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Tyco CEO Dennis Kozlowski transferred $3 million to Seton Hall University, and in return the university named its business school "Kozlowski Hall."[1] A philanthropist typically cannot claim a charitable deduction to the extent the philanthropist receives a return benefit from the charity, but a special tax rule effectively values naming rights at zero.[2] The special rule allows naming donors like Kozlowski to deduct the full amount, in this case $3 million. In contrast, if Tanya Taxpayer

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1. Anthony Bianco et al., *The Rise and Fall of Dennis Kozlowski*, BUS. WK., Dec. 23, 2002, at 64, 78, *available at* http://www.businessweek.com/magazine/content/02_51/b3813001.htm.

2. *See infra* Part II.A.

pays $500 at a charity auction for a vase worth $100, Tanya can only deduct the $400 excess.[3]

This special rule for naming rights creates a significant tax revenue shortfall[4] shouldered by all taxpayers generally,[5] and may have pernicious consequences in the charitable world. Charities may choose to build new structures and offer naming rights to induce mammoth contributions rather than repair and maintain. Also, philanthropists may choose to fund new bricks and mortar at the symphony or zoo and enjoy naming rights, rather than donate to fund unnamed provisions at the food pantry.

An elephantine transfer to fund a university building, a medical clinic, or other charitable facility or fund is a socially beneficial, generous act that society subsidizes with a tax deduction. When the charity provides naming rights, however, the transaction abides at a complex intersection of generosity and pride. Anecdotal and empirical evidence demonstrate that in the new millennium, anonymity for colossal contributions has become rare, and mega-donors often acquire contractually enforceable, prestigious naming rights. Prestige can be an end in itself,[6] and these charitable naming rights signal wealth, power, and generosity, all prized and envied traits.[7]

This Article asserts that the economic substance of a charitable contribution rewarded with naming rights is part gift and part purchase. Data from other naming situations suggests that the lion's share of a naming philanthropist's total transfer to charity is an unrequited gift,[8] but the data also suggests that a portion purchases a return benefit. Accordingly this Article proposes that Congress should continue to

3. Treas. Reg. § 1.170A-1(h)(5), ex. 2 (1990).

4. *See infra* note 30 and accompanying text (estimating that in 2007 alone naming rights donations exceeded $4 billion).

5. Mark P. Gergen, *The Case for a Charitable Contribution Deduction*, 74 VA. L. REV. 1393, 1402 (1988) ("The cost of a deduction in lost revenues will be allocated capriciously.").

6. Richard H. McAdams, *Relative Preferences*, 102 YALE L.J. 1, 3 (1992) ("[An] important and often-neglected aspect of human motivation . . . is that . . . actors seek not an absolute end, but *relative position* among peers . . . . Whether it is termed 'status,' 'prestige,' or 'distinction,' people sometimes seek—*as an end in itself*—relative position . . . .").

7. Eric A. Posner, *Altruism, Status, and Trust in the Law of Gifts and Gratuitous Promises*, 1997 WIS. L. REV. 567, 575–76 (1997).

8. *See infra* Part III.D.3 and Appendix B.

allow deductions for the gift portion, but reverse course and prohibit income tax deductions for the naming portion. This Article also explores implementation issues.

For ease of reference regarding these part gift and part purchase transactions, this Article refers to what is colloquially called the philanthropist's donation or contribution as the "total transfer" to the charity. This Article also provides that the total transfer can have two parts, namely, the "purchase price for the naming rights" and the "gift." The gift is the total transfer in excess of the purchase price for the naming rights.

Existing scholarship considers the theory of the charitable deduction[9] and other types of return benefits to donors,[10] but has largely ignored the special tax rule for naming rights.[11] This vogue practice merits meaningful reform because recent empirical evidence indicates that naming rights have become ubiquitous, involve gargantuan sums,[12] and are aggressively marketed.

Repealing the special rule will raise formidable issues: Can we determine or approximate the monetary value of naming rights?[13] What compliance and administrative costs will ensue? If the naming portion is no longer deductible, will charitable contributions plummet, causing a net loss to society? Should the tax law treat naming rights as a return benefit even though it disregards certain other intangible donor benefits

9. *See, e.g.*, William D. Andrews, *Personal Deductions in an Ideal Income Tax*, 86 HARV. L. REV. 309, 344–76 (1972); Mark G. Kelman, *Personal Deductions Revisited: Why They Fit Poorly in an "Ideal" Income Tax and Why They Fit Worse in a Far from Ideal World*, 31 STAN. L. REV. 831, 836–59 (1979); *see also infra* Part III.B.

10. *See, e.g.*, Ronald J. Krotoszynski, Jr., *If Judges Were Angels: Religious Equality, Free Exercise, and the (Underappreciated) Merits of* Smith, 102 NW. U. L. REV. 1189, 1232–33 (2008) (discussing intangible religious benefits given in exchange for contributions); Ethan G. Stone, *Halos, Billboards, and the Taxation of Charitable Sponsorships*, 82 IND. L.J. 213 (2007) (considering corporate sponsorship payments to charities for the right to name college football bowl games).

11. *But cf.* John D. Colombo, *The Marketing of Philanthropy and the Charitable Contribution Deduction: Integrating Theories for the Deduction and Tax Exemption*, 36 WAKE FOREST L. REV. 657 (2001) (focusing on the theoretical rationales for granting charitable tax benefits and discussing charitable naming rights, but arguing that the proper tax treatment of naming arrangements depends on the theoretical foundation one chooses).

12. *See infra* note 30 and accompanying text.

13. Colombo, *supra* note 11, at 665 n.38 (asserting in 2001 this task posed "almost insurmountable practical issues of valuation").

such as improved self-image and a warm glow feeling?[14] If a charity's ensuing costs are minimal and the naming rights are harmless grandstanding, why disturb the current paradigm that pleases many? This Article confronts these challenging issues.

Part I of this Article introduces the relevant facts that compel scrutiny. Since the mid-1990s charitable naming rights have exploded.[15] Naming philanthropists annually transfer over $4 billion[16] and receive notable naming rights over schools, campuses, buildings, endowed chairs, and a plethora of other facilities and funds.[17]

Part II describes the general rule that a donor cannot claim a charitable deduction to the extent the donor receives a return benefit, and the current special exception for naming rights. Part II also demonstrates that the government subsidizes up to two-thirds of a wealthy donor's charitable contributions through tax benefits.[18]

Part III strives to justify the central thesis that part of a charitable naming transfer is the purchase of a valuable benefit, and the tax law should treat that benefit as a nondeductible personal expense. The assertion that a naming right is a valuable return benefit has multiple pillars of support. Contract law treats a charity's promise to provide naming rights as sufficient consideration to support a bilateral contract.[19] Many observers testify to the value of acquiring a favorable reputation: "Good name in man and woman . . . [i]s the immediate jewel of their souls."[20] More recently, a commentator observed that "to prove to others that one is wealthy [and generous] one must take actions only wealthy people can take such as . . . conspicuous donation."[21] In addition, modern market practices demonstrate that many

14. *See infra* notes 287–293 and accompanying text (regarding benefits from charitable giving).

15. TERRY BURTON, NAMING RIGHTS: LEGACY GIFTS & CORPORATE MONEY 49 (2008).

16. *See infra* note 30 and accompanying text; BURTON, *supra* note 15, at 50, 126.

17. This Article leaves the analysis of certain types of naming rights for another day, including a corporation's purchase of charitable naming rights, and a donor's creation of a private foundation that bears the donor's surname. Also, this proposal would not apply to publicity at press conferences, in press releases, on websites, in newsletters, and in similar ephemeral manifestations. *See infra* Appendix A.

18. *See infra* Part II.B.

19. *See infra* notes 105–107 and accompanying text.

20. WILLIAM SHAKESPEARE, OTHELLO act 3, sc. 3.

21. Posner, *supra* note 7, at 575.

philanthropists prize publicity. Also, naming transactions involving professional football, baseball, and basketball arenas indicate that naming rights in general are valuable.

Part III also considers implementation. Theoretically, one could prohibit a naming philanthropist from claiming any charitable deduction,[22] but such a draconian approach would ignore that naming donors truly give significant amounts in excess of the value of the naming rights.[23] This Article proposes a more balanced approach.

This Article asserts that any naming transfer in excess of a threshold amount should be split based on the fair market value of the naming rights. Current law already provides an instructive valuation framework, and this Article explores coordinating this proposal with that extant structure to minimize administrative burdens for philanthropists, charities, and the government. This Part also discusses using a uniform fraction approach in case the fair market value approach triggers excessive administrative and enforcement costs. Part III also addresses the IRS's stated rationales for effectively valuing naming rights at zero, discusses potential counterarguments, and bridges to broader issues.

In conclusion, Part IV focuses on the proposal's primary advantages, namely equitable sharing of tax burdens, increased respect for the tax laws, and greater honesty in fundraising, and highlights deeper, affiliated issues. Appendix A provides a proposed statute, and Appendix B summarizes data on nineteen professional sports-naming deals satisfying certain criteria.

I. CHARITABLE NAMING RIGHTS ABOUND

A cynical wag characterized mega-donor mores with the following strident mantra: "Maimonides be damned, [we]'re giving partly in exchange for the recognition your gift will earn you."[24] Others

22. *See infra* Part III.D.1.

23. *See infra* Part III.D.3.

24. Catherine Rampell, *[Your Name Here] Chair of Economics*, ECONOMIX (Oct. 15, 2009, 4:15 PM), http://economix.blogs.nytimes.com/2009/10/15/your-name-here-chair-of-economics/?hp (on file with author); *see also* Young v. New York City Transit Auth., 903 F.2d 146, 156 (2d Cir. 1990) (describing Moses Maimonides as a Medieval Jewish philosopher and mentioning his views on charitable giving); *see also* Barlow v. Humana, Inc., 495 So. 2d 1048 (Ala. 1986) (referring to the "12th Century Jewish physician and jurist Moses Maimonides").

scornfully pen that naming donors have an "edifice complex"[25] and pay "moniker money"[26] to charities.

Such vitriolic remarks do not portray the full spectrum of attitudes and motivations of all naming donors. Some philanthropists, particularly public figures, may allow a charity to publicize their largesse to encourage others to give or to publicize the charity and its mission. The Betty Ford Alcoholism Center likely was not named to enhance the personal reputation of the former first lady.[27] Also many naming donors likely have mixed motives, joining their quest for favorable publicity with bona fide generosity and true appreciation for the mission of their favorite charity.[28]

Research reveals that anonymous largesse from the wealthy has become rare,[29] and "deals involving naming rights . . . have expanded dramatically [since the mid-1990s] in scope, creativity, and dollar value . . . hitting by one estimate $4 billion in 2007."[30] Anecdotal evidence reveals a tripartite expansion: (1) the plurality of persons expecting naming rights in exchange for hefty donations; (2) the diversity of naming opportunities available; and (3) the plethora of charities and public institutions that enthusiastically advertise, offer, and sell naming rights.

25. Gergen, *supra* note 5, at 1409.

26. William P. Barrett, *Cash Strapped Charities Put Donors' Names On Just About Everything*, FORBES, 74 (Sept. 21, 2009), *available at* http://www.forbes.com/forbes/2009/0921/creative-giving-cash-strapped-charities-donors-names.html.

27. *See infra* notes 284–85 and accompanying text.

28. *See* Colombo, *supra* note 11, at 669; Stone, *supra* note 10, at 231; Amihai Glazer & Kai A. Konrad, *A Signaling Explanation for Charity*, 86 AM. ECON. REV. 1019, 1021 (1996) ("Donors may have several motivations for giving.").

29. *See generally* Charles Isherwood, *The Graffiti of the Philanthropic Class*, N.Y. TIMES, Dec. 2, 2007, § 2, at 6 ("Whatever happened to Anonymous? . . . [W]hat became of those wealthy philanthropists who used to support . . . charitable institutions without requiring that their names be slapped somewhere–anywhere, it sometimes seems–on a building."); Glazer & Konrad, *supra* note 28, at 1021 (reporting that in certain years less than one percent of the gifts to Harvard Law School, Yale Law School, and Carnegie Mellon University listed in their respective annual reports were anonymous); *see also infra* notes 54–55 and accompanying text (regarding the Business School at the University of Wisconsin-Madison).

30. Barrett, *supra* note 26, at 760; *see also* BURTON, *supra* note 15, at 49 ("The tradition of granting naming rights in exchange for money has been gaining momentum over the last three decades . . . [s]ince the mid-1990s, there has been a groundswell of naming rights activity.").

A. Plurality of Persons Purchasing Naming Rights

Historically many mega-donors were comparatively modest,[31] content with the evanescent praise from a press release or mention in the charity newsletter.[32] A big gift could certainly garner a prestigious position on the charity's board of directors and otherwise signal status among the social elite that one had arrived,[33] but few donors bargained for a public monument to their philanthropy designed to apprise all members of society for decades. In contrast, in the new millennium almost all substantial benefactors receive notable naming rights.[34]

31. *But see* BURTON, *supra* note 15, at 114 (reporting that in 1502, Henry the VII's mother, Margaret of Richmond, "established the Lady Margaret Professorship of Divinity"); Barrett, *supra* note 26, at 74 (reporting that John Harvard named a university with a gift of 400 books and 779 British pounds in 1639); William H. Byrnes, IV, *The Private Foundation's Topsy Turvy Road in the American Political Process*, 4 HOUS. BUS. & TAX L.J. 496, 531–32 (2004) (reporting that Rockefeller, Carnegie, Kellogg, Sage, and other industrial revolution tycoons seized charitable naming opportunities perhaps to cleanse family names tarnished from sharp business practices).

32. Glazer & Konrad, *supra* note 28, at 1020–21 (discussing the common practice of listing donors in an alumni report or newsletter in categories based on the size of the donation).

33. *See* FRANCIE OSTROWER, WHY THE WEALTHY GIVE: THE CULTURE OF ELITE PHILANTHROPY 44 (1995) ("[S]pecified levels of donations have also increasingly become a prerequisite for serving on other bodies associated with the institution . . . . A broader variety of donors also made a link between giving large sums and getting on the board."); Glazer & Konrad, *supra* note 28, at 1019 (discussing the "desire to demonstrate wealth, perhaps because individuals prefer to socialize with individuals of the same or higher social status").

34. *See* Isherwood, *supra* note 29. There are many examples. The wealthy in all fields seem to have gotten into the act. Famous funnyman Dave Letterman, for example, established the David Letterman Telecommunications Scholarship fund at Ball State University, and there is a profusion of other celebrity naming rights arrangements. *See, e.g.*, *Fun Scholarships for College from Funny Guys*, SCHOLARSHOPSGRANTS.US (Apr. 22, 2009), http://www.scholarshipsgrants.us/scholarships-grants/fun-scholarships-for-college-from-funny. In sports, Tiger Woods is the biggest donor to the Tiger Woods Learning Center in Anaheim, California. *See* Tim Lemke, *Schooled by Tiger*, WASH. TIMES, June 30, 2008, at C01, *available at* 2008 WLNR 12282561. Basketball's Carmelo Anthony donated $3 million to Syracuse University, and the school named a new basketball practice facility after him. Aaron J. Lopez, *Orange Gets Melo's Green: Anthony Will Donate $3 Million to Help Fund Practice Facility*, DENVER ROCKY MTN. NEWS, Nov. 8, 2006, at 9C, *available at* 2006 WLNR 19363977. In a similar exchange, Anthony contributed to help build the Carmelo Anthony Youth Development Center in Baltimore. *Id.* Computer genius Bill Gates transferred $6 million to the Gates Computer Science Building at Stanford University. *Gates Computer Science Building*, STANFORD COMPUTER SCIENCE, http://www-cs.stanford.edu/Info/gates (last visited Mar. 18, 2012). Not to be shut out by Microsoft's champion, Apple Computer co-founder Steve Wozniak's generous $1.8 million gift is feted with Woz Way, the street in front of the Children's Discovery Museum of San Jose. Julia Prodis Sulek, *Inspiring Kids in S.J. and Beyond: Children's Discovery Museum*, SAN JOSE MERCURY NEWS, June 16, 2010, at 1A, *available at* 2010 WLNR 1226042. Many financial moguls are not bashful about their beneficence.

B. The Graffiti of the Philanthropic Class; Charitable Naming Everywhere

The types of charitable properties donors can name have multiplied exponentially. In the new millennium donors' names appear on just about everything.[35] In exchange for $100,000, Ellen and Jerome Stern in Manhattan can now "see [their] names writ large on the [New Museum of Contemporary Art's] four restrooms."[36] In recognition of a $25,000 transfer, the University of Colorado at Bolder displays Brad Feld's name on a men's lavatory along with the inscription "The Best Ideas Often Come at Inconvenient Times–Don't Ever Close Your Mind to Them."[37] One scribe states that charitable naming rights have become the "graffiti of the philanthropic class."[38]

For tangible items and physical space, the "opportunities for naming things are limited only by imagination."[39] Anonymity has become such an aberration that in 2007, it was big news when the University of Wisconsin-Madison raised $85 million for its business school without granting naming rights.[40] One researcher called it "unprecedented."[41]

Oilman T. Boone Pickens donated $2 million to endow the T. Boone Pickens Distinguished Chair in Clinical Brain Science at the University of Texas in Dallas. Press Release, The University of Texas at Dallas, Denise Park Named T. Boone Pickens Distinguished Chair in Clinical Brain Science at UT Dallas (Aug. 19, 2007), *available at* http://www.utdallas.edu/news/archive/2007/08-19-001.html. The "queen of mean," real estate baroness Leona Helmsley, transferred $10 million to a hospital in Greenwich, Connecticut, to be named for the Helmsleys. *People*, DALLAS MORNING NEWS, Mar. 22, 1996, at 2A, *available at* 1996 WLNR 5996205. Other financial titans publicizing their philanthropy include record executive and film producer David Geffen and venture capitalist and financial backer of Home Depot Kenneth Langone. *See* Paul Tosto, *Is Med School Name Worth $150M?*, ST. PAUL PIONEER PRESS, Nov. 23, 2007, at A1, *available at* 2007 WLNR 23239695 (describing philanthropy of Geffen); *NYU Medical Center Changes Name*, LIFE SCIENCE WEEKLY, Apr. 29, 2008, at 49867, *available at* 2008 WLNR 7669294 (describing philanthropy of Langone).

35. Thomas Tryon, *We're Big & Rich, But Are We Generous?*, SARASOTA HERALD-TRIB., Apr. 1, 2007, at F1, *available at* 2007 WLNR 6200158.

36. Michael Gross, *Charities Get Inventive with Name-Dropping*, MSNBC (June 14, 2006, 2:46 PM), http://www.msnbc.msn.com/id/25147900.

37. Barrett, *supra* note 26, at 74.

38. Isherwood, *supra* note 29, at 26.

39. David Elbert, *This City Brought to You By Whoever Buys Rights*, DES MOINES REG., June 11, 2006, *available at* 2006 WLNR 24993838; *see also* BURTON, *supra* note 15, at 146.

40. Isherwood, *supra* note 29, at 26; *see also* Philip Fine, *U.S.: Naming Rights Net Millions—But at a Price*, UNIV. WORLD NEWS (Mar. 2, 2008), http://www.universityworldnews.com/article.php?story=20080228160422788.

In addition to business schools,[42] "medicine, law, and engineering have had their own share of champagne celebrations for naming gifts."[43] One researcher found that "[w]hile only four law schools were named for [financial benefactors] between 1784 (when the Litchfield Law School opened its doors) and 1984, in the two decades since then twelve law schools have been so named."[44]

In addition to school or building naming rights, academic institutions sell a host of interior space naming rights including the lobby, the library, the atrium, the auditorium, the conference room, and single classrooms and lecture halls.[45] As part of its capital campaign, the University of Pittsburgh School of Engineering published a list of twenty-two naming opportunities with minimum ask amounts, including: $30 million to name the school; $5 million to name the atrium; $1 million for the lobby; $500,000 for a digital classroom; $200,000 for an enhanced learning classroom; $200,000 for the dean's suite; $100,000 for a departmental suite; $50,000 for a departmental conference room; and $25,000 for a student organization office.[46]

Other charities sell naming rights to analogous areas. Hospitals sell naming rights to surgery rooms, nursing stations,[47] patient care rooms, and hallways.[48] Performing arts organizations sell naming rights to the costume storage area and the green room.[49] For athletic facilities,

41. BURTON, *supra* note 15, at 8.

42. *Id.* at 11, 20 (reporting that there are more named business schools than medical schools).

43. *Id*. at 11.

44. Robert M. Jarvis, *A Brief History of Law School Names*, 56 J. LEGAL EDUC. 388, 407 (2006).

45. BURTON, *supra* note 15, at 167; *see also* Fine, *supra* note 40 (stating that a $500,000 donation buys naming rights to a large lecture hall at the University of Virginia); Tim Martin, *More Universities Offer Donors Naming Rights*, LANSING ST. J., Jan. 25, 2004, at A1, *available at* 2004 WLNR 23159360 (stating that you can name a classroom at Central Michigan University College of Business for $50,000).

46. BURTON, *supra* note 15, at 104.

47. *See, e.g.*, Howard Greninger, *New Union Hospital Expected to Open in Early 2010*, TRIB. STAR (Terre Haute, Ind.), Mar. 15, 2009, *available at* 2009 WLNR 4939816 ("Naming rights for sections of the new Union Hospital . . . have raised more than $4.23 million . . . naming rights to all nursing stations . . . have been claimed by various donors."); *see generally* BURTON, *supra* note 15, at 109.

48. BURTON, *supra* note 15, at 137.

49. *See, e.g.*, Alice Warchol, *Theater Group Gets a New Home Downtown*, VIRGINIA-PILOT & LEDGER STAR, Nov. 22, 2009, at 1, *available at* 2009 WLNR 23564094.

donors can name the scoreboard, coaches' offices, the locker room, and the weight room.[50] Many charities sell naming rights to reception areas, staircases, elevators, and staff lounges,[51] plus the grounds, roads, parking facilities, and walkways.[52] At the Louisville Zoo, you can name the sea otter exhibit for $1.5 million, and at the Salisbury Zoo in Maryland you can name the wallaby exhibit for $250,000.[53]

In addition to naming rights over tangible items and spaces, philanthropists can name a wide variety of funds. "Named professorships are more common than grass in the summer."[54] Schools have tinkered with the titles of named professorships to create up to fifteen different labels that may appeal to diverse patrons.[55] One consultant proposes a price list that asks for donations from $4 million to $7 million for either a Presidential or a Chancellor's Endowed Chair, $3 to $5 million for a Regent's Endowed Chair, down to as low as $500,000 for an endowed chair for a term of years.[56]

Other charities sell their own versions of endowed chairs as "fundraising commodit[ies]."[57] "From YMCAs to the local museum and art gallery, from hospitals to international environmental groups, there is an ever-widening group of nonprofit organizations using some variation[] of an endowed chair . . . ."[58] Libraries and museums can sell the names to the curator positions; medical facilities can sell the naming rights to clinical and surgical staff positions, and other nonprofits can sell naming rights to key staff positions.[59] In addition, donors can name other funds; the ask amount to name a graduate fellowship at MIT is $1

50. BURTON, *supra* note 15, at 135.

51. *Id*. at 137.

52. *Id*. at 135; *see also supra* note 34 (discussing Woz Way at the Children's Discovery Museum in San Jose, California).

53. Barrett, *supra* note 26, at 76 (sea otter exhibit); *Renew the Zoo: Naming Opportunities for Australian Outback*, SALISBURY ZOO, http://www.renewthezoo.com/naming-for-australian-outback.html (last visited Mar. 28, 2012) (wallaby exhibit).

54. Fine, *supra* note 40 (quoting Jonathon Knight of the Association of American University Professors).

55. *See* BURTON, *supra* note 15, at 120.

56. *Id*. at 122–23.

57. *Id*. at 119.

58. *Id*. at 119.

59. *Id*. at 120.

million, and for $50,000 you can name an endowed lecture series at the University of Miami.[60]

C. Plethora of Organizations Marketing Naming Rights

Overall "[t]he [charitable] education sector continues to lead the way in terms of the number of naming opportunities"[61] and "healthcare [and research facilities] . . . appear to be riding [education's] coattails."[62] Niche markets for naming rights grew at double digit rates in 2007, and included environmental groups, arts and cultural organizations, and religious schools.[63] Many other charities eligible to receive tax deductible contributions sell naming rights, from the Salvation Army to the YWCA.[64]

In addition to allowing a tax deduction for charitable contributions, the federal income tax system also permits a deduction for donations to governments and their agencies.[65] Public entities from the federal government to the local school district sell naming rights. As of 2007, naming arrangements for state and federal government properties, especially parks, were growing at double digit rates,[66] [and] "[p]ublic universities [had] joined their private counterparts in the name game."[67]

Public grade schools and high schools hopped on the bandwagon in 2001 when the Brooklawn School Board in New Jersey sold the right to name the elementary school's gymnasium to the ShopRite grocery chain for $100,000.[68] "[W]ithin a few months of the Brooklawn deal, dozens–

60. Fine, *supra* note 40.

61. BURTON, *supra* note 15, at 188.

62. *Id*. at 14, 20, 187 (The "[n]ext big sector will be healthcare . . . [which includes] hospitals, clinics, [and] medical research facilities . . . .").

63. *Id*. at 188.

64. *Id*. at xiv; *id*. at 65 (stating that social service agencies and youth organizations also sell naming rights).

65. I.R.C. § 170(c)(1) (2011) (allowing a deduction for contributions to a "State, a possession of the United States, or any political subdivision of any of the foregoing, or the United States or the District of Columbia").

66. BURTON, *supra* note 15, at 188.

67. Fine, *supra* note 40.

68. Tamar Lewin, *In Public Schools, the Name Game as a Donor Lure*, N.Y. TIMES, Jan. 26, 2006, at A1; Joseph Blocher, *School Naming Rights and the First Amendment's Perfect Storm*, 96 GEO. L.J. 1, 2 n.1 (2007) (citing Robert Strauss, *Education: P.S. (Your Name Here)*, N.Y. TIMES, Dec. 16,

if not hundreds–of public schools had signed naming rights deals [for] . . . stadiums and athletic [venues] . . . libraries, hallways, and other facilities."[69] By 2007 "[s]chool boards across the country [had] entered into naming rights deals whose combined value . . . stretches into the hundreds of millions of dollars."[70]

D. Empirical Evidence on the Rise of Name-Dropping for Munificence

A national study[71] finds that charitable naming rights have exploded since the mid-1990s.[72] The study concluded that in 2007 alone, "American nonprofits are estimated to have logged over $4 billion in naming rights deals."[73] The top ten naming rights arrangements amounted to almost $1.5 billion.[74] The "next [sixteen] named gifts made in 2007 added up to another $595 million."[75] Thus, the twenty-six top named gifts alone totaled approximately $2 billion in 2007. The researchers also studied marketing trends, finding that "[i]n the winter of 2008 . . . there were more than 50,000 naming opportunities published on the Web sites of nonprofits."[76]

II. CURRENT RULES VALUE NAMING RIGHTS AT ZERO

The applicable statute allows a charitable income tax deduction only for a contribution or gift,[77] and the U.S. Supreme Court has stated "[t]he sine qua non of a charitable contribution is a transfer of money or

2001, § 14NJ, at 6).

69. Blocher, *supra* note 68, at 8; *id*. at 6 ("One recent study found that schools receive $2.4 billion a year from corporate relationships, more than the 2003 educational expenditures of twelve states and the District of Columbia.").

70. *Id*. at 2.

71. *See* BURTON, *supra* note 15, at xi (stating that Dig In Research conducted the study).

72. *Id*. at 49 (describing a "groundswell of naming rights activities").

73. *Id*. at 50, 126.

74. *Id*. at 50–51. The researchers provided a top twelve list, but the list included a corporate naming rights arrangement (Hewlett Packard Foundation donating for endowed professorships at the University of California, Berkeley) and a geographically named fund (the "Oregon Athletics Legacy Fund" at the University of Oregon). *Id.*

75. *Id*. at 51.

76. *Id*. at 169.

77. I.R.C. § 170(c) (2011).

property without adequate consideration."[78] When a "payment has the 'dual character' of a contribution and a purchase . . . [a] taxpayer may [only] claim a deduction for the difference between [the] payment to [the] charitable organization and the market value of the benefit received in return."[79]

A. Current Tax Rules

Currently there are no statutory or regulatory provisions directly applying this dual character approach when a charity provides naming rights to a donor.[80] Rather than apply the dual character approach without detailed statutory rules, the Treasury Department and the IRS have adopted a series of authorities effectively valuing naming rights at zero, which allows naming donors to deduct their total transfers to charity. In a ruling directly considering public recognition and the charitable deduction statute, the IRS stated that valuable return benefits must be identified, but "[s]uch privileges as being associated with or being known as a benefactor of the organization are not significant return benefits . . . ."[81] Under a related Treasury Regulation, public recognition is effectively valued at zero when a charity agrees to name a building after the donor.[82] Additional IRS rulings effectively value naming rights at zero when a charity (1) agrees to change its name to match the donor's name for one hundred years[83] or (2) agrees to name its defining attraction after a donor.[84]

78. United States v. Am. Bar Endowment, 477 U.S. 105, 118 (1986).

79. *Id*. at 117 (adopting the general IRS approach that a donor can only claim a charitable deduction for the amount transferred in excess of the return benefit); *see also* Rev. Rul. 67-246, 1967-2 C.B. 104, 105.

80. *See* I.R.C. § 170 (2006); *see also* Treas. Reg. § 1.170A-13(f)(8)(i)(B) (1996).

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

82. Treas. Reg. § 53.4941(d)-2(f)(2) (1973) (concluding that the building naming rights were merely incidental or tenuous return benefits and therefore did not violate the self-dealing rules, even though the self-dealing rules generally prohibit a private foundation from entering into a transaction providing a benefit to a substantial contributor).

83. Rev. Rul. 73-407, 1973-2 C.B. 383 (stating, "[a] court determined that the charity had the power to bind itself not to change its name for one hundred years," and concluding that naming rights are disregarded because they are an incidental and tenuous benefit under the self-dealing rules).

84. Rev. Rul. 77-367, 1977-2 C.B. 193 (stating "the corporation benefits by having the village named after it, by having its name associated with the village in conjunction with its own advertising

These IRS authorities fail to provide a detailed, theoretical analysis, but three brief references suggest the IRS rationales: (1) naming rights are incidental to the charity fulfilling its charitable mission,[85] (2) naming rights are not "significant return benefits,"[86] and (3) naming rights have no "monetary value."[87] Part III.C of this Article addresses these points.

Tax practitioners have seized upon these authorities to conclude that their philanthropic clients can deduct the entire amount given to charity even when the donor acquires valuable, legally enforceable naming rights,[88] and that advice appears accurate under IRS practices. Charitable naming arrangements are highly publicized,[89] but as of December 31, 2010, there are no published court cases or rulings challenging a naming donor.[90] Furthermore, the IRS operating manual as of December 31, 2010 provides no suggestion that IRS auditors should challenge naming philanthropists.[91]

program, and by having its name mentioned in each publication of the organization that it finances," but the IRS ignores these benefits, effectively valuing the naming and associated rights at zero).

85. *Id*. at 194 ("Although the corporation benefits by having the [charity's] village named after it . . . such benefits are merely incidental . . . ."); Rev. Rul. 73-407, 1973-2 C.B. 383 ("The public recognition the [donor] receives from the [charitable entity being named after the donor for one hundred years] . . . is an incidental and tenuous benefit . . . .").

86. Rev. Rul. 68-432, 1968-2 C.B. 104 (stating that "being known as a benefactor" is not a "significant return benefit").

87. *Id*. at 104 (indicating that public recognition has no "monetary value").

88. *See* JOSEPH P. TOCE, JR., ET AL., TAX ECONOMICS OF CHARITABLE GIVING 197 (2006–2007 ed. 2006) (discussing donor recognition and concluding "the contribution deduction amount should be unaffected"); John V. Woodhull and Vreni R. Jones, *The Who's Who and What's What of Charitable Fundraisers*, 13 J. TAX'N EXEMPT ORG. 23 (2001) ("[T]he naming of a building after a donor is considered an incidental benefit for purposes of the self-dealing rules. It is arguable that these types of incidental benefits should also be treated as incidental benefits for purposes of determining the extent to which the donor is entitled to [an I.R.C.] Section 170 deduction.").

89. *See supra* Parts I.A–I.C.

90. *See* BARBARA L. KIRSCHTEN & CARLA NEELEY FREITAG, CHARITABLE CONTRIBUTIONS: INCOME TAX ASPECTS, 863-2 TAX MGM'T A-37 to A-67 (2011) (providing a lengthy section on contributions to charities and the "receipt of consideration in specific settings;" the section includes no cases involving naming rights).

91. I.R.S. MANUAL § 4.76.50.7, *available at* 2007 WL 2643492 (citing *American Bar Endowment* and Rev. Rul. 67-246, and discussing transfers to charity with the dual character of a purchase and a contribution, but failing to address naming rights).

B. The Charitable Deduction as a Government Subsidy

When a donor claims a tax deduction for a charitable contribution, the government subsidizes a portion.[92] If a donor taxed at the thirty-five percent marginal income tax rate[93] contributes $1 million to a charity, the donor effectively gives only $650,000 to the charity because the federal government reimburses the donor for the other $350,000 in foregone taxes.[94]

The subsidy is larger if the donor otherwise would have retained the $1 million until death and the $1 million would have been subject to both federal income tax and estate tax. In the absence of the charitable donation, the federal government would have collected an additional $292,500 in estate tax.[95] Thus, in the case of a lifetime charitable gift shortly before a wealthy[96] donor's death, the government may bear almost two-thirds of the total cost,[97] and the donor (and the donor's estate) would incur only one-third. Even if the donor contributes a decade before death and the tax savings takes into account the time value of money, the total government subsidy approximates fifty

92. David A. Super, *Privatization, Policy Paralysis, and the Poor*, 96 CAL. L. REV. 393, 446 (2008) ("[T]he government makes open-ended offers to subsidize [charities] through tax deductions for charitable contributions.").

93. I.R.C. § 1(i)(2) (2006); Rev. Proc. 2011-12, § 2.01, 2011-2 I.R.B. 297 (stating that in 2011 the highest federal income tax rate on individuals is 35 percent).

94. Assuming a flat 35 percent tax rate, if the taxpayer has $2 million of taxable income for the year and no tax deductions or credits, the taxpayer would pay $700,000 in federal income taxes and would have $1.3 million remaining. In contrast, if that taxpayer donates $1 million in cash to a public charity, the taxpayer will only have taxable income of $1 million ($2 million - $1 million = $1 million), will pay federal income tax of $350,000 ($1 million x 35% = $350,000), and will have $650,000 remaining after the charitable donation and the tax payment ($2 million - $1 million - $350,000 = $650,000). Thus, the taxpayer has $650,000 less as a result of the contribution ($1,300,000 - $650,000 = $650,000), and the government collected $350,000 less in taxes ($700,000 - $350,000). As a result, the $1 million donation cost the taxpayer $650,000 and the government $350,000.

95. In the absence of the $1 million lifetime charitable contribution, the taxpayer would have paid an additional $350,000 in federal income tax. As a result the estate tax is calculated on $650,000 rather than the full $1 million. At a 45 percent rate the federal estate tax on $650,000 is $292,500. I.R.C. § 2001(c)(2) (2006) (45% rate).

96. In this discussion, the term wealthy refers to taxpayers subject to the federal estate tax. For decedent's dying in 2011, an estate will only pay estate tax if the decedent's taxable estate exceeds $5 million. I.R.C. § 2010(c)(2)(A) (2011).

97. The $1 million charitable contribution generates $350,000 of federal income tax savings and $292,500 of federal estate tax savings for a combined tax savings of $642,500. *See supra* note 95.

percent.[98] This public subsidy justifies government scrutiny of charitable transactions.[99]

III. PROPOSAL FOR BALANCED TAXATION: PARSING NAMING TRANSFERS

This Part seeks to justify the proposal for parsing naming transfers Specifically, this Part sets forth the reasons for the fundamental claim that the price paid for the naming rights should not be deductible, explores whether the proposal is consistent with prevailing charitable tax theories, and responds to the stated Treasury Department and IRS rationales for current law. This Part then discusses implementation and addresses counterarguments.

A. Reasons the Naming Portion Should Not Be Deductible

1. No Contribution to the Extent the Philanthropist Receives a Benefit

The charitable deduction exists to encourage contributions.[100] The deduction is only available for a "contribution."[101] The word contribution in this context is synonymous with gift,[102] and "[t]he sine qua non of a . . . contribution is a transfer of money or property without

98. The income tax savings is $350,000 or 35 percent of the $1 million donation. In regards to the estate tax, the present value of $292,500 payable in ten years is $179,569.62 (at a presumed interest rate of five percent compounded annually). *See Present Value Calculator*, CALCULATORSOUP, http://www.calculatorsoup.com/calculators/financial/present-value.php (last visited Mar. 30, 2009). Thus, the income tax savings and the estate tax savings combined would reduce the total tax by $529,569.62, or slightly more than 50 percent of the $1 million contribution.

99 Jeffrey Toobin, *Rich Bitch*: *The Legal Battle Over Trust Funds for Pets*, NEW YORKER, Sept. 29, 2008, at 38, 47 (quoting Vartan Gregorian, President of Carnegie, Inc.) ("[O]nce [the government] started giving tax deductions, which amounted to a publicly approved subsidy, [the mega-donors] had to prove that the money was going for a philanthropic purpose . . . .").

100. Gergen, *supra* note 5, at 1396.

101. I.R.C. § 170(a)(1) (2006).

102. *See* I.R.C. § 170(c) (2006) (stating that "the term 'charitable contribution' means a contribution or gift . . . ."); *see also* Rev. Rul. 67-246, 1967-2 C.B. 104, 105 ("To be deductible as a charitable contribution for Federal income tax purposes . . . a payment . . . must be a gift. To be a gift . . . there must be, among other requirements, a payment of money or transfer of property without adequate consideration."); *see also* KIRSCHTEN & FREITAG, *supra* note 90, at A-22.

adequate consideration."[103] Based on these fundamental tenets, to the extent the charity provides the donor with a return benefit there is no gift, and therefore, no tax incentive is needed to encourage the transfer, and no charitable deduction should be available.[104] Many sources support the view that naming rights are a valuable return benefit, including (1) contract law, (2) perceptive commentators observing charitable market behavior generally, (3) actual practices in the charitable naming market, and (4) data on professional sports arena naming deals.

a. Contract Law Treats Naming Rights as Valuable Consideration

In 1927 Justice Cardozo for the New York Court of Appeals famously concluded that a charity's assumption of an obligation to publicize the donor's name in connection with the receipt of a charitable gift or pledge is valid consideration to create an enforceable bilateral contract.[105] Justice Cardozo's "seminal"[106] opinion has been cited by "innumerable courts."[107]

b. Commentary on the Benefits of Naming and Reputation

Charitable naming rights can enhance the donor's personal reputation. Professor Posner and others recognize that a substantial charitable gift signals wealth, generosity,[108] and social status to others.[109] "Because

103. United States v. Am. Bar Endowment, 477 U.S. 105, 118 (1986).

104. *See* Rev. Rul. 67-246, 1967-2 C.B. 104 (stating that a donor cannot deduct a payment to charity to the extent the donor receives a return benefit).

105. Allegheny Coll. v. Nat'l Chautauqua Cnty. Bank, 159 N.E. 173, 176 (N.Y. 1927) ("When the [charity] subjected itself to such a duty at the implied request of the [donor], the result was the creation of a bilateral agreement."). *But see* Lawrence A. Cunningham, *Cardozo and Posner: A Study in Contracts*, 36 WM. & MARY L. REV. 1379, 1402 (1995) (stating that Justice Cardozo's "analysis in *Allegheny College* is regularly criticized as contrived and artificial"); Peter Linzer, *Consider Consideration*, 44 ST. LOUIS U. L.J. 1317, 1324 (2000) ("[S]ome would say [Justice Cardozo's legal analysis compares] with the misdirection of a three-card monte pitchman on the New York City subway.").

106. Arthur B. Schwartz, Note, *The Second Circuit Estopped: There Is No Promissory Estoppel in New York*, 19 CARDOZO L. REV. 1201, 1217 (1997).

107. *Id*.

108. Posner, *supra* note 7, at 575; Glazer & Konrad, *supra* note 28, at 1024 ("Charitable

one's wealth [and generosity are] not easily observable, to prove to others that one is wealthy [and generous] one must take actions that only wealthy people can take such as conspicuous consumption and conspicuous donation."[110] Conspicuous donation is the exclusive approach when "conspicuous consumption [is] banned by social norms."[111]

The father of modern economics, Adam Smith, asserted that the rich seek ever greater wealth to garner the adulation of others rather than for any physical pleasure.[112]

> [I]t is chiefly [for] the sentiments of mankind, that we pursue riches . . . . To be observed, to be attended to, to be taken notice of with . . . approbation, are all the advantages which we propose to derive from it . . . . The rich man glories in his riches, because he feels that they naturally draw upon him the attention of the world . . . .[113]

In his seminal treatise THE WEALTH OF NATIONS, Smith remarked "the chief enjoyment of riches consists in the parade of riches, which in their eye is never so complete as when they appear to possess those decisive marks of opulence which nobody can possess but themselves."[114]

In her book WHY THE WEALTHY GIVE, Francie Ostrower analyzes the responses of one hundred wealthy New York donors[115] and concludes that philanthropy is intimately intertwined with an individual's cultural identity.

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donations which are observable can signal wealth or income.").

109. OSTROWER, *supra* note 33, at 3 (stating that philanthropy is an "institution . . . [that] plays a central and defining role in upper-class culture").

110. Posner, *supra* note 7, at 575.

111. Glazer & Konrad, *supra* note 28, at 1019.

112. ADAM SMITH, THE THEORY OF MORAL SENTIMENTS 112–113 (D.D. Raphael & A.L. Macfie, eds., Clarendon Press, 1976) (1759) [hereinafter SMITH, MORAL SENTIMENTS], *quoted in* McAdams, *supra* note 6, at 10.

113. SMITH, MORAL SENTIMENTS, *supra* note 112, at 112–13.

114. ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (Edwin Cannan ed. University of Chicago Press 1976) (1777), *quoted in* McAdams, *supra* note 6, at 11 n.29.

115. OSTROWER, *supra* note 33, at 20–21 (stating that one-fourth of the donors interviewed contributed over half-a-million dollars; half contributed over $100,000; three-quarters contributed $20,000 or more, and the balance contributed between $5,000 and $20,000).

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> Philanthropy becomes a mark of class status that contributes to defining and maintaining the cultural and organizational boundaries of elite life . . . . Philanthropy becomes a way of being part of Society and one of the avenues by which Society makes its connections. Philanthropy is one of the activities [which] contribute to facilitating cohesion among elite groups.[116]

c. Market Practices Show that Recognition is a Benefit

In addition, market behavior in the new millennium demonstrates that charitable naming rights have value. An experienced consultant observes that a "charity's [fundraisers] may say the naming rights are secondary, but donors making these kinds of gifts think otherwise."[117]

When conducting a major capital campaign, charities now customarily offer naming rights,[118] specifying the ask amount for the right to name the building and various components. Typically the building naming right goes to the donor contributing the most. In a world in which it may be debatable who is best, greatest, or most stupendous, the naming rights market often allows one person to buy the undisputed top spot.

In a fascinating behavioral display perhaps designed to demarcate a linear hierarchical strata[119] with the clarity extant in various segments of the animal kingdom,[120] one researcher discovered that naming rights typically cascade in multiples of two.[121] If the ask amount for naming

116. *Id*. at 6 (emphasis added).

117. BURTON, *supra* note 15, at 146.

118. *Id*. at xx ("Putting naming rights on the market [is] . . . commonplace these days.").

119. Raffaele Caterina, *Comparative Law and the Cognitive Revolution*, 78 TUL. L. REV. 1501, 1538 (2004) ("An animal species may organize its social life through a rigid dominance hierarchy . . . ."); Andy Soos, *Pigeon Commander*, ENVTL. NEWS NETWORK (Apr. 8, 2010, 11:57 AM), http://www.enn.com/wildlife/article/41197 ("Dominance hierarchies can be despotic or linear. In a despotic hierarch, only one individual is dominant while the others are equally submissive. In a linear hierarchy . . . each individual dominates all individuals below him and not those above him.").

120. Mark F. Grady & Michael T. McGuire, *A Theory of the Origin of Natural Law*, 8 J. CONTEMP. LEGAL ISSUES, 87, 105 n.81 (1997) ("[L]inear and near-linear hierarchies exist among certain kinds of wasps and bumblebees; various birds, such as chickens [the pecking order]; domestic mammals, such as cows and ponies; wild mammals, such as coyotes and buffaloes, [and] primates, such as rhesus monkeys, baboons, and vervets.").

121. BURTON, *supra* note 15, at 166 ("In over 90 percent of the pricing strategies I have examined, nonprofits typically use a double-up and/or double-down [approach] when setting the ask

the building is $5 million, usually the next highest amount will be $2.5 million (perhaps for the lobby, the library or the atrium), the next highest will be $1.25 million (perhaps for the conference room or executive suite), and so on.[122] This "multiple of two" marketing method likely is no accident; it allows donors to buy at distinct rungs on the power, prestige, and generosity ladder. Professor Posner observes that "reputation for generosity is a positional good,"[123] and it appears that the modern structure of ask amounts assigns donors to relative status positions.

The benefit of prestige appears evident when donors aggressively bargain for recognition. In addition to the surname writ large on the building, atrium, library, common area, classroom, or other physical structure, donors sometimes negotiate for ancillary acknowledgments, such as a plaque[124] and portrait (life size for some)[125] in the entrance, vestibule, foyer, or the lobby, special signage on the facade and the interior (and accompanying lighting),[126] appearance of the surname on all letterhead[127] and business cards, along with a host of fleeting praise benefits including honors at an awards luncheon or dinner,[128] thanks at the groundbreaking ceremony,[129] photo opportunities with the charity's top brass, press releases, website coverage, and articles in the organization's newsletter.[130] Some donors even insist on having their

amounts for named gifts.").

122. BURTON, *supra* note 15, at 166–7.

123. Posner, *supra* note 7, at 576.

124. Multiple commercial firms specialize in engraving and selling donor recognition items including plaques, stained glass windows, donor trees (with a donor's name on each leaf), lamps, and entire donor recognition walls. *See, e.g.*, DONORWALL DESIGN GRP., http://www.donorwall.com (last visited Nov. 9, 2011); PARTNERS IN RECOGNITION, INC., http://www.partnersinrecognition.com (last visited Nov. 9, 2011).

125. *See* William A. Drennan, *Surnamed Charitable Trusts: Immortality at Taxpayer Expense*, 61 ALA. L. REV. 225, 232 (2010).

126. *See* Christina Macone-Greene, *Artist's Title and Mosaic Works a Big Part of City's New Library*, SAN DIEGO UNION TRIB., July 25, 2010, *available at* 2010 WLNR 15175282 (discussing a "donor mosaic mural").

127. BURTON, *supra* note 15, at 63 ("Suitable outdoor signage can be extended to the letterhead of the organization and all organizational media material . . . .").

128. Posner, *supra* note 7, at 574 n.18 (a charity may treat the donor "like royalty").

129. BURTON, *supra* note 15, at 63 ("The cutting of the Red Ribbon is included in the high-profile named gift, with stakeholders in attendance."). *Id*. at 67.

130. *Id*. at 168 (discussing "virtual acknowledgement[s] on [the charity's] website").

names at the top of every page of the charity's website.[131] The charity and the donor may detail all of these terms in a naming rights agreement[132] negotiated before the donor pledges.

d. Pro Sports Arena Naming Deals Reflect the Benefit of Naming

In 2010, over two-thirds of the "121 teams that play North America's top four pro sports games (baseball, hockey, football, and basketball) . . . have their home stadiums and arenas named after corporate sponsors."[133] Appendix B lists the total construction cost of the facility and the price of the naming and associated rights for nineteen pro sports venues constructed between 1994 and 2004.[134] In all of those naming deals the named buyer agreed to pay the equivalent of at least four percent, and in some cases over twenty percent, of the total construction cost, on a present value basis. Although it could be expanded and refined,[135] the data in Appendix B indicates that naming

131. *Id*. at 78 ("This style of naming rights recognition is . . . seen as an acceptable form in both the private and nonprofit sectors.").

132. *Id*. at 156, 158; *How Much Are Naming Rights Worth?*, NONPROFIT EDGE (DeLeon & Stang, Gaithersburg, M.D.) Sept. 2009, *available at* http://www.deleonandstang.com/news-articles/nonprofit-edge-article/how-much-are-naming-rights-worth/ ("The arrangement should include a formal written agreement . . . ."); *see, e.g.*, Naming Rights Agreement, Clinton, Okla. http://agendas.clintonokla.org/010308/SCHUMACHERAGREEMENT.pdf (noting that in exchange for donations from Walt Schumacher, the county recreational authority agrees to call facilities Schumacher Fields "in accordance with graphics and color guidelines established by Walt Schumacher . . . .").

133. Troy St. Louis, *The Cost of Owning Stadium & Arena Naming Rights*, ASKMEN.COM, http:www.askmen.com/sports/business_100/106_sports_business.html (last visited Feb. 24, 2012); *see also* Timothy D. DeSchriver & Paul E. Jensen, *What's in a Name? Price Variation in Sport Facility Naming Rights*, 29 E. ECON. J. 359, 360 (2003) (reporting that in 2003 more than half of all major pro sport facilities carried the name of a corporation).

134. The nineteen are the naming deals between 1994 and 2004 in which the commercial buyer agreed to pay for the naming and associated rights in equal installments over twenty years, as reported by the League of Fans website. *See infra* note 315 (explaining that one deal was excluded because of unusual terms). Figures in Appendix B presume in each case that the facility has a forty-year life and the commercial sponsor will pay an equal amount each year over the forty-year life. For tax depreciation purposes, a stadium has a forty-year life. I.R.C. § 168(g)(2)(C)(ii) (1996); *see also* Logan E. Gans, *Take Me Out to the Ball Game, But Should the Crowd's Taxes Pay for It?*, 29 VA. TAX REV. 751, 785 (2010).

135. The study could include naming rights deals lasting more or less than twenty years, and could describe the extent of the associated rights acquired, such as rights to operate concession stands, use billboards, and enjoy luxury boxes or other special privileges or benefits. *See infra* notes 233–35 and accompanying text.

and associated rights have significant value. This stands in contrast to the IRS position that effectively treats naming rights as valueless.[136]

2. Personal Expenses Are Not Deductible

A cardinal principle of income taxation is that personal expenses are not deductible.[137] If taxpayers could deduct personal expenses, the tax system would subsidize profligate spending,[138] discourage investment, and visit unequal treatment upon otherwise similarly situated taxpayers.[139]

3. Horizontal Equity, Voluntary Compliance, and Candor in Fundraising

The need for this Article's proposal is bolstered by the current disparate treatment of similarly situated taxpayers, which is contrary to the goal of horizontal equity.[140] Current rules specifically trim the deduction for a donor who contributes to a charity and receives the right to attend a buffet dinner,[141] but allows a deduction for every penny transferred when a donor contributes and receives the right to name a building.[142]

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136. *See* Rev. Rul. 68-432, 1968-2 C.B. 104, 105 ("being known as a benefactor . . . has no monetary value . . . .").

137. I.R.C. § 262 (2006); *see* Tsilly Dagan, *Ordinary People, Necessary Choices: A Comparative Study of Childcare Expenses*, 11 THEORETICAL INQUIRIES IN LAW 589, 590 (2010).

138. Daniel I. Halperin, *Business Deduction for Personal Living Expenses: A Uniform Approach to an Unsolved Problem*, 122 U. PA. L. REV. 859, 861 (1974) (reporting President Kennedy's observation that allowing businesses and their executives to deduct entertainment expenses "encourage[s] . . . luxury spending as a charge on the Federal Treasury . . . .").

139. JOEL S. NEWMAN, FEDERAL INCOME TAXATION 143 (5th ed. 2012) ("[M]ost would agree that one's personal lifestyle choices should not affect one's tax bill.").

140. Horizontal equity is a fundamental goal of U.S. taxation. *See* Steve R. Johnson, *An IRS Duty of Consistency: The Failure of Common Law Making and a Proposed Legislative Solution*, 77 TENN. L. REV. 563, 590–91 (2010); *see also* Andre Smith & Carlton Waterhouse, *No Reparation Without Taxation: Applying the Internal Revenue Code to the Concept of Reparations for Slavery and Segregation*, 7 PITT. TAX REV. 159, 176 (2010); *see also* Kelly A. Moore, *Previously Taxed Property Credit and the 2035(B) Gross Up*, 34 S. ILL. U. L.J. 275, 285 (2010).

141. Rev. Rul. 67-246, 1967-2 C.B. 104, 110 (in Example 8 the donor contributes $15 and may attend a motion picture and a buffet, and the IRS concludes that the donor can only deduct the amount of the contribution which exceeds the value of admission to the movie and the buffet).

142. *See supra* Part II.A.

This segues to the next policy justification, concerns about respect for the U.S. tax system. The U.S. tax system depends on voluntary compliance.[143] When taxpayers perceive that the tax laws are unjust, experts observe that compliance drops and egregious tax behavior proliferates.[144] The current exception for the naming portion may be the type of provision that engenders distrust and demoralizes otherwise acquiescent taxpayers.

Furthermore, the current paradigm forces charitable administrators and fundraisers into duplicative behavior, and requires that charities issue dubious documents. The charitable market effectively mandates that a charity conducting a significant capital campaign grant naming rights.[145] A charitable administrator committed to the institution's mission will want to raise adequate funds to provide charitable services and benefits for the poor, the homeless, the unemployed, the patients, the students, or the other charitable class benefited. A charity that does not sell naming rights may fail to secure key donations, and the charity's mission may suffer.[146]

Once the charity resolves to sell naming rights, the charity's fundraising officers must take steps more appropriate for a commercial business. Like a for-profit merchant, the charity must: (1) create an inventory of the naming rights for sale,[147] (2) engage in a marketing strategy,[148] (3) select whether to display its product line of naming rights on the institution's website using a "descriptive text" approach or employing the very popular "shopping list" method,[149] and (4)establish

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143. United States v. Arthur Young & Co., 465 U.S. 805, 815 (1984) ("Our complex and comprehensive system of federal taxation, relying as it does upon self-assessment and reporting, demands that all taxpayers be forthright in the disclosure of relevant information to the taxing authorities."); Couch v. United States, 409 U.S. 322, 335 (1973).

144. James Andreoni, Brian Erard & Jonathon Feinstein, *Tax Compliance*, 36 J. ECON. LITERATURE 818, 851 (1998) ("In psychological terms, an unfair tax system could lead people to 'rationalize' cheating."); *see also* Marjorie E. Kornhauser, *A Tax Morale Approach to Compliance: Recommendations for the IRS*, 8 FLA. TAX REV. 599, 613 (2007).

145 *See* BURTON, *supra* note 15, at xx ("Putting naming rights on the market [is] . . . commonplace these days . . . ."); *id*. at 7–8.

146. *See id.* at xvii (indicating that charities must offer naming rights to raise needed funds).

147. *Id*. at 134–39.

148. *See id.* at 125–26 (discussing the fundraiser's toolbox and the use of that toolbox "to *sell* naming rights to donors and sponsors") (emphasis added).

149. *Id*. at 160–61 (comparing the shopping list approach and the descriptive approach); *see also*

the ask amount for the various naming rights for sale.[150] Similar to a franchisor that adopts uniform policies for all its outlets, many institutions adopt a naming rights policy so that each department, unit, or affiliate will utilize consistent advertising, marketing, and selling policies.[151]

After all this commercial behavior—and in spite of the valuable naming rights given to the donors—in compliance with current law, the charity then issues each donor a receipt stating the charity provided "no goods or services" in return for the donation.[152]

B. Proposal Is Consistent with Charitable Tax Policies

Scholars endorse multiple rationales for the charitable tax deduction, and this subpart analyzes whether this Article's fundamental claim is in accord with each rationale. Professor Atkinson asserts that if we adopt the Platonic approach and suppose there is a single unifying feature for the descriptive term charitable,[153] we commit the fallacy of "the one true way."[154] Instead, Professor Atkinson and others assert that charitable tax rules are a "complex phenomenon"[155] that reflect a more holistic approach recognizing multiple policies that in combination may justify a philanthropist's tax deduction depending upon the presence or absence

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id. at 81–83.

150. *See supra* notes 121–23 and accompanying text (stating that many charities adopt the "multiple of two" pricing scheme to ensure that all will know who made the top gift, and how the other donors rank on the ladder of generosity).

151. *See* BURTON, *supra* note 15, at 139–52.

152. *See* I.R.C. § 170(f)(8)(B)(ii) (2006) (requiring that a donor must receive a contemporaneous written acknowledgment from the charity which states whether the charity provided any goods or services in return for the contribution to claim a charitable deduction); *see also* I.R.C. § 6115(b) (2006) (requiring that the charity provide a receipt if the amount exceeds $75 and the payment was "partly as a contribution and partly in consideration for goods or services provided . . . .").

153. Rob Atkinson, *Theories of the Federal Income Tax Exemption for Charities: Thesis, Antithesis, and Syntheses*, 27 STETSON L. REV. 395, 399 (1997) (stating that with a Platonic view, the anticipated single feature "is the essence of . . . 'charitability'").

154. *Id*. at 400; *see also id*. at 399 ("Modern philosophers have questioned the adequacy of [the Platonic] account of description, pointing out that things described by the same term can bear a family resemblance to one another even though all members of the class do not share a single common characteristic.").

155. *Id.* at 401; Gergen, *supra* note 5, at 1394; Colombo, *supra* note 11, at 662.

of various features.[156]

Erudite scribes offer four major rationales. First, the altruism rationale[157] posits that a true definition of charity involves "selfless love of others,"[158] and a tax deduction to promote this virtuous behavior is appropriate.[159] Although the tax laws often seek to promote specific types of behavior[160] and altruistic generosity is praiseworthy,[161] critics persuasively argue that the altruism theory founders as the exclusive theoretical platform for designing an ideal charitable tax deduction.[162] As a practical matter, even if some people act altruistically some of the time,[163] "developing an administrable legal test that could accurately isolate donations which are selflessly motivated . . . would be practically impossible."[164] Even the theory's chief proponent concedes that because charity "is a matter primarily of the heart . . . in seeking a legal definition in objective terms, we are bound to be disappointed."[165]

Moreover, many social scientists forcefully assert that donors are not altruistic, and instead are self-interested rational actors.[166] For example, evolutionary psychologists posit that the drive to reproduce and perpetuate our genes motivates much human behavior. These

156. Atkinson, *supra* note 153, at 425; *id*. at 399 (suggesting that instead of sharing a single unifying feature, transactions worthy of charitable tax benefits share a "gestalt or family resemblance"); *see also* Gergen, *supra* note 5, at 1394 ("examin[ing] three theories supporting some form of a deduction or tax credit for contributions"); Colombo, *supra* note 11, at 662 (examining "several different rationales for the charitable contribution deduction").

157. Atkinson, *supra* note 153, at 423–24 (discussing "Atkinson's altruism theory"); *see also* Rob Atkinson, *Altruism in Nonprofit Organizations*, 31 B.C. L. REV. 501, 599–600 (1990).

158. Atkinson, *supra* note 153, at 401.

159. Gergen, *supra* note 5, at 1395.

160. The tax law is "replete with . . . provisions aimed at inducing certain kinds of behavior . . . ." Colombo, *supra* note 11, at 668.

161. TIBOR R. MACHAN, GENEROSITY: VIRTUE IN CIVIL SOCIETY ix (1998) ("Generosity is a moral virtue."); *id*. at 1 ("No direct personal gain is involved in generous conduct.").

162. Posner, *supra* note 7, at 574 ("[A]ltruism does not supply a satisfactory explanation of philanthropic giving. It does not explain why people do not decrease their giving as a charity becomes wealthier, [or] why large gifts are conveyed in a highly public way.").

163. Despite his criticisms, Professor Colombo does not rule out the chance that people "act altruistically from time to time." Colombo, *supra* note 11, at 669.

164. *Id*.

165. Atkinson, *supra* note 153, at 401.

166. *See* Colombo, *supra* note 11, at 669 (observing that "[t]here is a great debate within the social sciences . . . over whether 'unselfish [behavior]' actually exists").

psychologists view charitable giving as a means to "help[] other organisms to reproduce which are likely to carry the same genes . . . [and as a means of inducing] reciprocal altruism."[167] Economists point to the various donor benefits including improved public image, enhanced self-image, the "warm glow,"[168] and other personal benefits, to deduce that philanthropists donate when they gain by giving.[169] Social psychologists surmise that charitable patrons feel a natural empathy when they see members of the same species in distress and use charitable giving to assuage their mental turmoil and avoid guilt.[170]

Although it may not function as the exclusive fountainhead of the charitable tax deduction, the altruism theory may help explain the availability of a deduction in some situations. Judges and regulators likely desire to promote virtue or wish to be perceived as promoting virtue.[171]

In regards to whether this Article's suggestion is consistent with the altruism rationale of allowing the deduction for selfless transfers, it is noted that "human motivation is terribly complex,"[172] and naming donors' motivations vary. Nevertheless, naming arrangements may reflect, at least in some situations and to some extent, selfishness, ego, and pride[173] when compared to anonymous gifts which are more likely the progeny of selfless love.[174] This Article's approach would tend to encourage anonymous giving by reducing the tax deduction for named

167. *Id*. at 673–74.

168. *Id*.

169. *Id*.; *see infra* Part III.E.1 (discussing the warm glow and various other nonmonetary personal benefits).

170. *See* Colombo, *supra* note 11, at 675–76.

171. *See* Kelman, *supra* note 9, at 880 ("Even the most sincere altruist buys the scarce resource of looking altruistic."); *see also* Colombo, *supra* note 11, at 669 (noting that some of the people may act altruistically some of the time).

172. Colombo, *supra* note 11, at 669; Stone, *supra* note 10, at 231 ("The psychology and economics of charitable giving by individuals is a difficult and hotly debated topic.").

173. *See infra* Part III.A.1.b (discussing the potential benefits to the donor from a naming rights arrangement). *But see infra* notes 257–61 and accompanying text (observing that some philanthropists, particularly celebrities, may allow their largesse to be publicized to help the charity's fundraising efforts).

174. *But see infra* Part III.E.1 (suggesting that substantial benefits can result from philanthropy even in the absence of naming rights).

gifts. Consequently its claim is in harmony with the altruism theory.

The second major rationale considered in this subpart is the subsidy theory, which is "[f]irst in importance in the literature"[175] and is described as "orthodoxy."[176] Under this theory, the charitable deduction subsidizes, and thereby encourages, donations to charities that provide societal benefits.[177] The theory asserts that without the tax deduction, the public will donate at a suboptimal level. Taxpayers will not have sufficient incentives to donate because the charity's activities may not benefit the donors, and instead may benefit people who do not contribute, commonly called "free riders."[178] The charitable tax deduction grants donors a tax break, and charges the free riders, and everyone else, higher taxes.[179]

An example involving a disaster relief organization, such as the Red Cross, helps demonstrate the theory. The Red Cross provides socially beneficial services, but individuals may have insufficient incentives to donate without a tax benefit. A person who donates to the Red Cross may never be a disaster victim. On the other hand, people who never donate may become disaster victims. These victims may receive direct services from the Red Cross because the Red Cross does not discriminate when providing services. As a result, economically, each individual has an incentive to refrain from contributing and freely ride on the generosity of others.[180] The subsidy theory posits that this free-

175. Gergen, *supra* note 5, at 1394; *see also id*. at 1396 ("To encourage giving is to this day the major rationale for a deduction."); *see also* Halperin, *supra* note 138, at 4 ("Most observers justify the charitable deduction as an incentive to encourage taxpayers to increase their contributions to charity.").

176. Ilan Benshalom, *The Dual Subsidy Theory of Charitable Deductions*, 84 IND. L.J. 1047, 1050 (2009); *see also* Colombo, *supra* note 11, at 661 (The I.R.C. § "170(c) deduction is best explained as an indirect government subsidy to charitable organizations . . . the existing literature . . . generally accepts the subsidization role of the deduction."); *see also id*. at 682 (referring to this as "the most widely accepted rationale").

177. Colombo, *supra* note 11, at 662 (observing that under the subsidy theory the charitable contribution deduction is "simply an auxiliary subsidy for exempt organizations rather than . . . a stand-alone provision with a separate theoretical basis"); *see also* Atkinson, *supra* note 153, at 397 ("[T]he conventional wisdom [is that charitable tax benefits] subsidize[] the social benefits charities provide.").

178. Benshalom, *supra* note 176, at 1050; *see* Atkinson, *supra* note 153, at 406 (discussing classic examples of organizations providing benefits to free-riders such as listener-supported radio, community development organizations, and organizations dedicated to enhance environmental quality); *see also* Colombo, *supra* note 11, at 686 (discussing basic scientific research).

179. *See* Gergen, *supra* note 5, at 1403.

180. Atkinson, *supra* note 153, at 405 ("[N]onprofits produce what economists call public goods,

rider problem will leave disaster relief organizations under-funded, and to compensate, the tax system should entice possible donors with a deduction.[181]

In the case of a naming rights arrangement, with respect to the part of the transfer equal to the value of the naming rights, the charity adequately compensates the philanthropist. As a result, no government subsidy is necessary for that part. Professor Gergen confirms that no charitable tax deduction is justified under the subsidy theory if a "group . . . has sufficient incentive to fund the good at an optimal level without a deduction for its payments."[182] This Article's claim is consonant with the subsidy rationale because the charitable tax deduction is available for the gift portion of a philanthropist's transfer but not for the portion that purchases a naming right.

Third, the "proper measure of disposable income"[183] rationale posits that taxable income should include only annual earnings available for "personal consumption."[184] Whether this Article's proposal is consistent with this rationale depends on whether the focus is on the philanthropist or on the charity's beneficiaries. Focusing on the former, arguably the philanthropist has purchased a valuable return benefit, and he enjoyed personal consumption. Thus, no tax deduction is appropriate for the naming portion of the transfer to charity.[185] On the other hand, if one

goods the enjoyment of which cannot effectively be limited to those who pay and which thus are unlikely to be produced in optimal quantities by for-profit firms.").

181. Gergen, *supra* note 5, at 1403 (observing that the charitable deduction "enables people with a high preference for a [charitable] good to shift some of [the] cost to low-preference freeriders" by forcing everyone to pay higher taxes).

182. *Id*. at 1412; *see also id*. at 1438 (questioning tax deductions for contributing churchgoers and viewer-contributors of public television).

183. *See* Peter J. Wiedenbeck, *Charitable Contributions: A Policy Perspective*, 50 MO. L. REV. 85, 88 (1985); *see also* Gergen, *supra* note 5, at 1394, (citing Andrews, *supra* note 9, at 309).

184. Wiedenbeck, *supra* note 183, at 87 n.14 ("[P]ersonal income [is the] sum of . . . [personal] consumption and [accumulation,] and [] the change in value of the store of property rights between the beginning and end of the period in question.") (quoting HENRY SIMONS, PERSONAL INCOME TAXATION 50 (1938)); *see also* Andrews, *supra* note 9, at 313. Traditionally the definition of income includes resources available for both consumption and savings, but in the case of a charitable donation the taxpayer cannot save the resources because the taxpayer has paid the resources to the charity. Colombo, *supra* note 11, at 680. This leaves only the consumption element to consider.

185. *See supra* Part III.A.1; Colombo, *supra* note 11, at 680 ("Transactions that involve direct quid pro quo unquestionably involve private preclusive appropriation of resources.") (internal quotations omitted).

focuses on the charity's beneficiaries, they will benefit from (consume)[186] the naming part just as much as the gift part, and the naming philanthropist should deduct the entire transfer to charity because the charity's beneficiaries consume those amounts.

The redistribution theory is closely aligned with the proper measure of disposable income rationale. It maintains that the tax system should reward donors who voluntarily distribute resources for the ultimate benefit of a charity's beneficiaries who will be poor or otherwise in need.[187] Again, this Article's proposal is consistent with the theory if one focuses on the philanthropist's acquisition of the naming rights but not if one focuses on the benefits to the charity's beneficiaries.

Fourth, the pluralism theory stresses that a charitable deduction can admirably facilitate the efforts of a passionate minority striving to pursue bold social goals through the charitable sector.[188] In our democratic society, arguably the views of the majority direct public funds, and autonomous mavericks with salutary, but minority views cannot direct tax revenues.[189] "[C]haritable relief . . . allows taxpayers to speak while avoiding the bureaucratic shortcoming[s] of government spending, [and] the deduction for charitable giving "promotes a more defused and pluralistic way of spending public funds."[190] Critics counter that the charitable deduction provides excessive power to wealthy philanthropists to shape social policy.[191] In any event,

186. *See* Andrews, *supra* note 9, at 347 (supporting the view that because the funds are no longer available to the wealthy donor for consumption, under this theory the donor should deduct the amount); *see also* Gergen, *supra* note 5, at 1415 ("Gifts to charity [are not] consumption because they do not divert resources to [the donor's] private use.").

187. *See* Gergen, *supra* note 5, at 1408; *id*. at 1394 ("[A charitable] deduction equitably accounts for the loss in welfare suffered by people who transfer their resources to charity."); Miranda Perry Fleischer, *Theorizing the Charitable Tax Subsidies: The Role of Distributive Justice*, 87 WASH. U. L. REV. 505 (2010).

188. *See* Saul Levmore, *Taxes as Ballots*, 65 U. CHI. L. REV. 387 (1998); Benshalom, *supra* note 176, at 1050; Gergen, *supra* note 5, at 1395 (noting that "charity is a high form of self-expression deserving encouragement").

189. Benshalom, *supra* note 176, at 1047–48 ("[C]haritable spending [voices] preferences not accounted for by the majoritarian process . . . [and the charitable] subsidy . . . supplements the shortcomings of majority decision making.").

190. *Id*. at 1050; *id*. at 1047 (noting that the charitable tax deduction "decentraliz[es] the provision of public goods [and] allows individual donors to direct public funds while bypassing majority approval").

191. Gergen, *supra* note 5, at 1405–406 ("The use of a deduction to provide tax relief is

eliminating the deduction for the naming portion should not impede philanthropic mavericks because they are free to donate anonymously and deduct the full amounts they transfer to charity.

C. Addressing IRS Arguments

In 1968, the IRS proclaimed that donors can deduct the full amount transferred to charity regardless of any public recognition received.[192] In effect, the IRS allows charities and donors to value naming rights at zero.

The IRS provided no detailed explanation for its decision, but the rulings briefly refer to three justifications.[193] First, the IRS stated "[s]uch privileges as being associated with or being known as a benefactor . . . are not significant return benefits . . . ."[194] While the public recognition likely will be trivial when the transfer to charity is comparatively miniscule, as when a donor's name is listed along with hundreds of others in an alumni newsletter,[195] notable naming rights can have significant value for the reasons discussed in Part III.A.1.

Second, in 1968, the IRS stated that "being known as a benefactor . . . [has no] monetary value . . . ."[196] In 1968 naming rights for a building or charitable fund would have been especially difficult to monetize because of the lack of activity in both the charitable naming rights market and the commercial facilities naming market. But things have changed in forty years. The markets for naming rights have expanded exponentially. Charities collect approximately $4 billion

particularly troublesome because it makes it cheaper for high-bracket taxpayers to give . . . . [This] system . . . removes power from the majority and revests it in wealthy donors."); Colombo, *supra* note 11, at 685 (stating that this system "skews the influence of big donors").

192. Rev. Rul. 68-432, 1968-2 C.B. 104 ("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 . . . .").

193. *See, e.g.*, Rev. Rul. 77-367, 1977-2 C.B. 193; Rev. Rul. 73-407, 1973-2 C.B. 383; Rev. Rul. 68-432, 1968-2 C.B. 104.

194. Rev. Rul. 68-432, 1968-2 C.B. 104 (emphasis added).

195. This Article's proposal would not apply to this type of evanescent public recognition. *See* Appendix A.

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

annually in naming transfers,[197] and consultants stand willing and able to establish ask amounts for charitable naming rights.[198] Also, as discussed in Part III.D.3, data on sales of naming and related rights for professional sports arenas indicates that naming rights are valuable, and many consultants now specialize in estimating the commercial value of naming rights and associated rights.[199]

Third, the IRS has stated that public recognition is "incidental to making the organization function."[200] Generally, a benefit to a donor is incidental if it naturally flows from the organization's operations. [201] For example, if a donor contributes to a museum to build a new exhibit hall, the donor's ability to visit the completed exhibit hall will be an incidental benefit to the donor. As part of its charitable mission, the museum likely allows members of the general public to visit; the donor's opportunity to visit the new exhibit hall is a benefit, but it is a minor benefit that occurs as a natural consequence of the museum's open-door policy.

Notable naming rights do not appear to fall within the normal description of incidental. In connection with major capital campaigns, charities identify naming opportunities,[202] engage paid experts to help

197. *See supra* note 30 and accompanying text.

198. *See, e.g.*, *How Much Are Naming Rights Worth?*, NONPROFIT EDGE (DeLeon & Stang, Gaithersburg, M.D.) Sept. 2009, *available at* http://www.deleonandstang.com/news-articles/nonprofit-edge-article/how-much-are-naming-rights-worth/; *Major Gifts Research Centre*, DIG IN RESEARCH, http://diginresearch.biz/references.html (last visited Oct. 2, 2011) (discussing "emerging trends in [charitable] naming opportunities"); Ann Goldman, *Magic Number: How to Ask for the "Right" Gift*, FRONT RANGE SOURCE (Nov. 10, 2010), http://www.frontrangesource.com/the-magic-number-ask-for-the-%E2%80%9Cright%E2%80%99-amount; *see also* BURTON, *supra* note 15, at xi (stating that Dig In Research helps charities develop marketing strategies for selling naming rights, in particular "defining their inventory of named properties and setting the ask amounts for naming rights").

199. *See, e.g.*, Jim Harris, *What's in a Name?*, ARK. BUS., Oct. 11, 2010, at 28, *available at* 2010 WLNR 21078353 (discussing Turner Sponsorship Consultants); Jim Bentubo, *Colleges Forgoing Millions in Naming-Rights Deals*, SPORTS BUS. DAILY (Aug. 31, 2007), http:www.sportsbusinessdaily.com/article/114626 (regarding Front Row Marketing and Wasserman Media Group Marketing); Chris Poynter, *$40 million may be high for naming of new arena*, COURIER J. (Louisville, KY), Sept. 11, 2005, at A1, *available at* 2005 WLNR 26774540 (discussing the Bonham Group, "a Denver company that negotiates and tracks naming-rights deals").

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

201. *See* Rev. Rul. 80-77, 1980-1 C.B. 56 (a taxpayer may deduct the full amount she transferred to the Girl Scouts of America even though her daughter is a girl scout); *see also* Rev. Rul. 81-307, 1981-2 C.B. 78; Rev. Rul. 67-446, 1967-2 C.B. 119.

202. *See* BURTON, *supra* note 15, at 134.

determine the ask amounts, and develop elaborate marketing strategies.[203] Rather than being incidental, naming rights are contrived and seem to unnaturally clutter the charitable landscape.[204]

The government formulated its approach in 1968, before the explosion of charitable naming rights in the 1990s.[205] Because naming rights were comparatively rare in 1968, the government in 1968 may have rationally chosen to pursue other tax inequities at that time. With the changes in the charitable market, reevaluation is appropriate.

D. Implementation Options; Parsing Based on Commercial Value

There are at least three options for implementing this Article's claim that naming philanthropists receive a valuable return benefit and the tax law should restrict the charitable deduction: (1) prohibit any deduction when a donor acquires significant naming rights; (2) apply a uniform fraction approach to calculate the naming portion and prohibit a deduction for that portion, or (3) design a fair market value approach that estimates the value of the particular naming rights, and prohibits a deduction for that portion of the philanthropist's transfer to charity. The third option should come closest to achieving horizontal equity,[206] but the uniform fraction approach might be a viable backup if the fair market value approach poses excessive administrative costs.

1. Rejecting Total Disallowance

A total disallowance rule finds support in the legislative history for the charitable deduction,[207] but would be excessively harsh. A naming

203. *See* Gergen, *supra* note 5, at 1409.

204. *See* Isherwood, *supra* note 29, § 2, at 6.

205. *See supra* note 30 and accompanying text.

206. *See supra* note 140 and accompanying text (describing horizontal equity as treating similarly situated taxpayers the same).

207. S. REP. NO. 1622, at 196 (1954), *reprinted in* 1954 U.S.C.C.A.N. 4629; H.R. REP. NO. 1337 (1954), *reprinted in* 1954 U.S.C.C.A.N. 4017, 4180 (providing that no charitable deduction is available if the donor expects a substantial financial return benefit); *see also* Staples v. Comm'r, 821 F.2d 1324, 1326 (8th Cir. 1987), *vacated*, 490 U.S. 1103 (1989), *and abrogated by* Hernandez v. Comm'r, 490 U.S. 680 (1989) (discussing the legislative history).

donor makes the quintessential "dual character"[208] payment, and the lion's share of the naming transfer likely is a bona fide, generous gift.[209] A complete disallowance rule would fail to acknowledge this generosity. In addition, a draconian disallowance rule could trigger devious gamesmanship[210] by philanthropists resulting in excessive enforcement costs.

2. Fair Market Value Approach

In implementing this Article's claim, the best method for advancing horizontal equity[211] is to allow a charitable deduction only for the philanthropist's transfer in excess of the fair market value of the naming rights. Existing law applies this method for other return benefits[212] and would provide a framework even if the government enacts no special statutory or regulatory provisions to address naming rights. For charitable contribution purposes, fair market value is the price at which property would change hands between a hypothetical willing buyer and a hypothetical willing seller, both with reasonable knowledge of the relevant facts, and neither being under a compulsion to act.[213] For tax purposes, property is valued at its "highest and best use"[214] and "is not affected by whether the owner has actually put the property to its highest and best use. The realistic objective potential uses for property control the valuation."[215]

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208. United States v. Am. Bar Endowment, 477 U.S. 105, 117 (1986) (describing a "dual character" payment as a purchase and a contribution).

209. *See infra* Part III.D.3 and Appendix B.

210. Charities and donors might engage in reciprocal or circuitous multi-step transactions. For example, multiple donors might collude to allow each donor to contribute to one charity while enjoying a naming right from another. Any proposal will need to prevent machinations, but a total disallowance rule would encourage aggressive behavior.

211. *See supra* note 140 (describing horizontal equity).

212. *See supra* note 79 and accompanying text.

213. Treas. Reg. § 1.170A-1(c)(2) (as amended in 2008); Treas. Reg. § 1.6115-1(a)(1) (1996). *But see* Turner v. Comm'r, 13 T.C.M. (CCH) 462 (1954) (presenting unique facts in which the court declines to use the "retail value" of property, refers to the "value to the [taxpayer]," and chooses an amount between the two figures).

214. Stanley Works v. Comm'r, 87 T.C. 389, 400 (1986).

215. Consol. Investors Grp. v. Comm'r, 98 T.C.M. (CCH) 601 (2009).

In general, when a charity provides a significant[216] return benefit, the charity must disclose the return benefit to the donor[217] and provide a "good faith estimate of the value"[218] of the return benefit to the donor. Treasury Regulations state that the charity can use any reasonable method to value the return benefit if used in good faith.[219] The charity provides the good faith estimate on a contemporaneous written acknowledgment delivered to the donor, and the donor may follow the charity's estimate unless the donor knows or has reason to know that the charity's estimate is unreasonable.[220]

Thus, the IRS could adopt a fair market value approach by repealing its administrative pronouncements that effectively value naming rights at zero[221] and by applying the general rules. In addition, a de minimis exception excludes insignificant return benefits given in fundraising campaigns.[222] These rules ignore a return benefit if the cost to the charity is $9.70 or less (in 2011)[223] and the value of the benefit is less than $97.00 (in 2011) (both figures are adjusted for inflation).[224] This existing exception would exclude many small naming rights arrangements.[225] Donors who merely name a brick in the sidewalk or similar item likely could continue to deduct one hundred percent of their transfers to charity, notwithstanding the receipt of the naming rights.

Although the IRS could independently subject naming rights to the

216. *See infra* notes 223–224 and accompanying text (disregarding insubstantial return benefits).

217. I.R.C. §§ 170(f)(8)(B)(ii), 6115(a) (2006) (providing that if the charity receives a quid pro quo donation in excess of $75 and fails to provide an acknowledgement to the donor, the charity is liable for a monetary penalty of $10 per statement with a maximum penalty of $5,000 per fundraising event or mailing); *see also* I.R.C. § 6714(a) (2006).

218. I.R.C. §§ 170(f)(8)(B)(iii), 6115(a)(2) (2006); Treas. Reg. § 1.170A-13(f)(2)(iii) (as amended in 1996).

219. Treas. Reg. § 1.6115-1(a)(1) (1996); *see also* Treas. Reg. § 1.170A-13(f)(7) (as amended in 1996) (explaining that whether the charity provides the estimate in good faith is determined "without regard to the manner in which the [charity] in fact made the estimate").

220. Treas. Reg. § 1.170A-1(h)(4) (1996); Treas. Reg. § 1.170A-13(f)(7)(1996).

221. *See supra* Part II.A (discussing the government authorities that effectively value public recognition at zero).

222. Treas. Reg. § 1.170A-13(f)(8)–(9) (as amended in 1996); Rev. Proc. 90-12, 1990-1 C.B. 471, 472.

223. Rev. Proc. 2010-40, 2010-46 I.R.B. 663, 666, § 3.16(2).

224. *Id*.

225. Rev. Proc. 90-12, 1990-1 C.B. 471 (allowing charities and their donors to disregard certain token or insignificant benefits).

general rules, congressional modifications would be appropriate to accommodate special concerns with naming rights.

a. Proposed Focus on Commercial Value of Advertising Impressions

If the IRS changed its administrative position and required charities and philanthropists to value naming rights without legislative adjustments, significant practical problems would arise. As a preliminary matter, the value of charitable naming rights cannot be isolated merely by focusing on the ask amounts and the actual amounts transferred with respect to comparable properties.

A preferred method of valuation is frequently the market value method in which the appraiser identifies recent sales of comparable rights and then adjusts those sale prices to estimate the value of the subject rights.[226] Appraisers, researchers, and consultants can research the ask amounts and actual transfer amounts.[227] In the charitable market, however, the sale of the naming rights is intertwined with generosity, and neither charities nor philanthropists have sufficient incentives to unbundle the naming rights as a separate commodity. From the charity's standpoint, the current system of negotiating with the benefactor for naming rights and then proclaiming that the benefactor's total transfer to the charity is an unrequited gift[228] is extremely lucrative. It allows charities to base the ask amount on its own construction costs and in many cases collect fifty percent of the construction costs from a single naming donor.[229] Outside the charitable sector, in the world of professional sports arena naming, the owner's construction costs are

226. *See* Greg C. Ashley & Michael J. O'Hara, *Valuing Naming Rights*, 2, UNIV. OF NEB. OMAHA (Aug. 8, 2001), http://cba.unomaha.edu/faculty/mohara/web/ALSB01ValuingNamingRights.pdf ("The lynchpin of valuation is comparable transactions . . . [but] [w]ith regard to naming rights, it is important to note that no two deals are the same."); Bill Gerrard, Milena M. Parent & Trevor Slack, *What Drives the Value of Stadium Naming Rights? A Hedonic-Pricing Approach to the Valuation of Sporting Intangible Assets*, 2 INT'L J. SPORT FIN. 10, 12 (2007) (relying on a "benchmark anchor-and-adjustment method[] in which the recent market valuations of similar assets are used as an 'anchor' or 'benchmark' valuation that is adjusted to take account of asset-specific factors").

227. *See, e.g.*, *supra* notes 71–76 and accompanying text (discussing Dig In Research's extensive nationwide study of charitable naming rights).

228. *See supra* note 152 and accompanying text.

229. *See infra* note 275.

irrelevant in the negotiations.[230] As the data in Appendix B indicates, the facility owner of a pro sports venue may receive payments from the name buyer worth only from four percent to approximately twenty-five percent of the construction costs.

Likewise philanthropists do not want charities to separate naming rights from generosity. Professor Posner observes that if charities customarily sold naming rights to the highest bidder, charitable naming rights would lose their luster and would no longer signal that the name holders are virtuous benefactors.[231] As a result, the charitable naming rights market is a complex junction of generosity and pride.

Because the ask amount in a charitable naming arrangement does not equal the value of the naming right, an appraiser seeking to value naming rights might consult a different market[232] such as for pro sports arena naming rights. But that data is not perfect either. The amounts paid for naming rights of sports arenas typically are bundled with the purchase of other commercial rights. Although the parties involved frequently do not disclose all the details,[233] researchers report that the price quoted publicly for the naming rights often encompasses many other valuable rights, including but not limited to, the right to: (1)

230. GORDON V. SMITH & RUSSELL L. PARR, INTELLECTUAL PROPERTY: VALUATION, EXPLOITATION, AND INFRINGEMENT DAMAGES 63 (2005) ("The cost of putting together such a contract and the cost of the facility involved are both irrelevant to the value of the deal."); DeSchriver & Jensen, *supra* note 133, at 361 ("[W]e also find that the price for facility naming rights is independent of . . . the cost of construction.").

231. Posner, *supra* note 7, at 574 ("The reason that universities do not simply sell titles and positions is that their prestige would be destroyed if they were routinely sold . . . to the highest bidder . . . . [P]eople value reputations for generosity . . . but if one could purchase such reputations, then they would cease to exist."). Naming rights signal that the charity approves of the naming donor. This implicit approval feature was evident when Seton Hall University removed the name of disgraced Tyco CEO Dennis Kozlowski from its business school after his criminal conviction. Larry Gordon, *When the Name on the Building Is Mud*, L.A. TIMES, July 11, 2008, at 1, *available at* 2008 WLNR 13001702; *see also* Emily S. Achenbaum, *Levine Good Example of a Donor Gone Bad; Zoo Takes His Name Off Polar Bear Exhibit*, CHI. TRIB., Apr. 17, 2008, at Metro Zone NS 1.

232. Nancy J. Knauer, *The Paradox of Corporate Giving: Tax Expenditures, the Nature of the Corporation, and the Social Construction of Charity*, 44 DEPAUL L. REV. 1, 81 (1994) (questioning whether corporations have altruistic motives when making contributions to charity). *But see* DeSchriver & Jensen, *supra* note 133, at 361 (mentioning that some commercial firms may have community motives).

233. Gerrard, Parent & Slack, *supra* note 226, at 15.

operate concession stands (sometimes called "pouring rights"[234]); (2) the right to purchase, or use without additional consideration, preferred seating for the company's executives and its best customers; and (3) the exclusive right to sell its products to the team and building owners.[235] As a result, the amounts publicly quoted for pro sports naming rights likely overstate the price for the naming rights alone.

Nevertheless, part of the process[236] used to estimate the value of pro sports arena naming rights could be employed to estimate the value of charitable naming rights. In sports-naming deals, experts frequently analyze the "ad impressions"[237] generated. "[T]he fundamental value of [naming rights] depends primarily on the . . . advertising messages generated . . . ."[238] Potential ad impressions can occur from a variety of sources, including (1) direct advertising by the named institution itself; (2) direct impressions received by people present at the facility; (3) "[m]iscellaneous non-paid mentions in newscasts and articles;" (4) TV, radio, and other media coverage of events or programs at the facility; (5) passing pedestrians and automobile traffic; (6) "direct view from area buildings;" and (7) "word-of-mouth."[239]

Appraisers then consider the cost of generating ad impressions from other platforms such as television, radio, or newspaper to calculate the value of the naming rights based on the cost to secure the same number and value of ad impressions from other sources.[240] Appraisers have

234. Ashley & O'Hara, *supra* note 226, at 13.

235. *Id*. at 12 ("Naming rights deals usually include more, often much more, than just the right to have a name placed on a building."); *see also id*. at 13 (listing twenty-seven different types of added benefits provided with arena naming rights); Gerrard, Parent & Slack, *supra* note 226, at 11.

236. *See* Ashley & O'Hara, *supra* note 226, at 15–16 (discussing different methods to appraise naming rights, including a cost method, an income method, and a market value method); Gerrard, Parent & Slack, *supra* note 226, at 10 ("adopt[ing] a multi-attribute hedonic-pricing benchmark valuation approach to the determination of the observed market value of stadium naming rights"); Harris, *supra* note 199, at 2B (stating that a consultant claims to have a proprietary method for valuing naming rights).

237. Ashley & O'Hara, *supra* note 226, at 18.

238. Gerrard, Parent & Slack, *supra* note 226 at 11; Ashley & O'Hara, *supra* note 226, at 18 ("[S]ome of the naming rights literature suggests that ad impressions are the primary value driver in a naming rights deal.").

239. Ashley & O'Hara, *supra* note 226, at 18.

240. *Id*. at 17 (referring to this as the "cost method" of valuing the naming rights); SMITH & PARR, *supra* note 230, at 65 (describing this approach as an "income method" of valuation). *But see* Ashley & O'Hara, *supra* note 226, at 15 (discussing other methods of valuation).

developed various conversion ratios. For example one group has determined that "four signage-generated impressions are needed to equal the effect of one radio-generated impression."[241]

Charitable naming rights also provide ad impressions, and commercial firms likely would buy those ad impressions in the absence of higher bids from philanthropic individuals.[242] Thus, a possible simplification could involve permitting charities and philanthropists to value charitable naming rights based on the amount a reasonable commercial buyer acting at arm's length would pay for the ad impressions from the charitable naming rights. This would isolate the value of the naming right as an advertising opportunity from the halo effect or other impacts unique to charitable arrangements.[243] This simplification would conform to an established IRS principle. When a taxpayer receives a return benefit for a charitable contribution, in reducing the taxpayer's charitable deduction for the value of the return benefit, the IRS refuses to consider the taxpayer's unique enjoyment of the return benefit.[244] For example, if a taxpayer contributes and receives a ticket for a concert or a dinner, the taxpayer can deduct only the amount given in excess of the value of the concert or dinner ticket as determined in an arm's-length sale between a hypothetical willing buyer and willing seller. This is true even if the taxpayer does not wish to attend the concert or the dinner and, in fact, fails to attend.[245] Appendix A of this Article sets forth a proposed statute implementing a special valuation rule for charitable naming rights.

241. Ashley & O'Hara, *supra* note 226, at 18.

242. *See, e.g.*, Will Connaghan, *St. Louis to Host Supreme Visits this Month*, DAILY REC. (St. Louis, Mo.), Feb. 1, 2007, *available at* 2007 WLNR 26366085 (demonstrating that on some occasions commercial firms acquire naming rights to charitable structures; referring to the law school at Washington University in St. Louis, Missouri named "Anheuser-Busch Hall"); *see also supra* note 34 and accompanying text (discussing Bill Gates' acquisition of naming rights over the Stanford University computer center).

243. *See* Stone, *supra* note 10, at 215 ("[E]lucidat[ing] the conceptual distinction between selling sponsorships and selling advertising–between leasing halos and billboards.").

244. Rev. Rul. 67-246, 1967-2 C.B. 104 (explaining that the value of tickets or other privileges provided to a philanthropist in connection with a fundraising event will reduce the philanthropist's charitable deduction even if the philanthropist does not use, utilize, or exercise the privileges).

245. *Id*. (determining value based on an arm's-length sale between a hypothetical willing buyer and willing seller without considering whether the taxpayer actually will attend the concert or the dinner).

b. Expanded Exception for Insubstantial Rights

This Article's proposal would impose administrative burdens on charities. Without further adjustment, charities would need to make a good faith value estimate even for minor naming rights provided as part of a capital campaign.[246] Charities might need to estimate the value of naming rights for relatively minor items such as a tree, a park bench, or a window. The current de minimis threshold allows the parties to ignore a return benefit only if the cost to the charity is below the threshold ($9.70 in 2011) or less, and the value of the benefit is less than the threshold ($97.00 in 2011) (both figures are adjusted for inflation).[247]

Another potential modification of existing law could shelter certain small naming rights arrangements that exceed the current de minimis threshold. Existing charitable deduction laws employ an amazing number of threshold figures, including $250, $500, $5,000, $20,000, and $500,000.[248] Adding a new threshold specifically for naming rights would not substantially increase the law's complexity. As an example, Congress could direct the Treasury Department to issue regulations increasing the "insubstantial benefit" exception ten fold when applied to charitable naming rights. Allowing the exception for naming rights that cost the charity $97.00 or less and which have a value of $970.00 or less could significantly reduce the potential administrative burdens. Appendix A includes sample statutory language implementing this modification.

c. Advantages of the Fair Market Value Approach

In addition to improving horizontal equity,[249] eliminating the naming rights exception should have other positive ramifications. It would address the anomaly that the benefactor bargains vociferously over the

246. *See* I.R.C. § 170(f)(8)(B) (2006) (requiring the charity, generally, to provide a "good faith estimate of the value of any goods or services" given in consideration of a charitable donation).

247. *See supra* notes 223–224 and accompany text.

248. *See generally* Treas. Reg. § 1.170A-13 (as amended in 1996); KIRSCHTEN & FREITAG, *supra* note 90, § VI-C(1)–(4) (discussing the $250, $500, $5,000, and $500,000 thresholds); *see also id.* at A-182 (discussing the $20,000 threshold).

249. *See supra* note 140 and accompanying text.

extent of the naming rights, while the charity proclaims that the benefactor's entire transfer to charity was a gift.[250] Similarly it will free the charity's fundraisers from the current duplicity of courting donors with valuable naming rights and then treating the total transfer as pure generosity.[251] Likewise it frees charities, some of our most revered institutions, from issuing receipts to donors which boldly proclaim that the charity provided "no goods or services . . . in connection with" the donor's contribution[252] when the parties bargained ardently about the extent of the naming rights. Also, eliminating the exception may improve public perception of the tax rules, thereby helping voluntary compliance.[253]

d. Disadvantages of the Fair Market Value Approach

Even with the simplifying modifications proposed in this Article, employing the fair market value approach may involve substantial costs. For example, charities will need to state a good faith estimate of the value of the return benefits on the written acknowledgements provided to donors.[254] Charities may wish to hire valuation experts, particularly for the first few fundraising campaigns, to confidently estimate the value. Also, charities may feel implicit pressure from donors to state a low estimate of value, although similar valuation temptations are inherent throughout our tax system which allows charitable deductions based on the value of property donated.[255]

In addition, valuation uncertainties may lead to enforcement and dispute resolution costs. While some charities may hire competent experts to determine the value of the ad impressions, others may be less diligent, attracting potential IRS audits. The IRS may use their own valuation experts, or hire outside experts, to determine if the charity's (and the donor's) estimates are reasonable. If the parties' value

250. *See supra* note 152 and accompanying text.

251. *See supra* notes 147–52 and accompanying text.

252. *See supra* note 152 and accompanying text.

253. *See supra* notes 143–44 and accompanying text.

254. *See* I.R.C. §§ 170(f)(8), 6115(a)(2) (2006).

255. *See* Treas. Reg. § 1.170A-1(c)(2) (as amended in 2008); *see also* Treas. Reg. § 1.170A-1(h)(4) (discussing reliance on donee estimates as to fair market value).

estimates are not reasonable, the IRS will incur additional costs to determine a reasonable estimate for audit purposes, and taxpayers disputing the resulting IRS assessments will incur administrative and potentially legal costs.

Also, the fair market value approach based on a hypothetical buyer and a hypothetical seller may be unfair when the actual philanthropist acquires no or only slight benefits from acquiring the naming rights because of the philanthropist's particular circumstances. For example, the naming donor may have an extremely common surname such as Smith, Jones or Johnson.[256]

Similarly, there may be cases when a charitable naming right is really of no benefit to the donor but greatly helps the charity, particularly when the donor is a celebrity. For example, it would seem inappropriate to reduce Betty Ford's charitable deduction for her contributions to the Betty Ford Alcoholism Center[257] because the naming may have tarnished her reputation while greatly benefiting the charity.[258] In other celebrity situations, the value of the naming right to the celebrity donor may be ambiguous, but the benefit to the charity may be substantial. Examples might include the Arnold Palmer Prostate Center,[259] or Bob Barker's animal rights endowments at eight U.S. law schools.[260] In these situations the charity may want to use the celebrity's name for publicity, hoping that it will inspire others to give.[261] Also, there may be situations when the donor is ambivalent about the publicity, but the charity's officials feel that naming the building after the donor is an

256. Commonality may dilute the benefits to reputation. Others may be unsure about which person named Smith donated the money and therefore is wealthy and generous.

257. *See* BETTY FORD CTR., http://www.bettyfordcenter.org (last visited Oct. 2, 2011).

258. *But see* Gergen, *supra* note 5, at 1395 (arguing that if philanthropists are truly altruistic they will not care about the amount of their charitable tax deduction).

259. *See Arnold Palmer Prostate Center*, EISENHOWER MED. CTR., http://www.emc.org/body.cfm?id=191 (last visited Oct. 2, 2011). On the one hand, famous golf legend Arnold Palmer will increase his reputation for generosity; on the other hand, an affiliation with a disease may diminish his effectiveness in endorsing products associated with physical and athletic excellence.

260. *See* Tamie L. Bryant, *The Bob Barker Gifts to Support Animal Rights Law*, 60 J. LEGAL EDUC. 237, 241 (2010) (indicating that Barker's commitment to animal rights cost him financially; "[Barker] resigned from hosting the Miss USA and Miss Universe beauty pageants–a financially rewarding role he enjoyed–because furs were given as prizes.").

261. If the donor is highly respected in the community, the affiliation may help the charity's reputation more than the donor's reputation.

appropriate way to express gratitude.

The next subpart considers an alternative that could reduce administrative, compliance, and enforcement costs, but may unduly sacrifice the potential fairness gained from the fair market value approach.

3. A Uniform Fraction Approach as a Backup

The fair market value approach has the potential to deliver equitable results, and the focus on commercial value and the enhanced de minimis exception[262] may reduce administrative burdens, but in the end, fair market valuation may prove unduly cumbersome. Accordingly, it is appropriate to explore a potential backup method that this Article will call the uniform[263] fraction approach. The government has adopted this type of approach in two prominent tax situations involving difficult valuation issues.

First, in 1978, the IRS challenged members of the Church of Scientology who claimed tax deductions for transfers to their church made in connection with obtaining auditing and training services.[264] Basically, the government asserted that the individual church members received intangible religious benefits in exchange for their transfers to the church, and therefore, the church members were not entitled to claim charitable deductions. After eleven years of litigation, the U.S. Supreme Court ruled in favor of the IRS,[265] but the IRS promptly abandoned its right to audit Scientologists on a case-by-case basis and dispute the fair market value of the intangible religious benefits. Instead, the IRS

262. *See supra* Part III.D.2.b.

263. *See* Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 311 (1976) (holding that a Massachusetts statute requiring state police officers to retire at age 50 did not violate the equal protection clause of the U.S. Constitution even though expert testimony demonstrated that "particular individuals over [age fifty] could be capable of safely performing the functions of uniformed officers"); *see also id*. at 314 (acknowledging that "the drawing of lines that create distinctions is peculiarly a legislative task . . . [and that] [p]erfection in making the necessary classification is neither possible nor necessary").

264. Rev. Rul. 78-189, 1978-1 C.B. 68 (declaring a Scientology member's fees for auditing and training services nondeductible); *see* Hernandez v. Comm'r, 490 U.S. 680, 684–85 (1989) (explaining that auditing sessions identified the member's "areas of spiritual difficulty," and after completing the auditing sessions, the Church member could participate in training sessions, which were "doctrinal courses . . . in [which the member] stud[ies] the tenets of Scientology . . . .").

265. *Hernandez*, 490 U.S. at 694.

entered into a settlement agreement and adopted a uniform fraction approach, which might be called the twenty-percent solution. Under this approach, based on a twenty percent and eighty percent split, a Scientologist can deduct eighty percent of the amounts paid for auditing and training services as a charitable contribution, but he must treat the twenty percent balance as a nondeductible personal expense.[266]

Second, in 1986 the IRS announced that when alumni contribute to a university fund and, in return, receive the equivalent of private seat licenses (commonly known as PSLs) for college football games, the alumni cannot deduct the contribution to the extent of the fair market value of the seating privileges.[267] In one scenario, the university's home football games regularly sell out in advance and are effectively unavailable to an alumnus unless the alumnus pays the fixed amount ($300 in the ruling) to join the school's athletic scholarship program. The IRS concluded that the taxpayer can attempt to establish the fair market value of the right to purchase the tickets, and if the value is less than $300, the taxpayer can deduct the excess.[268] Three years later, Congress concluded that the IRS position would entail valuation disputes with huge numbers of individual taxpayers,[269] abandoned the fair market value approach, and adopted a uniform fraction approach based on an eighty percent and twenty percent split.[270] Any alumnus at any school contributing and thereby acquiring a right to purchase athletic tickets can deduct eighty percent of the amount transferred as a charitable contribution, and twenty percent is a nondeductible personal expense.

a. Advantages of a Uniform Fraction Approach; Possible Method

The uniform fraction approach could eliminate valuation

266. *See* Sklar v. Comm'r, 125 T.C. 281, 298–99 (2005) ("According to a letter sent to petitioners in 1994 from the chief of the [IRS] adjustments branch . . . the settlement . . . allows [Scientology members] to claim, as charitable contributions, 80 percent of the cost of qualifying religious services."), *quoted in* Wendy Gerzog, *From the Greedy to the Needy*, 87 OR. L. REV. 1133, 1135 n.5 (2008).

267. Rev. Rul. 86-63, 1986-1 C.B. 88.

268. *Id*. (concluding that if the taxpayer fails to meet this burden, the taxpayer cannot claim a charitable deduction).

269. H.R. Rep. No. 100-795, 100th Cong., 2d Sess., at 523 (1988).

270. I.R.C. § 170(l) (2006).

controversies and the attendant administrative, compliance, and dispute resolution costs. Data is available that may suggest an appropriate fraction. For a dual character[271] transfer, a uniform fraction approach will specify the deductible and nondeductible portions. In the athletic booster club situation, the statute deems that the nondeductible value of the seating privileges is always twenty percent of the total transfer to the school. Presumably Congress made an assessment that twenty percent was a reasonable fraction to apply in those cases.[272]

For charitable naming rights transfers, the nondeductible portion should approximate the value of the naming rights. Approximating the naming rights part might involve two steps: (1) estimating the typical ask amount in charitable naming transactions; and (2) estimating the value of the ad impressions provided by the naming rights.[273]

First, establishing the ask amount is an essential step for charities conducting capital campaigns. A charitable consultant researched over 30,000 naming opportunities[274] and noted a general rule of thumb in the charitable market: charities typically set ask amounts for naming rights at fifty percent of construction cost.[275] Thus, a prospective donor wishing to surname a charity's edifice will need to transfer approximately half the cost of building the structure, a prospective donor wishing to surname an elevator will need to pay half the cost of the elevator, and so forth.

Second, estimating a uniform fraction for the value of the ad impressions generated by a typical charitable naming rights arrangement would require reference to another market, because as discussed in Part III.D.2.a, the total ask amount in the charitable market mixes both

271. United States v. Am. Bar Endowment, 477 U.S. 105, 117 (adopting the "dual character" terminology to describe a single transfer that is part contribution and part purchase).

272. *But see* Colombo, *supra* note 11, at 663 n.23 (asserting that the twenty percent fraction is "arbitrary").

273. *See supra* notes 237–41 and accompanying text.

274. BURTON, *supra* note 15, at 167, 169 ("In the winter of 2008, it was estimated that there were more than 50,000 naming opportunities published on the websites of nonprofits."); *see also id.* at 125–69 (describing the process for developing a capital campaign utilizing naming rights).

275. *Id*. at 142 ("The general rule of thumb for naming a newly constructed building or outdoor space is a donation equivalent to 50 [percent] of the project cost."). *But see id*. at 162–68 (maintaining that each charity should consider a multitude of factors in setting the ask amount notwithstanding the rule of thumb).

generosity and the purchase of the naming rights. In regards to the pro sports arena naming rights market,[276] Appendix B lists the price of the naming and related rights for nineteen venues constructed from 1994 to 2004 and calculates that the average price for a naming rights package is between ten and fifteen percent of the total construction cost.[277] Comparing the price of pro sports venue naming rights with the ask amounts for charitable naming rights, it appears that the price of naming and related rights may represent from twenty to thirty percent of the philanthropist's total transfer in a charitable naming rights arrangement.[278] As stated in Part III.D.2.a, the publicized naming price for pro sports venues often includes associated rights, and as a result, the value of the ad impressions for charitable naming rights are likely less than twenty to thirty percent.

An example can illustrate a uniform fraction approach based on a twenty percent fraction. Imagine that a new law school will cost $10 million. Consistent with the fifty percent rule of thumb,[279] the naming philanthropist contributes $5 million. In this situation, the naming philanthropist could treat $4 million as a tax-deductible charitable contribution, and the $1 million balance would be the price of the nondeductible naming rights.

b. Disadvantages of a Uniform Fraction Approach

A problem with a uniform fraction approach is that the fraction will not be equitable in all situations. Congress's twenty percent solution to the purchase of the right to buy tickets to college athletic events has been called "arbitrary,"[280] and a uniform rule on naming rights may draw similar criticism.

276. Commercial concert venues, conference centers, and multifunction facilities also might provide additional data. *See* BURTON, *supra* note 15, at 164; *see also* Ashley & O'Hara, *supra* note 226, at 6.

277. *See* Appendix B (calculating an average of 12.98 percent).

278. If the philanthropist contributes fifty percent of the construction cost, *see supra* note 275, and the naming rights are worth ten to fifteen percent of the construction costs, *see supra* note 278 (by analogy to the sports arena venue market), twenty to thirty percent of the philanthropist's transfer is for the charitable naming rights.

279. *See supra* note 275 and accompanying text.

280. Colombo, *supra* note 11, at 663 n.23.

In particular, the uniform fraction approach will be inequitable when a donor pays far less, or far more, than the typical fifty percent rule of thumb. For example, Bill Gates arguably executed a tremendous bargain purchase when he donated only $6 million and Stanford University named the $38 million Gates Computer Science Building.[281] If a twenty percent uniform fraction approach had applied, Gates could have deducted $4.8 million even though his true gift—based on the price a hypothetical willing buyer would have paid for the naming rights—may have been closer to $2.2 million.[282]

In other situations, the donor may contribute more than the fifty percent of construction cost rule of thumb, and again, the uniform fraction approach would be unfair. For example, an extraordinarily generous donor may transfer $10 million to name a building that costs $10 million to construct. In that case, the naming rights may be worth only $1 million,[283] but a twenty percent uniform fraction approach would treat the donor as paying $2 million for the naming rights.

Furthermore, the complaints about the fair market value approach when using hypothetical parties without taking into account the unique characteristics of the actual parties also applies to the uniform fraction approach.[284] With the uniform fraction approach, Betty Ford could not deduct twenty percent of her contributions, although she derives no personal benefit from the naming rights at the Alcoholism Center.[285]

Nevertheless, in any situation in which the uniform fraction approach would treat a philanthropist unfairly, the philanthropist could circumvent the rule by donating anonymously, or by merely being content with evanescent praise, including publicity in the charity's

281. *Stanford Computer Science: Gates Computer Science Building*, STANFORD UNIV. (Oct. 1, 2011), http://www-cs.stanford.edu/info/gates. In this naming transaction Bill Gates transferred an amount equal to only 16 percent of the building's construction cost to Stanford; in typical charitable naming transactions the patron must contribute fifty percent of the construction cost. *See supra* note 34 and accompanying text.

282. Presuming that naming rights are worth ten percent of total construction cost, *see* Appendix B, the naming rights for a $38 million building are worth $3.8 million. If Bill Gates transferred a total of $6 million and the value of the naming right was $3.8 million, the charitable contribution (the excess amount) was only $2.2 million.

283. This presumes that naming rights are worth ten percent of construction costs. *See* Appendix B; *see also supra* note 278 (stating the average price at 12.98 percent of construction costs).

284. *See supra* notes 256–61 and accompanying text.

285. *See supra* notes 257–58 and accompanying text.

newsletter or adulation at a luncheon, dinner, or groundbreaking ceremony.

E. Considering Other Counterarguments

Part III.C addresses counterarguments stated in IRS rulings, including the assertion that public recognition has no monetary value. In addition, Part III.D.2.d discusses the problem for named donors, including celebrities, who do not benefit from naming arrangements.

1. Why Differentiate from the Warm Glow and Other Donor Perks?

Cynical commentators indicate that when individuals contribute it "does not mean [they] are acting other than as rational, egoistic, pleasure maximizers."[286] Researchers have isolated many motives other than genuine altruism that each theoretically constitutes a return benefit to the donor. In addition to the prestige from naming rights, the list includes: (1) an improved self-image,[287] also described as a "sense of self-righteousness;"[288] (2) the personal pleasure or "warm glow"[289] feeling; (3) fulfilling the expectations of others, in the case of the wealthy sometimes called "noblesse oblige;"[290] (4) the public esteem available even in the absence of naming rights, such as the adulation flowing from transitory publicity in the charity's newsletter, its website, at luncheons, dinners, and groundbreaking ceremonies; (5) the prospect that a substantial gift will result in a seat on the charity's board of directors or a position on a high-profile committee, leading to business and social

286. *See, e.g.*, Gergen, *supra* note 5, at 1408; *see also* Kelman, *supra* note 9, at 880 (asserting that "charitable donors are the same as everyone else in an individualist culture").

287. Gergen, *supra* note 5, at 1408–09 (referring to "self-respect").

288. Colombo, *supra* note 11, at 671.

289. Brian Gale, *Keep Charity Charitable*, 88 TEX L. REV. 1213, 1222–23 (2010); Gergen, *supra* note 5, at 1408 (The donor "may find joy in doing good"); Colombo, *supra* note 11, at 672.

290. OSTROWER, *supra* note 33, at 16; *id*. at 13 ("The vast majority of donors agreed that for wealthier members of our society, philanthropy is not only a matter of personal choice, but is an obligation.") (internal quotations omitted); *see also* Colombo, *supra* note 11, at 672 (stating that some affluent individuals contribute to "avoid the social opprobrium and scorn that [otherwise] would result").

connections with other wealthy individuals;[291] (6) assuaging feelings of guilt from accumulating excess riches, or otherwise "legitimating wealth;"[292] and (7) assuaging feelings of guilt that may arise from seeing the suffering of others.[293]

Professor Kelman indicates that if tax law considered all these motivations as return benefits, perhaps no portion of a transfer to charity would qualify as a deductible contribution.[294] Notwithstanding that argument, this proposal maintains that naming rights are distinguishable from these other donor benefits. Appraisers could reasonably estimate the value of naming rights based on ad impressions,[295] but a method for reasonably appraising the warm glow or the improved self-image remains elusive. In addition, the purchase of naming rights is voluntary, meaning a philanthropist could donate anonymously. In contrast, many of the benefits described above are unavoidable consequences. Finally, as discussed in Part IV, notable naming rights may have serious adverse societal consequences not associated with the other benefits. Accordingly, the tax laws should reduce the charitable tax deduction for the value of notable naming rights, and at least at this time, likely should ignore the more nebulous donor benefits.

2. Would Charitable Giving Decline?

Any restriction on the tax benefits of charitable giving likely will diminish contributions. This Article's proposal would increase a philanthropist's after-tax cost of a naming arrangement. As a result, some benefactors may be more hesitant to give a fixed ask amount and

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291. OSTROWER, *supra* note 33, at 45–47; *id*. at 48 ("Through . . . board memberships . . . and related mechanisms, elites carve out a separate world for themselves through philanthropy.").

292. *Id*. at 13.

293. Colombo, *supra* note 11, at 674–76 (observing that if a person feels empathy with a suffering individual or group, the person will feel distress and will want to eliminate those feelings).

294. Kelman, *supra* note 9, at 880.

295. *See supra* Part III.D.2.a; Ashley & O'Hara, *supra* note 226, at 17 ("The number of ad impressions generated will drive most replacement cost analysis, and thus need to be calculated."); Gerrard, Parent & Slack, *supra* note 226, at 11 ("[T]he fundamental value of the asset depends primarily on the . . . advertising messages generated and consequent increased sales . . . ."); DeSchriver & Jensen, *supra* note 133, at 362 ("[I]t is reasonable to view the market for stadium names as a market for advertising space.").

might negotiate a lower ask amount. Other benefactors might settle for a less expensive naming right[296] or make no gift at all. Charities might downsize the ask amounts for naming rights generally.

A drop in charitable giving, however, does not necessarily mean the total amount of funds available for beneficial projects drops. As discussed in Part II.B, the government reimburses donors for a portion of charitable gifts through tax benefits. In the case of donations by the wealthy shortly before death, the government may bear approximately sixty-five percent of the cost.[297] Thus, a one dollar drop in charitable donations can trigger a sixty-five cent increase in tax revenue available for humanitarian projects such as poverty relief, environmental cleanup, and foreign aid.

This leads to two controversies. First, does society benefit more from an additional sixty-five cents in government spending or from one dollar in charitable spending? The charitable money may fund a symphony,[298] a drag strip for race enthusiasts,[299] seminars for yachtsmen training to represent the United States at sailing events in exotic foreign locations,[300] or any of the other varied activities that qualify to receive tax-deductible contributions under current law.[301] On the other hand, many argue that not all government spending is prudent.

Second, researchers debate the extent to which the total amount available for worthwhile causes fluctuates with changes to the charitable deduction rules. Some people donate regardless of the tax consequences; they would contribute even if there were no charitable deduction.[302] With respect to these donors, a change in law preventing a charitable deduction would have no impact on their charitable giving,

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296. *See, e.g.*, *supra* note 46 and accompanying text (listing the various ask amounts donors can choose from in connection with a School of Engineering's capital campaign).

297. *See supra* notes 95–98 and accompanying text.

298. Treas. Reg. § 1.501(c)(3)-1(d)(3)(ii), ex. 4 (as amended in 2008).

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

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

301. *See, e.g.*, Rev. Rul. 68-372, 1968-2 C.B. 205 (a sports hall of fame is tax-exempt and eligible to receive tax deductible contributions); Rev. Rul. 67-148, 1967-1 C.B. 132 (an organization conducting civil war reenactments is tax-exempt and eligible to receive tax deductible contributions).

302. *See* William A. Drennan, *Charitable Donation of Intellectual Property: The Case for Retaining the Fair Market Value Deduction*, 2004 UTAH L. REV. 1045, 1140 (stating that these donors give and do not count the cost).

and would increase taxes paid, thereby increasing the total funds available for worthwhile projects. Researchers studying the elasticity of charitable giving disagree about whether restrictions in the charitable tax deduction will inspire a decrease in charitable donations greater than, equal to, or less than, the resulting increase in tax revenue available to the government.[303]

Even if this Article's proposal will reduce charitable donations in excess of the corresponding increase in government tax revenues, the proposal provides other important benefits, namely improved horizontal equity, greater respect for the tax system, and greater honesty in fundraising.[304]

3. Can Philanthropists Deduct the Naming Part as a Business Expense?

Theoretically, philanthropists in business might try to deduct the naming portion as a business expense, alleging the purchase enhances their business reputation rather than their personal reputation. Applicable Treasury Regulations, however, prevent such gamesmanship. Specifically, regulations prohibit a business deduction whenever part of a transfer to charity qualifies as a charitable deduction.[305] This longstanding rule prevents taxpayers from circumventing restrictions on claiming charitable deductions,[306]

303. *See, e.g.*, Gergen, *supra* note 5, at 1404 (discussing study by Hochman and Rodgers); Todd Izzo, *A Full Spectrum of Light: Rethinking the Charitable Contribution Deduction*, 141 U. PA. L. REV. 2371, 2385–86 (1993); Wiedenbeck, *supra* note 183, at 95 ("[T]he best available economic research indicates that the tax deduction is efficient.") (emphasis omitted). *But see* Kevin Stanton Barrett, Anya M. McGuirk & Richard Steinberg, *Further Evidence on the Dynamic Impact of Taxes on Charitable Giving*, 50 NAT'L TAX J. 321 (1997) ("results challenge the view that tax deductions for charitable giving are efficient"); Colombo, *supra* note 11, at 683–84 ("More recent studies . . . indicate that the price elasticity is less than one . . . .").

304. *See supra* Part III.A.3; *see also infra* Part IV.

305. Treas. Reg. § 1.162-15 (1965) ("No deduction is allowable under [I.R.C. §] 162(a) for a contribution or gift by an individual or a corporation if any part thereof is deductible under [I.R.C. §] 170. For example, if a taxpayer [contributes] $5,000 and only $4,000 . . . is deductible under [I.R.C. §] 170(a) . . . no deduction is allowable under [I.R.C. §] 162(a) for the remaining $1,000."). *But see* Singer v. United States, 449 F.2d 413, 421 (Ct. Cl. 1971) ("[W]e are of the opinion that if the transfer to a charitable organization does not qualify as [an I.R.C.] section 170 deduction . . . it might be deductible under [I.R.C.] section 162, if all other requirements are met.").

306. I.R.C. § 162(b) (2006) ("No deduction shall be allowed [as a business expense] for any contribution or gift, which would be allowable as a deduction under [I.R.C.] section 170 were it not for

encourages taxpayers to decide upfront whether a transfer is charitable or mercantile,[307] and frees the IRS and the courts from the potential morass of determining motive, intent, and impact when a taxpayer seeks to change the characterization of a transfer after the initially desired charitable contribution deduction is unavailable.[308] The regulatory approach may be suspect, particularly when applied to business entities, but it does provide clarity by forcing taxpayers to choose between structuring a transfer as a charitable donation or a business expense if the taxpayer desires to deduct the entire transfer.

IV. CONCLUSION: CURRENT LAW ENCOURAGES PHILANTHROPISTS TO FUND BRICKS AND MORTAR FOR THE SYMPHONY INSTEAD OF FOOD FOR THE HOMELESS

This Article's proposal to eliminate the tax deduction for the naming portion of a transfer to charity will (1) advance horizontal equity by treating naming philanthropists like other donors who receive a return benefit from a charity; (2) improve taxpayer confidence in the fairness of the U.S. tax system, and may in turn improve voluntary compliance; and (3) free charitable fundraisers from the current duplicative milieu in which the charity advertises naming rights like a commodity, enters into a contractually binding agreement with the benefactor, and then proclaims that the naming right was not a return benefit to the philanthropist.[309] The current situation compels our charities to issue dubious documents and make suspect statements to comply with the tax laws and accommodate benefactors.[310] This Article proposes a viable

the percentage limitations, the dollar limitations, or the requirements as to the time of payment, set forth in [section 170].").

307. Rev. Rul. 72-314, 1972-1 C.B. 44 (stating that whether a transfer to a charity is a charitable gift or a business expense depends on whether the payment "bear[s] a direct relationship to the taxpayer's business and [is] made with a reasonable expectation of a financial return commensurate with the amount of the payment."); Rev. Rul. 73-113, 1973-1 C.B. 65 (emphasizing the importance of the taxpayer's reasonable expectations for a commensurate financial benefit).

308. *See* Dagan, *supra* note 137, at 597. Dagan also highlights the difficulty of such an inquiry because "[t]here is unfortunately, no theoretically satisfactory boundary between business expenses that provide incidental personal benefits and personal expenditures that incidentally serve business purposes . . . ." *Id.* (alteration in original).

309. *See supra* notes 147–52 and accompanying text.

310. *See supra* note 152 and accompanying text.

approach for implementing the fundamental claim consistent with the current regulatory structure for valuing charitable gifts and documenting donations.

Correcting the tax treatment for charitable naming arrangements may have broad beneficial effects. The ability of wealthy philanthropists to buy naming rights and deduct the entire amount transferred may be triggering profound adverse consequences in the charitable world. Philanthropists evaluating potential charitable recipients may choose the charity that can sell the best publicity package, rather than the charity with the best plan for helping the poor or cleaning the environment.[311] Benefactors seeking to fund education may choose to have their names emblazoned across prestigious university campuses[312] while ignoring petitions from lower-ranked institutions. Patrons trying to select a charitable cause may buy naming rights from the symphony constructing a grand new edifice, rather than contributing to help stock the shelves at the food pantry.[313] Current law treats donors the same whether or not they indulge their propensity for pride when acting generously.

Furthermore, charities may structure their activities to offer tax-advantaged naming rights. Rather than repairing the boiler and patching the roof, the charity may decide to build a new structure and sell naming rights to fund it. A consultant observes that billion dollar fundraising campaigns abound in the new naming rights era, and he asks whether these campaigns are undertaken because they are needed or because they are possible.[314] These broader issues highlight that ending the special exception for the naming portion is vital.

311. Miranda Perry Fleischer, *Charitable Contributions in an Ideal Estate Tax*, 60 TAX L. REV. 263, 302 (2007) (stating that due to the "edifice complex" "bequests to large, wealthy organizations such as colleges or museums fund more capital projects (such as buildings) than are actually needed.").

312. *See, e.g.*, Ron Rapoport, *Book Exposes College Athletics as Bad Business*, DAILY NEWS (Los Angeles), Sept. 2, 1990, at S1, *available at* 1990 WLNR 991166; *see also* Sarah E. Waldeck, *The Coming Showdown Over University Endowments: Enlisting the Donors*, 77 FORDHAM L. REV. 1795, 1818–19 (2009) (arguing for a "cap" on deductions that contribute to the purchase or construction of depreciable assets **. . . "** and pointing to an "edifice complex" under which "some major donors prefer to put their names on new buildings that require 'massive additional investment in both construction and long-term maintenance'" rather than scholarships or operating activities).

313. *See* Waldeck, *supra* note 312.

314. BURTON, *supra* note 15, at 19 (asking "is this about entitlement or need?").

Appendix A: Recommended Statute

I.R.C. § 170(f) Disallowance of deduction in certain cases and special rules—

. . . .

(8) Substantiation requirements for certain contributions –

. . . .

Paragraph (E) of Section 170(f)(8) is hereby changed to Paragraph (F) and a new Paragraph (E) is hereby added to provide as follows:

(E) Special rules for naming rights:

(i) If the donee organization provides name recognition in consideration, in whole or in part, for any money or property contributed:

(I) the value of such naming rights shall equal the price at which the naming rights would be sold by a hypothetical commercial seller to a hypothetical commercial buyer if each had reasonable knowledge of the relevant facts and each was under no compulsion to buy or sell, considering only the expected benefits from the resulting advertising impressions, and without considering any additional value attributable to the advertising impressions being related to a charitable item or fund; and

(II) such name recognition shall be disregarded for purposes of this subsection if the donee organization's cost, and the value of the naming rights benefit to the contributor (as determined under clause (i)), do not exceed ten times the maximum amounts considered insubstantial under regulations prescribed by the Secretary for goods or services provided in consideration of charitable contributions generally.

(ii) For purposes of this subsection, a donee organization provides name recognition if:

(I) the taxpayer or any related person, directly or indirectly, acquires the right to name a campus, a building, or any other physical structure or location, or any physical item, or any fund or other account of any kind, owned or used by the donee organization, or acquires the right to have a picture, portrait or

> other likeness displayed at a location owned or used by the donee organization, or acquires the right to have a name appear on a plaque or other location, owned or used by the donee organization, or
>
> (II) the taxpayer's name or the name of any person related to the taxpayer (even if deceased) is used to name a campus, building, or any other physical structure or location, or any physical item, or any fund or other account of any kind, owned or used by the donee organization, or a picture, portrait or other likeness of the taxpayer or any person related to the taxpayer (even if deceased) is displayed at a location owned or used by the donee organization, or the taxpayer's name or the name of any person related to the taxpayer (even if deceased) appears on a plaque or other location, owned or used by the donee organization.

A donee organization does not provide name recognition to a taxpayer when the taxpayer's name appears in press releases or other similar announcements, or in the donee organization's newsletter, website or other similar communication materials.

Appendix B: Pro Sports Arenas: The Price of Naming Rights Compared to Construction Costs

This chart contains data for nineteen naming rights deals from 1994 to 2004 in which (i) the sports authority or other owner constructed a new professional football stadium, baseball park, or basketball arena; (ii) in connection with the construction the sports authority or other owner sold naming rights to a commercial enterprise; and (iii) the duration of the naming rights purchased was twenty years.[315] In estimating the cost of the naming rights, (i) the annual payments are presumed to continue for forty years (the entire depreciable life of a stadium or arena for tax purposes); and (ii) the present value of the stream of forty annual payments is determined using the annual prime rate of interest for the year in which the owner sold the naming rights.[316]

315. The League of Fans website summarizes naming rights arrangements for National Football League teams, Major League Baseball teams, and National Basketball Association teams. *See Selling Out the Fans and Taxpayers: NFL*, LEAGUE OF FANS, http://www.leagueoffans.org/nflnamingrights.html (last visited Oct. 2, 2011) (football); *Selling Out the Fans and Taxpayers: MLB*, LEAGUE OF FANS, http://www.leagueoffans.org/mlbnamingrights.html (last visited Oct. 2, 2011) (baseball); *See Selling Out the Fans and Taxpayers: NBA*, LEAGUE OF FANS, http://www.leagueoffans.org/nbanamingrights.html (last visited Oct. 2, 2011) (basketball). These summaries provide (1) the team name, (2) the stadium name, (3) the amount the commercial enterprise pays each year for the naming rights and associated rights, (4) the year the owner sold the naming rights. In order to compare the price of the naming rights to the total construction cost (and adjust for the time value of money), the approximate present value of the stream of naming right payments is calculated based on the average prime rate of interest for the year the owner sold the naming rights. The chart excludes one naming rights arrangement because the price quoted for the naming rights included other rights that may have equaled or exceeded the value of the naming rights. In 1999 Phillips Electronics paid $185 million to name the home of the Atlanta Hawks basketball team Phillips Arena, and in the deal with Ted Turner, Phillips Electronics acquired an array of business and marketing benefits including "first consideration by [Ted] Turner . . . to buy Phillips electronics [and] . . . [the] [u]se of Cartoon Network characters to sell Phillips products." *See* Ashley & O'Hara, *supra* note 226, at 14.

316. *See Prime Interest Forecast*, FORECASTCHART.COM, http://www.forecast-chart.com/year-prime-interest.html (last visited Oct. 2, 2011) (listing the "average annual rates for the Prime Interest Rate . . . 1949 to 2010"); *see also Present and Future Value Tool*, UIC.EDU, www.uic.edu/classes/actg/actg500/pfvatutor.htm (last visited Oct. 2, 2011) (using "Present Amount of Ordinary Annuity" to calculate the "Present Value Factor" and the "Present Value of Annuity $" upon entering the "Payment Amount," "Interest Rate," "Number of Payments," and clicking "Calculate"); *see supra* note 134 (explaining that a stadium has a forty-year life for tax depreciation purposes).

Stadium, Park, or Arena—Team Name **[sport]** **(annual payment)**	**Year** **[Prime Rate]** **(PV Factor)**	**Total Construction Cost***	**Present Value of Payments for Naming Rights***	**Percent**
1. Safeco Field—Seattle Mariners [baseball] ($2 million)	1999 [7.99%] (11.94)	$517M	$23.88M	4.62%
2. Miller Park—Milwaukee Brewers [baseball] ($2.05 million)	2000 [9.23%] (10.52)	$414M	$21.57M	5.21%
3. Jacobs Field—Cleveland Indians [baseball] ($695,000)	1994 [7.14%] (13.12)	$173M	$9.12M	5.27%
4. Gunn Arena—Cleveland Cavaliers [basketball] ($700,000)	1994 [7.14%] 13.12	$152M	$9.18M	6.04%
5. TWA Dome—St. Louis Rams [football] ($1.84 million)	1995 [8.83%] 10.94	$300M	$20.13M	6.71%
6. PNC Park—Pittsburgh Pirates [baseball] ($1.5 million)	1998 [8.35%] (11.49)	$233M	$17.23M	7.40%

7. Air Canada Centre—Toronto Raptors [basketball] ($2 million)	1999 [7.99%] (11.94)	$265M	$23.88M	9.01%
8. MCI Center—Washington Wizards [basketball] ($2.2 million)	1997 [8.44%] (11.38)	$260M	$25.04M	9.36%
9. America Airlines Arena—Miami Heat [basketball] ($2.1 million)	1999 [7.99%] (11.94)	$241.3M	$25.07M	10.39%
10. Ford Field—Detroit Lions [football] ($2 million)	2002 [4.68%] 17.94	$300M	$35.88M	11.96%
11. Conseco Field House—Indiana Pacers [basketball] ($2 million)	1999 [7.99%] 11.94	$175M	$23.88M	13.65%
12. United Center—Chicago Bulls [basketball] ($1.8 million)	1994 [7.14%] (13.12)	$150M	$23.62M	15.75%
13. Delta Center—Utah Jazz [basketball] ($1.25 million)	1991 [8.46%] (11.36)	$90M	$14.20M	15.78%

14. Heinz Field—Pittsburgh Steelers [football] ($2.9 million)	2001 [6.92%] (13.46)	$244M	$39.03M	16.00%
15. Staples Center—Los Angeles Lakers/Los Angeles Clippers [basketball] ($5 million)	1999 [7.99%] (11.94)	$321M	$59.7M	18.60%
16. SBC Center—San Antonio Spurs [basketball] ($2.1 million)	2002 [4.68%] (17.94)	$175M	$37.67M	21.53%
17. Invesco Field at Mile High—Denver Broncos [football] ($6 million)	2001 [6.92%] (13.46)	$360M	$80.76M	22.43%
18. Lincoln Financial Field—Philadelphia Eagles [football] ($7 million)	2002 [4.68%] (17.94)	$520M	$125.58M	24.15%
19. Pepsi Center—Denver Nuggets [basketball] ($3.4 million)	1999 [7.99%] (11.94)	$165M	$40.6M	24.61%
Total		$5,055.3M	$656.02M	12.98%

* = Millions