

ARTICLES

CONSPICUOUS PHILANTHROPY: RECONCILING CONTRACT AND TAX LAWS

WILLIAM A. DRENNAN*

It sold for \$15 million, and the IRS treated it as worthless. Avery Fisher, a titan of industry and a lover of classical music, made a generous contribution to renovate a charity's building, and in exchange the charity agreed to name the building after Fisher in perpetuity. Forty years later, the Fisher family sold the naming rights back to the charity for \$15 million in cash. The IRS treats these publicity rights as worthless when charities grant them, and this generates substantial tax benefits for the donor and the donor's family. In contrast, the common law can treat these publicity rights as valuable consideration supporting an enforceable contract, and a charity may be liable for damages if it renames a building. Why the contradiction? What are the consequences? Should we reconcile these positions? How? This Article asserts that the common law contract approach is well-suited for today's mega-million dollar charitable building naming rights deals, but the tax approach is outdated and inconsistent with U.S. Supreme Court precedents.

* Professor, Southern Illinois University School of Law. Member, American Law Institute. Partner and Associate, Husch Blackwell Sanders LLP (1985–2005). Washington University School of Law, Adjunct Professor, Graduate Tax Program (1996–2000). New York University School of Law, LL.M. (Executive) (2013); Washington University School of Law, LL.M. in Intellectual Property (2003); Washington University School of Law, LL.M. in Taxation (1997); St. Louis University School of Law, J.D. (1985). Professor Drennan practiced law full-time for twenty years in the areas of tax-exempt organizations, charitable giving, tax, estate planning, and business law. Special thanks to Jennifer Davies, Class of 2018, for her excellent editorial and research assistance.

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INTRODUCTION

When a donor contributes to a charity and, in exchange, the charity names a prestigious building after the donor, the common law can treat the arrangement as a part sale—and therefore a contract—but the tax law will treat the transaction as an unrequited gift. This contradiction can be very advantageous for charities and their donors in the short run but may have long-term disadvantages for charities and society generally.

The story of Avery Fisher and the Lincoln Center charity vividly demonstrates the inconsistency and some of its consequences. Fisher was a titan of industry, a lover of classical music, and a generous

philanthropist.¹ In 1973, Lincoln Center's philharmonic hall, home of the New York symphony orchestra, needed renovation.² Fisher stepped forward and pledged \$10.5 million for the renovation in exchange for Lincoln Center's promise to publicize his name on the building in perpetuity and to use the name "Avery Fisher Hall" on all "tickets, brochures, program announcements, and advertisements and the like" in perpetuity.³ Charities and their fundraisers now embrace the sale of naming rights generally as an indispensable trick of the trade for enticing donations.⁴

On the tax side, under a series of special rulings, the Internal Revenue Service (IRS) treats a charitable donation in exchange for public recognition as an unrequited gift with conspicuous philanthropists like Avery Fisher deemed to receive nothing of value in return for the contribution.⁵ The IRS takes this position even though the general rule is that no charitable deduction is available to the extent a donor received a significant benefit for a contribution.⁶ This general rule recognizes that, to the extent the donor received a benefit, the donor made a purchase, not a gift.⁷ The related policy is that the donor should only claim a charitable tax deduction when

1. See John Rockwell, *He's First a Music Lover, Then a Philanthropist*, N.Y. TIMES (Nov. 10, 1976), <http://www.nytimes.com/1976/11/10/archives/westchester-weekly-hes-first-a-music-lover-then-a-philanthropist.html> (describing Avery Fisher as "the archetypal music lover," the "savior of the Lincoln Center concert hall that bears his name," and a "high-fidelity pioneer"); Allan Kozinn, *Avery Fisher, Philanthropist, Dies at 87*, N.Y. TIMES (Feb. 27, 1994), <http://www.nytimes.com/1994/02/27/obituaries/avery-fisher-philanthropist-dies-at-87.html?pagewanted=all> (including within the list of his accomplishments the founding of Fisher Radio, "an extremely profitable [electronics] business").

2. See Kozinn, *supra* note 1 (specifying problems with the concert hall such as "echoes in some parts . . . and dry, unresonant sound elsewhere"); Robin Pogrebin, *Lincoln Center to Rename Avery Fisher Hall*, N.Y. TIMES (Nov. 13, 2014), <https://www.nytimes.com/2014/11/14/arts/music/lincoln-center-to-rename-avery-fisher-hall.html> (reporting that Lincoln Center built the hall in 1962).

3. See Pogrebin, *supra* note 2.

4. See TERRY BURTON, NAMING RIGHTS: LEGACY GIFTS AND CORPORATE MONEY 125 (2008) (outlining the "manager's toolbox for naming rights," a set of donor campaign strategies for non-profit management).

5. See Rev. Rul. 73-407, 1973-2 C.B. 383, 384 (defining the public recognition donors receive for charitable contributions as an "incidental and tenuous benefit").

6. See generally Rev. Rul. 67-246, 1967-2 C.B. 104, 105 (stating that there is a presumption against interpreting a charitable contribution as a gift where the donor receives a benefit).

7. *Id.* But see Treas. Reg. § 1.170A-13(f)(8)(A) (1996) (excluding "[g]oods or services that have insubstantial value under the [IRS] guidelines").

there “is not a consumption by the donor.”⁸ Nevertheless, for almost fifty years, the IRS has steadfastly clung to its special rule that charitable recognition is *not a benefit* and is not consideration, and a donor like Avery Fisher can treat the entire amount that he transferred to the charity as a tax-deductible, unrequited gift.⁹ Furthermore, for federal estate tax purposes, there is no indication that a donor’s estate (like Avery Fisher’s) must include the value of the perpetual naming right in the taxable gross estate.¹⁰ Because of this extremely donor-friendly income and estate tax regime, if Avery Fisher, a wealthy business magnate, was subject to a forty percent federal income tax rate in 1973, and his estate was subject to a fifty percent federal estate tax rate upon his death, the *after-tax* cost to the Fisher family of the \$10.5 million donation was only \$3.15 million, or thirty cents on the dollar.¹¹ U.S. taxpayers shouldered the other seventy percent of the after-tax cost of the donation.¹² Commentators refer to the charitable contribution

8. Douglas A. Kahn & Jeffrey H. Kahn, “*Gifts, Gifts, and Gifts*”—*the Income Tax Definition and Treatment of Private and Charitable “Gifts” and a Principled Policy Justification for the Exclusion of Gifts from Income*, 78 NOTRE DAME L. REV. 441, 521 (2003) (noting that the purpose of this distinction is to avoid double taxation on income the donor did not consume).

9. See *infra* notes 134–50 and accompanying text.

10. See *infra* Section II.B.

11. If Avery Fisher had not made the donation, he could not have claimed the \$10.5 million income tax charitable deduction in 1973. At a forty percent marginal federal income tax rate, without the charitable deduction, Fisher would have paid an additional \$4.2 million in federal income tax (\$10.5 million x 40% = \$4.2 million). If Fisher had not made the donation, and still held the \$6.3 million after-income-tax balance at his death in 1994, and if his estate was subject to a fifty percent federal estate tax rate, his estate would have paid an additional \$3.15 million in federal estate tax. Thus, Fisher’s \$10.5 million charitable donation saved \$7.35 million in taxes (\$4.2 million + \$3.15 million = \$7.35 million), so his after tax-cost of making the \$10.5 million donation was only \$3.15 million, or thirty percent of the amount donated (\$3.15 million/\$10.5 million = thirty percent). In effect, the Fisher family bore thirty percent of the cost of the donation, and the U.S. taxpayers bore the other seventy percent. The author acknowledges that this calculation considers neither (i) the time value of money, which would increase the percentage after-tax cost to the Fisher family because of the gap between the year of donation and year of Avery Fisher’s death, nor (ii) the impact of Avery Fisher’s state income tax savings which would decrease the percentage after-tax cost to the Fisher family.

12. See Mark P. Gergen, *The Case for a Charitable Contributions Deduction*, 74 VA. L. REV. 1393, 1402 (1988) (“[T]he costs of a deduction in lost revenues will be allocated capriciously.”).

deduction as an “upside-down subsidy” because it benefits the rich more than the poor.¹³

On the common law side, Justice Cardozo’s landmark *Allegheny College*¹⁴ opinion concludes that a charitable publicity arrangement can be an enforceable bilateral contract because the charity provides a *benefit* to the donor constituting consideration.¹⁵ Lincoln Center honored its agreement to publicize Avery Fisher as the naming donor, apparently without complaint, until another major renovation of the music hall was necessary.¹⁶ In 2002, when Lincoln Center proposed a new fundraising drive that would involve removing Avery Fisher’s name and allowing a new philanthropist to make a major donation and acquire the primary publicity rights for the renovated building, Avery Fisher’s heirs threatened legal action to enforce the 1973 agreement.¹⁷ After twelve years of saber-rattling and negotiations involving up to ten heirs, in 2014, the Lincoln Center charity repurchased the naming

13. See, e.g., John D. Colombo, *The Marketing of Philanthropy and the Charitable Contributions Deduction: Integrating Theories for the Deduction and Tax Exemption*, 36 WAKE FOREST L. REV. 657, 678 (2001) (observing that when a poor person makes a contribution, there is no government subsidy because a tax deduction does not benefit the poor donor who otherwise owes no income tax); Vada Waters Lindsey, *The Charitable Contribution Deduction: A Historical Review and a Look to the Future*, 81 NEB. L. REV. 1056, 1058 (2003) (describing the charitable contributions rules as an “affront [to the] progressive tax system” because low-income individuals do not benefit from the rules); Todd Izzo, Comment, *A Full Spectrum of Light: Rethinking the Charitable Contribution Deduction*, 141 U. PA. L. REV. 2371, 2374 (1993) (noting that the charitable deduction is most beneficial to taxpayers in the highest income tax bracket).

14. *Allegheny Coll. v. Nat’l Chautauqua Cty. Bank*, 159 N.E. 173 (N.Y. 1927). *Allegheny College* is a traditional favorite in contract law casebooks. See, e.g., RANDY E. BARNETT & NATHAN B. OMEN, *CONTRACTS: CASES AND DOCTRINE* 714 (6th ed. 2017) (reprinting an edited version of *Allegheny College*); E. ALLAN FARNSWORTH ET AL., *CONTRACTS* 90 (6th ed. 2001); CHARLES L. KNAPP ET AL., *PROBLEMS IN CONTRACT LAW: CASES AND MATERIALS* 230 (8th ed. 2016) (referring to *Allegheny College* as a “leading case”); JOHN EDWARD MURRAY, JR., *MURRAY ON CONTRACTS* 315 (4th ed. 2001) (referring to *Allegheny College* as a “famous opinion”).

15. *Allegheny Coll.*, 159 N.E. at 176.

16. See Pogrebin, *supra* note 2 (listing problematic acoustics and outdated audience amenities among the faults). Avery Fisher passed away in 1994. *Id.*; Kozinn, *supra* note 1.

17. See John K. Eason, *Private Motive and Perpetual Conditions in Charitable Naming Gifts: When Good Names Go Bad*, 38 U.C. DAVIS L. REV. 375, 450–52 (2005) (discussing the merits of the Fisher family’s specific performance demands); Pogrebin, *supra* note 2 (explaining that in addition to the Avery Fisher Hall renovations that sparked the legal threats, Lincoln Center proposed renovating its entire campus).

rights from the Fisher heirs for \$15 million cash plus lesser publicity rights and honors for the Fisher family.¹⁸

It is anomalous that the federal tax laws effectively treat these publicity rights as worthless even though the Fisher heirs extracted \$15 million cash from a sophisticated charity in exchange for those rights.¹⁹ Another indication that charitable recognition can provide significant benefits, and is bargained for, is the 2016 tale of Representative Greg Gianforte, then a Montana candidate for Governor, who, in the midst of his campaign, purchased the naming rights to the computer science school at Montana State University for \$8 million.²⁰ State lawmakers

18. See Pogrebin, *supra* note 2 (detailing that in addition to the \$15 million in cash, Lincoln Center granted five additional honors or rights to the Fishers, including automatic induction of Avery Fisher into the new Lincoln Center Hall of Fame, prominent tributes to Avery Fisher in the lobby, and a guaranteed position for a Fisher family member on the Hall of Fame's advisory board). In 2015, Lincoln Center announced that it would change the building's name to Geffen Hall, in perpetuity, in exchange for a \$100 million pledge toward the renovation from the famous entertainment mogul David Geffen. See Robin Pogrebin, *David Geffen Captures Naming Rights to Avery Fisher Hall with Donation*, N.Y. TIMES (Mar. 4, 2015), https://www.nytimes.com/2015/03/05/arts/david-geffen-captures-naming-rights-to-avery-fisher-hall-with-donation.html?_r=0; Robin Pogrebin, *How David Geffen's \$100 Million Lincoln Center Gift Came Together*, N.Y. TIMES (Mar. 23, 2015), <https://www.nytimes.com/2015/03/24/arts/music/how-david-geffens-100-million-lincoln-center-gift-came-together.html>.

19. Lincoln Center for the Performing Arts (LCPA) owns and operates a complex of performing arts buildings in the Lincoln Square neighborhood of Manhattan, which hosts the New York Philharmonic, the Metropolitan Opera, and the New York City Ballet. See generally Lincoln Center, <http://www.lincolncenter.org/organization/lincoln-center> (last visited Aug. 30, 2017). "LCPA led a \$1.2 billion campus renovation, completed in October 2012." *Id.*

20. See Troy Carter, *Lawmakers Propose Bill in Response to Gianforte's MSU Donation*, BOZEMAN DAILY CHRON. (May 17, 2016), http://www.bozemandailychronicle.com/news/politics/lawmakers-propose-bill-in-response-to-gianforte-s-msu-donation/article_4993e3bd-09e8-529a-969a-fde4d17a2599.html (reporting that Montana lawmakers introduced a bill barring university system buildings from being named after elected officials after Gianforte's donation). Greg Gianforte would ultimately win the Republican gubernatorial primary, but lost the general election to Steve Bullock. See Andy Boyd, *Montanans Were Right to Take a Pass on Gianforte*, BOZEMAN DAILY CHRON. (Jan. 4, 2017), http://www.bozemandailychronicle.com/opinions/letters_to_editor/montanans-were-right-to-take-a-pass-on-gianforte/article_c52755b7-f788-50b3-8cf9-4c86e47778e9.html (opining as to why Gianforte's election loss was a good thing for Montana). A commentator argued that Gianforte made the donation to "exploit the attention received in the media." JoLynn Yenne, Letter to the Editor, *Gianforte's "Money Problems,"* DAILY INTER LAKE (Apr. 30, 2017, 5:00 AM), <http://www.dailyinterlake.com/article/20170430/ARTICLE/170439995>. Apparently, Gianforte is not the only political candidate to have publicized his

subsequently introduced the anti-Gianforte bill prohibiting candidates from using “gifts” to influence elections.²¹ Although the bill failed to advance past the Montana education committee in 2017, the Board of Regents for Montana State University adopted a policy generally barring naming university places or programs for statewide or federal political candidates.²² Also, very wealthy and generous philanthropist Joan Weill pledged \$20 million to Paul Smith’s College of Arts and Sciences in upstate New York provided the school would change its name to “Joan Weill-Paul Smith’s College.”²³ However, Joan Weill reneged immediately when a court concluded the school could not change its name.²⁴ Despite the great value donors place on these publicity rights, the IRS treats them as worthless.

philanthropy. See Bob Sexter, *Commentary: The Rich Can Name Their Price for Giving*, CHICAGO TRIB. (Oct. 26, 2015, 1:14 PM), <http://www.chicagotribune.com/news/ct-donations-naming-rights-secter-20151026-column.html> (describing Illinois Governor Bruce Rauner’s references to his philanthropy in campaign pitches, as well as the pervasiveness of his philanthropy through naming rights on various community buildings).

21. *Dems Introduce Anti-Gianforte Bill Prohibiting Candidates from Using “Gifts” to Influence Elections*, MONT. DEMOCRATS, <http://www.montanademocrats.org/news/dems-introduce-anti-gianforte-bill-prohibiting-candidates-from-using-gifts-to-influence-elections> (last visited Aug. 30, 2017).

22. See Gail Schontzler, *Regents Bar Naming Buildings for Political Candidates*, BOZEMAN DAILY CHRON. (Mar. 10, 2017), http://www.bozemandailychronicle.com/news/montana_state_university/regents-bar-naming-buildings-for-political-candidates/article_64727a6f-d9cc-50b7-9078-51c28cd5d68e.html (specifying that the Regents policy change prohibits naming things after political candidates unless “someone dies, an unrelated person requests the honor[,] or other circumstances”); Gail Schontzler, *What’s in a Name? Controversy, Montana Universities Find*, BOZEMAN DAILY CHRON. (Mar. 1, 2017), http://www.bozemandailychronicle.com/news/montana_state_university/what-s-in-a-name-controversy-montana-universities-find/article_745643be-f0ef-5a4f-9fa7-9b19f269767a.html (reporting that the bill was killed based on Montana constitutional concerns).

23. Eric Konigsberg & Ben Ryder Howe, *The Name Game: An Inside Look at the Politics of Donations*, TOWN & COUNTRY (Mar. 24, 2016), <http://www.townandcountrymag.com/society/money-and-power/a5341/naming-rights-philanthropy-anonymous-giving>.

24. *Id.*; Jacob Bernstein, *Sandy and Joan Weill and the \$20 Million Gift that Went Awry*, N.Y. TIMES (Dec. 19, 2015), <https://www.nytimes.com/2015/12/20/fashion/sandy-and-joan-weill-and-the-20-million-gift-that-went-awry.html>; Norris Burkes, *It’s Not Really Giving Until It’s Selfless*, STAR-GAZETTE (Dec. 17, 2015, 12:54 PM), <http://www.stargazette.com/story/news/local/2015/12/17/s-not-really-giving-until-s-selfless/77485988> (“It’ll be a sad Christmas for Paul Smith’s College in New York, as it won’t be receiving the \$20 million pledged by Sanford and Joan Weill.”); David H. Lenok, *The Perpetual Naming Rights Problem: Is All Charity Helpful?*, WEALTHMANAGEMENT.COM (Oct. 30, 2015), <http://www.wealthmanagement.com/>

In considering whether the consequences of this inconsistency are good or bad, in the short run, a charity's contractual sale of naming rights and other publicity appears to be a win-win scenario for the donor and the charity. The donor and the donor's family receive public praise for their wealth and generosity, which can bring them more wealth, and the charity's officers and fundraising department receive praise for achieving their targets and making a building (or its renovation) possible.²⁵ In the long-run, however, these arrangements pose potential problems for the charities involved and society generally. These problems stem from two sources. First, from complications in negotiating and resolving disputes, particularly with donors who expect perpetual publicity rights and resist morals clauses.²⁶ And second, from difficulties in raising funds for charitable endeavors that do not offer building naming rights or other forms of enduring publicity, such as stocking the shelves at a food pantry or providing supplies at the homeless shelter.

This Article explores the causes for the tax and common law contradiction, considers possible means of reconciliation, and asserts that the current tax treatment is inconsistent with U.S. Supreme Court precedents. Based on the case law and relevant policies in this area, this Article asserts that when claiming a charitable contribution deduction donors should have the burden of proving (i) the amount they gave to charity in excess of the significant benefits received in return and (ii) that they contributed the excess with the intent to make a gift. Replacing the IRS approach with this U.S. Supreme Court

philanthropy/perpetual-naming-rights-problem (reporting that the college petitioned the New York State Supreme Court to "free it from the restrictions of its founder's will [because] it 'nearly fatally impedes the ability of [the college] to seek large gifts from a single donor[.]'" but the court rejected the petition because the school's financial situation was not severe enough to warrant deviation from the will).

25. A substantial donation often is the ticket to membership on boards and committees dominated by persons of wealth and influence, and these memberships facilitate profitable business opportunities. See FRANCIE OSTROWER, *WHY THE WEALTHY GIVE: THE CULTURE OF ELITE PHILANTHROPY* 44 (1995) (identifying specified donation amounts as prerequisites for donors to serve on boards and other institutional bodies); Kahn & Kahn, *supra* note 8, at 515 (observing that "the enhanced personal status that a donor achieves in the community . . . could translate into an economic benefit").

26. See Adam Scott Goldberg, *When Charitable Gift Agreements Go Bad: Why a Morals Clause Should Be Contained in Every Charitable Gift Agreement*, FLA. B.J., Dec. 2015, at 48, 50 (defining a morals clause as a check on donors in the naming rights process, providing the charity with the right to remove the donor's name in the event of donor misconduct).

general approach could change the tenor of negotiations between charities and donors regarding publicity, encourage donors and the IRS to reasonably value these publicity rights, and perhaps inspire donors to contribute anonymously. These changes, in turn, could eliminate some of the adverse consequences associated with transactions involving charitable naming rights.

Part I of this Article discusses common law treatment of these charitable publicity arrangements as contracts or conditional gifts. A key factor in tipping the scale is whether charitable publicity provides a benefit to the donor. Contract characterization is more likely when the charitable publicity is a significant benefit, and contract characterization can help courts reach more reasonable results when resolving disputes between charities and donors.²⁷

Part II analyzes the IRS's insistence that charitable public recognition is not a significant benefit to the donor and is worthless. The IRS developed this special rule in the late 1960s and 1970s, and this Article maintains that the general judicial approach to charitable deduction transactions in which the donor received a return benefit changed after the IRS created the special rule. This Part also considers an aspect of these transactions that appears to have never been analyzed before, namely, their treatment under federal gift and estate tax laws. The absence of precedent suggests that these benefits are effectively valued at zero, generating no gift or estate tax liability for the naming family. The favorable income, gift, and estate tax treatment may artificially promote these arrangements.

Part III explains how these deals may adversely affect charities and, more generally, society and considers some alternative approaches. Under the common law, courts sometimes characterize significant naming arrangements as conditional gifts. It is more appropriate, however, to treat these arrangements as contracts under fundamental common law tenets. Furthermore, in this context, contract law remedies can be more flexible and generally superior to remedies under the law of conditional gifts. In contrast, under tax law, the current IRS approaches conflicts with key U.S. Supreme Court opinions on charitable donors receiving benefits.

The conclusion suggests that the legal inconsistency reflects society's divided view of conspicuous generosity. This Article proposes a balanced approach, namely that these transactions are part sale and part gift. This proposal can reduce disputes and lead to more reasonable results.

27. See *infra* notes 36–45 and accompanying text.

I. COMMON LAW CAN TREAT CHARITABLE PUBLICITY AS CONSIDERATION OR A GIFT

The common law can treat charitable publicity transactions as providing a benefit sufficient to qualify as consideration for an enforceable contract, or it may treat these transactions as conditional gifts. Standards that separate the contracts from the gifts are easy to articulate but difficult to apply.²⁸ When characterizing arrangements as contracts, courts tend to say: “[o]rdinarily . . . courts do not inquire into the adequacy of consideration, particularly where one or both of the values exchanged are difficult to measure;”²⁹ and a part sale and part gift is treated as one transaction supported by consideration and is an enforceable contract.³⁰ On the other hand, when characterizing arrangements as conditional gifts, courts tend to say: (i) that a mere pretense of consideration, such as a nominal amount, is not consideration;³¹ (ii) that “[n]othing is consideration that is not regarded as such by both parties;”³² and (iii) that the famous, enduring hypothetical of the benevolent man and the homeless person applies.³³

28. RESTATEMENT (SECOND) OF CONTRACTS § 71 cmt. c (AM. LAW INST. 1981) (“[T]he distinction between bargain and gift may be a fine one, depending on the motives manifested by the parties.”); *see* *Allegheny Coll. v. Nat’l Chautauqua Cty. Bank*, 159 N.E. 173, 176 (N.Y. 1927) (discussing the difficulty applying the distinction in practice); *Carlisle v. T & R Excavating, Inc.*, 704 N.E.2d 39, 45 (Ohio Ct. App. 1997) (“[T]here is no easy test for distinguishing between a condition and consideration . . .”); *Pennsy Supply, Inc. v. Am. Ash Recycling Corp.*, 895 A.2d 595, 601 (Pa. Super. Ct. 2006) (same).

29. RESTATEMENT (SECOND) OF CONTRACTS § 71 cmt. c; JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS 154 (6th ed. 2009).

30. RESTATEMENT (SECOND) OF CONTRACTS § 71 cmt. c (“Even where both parties know that a transaction is in part a bargain and in part a gift, the element of bargain may nevertheless furnish consideration for the entire transaction.”); PERILLO, *supra* note 29, at 159 (providing an example in which a party promises to sell a used car worth \$5,000 to a friend for the friend’s promise to pay \$1,000; the arrangement is an enforceable contract although the primary inducement is friendship).

31. RESTATEMENT (SECOND) OF CONTRACTS § 71 cmt. b (“[A] mere pretense of bargain does not suffice, as where there is a false recital of consideration or where the purported consideration is merely nominal.”).

32. *Dougherty v. Salt*, 125 N.E. 94, 95 (N.Y. 1919) (quoting *Wis. & Mich. Ry. Co. v. Powers*, 191 U.S. 379, 386 (1903)).

33. *See, e.g., Pennsy Supply, Inc.*, 895 A.2d at 600–01 (quoting *Weavertown Transp. Leasing, Inc. v. Moran*, 834 A.2d 1169, 1172 (Pa. Super. Ct. 2003)) (employing the hypothetical). *See generally* 1 SAMUEL WILLISTON, THE LAW OF CONTRACTS 231–33 (1920). The hypothetical in Professor Williston’s 1920 treatise used the word “tramp,” instead of homeless person. *See* KNAPP ET AL., *supra* note 14, at 110 (suggesting using the words “homeless person” rather than “tramp,” “hobo,” or “vagrant”).

In this famous hypothetical from Professor Williston, the benevolent man says to the homeless person, “If you go around the corner to the clothing shop there, you may purchase an overcoat on my credit.”³⁴ Professor Williston concludes that although the homeless person incurred a legal detriment because he agreed to comply with the condition that he walks around the corner to the clothiers to pick up a free overcoat, there is an insufficient benefit to the benevolent man to create an enforceable contract, and the arrangement is a conditional gift.³⁵ Thus, it is often difficult to distinguish a contract from a conditional gift.

Many courts have stated that a key factor in distinguishing a contract from a conditional gift is whether the promisor received a sufficient benefit.³⁶ When a charitable publicity transaction provides only a nominal benefit to the donor, it would not provide sufficient benefit to support an enforceable contract. These transactions may involve (i) inclusion of the donor’s name in an alumni appreciation booklet or annual report that includes hundreds, or in some cases thousands, of donor names;³⁷ (ii) mention of the donor in a newsletter or press release; or (iii) donor name placement on something as trivial as a brick on a sidewalk, or as part of a list on a “donor wall” along with

34. *Pennsy Supply, Inc.*, 895 A.2d at 600–01 (quoting *Weavertown Transp. Leasing, Inc.*, 834 A.2d at 1172). See generally WILLISTON, *supra* note 33, at 231–32 (setting forth the hypothetical). Many contract casebooks discuss the hypothetical. See e.g., KNAPP ET AL., *supra* note 14, at 110 (referring to “Professor Williston’s ‘an overcoat for the tramp’ hypothetical”); FARNSWORTH ET AL., *supra* note 14, at 52; MURRAY, *supra* note 14, at 265 n.249 (providing a “paraphrase of the famous Williston ‘tramp’ illustration”); ROBERT E. SCOTT & JODY S. KRAUS, *CONTRACT LAW AND THEORY* 133–34 (3d ed. 2002) (including “Williston’s Tramp” as a heading and quoting Professor Williston at length).

35. See *Pennsy Supply, Inc.*, 895 A.2d at 600–01 (quoting *Weavertown Transp. Leasing, Inc.*, 834 A.2d at 1172); WILLISTON, *supra* note 33, at 231–32.

36. See, e.g., *Allegheny Coll. v. Nat’l Chautauqua Cty. Bank*, 159 N.E. 173, 176 (N.Y. 1927) (quoting WILLISTON, *supra* note 33, at 231–32) (“An aid, though not a conclusive test . . . is an inquiry whether the happening of the condition will be a benefit to the promisor.”); see also *Carlisle v. T & R Excavating, Inc.*, 704 N.E.2d 39, 45 (Ohio Ct. App. 1997) (stating that while it is difficult to distinguish between consideration and a condition, it is helpful to determine if the promisor receives a benefit); *Pennsy Supply, Inc.*, 895 A.2d at 601 (same).

37. Nevertheless, a listing may be a significant benefit to a donor included in an elite category, in the front of the report, reserved for donors contributing substantial amounts.

dozens, hundreds, or even thousands of other donors.³⁸ This Article is concerned with significant transactions such as naming rights over prestigious university edifices, medical buildings, or other charitable structures. This Part first explores charitable publicity arrangements that courts have treated as contracts. Then, it examines transactions that courts characterized as conditional gifts. Finally, this Part describes the advantages of characterizing a transaction as a contract rather than as a gift.

A. *Charitable Publicity as Consideration in Contract Cases*

Justice Cardozo's famous 1927 opinion in *Allegheny College* concludes that the donor received a benefit sufficient to support a bilateral contract because the charity agreed to name a scholarship fund after the donor and publicize the donor's name in administering the scholarship program.³⁹ Although Justice Cardozo did not rely extensively on prior cases in deciding that charitable publicity could be sufficient consideration to support an enforceable contract, there were older cases supporting this view.⁴⁰ In 1882, in *Wolford v. Powers*,⁴¹ the Indiana Supreme Court discussed English precedents concluding that charitable publicity is valuable.

We find scattered through the books cases where devises of property are made upon conditions having no pecuniary value at all, and yet they are always enforced; and so we find men in life making subscriptions to colleges on condition that they shall bear their names, or endowing professorships upon condition that they shall be given their names, and, so far as our observation has extended, the validity of such conditions has never been challenged. It is evident that the naming of a college professorship or the like has always been considered *as a matter of importance and value*, for to declare otherwise would be to affirm that courts and law-writers have for ages been solemn respecters of worthless trifles. It will not do to

38. *Cf. Singer Co. v. United States*, 449 F.2d 413, 424 (Ct. Cl. 1971) (distinguishing between substantial benefits to the promisor creating a contract and benefits "merely incidental to the charitable nature of the transfer").

39. *Allegheny Coll.*, 159 N.E. at 174-75 (finding an acceptance of terms because "[t]he moment that the college accepted \$1,000 as a payment on account, there was an assumption of a duty to do whatever acts were customary or reasonably necessary to maintain the memorial fairly and justly in the spirit of its creation").

40. *Id.* at 176 (citing only one New Jersey case and one Pennsylvania case for the proposition that the charity incurs an obligation when promising to name).

41. 85 Ind. 294 (1882) (involving a promise to pay \$10,000 in connection with an agreement to name a child after the payor).

say that the bestowal of a name is a valueless act, and if once it be granted to be of some value, then, in the absence of fraud and oppression, it must be held to possess the value placed upon it by the contracting parties.⁴²

Returning to the landmark opinion of *Allegheny College*, Justice Cardozo carefully analyzed whether charitable publicity is a significant benefit sufficient to support a contract. Allegheny College was conducting a “drive” to raise \$1.25 million for the school, and Mary Yates Johnston made a pledge specifying that the “gift shall be known as the Mary Yates Johnston memorial fund, the proceeds from which shall be used to educate students preparing for the ministry, either in the United States or in the Foreign Field.”⁴³ The facts were unusual. During the fund drive, Johnston promised that her estate would pay the college \$5,000 within thirty days of her death, but later Johnston gave the college \$1,000 toward the \$5,000 pledge.⁴⁴ Approximately seven months later, Johnston repudiated the \$4,000 balance of the pledge.⁴⁵

Justice Cardozo, writing for the majority, concluded that Johnston made an offer, and Allegheny College accepted.⁴⁶ Justice Cardozo found a bilateral (rather than a unilateral) agreement, stating that when Johnston paid the \$1,000, she “in effect [said]: I hand you \$1,000, and if you are unwilling to commemorate me, the time to speak is now.”⁴⁷ In regards to consideration, Justice Cardozo stated, “The longing for posthumous remembrance is an emotion not so weak as to justify us in saying that its gratification is a negligible good.”⁴⁸ In addition, Justice Cardozo found that “[t]he college set the [\$1,000 contribution] aside to be held as a scholarship fund,”⁴⁹ and that the college assumed the duty to “communicate to the world, or in any event to applicants for the scholarship, . . . the name of the donor.”⁵⁰

More recently, in 2002, in *Stock v. Augsburg College*,⁵¹ a college promised to name a wing in its new building the “Elroy Stock

42. *Id.* at 308–09 (emphasis added).

43. *Allegheny Coll.*, 159 N.E. at 173–74 (noting that the school was attempting to raise an “additional endowment”).

44. *Id.*

45. *Id.* (stating that Johnston “gave notice to the college that she repudiated the promise,” but the opinion fails to state any reasons for Johnston’s repudiation).

46. *Id.* at 175.

47. *Id.* at 176–77.

48. *Id.* at 176.

49. *Id.* at 174.

50. *Id.* at 175.

51. No. C1-01-1673, 2002 WL 555944 (Minn. Ct. App. Apr. 16, 2002).

Communication Wing” as a result of Elroy Stock’s pledge of \$500,000.⁵² Stock contributed the \$500,000, but the college named the wing after someone else.⁵³ When Stock sued, the Minnesota Court of Appeals characterized the arrangement as a contract, in part because Stock intentionally increased his pledge from \$100,000 to \$500,000 when the college representative promised the naming rights.⁵⁴ Nevertheless, the court did not grant Stock a remedy because he failed to sue within the applicable six-year statute of limitations period.⁵⁵

Also, in 2009, in *Paul & Irene Bogoni Foundation v. St. Bonaventure University*,⁵⁶ the Bogonis pledged \$2 million toward the new St. Bonaventure University library addition to house the school’s rare books collection, and the school agreed to name the addition after Paul and Irene Bogoni.⁵⁷ The Bogonis paid \$1.1 million, and the university sued to collect the \$900,000 balance.⁵⁸ The court concluded that the naming rights arrangement was a unilateral contract, and the college could sue to collect damages for the delay in payment.⁵⁹

In addition, the view that charitable publicity can be consideration also finds support in several baby naming cases.⁶⁰ For example, in *Schumm v. Berg*,⁶¹ Gloria Schumm conceived a child with sixty-three-year-old Academy Award winning actor Wallace Beery, and Schumm agreed to include the name “Wallace” in the child’s name in exchange for cash payments in excess of Beery’s legal obligations to support the

52. *Id.* at *1.

53. *Id.* at *4.

54. *Id.* at *1, *4.

55. *Id.* at *7.

56. No. 10,2095/08, 2009 WL 6318140 (N.Y. Sup. Ct. Oct. 6, 2009), *aff’d*, 913 N.Y.S.2d 154 (N.Y. App. Div. 2010).

57. *Id.* at *3–5.

58. *Id.* at *1, *6.

59. *Id.* at *12.

60. *See, e.g.*, *Daily v. Minnick*, 91 N.W. 913, 914 (Iowa 1902) (discussing an oral promise whereby the named child would receive forty acres of land); *Wolford v. Powers*, 85 Ind. 294, 295 (1882) (recounting how if a child was named after Wolford, he promised to “make its welfare his chief object in life”); *Gardner v. Denison*, 105 N.E. 359, 360 (Mass. 1914) (“The privilege of naming a child is a valid consideration for a promise to pay money.”). *But see* *Dohrmann v. Swaney*, 14 N.E.3d 605, 613–15 (Ill. App. Ct. 2014) (finding that an agreement to name children was unenforceable under the particular facts because the agreement was either illusory, grossly inadequate, or entirely fraudulent).

61. 231 P.2d 39 (Cal. 1951).

child.⁶² Because Beery did not acknowledge paternity, he had no rights in naming the child, and the court concluded that Gloria Schumm's agreement to include "Wallace" in the child's name was adequate consideration.⁶³ While Beery refused to abide by most of the contract, he made the agreed-upon payments during his life, but he died just fourteen months after the child's birth.⁶⁴ Beery's estate refused to honor the agreement, arguing that the right to name was insufficient consideration to support the agreement.⁶⁵ In concluding that the naming right was valid consideration, and the estate was obligated to make the payments, the court stated, "[H]aving a child bear its father's name is commonly considered a privilege and honor, and Beery assumed it was, for he obtained such a promise running to him."⁶⁶

B. Gift Cases and Extreme Results

In some situations, courts have decided that charitable naming arrangements were gifts rather than contracts under common law. As discussed earlier, in general, it can be difficult for courts to draw the line between gifts and contracts, and a key factor is the extent of the benefit to the promisor.⁶⁷ Two cases in particular demonstrate potential problems for donors and charities when courts treat substantial charitable recognition transactions as gifts.

In *Tennessee Division of the United Daughters of the Confederacy v. Vanderbilt University*,⁶⁸ the Tennessee Division of the United Daughters of the Confederacy (Daughters of the Confederacy) contributed \$50,000 toward the construction of a dormitory costing \$150,000 in 1933.⁶⁹ In connection with the contribution, Vanderbilt's predecessor agreed that female descendants of Confederate soldiers could stay

62. *Id.* at 41–42 (listing Beery's obligations to pay \$100 per week from the day of the child's birth until he reaches the age of twenty-one, and a lump sum of \$25,000 when the child attains age twenty-one). The mother agreed to name the child "Wallace" if the child was a boy and "Wally" if the child was a girl. *Id.*

63. *Id.* at 44 (noting that "[t]he privilege of naming a child is valid consideration" because Gloria Schumm's promise was a detriment to her and a benefit to Beery); see Carlton F.W. Larson, *Naming Baby: The Constitutional Dimensions of Parental Naming Rights*, 80 GEO. WASH. L. REV. 159, 166 (2011) (discussing various state laws regarding the rights of mothers and fathers in naming their nonmarital children).

64. *Schumm*, 231 P.2d at 43.

65. *Id.* at 44.

66. *Id.* at 44–45.

67. See *supra* notes 28–30, 36 and accompanying text.

68. 174 S.W.3d 98 (Tenn. Ct. App. 2005).

69. *Id.* at 104.

rent-free in the dormitory's first two floors and agreed to "place on the building an inscription naming it 'Confederate Memorial [Hall].'"⁷⁰ Over fifty years later, in 1987 and 1988, Vanderbilt completed a \$2.5 million renovation of Confederate Memorial Hall, and university officials and the university's Student Government Association began debating the propriety of retaining the word "Confederate" in the building's name.⁷¹ Eventually, in 2002, the university announced that it would remove the word "Confederate" and simply call the dorm "Memorial Hall," changing the name on its maps, websites, and correspondence.⁷²

Before the university removed the word "Confederate" from the dorm's pediment, the Daughters of the Confederacy sued for breach of contract.⁷³ The Tennessee Court of Appeals, however, concluded that the arrangement was a *gift*, not a contract.⁷⁴ The court stated that the documents memorializing the Daughters' pledge did not "establish a typical commercial arrangement in which one party provides certain goods or services in return for a sum to be paid by the other party."⁷⁵ The court's refusal to find a contract can be criticized in many respects. First, not all common law contracts are "typical commercial arrangements." For example, perhaps the leading case on the historical approach to consideration, *Hamer v. Sidway*,⁷⁶ involved a nephew promising his uncle to refrain from alcohol, smoking, cursing, playing pool for money, and playing cards for money, until attaining age twenty-one.⁷⁷ Second, many of the cases discussed above conclude

70. *Id.* at 104–05. The Daughters of the Confederacy contributed to Peabody College, a teachers' college that merged into Vanderbilt University on April 28, 1979. *Id.* at 106.

71. *Id.* at 106. In 2002, a Student Government Association resolution "stated that the name . . . had been under debate for fourteen years because of its negative association with slavery." *Id.* at 108.

The resolution noted that names on buildings are usually a sign of pride and thankfulness for the contributions made to construct them, but that Vanderbilt was not proud of the legacy of slavery attached to the name of Confederate Memorial Hall or some of the actions of the United Daughters of the Confederacy.

Id.

72. *Id.*

73. *Id.* at 109.

74. *See id.* at 120 (holding that the Daughters of the Confederacy gave Vanderbilt a gift, and Vanderbilt accepted the gift with its associated conditions).

75. *Id.* at 112.

76. 27 N.E. 256 (N.Y. 1891).

77. *Id.* at 257.

that charitable publicity is sufficient consideration to support a contract without describing the naming rights as a “good or service.”⁷⁸ Third, the naming arrangement in *Vanderbilt* did involve the Daughters of the Confederacy paying a “sum” in exchange for certain publicity services from the school.⁷⁹

After the Tennessee Court of Appeals decided that the Daughters of the Confederacy had made a conditional gift and Vanderbilt was threatening to violate the condition, the court considered the remedy. The court concluded that if Vanderbilt removed the word “Confederate” from the dorm’s pediment, it would have to return the \$50,000 gift plus earnings on that amount based on the Consumer Price Index since 1933, bringing the damages up to approximately \$700,000 in 2005.⁸⁰ Vanderbilt finally removed the word “Confederate” from the pediment in 2016, and, under the court’s mandated approach, Vanderbilt paid the Daughters of the Confederacy approximately \$1.2 million.⁸¹

The court’s remedy ignores many significant facts, including (i) the Daughters of the Confederacy contributed only one-third of the original cost of the building, but they obtained exclusive naming control; (ii) the Daughters of the Confederacy contributed no real estate in connection with the establishment of the dormitory; (iii) Vanderbilt University paid the entire \$2.5 million renovation costs in 1987 and 1988 with no contribution from the Daughters of the Confederacy, and (iv) the Daughters of the Confederacy enjoyed the naming rights for approximately seventy years.⁸²

*Courts v. Annie Penn Memorial Hospital, Inc.*⁸³ is another charitable naming rights case demonstrating a problem with gift

78. See *supra* Section I.A.

79. See *Tenn. Div. of the United Daughters of the Confederacy*, 174 S.W.3d at 104 (discussing the payment by the Daughters of the Confederacy).

80. *Id.* at 119; see R. WILSON FREYERMUTH ET AL., PROPERTY AND LAWYERING 217–18 (3d ed. 2011) (stating that the \$700,000 amount was the present value of the gift based on the Consumer Price Index).

81. See Nick Anderson, *Vanderbilt University Removes “Confederate” from Inscription at Front of Dorm*, WASH. POST (Aug. 15, 2016), <https://www.washingtonpost.com/news/grade-point/wp/2016/08/15/vanderbilt-university-removes-confederate-from-inscription-at-front-of-dorm> (reporting the \$1.2 million figure).

82. *Tenn. Div. of the United Daughters of the Confederacy*, 174 S.W.3d at 109.

83. 431 S.E.2d 864 (N.C. Ct. App. 1993).

characterization.⁸⁴ In *Courts*, the donor invested her lifesavings in stocks.⁸⁵ In anticipation of a corporate merger, the donor mailed the stock certificates to the local hospital's president, intending to endow a memorial fund at the hospital in honor of her grandfather.⁸⁶ Unfortunately, the donor simply mailed the endorsed stock certificates to the hospital president, and he accepted the certificates immediately before the donor specified her wishes regarding a memorial in honor of her grandfather.⁸⁷ Although the donor asked for family recognition soon thereafter, the hospital eventually decided it would keep the donor's contribution without honoring the donor, her grandfather, or her family in any way.⁸⁸ The court described the actions of the hospital officials as callous.⁸⁹ Nevertheless, the court characterized the transaction as a completed gift rather than a contract, and, as a result, the court concluded there was no remedy available for the donor.⁹⁰

C. The Trouble with Gift Characterization and the Relative Advantages of Contract Characterization for Charities and Donors

Contract characterization can have several advantages for the donor and charity as compared to treating similar arrangements as conditional gifts. When courts use contract law doctrines and approaches, they may have flexibility in crafting remedies, implying omitted terms based on parties' intent and compelling specific performance. Donors and charities, therefore, may have less risk and may anticipate more reasonable results when courts treat these arrangements as contracts. The cases discussed in this Section help demonstrate the disadvantages of the gift characterization, mainly that remedies tend to be all-or-nothing. The charity may be forced to refund the total contribution if the donor makes a conditional gift and the charity does not satisfy every condition. Although donors may receive windfalls, they may just as well find themselves with no recourse to sue a charity that has not complied with all gift conditions if a court

84. *See id.* at 868 (concluding that the donor made an unconditional gift to the charity).

85. *Id.* at 864.

86. *Id.* at 864–65.

87. *Id.* at 865.

88. *Id.*

89. *Id.* at 867.

90. *Id.* at 867–68 (“[A]fter-the-fact’ conditions are not recognized by the law . . . [and] to allow conditions to attach later would put the donee in a position fraught with uncertainty regarding his or her rights to the property received.”).

finds that the charity substantially complied with its obligations. Both sides of this coin illustrate the uncertain, winner-takes-all reality that donors and charities may face when courts characterize arrangements as gifts rather than contracts.

The court in *Tennessee Division of the United Daughters of the Confederacy* indicated that with the law of gifts only an all-or-nothing approach to remedies is available.⁹¹ If a donor makes a conditional gift and the charity ever fails to satisfy the condition, the charity must refund the gift to the donor, regardless of the publicity services received by the donor and any other events that occur after the gift.⁹² In *Tennessee Division of the United Daughters of the Confederacy*, Vanderbilt University and its predecessor paid \$2.5 million toward the construction and renovation of a dormitory and presumably donated the land; the Daughters of the Confederacy contributed only \$50,000 in 1933 and enjoyed the building naming rights for approximately eighty years.⁹³ Nevertheless, Vanderbilt University had to pay \$1.2 million to remove the word “Confederate” from the dormitory’s pediment in 2016.⁹⁴

This potential for a donor windfall may explain, in part, how the Fisher family convinced Lincoln Center to pay them \$15 million for the naming rights to a building that a Fisher family member described as an “old slipper” on a campus of newly renovated buildings.⁹⁵ If a court were to characterize Avery Fisher’s original \$10.5 million naming rights deal as a gift under the common law rules, and the Lincoln Center then violated a condition of the gift by removing Avery Fisher’s name, the Lincoln Center could have been obligated to pay the Fisher family approximately \$56 million in 2015.⁹⁶

91. *Tenn. Div. of the United Daughters of the Confederacy v. Vanderbilt Univ.*, 174 S.W.3d 98, 119 (Tenn. Ct. App. 2005) (“[W]here a donee fails or ceases to comply with the conditions of a gift, the donor’s remedy is *limited* to recovery of the gift.” (emphasis added)).

92. *Id.* at 114, 119.

93. *See supra* notes 69–71 and accompanying text (discussing the amount paid by the Daughters of the Confederacy and the benefits they enjoyed).

94. *See supra* note 81 and accompanying text (reporting the amount of money Vanderbilt paid).

95. Pogrebin, *supra* note 2 (reporting that Avery Fisher’s daughter, Nancy Fisher, stated, “The hall was like an old slipper How could you avoid sensing that?”).

96. According to the Bureau of Labor Statistics online calculator, \$10.5 million in 1973 would have had a purchasing power of approximately \$56.05 million in 2015. *CPI Inflation Calculator*, U.S. BUREAU LAB. STAT., http://www.bls.gov/data/inflation_calculator.htm (last visited Aug. 30, 2017); *see also* Amy Schiller, *Renaming Avery Fisher Hall Raises the Question of Authenticity*, CHRON. OF

The donor family can reap a tremendous windfall under the law of gifts even if it enjoys the naming rights for decades before the charity removes the family name; however, the donors also risk receiving absolutely nothing under the all-or-nothing approach of the law of gifts. In *St. Mary's Medical Center, Inc. v. McCarthy*,⁹⁷ the donor contributed \$250,000 for the benefit of the hospital post-mortem, and the hospital used the funds to construct a chapel in 1956.⁹⁸ In keeping with the terms, the hospital installed a plaque stating that the chapel was a memorial to the donor, Cornelia Haney.⁹⁹ Nearly fifty years later, in 2004, the hospital began demolishing the chapel to allow the hospital to expand, and the family sued.¹⁰⁰ In dicta, the court stated that even if the publicity was a condition to the gift, the family could not recover the gift plus earnings because the hospital had *substantially* complied with its obligation to provide publicity for the donor.¹⁰¹ The introduction of the standard of *substantial* compliance in a charitable publicity deal allows a court more flexibility to decide which side should win. Nevertheless, donors and charities still face great uncertainty when a dispute arises because the outcome will be winner-takes-all.

If the courts treated the *Tennessee Division of the United Daughters of the Confederacy* and Fisher-Lincoln Center disputes as contracts, rather than gifts, it is not difficult to see how much more flexibility the courts would have had in determining damages and remedies. Generally, an injured party in a breach of contract situation is entitled to the benefit of the bargain.¹⁰² Presumably, in determining the extent to which the donor has received the benefit of the bargain, a court would reduce the donor's recovery for the value of the publicity already enjoyed. Perhaps most important, the damages for breach of contract must be reasonably foreseeable.¹⁰³ Alternatively, a court would have discretion to grant specific performance, which would allow for an all-or-nothing

PHILANTHROPY (Nov. 18, 2014), <https://www.philanthropy.com/article/Renaming-Avery-Fisher-Hall/152193> (stating that Avery Fisher's \$10.5 million donation in 1973 would be worth "more than \$56-million in today's dollars").

97. 829 N.E.2d 1068 (Ind. Ct. App. 2005).

98. *Id.* at 1071.

99. *Id.*

100. *Id.*

101. *Id.* at 1077 (qualifying its analysis in stating, "even if there was a . . . valid condition subsequent, St. Mary's use of the chapel for nearly fifty years represents substantial compliance with any such . . . condition").

102. RESTATEMENT (SECOND) OF CONTRACTS § 347 cmt. a (AM. LAW INST. 1981).

103. *Hadley v. Baxendale*, 156 Eng. Rep. 145, 145 (1854) (setting forth the basic rule used to determine damages for breach of contract).

approach to the remedy similar to the approach under a gift analysis.¹⁰⁴ For example, in *Stock v. Augsburg College*, in dicta, the court stated that the donor could have recovered the entire amount of his donation because the charity never provided the donor with any of the agreed-upon publicity benefits.¹⁰⁵

The gift approach rather than the contract approach may restrict the remedies available to the parties and tie the courts' hands, leading to unjust results. *Courts v. Annie Penn Hospital, Inc.* demonstrates another potential problem with the law of gifts.¹⁰⁶ In *Courts*, because the hospital president accepted the property delivered before the donor told the hospital president about her desire to create a memorial for her grandfather, the court apparently had no choice in deciding the case under the law of gifts.¹⁰⁷ Although the court described the hospital president's dealings with the donor as callous, the court concluded it could not grant any relief whatsoever to the donor.¹⁰⁸ In contrast, with a contract law approach, a court would have flexibility in deciding whether the terms of the deal were really finalized when the hospital president accepted delivery of the gifted property.¹⁰⁹ Also, under a contract approach, the court might imply omitted terms based on the intentions of the parties.¹¹⁰

II. THE IRS TREATS CHARITABLE PUBLICITY AS WORTHLESS

For almost fifty years, the IRS effectively has treated charitable recognition as providing no benefit to donors. This allows a conspicuous philanthropist to claim a charitable income tax deduction in the same manner as an anonymous donor. In the midst of a raging controversy, the IRS created these rules before the U.S. Supreme Court provided a general framework for analysis.

In 1917, Congress authorized an income tax charitable deduction, but Congress provided little guidance to taxpayers, the IRS, and the courts for situations when a donor transferred money or property to a

104. See RESTATEMENT (SECOND) OF CONTRACTS § 357 (“[S]pecific performance of a contract duty will be granted in the discretion of the court against a party who has committed or is threatening to commit a breach of the duty.”).

105. No. C1-01-1673, 2002 WL 555944, at *4 (Minn. Ct. App. Apr. 16, 2002).

106. See *supra* notes 83–90 and accompanying text (discussing the *Courts* case).

107. See *Courts v. Annie Penn Mem'l Hosp., Inc.*, 431 S.E.2d 864, 867–68 (N.C. Ct. App. 1993) (asserting that “after-the-fact conditions are not recognized by the law”).

108. *Id.*

109. See *infra* note 308 and accompanying text.

110. RESTATEMENT (SECOND) OF CONTRACTS § 204 (AM. LAW INST. 1981).

charity and received some benefit in return.¹¹¹ The statute allows an income tax deduction for a “charitable contribution,”¹¹² and a charitable contribution means a “contribution or gift” to a qualified organization.¹¹³ Neither the statute nor the regulations define the term “gift.” The relevant legislative history is so “sparse” that the U.S. Supreme Court has relied upon the 1954 legislative history of a related statute in emphasizing that gifts are payments “made with no expectation of a financial return commensurate with the amount of the gift.”¹¹⁴ Although the U.S. Supreme Court did not quote these reports in its cases on this topic, the legislative history also states that “payments are not ‘gifts’ if paid ‘in consideration of a binding obligation [Payments are gifts] only if there [is] no expectation of a quid pro quo.”¹¹⁵

In the absence of legislative guidance, before 1980, courts made compelling arguments for different approaches in a variety of factual situations.¹¹⁶ Congress’s laconic approach fails to indicate whether the donor’s intent is relevant when deciding if a transfer is a gift and whether decision makers should determine intent objectively or subjectively. If intent was relevant, taxpayers, IRS officials, and the courts may have needed to weigh all the facts and circumstances and made different factual determinations. Fact finders may have felt

111. War Revenue Act, ch. 63, § 1201(2), 40 Stat. 300, 330 (1917). The original Internal Revenue Code did not include an income tax charitable deduction for gifts to charity; Congress added the deduction when it increased income tax rates to finance World War I. See *Hernandez v. Comm’r*, 490 U.S. 680, 689 (1989) (citing 2 B. BITTKER, FEDERAL TAXATION OF INCOME, ESTATES AND GIFTS ¶ 35.1.1 (1981)) (tracing history of the charitable deduction); Mark L. Geier, Note, *What the Good Lord Giveth, Uncle Sam Taketh Away: A Proposal Allowing Payments Made in Exchange for Religious Benefits to Be Tax Deductible*, *Hernandez v. Commissioner*, 109 S. Ct. 2136, reh’g denied, 110 S. Ct. 16 (1986), 13 HAMLINE L. REV. 433, 444 (1990) (discussing the War Revenue Act of 1917’s charitable contribution deduction).

112. I.R.C. § 170(a)(1) (2012).

113. § 170(c).

114. Geier, *supra* note 111, at 445 (quoting S. Rep. No. 83–1622 (1954)); see *Hernandez*, 490 U.S. at 690 (describing the legislative history as “sparse” and relying on the 1954 legislative history instead); *Am. Bar Endowment v. United States*, 761 F.2d 1573, 1578 (Fed. Cir. 1985), (noting that “[t]he only real clue as to what Congress intended by the term charitable contribution is a comment regarding [I.R.C.] section 162(b)” enacted in 1954), *rev’d*, 477 U.S. 105 (1986). Section 162(b) of the 1954 legislation “provides that contributions which exceed the [percentage] limitations of section 170 are not deductible as trade or business expenses.” *Am. Bar Endowment*, 761 F.2d at 1578 n.7.

115. Geier, *supra* note 111, at 445 (quoting S. Rep. No. 83–1622 (1954)) (alteration in original).

116. See *infra* notes 165–70 (discussing cases providing such arguments).

adrift “on an illimitable ocean” of information in trying to calculate the correct amount of tax due.¹¹⁷ Not surprisingly, before the U.S. Supreme Court addressed this fundamental issue, taxpayers, the IRS, and the courts, in a variety of factual situations, seized upon objective factors and tried to establish easy-to-apply, absolute rules to decide cases without the necessity of making “painstaking inquir[ies]” into complex factual situations.¹¹⁸ Automatic rules can create certainty and permit quick and easy decision-making, but they also can lead to injustice and create opportunities for manipulation, abuse, and unintended consequences.

A. *The IRS Income Tax Approach Established Almost Fifty Years Ago*

In the late 1960s and 1970s, the IRS established its approach for charitable publicity transactions. At that time, the controversy about the relevance of donor intent in the charitable deduction area was reaching its zenith in the courts, and the U.S. Supreme Court had not yet established a general test. In 1968, the fountainhead ruling, Revenue Ruling 68-432,¹¹⁹ involved a transaction far removed from today’s mega-million dollar building naming deals, but the ruling established the IRS position that conspicuous philanthropists can deduct their entire contributions regardless of the value of the charitable publicity received in exchange.¹²⁰

Revenue Ruling 68-432 considered the deductibility of membership dues paid to a charity operating a museum and library for the study of the fine arts.¹²¹ The organization basically had two groups of members. Both groups enjoyed the same privileges associated with membership, but one group paid lower membership dues. The first group, the Annual and Family members, paid only \$2x and \$3x respectively which

117. *Comm’r v. Duberstein*, 363 U.S. 278, 297 (1960) (Frankfurter, J., concurring).

118. *Am. Bar Endowment v. United States*, 4 Cl. Ct. 404, 416 (1984) (establishing that a portion of payments for group insurance from an organization is considered a charitable contribution if a member shows that an equivalent insurance product was available to him for a lower price and that he bypassed that product because he wished to make a charitable contribution to the organization), *aff’d in part, rev’d in part*, 761 F.2d 1573 (Fed. Cir. 1985), *rev’d*, 477 U.S. 105 (1986).

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

120. See, e.g., Harvey P. Dale & Roger Collinvaux, *The Charitable Contributions Deduction: Federal Tax Rules*, 68 TAX LAW. 331, 340 (2015) (citing Rev. Rul. 68-432 and later IRS pronouncements, and concluding, “For these purposes, the value of . . . recognition, praise, and even naming opportunities are disregarded”).

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

was the minimum allowed by the charity to become a member.¹²² The other groups, the Sustaining and Fellowship members, paid \$5x and \$20x, respectively.¹²³ Only one of the privileges of membership involved any publicity rights. The non-publicity membership privileges included free or discounted admission to “poetry evenings” and other events and discounts on the purchase of certain publications.¹²⁴ The only privilege of membership apparently providing any publicity was “invitations to selected lectures and other special events for members only.”¹²⁵ This only provided publicity among the members themselves. This publicity likely provided minuscule prestige benefits and limited business-connection benefits when compared to the corresponding benefits associated with naming a building at a prestigious university or major medical complex.

In Revenue Ruling 68-432, the IRS described the membership dues paid as “contributions” and stated that whether a member could claim a charitable contribution deduction was a question of fact.¹²⁶ The IRS indicated it would decide this question of fact based on a series of considerations that made no mention of the donor’s intent.¹²⁷ The first consideration was the objectives and activities of the organization; the IRS may have included this factor so that it could consider whether the charity solicited the contribution as part of a charitable bizarre or other fund drive.¹²⁸ The second consideration was the “nature . . . of the benefits . . . conferred upon its members.”¹²⁹ The third

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.* The ruling did not expressly state that this privilege provided publicity, but presumably attendance at these events would signal to other members that one had paid the annual membership dues.

126. *Id.*

127. *Id.*

128. *Id.*; see Rev. Rul. 67-246, 1967-2 C.B. 104, 104 (setting forth the income tax charitable deduction rules for donors who contributed as part of “charity balls, bazaars, banquets, shows, and athletic events,” or other fundraising activities and received some type of return benefit).

129. Rev. Rul. 68-432, 1968-2 C.B. 104, 104. Perhaps the IRS intended this to refer solely to the “satisfaction of participating in furthering the charitable cause,” which the IRS disregards in Rev. Rul. 68-432. *Id.* at 105. Also, the IRS may have intended to include other types of benefits, such as the privilege of “being associated with or being known as a benefactor of the organization” which the IRS describes in Rev. Rul. 68-432 as not being a “significant return benefit[] that [has] a monetary value.” *Id.*

consideration was the “extent of the benefits . . . conferred upon its members.”¹³⁰

After listing these considerations, the IRS stated that it would assign any particular membership arrangement to one of three classes, and this classification would help determine the amount of the member’s charitable contribution deduction.

In the first class, the IRS stated that if the value of the return privileges were reasonably commensurate with the member’s payment, the donor had not made a tax deductible charitable contribution.¹³¹ The IRS assigned the Annual and Family membership dues payments to the museum and library into this class because there was a “reasonable relationship to the monetary value of the corresponding benefits that thereby [became] *available* to [these] individual[s].”¹³² The IRS emphasized that it would treat a privilege as a return benefit if it was available to the members regardless of whether the individual exercised, or even wanted, the privilege.¹³³

In the second class, the IRS stated if the return benefits were merely “incidental to making the organization function according to its charitable purposes *and* the only return benefit thereby obtainable is the satisfaction of participating in the furthering of the charitable cause,” then the payment of the membership dues was a tax-deductible gift.¹³⁴

The third class applied when the dues payment “substantially exceed[ed] the value of any benefits or privileges offered [and] the discrepancy between the size of the membership contribution and the potential monetary benefit is so great as to make it reasonably clear that the payment is of a dual character.”¹³⁵ In this third class, the IRS stated that the portion of the donor’s contribution compensated for with benefits will not be deductible, but any excess payment will be a tax deductible charitable contribution.¹³⁶ The IRS assigned the Sustaining and Fellowship membership dues payments to this third category and presumably allowed a charitable deduction for the

130. *Id.* at 104.

131. *Id.*

132. *Id.* (emphasis added).

133. *Id.*; *see also* Rev. Rul. 67-246, 1967-2 C.B. 104, 105 (adopting the same position).

134. Rev. Rul. 68-432, 1968-2 C.B. 104, 105 (emphasis added).

135. *Id.*

136. *Id.*

amounts these members paid in excess of the amounts charged the Annual and Family members.¹³⁷

In connection with setting forth the list of considerations and the different ways it would classify membership payments, the IRS tossed out the following statement: “Such privileges as being . . . known as a benefactor of the organization are not significant return benefits that have a monetary value within the meaning of this Revenue Ruling.”¹³⁸ This gratuitous sentence appears to have formed the basis of the IRS’s income tax treatment of charitable publicity rights generally even though the phrase “within the meaning of this Revenue Ruling” could be read to limit this conclusion to the particular facts involved in Revenue Ruling 68-432.¹³⁹

In 1969, Congress enacted the self-dealing rules for private foundations, which impose different penalties than reducing a donor’s income tax charitable deduction.¹⁴⁰ The self-dealing rules specify when a substantial contributor to a private foundation (or another insider) and the foundation’s managers should be subject to excise taxes when the private foundation engages in a transaction with a substantial contributor or another insider.¹⁴¹ The self-dealing rules provide that if the substantial contributor or other insider received merely an “incidental or tenuous benefit” as a result of the transaction, the excise tax does not apply.¹⁴² The regulations interpreting the self-dealing statute, which the IRS originally promulgated in 1973, state, “[T]he public recognition a person may receive, arising from the charitable activities of a private foundation to which such person is a substantial contributor, does not in itself result in an act of self-dealing

137. *See id.* (allowing deductions for excess cost for Fellowship and Sustaining memberships).

138. *Id.*

139. *Id.*

140. Tax Reform Act of 1969, Pub. L. No. 91-172, 83 Stat. 487 (1969).

141. *See* I.R.C. § 4941(a) (2012) (imposing an excise tax of ten percent of the amount involved on the substantial contributor or other insider and imposing a five percent excise tax on each foundation manager who knowingly participates in the transaction); § 4941(b) (increasing the excise tax to 200 percent if the transaction is not reversed within a specified period after the IRS provides notice); *see also* § 4942(c)(2) (capping the maximum excise tax on a foundation manager at \$40,000 for one act of self-dealing).

142. Treas. Reg. § 53.4941(d)-2(f)(2) (2017) (stating there is no “act of self-dealing” if the benefit is merely incidental or tenuous).

since *generally* the benefit is incidental and tenuous.”¹⁴³ The regulations include the following example about naming rights:

A, a disqualified person with respect to private foundation S, contributes certain real estate to S for the purpose of building a neighborhood recreation center in a particular underprivileged area. As a condition of the gift, S agrees to name the recreation center after A. Since the benefit to A is only incidental and tenuous, the naming of the recreation center, by itself, will not be an act of self-dealing.¹⁴⁴

The example does not explain why the benefit is merely incidental and tenuous. In any event, with this regulation, the IRS has indicated that public recognitions, such as building naming rights, are merely incidental and tenuous benefits, and it therefore disregards them when calculating excise taxes.

In a 1973 Revenue Ruling, the IRS considered if there was an act of self-dealing when an individual made a substantial donation to a private foundation and the private foundation, in turn, donated money to a public charity on the condition that the public charity change its name to include the name of the substantial contributor.¹⁴⁵ In the ruling, the public charity changed its name and agreed that it would not change its name again for at least one hundred years, and a court had “determined that the charity had the power to bind itself not to change its name for one hundred years.”¹⁴⁶ The IRS concluded the “public recognition a person may receive, arising from the charitable activities of a private foundation to which such person is a substantial contributor, does not in itself result in an act of self-dealing since generally the benefit is incidental and tenuous.”¹⁴⁷ Although they do not involve the charitable income tax deduction, these authorities under the self-dealing rules all indicate the IRS had no desire in dealing with the difficult factual issues involved with determining whether a naming donor intended to make a gift, whether the charity provided publicity as a quid pro quo for the contribution, or the contribution had a dual purpose.

In 1977, the IRS issued Revenue Ruling 77-367 and concluded that a public charity will not jeopardize its charitable tax status if it grants

143. *Id.* (emphasis added); 38 Fed. Reg. 9493, 9498 (Apr. 17, 1973).

144. § 53.4941(d)-2(f)(9) ex.4.

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

146. *Id.*

147. *Id.* at 384.

publicity rights to a corporation in exchange for donations.¹⁴⁸ In Revenue Ruling 77-367, the charity operated a replica of an early nineteenth century American village.¹⁴⁹ A corporation donated the land and provided a “substantial percentage of the organization’s support.”¹⁵⁰ In exchange, the charity named the village after the corporation, and the charity acknowledged the corporation’s support in its pamphlets and historical research publications.¹⁵¹ The IRS concluded that the publicity benefits were “merely incidental to the benefits flowing to the general public,” so the organization operated exclusively for charitable and educational purposes.¹⁵²

These rulings and regulations, all promulgated at least forty years ago, have provided the authority for charities and their donors to treat charitable publicity rights as effectively worthless.¹⁵³ Scholars and practitioners cite these authorities when advising donors and charities to treat charitable publicity rights as worthless for income tax purposes.¹⁵⁴

1. *The IRS created its unitary rule when case law was unsettled*

The IRS adopted these authorities, which effectively ignore charitable publicity, in the midst of a raging controversy over the necessity and procedures for determining the charitable donor’s intent when the donor received a return benefit. The word “gift” had created a similar controversy for general tax purposes under Internal Revenue Code (IRC) section 102 a few decades earlier, and the arguments in that debate were echoing in the charitable contribution deduction cases in the 1960s and 1970s.¹⁵⁵

148. Rev. Rul. 77-367, 1977-2 C.B. 193, 194.

149. *Id.* at 193.

150. *Id.*

151. *Id.*

152. *Id.* at 194.

153. See I.R.S. Ann. 92-15, 1992-5 I.R.B. 51, modified by Ann. 92-58, 1992-15 I.R.B. 54 (confirming approach).

154. See Dale & Collinvaux, *supra* note 120, at 340; JOSEPH P. TOCE, JR. ET AL., TAX ECONOMICS OF CHARITABLE GIVING 197 (2006) (discussing donor recognition and concluding “the contribution deduction amount should be unaffected”); John V. Woodhull & 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.”).

155. See *e.g.*, *Singer Co. v. United States*, 449 F.2d 413, 418–19 (Ct. Cl. 1971) (discussing generally the definition of “gift” that the parties want the Court to adopt).

IRC section 102(a) provides that “gifts” are not subject to income tax, but Congress provided no definition of the word “gift.”¹⁵⁶ Several courts grappled with defining “gift” under IRC § 102(a) and formulated conflicting tests to determine if a payment was a gift.¹⁵⁷ When the issue reached the U.S. Supreme Court, the IRS strenuously argued for clarification in the form of automatic rules, presumably so the IRS could avoid analyzing donor intent.¹⁵⁸ Specifically, in litigating *Commissioner v. Duberstein*,¹⁵⁹ the IRS requested that the U.S. Supreme Court adopt a series of presumptions subject to various exceptions and corollaries.¹⁶⁰ The IRS’s proposed general test would have defined gifts as “transfers of property made for personal as distinguished from business reasons,”¹⁶¹ and automatic, mechanical rules flowing from the IRS’s proposed general test would include: (i) a payment by an employer to an employee cannot be a gift;¹⁶² (ii) a recipient cannot treat cash or property as a “gift” if the payer treated the transfer as a deductible business expense;¹⁶³ and (iii) a business corporation cannot make a gift.¹⁶⁴ These rules would have easily resolved the disputes in

156. See I.R.C. § 102(a) (2012) (“Gross income does not include the value of property acquired by gift . . .”); *Comm’r v. Duberstein*, 363 U.S. 278, 284 (1960) (“Specific and illuminating legislative history on the point does not appear to exist.”).

157. See *Duberstein*, 363 U.S. at 284 (discussing confusion in the circuit courts regarding the definition of gift under § 102(a)).

158. *Id.* at 283.

159. 363 U.S. 278 (1960).

160. *Id.* at 287.

161. *Id.* at 284 n.6. In dissent, Justice Frankfurter praised the IRS’s view that personal transactions are more likely to be tax-free gifts than business transactions.

[W]e should normally suppose that a payment from father to son was a gift, unless the contrary is shown, [but] in the two situations before us the business implications are so forceful that I would apply a presumptive rule placing the burden upon the beneficiary to prove the payment wholly unrelated to his services to the enterprise.

Id. at 296 (Frankfurter, J., concurring in part and dissenting in part).

162. *Id.* at 287 (arguing that employer payments would not be a gift). *But see* I.R.C. § 102(c)(1) (2012); 54 Fed. Reg. 631 (proposed Jan. 9, 1989) (to be codified at Treas. Reg. § 1.102-1(f)(2)) (providing that the IRS recognizes a transfer from employer to employee as a gift “if the purpose of the transfer can be substantially attributed to the familial relationship of the parties and not to the circumstances of their employment”).

163. *Duberstein*, 363 U.S. at 287.

164. *Id.*

the consolidated cases before the Court without the need for any significant fact-finding.¹⁶⁵

The U.S. Supreme Court rejected the IRS's calls for clarification in the form of mechanical rules because the statute did not list or suggest such automatic rules. The Court said, "[T]he problem is one which, under the present statutory framework, does not lend itself to any more definitive statement that would produce a talisman for the solution of concrete cases."¹⁶⁶ In struggling with the statutory language, the Court quotes an old Justice Cardozo tax opinion stating, "One struggles in vain for any verbal formula that will supply a ready touchstone. The standard set up by the statute is not a rule of law; it is rather a way of life. Life in all its fullness must supply the answer to the riddle."¹⁶⁷

The Court declined to adopt the common law test for a gift, and the Court concluded that the word "gift" under IRC § 102 should be defined in a "more colloquial sense"¹⁶⁸ based on the "fact [finder's] experience with the mainsprings of human conduct."¹⁶⁹ Applying this view, the Court concluded that a "gift" is a transfer which "proceeds from a 'detached and disinterested generosity' . . . [a]nd in this regard, the most critical consideration . . . is the transferor's '*intention*.'"¹⁷⁰

After concluding that the transferor's intent is the most critical consideration, the Court considered whether a fact-finder's search for a transferor's intent would be an objective or subjective quest, and decided this is an "*objective inquiry*" and that the transferor's

165. In the *Duberstein* case, Duberstein was the president of a metal company, and he provided valuable referrals to another metal company which profited from the referrals. *Id.* at 280. He accepted a Cadillac automobile at the insistence of the president of the other metal company for the referrals. *Id.* at 280–81. If the Court had adopted the IRS's mechanical rules, the Court could have automatically concluded that Duberstein did not receive a tax-free gift because the other metal company "deducted the value of the Cadillac as a business expense on its corporate income tax return." *Id.* at 281. In the companion case, *Stanton v. United States*, a corporation made a severance payment to Stanton upon the termination of his employment with the corporation. *Id.* at 281–82. Presuming the IRS's proposed rule that employers cannot make tax-free gifts to employees would extend to payments to former employees for past services, the IRS's proposed rule would have easily resolved the *Stanton* case.

166. *Id.* at 284–85.

167. *Id.* at 288 n.9 (quoting *Welch v. Helvering*, 290 U.S. 111, 115 (1933)).

168. *Id.* at 285.

169. *Id.* at 289.

170. *Id.* at 285–86 (emphasis added) (quoting *Comm'r v. LeBue*, 351 U.S. 243, 246 (1956); *Bogardus v. Comm'r*, 302 U.S. 34, 43 (1937)).

characterization or expectation has “nothing to do with the matter.”¹⁷¹ Additionally, “the proper criterion, established by decision . . . is one that inquires what the basic reason for [the transferor’s] conduct was in fact.”¹⁷² The Court acknowledged that the general test and specific rules proposed by the IRS may highlight important facts in deciding cases.¹⁷³ However, it rejected the use of any single factor as a “shibboleth”¹⁷⁴ and emphasized that the fact-finder in any particular case (either a judge or a jury) must consider all the facts and decide the case “based ultimately on the application of the fact-finding tribunal’s experience with the mainsprings of human conduct to the totality of the facts of each case.”¹⁷⁵ This approach “may not satisfy an academic desire for tidiness, symmetry[,] and precision in this area . . . [b]ut the question here remains basically one of fact, for determination on a case-by-case basis.”¹⁷⁶

In dissent, Justice Frankfurter asserted that when enacted, the “tax conception of a gift no doubt reflected [a] non-legal, non-technical notion of a benefaction unentangled with any aspect of worldly requital.”¹⁷⁷ Accordingly, Justice Frankfurter agreed with the majority that the common law test for a gift should not apply, and there were inherent difficulties in formulating a “general rule or test sufficiently definite to confine within narrow limits the area of judgment.”¹⁷⁸ Nevertheless, Justice Frankfurter criticized the majority for not providing greater explicitness that a business relation “militate[s] against a gift.”¹⁷⁹ Regarding the majority’s directions that the fact-finder determine intent by relying on their “experience with the mainsprings of human conduct,”¹⁸⁰ Justice Frankfurter stated that the majority “sets fact-finding bodies to sail on an illimitable ocean of individual beliefs and experiences” which will “encourage[] too individualized diversities in the administration of the income tax law.”¹⁸¹

171. *Id.* (emphasis added).

172. *Id.*

173. *Id.* at 287.

174. *Id.*

175. *Id.* at 288–89.

176. *Id.* at 290.

177. *Id.* at 295 (Frankfurter, J., concurring in part and dissenting in part).

178. *Id.*

179. *Id.*

180. *Id.* at 289.

181. *Id.* at 297.

After *Duberstein*, the charitable “gift” test was unsettled. In the two decades following the decision, taxpayers, the IRS, and the lower courts debated whether the *Duberstein* principles were relevant in defining the word “gift” under IRC § 170 when a donor made a contribution to charity and received a return benefit. Some courts embraced *Duberstein*, and others rejected it.

The Court of Claims debated the topic at length in *Singer Co. v. United States*.¹⁸² The Singer Sewing Machine Company sold sewing machines at a forty-five percent discount to public and parochial schools, the Red Cross, government agencies, and government and nonprofit hospitals, and it sold sewing machines at a twenty-five percent discount to churches and all other charities.¹⁸³ Singer claimed a charitable contribution deduction for the discounts.¹⁸⁴ The IRS urged the Court of Claims to apply *Duberstein* and conclude that Singer did not transfer the sewing machines to the schools with detached and disinterested generosity because the company anticipated future economic benefits.¹⁸⁵ Specifically, if public or parochial students learned to sew on Singer machines in school, those students would be more likely to buy Singer machines later in life.¹⁸⁶ On the other hand, Singer argued that *Duberstein* was inapplicable to charitable contributions under IRC § 170 and that the school discounts should be “gifts” under IRC § 170 because Singer did not receive a “specific and direct quid pro quo flowing from the transfer.”¹⁸⁷

The Court of Claims rejected both the IRS’s reliance on *Duberstein*¹⁸⁸ and Singer’s proposed test distinguishing between direct and indirect benefits.¹⁸⁹ Emphasizing the language of the legislative history, the Court of Claims stated that “charitable gifts are ‘those contributions which are made with no expectation of a financial return commensurate with the amount of the gift.’”¹⁹⁰ It continued, “[W]e do not contend that absolutely no benefits can be derived from an

182. 449 F.2d 413 (Ct. Cl. 1971).

183. *Id.* at 415.

184. *Id.* at 416.

185. *Id.* at 418.

186. *Id.* at 423.

187. *Id.* at 419.

188. *Id.* at 422.

189. *Id.* at 420 (“We are of the opinion that [Singer’s] analysis . . . is overly restrictive and quite narrow.”).

190. *Id.* at 422 (quoting H.R. Rep. No. 83-1337, at A44 (1954); S. Rep. No. 83-1622, at 196 (1954)).

otherwise charitable contribution or gift. It is only when the benefits derived are substantial enough to provide a quid pro quo for the transfer that the deduction is not allowed.”¹⁹¹ This test arguably tracks the familiar “bargain” requirement under the common law of contracts, in which a benefit, bargain, or quid pro quo exists if the promisor would refuse to proceed with the transaction in the absence of the return benefit.¹⁹² Relying on three factors, the Court of Claims concluded that Singer’s “predominant reason for granting [the] discounts [to the schools] was other than charitable” because Singer “expected a return in the nature of future increased sales.”¹⁹³ It is noteworthy that although the Court of Claims rejected the *Duberstein* analysis proposed by the IRS, the Court of Claims based its conclusion on Singer’s expected and predominant reason for contributing.¹⁹⁴

One of the first charitable contribution cases expressly applying the *Duberstein* principles was the Tax Court’s opinion in *DeJong v. Commissioner*.¹⁹⁵ In *DeJong*, the taxpayers’ two children attended a church-operated grammar school.¹⁹⁶ Church officials told the taxpayers that the cost of educating their two children for the year would be \$400, and the church officials suggested that the taxpayers contribute the full amount of that estimated cost.¹⁹⁷ The taxpayers contributed \$1075 and claimed the entire amount as a charitable contribution deduction.¹⁹⁸ The Tax Court cited *Duberstein* and stated, “If a payment proceeds primarily from the incentive of anticipated benefit to the payor beyond the satisfaction which flows from the performance of a generous act, it is not a gift.”¹⁹⁹ The Tax Court agreed with the IRS’s determination that \$400 of the transfer was a payment for services and not a deductible charitable contribution.²⁰⁰

A later case following *DeJong* and *Duberstein* was *Collman v. Commissioner*,²⁰¹ in which the taxpayer owned a citrus grove bounded

191. *Id.* at 423 (citations omitted).

192. See PERILLO, *supra* note 29, at 159–60.

193. *Singer*, 449 F.2d at 423–24.

194. *Id.*

195. *DeJong v. Comm’r*, 36 T.C. 896 (1961), *aff’d*, 309 F.2d 373 (9th Cir. 1962).

196. *Id.* at 900.

197. *Id.* at 899–900.

198. *Id.* at 900.

199. *Id.* at 899 (citing *Comm’r v. Duberstein*, 363 U.S. 278).

200. See *id.* at 900 (concluding that the \$400 payment was “induced, at least in substantial part, by the benefits which the parents sought and anticipated from the enrollment of their children as students in the [Church’s] school”).

201. 511 F.2d 1263 (9th Cir. 1975).

by Orangethrope Avenue and bisected by Orchard Avenue.²⁰² The taxpayer dedicated approximately three-quarters of an acre of land (worth more than \$33,000) to the local municipality, and the local municipality agreed to expand the two streets and construct gutters and curbs.²⁰³ After citing *DeJong* with approval, the Ninth Circuit cited *Duberstein* for the rule that “[t]he critical consideration . . . is the transferor’s *intention* . . . [and the] decision as to intent or motive necessarily must be based on the factfinder’s experience with human conduct as applied to the totality of the facts.”²⁰⁴ The Ninth Circuit rejected the Tax Court’s conclusion that the taxpayer was entitled to no charitable deduction; instead the Ninth Circuit merely reduced the deduction by the \$20,711 cost of the improvements which “represents consideration” to the taxpayer.²⁰⁵

Some courts questioned whether the focus on the transferor’s intent was appropriate. In 1972, the First Circuit “expressed [its] dissatisfaction with such subjective tests as the taxpayer’s motives in making a purported charitable contribution.”²⁰⁶ Employing more memorable language in a prior case, the First Circuit stated, “Were the deductibility of a contribution under section 170(c) . . . to depend on ‘detached and disinterested generosity,’ an important area of tax law would become a . . . nest of uncertainty woven of judicial value judgments irrelevant to eleemosynary reality.”²⁰⁷ In contrast, in *Dowell v. United States*,²⁰⁸ the Tenth Circuit emphasized that although *Duberstein* focused on the transferor’s intent, *Duberstein* also directed the fact-finder to “predicate his conclusion upon his experience ‘. . . with the mainsprings of human conduct as applied to the totality of the facts of each case’”²⁰⁹ Accordingly, the Tenth Circuit emphasized that the transferor’s subjective and self-serving testimony, while admissible, will only “be given such weight as the circumstances from the entire record dictate.”²¹⁰ Because such testimony will likely

202. *Id.* at 1265.

203. *Id.* at 1265–66.

204. *Id.* at 1267.

205. *Id.* at 1269.

206. *Oppewal v. Comm’r*, 468 F.2d 1000, 1002 (1st Cir. 1972).

207. *Crosby Valve & Gage Co. v. Comm’r*, 380 F.2d 146, 146 (1st Cir. 1967).

208. 553 F.2d 1233 (10th Cir. 1977).

209. *Id.* at 1238 (quoting *Comm’r. v. Duberstein*, 363 U.S. 278, 289 (1960) (alteration in original)).

210. *Id.* at 1238 (citing *King v. United States*, 545 F.2d 700 (10th Cir. 1976)).

be “subjective” and “inclined to be self-serving in relation to the issue of intent” such testimony will be suspect.²¹¹

2. *U.S. Supreme Court subsequently established a general test*

In 1986, in *United States v. American Bar Endowment*,²¹² the U.S. Supreme Court established a two-prong test to calculate the charitable deduction when an individual transfers funds to a charity but receives a benefit in return. The U.S. Supreme Court emphasized that the burden is on the donor to prove both prongs.²¹³

In *American Bar Endowment*, the U.S. Supreme Court addressed a peculiar fact pattern but chose to establish a general test intended to apply to all charitable donors who receive a substantial benefit in return.²¹⁴ American Bar Endowment (ABE) was a charitable organization described in IRC § 501(c)(3) and was eligible to receive tax-deductible charitable contributions.²¹⁵ ABE initially developed a group-term life insurance program²¹⁶ and eventually expanded the program to include health, accident, and disability insurance policies.²¹⁷ Under ABE’s program, American Bar Association (ABA) members paid premiums to buy insurance.²¹⁸ The dividends on that insurance, which the insurer normally would pay back to the insured-member, were retained by the ABE for its charitable activities.²¹⁹ The dividends were the ABA members’ premiums in excess of ABE’s cost of providing the insurance.²²⁰ ABE explained the charitable aspects of

211. *Id.*

212. 477 U.S. 105 (1986).

213. *Id.* at 117–18.

214. See *United States v. Am. Bar Endowment*, 761 F.2d 1573, 1579 (Fed. Cir. 1985) (noting that “[t]he taxpayers’ case is unusual”), *rev’d*, 477 U.S. 105 (1986).

215. *Am. Bar Endowment*, 477 U.S. at 107 (“ABE’s primary purposes are to advance legal research and to promote the administration of justice . . .”).

216. *Am. Bar Endowment v. United States*, 4 Cl. Ct. 404, 405–06 (1984), *aff’d in part, rev’d in part*, 761 F.2d 1573 (Fed. Cir. 1985), *rev’d*, 477 U.S. 105 (1986).

217. *Am. Bar Endowment*, 477 U.S. at 107.

218. *Id.* (“The ABA is exempt from taxation as a ‘business league’ under [I.R.C.] § 501(c)(6).”). Business leagues are tax-exempt, but they are not entitled to receive tax-deductible charitable contributions. *Am. Bar Endowment*, 4 Cl. Ct. at 413. Business leagues often use affiliated organizations described in IRC section 501(c)(3) to carry out charitable activities. See BRUCE R. HOPKINS, *THE LAW OF TAX-EXEMPT ORGANIZATIONS* 874 (10th ed. 2011) (providing an example of a medical society organizing a scholarship fund for medical students “as a charitable organization for both tax exemption and tax-deductible charitable giving purposes”).

219. *Am. Bar Endowment*, 477 U.S. at 108.

220. *Id.*

this arrangement to an ABA member before the member joined and began paying premiums, and there was no requirement that an ABA member buy this insurance.²²¹ ABA members were free to buy insurance from other sources.²²² ABE informed participating members “what percentage of [their] total premiums had been . . . used for charitable purposes,” and many ABA members claimed an income tax charitable deduction for the dividends retained by ABE, as if the participants had paid those amounts to a charity.²²³

The IRS disallowed ABA members’ charitable income tax deductions for the dividends arguing that ABA members had not made gifts or contributions and instead merely purchased insurance.²²⁴ The divergent legal theories used, and the conclusions reached, by the different courts deciding this case demonstrate the legal uncertainty pervading this entire topic before the U.S. Supreme Court’s decision. At trial, the U.S. Claims Court stated that “[t]he valuation of insurance is . . . difficult,”²²⁵ but ruled that no member could deduct any part of the dividends.²²⁶ The Claims Court appeared to adopt two theories. First, the court stated no charitable deduction is available “where the entire amount paid by the taxpayer is economically motivated.”²²⁷ Second, the court stated that “[t]o establish that a portion of the payment for ABE insurance is a charitable contribution, a [taxpayer] must show that an equivalent insurance product was available to him for a lower price and that he bypassed that product because he wished to make a charitable contribution to the Endowment.”²²⁸

On appeal, the Federal Circuit concluded that the Claims Court applied the wrong legal test and reversed.²²⁹ The Federal Circuit relied heavily on *Singer* and another case to conclude that an ABA member could deduct the amount of the dividends by showing that his or her transaction had a “charitable nature” rather than a “business

221. See *Am. Bar Endowment*, 4 Cl. Ct. at 408 (noting members were “well informed” about the program and its “fundraising nature”).

222. *Am. Bar Endowment*, 477 U.S. at 127 (Stevens, J., dissenting).

223. *Am. Bar Endowment*, 4 Cl. Ct. at 409.

224. *Id.* at 415.

225. *Id.*

226. *Id.* at 417–18.

227. *Id.* at 415.

228. *Id.* at 416.

229. *United States v. Am. Bar Endowment*, 761 F.2d 1573, 1581–83 (Fed. Cir. 1985), *rev’d*, 477 U.S. 105 (1986).

nature.”²³⁰ The Federal Circuit criticized the Claims Court for making an “incorrect definitization of the proper standard” and imposing “too harsh a burden on [donors].”²³¹ In the final appeal, the U.S. Supreme Court rejected the Federal Circuit’s legal test.

In *American Bar Endowment*, the U.S. Supreme Court devoted just three pages to this topic.²³² The Court initially stated that

[w]here the size of the [donor’s] payment is clearly out of proportion to the benefit received, . . . [a] taxpayer may therefore claim a deduction for the difference between a payment to a charitable organization and the market value of the benefit received in return, on the theory that the payment has the “dual character” of a purchase and a contribution.²³³

The Court then added an additional requirement, namely that “the excess payment must be ‘made with the intention of making a gift.’”²³⁴ The Court clearly holds that the burden is on the donor to prove both prongs of the test.²³⁵

Applying the two-prong test to the four individual ABA members involved in the case, the Court held that three members did not satisfy their burden under the first prong. They “failed to establish that the value of ABE’s insurance to them was less than the premiums paid.”²³⁶

230. *Id.* at 1582 (citing *Ottawa Silica Co. v. United States*, 699 F.2d 1124 (Fed. Cir. 1983)); *Singer Co. v. United States*, 449 F.2d 413 (Ct. Cl. 1971)) (indicating that the transaction would have a “charitable character” for members who made “a sworn assertion that they wanted to aid that charitable endeavor and entered [ABE’s] plan because it enabled them to do so”). For a discussion of the *Singer* case, see *supra* notes 182–87 and accompanying text. In *Ottawa Silica*, the taxpayer contributed real estate to a school district and expected the transaction to increase the value of other land owned by the taxpayer. *Ottawa Silica Co.*, 699 F.2d at 1126–27. The Federal Circuit concluded the taxpayer was not entitled to a charitable contribution deduction because the taxpayer expected a future economic benefit. *Id.* at 1132.

231. *Am. Bar Endowment*, 761 F.2d at 1581. The Federal Circuit also criticized the Claims Court for calculating the value of the insurance incorrectly. *Id.* at 1582 (“[T]he court below failed to take into account the fact that . . . the participants are entitled to their dividends.”).

232. *United States v. Am. Bar Endowment*, 477 U.S. 105, 116–18 (1986). Separate from the charitable deduction issue, the U.S. Supreme Court engaged in a detailed analysis of whether ABE was liable for unrelated business income tax (UBIT) on the net income earned from the insurance program. *See id.* at 109–16.

233. *Id.* at 117 (citing Rev. Rul. 68-432, 1967-2 C.B. 104, 105).

234. *Id.*

235. *Id.* at 118 (“The taxpayer, therefore, must at a minimum demonstrate that he purposely contributed money or property in excess of the value of any benefit he received in return.”).

236. *Id.* at 117.

Although the fourth member satisfied the first prong, he did not meet his burden under the second prong because he “failed to establish that he was aware of [a cheaper insurance] program during the years at issue.”²³⁷ Thus, he failed to meet his burden that he “purposely contributed money or property in excess of the value of any benefit he received in return,” or phrased another way, he “failed to demonstrate that he intentionally gave away more than he received.”²³⁸

Further, in *American Bar Endowment*, the U.S. Supreme Court ignored its 1960 *Duberstein* decision, so the IRS need not follow the *Duberstein* principles.²³⁹ Nevertheless, *Duberstein* contains some wisdom in evaluating donor intent that the IRS could consider in formulating a new approach to charitable publicity. Because the IRS established its approach to charitable publicity before this U.S. Supreme Court case, the IRS should reevaluate its position.

Three years after *American Bar Endowment*, the U.S. Supreme Court tackled another case in which the donors received a hard-to-value benefit. In *Hernandez v. Commissioner*,²⁴⁰ hundreds of members of the Church of Scientology claimed a charitable contribution deduction for payments to the Church in exchange for certain intangible religious benefits, referred to as “auditing” and “training” services.²⁴¹ The Church designed the auditing and training services to allow church members to become “aware of [their] spiritual dimension.”²⁴² In disallowing the claimed deductions, the IRS asserted that the church members received a return benefit, so their payments were purchases and not gifts under IRC § 170.²⁴³

The U.S. Supreme Court discussed its prior decision in *American Bar Endowment* with approval,²⁴⁴ but the Court did not need to discuss the *American Bar Endowment* test in detail, nor expand on procedures for

237. *Id.* at 118.

238. *Id.*

239. See Kahn & Kahn, *supra* note 8, at 512 (discussing the *American Bar Endowment* and *Hernandez* cases and concluding, “[T]he *Duberstein* standard of ‘detached and disinterested generosity’ . . . has been rejected or ignored by the Supreme Court”).

240. 490 U.S. 680 (1989).

241. *Id.* at 683; see Geier, *supra* note 111, at 433 (discussing the donations to the Church of Scientology).

242. *Hernandez*, 490 U.S. at 684.

243. See *id.* at 686.

244. See *id.* at 691 (discussing *American Bar Endowment* and stating the Court “upheld the Commissioner’s disallowance of the partial deductions because the taxpayers had failed to demonstrate . . . the existence of comparable insurance policies with lower prices”).

its application, because the donors did not challenge this general method of analysis.²⁴⁵ Instead, the donors specifically argued that any “quid pro quo analysis is inappropriate under § 170 when the benefit a taxpayer receives is purely religious in nature,” and that any “payments made for the right to participate in a religious service should be automatically deductible under § 170.”²⁴⁶ Also, the dissenting justices argued that intangible religious benefits are difficult to value under any quid pro quo analysis because there is no non-charitable, commercial market for this type of a return benefit.²⁴⁷

The Court rejected these arguments, stating that they find “no support in the language of § 170,”²⁴⁸ and “[t]he Code makes no special preference for payments made in the expectation of gaining religious benefits [and] . . . the legislative history . . . offer[s] no indication that Congress’s failure to enact such a preference was an oversight.”²⁴⁹ Regarding calculating the value of the auditing and training services, the Court rejected the argument that it was impractical to value the services because “the Church itself had ‘established and advertised monetary prices’ for auditing and training sessions.”²⁵⁰ Applying these principles to charitable publicity, many charities now advertise naming

245. See Rodney P. Mock, *Burning down the House and the Charitable Deduction*, 11 HOUS. BUS. & TAX L.J. 353, 377 (2011) (“The *Hernandez* court made no mention of the substantial versus incidental issue. Instead, it threw further darkness on the issue in a footnote, stating that the taxpayers never argued that their payments qualified as ‘dual payments,’ and that they are therefore entitled to a partial deduction.”).

246. *Hernandez*, 490 U.S. at 692. This argument finds support in the IRS’s treatment of pew rents, payments for attendance at High Holy Day services, and mass stipends. See *Tax Write-Offs for Synagogue Seats: Any Prayer for Full Deductibility?*, 107 J. TAX’N. 317, 317–18 (2007) (citing Rev. Rul. 70-47, 1970-1 C.B. 49, 49).

247. *Hernandez*, 490 U.S. at 706–07 (O’Connor, J., dissenting) (“It becomes impossible, however, to compute the ‘contribution’ portion of a payment to a charity where what is received in return is [an item] . . . that is not bought and sold except in donative contexts so that the only ‘market’ price against which it can be evaluated is a market price that always includes donations.”). The dissenting judges indicated that between the choices of (i) allowing a deduction for payments in exchange for intangible religious benefits and (ii) prohibiting any deduction whatsoever for a payment in exchange for an intangible religious benefit, it would be preferable to allow donors to deduct these payments in full. See *id.* at 707.

248. *Id.* at 692 (majority opinion).

249. *Id.* at 693.

250. *Id.* at 688 (quoting *Hernandez v. Comm’r*, 819 F.2d 1212, 1218 (1st Cir. 1987), *aff’d*, 470 U.S. 680 (1989)); see also Kahn & Kahn, *supra* note 8, at 519–20. (agreeing that, although a charitable organization may have greater bargaining power, it is reasonable to accept the value of the benefit as equal to the price that the charity charged for it).

rights and the related minimum donation amounts on their websites, in effect providing a price list to prospective donors.²⁵¹

In addition to indicating that the IRS and the courts should apply the first prong of the *American Bar Endowment* test even when the return benefits are hard to value, the Court in *Hernandez* indicated that when applying the second prong—the donor’s intent test—the IRS or a court may sometimes resolve the inquiry by focusing on external factors rather than making a complex analysis of other factors.²⁵² *Hernandez* was a rather unique factual case in that the donors received intangible religious benefits, and the Church structured the program with many commercial features, including publishing a price list, offering pre-payment discounts, refusing to provide any free services, and granting refunds if an individual paid but did not receive the services purchased from the price list.²⁵³

American Bar Endowment, and to a lesser extent *Hernandez*, established an analytical framework for determining a donor’s charitable contribution deduction when the donor received a return benefit. Because the IRS created its approach to charitable publicity in Revenue Ruling 68-432 and the other authorities before the U.S. Supreme Court established the method of analysis in *American Bar Endowment* and *Hernandez*, it would be appropriate for the IRS to reconsider its approach. Furthermore, *American Bar Endowment* emphasized that the donor should bear the burden in these cases.²⁵⁴ As the IRS approach in Revenue Ruling 68-432 and the related authorities fail to clearly put the burden on the donor, arguably Revenue Ruling 68-432 and the related authorities no longer create an appropriate approach in these situations.

251. See Drew Lindsay, *Your Name Here.Org*, CHRON. PHILANTHROPY, June 2015, at 20, <https://www.philanthropy.com/article/As-Menu-of-Naming-Rights/230469> (discussing how the age of the Internet has promoted a growing practice of non-profits advertising naming opportunities).

252. See *Hernandez*, 490 U.S. at 690–91 (noting that focusing on external factors allows the IRS to avoid “imprecise inquiries into the motivations of individual taxpayers”).

253. *Id.* at 691–92.

254. *United States v. Am. Bar Endowment*, 477 U.S. 105, 117–18 (1986).

B. No Indication the Government Has Applied (or Imposed) the Gift or Estate Tax on Charitable Publicity Rights

The federal estate tax and its sidekick, the federal gift tax, have faced many existential crises.²⁵⁵ The role of these taxes, which are imposed on gratuitous transfers of property during life and at death, is controversial. Commentators assert that this transfer tax system has not raised significant revenue for the government, but it has great potential to address wealth inequality.²⁵⁶ President Theodore Roosevelt, a staunch advocate of death taxes, said, “[A] prime objective should be to put a constantly increasing burden on the inheritance of those swollen fortunes which it is certainly of no benefit to the country to perpetuate.”²⁵⁷ Despite Theodore Roosevelt’s eloquence, Congress did not pass a federal estate tax until the Woodrow Wilson Administration.²⁵⁸

The estate tax imposes a high, flat rate of tax on the value of the decedent’s estate in excess of a threshold amount.²⁵⁹ The threshold

255. See Mitchell M. Gans & Jay A. Soled, *Reforming the Gift Tax and Making It Enforceable*, 87 B.U. L. REV. 759, 762 n.14 (2007) (referring to the gift tax as a “necessary backstop to the estate tax”). See generally Louis Eisenstein, *The Rise and Decline of the Estate Tax*, 11 TAX L. REV. 223, 223 (1956) (observing that the ancient Egyptian, Greek, and Roman civilizations imposed taxes at death; however, historical critics were primarily concerned with causing stress to the survivors rather than economic ideology); Rahim Silberstein, *A History of the Death Tax: A Source of Revenue, or a Vehicle for Wealth Redistribution?*, PROB. & PROP., May/June 2003, at 58, 62–63.

256. BORIS I. BITTKER ET AL., FEDERAL ESTATE AND GIFT TAXATION 1 (10th ed. 2011) (“[These] taxes . . . are not important sources of government revenue. The federal government has collected \$40 billion to \$2 trillion in taxes annually since World War II; of this amount, estate and gift taxes have yielded only \$500 million to \$30 billion a year.”); see, e.g., Goldburn P. Maynard Jr., *Addressing the Wealth Disparities: Reimagining Wealth Taxation as a Tool for Building Wealth*, 92 DENV. U. L. REV. 145, 146–47 (2014) (discussing the potential to address wealth inequality).

257. BITTKER ET AL., *supra* note 256, at 3 (citing 17 THEODORE ROOSEVELT, WORKS OF THEODORE ROOSEVELT 434 (1925)); see Silberstein, *supra* note 255, at 61 (“Roosevelt propelled the death tax movement into the limelight in 1906.”).

258. Carlyn S. McCaffrey & John C. McCaffrey, *Our Wealth Transfer Tax System—A View from the 100th Year*, 41 ACTEC L.J. 1, 2 (2015) (“Our current wealth transfer tax system was . . . battle-born on September 8, 1916, a few months before the United States joined World War I on April 6, 1917.”).

259. See BITTKER ET AL., *supra* note 256, at 19 (noting that in 1976 Congress reduced the unified gift and estate tax rate from 77 percent to 70 percent). For decedents dying in 2017, the unified gift and estate tax rate was a flat 40 percent. I.R.C. § 2001(c) (2012); see Stephen M. Margolin & Lindsey Paige Markus, *Estate Tax Relief, Income Tax Headache: Estate Planning and the American Taxpayer Relief Act*, ILL. B.J., Feb. 2014, at 92, 96 (explaining the new challenges imposed by the estate tax and offering two

amount has varied significantly over time.²⁶⁰ For decedents dying in 1975, the tax-free threshold was only \$60,000;²⁶¹ for decedents dying in 2017, the tax-free threshold was \$5,490,000.²⁶² As further evidence of volatility, there was no federal estate tax for decedents dying in 2010.²⁶³ For example, when billionaire George Steinbrenner, former owner of the New York Yankees baseball team, died that year, the federal government could not collect any estate tax.²⁶⁴ In 2016, both President-elect Donald Trump and Speaker of the House Paul Ryan proposed abolishing the federal estate tax.²⁶⁵

suggestions depending on the client's needs: a fully funded marital deduction trust and a traditional A/B trust to retain wealth). The lower tax rates listed in the I.R.C. § 2001(c) rate schedule generally do not apply because of the estate tax exemption amount under I.R.C. § 2010(c). See BITTKER ET AL., *supra* note 256, at 20 (observing that because the unified credit under I.R.C. § 2010(c) effectively exempts the amount of taxable transfers otherwise taxed at lower rates, the “estate and gift taxes in effect are imposed at a flat . . . rate”).

260. See BITTKER ET AL., *supra* note 256, at 19 (“The exemption (*i.e.*, the amount sheltered from tax by the unified credit) has grown by leaps and bounds from its original level of less than \$200,000 under the 1976 Act.”).

261. See *id.* (noting the \$60,000 estate tax threshold); Silberstein, *supra* note 255, at 60–61 (“The 1976 Act also increased the \$60,000 estate tax exemption to \$175,000.”).

262. See I.R.C. § 2010(c)(3)(A) (setting the “basic exclusion amount” at \$5 million); I.R.C. § 2010(c)(3)(B) (directing that the basic exclusion amount will increase annually for inflation in \$10,000 increments for decedents dying after 2011); Rev. Proc. 2016-55, 2016-45 I.R.B. 707, § 3.35 (2016) (specifying that the exclusion amount for 2017 is \$5,490,000).

263. See Peter J. Kosydar, III, “*Death and Taxes*” or *Death Without Taxes*, 37 J. LEGIS. 224, 225–26 (2012) (exploring the constitutionality and ramifications of a retroactive estate tax).

264. *Id.* at 225. (“George Steinbrenner potentially saved his heirs \$500 million by dying on July 13, 2010 [because] . . . the estate tax was repealed for the year 2010.”).

265. See Max Ehrenfreund, *Analysis: By 2025, 99.6% of Paul Ryan's Tax Cuts Would Go to the Richest 1% of Americans*, WASH. POST (Sept. 16, 2016), https://www.washingtonpost.com/news/wonk/wp/2016/09/16/analysis-by-2025-99-6-of-paul-ryans-tax-cuts-would-go-to-the-richest-1-of-americans/?utm_term=.84fe208b2d43 (regarding Speaker Paul Ryan's tax plan); Sahil Kapur, *Estate Tax Repeal Would Be a Bonanza for Trump and His Cabinet*, BLOOMBERG (Dec. 9, 2016 5:00 AM), <https://www.bloomberg.com/politics/articles/2016-12-09/estate-tax-repeal-under-trump-would-benefit-president-cabinet> (observing that President Trump and Speaker Ryan's mutual desire to abolish the estate tax would offer Trump's cabinet a windfall in tax-savings); Anthony G. Sandomato, *Keeping Your Balance: What Estate Planners Might Expect Under Trump*, DAILY REC. (Jan. 19, 2017), <http://nydailyrecord.com/2017/01/19/keeping-your-balance-what-estate-planners-might-expect-under-trump> (discussing President Donald Trump's tax plan); see also Brandon C. Roman, *Tax-Writers Huddle Up as Trump Releases Tax Principles*, CAP. THINKING BLOG (May 1, 2017), <http://www.capitalthinkingblog.com/2017/05/tax->

The federal gift tax is an essential compliment to the federal estate tax. The federal estate tax generally applies to property in which the decedent has an interest at death.²⁶⁶ As a result, if there were only an estate tax, the wealthy could transfer their property to younger generation family members before death and avoid transfer tax. Accordingly, the government created a gift tax to restrict tax-avoidance opportunities.²⁶⁷ The gift tax allows a generous annual exclusion,²⁶⁸ but the tax on amounts given during lifetime in excess of the annual exclusion may be subject to a gift tax coordinated, at least in part, with the estate tax.²⁶⁹ As an example of the coordination between the gift and estate taxes, prior adjusted taxable gifts are added to a decedent's taxable estate to calculate the "tentative estate tax," and that amount is reduced by a unified credit, to approximate the total tax liability as if the decedent had not made any lifetime taxable gifts and instead had transferred all the property at death.²⁷⁰

The Avery Fisher saga²⁷¹ colorfully illustrates that a philanthropist can transfer substantial wealth to younger family members through a charitable naming arrangement. In the Fisher saga, the family patriarch, Avery Fisher, donated \$10.5 million to a charity and received *perpetual* naming rights over a very prominent charitable building in New York City. After his death, when the charity concluded it needed

writers-huddle-up-as-trump-releases-tax-principles (reporting that the Trump Administration released a list of tax principles on April 26, 2017 proposing the repeal of the estate tax but preserving the charitable income tax deduction for individuals).

266. See I.R.C. § 2031(a) (defining gross estate).

267. See § 2501(a)(1) (establishing a gift tax); McCaffrey & McCaffrey, *supra* note 258, at 13 (noting that "[t]he stated purpose of the gift tax was to prevent the avoidance of the estate tax").

268. See I.R.C. §§ 2503(a)–(e) (permitting an annual exclusion of \$10,000, adjusted for inflation, as well as exemptions for donations to minors, education, and medical expenses).

269. See Silberstein, *supra* note 255, at 60 ("[T]he Tax Reform Act of 1976 . . . integrated the formerly separate estate and gift tax schedules."). Before a donor would pay a gift tax, the donor's taxable gifts during lifetime would need to exceed the estate tax exclusion amount. See I.R.C. § 2505(a)(1) (allowing a credit equal to the estate tax credit under § 2010(c) applicable "if the donor died as of the end of the calendar year"); see also *supra* note 262 and accompanying text (discussing the \$5,490,000 estate tax exclusion amount for decedents dying in 2017).

270. See BITTKER ET AL., *supra* note 256, at 21 (noting that the systems are not fully integrated, in part, because a "decedent's taxable estate includes amounts used to pay estate taxes, but a donor's taxable gifts do not include amounts used to pay gift taxes").

271. For a more detailed discussion of the Avery Fisher saga, see *supra* notes 1–4, 15–18 and accompanying text.

to violate the condition and rename the building to raise funds to renovate, Fisher's heirs sold those naming rights back to the charity for \$15 million. There appears to be no reported cases or other legal authority indicating the IRS has even attempted to impose a gift or estate tax on charitable publicity rights benefitting a decedent's heirs.²⁷² Nevertheless, the gift and estate tax structures could impose a federal gift and estate tax in these situations.

In general, IRC section 2501(a)(1) imposes a tax on the "transfer of property by gift," and the amount of the gift is reduced by the value of any consideration received.²⁷³ The applicable regulations clarify that "[t]ransfers reached by the gift tax are not confined to those [in] . . . accord with the common law concept of gifts," and includes any exchanges when the value of the property contributed exceeds the consideration received in return.²⁷⁴ In a charitable naming transaction, the philanthropist will transfer money or property to the charity in exchange for publicity. Thus, for gift tax purposes, a naming philanthropist may have made a gift to the charity to the extent the philanthropist's contribution exceeds the value of the return publicity benefits received.²⁷⁵ Normally in calculating the gift tax, a donor can deduct all gifts made to a charity.²⁷⁶

272. See McCaffrey & McCaffrey, *supra* note 258, at 41 n.175 (discussing the right of publicity but failing to cite any cases regarding charitable naming rights). See generally Mitchell Gans et al., *Postmortem Rights of Publicity: The Federal Estate Tax Consequences of New State-Law Property Rights*, 117 YALE L.J. POCKET PART 203, 206 (2008), <http://www.yalelawjournal.org/forum/postmortem-rights-of-publicity-the-federal-estate-tax-consequences-of-new-state-law-property-rights> (concluding that "[d]escendible property rights to postmortem publicity . . . are property rights that likely will be included in a decedent's gross estate" but not mentioning charitable publicity rights); Ray D. Madoff, *Taxing Personhood: Estate Taxes and the Compelled Commodification of Identity*, 17 VA. TAX REV. 759, 773 (1998) (noting that "every expansion of the concept of property has resulted in an expanded application of the estate tax" but not mentioning charitable publicity rights).

273. I.R.C. §§ 1250, 2512(b).

274. Treas. Reg. § 25.2512-8 (1992); see *Comm'r. v. Wemyss*, 324 U.S. 303, 306 (1945) (concluding that the gift tax can apply even when the donor has no "donative intent" under state law).

275. For gift tax purposes, the amount of a present interest gift also would be reduced by the amount of the annual exclusion, which was \$14,000 in 2017. See I.R.C. § 2503(b)(1) (providing for a \$10,000 exclusion); see also § 2503(b)(2) (providing for inflation adjustments); Rev. Proc. 2016-55, 2016-45 I.R.B. 707, 714 (2016) (reporting that the annual exclusion amount for 2017 was \$14,000).

276. I.R.C. § 2522(a)(2).

No charitable deduction is available, however, if a “donor transfers an interest in property . . . to a [charity] . . . and an interest in the same property is retained by the donor, or is transferred . . . from the donor to [another person other than a charity].”²⁷⁷ This is sometimes referred to as the “partial interest rule” because it prohibits a charitable deduction for the transfer of a partial interest to charity.²⁷⁸ Congress included some narrow exceptions with this all-or-nothing rule that would not apply in a charitable naming transaction.²⁷⁹

The regulations under the partial interest rule provide rules for conditions precedent and conditions subsequent which could be relevant for charitable naming transactions or other charitable publicity arrangements. The regulations provide in part,

If an estate or interest has passed to, or is vested in, [a] charity on the date of the gift and the estate or interest would be defeated by the performance of some act or the happening of some event, the possibility of occurrence of which appeared on such date to be so remote as to be negligible, the deduction is allowable.²⁸⁰

If this exception does not apply, because the possibility is more than negligible, the statutory partial interest rule will apply, the charitable deduction will be unavailable, and *the donor’s gift to the charity could be subject to the gift tax*. This regulation might apply to a charitable naming transaction if the donor contributed cash or property to the charity on the condition that the charity name a prestigious building or other space or place after the donor for a significant period of time or in perpetuity.

Also, the federal estate tax regulations and the federal income tax regulations employ the same test, namely “so remote as to be negligible,” in determining when a condition jeopardizes the charitable deduction.²⁸¹ Thus, if a donor’s contribution is conditioned

277. § 2522(c)(2).

278. See Treas. Reg. § 25.2522(c)-3(d)(1) (2016) (referring to a “contribution of a partial interest in property”).

279. See I.R.C. § 2522(c)(2)(A) (listing the major exceptions as a retained interest in a charitable remainder annuity trust, a retained interest in a charitable remainder unitrust, and an interest in a pooled income fund).

280. Treas. Reg. § 25.2522(c)-3(b)(1) (2016); see *Briggs v. Comm’r*, 72 T.C. 646, 656–57 (1979) (defining the phrase “so remote as to be negligible” under the estate tax regulations to mean “a chance which persons generally would disregard as so highly improbable that it might be ignored with reasonable safety in undertaking a serious business transaction”).

281. Treas. Reg. § 20.2055-2(b)(1) (2016) (federal estate tax); § 1.170A-1(e) (federal income tax).

on the charity naming a building after the donor in perpetuity, and there is a non-negligible risk the charity will remove the donor's name, a portion of the contribution should be subject to gift tax (or estate tax if the transfer is at death), and no charitable income tax deduction should be allowed.²⁸² The Avery Fisher saga demonstrates that the risk may be more than negligible when the following circumstances are present: the donor and charity agree to perpetual naming rights, the building will need renovation eventually, and the charity will be unable to raise the necessary funds for a renovation without offering building naming rights to a donor for the renovation. A researcher in 2007 determined that the traditional duration for charitable building naming rights is perpetual.²⁸³

Nevertheless, no reported gift or estate tax rulings or cases appear to even address the question.²⁸⁴ Thus, there seems to be no authority that would suggest the IRS has even raised this issue. It appears that practitioners do not contemplate any risk that a naming requirement will be a more-than-negligible condition that may jeopardize the income, gift, or estate tax charitable deduction.²⁸⁵

One estate tax case concluded that a deceased author's name can be a property right subject to estate tax and the value depends on the popularity of the name. In *Estate of Andrews v. United States*,²⁸⁶ Virginia C. Andrews died at the height of her fame.²⁸⁷ Andrews was an internationally-known, best-selling author, and the "undisputed master" of the "children in jeopardy" genre.²⁸⁸ She had written seven commercially-successful novels in the genre and was in the process of

282. See Gans et al., *supra* note 272, at 208 (emphasizing that the estate tax only applies if there is a transfer of property).

283. See BURTON, *supra* note 4, at 162 ("The long-standing tradition is to use 'in perpetuity' as the basis for the named gift."). *But see id.* at 143 (mentioning an example where "[t]he name will remain on the building . . . for the life of the building").

284. See *supra* note 272 (providing examples of cases and sources that fail to discuss the issue).

285. See, e.g., Christine W. Hubbard, *Draft Charitable Gifts that Protect Donor Intent and Tax Savings*, EST. PLAN., July 2015, at 26, 33 ("The IRS agrees that so long as these [naming opportunity] gifts further the organization's charitable purposes, the deductibility of a gift conditioned on the naming opportunity will be honored"). See generally John McGown, Jr., *Major Charitable Gifts—How Much Control Can Donors Keep and Charities Give Up?*, 91 J. TAX'N 279 (1999) (failing to discuss charitable naming rights).

286. 850 F. Supp. 1279 (E.D. Va. 1994).

287. *Id.* at 1281.

288. *Id.*

concluding a contract with her publisher in which she would produce two more novels and receive \$3 million in advance royalties.²⁸⁹ A representative of her publisher stated, “[O]nly [fifty] other authors ever had achieved the level of sales achieved by Andrews,” and “[s]he was one of those rare authors who brought millions of readers into the stores within weeks of each new release.”²⁹⁰ Andrews died before the publisher signed the \$3 million contract.²⁹¹ Nevertheless, the publisher was confident that a ghostwriter could imitate the Virginia C. Andrews style and successfully publish under her name.²⁹² The publisher entered into a contract with the Andrews estate allowing the publisher to use the Andrews name.²⁹³

Initially the Andrews estate included no value for her name on the federal estate tax form.²⁹⁴ In response, the IRS asserted that the “Andrews’ name was an asset of the Estate” worth over \$1.2 million.²⁹⁵ At the trial, the estate argued that any value was speculative because the ghostwriter might fail, and the name was worth only \$140,000.²⁹⁶ Although there were concerns, the ghostwriter was very successful. The publisher announced the ghostwriter’s first book a commercial success within a week of its release, and the ghostwriter produced at least four more novels in the genre and in the Andrews style.²⁹⁷ All of the ghostwriter’s books published under the name “Virginia C. Andrews” made no mention of the ghostwriter.²⁹⁸ The court indicated that the name was a property right subject to the estate tax,²⁹⁹ but the court refused to assign a value beyond the first book because of the uncertainty of success for any of the ghostwritten books at the date of death.³⁰⁰ The IRS asserted a value of over \$1.2 million, the estate proposed \$140,000, and the court determined a value of \$703,000.³⁰¹

289. *Id.* at 1281–82.

290. *Id.*

291. *Id.* at 1283.

292. *Id.* (explaining that Andrew Niederman was the ghostwriter).

293. *Id.* at 1282–83.

294. *Id.* at 1281.

295. *Id.*

296. *Id.* at 1288.

297. *Id.* at 1284; *see also id.* at 1286 (stating that all “five ghostwritten books . . . enjoyed great commercial success”).

298. *Id.* at 1284.

299. *Id.* at 1288.

300. *Id.* at 1293.

301. *Id.* at 1295; *see Madoff, supra* note 272, at 780 (summarizing with what may have been an intentional pun, Professor Madoff opined that the court’s decision was an “attempt to find a happy *medium*” (emphasis added)).

III. PROBLEMS WITH INCONSISTENCY AND A PROPOSAL

Under the common law, many problems can arise if charitable publicity transactions are treated as gifts rather than contracts. Gift characterization may cause the parties to ignore matters they should negotiate, trigger results that conflict with reasonable expectations, and leave courts without appropriate options for resolving disputes. Under the tax law, the current approach to charitable publicity is inconsistent with U.S. Supreme Court cases and places an undue burden on other taxpayers. Because the facts and circumstances involved in charitable publicity arrangements can differ, no single approach may be perfect for all occasions, but treating significant arrangements as part sales for both common law and tax purposes generally would lead to more reasonable outcomes.

A. *Problems with Inconsistent Positions*

Problems arise when parties proceed as if the donor is making an unrequited gift. In those situations, the parties likely anticipate the donor will dictate the terms of the arrangement, the charity will passively agree, and the parties will not negotiate the terms thoroughly and carefully. One scholar devoted an entire law review article to problems arising when the following set of facts exists: the charity fails to negotiate a morals clause (also called a “bad boy” clause), the naming donor’s despicable conduct subsequently becomes public knowledge, and the ensuing revelations tarnish the charity’s reputation.³⁰² Examples apparently abound, from the criminal convictions of embezzler and former-Tyco C.E.O. Dennis Kozlowski focusing unwanted attention on Seton Hall University,³⁰³ to the guilty pleas of suspected child molester and former Illinois Congressman and Speaker of the U.S. House of Representatives Dennis Hastert highlighting his connections with Wheaton College.³⁰⁴

302. See generally Eason, *supra* note 17 (discussing the negative effects of donative naming).

303. See *id.* at 394–95 (noting that Kozlowski was charged with tax evasion, illegal stock sales, and misappropriating corporate funds); see also Goldberg, *supra* note 26, at 48–50 (discussing the effect of donor malfeasance and the importance of a morals clause for charities).

304. See Katherine Skiba, *Amid Allegations, Some Consider Removing Dennis Hastert’s Presence*, CHI. TRIB. (June 13, 2015, 6:18 AM), <http://www.chicagotribune.com/news/ct-hastert-portrait-us-capitol-20150612-story.html> (reporting that Wheaton College removed Hastert’s name from its Center for Economics, Government, and

A different negotiation failure involves granting a major donor *perpetual* publicity rights. The Avery Fisher saga in 1973³⁰⁵ and the David Geffen situation in 2015³⁰⁶ both highlight a charity's difficulties in negotiating a reasonable duration clause and the inevitable conflict if the charity allows perpetual naming rights for a building that will need costly renovation in the future. If the parties view the transaction as a part-sale with the charity selling valuable publicity services, it may set a tone allowing the charity to reasonably negotiate and protect its interests. If the parties agree on reasonable endgame provisions before the donor formally makes the substantial pledge, the results may be more reasonable when the publicity needs to end, either because of the donor's misdeeds or the need to renovate the building.

The *Courts* and *Vanderbilt University* cases, discussed above, indicate other problems with gift treatment.³⁰⁷ These cases demonstrate that, if a court views the transaction as a gift, then the court may have little flexibility in applying formation rules and in deciding upon a remedy.³⁰⁸ Contract law doctrine allows a court to imply terms and supply omitted terms, including morals clauses.³⁰⁹ It also allows a court to employ a range of remedies from benefit-of-the-bargain damages to specific performance.³¹⁰ In contrast, when a charity breaches its

Public Policy in connection with his indictment for banking irregularities stemming from allegations of sex with minors).

305. See *supra* notes 1–4, 15–18 and accompanying text (describing the Avery Fisher saga).

306. See *supra* note 18 and accompanying text (reporting that Lincoln Center granted perpetual naming rights to David Geffen).

307. See *supra* notes 83–90, 68–81 (discussing the *Courts* and *Vanderbilt University* cases respectively).

308. In contrast, the test for determining when a *contract* arises can depend on whether a party reasonably believes a communication includes all of the expected terms. See RESTATEMENT (SECOND) OF CONTRACTS § 24 (AM. LAW INST. 1981) (defining an offer); see also *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1149 (7th Cir. 1997) (indicating that whether a statement includes all the expected terms depends on the other party's reasonable expectations).

309. RESTATEMENT (SECOND) OF CONTRACTS § 204 cmt. b (providing that one reason a court might supply an omitted term is because the parties had “expectations but fail[ed] to manifest them”).

310. See *id.* § 347 cmt. a (regarding benefit-of-the-bargain damages); *id.* § 364 (granting discretion to refuse specific performance “if such relief would be unfair”); see also *Cumbest v. Harris*, 363 So. 2d 294, 297 (Miss. 1978) (demonstrating that under contract law there is “liberality in the granting of an equitable remedy”). *But see* *Prentis Family Found., Inc. v. Karmanos Cancer Inst.*, 698 N.W.2d 900, 913 (Mich. Ct. App. 2005) (reporting that a trial court refused to base damages on the value of naming rights because the donor was a charitable foundation rather than an individual, and

publicity obligation as part of a conditional gift, the sole remedy is for a court to order the return of the donation and payment of earnings on that amount. The earnings are based on increases in the consumer price index from the date of the contribution.³¹¹ As an example, in the *Vanderbilt University* case, the court applied the conditional gift rules rather than the contract rules. Thus, the court required Vanderbilt to pay the Daughters of the Confederacy \$1.2 million to remove the word “Confederate”³¹² from the pediment of a building even though the Daughters of the Confederacy paid only one-third of the initial cost of the building, enjoyed the naming rights over the building for approximately eighty years, and contributed nothing to a \$2.5 million renovation of the building.³¹³

Several cases have characterized charitable naming arrangements as conditional gifts,³¹⁴ but there are also multiple cases treating these arrangements as contracts.³¹⁵ Thus, courts wishing to choose contract characterization have authority to cite. Sometimes, it appears that courts go out of their way to apply conditional gift law. For example, in the *Vanderbilt University* case, after observing that the three written documents between the donor and the university’s predecessor referred to the agreement as a “contract,” the Tennessee Court of Appeals declined to apply contract law.³¹⁶ The court stated that the written agreements “do not purport to establish a typical *commercial* arrangement in which one party provides certain goods or services in return for a sum to be paid by the other party.”³¹⁷ The court’s reasoning is unpersuasive because the Daughters of the Confederacy

this made the determination of damages impermissibly speculative; in any event, the appellate court did not address the issue).

311. See *Tenn. Div. of the Daughters of the Confederacy v. Vanderbilt Univ.*, 174 S.W.3d 98, 119 (Tenn. Ct. App. 2005) (“[W]here a donee fails or ceases to comply with the conditions of a gift, the donor’s remedy is limited to recovery of the gift . . . [and] [t]o reflect the change in the buying power of the dollar, the amount [the charity] must pay . . . should be based on the consumer price index . . .”).

312. See *supra* note 81 and accompanying text (reporting that Vanderbilt University will pay \$1.2 million to the Daughters of the Confederacy).

313. See *supra* notes 69–81 and accompanying text.

314. See *supra* Section I.B.

315. See *supra* Section I.A.

316. *Tenn. Div. of the Daughters of the Confederacy*, 174 S.W.3d at 112.

317. *Id.* (emphasis added).

paid a sum (\$50,000) in return for services (perpetual publicity), and many contracts are not commercial arrangements.³¹⁸

On the tax side, the Fisher family tale vividly demonstrates that the IRS approach treating charitable publicity as worthless is contrary to economic reality—the Fischer heirs sold the publicity rights for \$15 million.³¹⁹ The IRS approach permits major donors purchasing publicity to claim excessive income and gift tax deductions.³²⁰ This shifts more than sixty percent of the cost of naming donations to other taxpayers.³²¹ The IRS approach here is inconsistent with the approach it has taken in similar situations. For example, under IRS Revenue Ruling 67-246, if a charity arranges a fundraiser in which members pay \$100 to the charity in exchange for a \$15 radio, the member is only entitled to claim an \$85 income tax deduction.³²²

B. Proposal for Reconciliation

As a preliminary matter, it is not expected that the federal income tax system always will treat transactions consistently with other systems. The tax system can have different objectives from another area of inquiry, and as a result a different approach may be appropriate. For example, the U.S. Supreme Court concluded that the federal income tax rules should calculate “income” differently than generally accepted accounting principles when the value of a corporation’s inventory drops in certain situations.³²³ Nevertheless, it would be beneficial for

318. See, e.g., *Hamer v. Sidway*, 27 N.E. 256, 259 (N.Y. 1891) (concluding an arrangement was a contract when an uncle promised to pay his 16-year-old nephew \$5,000 in exchange for his nephew’s promise to refrain from drinking alcohol, smoking, swearing, playing cards for money, or playing billiards for money until attaining age 21).

319. See *supra* note 18 and accompanying text.

320. See *supra* notes 119–39 and accompanying text (discussing the income tax deduction); *supra* notes 266–67 and accompanying text (outlining the gift tax deduction).

321. As an example, using the highest tax rates for 2017, if a donor contributes \$1 million in a charitable naming transaction and deducts \$1 million, the after-income-tax cost to the donor is \$604,000 [$\$1 \text{ million} \times 39.6\% = \$396,000$ in tax savings]. If the donor had not made the contribution and the donor’s estate was subject to a 40% federal estate tax rate, the additional federal estate tax would have been \$241,600 [$\$604,000 \times 40\% = \$241,600$]. Thus, the combined income and estate tax savings from the charitable gift was \$637,600 [$\$396,000 + \$241,600 = \$637,600$].

322. See Rev. Rul. 67-246, 1967-2 C.B. 104, 111 ex.11.

323. *Thor Power Tool Co. v. Comm’r*, 439 U.S. 522, 542–43 (1979) (observing that although financial accounting is based on the principle of conservatism, the primary goal of the income tax system is the “equitable collection of revenue,” and “[g]iven

both the common law and the tax system to treat significant charitable publicity transactions as part sales.

In choosing whether to resolve the inconsistency by always treating charitable publicity transactions as (i) unrequited gifts, or (ii) part sales, common law cases exist to support either choice.³²⁴ Regardless, under the common law, treating significant charitable publicity arrangements as part sales (and therefore as contracts) rather than gifts, should result in more predictable and reasonable results. As discussed above, contractual (part sale) characterization may encourage the parties to negotiate reasonable morals clauses and duration clauses,³²⁵ allow courts to imply or add terms that the parties failed to negotiate,³²⁶ and enable courts to craft appropriate remedies for disputes the parties cannot resolve.³²⁷

On the tax side, the IRS has been treating charitable publicity transactions as unrequited gifts for almost five decades.³²⁸ The IRS can change this approach, however, by embracing existing authorities—no legislation is necessary. For federal income tax purposes, the IRS could announce that, for significant charitable recognition transactions, it will follow the U.S. Supreme Court's approach in *American Bar Endowment* and *Hernandez*, and it will limit the application of Revenue Ruling 68-432 to its particular facts. Revenue Ruling 68-432 did not involve substantial naming or other publicity benefits; the only

this diversity . . . any presumptive equivalency between tax and financial accounting would be unacceptable"). In *Thor Power Tool Co.*, the taxpayer and the IRS agreed the fair market value of the taxpayer's spare parts inventory dropped. *Id.* at 526–27. Although the drop-in values required the company to reduce its income for financial accounting purposes under generally accepted accounting principles, the drop-in value did not trigger an income tax deduction, and a corresponding decrease in taxable income, because the evidence indicating the decline in value was not the type of evidence listed in the IRS regulations supporting a deduction. *See id.* at 535–36.

324. Nevertheless, there may be situations when the transaction clearly is one or the other. *See supra* notes 28–35 and accompanying text (regarding the benevolent man hypothetical and other factors in drawing the line between contracts and conditional gifts). For example, it is unlikely that most reasonable persons would reap a benefit from having an alcohol rehabilitation center named after them. *See, e.g., Betty Ford Center in Rancho Mirage, California*, HAZELDEN BETTY FORD FOUND., <http://www.hazeldenbettyford.org/locations/betty-ford-center-rancho-mirage> (last visited Aug. 30, 2017) (regarding the Betty Ford Alcoholism Center).

325. *See supra* notes 302–05 and accompanying text.

326. *See supra* note 309.

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

328. *See supra* Section I.A (describing how the IRS established its approach to charitable publicity transactions in the late 1960s and 1970s).

publicity benefit the donating members received was the opportunity to attend members-only events, including lectures.³²⁹ This negligible benefit could be ignored under the insubstantial benefit exceptions currently available according to the most recent iteration of Revenue Procedures 90-12 and 92-58.³³⁰

If it repealed the special rules, the IRS could allow the general rule from the U.S. Supreme Court's decision in *American Bar Endowment* to apply. Under the *American Bar Endowment* approach, the donor would have the burden to prove (i) the amount contributed in excess of the fair market value of the return publicity benefit and (ii) that the donor gave the excess with the intent to make a gift.³³¹ Some might argue that applying the U.S. Supreme Court's approach to charitable publicity transactions will place an impossible valuation burden on donors. In response, in *Hernandez*, the U.S. Supreme Court reduced the donors' charitable tax deductions by the value of the church-provided intangible religious benefits,³³² even though there was no commercial market for the benefits or any other easy way to value the benefits.³³³ In addition, in 2003, a Michigan trial court discussed the fair market value of charitable naming rights for each of five different types of donors.³³⁴

In *Meyer and Anna Prentis Family Foundation, Inc. v. Barbara Ann Karmanos Cancer Institute*,³³⁵ the court addressed whether the evidence and arguments available to five different types of donors trying to value naming rights would be too speculative to support an award of damages for breach of a charitable publicity contract.³³⁶ In 1985, the

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

330. Rev. Proc. 90-12, 1990-1 C.B. 471, 472 (1990); Rev. Proc. 92-58, 1992-2 C.B. 410, 410 (1992).

331. United States v. Am. Bar Endowment, 477 U.S. 105, 117-18 (1986).

332. *Hernandez v. Comm'r*, 490 U.S. 680, 684-85 (1989) (explaining that the donors received auditing and training services).

333. *See id.* at 706-07 (O'Connor, J., dissenting) ("It becomes impossible, however, to compute the 'contribution' portion of a payment to a charity where what is received in return is not merely an intangible, but an intangible . . . that is not bought and sold except in donative contexts so that the only 'market' price against which it can be evaluated is a market price that always includes donations.").

334. *Meyer and Anna Prentis Family Found., Inc. v. Barbara Ann Karmanos Cancer Inst.*, No. 00-024848 CK, 2003 WL 25756356, at *1-2 (Mich. Cir. Ct. June 4, 2003), *aff'd in part, rev'd in part* 698 N.W.2d 900 (Mich. App. 2005).

335. No. 00-024848 CK, 2003 WL 25756356 (Mich. Cir. Ct. June 4, 2003), *aff'd in part, rev'd in part* 698 N.W.2d 900 (Mich. App. 2005).

336. *See id.* at *1-2.

Meyer and Anna Prentis Family Foundation pledged \$1.5 million over a five-year period to establish an endowment to benefit a cancer center affiliated with Wayne State University.³³⁷ The court characterized the arrangement as a contract³³⁸ and stated that “as consideration for the 1.5 million dollar contribution to the cancer center,” the Comprehensive Care Center of Metropolitan Detroit would be “renamed and henceforth known as” the Meyer L. Prentis Comprehensive Cancer Center of Metropolitan Detroit.³³⁹ All parties agreed that the cancer center operated under the Meyer L. Prentis name consistently and exclusively for nine years although the entity never formally changed its corporate name.³⁴⁰ The Prentis Family Foundation argued that the cancer center breached the naming obligation after it merged in 1994 with the Michigan Cancer Foundation, accepted a \$15 million donation from Peter Karmanos, and adopted the name “Barbara Ann Karmanos Cancer Institute.”³⁴¹ The court emphasized that the new donor, Mr. Peter Karmanos, owned Compuware, a commercial enterprise.³⁴² The lower court concluded that the charity breached its naming obligation, and the Meyer L. Prentis Foundation could require the entity to readopt the Meyer L. Prentis name as a specific performance remedy.³⁴³ The court went on to consider whether the Meyer L. Prentis Foundation could choose to recover money damages as an alternative remedy and allow the cancer center to continue using the Barbara Ann Karmanos name.³⁴⁴

The Michigan court indicated whether money damages would be available for breach of a charitable publicity arrangement for five different types of donors, or whether, in each situation, the calculation of money damages would be too speculative and therefore not

337. *Id.*

338. *See Meyer and Anna Prentis Family Found., Inc.*, No. 00-024848 CK., 2001 WL 36154245, at *2 (Mich. Cir. Ct. Aug. 16, 2001) (concluding that the six-year statute of limitations for a breach of contract action would apply to an allegation that the charity failed to honor its publicity obligations), *aff'd in part, rev'd in part*, 698 N.W.2d 900 (Mich. Ct. App. 2005).

339. *Id.* at *6.

340. *Id.* at *2.

341. *See Meyer and Anna Prentis Family Found., Inc.* No. 00-024848 CK., 2003 WL 25756356, at *2.

342. *Id.* at *8.

343. *Id.* at *2-3 (“Judge Svenson found the Defendant breached the 1985 Agreement and granted equitable relief.”).

344. *Id.* at *4-8.

available under common law.³⁴⁵ First, the court discussed situations when a commercial entity donates and “there is clearly a valuable commercial purpose” and indicated that the commercial entity could recover money damages for its commercial loss.³⁴⁶ Second, the court speculated that Peter Karmanos, the owner of Compuware, could recover money damages if the entity breached its naming obligation to him, to the extent of his commercial loss.³⁴⁷ This may be highly relevant in other situations because many other naming donors likely are closely affiliated to commercial enterprises. Third, the court implied that if a charity made a donation to another charity, and the donor charity could prove that it would be unable to raise funds “as a result of losing its naming rights” it would be able to recover money damages.³⁴⁸ Fourth, the court implied that an individual naming donor could recover money damages for “hurt feelings” if the charity breached the naming obligation.³⁴⁹ Fifth, the court concluded that a family charitable foundation that cannot prove it will be unable to raise funds will not be able to recover money damages for a breach of a naming obligation because it cannot prove a monetary loss and will not suffer “hurt feelings.”³⁵⁰ In this fifth scenario, the court noted that a founder or substantial contributor of the family charitable foundation may experience “hurt feelings,” but the loss would not be compensable because it would be the charitable family foundation and not the individual founder or substantial contributor, who would be the

345. See RESTATEMENT (SECOND) OF CONTRACTS § 352 (AM. LAW INST. 1981) (“Damages are not recoverable for loss beyond an amount that the evidence permits to be established with reasonable certainty.”); see, e.g., *Chi. Coliseum Club v. Dempsey*, 265 Ill. App. 542, 550 (1932) (“Compensation for damages for breach of contract must be established by evidence from which a court or jury are able to ascertain the extent of such damages . . . to a reasonable degree of certainty.”).

346. *Meyer and Anna Prentis Family Found., Inc.*, No. 00-024848 CK., 2003 WL 25756356, at *7; see, e.g., Jody Meacham, *Avaya Says It Will Keep Its Name on Soccer Stadium While It Reorganizes*, SILICON VALLEY BUS. J. (Jan. 20, 2017, 1:52 PM), <http://www.bizjournals.com/sanjose/news/2017/01/20/avaya-says-it-will-keep-its-name-on-soccer-stadium.html> (reporting that Santa Clara tech company Avaya planned to keep its brand name on the home of the San Jose Earthquake soccer team despite filing bankruptcy under Chapter 11 and that Avaya purchased the naming rights for ten years in exchanged for \$20 million in 2014).

347. *Meyer and Anna Prentis Family Found., Inc.*, No. 00-024848 CK., 2003 WL 25756356, at *8.

348. *Id.*

349. *Id.*

350. *Id.*

plaintiff in the case suing to enforce the naming rights.³⁵¹ The court indicated the result may have been different if the original 1985 agreement allocated a portion of the contribution to the acquisition of the naming rights.³⁵²

The *Prentis Family Foundation* case identifies two types of value, commercial and emotional, that a donor could try to value. Donors would need to monetize the commercial and emotional value under the *American Bar Endowment* test to claim a charitable income tax deduction. The standard definition of “fair market value” for tax purposes is “the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of relevant facts,”³⁵³ and there appears to be no reason to deviate from the standard definition in these situations.³⁵⁴ In the first two categories identified in *Prentis*—a commercial entity donating or an individual with a commercial interest donating—the amount commercial entities pay to name commercial facilities, such as professional sports stadiums, could be relevant. Researchers indicate that schools or other charities typically require that the naming donor for a building contribute fifty percent of the cost of the building, and in a noncharitable situation, a professional sports team typically requires a commercial firm to pay ten percent to twenty percent of the building cost to name a professional sports stadium.³⁵⁵ Thus, using these rules of thumb, perhaps twenty percent to forty percent of a commercially motivated naming philanthropist’s contribution represents the purchase price of the publicity, and the balance is an unrequited gift.³⁵⁶ Commercial

351. *Id.*

352. *Id.* at *7.

353. *See, e.g.*, Treas. Reg. § 1.170A-1(c)(2) (2016).

354. *See, e.g.*, *Turner v. Comm’r*, 13 T.C.M. 462 (1954) (considering the subjective value of a prize to the taxpayer, but involving unique facts, specifically a luxury item the taxpayer did not choose which was subject to the control of a third party).

355. *See* BURTON, *supra* note 4, at 142–43; William A. Drennan, *Where Generosity and Pride Abide: Charitable Naming Rights*, 80 U. CIN. L. REV. 45, 93–96 (2011) (listing nineteen sports stadium naming rights deals from 1994 to 2004); *see also* Cory Weinberg, *Not Everybody Is Happy with Company Names on Business School Buildings*, BLOOMBERG (June 23, 2014, 10:59 AM), <https://www.bloomberg.com/news/articles/2014-06-23/business-schools-cause-scrutiny-for-naming-buildings-after-corporations> (reporting that naming gifts typically must cover at least fifty percent of the fundraising amount).

356. As an example, if a charitable building cost \$100 million, the charity would require the naming donor to contribute \$50 million. Also, in the case of a professional

entities generally consider the extent and quality of brand exposure when deciding to purchase or contribute.³⁵⁷

In the case of a naming individual without a commercial interest, the *Prentis* case suggests that the return benefit would be the emotional value from the publicity, perhaps bearing some inverse relation to the “hurt feelings” when the charity breaches the deal and removes the donor’s name. Many authors throughout the ages have discussed the noneconomic benefits of naming, including glory, prestige, and improved social reputation for generosity, wealth, and power.³⁵⁸ Although courts have monetized subjective values to calculate damages in the case of family heirlooms, haunted houses, and collectibles or nostalgic items,³⁵⁹ perhaps the appraisal for tax purposes should be

sports stadium that costs \$100 million, a commercial firm might purchase the naming rights for only \$10 or \$20 million. These figures suggest the naming charitable donor spent \$10 or \$20 million for the naming rights, and the excess of \$30 or \$40 million was a charitable gift. Some may argue the charitable naming rights provide a fundamentally different benefit that should not be equated with the brand name recognition the commercial firm is buying with naming the sports stadium. Nevertheless, the analogy may become more appropriate as more commercial firms purchase charitable naming rights. See Weinberg, *supra* note 355 (quoting the president of the Council for Advancement and Support of Education, who stated that “[t]he practice of putting corporate names on campus buildings goes back at least three decades but is accelerating”).

357. See William A. Drennan, *Taxing Commercial Sponsorships of College Athletics: A Balanced Proposal*, 73 OHIO ST. L.J. 1353, 1380 (2012) (discussing brand exposure in relation to college athletic sponsorships).

358. See, e.g., Richard H. McAdams, *Relative Preferences*, 102 YALE L.J. 1, 11 n.29 (1992) (quoting ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 79 (Edwin Cannan ed., University of Chicago Press 1976) (1776)) (“[T]he 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.”); Eric A. Posner, *Altruism, Status, and Trust in the Law of Gifts and Gratuitous Promises*, 1997 WIS. L. REV. 567, 575–76 (1997) (asserting that charitable publicity signals wealth, power, and generosity, all prized and envied traits); see also Konigsberg & Howe, *supra* note 23 (quoting Mark Twain regarding his assessment that steel magnate Andrew Carnegie’s endowment of 3500 libraries was “a shrewd plan not to elevate mankind but to secure [Carnegie’s] immortality He has bought fame and paid cash for it He has arranged that his name shall be famous in the mouths of men for centuries to come”); McAdams, *supra*, at 3 (“[A]n 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 . . .”).

359. See *Reed v. King*, 145 Cal. App. 3d 261, 267 (1983) (calculating the change in the fair market value of a home because it was the site of five murders). “Stamp collections and gold speculation would be insane activities if utilitarian considerations

more objective. In Revenue Ruling 67-246, the IRS refused to consider the donor's subjective wishes when the donor received a return benefit, and instead, the IRS embraced an objective approach.³⁶⁰ For example, if a charity announces it will award a concert ticket to every person donating at least \$100, and the concert ticket would sell on the open market for \$5, a person donating \$100 could only deduct \$95 even if the donor has absolutely no wish to receive the concert ticket or attend the concert.³⁶¹ Consistent with this objective approach, the IRS might prefer to value all publicity rights based on their commercial value if purchased by a business enterprise.

Since 2001, when the Michigan trial court issued its order in the *Prentis* case, commercial firms have become more active in purchasing naming rights for charitable buildings, arguably establishing a market.³⁶² Many corporations have purchased the naming rights for university business schools or centers.³⁶³ For example, Capitol Federal Savings Bank donated \$20 million, and in exchange the University of Kansas named its business school Capitol Federal Hall.³⁶⁴ The CEO of Capitol Federal was clear about motives when saying he "hopes the name will encourage university faculty, students, and their parents to do business with the bank."³⁶⁵ Other examples include Wells Fargo Hall at U.C. San Diego's Rady School of Management, the Office Depot Center at Florida Atlantic's College of Business, and PACCAR Hall (named after the truck-maker) at the University of Washington's Foster School of Business.³⁶⁶

CONCLUSION

Society is divided about donor recognition. Historically, anonymous giving was the norm, some rather humble donor recognition was not

were the sole measure of value." *Id.*; see also W. E. Shipley, Annotation, *Measure of Damages for Conversion or Loss of, or Damage to, Personal Property Having No Market Value*, 12 A.L.R.2d 902 (1950).

360. Rev. Rul. 67-246, 1967-2 C.B. 104, 105 (1967).

361. *Id.*

362. See Weinberg, *supra* note 355 (discussing the increase in corporate naming of college buildings).

363. *Id.*

364. *Id.*

365. *Id.*

366. *Id.*

unheard of,³⁶⁷ and conspicuous philanthropy was the exception.³⁶⁸ In the late 1960s and the 1970s, it is not surprising that the IRS effectively ignored public recognition and treated these transactions as unrequited gifts because charities seldom provided significant publicity. Times changed. Charitable recognition exploded in the 1990s.³⁶⁹ Commentators now observe that charities routinely emblazon donor names across all charitable properties as enduring testimonials.³⁷⁰

Some commentators indicate that conspicuous philanthropy is less virtuous than anonymous giving.³⁷¹ They emphasize motives such as those expressed by the naming philanthropist for the student athletic complex at the University of Chicago, who said the athletic complex was like his tombstone, advertising to all the world that he “worked hard . . . accumulated money and . . . left something behind.”³⁷² Others, however, praise conspicuous philanthropy because recent social science research shows public recognition increases giving³⁷³ and assert that a charity failing to provide publicity to substantial donors jeopardizes its charitable mission.³⁷⁴

For common law purposes, an intermediate position, treating significant conspicuous philanthropy under existing authorities as part sales, and therefore as contracts, will encourage more effective arm’s length negotiations between naming donors and the charities, thereby

367. See e.g., Rev. Rul. 68-432, 1968-2 C.B. 104, 104 (1968) (describing an arrangement in which donating members could attend members-only lectures at a library and museum).

368. See Drennan, *supra* note 355, at 51 n.31 (listing a few historical examples of conspicuous philanthropy).

369. BURTON, *supra* note 4, at 49 (referring to a “groundswell of naming rights activities”).

370. See Charles Isherwood, *The Graffiti of the Philanthropic Class*, N.Y. TIMES (Dec. 2, 2007), <http://www.nytimes.com/2007/12/02/theater/02ishe.html> (“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.”).

371. See, e.g., Patricia M. Jones, *Gift Has Name for It*, CHI. TRIB. (Jan. 10, 1999), <http://articles.chicagotribune.com/1999-01-10/news/9901100326>; see also BURTON, *supra* note 4, at xvi (referring to the “moral high road”).

372. Jones, *supra* note 371.

373. See Brian Broughman & Robert Cooter, *Charity and Information: Correcting the Failure of a Disjunctive Social Norm*, 43 U. MICH. J. L. REFORM 871, 885 n.49 (2010) (“[P]ublicity [sharply] increases charitable giving in [the] aggregate.”).

374. BURTON, *supra* note 4, at xvii.

reducing disputes. In addition, a contract approach will allow courts more flexibility in fashioning remedies when disputes arise.

For tax purposes, the extreme position of treating charitable publicity transactions as unrequited gifts regardless of the facts ignores economic reality and allows donors excessive tax deductions. As the old adages say, “If you want more of something, subsidize it; if you want less, tax it,”³⁷⁵ and “Every tax exemption constitutes a subsidy.”³⁷⁶ The IRS can adopt a more balanced approach, treating these transactions as part sale and part gift, by following two U.S. Supreme Court cases on charitable giving that reduce the donor’s charitable tax deduction by the value of the return benefit the charity provides to the donor.

The tax approach may be fueling the edifice complex. Professor Fleisher asserts that the “edifice complex occurs when the pleasure or prestige from giving encourages donors to fund projects that are already funded close to optimal levels. Due to prestige that accompanies naming a building, this often results in over-building on campus.”³⁷⁷ Professor Fleischer also observes that, because of the edifice complex, “bequests to large, wealthy organizations such as colleges or museums fund more capital projects (such as buildings) than are actually needed.”³⁷⁸ Presumably, the edifice complex makes it more difficult for charities to raise funds for routine operations. Recently, a homeless shelter gerrymandered a naming benefit to encourage donors to contribute routine supplies.³⁷⁹ This Article’s tax proposal would not necessarily bring back anonymous giving, but it would eliminate artificial tax incentives for conspicuous philanthropy.

375. Jeffrey L. Yablon, *As Certain as Death—Quotations about Taxes (2006 Edition)*, 110 TAX NOTES 103, 108 (2006) (referring to an “Old Economic Adage”).

376. *Id.* at 139 (quoting William J. Brennan Jr.).

377. Miranda Perry Fleischer, *Charitable Contributions in an Ideal Estate Tax*, 60 TAX L. REV. 263, 302 n.156 (2007); see also Gergen, *supra* note 12, at 1409; Sarah E. Waldeck, *The Coming Showdown over University Endowments: Enlisting the Donors*, 77 FORDHAM L. REV. 1795, 1819 (2009) (“[U]niversities might respond by encouraging the kind of gifts that contribute to the edifice complex, that is, the construction of new buildings or general campus beautification.”).

378. Fleischer, *supra* note 377, at 302.

379. Sarah Murray, *Institutional Naming Rights Gaining Favour Among Wealthy Donors*, FIN. TIMES (Sept. 18, 2014), <https://www.ft.com/content/5c1d62e0-3834-11e4-a687-00144feabdc0?mhq5j=e2> (reporting that Urban Ministries of Durham, North Carolina adopted the “Names for Change campaign” in which visitors to its website can choose from more than 160 items, including tampons or foodstuffs, and “for their donation they get a certificate with an image of the object and their name”).