

SURNAMED CHARITABLE TRUSTS IMMORTALITY AT TAXPAYER EXPENSE:

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I. THE NAME GAME: ALTRUISM TAINTED WITH NARCISSISM	5
A. <i>Praise by Association: Naming in General</i>	5
B. <i>New Empirical Evidence that Founders Surname Almost Eight-Five Percent of Charitable Trusts</i>	10
C. <i>Immortality, Self-Aggrandizement, and Other Motives</i>	12
1. Possible Altruistic or Impersonal Motives.....	12
2. Immortality and Self-Aggrandizement	13
D. <i>Charitable Trust Law Permits Surnames in Perpetuity</i>	14
E. <i>Tax Law Considers Surnames Harmless</i>	16
II. WHAT’S IN A NAME? THE POWER OF APPELLATION.....	17
A. <i>Naming Rights in the Great Debate on Charitable Tax Subsidies</i>	17
1. Charitable Tax Benefits Are a Government Subsidy.....	18
2. Tax Subsidies Should Be in Exchange for Public Benefits	21
B. <i>Giving Narcissus His Due – Possible Benefits</i>	24
C. <i>Reflections on Narcissism as a Tragedy for Charitable Trusts</i>	26
1. Structural Features that Reduce Public Benefits.....	26
2. The Inefficiencies of Adulation	27
3. Discouraging Diversity and Community Involvement	29
4. Inhibiting the Flow of Information and Promoting Isolationism.....	30
5. Nepotism in Employment	30
6. Uninformed and Biased Grant Making.....	32
III. VIABLE RESPONSE – A TEMPORAL RESTRICTION.....	33
A. <i>Naming for Half a Century, Not Forever</i>	35
B. <i>Tax Benefits Justify Regulation, and Tax Regime Facilitates Enforcement</i>	35
C. <i>Practical Considerations, Special Rules, and Exceptions</i>	37
D. <i>Potential Counter Arguments and Broader Issues</i>	39
IV. CONCLUSION: PAY-TO-PLAY CHARITY STYLE	41
APPENDIX A – EMPIRICAL RESEARCH COMPENDIUM	42

Hotel chain magnate Leona Helmsley was the “queen of mean” with her choleric demeanor, “sharp tongue and impatience with humanity.”¹ Her name is synonymous with

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¹ Stephanie Strom, *Helmsley Left Dogs Billions in Her Will*, N.Y. TIMES, July 2, 2008, at A1, A14.

“unbridled arrogance . . . belief in entitlement” and disdain for the less privileged.² At death, she bequeathed \$8 billion to the Leona M. and Harry B. Helmsley Charitable Trust, in perpetuity.³ The trust’s mission statement⁴ initially provided that the trust could benefit “indigent people” and dogs, but Leona Helmsley subsequently deleted the reference to “indigent people.”⁵ A philosophy professor compared Ms. Helmsley’s stewardship to “setting the money on fire in front of a group of poor people.”⁶ A New York judge ruled that the trustees can use the funds for the benefit of dogs, or for other charitable purposes.⁷

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

Family charitable trusts are controversial. Advocates and critics debate whether they provide sufficient public benefits in exchange for the generous tax subsidies.¹² Advocates point

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

³ Strom, *supra* note 1, at A14. At one time the Helmsleys owned the Empire State Building. Leslie Friedman Rosenthal, *Redeveloping Corporate Governance Structures: Not-for-Profit Governance During Major Capital Projects – A Case Study at Lincoln Center for the Performing Arts*, 76 FORDHAM L. REV. 929, 940 (2007).

⁴ The 1999 Helmsley trust document itself does not specify the charitable purpose. See Joanna Grossman, *Going to the Dogs?*, July 15, 2008, available at <http://writ.lp.findlaw.com/grossman/20080715.html>. Instead, Ms. Helmsley executed a separate “mission statement” which recites the trust purposes. Jeffrey Toobin, *The legal battle over trust funds for pets*, THE NEW YORKER, Sept. 29, 2008, at 38, 41-42.

⁵ *Id.* at 41. “Helmsley’s relationship with dogs reflects some of the distemper of her dealings with humans.” *Id.* at 40.

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

⁷ Stephanie Strom, *Not All of Helmsley’s Trust Has to Go to Dogs*, N.Y. TIMES, Feb. 26, 2009, at A23 (“The court finds that the trustees may apply trust funds for such charitable purposes and in such amounts as they may, in their sole discretion, determine . . .”). In the initial tranche, the trustees distributed \$1 million to dog-related charities, including \$100,000 to Puppies Behind Bars. *Part of Helmsley’s Trust Going to the Dogs*, Reuters UK, Apr. 22, 2009, available at <http://uk.reuters.com/article/lifestyleleMolz/idUKTRE53L37C20090422>.

⁸ An estate can claim an estate tax deduction for the “amount of all bequests . . . to a trustee . . . if such contributions . . . are to be used . . . exclusively for . . . charitable . . . purposes, or for the prevention of cruelty to . . . animals . . .” I.R.C. § 2055(a)(3) (2000).

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

¹⁰ If the \$8 million payment did not qualify for the charitable deduction, the estate would have paid a 45% tax on that amount. See I.R.C. § 2001(c)(2)(B) (2000).

¹¹ Madoff, *supra* note 9, at A23.

¹² The President of the Kaufman Foundation praises charitable trusts. “As an institution born out of democratic pluralism and a free-market economy, the foundation . . . serves as a mechanism for the reconstitution of wealth, and it plays the role of institutional entrepreneur, challenging other social institutions.” Carl J. Schramm, *Law Outside the Market: The Social Utility of the Private Foundation*, 30 HARV. J.L. & PUB. POL’Y 355, 358 (2006);

to the elephantine sums the Helmsleys, the Rockefellers, the Fords, and other outrageously wealthy families contribute.¹³ A family charitable trust typically conducts no charitable activities directly, but instead functions as an endowment which makes annual grants to operating charities. Advocates emphasize the success stories. Charitable trusts helped fund the Salk polio vaccine,¹⁴ the community college system,¹⁵ the 1960s “green-revolution” in agriculture,¹⁶ the Sesame Street television series,¹⁷ and a host of excellent academic institutions including Duke, Vanderbilt, Cornell, the University of Chicago, John Hopkins, and Rice.¹⁸

Critics emphasize that charitable trusts generally are available only for donors contributing \$3 million or more.¹⁹ With income and estate tax deductions, the government may subsidize over two-thirds of donations to charitable trusts.²⁰ These trusts can pay compensation to members of the founder family for management, investment and other personal services.²¹ Typically a charitable trust annually pays over one percent of its assets in fees.²² The tax laws obligate these trusts to pay less than four percent of their total assets annually as grants to operating charities.²³ If the trust generates an average annual return of at least five percent before expenses, the trust may never distribute the trust principal for charitable purposes, and the trust may last in perpetuity as a tribute to the founder family.²⁴ When these trusts make grants to operating charities, they may fund projects that provide dubious public benefits, such as training camps for yachtsmen who desire to represent the United States at sailing events in exotic foreign locations,²⁵ sports halls of fame,²⁶ civil war reenactments,²⁷ or drag racing strips.²⁸

but see William H. Byrnes IV, *The Private Foundation’s Topsy Turvy Road in the American Political Process*, 4 HOUS. BUS. TAX L.J. 496 (2004) (summarizing the debate from the time of King Henry VIII through the Tax Reform Act of 1969).

¹³ See Schramm, *supra* note 12, at 392-93.

¹⁴ *Id.* at 376 n.82 (“Salk was able to establish and equip his virus laboratory . . . because of a 1948 grant from the Sarah Scaife Foundation.”).

¹⁵ *Id.* at 375 (funded by the Kellogg Foundation).

¹⁶ *Id.* at 376.

¹⁷ *Id.* at 374-75 (funded by the Carnegie Corporation in 1969).

¹⁸ *Id.* at 373-74.

¹⁹ See Foundation Source, *Frequently Asked Questions About Private Foundations*, Question #3 (“the rule of thumb stated that a private foundation did not make sense unless the initial funding was \$3 - \$5 million”), available at <http://www.foundationsource.com/aboutus?faqs.asp>.

²⁰ See *infra* notes 149-62 and accompanying text.

²¹ A charitable trust may pay reasonable fees to a substantial contributor. Treas. Reg. § 53.4941(d)-3(c)(1) (1973); see *infra* notes 239-46 and accompanying text.

²² Council of Foundations, *Foundation Management Report*, Chapter 5 (*Administrative Expenses in Private Foundations*), 10 (2004) (“The median total investment and charitable administrative expense as a percentage of noncharitable use assets for all 360 foundations was 1.21 percent . . .”).

²³ Generally a private foundation must distribute five percent of its net assets annually for charitable purposes. See I.R.C. § 4942(e)(1) (2000). The expenses paid to family members and others, however, reduce the required charitable distribution. See I.R.C. § 4942(g)(1)(A) (2000). In response to a challenge in 2003, Congress confirmed that these tax-exempt trusts can count fees paid to the founder’s family and others toward the five percent figure. See *infra* note 264; Madoff, *supra* note 9, at A23.

²⁴ Founders typically design charitable trusts to last forever. Austin Wakeman Scott and William Franklin Fratcher, *IVA THE LAW OF TRUSTS*, § 365, at 109 n.1 (4th ed. 1989) [hereinafter “SCOTT ON TRUSTS”] (“most charitable trusts are of indefinite duration”).

²⁵ Rev. Rul. 64-275, 1964-2 C.B. 142.

²⁶ Rev. Rul. 68-372, 1968-2 C.B. 205.

²⁷ Rev. Rul. 67-148, 1967-1 C.B. 132.

²⁸ *Lions Assoc. Drag Strip v. United States*, 64-1 U.S. Tax Cas. (CCH), ¶ 9283 (S.D. Cal. 1963).

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

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

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

Part I discusses the burgeoning popularity of naming rights, and provides original empirical evidence that founders surname approximately eighty-five percent of the time. Combining this new empirical evidence with available IRS statistics indicates there are over 60,000 surnamed charitable trusts in the United States,²⁹ with assets in excess of \$370 billion.³⁰

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

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

Part III proposes a nuanced approach. The proposal would require that a charitable trust omit the surname after a period of years. Prior reform proposals aimed at different aspects of

²⁹ See *infra* note 92 and accompanying text.

³⁰ *Id.*

charitable trusts required action within twenty-five years, and Congress rejected those proposals as too radical.³¹ Accordingly, this proposal would allow surnames for fifty years.

Part III also considers the practical implications for many charitable trusts, including national multipurpose surnamed charitable trusts. The new requirements would not apply to publicly supported charities,³² trusts dedicated to support one publicly supported charity with the same surname,³³ or trusts underwritten by publicly traded corporations. Although beyond the scope of this Article, Part III raises other important issues involving diversity, transparency, and accountability.

I. THE NAME GAME: ALTRUISM TAINTED WITH NARCISSISM

A. *Praise by Association: Naming in General*

Naming rights abound. You can buy the “rights to name a new monkey species for \$650,000,”³⁴ or a villain in a British novel for 10,000 pounds.³⁵ A couple donated \$100,000 to the Museum of Contemporary Art in Manhattan “to see [their] names writ large on the museum’s four restrooms.”³⁶ An incorporated assassin paid tribute to its nemeses when the Orkin Pest Control Company contributed \$100,000 to name the O. Orkin Insect Zoo in the National Museum of Natural History at the Smithsonian Institute.³⁷

Basketball’s best played G-E-I-C-O instead of H-O-R-S-E as part of the 2009 NBA All-Star weekend.³⁸ Professional race car drivers compete for the Sprint Cup.³⁹ Golfers drive, chip,

³¹ See *infra* notes 260-63 and accompanying text.

³² For example, the proposal would not apply to the William J. Clinton Presidential Foundation because it receives substantial funds from many different sources. See *infra* note 300.

³³ See *infra* note 298 and accompanying text.

³⁴ Kevin Post, *Nature’s Way/Name Game Played with Many Species*, PRESS ATLANTIC CITY, March 7, 2006, at A4, available at 2006 WLNR 3858929 (Golden Bay Casinos of Atlantic City purchased the “naming rights to a foot-high primate in South America.”). In addition, McDonald’s, the fast-food chain, purchased the right to name a palm in Madagascar now known as *Dypsis mcdonaldiana*. *Id.*

³⁵ *Book a chance to be a villain*, Daily Post (Liverpool), June 17, 2008, at 9, available at 2008 WLNR 114086140; *Villain name going, gone*, Birmingham Mail, June 26, 2008, at 4, available at 2008 WLNR 12006845 (“The chance to name the villain in Andy McNab’s next book sold for pounds 10,000 at auction.”). One columnist proposes that “big corporations buy sponsorships to big storms.” Mike Gross, *Naming rights to storms could benefit disaster relief*, Virginia Post and Ledger-Star (Norfolk, VA), May 3, 2008, at 1, available at 2008 WLNR 8267582 (suggesting the “Toyotathon Twister”).

³⁶ Michael Gross, *Charities get inventive with name-dropping*, U.S. NEWS, June 14, 2008, <http://www.msnbc.msn.com/id/25147900>.

³⁷ Michael Gross, *Trends: Naming Rights*, CONTRIBUTE NEW YORK, May/June 2007, 48, 48, available at http://www.mgross.com/upload/Rights_Spread3.pdf.

³⁸ “[B]asketball has utterly ruined a fantastic idea. The league renamed the H-O-R-S-E contest to G-E-I-C-O. To clarify: Instead of spelling horse, the players spell Geico.” Michel Freeman, *H-O-R-S-E cents: NBA sells slice of Americana to glue factory*, Feb. 13, 2009, available at <http://www.cbssports.com/print/columns/story/11375241>. “They [will be] . . . playing G-E-I-C-O, thanks to the insurance company paying a premium for the name change.” Darren Rovell, *Game of G-E-I-C-O Will Be All-Star Weekend Highlight*, Feb. 12, 2009, available at <http://www.cnbc.com/id/29164195>.

³⁹ Anthony Andro, *Dale Earnhart Jr. good for NASCAR even as the bad guy*, Dallas Morning News, Feb. 18, 2009, available at <http://www.dallasnews.com/sharedcontent/dws/spt/stories/021909dnspomotersreport.352a>. They formerly competed for the Nextel Cup. See www.nascar.com/series/cup.

and put for the Fed Ex Cup.⁴⁰ Professional sports teams have played in stadiums, domes and parks named for commercial enterprises⁴¹ since Anheuser-Busch Brewery changed the name of the home of the St. Louis Baseball Cardinals to Busch Stadium in 1953.⁴²

After Citigroup purchased the naming rights to the New York Mets' baseball stadium for \$400 million in 2006,⁴³ and the U.S. Government subsequently transferred \$45 billion to bail-out the financial giant,⁴⁴ clever wags suggested a new name -- "Citigroup-Taxpayer Park."⁴⁵ Any surnamed charitable trust deserves a similar quip because typically the government underwrites from forty-five percent to sixty-seven percent of the total donations through tax benefits.⁴⁶ Perhaps the tax laws should refer to these entities as "taxpayer subsidized foundations" rather than "private foundations."⁴⁷ This Article will refer to these entities created by one founder as "charitable trusts" or "family charitable trusts."

Many tax-exempt entities regularly sell naming rights as advertising. Corporations make substantial "contributions" to sponsor college football bowl games in exchange for naming rights.⁴⁸ This practice became so wide-spread that in 1997, Congress changed the tax law to provide that unless the charity observes certain restrictions when hyping the corporate sponsor, the otherwise tax-exempt charity must pay income taxes on the contributions received from the corporate sponsor.⁴⁹ The 1996 Atlanta Olympic organizing committee sold the rights to be

⁴⁰ See www.pgatour.com/fedexcup.

⁴¹ Professional football teams play at Bank of America Stadium (Charlotte, N.C.), FedEx Field (Washington D.C.), The Edward Jones Dome (St. Louis, MO), Lincoln Financial Field (Philadelphia, PA), Monster Park (San Francisco, CA), Heinz Field (Pittsburgh, PA), and Ford Field (Detroit, MI). See www.stadiumsofnfl.com/nfestedopin.htm. Named baseball stadiums include AT&T Park (San Francisco, California); AutoZone Park (Memphis, Tennessee); Coca-Cola Field (Buffalo, New York); Coors Field (Denver, Colorado); Dr. Pepper Ballpark (Frisco, Texas); Miller Park (Milwaukee, Wisconsin); Minute Maid Park (Houston, Texas); PETCO Park (San Diego, California); Pringles Park (Jackson, Tennessee); U.S. Steel Yard (Gary, Indiana), and Whataburger Field (Corpus Christi, Texas). See Wikipedia, *List of sports venues with sole naming rights*, http://en.wikipedia.org/wiki/List_of_sports_venues_with_sole_naming_rights. Dunkin' Donuts Center is a multi-use indoor arena in Providence, Rhode Island. *Id.*

⁴² See Naming Rights, available at http://en.wikipedia.org/wiki/Naming_rights.

⁴³ Daniel Gross, *Should Citi Cancel its Sponsorship of the New York Mets Stadium?*, NEWSWEEK, Nov. 24, 2008, available at <http://www.newsweek.com/id/170692> (Citigroup will pay the \$400 million over twenty years).

⁴⁴ Jessica Shamboro, *Poor Sports*, FORTUNE, March 2, 2009, at 89, available at 2009 WLNR 3079269.

⁴⁵ *Field of Extremes*, STATEN ISLAND ADVOCATE, Nov. 28, 2008, at 18, available at 2008 WLNR 22837106.

⁴⁶ See *infra* notes 149-62 and accompanying text.

⁴⁷ See I.R.C. § 509(a) (2000) (defining "private foundation").

⁴⁸ In 1991, Mobil Oil donated over \$1 million to the Cotton Bowl Association, a tax-exempt organization, and negotiated the following rights: (i) the name of the game would become the "Mobile Oil Cotton Bowl," (ii) all the players' uniforms would have the name of Mobil Oil; (iii) the telecast would mention Mobile Oil at least four times during the broadcast, and (iv) both end zones would prominently display the name "Mobil Oil." Joel S. Newman, FEDERAL INCOME TAXATION, 561-62 (4th ed. 2008). Initially, the IRS attempted to tax the charity on the \$1 million payment under the unrelated business income tax regime. I.R.S. Tech. Adv. Mem. 9147007 (Aug. 16, 1991), available at 1991 WL 779696; I.R.S. Announcement 92-15, 1992-5 I.R.B. 51 (Feb. 3, 2002), available at 1992 WL 786303. The IRS, however, soon retreated. See Taxation of Tax Exempt Organizations' Income from Corporate Sponsorship, 58 Fed. Reg. 5687 (proposed Jan. 22, 1993), available at 1993 WL 10498. In the Taxpayer Relief Act of 1997, Congress enacted a compromise that allows the charity to avoid the unrelated business income tax if it satisfies certain conditions. P. L. No. 105-34, § 965(a) (codified at IRC § 513(i)).

⁴⁹ *Id.*

commercial sponsors of the Olympics.⁵⁰ Credit card companies pay to partner with charities, coveting the rights to use the charity's name, logo, or distinctive symbol on a credit card.⁵¹ These practices are so pervasive that the motive has its own moniker – the “halo effect.”⁵²

Charities routinely grant naming rights in exchange for donations to significant fund raising campaigns. On a recent visit to the Washington University School of Law, also known as Anheuser-Busch Hall,⁵³ on the Danforth campus,⁵⁴ I strolled past the portrait of Fred Kuhlman in the vestibule and read the inscribed plaque regarding his lifetime contributions. I soon arrived at the Lasater Library Lobby, and before entering the Janite Lee Reading Room I gazed at the almost life-size portrait of Ms. Lee and a placard proclaiming that Ms. Lee was born in Pusan, South Korea on April 5, 1941. After bypassing the Proost Family Study, I shuffled past windows made possible by the beneficence of Michael T. Hannafan, J.D., Class of 1970, and Mr. and Mrs. Donald W. Paule, J.D., Class of 1966.⁵⁵

Naming rights are restrained only by the creativity of the parties. For the right price, philanthropists can attach their names to an entire building, a wing, or a room at academic institutions or health care facilities. One enthusiastic patron stated, “I know it says in the Bible it is better to give, but I still enjoy having my name on the building.”⁵⁶ In New York, “[s]hould you get hit by a cab strolling from the David Koch Theater to the Steven Schwarzman Library, don't worry – the ambulance can take you to the N.Y.U. Langone Medical Center”⁵⁷ Since the Atlantic Olympic Committee raised money by selling commemorative bricks in Centennial Olympic Park in 1996,⁵⁸ commemorative walkways have become commonplace.⁵⁹ The practice

⁵⁰ Wikipedia, *1996 Summer Olympics*, http://en.wikipedia.org/wiki/1996_Summer_Olympics (“To pay for the games, Atlanta relied on commercial sponsorship”); see also Sergio Zyman, *Commercialized?*, CRAIN'S CHICAGO BUSINESS, Sept. 29, 2008, at 33 (“The 1996 Atlanta Games were called one of the most commercialized Olympics in history.”), available at 2008 WLNR 18821851. “Worldwide Olympic Partners” for the 2008 Olympic Games in Beijing included Coca-Cola, GE, Kodak, McDonald's, VISA, and Samsung. *Sponsors of the Beijing 2008 Olympic Games*, <http://en.beijing2008.cn/bocog/sponsors-sponsors>.

⁵¹ See *Sierra Club, Inc. v. Commissioner*, 86 F.3d 1526 (9th Cir. 1996). A credit card with a charity connection may be called an “affinity credit card.” Newman, *supra* note 48, at 562.

⁵² Nancy J. Knauer, *The Paradox of Corporate Giving: Tax Expenditures, the Nature of the Corporation, and the Social Construction of Charity*, 44 DEPAUL L. REV. 1, 7 n.27 (1994) (“The commensurate benefit that corporations expect to receive is the result of the generally favorable public perception of transfers to charity (and charitable organizations), known as the ‘halo effect.’”); Elizabeth M. Roberts, Note, *Presented to You by . . . Corporate Sponsorship and the Unrelated Business Income Tax*, 17 VA. TAX REV. 399, 401 (1997).

⁵³ In case any passerby is unaware of the brewery's philanthropy, the engraved name “Anheuser-Busch Hall” appears in stone above the main entrance. For a “historical campus tour” of Anheuser-Busch Hall, see www.wustl.edu/tour/danforth/anheuser-busch_hall.html.

⁵⁴ The Danforth family controlled Ralston-Purina Corporation, the world's largest producer of cat litter, and made multiple fortunes. See *Purina: Your Pet: Our Passion*, William H. Danforth, Founder, www.purina.com/company/Danforth.aspx.

⁵⁵ For a similar description of a walk through the University of Illinois College of Law, see 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, 657 (2001).

⁵⁶ Patricia M. Jones, *Gift Has Name For It*, CHI. TRIB., Jan 10, 1999, section 4, at 1 (quoting Gerald Ratner, whose name adorns the student athletic complex at the University of Chicago); see also Colombo, *supra* note 55, at 657.

⁵⁷ Gary Weiss, *The Price of Immortality*, CONDE NAST, Oct. 15, 2008, available at <http://www.portfolio.com/executives/features/2008/10/15/Profile-of-Billionaire-David-Koch>.

⁵⁸ Bert Roughton, Jr., *Olympic Facelift: A Master Plan for Downtown; Payne Proposes “Olympic Legacy,”* ATLANTA J. CONST., Nov. 19, 1993, at A1, available at 1993 WLNR 2369244.

extends to steps on a staircase, theater seats, lockers at a college football stadium,⁶⁰ park benches and trees.⁶¹ Big donors now expect naming rights, and a charity may be unable to raise significant funds for projects which do not offer naming rights.⁶² An affluent donor may prefer to contribute for a new classroom, rather than a roof-patch or a rebuilt generator.

While these practices reveal donor motivations, these naming rights have minimal impact beyond the positive impact on fund raising. These naming rights do not impede the charity's efforts to fulfill its mission, usually attach to only a small fraction of the institution's facilities or activities, and expire with the depreciation, disposal or destruction of the named tangible article.⁶³

Even when a good name on a tangible structure goes bad, it causes mere temporary embarrassment rather than a serious diminution of the public benefits provided by the charity. Tyco CEO Dennis Kozlowski donated a fortune in his heyday, and in exchange the Seton Hall Business School became Dennis Kozlowski Hall in 1997.⁶⁴ The name Kozlowski subsequently became synonymous with corporate greed. He was infamous for his excessive spending, including a \$2 million toga party on the Mediterranean island of Sardinia featuring singer Jimmy Buffet and X-rated ice sculptures; other Kozlowski excesses included \$30,000 opera glasses, a \$16,000 dog-shaped umbrella stand, and a \$6,000 shower curtain in his maid's bathroom, all at company expense.⁶⁵ A New York court eventually convicted Kozlowski of grand larceny, and sentenced him to eight to twenty-five years in prison.⁶⁶ “[T]wo other buildings on Seton Hall’s campus alone . . . [were] named for convicted or accused corporate malfeasants.”⁶⁷

⁵⁹ See Colombo, *supra* note 55, at 657 n.3

⁶⁰ John K. Eason, *Private Motive and Perpetual Conditions in Charitable Naming Gifts: When Good Names Go Bad*, 38 U.C. DAVIS L. REV. 375, 378 n.2 (2005); Eric Gibson, *Giving Without Giving a Darn Who Gets the Credit*, WALL ST. J., Aug. 3, 2001, at W13; Kathleen Teltsch, *The Memorial Alumni Boulder—Colleges Are Naming Anything and Everything to Get Donors’ Bucks*, S.F. CHRON., July 4, 1993, at 5 (the opportunity to name individual lockers in the men’s football team locker room sold for \$1,000), available at 1993 WLNR 2607110.

⁶¹ Eason, *supra* note 60, at 378 n.3.

⁶² *Id.* at 449 (“[H]uge philanthropic undertakings in the modern era almost by definition anticipate a major donor who will likely expect prominent name recognition for [the] contribution.”).

⁶³ The situation could be more significant if the charity grants the donor a perpetual naming right. For example, the heirs of Avery Fisher alleged that the Fisher name must accompany any philharmonic concert hall in New York used by the Lincoln Center in perpetuity. *Id.* at 450-51. The parties eventually settled the dispute. Lincoln Center agreed to name a building exterior after Avery Fisher, but reserved the right to name interior portions of that building for other donors. Gross, *supra* note 37, at 48; see also *supra* note 123.

⁶⁴ See Charity Governance, August, 2005, available at http://www.charitygovernance.com/charity-governance/2005/08/naming_rights_a.html. (discussing Kozlowski’s \$3 million contributions to Seton Hall). The rotunda of the university’s library also bore Kozlowski’s name. *Id.*

⁶⁵ See William A. Drennan, *Enron-Inspired Nonqualified Deferred Compensation Rules: “If You Don’t Know Where You’re Going, You Might Not Get There,”* 73 TENN. L. REV. 415, 415 (2006). Kozlowski was president of Tyco Corporation, a publicly traded company. The Tyco shareholders lost \$80 billion under his leadership. *Id.* In addition, Cambridge University has the Kozlowski Professorship of Corporate Leadership and Accountability, which Professor Eason describes as “oxymoronic.” Eason, *supra* note 60, at 386; see also Christine Dugas, *Tyco sues former chief over self-serving gifts*, USA TODAY, Sept. 15, 2002 (Kozlowski established the professorship with a \$1 million donation), available at 2002 WLNR 4495162.

⁶⁶ James L. Gustafson, Note, *Cracking Down on White-Collar Crime: An Analysis of the Recent Trend of Severe Sentences for Corporate Officers*, 40 SUFFOLK U.L. REV. 685, 696 (2007); Charity Governance, *supra* note 64. In July, 2005, Kozlowski reportedly contacted Seton Hall’s president and requested that the University remove his

Many similar situations have arisen since the mid-1990s. Richard Scrushy's name "adorn[ed] . . . buildings, schools, and athletic facilities across Alabama,"⁶⁸ but after the donations the U.S. Attorney's Office alleged that as president of HealthSouth Corp. he was the mastermind of a \$3 billion accounting fraud.⁶⁹ Alfred Taubman donated \$15 million to Harvard to fund the "Taubman Center for State and Local Government" while he was the chairman of Sotherby's Auction House.⁷⁰ Brown University had the Taubman Center for Public Policy, and the University of Michigan had a medical center and architectural college named for Mr. Taubman.⁷¹ Subsequently prosecutors convicted Mr. Taubman of price-fixing, and the court sentenced him to a year and a day in prison, and ordered him to pay a \$7.5 million fine.⁷² Harvard also received \$5 million to fund the Kokkalis Program for the "strengthening of democracy and free market econom[ies] in the Balkans and nearby countries" but authorities subsequently investigated Mr. Kokkalis, a Greek telecommunications magnate, for "betraying his country as a Cold War spy for communist East Germany."⁷³ Northwestern University had Andersen Hall, named for the founder of the accounting firm implicated in, and destroyed by, the Enron financial scandal.⁷⁴ Villanova University, the University of Missouri, and other institutions had analogous incidents.⁷⁵

name because of "his ongoing affection for the University, as well as his desire to spare Seton Hall any further adverse attention or distraction from its educational mission." *Id.*

⁶⁷ Eason, *supra* note 60, at 395.

⁶⁸ *Id.* at 386.

⁶⁹ Pamela H. Bucy, *Why Do They Do It? The Motives, Mores, and Character of White Collar Criminals*, 82 ST. JOHN'S L. REV. 401, 435 n.235 (2008) ("Almost one year to the day that he was acquitted on the fraud charges, Scrushy was convicted on federal bribery charges . . . and sentenced to six years and ten months . . ."); John R. Wilke & Chad Terhune, *Scrushy May Be Indicted Today*, WALL ST. J., Nov. 4, 2003, at A3; Eason, *supra* note 60, at 395.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² Christopher R. Leslie, *Cartels, Agency Costs, and Finding Virtue in Faithless Agents*, 49 WM. AND MARY L. REV. 1621, 1659-60 (2008); Matthew Benjamin, *An Embarrassment of Riches*, U.S. NEWS & WORLD REP., Dec. 30, 2002, at 36; Marcella Bombardieri, *Harvard Benefactor in Furor Abroad*, BOSTON GLOBE, Mar. 10, 2003, at A1, available at 2003 WLNR 3454355; Ameet Sachdev, *What's School To Do When Fallen CEO's Name On Wall?*, CHI. TRIB., Oct. 14, 2003, at 1, available at 2003 WLNR 153601634; Eason, *supra* note 60, at 395.

⁷³ *Id.* at 396.

⁷⁴ *Id.* at 400 n.91.

⁷⁵ Villanova University named its basketball arena du Pont Pavilion after a donation from John du Pont, a member of a fabulously wealthy family, but changed the name with the family's consent after John du Pont "was found guilty in the 1996 murder of Olympic wrestling gold medalist Dave Schultz." *Naming Rights*, *supra* note 43.

In 2004, the University of Missouri named its new basketball arena Paige Sports Arena after the daughter of two major donors to the university, but after "allegations of academic fraud against the daughter surfaced, her parents removed her name from the arena . . ." Keith Herbert, *Lawmakers call Citibank out*, NEWSDAY, Jan. 30, 2009, at A03, available at 2009 WLNR 1779901.

A professor at the University of Missouri is the Kenneth L. Lay Chair in Economics. Christian Basi, *MU Economics Professor Appointed Ken Lay Chair in Economics*, April 21, 2008, available at <http://munews.missouri.edu/news-releases/2008/0421-Ken-lay-chair-php>. Ken Lay became infamous for his fiscal shenanigans as president of Enron Corporation. See Carrie Johnson, *Former Chairman of Enron Charged*, WASH. POST, July 8, 2004, at A1; Boert Trigaux, *USF Business Dean Hopes It Is Not Too Late To Teach Ethics*, ST. PETERSBURG TIMES, Jan. 12, 2003, at 1E. A jury convicted Mr. Lay in May of 2006 for deceiving investors, but the judge vacated the conviction after Mr. Lay died on July 5, 2006. Greg Farrell, *Trial Judge Vacates Conviction of Late Enron Founder Lay*, USA TODAY, Oct. 18, 2006, at 3B.

Although a charitable institution may endure some short-term embarrassment when circumstances tarnish a donor's name, it seems unlikely that a naming right for a particular building or other item of tangible property will have a significant impact on the ability of a large publicly supported institution to fulfill its charitable mission. Even when circumstances sully the names of Kokkalis, Kozlowski, Scrushy, and Taubman, Harvard University, Seton Hall, Brown University, and the University of Michigan continue to provide quality education and otherwise fulfill their charitable missions. Seton Hall may actually benefit from the Kozlowski affair. After the school removed Kozlowski's name, it quickly announced that it would "offer the naming opportunity . . . to another donor,"⁷⁶ providing Seton Hall with the opportunity to sell the naming rights twice. In contrast to naming rights for physical structures, this Article asserts that the perpetual presence of a surname in the name of a charitable trust will diminish the benefits that society should otherwise enjoy.

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

Anecdotal evidence that founders surname charitable trusts is ubiquitous. The robber barons of the early industrial age funded enormous surnamed charitable trusts,⁷⁷ perhaps in an attempt to cleanse family names tarnished by disclosure of egregious business practices. John D. Rockefeller, Andrew Carnegie, Russell Sage, W.K. Kellogg, Eli Lilly,⁷⁸ and other early industrialists established charitable trusts.

Similarly the tycoons of each passing decade have employed surnamed charitable trusts from Henry Ford in the 1940s,⁷⁹ to Bernard Madoff,⁸⁰ T. Boone Pickens,⁸¹ and Bill and Melinda

In addition, in *Stock v. Augsburg College*, Mr. Stock contributed \$500,000 and the College agreed to name a wing in a new facility after him, but unfavorable publicity followed. The donor was publicly disgraced for having sent letters denouncing interracial marriage. *Stock v. Augsburg College*, 2002 Minn. Appl. WL 555944 (Minn. Ct. App. 2002). In *Stock*, the school refused to name the wing after Mr. Stock. Although the statute of limitations barred the donor's family from enforcing the naming restriction, the court stated that it would have otherwise forced the school to forfeit the donation for failing to comply with the naming condition. *Id.* at 6.

⁷⁶ *Charity Governance*, *supra* note 64.

⁷⁷ "The accumulated industrial wealth of the late nineteenth century U.S. industrial revolution ushered in the next phase of the charitable institution, the private foundation. Before the twentieth century, only five foundations had been established, whereas over sixty foundations were recorded by 1910." Byrnes, *supra* note 12, at 530.

⁷⁸ *Id.* at 531-32 (discussing private foundations for Rockefeller, Carnegie, Sage, Kellogg, and Lilly).

⁷⁹ Henry Ford's charitable trust was controversial. In 1916 Ford testified before a Congressional committee that he opposed charity because it "weakened the self-reliant spirit of men." *Id.* at 535 (citing Staff of Senate Comm'n. on Indus. Relations, 64th Cong., Industrial Relations: Final Report and Testimony Submitted to Congress (Comm. Print 1916) [hereinafter Walsh Comm'n], at 7630). However in 1947, the Ford family contributed huge amounts of Ford stock into a charitable trust to reap enormous tax benefits, provide limited amounts for charity, and ensure that the stock did not fall into the control of outsiders. See Byrnes, *supra* note 12, at 535. The charitable trust device allowed the Ford family to maintain control over the stock in their role as trustees.

⁸⁰ See The Madoff Family Foundation, IRS Form 990-PF, Return of Private Foundation, *available at* guidestar.org (the 2007 tax return reports assets in excess of \$19 million).

⁸¹ See The T. Boone Pickens Foundation, IRS Form 990-PF, Return of Private Foundation, *available at* guidestar.org (the 2007 tax return reports assets in excess of \$188 million).

Gates in the new millennium.⁸² While this anecdotal evidence indicates the prevalence of these perpetual naming rights, this Article presents broader evidence.

IRS Publication 78 lists organizations eligible to receive tax-deductible contributions,⁸³ and specifically identifies private foundations.⁸⁴ Most of these private foundations are charitable trust, and only a small portion are nonprofit corporations.⁸⁵ Publication 78 resembles three telephone books, containing over 3,700 pages,⁸⁶ with approximately 180 organizations listed on each page. An analysis of all organization names beginning with the letter “P” reveals that approximately eighty-five percent of individual founders surname their charitable trust. Over seventy-five percent include a surname and completely fail to indicate the charitable function or geographic territory of the charitable trust.⁸⁷

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

Although a donor may organize a private foundation as a nonprofit corporation, the great majority of private foundations are charitable trusts.⁸⁸ In fact, the IRS form presupposes that a private foundation is a charitable trust.⁸⁹ IRS statistics report that there were 72,800 private foundations with almost \$440 billion in accumulated assets in 2005, and that donors contributed more than \$27 billion to private foundations in 2005.⁹⁰ Reducing the eighty-five percent figure

⁸² See Bill and Melinda Gates Foundation Trust, IRS Form 990-PF, Return of Private Foundation, *available at* guidestar.org (the 2007 tax return reports assets in excess of \$38 billion).

⁸³ IRS Publication 78, Cumulative List of Organizations Described in Section 170(c) of the Internal Revenue Code of 1986 (revised Sept. 30, 2007) [hereinafter IRS Pub. 78].

⁸⁴ The numeral four follows the name of each private foundation listed in IRS Publication 78. *Id.* at 1.

⁸⁵ See *infra* note 88 and accompanying text.

⁸⁶ IRS Pub. 78, *supra* note 83. Volume 1 consists of pages 1 to 1300; Volume 2 consists of pages 1301 to 2521; and Volume 3 consists of pages 2523 to 3739.

⁸⁷ Approximately seven percent of the names include both a surname and a functional or geographic designation, *see infra* Appendix A, such as the Page Ann Hayden Foundation for Children with Special Needs. IRS Pub. 78, *supra* note 83, at 2606. This survey considered a charitable trust identified as a “scholarship” entity, such as the “George William Patton and Mary Burnham Patton Scholarship Fund,” *id.* at 2642, as having a functional name because the word “scholarship” provides grant seekers and others an indication of the entity’s charitable purpose. This survey, however, considers a charitable trust with a name such as “The Patton Charitable Foundation,” *id.* at 2641, as a surnamed charitable trust failing to provide a functional designation because almost all private foundations must be “charitable” in some way, *see* I.R.C. § 509(a) (2000) (all private foundations must be described in I.R.C. § 501(c)(3)), and the mere use of the word “charitable” provides no meaningful clue to grant seekers or others regarding the entity’s function.

⁸⁸ Schramm, *supra* note 12, at 370 (a private foundation is “generally organized as a trust”). Founders likely avoid the corporate form because a corporation’s board of directors can amend the corporation’s Articles of Incorporation. *See e.g.*, Mo. Rev. Stat. § 355.551 (1995). This would permit a future board to amend or destroy the terms and procedures created by the founder. A subsequent board of directors could change the entity’s name, purpose or method of selecting the members of its governing body. In contrast, it is very difficult to change the terms of a charitable trust. *See infra* Part I.D.

⁸⁹ IRS Publication 557, Tax-Exempt Status for Your Organization, at 70-72 (June, 2008) (providing a sample charitable trust document for creating a private foundation).

⁹⁰ The IRS reported that 72,800 nonoperating private foundations filed tax reports in 2005. IRS, SOI Tax Stats-Domestic Private Foundations and Charitable Trust Statistics, Table 1, Domestic Private Foundations, 2005,

discussed above⁹¹ to eighty percent because some private foundations may be corporations, there are more than 58,000 surnamed charitable trusts, holding approximately \$350 billion of accumulated assets, and donors contributed approximately \$21.5 billion to surnamed charitable trusts in 2005.⁹²

Thus, surnamed charitable trusts are extremely important. As the tax subsidy for each donation to a surnamed charitable trust likely is from forty-five percent to sixty-seven percent of the donation,⁹³ the taxpaying public grants enormous tax subsidies to these entities. Whether the public receives a commensurate community benefit is an important issue.

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

1. Possible Altruistic or Impersonal Motives.

The reason people give to charity is “hotly debated,”⁹⁴ and donor motives in publicizing their charitable giving could also spark a fiery discourse. “[H]uman motivations are terribly complex,”⁹⁵ and a single donor who broadcasts philanthropy may have multiple goals.

In some cases a founder may have no selfish motive, but instead may desire to follow or create a social norm. Some may believe the publicity will inspire generosity in others and make the world a better place. Matriarchs and patriarchs may desire to set a positive example for their descendants.⁹⁶

Also, when giving reaches certain levels, there may be a societal expectation that the charity should thank the benefactor.⁹⁷ Some wealthy donors may believe that because they receive naming rights whenever they make a sizeable donation to an operating charity, the charitable trust should bear their name.

column 1, available at <http://www.irs.gov/taxstats/charitablstats/article/0,,id=96996,00.html>. The IRS also reported that these entities had “total assets (book value)” of \$443,893,345,000, *id.* column (23), and received “contributions, gifts, and grants” of \$27,248,328,000. *Id.* column (5).

⁹¹ See *supra* notes 86-87 and accompanying text.

⁹² Eighty percent of the 72,800 private foundations were 58,240 charitable trusts; eighty percent of the \$440 billion in assets were \$352 billion in assets; and eighty percent of total contributions of \$27.2 billion were \$21.76 billion.

⁹³ See *supra* notes 149-63 and accompanying text, regarding the amount of the tax subsidies.

⁹⁴ “[T]he psychology . . . of charitable giving by individuals is a difficult and hotly debated topic.” See Ethan Stone, *Halos, Billboards, and the Taxation of Charitable Sponsorship*, 82 IND. L.J. 213, 231 (2007) (citing Colombo, *supra* note 55, at 667-79).

⁹⁵ Colombo, *supra* note 55, at 669.

⁹⁶ Barbara R. Hauser, *Charitable Giving: Noblesse Oblige, The Gospel of Wealth, and Other Shibboleths*, THE JOURNAL OF WEALTH MGMT’T 23, 23 (2004), available at www.cadwalader.com/assets/article/Hauser_100104.pdf.

⁹⁷ “[A] charity’s grateful acknowledgement of [a] gift is the socially expected response to a display of generosity. The donor would be insulted (and society would condemn the charity) if public thanks were not forthcoming.” Stone, *supra* note 94, at 231.

Some may believe that charitable giving is an obligation which accompanies great wealth, and the publicity is necessary to inform the rabble that the aristocrat has met the burden. One commentator asserts, however, that “noblesse oblige is a mere shibboleth.”⁹⁸

Others may donate to cleanse a sullied family name. For example, “dead bodies of factory workers . . . soiled the legacy of Andrew Carnegie . . . whose suppression of the Homestead, Pennsylvania[] steel-mill strike of 1892 left nine workers dead.”⁹⁹

Others may surname without serious reflection. When an individual establishes a charitable trust, the individual may learn from peers or advisors that including the family name in the entity name is a standard practice which the IRS has approved.¹⁰⁰

2. Immortality and Self-Agrandizement

In contrast to modest philanthropists,¹⁰¹ many wealthy patrons consciously choose to employ their surname in search of immortality and self-aggrandizement. Charitable giving can instill a sense of pride and self-worth. “[I]ndividuals often give . . . because they value (as an end in itself) a self-image of generosity and responsibility”¹⁰²

A charitable trust can be a vehicle for improving social status and reputation.¹⁰³ “[L]arge charitable gifts can be a method for an individual to signal that [the individual] is both wealthy and generous, traits which are highly prized by our society.”¹⁰⁴ Individuals often seek status and prestige relative to their peers as an end in itself.¹⁰⁵ As described in Part II.C.2 of this Article, a founder family will enjoy adulation and ingratiating behavior from seekers of charitable grants.

Also, “[h]uman beings have always been fascinated with the concept of living forever. The search for the cure for mortality has embodied knightly quests (Search for the Holy Grail) . . . foreign conquests (Ponce de Leon’s Floridian Fountain of Youth) and, most recently, scientific research (cloning).”¹⁰⁶ Philanthropists may desire to be admired by others after death, sometimes described as “financial immortality”¹⁰⁷ or “social immortality.”¹⁰⁸ “[O]ne can expect

⁹⁸ Hauser, *supra* note 96, at 23.

⁹⁹ Weiss, *supra* note 57.

¹⁰⁰ *See infra* Part I.E.

¹⁰¹ Some donors prefer anonymity. *See* Gross, *supra* note 37, at 49. A Bible passage encourages anonymity.

[W]hen thou doest [give] alms, do not sound a trumpet before thee, as the hypocrites do . . . that they may have glory of men. Verily I say unto you, they have their reward. But when thou doest [give], let not thy left hand know what thy right hand doeth.”

Matthew 6:2-3 (King James).

¹⁰² Stone, *supra* note 94, at 231.

¹⁰³ “Charitable name association provides the donor with much by way of recognition, status, identity definition (or redefinition), and other personal pleasures.” Eason, *supra* note 60, at 453.

¹⁰⁴ Colombo, *supra* note 55, at 671 n.66, citing Eric A. Posner, *Altruism, Status, and Trust in the Law of Gifts and Gratuitous Promises*, 1997 WIS. L. REV. 567, 574-77 (1997).

¹⁰⁵ Colombo, *supra* note 55, at 671 n.66, citing Richard H. McAdams, *Relative Preferences*, 102 YALE L. J. 1 (1992).

¹⁰⁶ Olen M. “Mac” Bailey, Jr., *Financial Immortality*, THE BEST TIMES, available at http://www.thebaileylawfirm.com/articles_release.cfm?Article_ID=7.

¹⁰⁷ *Id.* (contrasting “financial immortality” with political, athletic, artistic, scientific, business or literary immortality).

that, especially with large . . . gifts . . . the desire to purchase some measure of immortality weighs heavily in the decision by the ‘donor’”¹⁰⁹ One donor commented that having his name on the school building “validates my existence. It is a monument, a tombstone in a way. It says that I worked hard, I accumulated money, and I left something behind.”¹¹⁰

D. Charitable Trust Law Permits Surnames in Perpetuity

Cardinal principles of charitable trust law permit a founder to exploit perpetual naming rights. First, the grantor of a trust is the master of its terms. The grantor is free to designate the name of the trust, the initial and subsequent trustee or trustees, and the conditions for amending any terms of the trust. A wealthy donor can surname a charitable trust, be designated as the trustee for life, and retain the exclusive power to amend the trust for life.¹¹¹ The grantor can also designate the future trustee or trustees after death, or a mechanism for choosing trustees, and may provide that only descendants can serve as trustees.¹¹²

Second, a charitable trust can last forever notwithstanding the rule against perpetuities.¹¹³ “[M]ost charitable trusts are of indefinite duration.”¹¹⁴

Third, the opportunities to amend or modify a charitable trust are severely limited, except as permitted by the terms of the trust. Although a grantor serving as trustee could amend a *non-charitable* trust with the agreement of all the beneficiaries,¹¹⁵ the beneficiaries of a charitable trust are indefinite.¹¹⁶ Judicial amendment is possible under the *cy pres* doctrine¹¹⁷ and the doctrine of equitable deviation, but neither doctrine likely would remove a surname from the name of a charitable trust even hundreds of years after the founder’s death.

¹⁰⁸ Robert A. Kastenbaum & Ruth Aisenberg, *THE PSYCHOLOGY OF DEATH*, 101 (1972), quoted in Ronald Chester, *The Psychology of Dead Hand Control*, 43 *REAL PROPERTY, TRUST AND ESTATE LAW J.* 503, 506 (2008) (“As two noted psychologists wrote, “That \$2,000,000 Chair in Psychological Gerontology which you have . . . endow[ed] at your local university . . . bestows social immortality; your name will be linked forevermore to the professor who holds that enviable title.”).

¹⁰⁹ Colombo, *supra* note 55, at 677. When a donor enjoys naming rights, he may be “purchasing a monument to himself,” and may be seeking a “measure of immortality.” *Id.*; Hauser, *supra* note 96, at 28 (“A major endowment results in name recognition if not literal immortality”); Eason, *supra* note 60, at 394 n.58 (stating that tobacco baron James B. Duke “purchase[d] redefined immortality” in acquiring the naming rights to Duke University).

¹¹⁰ Jones, *supra* note 56, at 4 (quoting Gerald Ratner, a University of Chicago donor), *quoted in* Colombo, *supra* note 55, at 659 n.8

¹¹¹ SCOTT ON TRUSTS, *supra* note 28, § 100, at 73 (settler can serve as trustee). The grantor can only claim a charitable tax deduction for the contribution if the trust must use the funds for charitable or other exempt purposes. *See* I.R.C. § 170(c)(2) (2000).

¹¹² The trust can provide a mechanism for choosing trustees if in the future the founder has no descendants.

¹¹³ SCOTT ON TRUSTS, *supra* note 28, § 365, at 109 (“A charitable trust is valid although it is to continue beyond the period of the rule against perpetuities. It is valid even though it is to continue indefinitely.”).

¹¹⁴ *Id.* § 365, at 109 n.1.

¹¹⁵ *Id.* § 367, at 113.

¹¹⁶ *Id.*

¹¹⁷ *See* 2 RESTATEMENT (THIRD) OF TRUSTS § 67 (2003); *see also* Johnny Rex Buckles, *When Charitable Gifts Soar Above Twin Towers: A Federal Income Tax Solution to the Problem of Publicly Solicited Surplus Donations Raised for a Designated Charitable Purpose*, 71 *FORDHAM L. REV.* 1827 (2003).

Courts employ the cy pres doctrine to change the purpose of a charitable trust, and only when the stated purpose becomes impossible or impractical to pursue.¹¹⁸ The use of a surname would not be a purpose of a charitable trust, and the surname's presence likely would not make it "impossible" or "impractical" for the charitable trust to pursue its charitable purpose.¹¹⁹

The doctrine of equitable deviation allows a court to deviate from the administrative terms of a trust, but only if justified by a change in circumstances¹²⁰ which was not anticipated by the donor,¹²¹ and which would "defeat or substantially impair the accomplishment of the [donor's] purposes."¹²² In regards to the name of a charitable trust, it seems unlikely that a change in circumstances which could defeat or substantially impair the accomplishment of the donor's purpose could be addressed by changing the charitable trust's name. A charitable trust likely *could* fulfill its charitable objectives regardless of its name, although this Article explores many problems with a perpetual surname.¹²³

¹¹⁸ A leading commentator states,

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

SCOTT ON TRUSTS, *supra* note 28, § 367.2, at 118. An American Law Institute Restatement would allow cy pres to also apply if implementation of the purpose becomes "wasteful." 2 RESTATEMENT (THIRD) OF TRUSTS § 67 (2003).

¹¹⁹ Presumably, regardless of a charitable trust's name, it could operate in a praiseworthy fashion. Nevertheless, as discussed in Part II.C of this Article, the surname will encourage nepotism, uninformed decision making, and a lack of transparency which will make it less likely that the charitable trust will fulfill its maximum potential.

In discussing cy pres and charitable naming rights, Professor Eason identifies two ways in which the donor's retained naming rights might influence a court's application of cy pres. First, if a court determines that a trust should use its assets for a different charitable purpose under cy pres, the court may allow the naming right to apply "in a manner that differs from that stated by the donor." Eason, *supra* note 60, at 425; *see e.g.* Zevely v. City of Paris, 298 S.W.2d 12 (Ky. 1956) (donor originally contributed to a hospital that was later closed; under cy pres the remaining assets then funded a room bearing the name of the donor's son in a new health care facility); *see also* Pedrotti v. Marin County, 152 F.2d 829 (9th Cir. 1946), *cert. denied*, 328 U.S. 853 (1946), *rev'g* 263.5 Acres of Land, 54 F. Supp. 692 (N.D. Cal. 1944) (although donor specified that ranch donated for charitable purposes should bear his name, court applying cy pres allowed proceeds from the disposition of the ranch to be a charitable fund in the donor's name); Grant Home v. Medlock, 349 S.E.2d 655 (S.C. Ct. App. 1986) (although funds could not build a home for the needy, under cy pres the funds could establish a charitable trust bearing the donor's surname, which would distribute money to house the needy).

Second, a court may consider the donor's retention of a naming right when deciding whether the donor had a general charitable intent supporting the application of cy pres. If the donor had a specific intent, rather than a general intent, and the original charitable purpose becomes impractical or impossible, cy pres may not apply, and the donated assets would pass to the donor's heirs. For example, in *Nelson v. Kring*, 592 P.2d 438 (Kan. 1979), the court refused to apply cy pres after specifically noting that the donor intended to fund a hospital that bore his name. In *Hardy v. Davis*, 148 N.E.2d 805 (Ill. App. Ct. 1958), however, the donor contributed funds for a surnamed orphanage. When it was no longer possible to operate the orphanage, the court concluded that the naming rights did not preclude a finding of general intent, and the court applied cy pres.

¹²⁰ RESTATEMENT (SECOND) OF TRUSTS § 381 (1959); *see also* RESTATEMENT (THIRD) OF TRUSTS, § 66 (2003). "The changed circumstances may, but need not, result in cy pres equivalent impossibility, impracticability, or illegality." Eason, *supra* note 60, at 436 n.262.

¹²¹ RESTATEMENT (SECOND) OF TRUSTS, § 381, cmt. E (1959).

¹²² *Id.* § 381 (1959).

¹²³ Equitable deviation may assist a charity when it makes a peculiar type of naming agreement regarding a physical facility. For example, Avery Fisher donated \$10.5 million in 1973 to support the Lincoln Center philharmonic

E. *Tax Law Considers Surnames Harmless*

In the 1960s and 1970s, the IRS issued a regulation and a series of rulings which bless charitable naming rights in varied circumstances. Specifically on entity naming rights, in Revenue Ruling 73-407,¹²⁴ a charitable trust¹²⁵ entered into a contract to make a large donation to an operating charity if the operating charity changed its name to include the surname of the trust's founder, "and agreed to refrain from changing its name for one hundred years."¹²⁶ Despite the rather narrow fact pattern involved, the IRS proclaimed a broad immunity for those who broadcast their philanthropy. The IRS stated, "the public recognition a person may receive, arising from the charitable activities of a [charitable trust] to which such person is a substantial contributor . . . is [merely an] incidental and tenuous [benefit],"¹²⁷ and will not violate the applicable tax rule.¹²⁸

In Revenue Ruling 68-432¹²⁹ the IRS considered the amount an individual can deduct when receiving certain benefits in return for making a charitable contribution.¹³⁰ The IRS

concert hall, and the charity not only agreed to name the hall that was built with the donation after Mr. Fisher, but allegedly agreed to name all future halls after Mr. Fisher. See Eason, *supra* note 60, at 449, citing Elaine Dutka, *Avery Fisher Hall Now, But Will It Stick*, L.A. TIMES, June 5, 2002, at F2; Robin Pogrebin, *Avery Fischer Hall Forever, Heirs Say*, N.Y. TIMES, May 13, 2002, at E1. As could have been predicted, the original hall subsequently deteriorated and in 2002 the charity was ready to tear it down and raise funds necessary for a \$250 million to \$300 million new facility. Lincoln Center wanted to offer a new primary donor (who would be asked to donate \$75 to \$100 million) naming rights in the new hall, and the Fisher family objected. Eason, *supra* note 60, at 451. Eventually the parties settled, with the exterior of a Lincoln Center building named after Mr. Fisher. See Gross, *supra* note 37, at 49. Professor Eason admits that it is foolish for a charity to enter into such a perpetual naming agreement regarding physical structures. Eason, *supra* note 60, at 452 ("To allow a current donor to dictate that all future facilities will bear [the donor's] name . . . to appease that [donor's] vanity, seems both unnecessary and short-sighted."). Even in the rare circumstance in which a charity might agree to such a naming right, Professor Eason notes that the doctrine of equitable deviation might allow a court to release the charity from the naming condition if the donor did not anticipate that the retained naming right would prevent the creation of a new building necessary for the entity to conduct its charitable purposes. See *id.* at 439 ("characterizing naming provisions as demonstrative [under the doctrine of equitable deviation] . . . clearly opens a pervasive route to escaping or circumventing a donor's seemingly restrictive name association demands.").

¹²⁴ Rev. Rul. 73-407, 1973-2 C.B. 383, available at 1973 WL 33497.

¹²⁵ The entity likely is a charitable trust because Rev. Rul. 73-407 refers to a "private foundation." See *supra* note 88.

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

¹²⁷ *Id.*

¹²⁸ Rev. Rul. 73-407 considered whether the transaction triggered the excise tax on self-dealing under I.R.C. § 4941(d)(1)(B) (2000). Generally "self-dealing" includes any direct or indirect transfer by the charitable trust for the benefit of the founder, unless the benefit is "incidental or tenuous." Treas. Reg. § 53.4941(d)-2(f)(2) (1973); Rev. Rul. 82-136, 1982-2 C.B. 300.

¹²⁹ Rev. Rul. 68-432, 1968-2 C.B. 104, available at 1968 WL 15104.

¹³⁰ In general, a taxpayer cannot deduct a contribution to the extent the taxpayer receives a monetary benefit. Rev. Rul. 67-246, 1967-2 C.B. 104, available at 1967 WL 15031. If the taxpayer's donation exceeds the return benefit, the taxpayer may deduct the excess. *Id.*; *United States v. American Bar Endowment*, 477 U.S. 105, 117-18 (1986).

signaled that it would ignore naming rights when it stated “[s]uch privileges as being associated with or being known as a benefactor of the organization are not significant return benefits that have a monetary value [under the charitable tax deduction rules].”¹³¹

In 1977, the IRS ruled favorably on an arrangement that involved naming rights of a public charity’s real estate, coupled with an interesting advertising scheme.¹³² A for-profit corporation donated land and substantial cash each year to a charity operating a replica of an early 19th century American village open to the general public similar to a history museum. “[T]he [for-profit] corporation benefits by having the village named after it, by having its name associated with the village in conjunction with its own advertising program, and by having its name mentioned in each [pamphlet or other] publication [which the charity provides to the general public].”¹³³ Nevertheless, the IRS ruled that “such [private] benefits are merely incidental to the benefits flowing to the general public,”¹³⁴ and do not violate the applicable rules. In 1973, the Treasury Department issued regulations that naming rights over a charity’s buildings are mere “incidental and tenuous” benefits.¹³⁵

Although the charitable name game has exploded since the 1960s and 1970s,¹³⁶ the IRS has not reexamined its view.¹³⁷

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

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

¹³¹ Rev. Rul. 68-432, 1968-2 C.B. 104. Also in the 1960s the IRS ruled that a charity providing educational broadcasting qualifies for tax-exempt status even if the programs acknowledge contributors by name, Rev. Rul. 67-342, 1967-2 C.B. 187, *available at* 1967 WL 15087, and that a charity could grant its commercial contributors the right to use the charity’s “identifying symbol” in advertising. Rev. Rul. 66-358, 1966-2 C.B. 218, *available at* 1966 WL 15029.

¹³² Rev. Rul. 77-367, 1977-2 C.B. 193, *available at* 1977 WL 43734.

¹³³ *Id.*

¹³⁴ *Id.* As a result, the charity qualifies for tax-exempt status because it is organized and operated exclusively for educational and charitable purposes.

¹³⁵ The IRS concluded that the naming rights will not trigger an excise tax on self-dealing transactions. Treas. Reg. § 53.4941(d)-2(f)(9) (Example 4) (1973).

¹³⁶ *See supra* Part I.A.

¹³⁷ In 2003, the IRS issued a warning in an unrelated field. In Priv. Ltr. Rul. 200323006 (June 6, 2003), *available at* 2003 WL 21300880, the IRS ruled that a commercial entity’s payment for naming rights constituted “private use” under municipal bond rules. The ruling, however, did not trigger an adverse consequence in the fact pattern considered, and a commentator asserts that practitioners can easily avoid the ruling by redirecting the payments. *See* Elizabeth Mills, *IRS Calls Foul in Naming Rights Agreement for Bond-Financed Facility*, 15 TAX’N OF EXEMPTS, 180 (Jan./Feb. 2004), *available at* 2004 WL 303912.

Tax benefits for charity antedate Moses,¹³⁸ and have a rich and colorful history.¹³⁹ Ancient Egypt, Greece, and Rome did not tax temples and other religious institutions on the theory that “they were owned by the gods themselves and were thus beyond the reach of mortal taxing authorities.”¹⁴⁰ In the United States every federal income tax¹⁴¹ has exempted charities,¹⁴² and since 1917 Congress has allowed taxpayers to claim income tax deductions for donations to charity.¹⁴³ Congress enacted the estate tax charitable deduction in 1918,¹⁴⁴ and the gift tax charitable deduction in 1924.¹⁴⁵

1. Charitable Tax Benefits Are a Government Subsidy.

Charitable tax benefits are an indirect government subsidy for charitable giving.¹⁴⁶ “It is as if the taxpayer incurred and paid a tax liability, and the government gave the taxpayer a direct subsidy for the same amount.”¹⁴⁷ When the individual is wealthy, the government subsidy is

¹³⁸ See *Genesis* 47:26 (King James) (“Joseph made it a law over the land of Egypt unto this day, that Pharaoh should have the fifth part; except the land of the priests only, which became not Pharaoh’s”), *quoted in* John D. Colombo & Mark A. Hall, *THE CHARITABLE EXEMPTION*, 3 (1995).

¹³⁹ “Exempting charities from various forms of taxation is a practice that appears as old as western civilization itself.” *Id.* at 3; Colombo, *supra* note 55, at 661 n.15. In approximately 1200 B.C., tax exemptions “endangered” the “economic equilibrium” of Egypt because tax-exempt temples owned fifteen percent of the cultivatable land, vast amounts of slaves, and other personal property. Colombo & Hall, *supra* note 138, at 3. Queen Elizabeth I’s Statute of Charitable Uses in 1601 ushered in post-Renaissance government support of charities, including “private perpetual funds [that] support . . . charitable institutions.” See Tanya D. Marsh, *A Dubious Distinction: Rethinking Tax Treatment of Private Foundations and Public Charities*, 22 VA. TAX L. REV. 137, 138 (2002). The Statute of Uses in 1601 permitted transfers of real property to perpetual trusts that supported specified charitable activities, notwithstanding the rule against perpetuities enacted in King Henry VIII’s Statute of Uses in 1536. See Byrnes, *supra* note 12, at 501-2.

¹⁴⁰ Colombo & Hall, *supra* note 138, at 4.

¹⁴¹ In Colonial times, before the imposition of the federal income tax, “[t]he primary example of a uniform [property tax] exemption . . . was for orthodox churches, which were not taxed because the colonies were established as theocracies and no government taxes itself.” *Id.*

¹⁴² When Congress enacted a federal income tax in 1894, it “included the first federal tax statute exempting charitable [religious or educational] associations from taxation,” Byrnes, *supra* note 12, at 525, and the exemption included “endowment income.” *Id.* “[E]very subsequent federal income tax law has contained a similar exemption.” Hall & Colombo, *supra* note 138, at 5.

¹⁴³ In 1917, Congress enacted the charitable deduction, Byrnes, *supra* note 12, at 539, which allowed donors to claim an income tax deduction for contributions to entities organized and operated exclusively for charitable, educational, scientific, religious, and other specified purposes, within limits. The current charitable deduction allows an individual to deduct cash contributions to public charities up to fifty percent of adjusted gross income. I.R.C. § 170(b)(1)(A) (2000).

¹⁴⁴ Byrnes, *supra* note 12, at 540-41.

¹⁴⁵ See *id.* at 541.

¹⁴⁶ “It is certainly true that the operation of tax exemption is equivalent, in effect, to a direct subsidy; monetarily, there is no difference.” Schramm, *supra* note 12, at 388; Rob Atkinson, *Theories of the Federal Income Tax Exemption for Charities: Thesis, Antithesis, and Syntheses*, 27 STETSON L. REV. 395, 403-04 (1997) (“[T]he exemption is an indirect subsidy by which the government encourages [charitable] organizations This view . . . is pretty much the foundation of present law . . .”).

¹⁴⁷ Donna D. Adler, *The Internal Revenue Code, the Constitution, and the Courts: The Use of Tax Expenditure Analysis in Judicial Decision Making*, 28 WAKE FOREST L. REV. 855, 858 (1993), *quoted in* Schramm, *supra* note 12, at 388 (citations omitted). “By foregoing taxes that otherwise would have been due on the contributions, the government makes contributions cheaper and supplies an implicit subsidy to the recipient organization equal to the donor’s marginal tax bracket.” Colombo, *supra* note 55, at 683.

substantial.¹⁴⁸ If the individual makes a charitable gift, the estate tax charitable contribution deduction alone can subsidize forty-five cents of every dollar donated.

For example, presume that wealthy hypothetical taxpayer Ned Narcissus contributes to a family charitable trust upon his *death*. The federal estate tax applies at a forty-five percent rate to a decedent dying in 2009 to the extent his taxable estate exceeds \$3.5 million.¹⁴⁹ Ned Narcissus dies with a net estate of \$20 million before the charitable deduction, and his will donates \$10 million to the Narcissus Charitable Trust for Groundhogs. The \$10 million bequest is tax deductible.¹⁵⁰ Ned Narcissus leaves the balance of his estate to his daughter.

In the absence of the gift to the surnamed charitable trust, Ned Narcissus's estate would have paid estate taxes of approximately \$7,425,000,¹⁵¹ and his daughter would have received approximately \$12,575,000.¹⁵² In contrast, because of the \$10 million charitable bequest, Ned Narcissus's estate will only pay estate taxes of \$2,925,000,¹⁵³ and Ned's daughter will receive \$7,075,000.¹⁵⁴ Thus, although Ned Narcissus gave \$10 million to charity, his daughter's inheritance only dropped by \$5,500,000¹⁵⁵ because the government subsidized \$4,500,000 of the donation.¹⁵⁶ The end result is the same as if Narcissus's estate paid the IRS \$7,425,000 and the IRS then paid \$4,500,000 to the Narcissus Charitable Trust for Groundhogs,¹⁵⁷ and the estate paid the charitable trust \$5,500,000.¹⁵⁸ Thus, the government pays forty-five percent of the charitable donation, and the estate pays fifty-five percent.

The government subsidy is even bigger if the wealthy donor makes the charitable donation during life. In that case the charitable income tax deduction and the estate tax deduction combined can subsidize up to sixty-seven percent of every dollar donated. In effect, a

¹⁴⁸ In contrast, when a very poor person makes a charitable donation, there is no government subsidy because a tax deduction does not benefit the poor donor who otherwise owes no income tax. *See infra* note 165.

¹⁴⁹ I.R.C. § 2001(c)(2)(B) (Supp. V 2005) (the tax rate in 2009 is 45%); I.R.C. § 2010(c) (Supp. V 2005) (the "applicable exclusion amount" for decedents dying in 2009 is \$3.5 million).

¹⁵⁰ An estate may claim an estate tax deduction for all transfers to or for the use of an organization organized and operated exclusively for the "prevention of cruelty to . . . animals . . ." I.R.C. § 2055(a)(2) (2000); *see* Madoff, *supra* note 9 (taxpayer could deduct a contribution for the exclusive benefit of the Maltese dog breed).

¹⁵¹ The taxable estate is the gross estate after deductions, minus the applicable exclusion amount [in this case, \$20 million - \$3.5 million = \$16.5 million]. The product of the taxable estate and the 45% tax rate would equal the estate tax payable [\$16.5 million x 45% = \$7,425,000].

¹⁵² Ned Narcissus's daughter receives the balance of the estate after the payment of federal estate taxes [\$20 million - \$7,425,000 = \$12,575,000].

¹⁵³ The taxable estate is the gross estate less the \$10 million charitable deduction, minus the applicable exclusion amount [\$20 million - \$10 million - \$3.5 million = \$6.5 million]. The product of the taxable estate and the 45% tax rate would equal the tax payable [\$6.5 million x 45% = \$2,925,000].

¹⁵⁴ Ned Narcissus's daughter receives the balance of the estate after the payment of the charitable donation and the federal estate taxes [\$20 million - \$10 million - \$2,925,000 = \$7,075,000].

¹⁵⁵ In the absence of the charitable donation, the daughter would receive \$12,575,000. *See supra* note 152. If Ned Narcissus's will bequeaths \$10 million to charity, his daughter receives \$7,075,000. *See supra* note 154.

¹⁵⁶ Without the charitable deduction, the government receives \$7,425,000 in federal estate taxes. *See supra* note 151. If the will makes the charitable donation, the government receives only \$2,925,000 in federal estate taxes. *See supra* note 153.

¹⁵⁷ The IRS would have \$2,925,000 in taxes after the transactions [\$7,425,000 - \$4,500,000 = \$2,925,000].

¹⁵⁸ If the estate paid \$7,425,000 to the IRS and \$5,500,000 to the family charitable trust, the daughter would receive \$7,075,000 [\$20 million - \$7,425,000 - \$5,500,000 = \$7,075,000]. *See supra* note 154 and accompanying text.

wealthy family may bear only one-third of the cost, because the government indirectly subsidizes two-thirds.

For example, presume that wealthy hypothetical taxpayer Sally Self-Aggrandizement pays federal and state income taxes at a combined forty percent rate.¹⁵⁹ Shortly before her death, Sally Self-Aggrandizement donated \$100,000 to the Self-Aggrandizement Trust for Tidily-Wink Training. The gift is tax deductible¹⁶⁰ and reduces her income tax liability for her final year by \$40,000.¹⁶¹ The gift also reduces her taxable estate by \$60,000,¹⁶² which reduces her estate tax liability by \$27,000.¹⁶³ Sally Self-Aggrandizement leaves the balance of her estate to her son. In the absence of the donation, Sally's son would have received an extra \$33,000, and the government would have received an extra \$67,000 in taxes. When Sally gave \$100,000 to the Self-Aggrandizement Charitable Trust for Tidily-Wink Training, the government lost \$67,000 in tax revenue, while the son lost only \$33,000 of his inheritance.

The U.S. Supreme Court agrees that the tax benefits granted for charitable giving are an “indirect economic benefit.”¹⁶⁴ The charitable contribution deduction¹⁶⁵ is an unusual tax subsidy because it is “upside-down.”¹⁶⁶ Wealthier individuals in a higher marginal tax bracket benefit more from the charitable deduction than less wealthy taxpayers in a lower tax bracket.¹⁶⁶ As the wealthy tend to contribute to arts organizations such as operas and symphonies, and the poor

¹⁵⁹ In 2009, the maximum federal income tax rate is 35%. I.R.C. § 1(i)(2) (Supp. V 2005). State income tax rates vary by state. Florida, Nevada, South Dakota, Texas, Washington, and Wyoming impose no income tax. 1 STATE TAX GUIDE – ALL STATES (CCH), 3503. Some states impose an income tax at comparatively high rates. *Id.* ¶ 15-681, at 3959 (New York imposes a maximum marginal rate of 7.7%); *id.* ¶ 15-365, at 3732 (Hawaii imposes a maximum marginal rate of 8.25%). In the interest of simplicity, this example employs a 5% state tax rate and ignores the taxpayer's ability to deduct federal income taxes paid on a state income tax return, and ignores the taxpayer's ability to deduct state income taxes on a federal income tax return. *See* I.R.C. § 164(a)(3) (2000).

¹⁶⁰ A contribution to an “educational” organization can be tax deductible, and the definition of “educational” is extremely broad. *See* Treas. Reg. § 1.501(c)(3)-1(c)(3)(i) (1959) (“The term ‘educational’ . . . relates to . . . [t]he instruction or training of the individual for the purpose of improving or developing his capabilities, or . . . [t]he instruction of the public on subjects useful to the individual and beneficial to the community.”).

¹⁶¹ This presumes that Sally Self-Aggrandizement's successor properly claims the full \$100,000 as an income tax charitable deduction. A taxpayer can only deduct cash contributions to a private foundation to the extent of thirty percent of adjusted gross income. I.R.C. § 170(b)(1)(B)(i) (2000).

¹⁶² In the absence of the gift, Sally would have died with additional assets of \$100,000, but her income tax liability would have been \$40,000 higher, for a net increase of \$60,000.

¹⁶³ At a 45% rate, a \$60,000 increase in the taxable estate triggers an extra \$27,000 estate tax liability [$\$60,000 \times 45\% = \$27,000$].

¹⁶⁴ *Walz v. Commissioner*, 397 U.S. 664, 674 (1970). The Court even concluded that no Constitutional impediment prevents the extension of the exemption to religious organizations. *Id.* at 675 (“The grant of a tax exemption is not sponsorship [of a religion] since the government does not transfer part of its revenue to charities but simply abstains from demanding that the church support the state.”); *see also* Joel S. Newman, FEDERAL INCOME TAXATION, 563 (4th ed. 2008) (“Waltz v. Commissioner put to rest” constitutional arguments about a subsidy to religion.). Justice Douglas strenuously objected. 397 U.S. at 709 (Douglas, J., dissenting) (“Tax exemption, no matter what its form, is essentially a government grant or subsidy. Such grants would seem to be justified only if the purpose for which they are made is one for which the legislative body would be equally willing to make a direct appropriation from public funds . . .”).

¹⁶⁵ Colombo, *supra* note 55, at 702 (referring to the charitable income tax deduction as “upside-down”); Newman, *supra* note 48, at 564.

¹⁶⁶ *See supra* notes 149-63 and accompanying text.

tend to contribute to churches and social welfare organizations, the upside-down subsidy favors some charities over others.¹⁶⁷

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

Congress apparently wished to extend tax subsidies only to organizations that provide significant public benefits when it granted tax-exempt status to charities,¹⁶⁸ and again when it allowed donors to claim income, gift, and estate tax deductions for contributions to charities.¹⁶⁹ Scholars describe this subsidy-in-exchange-for-economic-public-benefits approach as the “most defensible rationale.”¹⁷⁰ Today, an entity is entitled to these tax subsidies only if it “engages primarily in activities which accomplish one or more . . . exempt purposes . . .” and will not qualify “if more than an insubstantial part of its activities is not in furtherance of an exempt purpose.”¹⁷¹ Many scholars endorse the subsidy-in-exchange-for-economic-public-benefits rationale,¹⁷² although they find disagreement among the details.¹⁷³

¹⁶⁷ Colombo, *supra* note 55, at 685 (“Empirical studies confirm that some organizations, particularly churches, are largely funded by relatively small donations from middle and lower-income groups, whereas arts and education organizations rely more heavily on large gifts from wealthy contributors.”). *See also* Newman, *supra* note 48, at 564.

¹⁶⁸ In 1894, Congress granted federal tax exemption to entities organized and operated exclusively for charitable or other specified purposes. “Congress rationalized that charitable institutions provided public [benefits], thus justifying exemption.” *See* Byrnes, *supra* note 12, at 525. In a similar vein, in 1909 Congress denied tax-exempt status if “any part of the entity’s net income inures to the benefit of any . . . individual.” *See* Byrnes, *supra* note 12, at 529. In 1924, the U.S. Supreme Court stated that “[e]vidently the exemption is made in recognition of the benefit which the public derives from . . . activities of the class named, and is intended to aid them when not conducted for private gain.” *Trinidad v. Sagrado Orden de Predicadors*, 263 U.S. 578, 581 (1924), *quoted in* Byrnes, *supra* note 12, at 529.

¹⁶⁹ In 1917, Congress basically legislated that only tax-exempt charities can receive tax-deductible contributions. *See* 65 CONG. REC. 6728 (1917), *cited in* Colombo, *supra* note 55, at 682 (“Legislative history indicates that the original deduction was primarily intended to insure that the ‘new’ income tax did not seriously impair the flow of private funds to exempt charities”).

¹⁷⁰ Colombo, *supra* note 55, at 701; *see also* Atkinson, *supra* note 146, at 402 (“The traditional subsidy theory of the tax exemption for charities . . . [points] to . . . two kinds of public benefits In summary, charities provide primary public benefits [in the form of] good goods to ordinary people, and ordinary goods to the especially deserving.”). Similarly, “[t]he [state tax] exemptions flourished based on the economic policy justification of the trade off of *public service* for tax subsidy.” Byrnes, *supra* note 12, at 524 (emphasis added).

¹⁷¹ Treas. Reg. § 1.501(c)(3)-1(c)(1) (1959); *see* *American Campaign Academy v. Commissioner*, 92 T.C. 1053 (1989). Nevertheless, the courts and the IRS sporadically issue favorable rulings that allow entities to enjoy these tax subsidies although the public benefit is dubious. *See supra* notes 24-27 and accompanying text.

¹⁷² Colombo, *supra* note 55, at 682 (the public benefit theory is the “most widely accepted rationale”); Mark P. Gergen, *The Case for a Charitable Contributions Deduction*, 74 VA. L. REV. 1393, 1397-98 (1998); *see also* Saul Levmore, *Taxes as Ballots*, 65 U. CHI. L. REV. 387, 409 (1998).

¹⁷³ For example, Professor Gergen posits that government should only subsidize charities that provide public goods or services which otherwise would lack funding due to a tendency of persons to “free ride” on the philanthropy of others. As a result, he concludes that Congress should prohibit donors from deducting contributions to public television stations because “modern technology can provide a way to charge for this benefit to exclude free-riders.” Gergen, *supra* note 172, at 1443-47, *cited in* Colombo, *supra* note 55, at 687. Similarly, Professor Gergen would deny tax benefits to most churches because congregations can charge themselves for the religious services. Gergen, *supra* note 172, at 1434-43, *cited in* Colombo, *supra* note 55, at 687.

Professor Hansmann argues that charitable entities are appropriate to provide community benefits, rather than government or for-profit entities, when for-profit entities cannot raise equity capital, or some other market failure would arise. *See* Henry B. Hansmann, *The Role of the Nonprofit Enterprise*, 89 YALE L.J. 835, 845 (1980). Professors Colombo and Hall assert a “donative theory” based on the idea that Hansmann’s market

Society appropriately praises charities that significantly reduce the burdens of government. Without charitable hospitals, schools and relief agencies for the poor, government would need to spend more tax dollars to provide those essential services. If a partial tax subsidy induces donations that reduce the burdens of government, a burden has shifted from poorer citizens who are less able to contribute, to wealthy citizens who contribute. For example, if Ned Narcissus contributes \$1 to State University, presumably that is \$1 less the government must spend on education. Even if Narcissus enjoyed a sixty-seven percent tax subsidy in income and estate tax savings from the tax deductions, the government (and other taxpayers) save thirty-three cents on the dollar.

Also, charities may provide an economic benefit through plurality.¹⁷⁴ Charities can bring new and revolutionary ideas, and be willing to experiment with different approaches.¹⁷⁵ In contrast, government programs may be influenced by corruption, lobbying, political pressures, and inertia.¹⁷⁶ In addition, the charitable tax deduction may economically benefit society by granting an outlet for frustrated taxpayers who desperately desire to reduce their tax payments to the government. These taxpayers may not want to help finance military operations or other government activities.¹⁷⁷ Without charitable giving as an alternative, more taxpayers might turn to aggressive tax schemes or tax fraud.

The alternatives theories to the tax-subsidies-in-exchange-for-economic-public-benefits approach have fundamental weaknesses.¹⁷⁸ One alternative is that government provides tax subsidies because charities and their donors act with “altruism” and the government should

failure exists, and government should subsidize when an entity must rely on donations for at least one-third of its financial support. Mark A. Hall & John D. Colombo, *The Donative Theory of the Charitable Tax Exemption*, 52 OHIO ST. L. REV. 1379, 1454 (1991) (“historical experience suggest a threshold in the vicinity of one-third of gross revenues”); Colombo, *supra* note 55, at 697-98; Atkinson, *supra* note 146, at 422. In commentating on the donative theory, Professor Atkinson states that “[t]his [approach] would bar the exemption of most *private foundations* . . . and perhaps many heavily endowed and fee-supported public charities like museums and schools.” *Id.* (emphasis added).

¹⁷⁴ Colombo, *supra* note 55, at 692.

¹⁷⁵ Atkinson, *supra* note 146, at 403 (“[C]harities very existence is said to promote pluralism and diversity, which are taken to be either inherently desirable or intimately related to our liberal democratic values.”).

¹⁷⁶ Charitable organizations are typically free from the “vagaries of majoritarian politics.” Colombo, *supra* note 55, at 697 (citing Hall & Colombo, *supra* note 138, at 100-108).

¹⁷⁷ Newman, *supra* note 48, at 536 (discussing the charitable deduction as a “sort of escape valve”). “A classic example of [the objecting taxpayer] is Henry David Thoreau’s refusal to pay his taxes in protest of the federal government’s unwillingness to abolish slavery. Thoreau spent one night in jail.” James Andreoni, Brian Erard & Jonathon Feinstein, *Tax Compliance*, 36 J. OF ECON. LITERATURE, 818, 851 n.88 (1998).

¹⁷⁸ Colombo, *supra* note 55, at 702 (“Attempts to justify the [charitable] deduction as an incentive for individual altruism or as consistent with the normative tax base, on the other hand, are either overbroad, impossible to define, or both.”). This is not meant to imply that the tax-subsidies-in-exchange-for-economic-public-benefits approach is a talisman. First, this approach substitutes one question for another. Rather than asking why government grants tax subsidies, we now ask which entities provide sufficient economic public benefits to justify receipt of the tax subsidies. “To cloak the exemption in the garb of ‘public benefit’ without saying more about the cloth from which it is cut invites the suggestion that exemption is a matter of naked and unprincipled political preference.” Atkinson, *supra* note 146, at 405. Second, even if a charity provides a sufficient public benefit, one still can question why it is more efficient for the charity, instead of the government, to provide a particular service.

promote the virtue of altruism.¹⁷⁹ Social science research indicates, however, that people seldom act without regard to their own self-interest.¹⁸⁰ An altruism standard would not be administrable because it is extremely difficult to accurately determine whether a person acts exclusively for altruistic reasons, or the degree to which altruism inspires a particular action.¹⁸¹

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

One commentator challenges these fundamental principles, and indicates that government tax subsidies do not entitle the government to regulate. He relies on an analogy to an individual's 401(k) retirement account, stating, "Few would contend, for example, that individual 401(k) plans, because they involve tax-exempt contributions . . . can be directly controlled by the government."¹⁸² This analogy misses the mark for several reasons. First, "direct[] control" is a misplaced, value-laden phrase. The relevant inquiry is the proper extent of government regulation. Second, government imposes numerous restrictions on 401(k) arrangements.¹⁸³ For example, government regulations prohibit an individual from assigning a

¹⁷⁹ Under this approach, "[w]henver an organization with the potential to return profit to its founders is set up on a nonprofit basis, the founders have necessarily foregone that potential profit . . . [and] the organization embodies their altruism." *Id.* at 423. Professor Atkinson suggests that altruism alone may justify tax subsidies. *Id.* at 424 ("[The] rationale is that [the] altruistic supply of a good or service – any good or service -- is a matabenefit worthy of consideration for tax preference."). The government often uses the tax laws as a means of behavior modification. Colombo, *supra* note 55, at 668.

¹⁸⁰ Based on his analysis of the literature in psychology, social psychology, and economics, Professor Colombo concludes that if "altruism" means acting with "unselfish concern for the welfare of others," it is extremely rare that people act out of altruism. *Id.* at 668. "[A]n individual may contribute to charity to receive a personal sense of righteousness, to enhance his or her reputation or social standing, or to improve his or her self-image, or to feel a 'warm glow' sensation." Colombo, *supra* note 55, at 671-72.

¹⁸¹ *Id.* at 669 ("human motivations are terribly complex"); see *supra* Part I.C.

Other scholars argue that an accurate measurement of "income" compels the charitable tax benefits. First, this approach asserts that the revenues of charities are not truly "income" because contributions are gifts or capital contributions. See Boris I. Bittker & George K. Rahdert, *The Exemption of Nonprofit Organizations from Federal Income Taxation*, 85 YALE L.J. 299, 308-09 (1976); William Andrews, *Personal Deductions in an Ideal Income Tax*, 86 HARV. L. REV. 309 (1972). Second, this approach argues that a donor's charitable contributions are not personal expenses and therefore should be deductible in computing the individual's income tax liability. See Colombo, *supra* note 55, at 702 ("According to [Professor] Andrews, a charitable contribution does not constitute personal consumption; rather it is in the nature of a redistribution of income to the objects of charity.").

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

¹⁸² Schramm, *supra* note 12, at 388.

¹⁸³ Congress restricts the amount an employee can annually contribute to a 401(k) plan. IRC §§ 402(g) (2000), 415(c)(1)(A) (2000). The limit generally is \$16,500 for 2009. I.R.S. Notice 2008-102, 2008-45 I.R.B. 1106, available at 2008 WL 4635900. An employee must elect to defer amounts to the 401(k) account before those amounts become "available" to the employee. IRC § 401(k)(2)(A) (2000); Treas. Reg. § 1.401(k)-1(a)(3)(iv)(1988). An employee may only receive distributions in compliance with a detailed statutory and regulatory scheme. For example, the plan may not distribute amounts attributable to elective contributions

401(k) account to any other person, including family members or creditors.¹⁸⁴ Indeed, if *direct control* is merely synonymous with *regulation*, then one could fairly conclude that the government directly controls 401(k) arrangements. Third, the tax deduction for contributions to a 401(k) plan results in a mere deferral of tax because the individual will pay tax at ordinary income tax rates on the amounts distributed from the 401(k), usually at retirement.¹⁸⁵ Even if the individual dies and the individual's beneficiary receives the 401(k) balance, the beneficiary must pay income tax on that inheritance.¹⁸⁶ In contrast, the donor who deducts amounts contributed to a charitable trust never pays tax on those amounts.¹⁸⁷

B. *Giving Narcissus His Due – Possible Benefits*

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

First, charitable trusts receive elephantine donations,¹⁸⁸ and annually distribute a portion of their assets to operating charities which may provide important public benefits. While the Helmsley situation vividly demonstrates that charitable trusts can allow big money, including big taxpayer money, to go to the dogs,¹⁸⁹ charitable trusts also can transfer significant amounts to meritorious projects.

Second, a charitable trust can allow a founder to pursue an independent agenda, and boldly underwrite novel or nascent initiatives.¹⁹⁰ Commentators have compared charitable trusts to venture capital funds “seeking to advance the frontiers of knowledge.”¹⁹¹ Wealthy aristocrats who follow their entrepreneurial spirit to fame and fortune in the business world may have new and exciting ideas about improving society for common people. These magnates can use the charitable trust as a catalyst for change. Charitable trusts helped fund the vaccine for yellow fever,¹⁹² Robert Goddard's early research on the rocket,¹⁹³ and other breakthroughs.¹⁹⁴

before “severance from employment, death or disability,” termination of the plan or “attainment of age 59-1/2 . . .” I.R.C. § 401(k)(2)(A) (2000).

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

¹⁸⁵ I.R.C. § 61(a)(11) (2000).

¹⁸⁶ Although a beneficiary normally receives an inheritance free of income taxes, I.R.C. § 102(a) (2000), a beneficiary pays tax on the receipt of “income in respect of a decedent.” I.R.C. § 691(a)(1)(B) (2000).

¹⁸⁷ If a donor makes a contribution and claims a charitable tax deduction in one year, and in a later year the charity returns the property to the donor, the taxpayer must include the recovery in taxable income. *See* Alice Phelan Sullivan Corp. v. United States, 381 F.2d 399 (Ct. Cl. 1967) (applying the tax benefit doctrine).

¹⁸⁸ In 2005, charitable trusts received approximately \$23 billion in donations. *See supra* note 92 and accompanying text.

¹⁸⁹ *See supra* notes 1 to 11 and accompanying text.

¹⁹⁰ “Many foundations have translated their exceptional freedom into substantial achievements. Three areas – education, science, and social policy – illustrate the manner in which foundations can act as catalysts, often producing results that government and business are either unwilling or incapable of producing.” Schramm, *supra* note 12, at 373.

¹⁹¹ Byrnes, *supra* note 12, at 554; *id.* at 577 (citations omitted).

¹⁹² Schramm, *supra* note 12, at 375 (funded by the Rockefeller Foundation).

Charitable trusts can fund pilot programs in one geographic location. In contrast, the federal government could have problems attempting to extend a benefit to only one locality for political reasons.¹⁹⁵

Third, a benefit related to independence is pluralism. Charitable trusts allow the wealthy to “express their own bents, concerns, and experience[s].”¹⁹⁶ With our democratic government generally, the majority directs government responses to problems, and that majority may lean toward the status quo. It may be difficult for individuals to implement minority views. A charitable trust may allow a talented maverick to pursue a bold initiative that solves a vexing problem.¹⁹⁷

Fourth, charitable trusts can study both government and the charitable sector to assess their performance, and can criticize, make recommendations, and fill gaps that are not met with existing programs.¹⁹⁸ A charitable trust can “play[] the role of institutional entrepreneur, challenging other social institutions.”¹⁹⁹

Fifth, charitable trusts can rescue operating charities in difficult times.²⁰⁰ If an operating charity fails to save sufficient resources and an economic downturn or other outside force reduces contributions or operating revenues, a charity may need to drastically curtail programs or dissolve.²⁰¹ Charitable trusts, with their enormous uncommitted resources, may assist important operating charities in times of crisis.

Sixth, a business tycoon in charge of a charitable trust may demand improved administrative and other procedures from grant recipients.²⁰²

Naming rights may enhance three of these benefits. First, a prideful philanthropist may donate more if the charitable trust bears the family name.²⁰³ A maverick founder²⁰⁴ may have

¹⁹³ *Id.* at 376 (“in the 1920s, the Guggenheim Foundation supported Robert Goddard’s seminal experiments with rocketry.”).

¹⁹⁴ See *supra* notes 14-18 and accompanying text.

¹⁹⁵ Byrnes, *supra* note 12, at 577-78.

¹⁹⁶ STAFF OF SENATE COMM. ON FINANCE, 89th CONG., TREASURY DEPARTMENT ON PRIVATE FOUNDATIONS, at 12 (Comm. Print 1965) [hereinafter 1965 TREASURY REPORT], *cited in* Byrnes, *supra* note 12, at 569.

¹⁹⁷ “Private philanthropic organizations can possess important characteristics which modern government necessarily lacks . . . [the private organization can] dissent from prevailing attitudes . . . and . . . act quickly and flexibly.” 1965 Treasury Report, *supra* note 196, at 12, *cited in* Byrnes, *supra* note 12, at 569. The Treasury Department Report asserts that the independence of a charitable trust permits it to be more innovative than operating charitable organizations. “[T]heir freedom permits foundations relative ease in the shift of their focus of interest and their financial support from one charitable area to another.” Byrnes, *supra* note 12, at 571, quoting 1965 TREASURY REPORT, *supra* note 196, at 12.

¹⁹⁸ Byrnes, *supra* note 12, at 578.

¹⁹⁹ Schramm, *supra* note 12, at 358.

²⁰⁰ Byrnes, *supra* note 12, at 560.

²⁰¹ As a result of adverse financial conditions, many charities filed for bankruptcy in early 2009. See Stephanie Strom, *Bankruptcy Now Touching Nonprofits*, N.Y. TIMES, Feb. 20, 2009, at A17.

²⁰² See Schramm, *supra* note 12, at 368-69; Byrnes, *supra* note 12, at 533-34.

²⁰³ Eason, *supra* note 60, at 460 (“perpetual naming conditions are, thus, only defensible as a facilitator of charitable contributions”).

more passion and zeal because the family name accompanies all the activities. Second, the surname may promote the charitable trust's independence. As discussed in Part II.C.3 of this Article, the surname in the entity name will tend to discourage outsiders from participating. Third, naming rights can further pluralism by encouraging wealthy philanthropists to establish their own charitable trust rather than contributing to an operating charity or another charitable trust.²⁰⁵

C. Reflections on Narcissism as a Tragedy for Charitable Trusts

1. Structural Features that Reduce Public Benefits

As discussed in Part II.A of this Article, Congress should grant charitable tax subsidies only when the entity provides sufficient public benefits. A donation to a charitable trust, even if not surnamed, will tend to provide less public benefit than a donation to an operating charity because the principal of the trust fund may never be distributed for charitable activities, and the trust may distribute less than four percent of its net assets each year for charitable activities.²⁰⁶

Professor Byrnes's analysis of the historical debates concerning charitable trusts since the days of King Henry VIII identifies four recurring arguments against charitable trusts, whether or not surnamed. First, charitable trusts violate basic principles of democracy because the wealthy elite, scheming in isolation, allocate the tax subsidies among the projects they choose.²⁰⁷ A clever commentator describes the situation as "subsidy without representation."²⁰⁸

Second, charitable trusts allow the wealthy elite excessive power in shaping society.²⁰⁹ Early industrialists like Rockefeller and Carnegie arguably used their power as trustees of multi-million dollar charitable trusts to sharpen the skills of the workforce, rather than helping the poor.²¹⁰

Third, tax subsidies to these charitable trusts shift the nation's tax burden from the wealthy to the middle class, "creating the injustice of [an] inequitable burden against the non-favored class."²¹¹ An early commentator remarked that "the government has an interest in the

²⁰⁴ "Most large foundations were established by entrepreneurs who changed the world with bold risk-taking in their business practices and expected no less from their foundations. The courage to take risks and inspire progress remains at the core of the foundations today" Schramm, *supra* note 12, at 361-62.

²⁰⁵ A rare exception is Warren Buffet's multi-billion dollar donation to the Bill and Melinda Gates Foundation. See *The World's Richest Men in \$32 Billion Giveaway*, June 27, 2006, available at http://www.solarnavigator.net/sponsorship/bill_melinda_gates_warren_buffet.htm.

²⁰⁶ Tax law requires that a charitable trust distribute only five percent of its net assets each year. I.R.C. § 4942(e)(1) (2000). On average over 1.2% of that amount goes for expenses. As a result, a charitable trust may only grant 3.8% to operating charities. See *supra* notes 21-23 and accompanying text.

²⁰⁷ The trust must use its funds for charitable purposes, see I.R.C. § 170(c)(2) (2000), but the trustee can have absolute discretion in choosing among charitable projects.

²⁰⁸ Byrnes, *supra* note 12, at 564.

²⁰⁹ "The funds of these [charitable trusts] are exempt from taxation, yet during the lives of the founders are subject to their dictation for any purpose other than commercial profit" Walsh Comm'n, *supra* note 79, at 81-82, quoted in Byrnes, *supra* note 12, at 536.

²¹⁰ *Id.* at 534-35.

²¹¹ *Id.* at 512.

Rockefeller Foundation because the government’s contribution represents two million dollars a year in relinquished taxes, for which the public must make up the difference.”²¹²

Fourth, commentators often accuse the founders of these charitable trusts of amassing their millions by exploiting the American worker. “[T]hese wealthy financiers establishe[d] charitable institutions only to morally legitimize their ‘ill-gotten property,’”²¹³ and to “conjure adulation to fill the void during [their] retirement.”²¹⁴ One religious leader combined several arguments, stating “foundations were established from wealth earned from the common man’s labor, and thus government should democratically decide where the foundation’s resources should be spent.”²¹⁵

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

2. The Inefficiencies of Adulation

The founding donor and the founder’s descendants can act as the trustees of the charitable trust in perpetuity.²¹⁶ This is a prized position of power and prestige because the trustee controls the spigot over the trust’s wealth. Operating charities are keenly aware that charitable trusts must distribute five percent of their net assets, minus expenses, each year to operating charities.²¹⁷ Operating charities in search of grants can locate charitable trusts through multiple sources,²¹⁸ and in the case of surnamed charitable trusts the identity of the founder family is clear.²¹⁹

²¹² Walsh Comm’n, *supra* note 79, *quoted in* Byrnes, *supra* note 12, at 535.

²¹³ *Id.* at 511 (quoting James Parton).

²¹⁴ *Id.*

²¹⁵ *Id.* at 535 (describing the comments of Pastor John Haynes Holmes).

²¹⁶ *See supra* Part I.D.

²¹⁷ One presentation to grant seekers states “Why Foundations Are Relevant to You . . . All grant-making foundations must pay out at least five percent of their assets in the form of grants each year.” Terry Pearl, *How to Succeed in Obtaining Foundation Support for Your Research*, 3, available at www.mssn.edu.forfaculty/development/research/PDF/PrivateFoundationGrants.pdf.

²¹⁸ *See e.g.*, Foundation Center, The Foundation Directory (provides information on foundations with at least \$2 million in assets, or which grant at least \$200,000 annually); Foundation Center, The Foundation Directory Part 2 (providing information on foundations with less than \$2 million in assets, which make annual grants of at least \$50,000 but less than \$200,000); Foundation Center, Foundation Grant Index (listing grants of \$10,000 or more in 28 categories); R. R. Bowker, Annual Register of Grant Support (information on grants from private foundations, government agencies, corporations, community trusts, unions, and other organizations); Guidestar, www.guidestar.org; The Foundation Center, www.fdncenter.org; Grantmanship Center, www.tgci.com; GrantSmart, www.grantwriters.com.

²¹⁹ Charities can consult the charitable trust’s annual IRS Form 990-PF for the names and addresses of the current trustees. *See* IRS Form 990-PF, at 6 (Part VIII, titled “Information About Officers, Directors, Trustees, Foundation Managers, Highly Paid Employees, and Contractors”), available at <http://www.us.gov/pub/irs.pdf/990pf.pdf>. The IRS Form 990-PF for most charitable trusts is available through www.guidestar.org. *See* www.guidestar.org. Also, any member of the public may obtain a copy of a charitable trust’s IRS Form 990-PF by filing IRS Form 4506-A with the IRS. *See* I.R.C. § 6104(d) (2000); IRS Form 4506-A, Request for Public Inspection or Copy of Exempt or Political Organization, available at

Not surprisingly, operating charities beg, cajole, grovel,²²⁰ and engage in a variety of inefficient behaviors to curry the favor of the financial tycoons and their descendants who act as trustees. For example, the Papal Foundation, a public charity, offered donors a “medallion, a gold pin . . . a certificate . . . and a ceremony in Rome recognizing [the] contribution and a visit with [the] Pope . . . in his private library.”²²¹ Commentators allege that certain universities have abandoned their religious affiliations to curry the favor of charitable trusts.²²² Operating charities provide a variety of tangible “donor recognition” perquisites for a big enough contribution, ranging from recognition plaques, donor bricks, to gift trees.²²³ Marketers clearly describe these donor appreciation opportunities as benefits sold in exchange for a “donation.”²²⁴ An especially popular inducement is the “donor wall” which one organization brazenly compares to the Vietnam War Memorial in Washington, D.C.²²⁵ One supplier offers sixty-seven different designs for “donor walls” including one which boldly proclaims above the names of the big money donors “we have spoken your name to God.”²²⁶ In attempting to sell donor recognition, one organization bluntly states, “[l]et’s face it. People like to see their good deeds recognized. They also like to see themselves recognized where their friends and neighbors can see.”²²⁷

Grant seekers recognize that the competition is different when one individual or family exclusively wields the grant-making power. One presentation bluntly states, “Differences Between Government and Foundation Grant Review Processes Foundations’ own preferences are considered Personal connection[s] may have an impact.”²²⁸ In contrast, governments and publicly supported charities that allocate grant funds generally do not allow one person or family to allocate the funds.²²⁹

<http://www.irs.gov/pub/irs.pdf/4506a.pdf>. Also, any person can request IRS Form 990-PF from the charitable trust. See IRS Instructions, Form 990-PF, at 7 (2008), available at <http://www.irs.gov/app/picklist/list/formsInstructions.html?value=990PF&criteria=formNumber>.

²²⁰ Others prefer to describe this process as “building relationships with foundations,” cultivating the relationship, see e.g., Pearl, *supra* note 217, at 16, or providing “ongoing donor recognition.” *Id.* at 17.

²²¹ Colombo, *supra* note 55, at 659 n.9; see also The Papal Foundation, Stewards & Financials, available at <http://www.thepapalfoundation.com/stewards/html> (“For stewards of Saint Peter, the highlight of the year has been the annual pilgrimage to Rome . . . and a visit with the Holy Father has been customary.”).

²²² Byrnes, *supra* note 12, at 536 (“[T]he [Walsh] Commission found that the foundations were manipulating educational and thus social policy. Presented in support of this finding, some universities had severed their religious affiliation in order to receive grants from [Andrew] Carnegie’s foundations.”).

²²³ Fundraiser Help, *Donor Recognition*, <http://www.fundraiserhelp.com/donor-recognition.htm>. The charity may incorporate the bricks into a new “reflection garden or water foundation area.” *Id.* A gift tree is a “three dimensional sculpture of a tree with burnished metal leaves . . . [and] each leaf is engraved with the donor’s message. The end result is high-quality artwork . . . displayed in the organization’s foyer or lobby.” *Id.*

²²⁴ “In this type of capital campaign, a nonprofit group seeks a pledge of a certain contribution amount and in return, offers to provide a specific type of recognition. Donations of a certain amount are rewarded with graduated levels of recognition.” *Id.* (emphasis added).

²²⁵ *Id.*

²²⁶ United States Bronze, *Donor Walls*, <http://www.usbronze.com/displayProducts3.asp?sday=Donor+Walls&OVRAW=donor%2>.

²²⁷ Fundraiser Help, *supra* note 223.

²²⁸ Pearl, *supra* note 217, at 14.

²²⁹ For example, community foundations receive and hold contributions from multiple donors in separate funds, and typically serve a specific geographic territory. See *supra* note 258; see also Pearl, *supra* note 217, at 3.

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

3. Discouraging Diversity and Community Involvement

Government agencies and commentators encourage charities to seek diversity and community involvement when selecting the members of the entity's governing body.²³⁰ If people with different experiences and talents are brought to bear on a project, the governing body may find new and effective approaches. Many commercial enterprises recognize the benefits of an independent governing body.²³¹

A founder's surname in a charitable trust's moniker can act as a "keep out" sign for nonfamily members. Even the IRS's description of charitable trusts as "private foundations"²³² suggests these entities belong exclusively to the founder family and are not open to the public. This is singularly inappropriate as government provides forty-five percent to sixty-seven percent of the donations through tax subsidies.²³³

The presence of the surname will tend to repulse civic-minded individuals who desire to serve on a nonprofit governing body. These charitably inclined volunteers may desire to provide a public benefit and seek an improved self-image, a "warm glow" feeling,²³⁴ satisfaction in

²³⁰ The Massachusetts Attorney General's Office advises charities that,

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

Office of Attorney General, Commonwealth of Massachusetts, Guide for Board Members of Charitable Organizations, 4-5 (July, 2007), available at http://www.mass.gov/Cago/docs/nonprofit/guide_for_board_members.pdf. (emphasis added); see also David A. Brennan, *Race and Equality Across the Law School Curriculum, The Law of Tax Exemption*, 54 J. OF L. EDUC. 336, 349 (2004); Atkinson, *supra* note 146, at 403 ("[D]iversity . . . [is] taken to be either inherently desirable or intimately related to our liberal democratic values."). The Treasury Regulations encourage certain charities to "consider the nature and diversity . . . that . . . trustees bring to the organization" in composing the board of trustees. See Treas. Reg. § 1.170A-9(e)(3)(i) (1972). State nonprofit corporation laws often require that the entity have at least three persons on the board of directors. See e.g. Mo. Rev. Stat. § 355.321.2 (1994).

²³¹ See Heidrick & Struggles, *Building high-performance boards*, available at www.heidrick.com/NR/rdon/yres/FD74D2C1-7F07-4B88-BB40-9D60E0DB1298/90/HS_PerformanceBoards.pdf.

²³² I.R.C. § 509(a) (2000).

²³³ See *supra* notes 149-63 and accompanying text.

²³⁴ See Matthew D. Adler, *Welfare Polls: A Synthesis*, 81 N.Y.U.L. REV. 1875, 1908 (2006).

complying with a social norm, and an improved public reputation as a generous and engaged member of the community. When a person is on the governing board of a surnamed charitable trust, it may signal to friends, an employer, a prospective employer and others that the individual has an “in” with the family, rather than a desire to make a positive difference in the world. In the Helmsley situation, it may even signal that the volunteer is a tax cheater and mistreats the less fortunate.²³⁵

4. Inhibiting the Flow of Information and Promoting Isolationism

Operating charities desiring grants can search for charitable trusts in multiple ways.²³⁶ A charitable trust that is surnamed, and fails to include any geographic or functional description in its name, will be more difficult to find.

If a shelter for abused or abandoned dogs needs additional funding, its representatives may search internet databases, such as guidestar.org, with search terms including “dogs,” “pets,” “animals,” “protection,” and “prevention of cruelty.”²³⁷ The researcher would find Puppies Under Protection (Royal Palm Beach, Florida); Gone to the Dogs Inc. (Charles City, VA); Teachers Pet – Dogs & Kids Learning (Rochester Hills, MI); All Dogs Heaven Cleveland (Lakewood, OH); Dogs Deserve Better, Inc. (Tipton, PA); Dogs with a Mission (Washington, D.C.), and many others. However, this search would *not* find the Leona M. and Harry B. Helmsley Trust which has \$8 billion which may benefit dogs.²³⁸ The surname imposes an extra barrier for operating charities that are not connected with the wealthy family. The surname tends to restrict the flow of information to the charitable trust, which may encourage the charitable trust to continue in its historical pattern of giving. If the charitable trust never even receives a grant application from a dynamic operating charity, how could the trustees make an informed decision regarding that entity’s need for funds? As a result, each year, surnamed charitable trusts may tend to distribute to the same charities that successfully flatter the wealthy founder family.

5. Nepotism in Employment

Tax law recognizes some potential abuses when a charitable trust engages in transactions with the founder family. It imposes an excise tax if a charitable trust purchases or rents property from the founder family,²³⁹ even if the charity pays fair market value. In addition to an initial ten percent excise tax,²⁴⁰ if the parties do not reverse the purchase or rental transaction within a

²³⁵ See *supra* notes 1-6 and accompanying text.

²³⁶ A grant seeker can search guidestar.org, consult the Foundation Directory, or find other resources. See *supra* note 218.

²³⁷ A researcher could choose to narrow the search with geographic terms.

²³⁸ See *supra* notes 3-7 and accompanying text.

²³⁹ I.R.C. §§ 4941(d)(1)(A) (2000), 4941(d)(1)(C) (2000).

²⁴⁰ The statute imposes the tax on the party dealing with the charitable trust. *Id.* § 4941(a)(1). In addition, a foundation manager who willfully participates knowing it is an act of self-dealing is subject to an excise tax of five percent of the amount involved, up to a maximum of \$20,000. *Id.* §§ 4941(a)(2), 4941(c)(2).

certain period of time, the involved family member must pay an excise tax of 200% of the amount involved.²⁴¹

Nevertheless, Congress left an enormous loophole. A charitable trust can compensate the founder family for performing personal services for the charitable trust.²⁴² The tax law imposes no excise tax as long as the charitable trust does not pay amounts in excess of reasonable compensation.²⁴³ The amount which is reasonable will be uncertain. Neither the statutes nor regulations provide clear guidance. Instead reasonableness depends on the facts and circumstances of the particular situation.²⁴⁴ Other rules that could provide more objective standards for evaluating compensation paid do not apply to charitable trusts.²⁴⁵

The Treasury Regulations specifically list many different types of services the founder family can provide for compensation, including investment counseling, brokerage services, and legal advice.²⁴⁶ As the charitable trust will hold substantial wealth, the trust may need substantial services.

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

Some operating charities, government units,²⁴⁷ and commercial firms take steps to discourage or prohibit nepotism²⁴⁸ in hiring because it may “conflict[] . . . fundamentally with

²⁴¹ *Id.* § 4941(b)(1). A foundation manager who “refused to agree to part or all of the correction can be subject to an additional tax of fifty percent of the amount involved,” up to a maximum of \$20,000. *Id.* §§ 4941(b)(2), 4941(c)(2).

²⁴² The statute includes the “payment of compensation” among the list of “self-dealing” transactions, but excludes the payment of reasonable compensation. *Id.* §§ 4941(d)(1)(D), 4941(d)(2)(E).

²⁴³ *Id.* § 4941(d)(2)(E).

²⁴⁴ Treas. Reg. § 53.4941(d)-3(c) (1973) (requires that the amount is “not excessive”); I.R.S. Gen. Couns. Mem. 39,547 (Sept. 1, 1986), available at 1986 WL 373004; see Council of Foundations, *Determining Reasonable Compensation for Foundation Directors and Trustees*, 2 (Dec. 6, 2002), available at www.cof.org/files/Documents/Governing_Boards/trusteecomp2003.pdf (“[N]o single formula defining reasonable compensation exists. What is reasonable will depend on the facts and circumstances of each case.”).

²⁴⁵ See I.R.C. § 4958(e) (2000) (excluding private foundations from the definition of an “applicable tax-exempt organization” under the excess benefit transaction rules).

²⁴⁶ Treas. Reg. § 53.4941(d)-3(c) (Examples 1 to 3) (1973). Presumably a trustee could also provide accounting and auditing services. See Council of Foundations, *supra* note 244 (including “accounting/auditing fees”).

²⁴⁷ For example, the Massachusetts Attorney General’s Office warns against conflicts of interest.

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

Massachusetts Attorney General’s Office, *supra* note 230, at 7 (emphasis added).

the basic American value of egalitarianism and merit,”²⁴⁹ and can have undesirable consequences.²⁵⁰

6. Uninformed and Biased Grant Making.

Advocates defend charitable trusts by pointing to their annual distributions to operating charities. Perhaps the most crucial function²⁵¹ of a charitable trust is to wisely allocate its annual grant funds among effective operating charities. Charitable trusts can fund important medical research, innovative educational programs, food pantries, and homeless shelters. Nevertheless, they can also fund quilting schools,²⁵² schools for bank employees, and part-time yachtsmen wishing to compete in exotic foreign locations.²⁵³ Because of this enormous discretion,²⁵⁴ the qualifications of the grant makers and the procedures they follow are crucial.

In the case of a surnamed charitable trust, the founder family may dominate the board of trustees and all paid positions. This may not only lead to a lack of diversity, but a lack of expertise and experience. While the founder may be an entrepreneurial wizard who might bring innovative ideas from the business world to the charitable sector, the skill level of the founder’s descendants is mere speculation. Can the founder’s offspring accurately evaluate grant applications and proposals from sophisticated medical researchers, health care innovators, educational experts and advocates for the poor?

²⁴⁸ “Nepotism is prohibited by [nineteen] state legislatures either through statute or by constitution” for specified government positions, and the remaining states apply “general ethical considerations and . . . conflict of interest [rules].” Ginger Sampson, *To Hire (Or Not to Hire) A Relative*, <http://www.ncsl.org/programs/ethics/legisbrief-nepotism.htm>; Charity Governance, *This Bud’s Not For You: Why Nepotism Is a Problem*, May 27, 2008, <http://www.charitygovernance.com/charity-governance/2008/05/this-buds-not-f.htm> (Nepotism and its “baggage and psychodrama . . . isn’t good for any organization, be it for-profit or nonprofit.”). “Employers may create anti-nepotism policies to avoid employee discrimination charges,” Nepotism Definition, <http://employeeissues.com/nepotism.htm>, but “[t]here are no uniform national business laws regarding nepotism and the practice may be openly embraced by some businesses.” Terms, Nepotism, <http://www.criminal-law-lawyer-source.com/terms/nepotism.html>.

²⁴⁹ NPR, Nepotism: Wrong for the Workplace? <http://www.npr.org/templates/story/story.php?storyId=15353609>.

²⁵⁰ “Nepotism and [c]ronyism deny . . . qualified people access to income and power.” Nepotism, <http://en.wikipedia.org/wiki/Nepotism>. “[N]epotism . . . may cause problems with favoritism, discipline, fraud, confidentiality and liability.” Sampson, *supra* note 248. “[T]he consequences of nepotism might constitute illegal employment discrimination under Federal discrimination laws or state equivalents,” or wrongful termination. Nepotism Definition, *supra* note 248. Nevertheless, “[i]f . . . nepotism or its consequence are not illegal . . . then there’s little that an adversely-affected employee can do, but try to win the favor of the family clique or quit for a better job.” *Id.*

²⁵¹ A related key function is to wisely *invest* its wealth. If a charitable trust invests wisely, the trust fund will grow, and the trust can distribute more each year to operating charities. If the charitable trust invests poorly, the trust principal may decline or even disappear, and it will distribute less (or none) to operating charities.

²⁵² I.R.S. Priv. Ltr. 8930052 (May 5, 1989), *available at* 1989 WL 594194.

²⁵³ *See supra* notes 24-27 and accompanying text.

²⁵⁴ For example, if an appellate court fails to reverse the ruling of Judge Troy Webber of the Surrogate Court in Manhattan, the trustees of the Helmsley trust will have absolute discretion to choose among charitable causes. *See Strom, supra* note 7, at A23 (“[T]he trustees may apply trust funds for such charitable purposes and in such amounts as they may, in their sole discretion, determine . . .”). A founder could narrow the trustee’s discretion with the terms of the trust, but is also free to allow the trust funds to be used for any charitable purpose.

Charitable trust proponents can point to several success stories, such as funding the polio vaccine, the community college system, and Sesame Street.²⁵⁵ Such isolated and anecdotal evidence, however, leaves many questions. For example, would researchers and educators have made the same breakthroughs even faster if government had the additional tax revenues to fund those projects?²⁵⁶ Would a panel of experts be better qualified to choose worthwhile charitable projects to pursue rather than robber barons and tycoons who have no expertise in the fields of health, science, technology or education?²⁵⁷

In contrast to surnamed charitable trusts that use bloodline as the criteria for competence in evaluating grant applications, many government units and operating charities assemble diverse, experienced, and talented boards or committees to conduct grant making.²⁵⁸

III. VIABLE RESPONSE – A TEMPORAL RESTRICTION

Bold proposals attacking charitable trusts have foundered.²⁵⁹ Failed recommendations include restricting a charitable trust’s duration to ten or twenty-five years;²⁶⁰ delaying the donor’s tax deduction for a contribution until the charitable trust actually distributes the funds;²⁶¹ prohibiting the founding family from holding more than twenty-five percent of the positions on the charitable trust’s board of trustees after twenty-five years;²⁶² limiting the charitable trust’s tax

²⁵⁵ See *supra* notes 14-18.

²⁵⁶ Its vice-president once boldly stated that the Rockefeller Foundation “prodded scientists onto paths they might never have taken if left to their own devices.” Schramm, *supra* note 12, at 376 (quoting Warren Weaver).

²⁵⁷ The President of the Kaufman Foundation includes the philanthropist’s lack of expertise as a benefit for charitable trusts. “History has proven that diffusion of the benefits of progress occurs through neither the ministrations of ‘professionals’ and ‘experts’ . . . but through the . . . deliberate acts of individuals.” Schramm, *supra* note 12, at 360.

²⁵⁸ See e.g., Science Foundation Arizona, *SFAz Grant Programs*, available at <http://www.sfaz.org/our-investments/investments.aspx> (“Proposals undergo three separate reviews by experts in science, engineering, innovation and business. Technical reviews are provided by external peer review experts to avoid any conflicts of interest.”); Silicon Valley Community Foundation, *Grantmaking Strategies*, available at <http://www.siliconvalleycf.org/grantmaking-strategies%5Cindex.html>. (“Silicon Valley Community Foundation . . . [has] examined the diverse needs across our region, evaluated the best practices of our parent foundations and incorporated community input before launching a new set of grant making strategies By using an RFP approach, the community foundation aims to solicit the best thinking of nonprofit service providers, public sector agencies, research institutions and other entities serving San Mateo and Santa Clara counties.”); Placer Community Foundation, *Grantmaking*, available at <http://www.placercf.org/Grantmaking.php> (“We continuously monitor our community to understand the nature of local needs, forces of change, availability of resources, and capacity for growth.”).

²⁵⁹ Professor Byrnes’s comprehensive history of charitable trusts from King Henry VIII through the Tax Reform Act of 1969 demonstrates the sporadic appeals by reformers, and the political power of the charitable trust lobby. Byrnes, *supra* note 12, at 542-580.

²⁶⁰ *Id.* at 559, 563, 566.

²⁶¹ *Id.* at 566.

²⁶² *Id.* at 574.

exemption to forty years;²⁶³ and requiring that a charitable trust distribute five percent of its net assets each year to operating charities regardless of its expenses.²⁶⁴

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

Congress may be more receptive to nuanced proposals targeted at specific abuses. In the Tax Reform Act of 1969,²⁶⁵ Congress regulated specified egregious practices, including a charitable trust's ability to engage in certain self-dealing transactions with the founder family²⁶⁶ or make certain types of investments.²⁶⁷

Accordingly, rather than an absolute ban, this Article proposes a temporal restriction that can preserve two arguable benefits from surnames. First, the right to surname helps inspire the initial contribution to a charitable trust. If a charitable trust provides public benefits in excess of the tax subsidy, it is worthwhile encouraging those gifts.²⁶⁸ Second, the initial founder may be a maverick philanthropic wizard, and the right to surname may inspire the founder to expend more time and energy for a worthwhile charitable cause.

Lawmakers may be receptive to a temporal restriction because it highlights an especially outrageous feature of charitable trusts – their perpetual life. With the passage of time, government and the American public may begin to appreciate the consequences of perpetual life. Before 1900, there were only five charitable trusts in the United States.²⁶⁹ As a result, almost all of the 60,000 charitable trusts²⁷⁰ in the United States are less than one hundred years old. Nevertheless, the legal mechanisms are in place for these trusts to control enormous amounts of U.S. wealth for hundreds or thousands of years.²⁷¹

The current paradigm presents a formidable triumph of dead-hand control and family control over the changing needs of society. Society's image of charitable trusts today might be different if documents drafted, and families designated, in the year 1215 at the time of the Magna Carta controlled enormous wealth today and had the concomitant power to shape social

²⁶³ *Id.* at 580.

²⁶⁴ The Bill, introduced in 2003, also would have disregarded travel expenses for travel outside the U.S., first class travel within the U.S., and travel on a private aircraft. S. 1514, 108th Cong., 1st Sess. (July 31, 2003) (introduced by Senator Hutchinson); *see also* Charitable Giving Act of 2003, H.R. 7, 108th Cong., 1st Sess., § 105. The charitable trusts complained that the changes would jeopardize their perpetual existence, and the Bill died. *See* Madoff, *supra* note 9, at A23; Hodding Carter III, *Proposed Legislation Could Hurt Private Philanthropy*, MIAMI HERALD, July 11, 2003, <http://www.independentsector.org/members/carteroped.html>.

²⁶⁵ Tax Reform Act of 1969, P.L. No. 91-172, § 101, 83 Stat. 487.

²⁶⁶ I.R.C. § 4941 (2000).

²⁶⁷ I.R.C. §§ 4942 (2000), 4944 (2000).

²⁶⁸ *See supra* notes 173-74. Charitable trusts may distribute all of their funds to public high schools, hospitals, or other charities that clearly reduce the burdens of government.

²⁶⁹ Byrnes, *supra* note 12, at 530.

²⁷⁰ *See supra* note 92 and accompanying text.

²⁷¹ *See supra* Parts I.D. and I.E.

institutions. “The perpetual [charitable trust] is based on the assumption that people can make intelligent decisions about the use of resources far into the future. But . . . [w]ould it really make sense for current policy to be dictated by the vision of someone living in 1930? 1630? 1230?”²⁷² As demonstrated in Part II.C, naming rights exacerbate the worst aspects of family control. In searching for additional means to regulate charitable trusts for the common good, a temporal restriction on naming rights can be a viable proposal.

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

Because a proposal to ban surnames would trigger a maelstrom of powerful protests, and if enacted would preclude potential benefits of a short-term naming right, this Article proposes that charitable trusts could use a surname for a limited time. The appropriate duration is debatable.²⁷³ At various times, reformers recommended that unrelated changes to charitable trust operations occur after twenty-five years,²⁷⁴ and they failed.

A viable approach could allow a founder to surname for fifty years, and extant charitable trusts could remain surnamed for fifty years after enactment of the new law. This may encourage the wealthy to continue to contribute. A lifetime donation will provide self-aggrandizement, and will allow an entrepreneurial wizard fifty years to implement charitable dreams with a surname. Bill Gates established the predecessor of the Bill and Melinda Gates Foundation in 1994, when Bill Gates was 39 years old.²⁷⁵ If enacted in 2010, this proposal would allow the charitable trust to maintain the Gates surname until Bill Gates is 105 years old in 2060. In the case of lifetime gifts, a fifty year term allows the founder to use the surname for at least half of the founder’s life, except in the case of centenarians.

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

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

²⁷² Madoff, *supra* note 9, at A23.

²⁷³ The battles over copyright protection demonstrate durational debates. Copyright law grants protection to an author or performer for a limited period of time, and then releases the work for use in the public domain. *See* 17 U.S.C. § 301 (2000). The duration of copyright protection has gone from fourteen years plus an optional renewal term of fourteen years (Copyright Act of 1790), to a fixed term of twenty-eight years plus one optional renewal term of twenty-eight years (Copyright Act of 1909), to the life of the author plus fifty years (the 1976 Copyright Act), to the life of the author plus seventy years (1998 Copyright Term Extension Act). *See* Lindsay Warren Bowen, Jr., *Givings and the Next Copyright Deferment*, 77 *FORDHAM L. REV.* 809, 815-19 (2008). The 1976 Copyright Act provided a seventy-five year term for a work-for-hire, and the 1998 Act increased that protection to 120 years. *Id.* at 819.

²⁷⁴ *See supra* notes 260-63 and accompanying text.

²⁷⁵ Bill Gates established the William H. Gates Foundation in 1994, and converted that foundation and two others into the Bill and Melinda Gates Foundation in 2000. *See Bill Gates, Philanthropy*, en.wikipedia.org/wiki/Bill_Gates. His birthday is October 28, 1955. *See* <http://who2.com/billgates.html>.

In reflecting on Leona Helmsley's \$8 billion bequest that could exclusively benefit dogs, a veteran of the New York philanthropic scene observed a dynamic tension. On the one hand, a fundamental part of the American psyche is that people are free to use their money as they wish.²⁷⁶ On the other hand, once a robber baron or other donor forces the government to pay a large part of the tab by claiming a tax deduction, the government should regulate to protect the public interest.²⁷⁷

In 1969, Congress enacted rules that prohibit charitable trusts from engaging in various activities for more than a certain period of time. For example, a charitable trust cannot use more than a fixed percentage of its assets to purchase securities of a business dominated by the founder family.²⁷⁸ These investments are excessively risky for a variety of reasons. For example, they tie the financial health of the charitable trust to the founding family's private business, and they may allow the founding family to manipulate the private business through their position as trustees of the charitable trust. Furthermore, they impede the ability of the charitable trust to diversify its investment portfolio. Despite the inherent risks, the statute allows charitable trusts to receive unlimited amounts of these securities by gift or bequest, and hold them for up to five years.²⁷⁹ This allows donors to contribute the securities, and allows a reasonable time for the charitable trust to sell or otherwise dispose of the securities. If the charitable trust fails to dispose of the securities within five years,²⁸⁰ the IRS may seek to collect a ten percent excise tax from the charitable trust.²⁸¹ If the charitable trust fails to dispose of the securities after receiving several notices from the IRS,²⁸² the charitable trust will be liable for an excise tax equal to 200% of the value of the excess securities.²⁸³ This five-year approach eventually forces the charitable trust to either sell the risky assets or pay double the amount involved to the government as an excise tax.

²⁷⁶ Toobin, *supra* note 4, at 47 (quoting Vartan Gregorian, the president of the Carnegie Corporation).

²⁷⁷ *Id.* at 47 (“[O]nce [the government] started giving tax deductions, which amounted to a publicly approved subsidy, [the robber barons] had to prove that the money was going for a philanthropic purpose . . .”)

²⁷⁸ These excess business holding rules are detailed. Briefly, the charitable trust and the founding family may own up to twenty percent of the voting stock of a corporation without triggering the excise tax. I.R.C. § 4943(c)(2)(A) (2000). If the parties can satisfy the Secretary of the Treasury that outsiders have effective control of the corporation, the charitable trust and the founding family may own up to thirty-five percent of the stock. *Id.* § 4943(c)(2)(B). In all situations, a *de minimis* rule allows a charitable trust to own up to “[two] percent of the voting stock and not more than [two] percent in value of all outstanding shares of all classes of stock.” *Id.* § 4943(c)(2)(C).

²⁷⁹ *Id.* § 4943(c)(6).

²⁸⁰ *Id.* § 4943(c)(6) (the five-year test for securities acquired by gift or bequest).

²⁸¹ *Id.* § 4943(a)(1).

²⁸² The 200% additional excise tax does not apply unless the charitable trust still has excess business holdings at the close of the taxable period. *Id.* § 4943(b). The “taxable period” does not end until the IRS mails a formal “notice of deficiency” or actually assesses the tax. *Id.* § 4943(d)(2). The IRS cannot mail the notice of deficiency, or assess the tax, until the IRS has sent several notices to the charitable trust.

²⁸³ *Id.* § 4943(b).

Congress simultaneously enacted excise tax regimes for self-dealing transactions,²⁸⁴ jeopardizing investments,²⁸⁵ failures to distribute or spend at least five percent of net assets each year,²⁸⁶ inappropriate grants, political expenditures, and expenditures to influence legislation.²⁸⁷

This statutory scheme creates a ready model for enacting a temporal restriction on surnames. In the same way that a charitable trust can hold certain securities for only five years, this proposal allows charitable trusts to bear a surname for a limited time. When the time expires, the IRS would notify the charitable trust and request documentation verifying completion of the name change within a certain period of time. If the charitable trust fails to timely comply, the charitable trust would be liable for a five percent excise tax. If the charitable trust fails to capitulate after receiving a series of additional IRS notices, the charitable trust would become liable for a 100% excise tax. This 100% excise tax would terminate the charitable trust, and the government would use the funds for the public's benefit.

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

Many gargantuan surnamed charitable trusts have multiple purposes and operate nationally or internationally. How will the trustees of these important entities choose a new name when the surname is expunged? The practicalities of public acknowledgement have already forced many of these entities to adroitly synthesize their mission in a snippet. The Bill and Melinda Gates Foundation uses "All Lives Have Equal Value;"²⁸⁸ the Ford Foundation is a "Resource for Innovative People;"²⁸⁹ the Kaufman Foundation is the "Foundation of Entrepreneurship;"²⁹⁰ and the George Lucas Foundation is "Your Source for What Works in Education."²⁹¹ Clever trustees and their advisors will find a way to name.

Wealthy founders may complain that when contributing millions or billions into the charitable trusts, they relied on current laws which allowed the surname until the end of time. First, as a matter of justice, the government indirectly contributed from forty-five percent to sixty-seven percent of the total amount in these charitable trusts.²⁹² Second, the U.S. Supreme Court has held that even when a taxpayer structures a multi-year arrangement in compliance with

²⁸⁴ *Id.* § 4941.

²⁸⁵ *Id.* § 4944.

²⁸⁶ *Id.* § 4942.

²⁸⁷ *Id.* § 4945.

²⁸⁸ Bill & Melinda Gates Foundation, *About the Foundation*, available at <http://www.gatesfoundation.org/about/Pages/overview.aspx>.

²⁸⁹ Ford Foundation, *About Us*, available at <http://www.fordfound.org/about>.

²⁹⁰ Kauffman Foundation, *Entrepreneurship and Education at the Kauffman Foundation*, available at <http://www.kauffman.org>.

²⁹¹ Edutopia, The George Lucas Educational Foundation, *Grant Information*, available at <http://www.edutopia.org/grantinfo>.

²⁹² See *supra* Part II.A.1.

longstanding tax rules, the government is free to change the tax rules and apply the new rules to continuing arrangements.²⁹³

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

The new rules would not apply to charitable trusts funded exclusively by publicly traded corporations. The trust could maintain the corporate name until the corporation terminates. In the case of a merger or consolidation, the trust could maintain, or adopt, the name of the surviving entity. This creates a loophole, but a rather narrow one. A wealthy entrepreneur seeking to circumvent the temporal restriction on surnames could surname a for-profit corporation and then cause the corporation to establish a surnamed charitable trust. This is a potential opportunity, but it would make the process significantly more difficult for the founder. First, the scheming founder would need to establish the for-profit corporation. Second, the corporation would need to grow to the point that its securities are actively traded on a public exchange. Third, the founder likely would need to fund the trust²⁹⁴ over a series of years. Publicly traded entities are taxed as Subchapter C corporations,²⁹⁵ and a C corporation can only deduct charitable contributions each year to the extent of ten percent of the corporation's taxable income.²⁹⁶ Fourth, the founder's surname would not only attach to a charitable trust, but would also attach to a publicly traded corporation. Robber barons who desire to "cleanse" the family name through the use of a charitable trust may be stymied because the family name would also attach to a business enterprise.

The proposal would not apply to operating charities,²⁹⁷ entities that are dedicated exclusively to supporting one operating charity that bears the same surname,²⁹⁸ or trusts that

²⁹³ See *Dickman v. Commissioner*, 465 U.S. 330 (1984) (involving interest-free loans between family members). In *Dickman*, the Court states, "it is well established that the Commissioner [of the Internal Revenue Service] may change an earlier interpretation of the law, even if such a change is made retroactive in effect. This rule applies even though a taxpayer may have relied to his detriment upon the Commissioner's prior position. *Id.* at 343 (citations omitted).

²⁹⁴ The founder likely would need to make non-deductible capital contributions to provide the corporation with the money needed to fund the charitable trust. See I.R.C. § 351 (2000) (providing tax rules for capital contributions to corporations).

²⁹⁵ *Id.* § 7704(a) (even if the owners form an entity as a partnership, it will be taxed as a corporation if its securities are publicly traded).

²⁹⁶ *Id.* § 170(c)(2).

²⁹⁷ Also, the proposal would not apply to exempt operating foundations, because those entities directly conduct charitable activities. See *id.* § 4940(d)(2) (describing "exempt operating foundations").

²⁹⁸ The proposal would not apply to supporting organizations. See *id.* § 509(a)(3) (describing "supporting organizations"). As a result, if a separate entity named the ABC Hospital Foundation raises funds and makes

receive substantial support from a wide variety of sources. The proposal would apply only to trusts described as private foundations for tax purposes.²⁹⁹ As a result, the Bill Clinton Foundation could remain surnamed as long as it continues to receive financial support from many sources.³⁰⁰ These entities are exempt because they provide public benefits directly through charitable activities or they have outside constituencies that could protest if the surname interferes with the charitable mission.

If enacted, founders may create charitable trusts which self-destruct after fifty years by paying all remaining assets to one or more designated operating charities. This will benefit society because the funds will assist society sooner. One experienced practitioner suggests that founders design their charitable trusts to self-destruct after the death of the founder and the founder's spouse because their children likely will not have the acumen or enthusiasm to handle the trust administration.³⁰¹

D. *Potential Counter Arguments and Broader Issues*

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

Others may argue that founders surname to benefit others. Some surname to inspire their progeny.³⁰² Others surname to honor a deceased relative or a historical figure and to remind the public of the virtues that person exemplified. While this Article circumscribes surnamed charitable trusts, those who consider its restrictions burdensome will find that naming opportunities abound outside the world of family charitable trusts. Wealthy philanthropists can buy naming rights to school buildings, hospital facilities, church halls, community centers, and other buildings.³⁰³ Less wealthy donors can buy naming rights to windows or bricks in a school or hospital, stained glass windows at a church,³⁰⁴ or a park bench or a tree. Patrons who desire to establish and surname an endowment that will make grants indefinitely can establish a surnamed donor advised fund at a public charity,³⁰⁵ a separate surnamed grant-making fund at a community

grants exclusively for the benefit of the ABC Hospital, the proposal would not apply to either the ABC Hospital Foundation or the ABC Hospital.

²⁹⁹ See *id.* § 509(a).

³⁰⁰ The IRS classifies the William J. Clinton Presidential Foundation as a public charity rather than a private foundation. See IRS Pub. 78, *supra* note 83, at 3627 (listing the foundation with no “code” number following the foundation’s name); *id.* at 1 (explaining the “codes”). In 2008 the Clinton Foundation provided a list of ninety-nine donors who had each contributed at least \$500,000. See William J. Clinton Foundation, http://en.wikipedia.org/wiki/Clinton_Foundation.

³⁰¹ Louis J. Hector, *The Small Private Foundation*, available at [www.dadecommunityfoundation.org/Site/doc/1.2.1The Small.PDF](http://www.dadecommunityfoundation.org/Site/doc/1.2.1The%20Small.PDF). (Mr. Hector is a partner in the law firm of Steel, Hector & Davis).

³⁰² See *supra* note 96 and accompanying text.

³⁰³ See *supra* Part I.A.

³⁰⁴ See Colombo, *supra* note 55, at 657 n.3.

³⁰⁵ Evelyn Brody, *The Charity in Bankruptcy and Ghosts of Donors Past, Present and Future*, 29 SETON HALL LEGIS. J. 471, 524 n.170 (2005) (“[C]ommunity foundations and even individual public charities (such as universities) are beginning to offer donor-advised funds.”).

foundation,³⁰⁶ or a surnamed account with a commercially-affiliated charity such as the Fidelity Investments Charitable Gift Fund.³⁰⁷ These entities do not allow the donor or the donor's offspring toglom fees from the charity or to maintain absolute control over the grant-making process,³⁰⁸ but they allow the naming right.

Idealistic reformers may point out that this proposal would not eradicate all the problems identified. Even if the charitable trust changes its name after fifty years, family members could continue to dominate the board of trustees. The charitable trust's board would not instantly represent the diversity of the community or have expertise in making grants. Nepotism and isolationism could continue. A bolder proposal would prohibit family members from serving on the board of trustees.

Reformers previously proposed limiting family participation on the board of trustees, and that proposal failed. The Treasury Department proposed restrictions on board of trustee composition in 1965, and the proposal was annihilated in Congress.³⁰⁹ The lobbying power of founder families is formidable.

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

This Article focuses on perpetual naming rights, but the facts explored and the arguments developed raise broader issues about nepotism, grant-making procedures, and the flow of information. Should Congress prohibit charitable trusts from paying fees to family members? Should Congress require that all charitable trusts adopt detailed, written grant-making procedures? Should charitable trusts submit those written procedures to the IRS and obtain approval before the founder can claim a tax deduction for contributions to the charitable trust? Currently, charitable trusts that provide scholarships must submit a description of their grant-making process to the IRS in connection with their initial application for tax-exempt status.³¹⁰

³⁰⁶ *Id.* See also Marsh, *supra* note 139, at 141-42 (describing community foundations).

³⁰⁷ *Id.* at 146-47 (describing the Fidelity Fund and stating that "T. Rowe Price, Vanguard, and Charles Schwab provide similar opportunities.").

³⁰⁸ "Donor-advised funds . . . are wholly controlled by a community foundation or other charitable organization, and donees and their families are only permitted to make nonbinding recommendations about how monies should be distributed." Sarah E. Waldeck, *An Appeal to Charity: Using Philanthropy to Revitalize the Estate Tax*, 24 VA. TAX REV. 667, 690 (2005).

³⁰⁹ See *supra* note 262 and accompanying text.

³¹⁰ IRS Form 1023, 25 (June, 2006) (Schedule H, Organizations Providing Scholarships), available at www.irs.gov/pub/irs-pdf/f1023.pdf.

Many federal agencies are implementing on-line grant application processes.³¹¹ Congress could mandate similar processes for charitable trusts, and could mandate many procedures that are now considered “best practices” by grant-making entities. These and other reforms may be worthy of study in an attempt to bring greater diversity and community involvement to charitable trusts, and to ensure that the taxpaying public receives benefits commensurate to the tax subsidies granted.

IV. CONCLUSION: PAY-TO-PLAY CHARITY STYLE

Pay-to-play is a derogatory term for the political practice of doling out government contracts, construction projects, positions of power and influence, lucrative jobs, and other benefits, in exchange for campaign contributions.³¹² Pay-to-play politics is corrupt, and a violation of a public trust.³¹³ Perpetual naming rights promote charity’s version of pay-to-play forever.

The ability to surname in perpetuity can provide substantial private benefits to the founder family and diminish the public benefits. A surnamed charitable trust signals power, privilege, and prestige.³¹⁴ Family members can control the charitable trust as trustees. Grant writers, development officers, and others serving operating charities will flatter, cajole, plead, and reward the founding family in hopes of receiving grants from the trust. One charity provides big donors a private audience with the Pope, some create donor walls, and others establish donor parks and fountains, and devise different donor appreciation schemes.³¹⁵ When a founder surnames a charitable trust, the founder bequeaths some of society’s most prized attributes to the family in perpetuity – social status, respect and admiration. Along with this inefficient behavior, a perpetual naming right diminishes the public benefit in many other ways, from inhibiting diversity and community involvement on the board of trustees, to allowing personal relationships to influence grant making. In addition, the taxpaying public covers forty-five percent to sixty-seven percent of the cost of all the donations through tax subsidies.

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

³¹¹ See Joseph G. Perpich, *Grantmaking’s Looming Digital Divide*, FOUNDATION NEWS & COMMENTARY, Nov/Dec. 2006, available at <http://www.foundationnews.org/CME/article.cfm?ID=2694>.

³¹² See Bruce E. Cain, *Cheap Talk Citizenship: The Democratic Implications of Voting with Dollars*, 37 U. RICH. L. REV. 959, 965 n.26 (“[P]ay to play” politics . . . is essentially the practice of paying to gain access to politicians”); see also Pay to Play, http://en.wikipedia.org/wiki/Pay_to_play. (“[T]he phrase [is] almost always used in criticism”)

³¹³ *Id.*

³¹⁴ These are admired characteristics in our society. See Posner, *supra* note 104, at 574-77; Colombo, *supra* note 55, at 671 n.66 (“large capital gifts . . . can be viewed largely as purchases of status and may have little or nothing to do with how the gift affects the recipient or any kind of altruistic behavior”); McAdams, *supra* note 105.

³¹⁵ Representatives of grant seeking charities highly value access and influence with the founding family. See *supra* Part II.C.2.

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

APPENDIX A – EMPIRICAL RESEARCH COMPENDIUM

Survey of Private Foundations Beginning with the Letter “P”

The research reviewed pages 2602 to 2783 of IRS Publication 78 (revised Sept. 30, 2007), which included the names from Paact Inc. (on page 2602) to the P-47 Foundation (on page 2783). The research tabulated only the names of private foundations.³¹⁶ The pages included the names of approximately 3,000 private foundations. The chart below divides the names into five categories: (i) those including a surname but no functional or geographic designation; (ii) those which appear to have been established by a corporation or other commercial enterprise; (iii) those with a functional or geographic designation but no surname; (iv) those with both a surname and a functional or geographic designation; and (v) others – those for which it was not apparent whether the name included a surname, a functional designation, or a geographic designation, and which did not appear to have been founded by a corporation or other commercial enterprise.

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

³¹⁶ Private foundations are designated with the numeral four following the entity’s name in IRS Publication 78. IRS Pub. 78, *supra* note 83, at 1.

Breakdown among the five categories:

	Number	Percentage of Total
(i) Surname and no functional or geographic designation:	2,044	67.84%
(ii) Corporate founder:	153	5.08%
(iii) Functional or geographic designation but no surname	424	14.07%
(iv) Both a surname and a functional or geographic designation:	195	6.47%
(v) Other:	<u>197</u>	<u>6.54%</u>
Total	3,013	100.00%

Key Statistics:

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

Percentage of entities with a surname: The total number of entities with a surname is the sum of row (i), which is 2,044 names, plus row (iv), which is 195 names, for a total of 2,239 surnamed entities: $2,239/2,663 = 84.08\%$

Percentage of entities with a surname and no functional or geographic designation. The total number of entities with a surname and no functional or geographic designation is the number of entities in row (i) divided by the total number of entities: $2,044/2,663 = 76.76\%$

Percentage of entities with a functional or geographic designation: The total number of entities with a functional or geographic designation is the sum of row (iii), which is 424 names, and row (iv), which is 195 names, for a total of 619 entities with a functional or geographic designation.

Percentage of entities with a functional or geographic designation: $619/2,663 = 23.24\%$

Percentage of entities with a functional or geographic designation but no surname: row (iii) divided by the total number of entities: $424/2,663 = 15.92\%$

Percentage of entities with both a surname and a functional or geographic designation: row (iv) divided by the total number of entities: $195/2,663 = 7.32\%$