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Competitive Philanthropy: Charitable Naming Rights, Inequality, and Social Norms

LINDA SUGIN*

Income inequality today is at a high not seen since the 1920s, and one way the very richest display their wealth is through charitable giving. Gifts in excess of $100 million are no longer rare, and in return for their mega-gifts, the biggest donors get their names on buildings, an astonishingly valuable benefit that the tax law ignores. The law makes no distinction between a gift of $100 and a gift of $100 million.

This Article argues that the tax law of charity should focus on the very rich and harness the culture of philanthropy among the elite. The law should encourage and celebrate what this Article calls "competitive philanthropy," which defines philanthropic success as inspiring others to exceed your generosity. To promote competitive philanthropy, this Article proposes a legal regime that includes both more and less generous elements for donors than current law. It introduces a hierarchy of gift restrictions that calibrates the charitable deduction to reflect the burdens that restrictions impose on charities, disfavoring perpetuity and mission-diverting restrictions. It recommends eschewing the standard donor-centered perspective of the tax law to consider the perspective of charities.

While scholars have traditionally analyzed the charitable deduction in terms of economic incentives, this Article contends that the deduction may be more important in creating expectations and reinforcing social norms. By focusing on the largest gifts, this Article breaks new ground by integrating concerns about increasing inequality with tax benefits for charities. Policy makers can better design the tax law to address inequality while furthering the dual goals of distributing away from the very rich and protecting charities.

TABLE OF CONTENTS

I. INTRODUCTION 2
II. CHARITY LAW NEEDS NEW DIRECTION 8
  A. *The Tax Law of Philanthropy Should Focus on the Rich* 8
    1. *Follow the Money* 8
    2. *Competitive Philanthropy Is a Social Phenomenon* 9

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3. *The Law Can Give Charities Some Power* 12
B. *The Charitable Deduction Creates Both Incentives and Social Signals* 14
1. *The Economic Analysis Is Not Dispositive* 14
2. *Charities Produce Multiple Social Goods* 17
3. *Income Tax Analysis Is Too Donor-Centric* 19
C. *Charity Law Should Address Inequality* 21
1. *Why Care About High-End Inequality?* 21
2. *Taxes Are Not Enough To Deconcentrate Wealth* 24
III. CHARITABLE NAMING RIGHTS 28
A. *Naming Rights Are an Outlier in the Law of Charitable Quid Pro Quos* 28
B. *Naming Rights Are Good for Charities* 33
C. *Naming Rights Are Also Costly for Charities* 35
1. *Forever Is Too Long for Anything* 36
2. *Increasing Contractualization Is Harmful* 39
IV. FOSTERING COMPETITIVE PHILANTHROPY 41
A. *Principles for the Law of Competitive Philanthropy* 41
B. *Creating a Legal Hierarchy of Restricted Gifts* 43
C. *Add Sticks and Extra Carrots to the Charitable Deduction* 48
D. *Charities Should Support This Reform* 51
V. CONCLUSION 53

I. INTRODUCTION

Consider this tale of two gifts. In November 2015, the New York Philharmonic's concert hall at Lincoln Center became David Geffen Hall when the media mogul donated $100 million towards its estimated $500 million renovation.[1] The building had been called Avery Fisher Hall since 1973, when Mr. Fisher donated $10.5 million.[2] Though the hall had been in desperate need of renovation for some time, Lincoln Center for the Performing Arts had been paralyzed since 2002, when Fisher's children threatened to sue if his name were removed.[3] Lincoln Center could not have had a public battle with the heirs of a major donor because it might have chilled other potential

[1] Robin Pogrebin, *David Geffen Captures Naming Rights to Avery Fisher Hall with Donation*, N.Y. TIMES (Mar. 4, 2015), https://www.nytimes.com/2015/03/05/arts/david-geffen-captures-naming-rights-to-avery-fisher-hall-with-donation.html (on file with *Ohio State Law Journal*).

[2] John K. Eason, *Private Motive and Perpetual Conditions in Charitable Naming Gifts: When Good Names Go Bad*, 38 U.C. DAVIS L. REV. 375, 449 (2005).

[3] *See id.* at 449–57 (detailing the whole story).

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donors.[4] The Geffen deal was only possible because the Fisher children agreed to allow Lincoln Center to rename the building in exchange for $15 million.[5] This is an unhappy story because the gift transaction netted only $85 million for the charity to do its work; that $15 million could have made a lot of music. And the worst part is that the agreement with Geffen obligates *his* name to remain on the hall in perpetuity.[6]

The second story is a happy one. It is about a gift to Jazz at Lincoln Center (JALC), which is part of the same performing arts complex as Geffen Hall.[7] When JALC first opened in 2004, an intimate concert space was named for Herb Allen.[8] Jazz needed a fresh infusion of cash ten years later, so Allen challenged other philanthropists to top his gift by offering to relinquish his name on the theater.[9] Helen and Robert Appel rose to that challenge, and gave $20 million, the largest gift ever received by JALC.[10] The room is now the Appel Room.[11] This is a story of "competitive philanthropy." It is the exemplary story because it defines success as a philanthropist in a very particular way: you are a successful philanthropist if you inspire other people to be even more generous than you are.[12] This definition of success is a win-win situation for donors and charities because it maximizes dollars for charitable purposes and rewards donors with exceptional reputational benefits. This Article argues that the law should do more to encourage and celebrate it.

The law provides tax benefits to charities—including tax exemption for organizations[13] and deductions for donations to them[14]—in order to subsidize

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[4] The heirs did not actually sue, so we do not know whether they could have prevailed if they had. They would have had a difficult time establishing standing to sue, because heirs' standing to enforce gifts is restricted. *See* Evelyn Brody, *From the Dead Hand to the Living Dead: The Conundrum of Charitable-Donor Standing*, 41 GA. L. REV. 1183, 1186–87, 1198, 1203 (2007) (reviewing a donor's rights to enforce a charity's performance of a gift in different contexts). *But see* Smithers v. St. Luke's-Roosevelt Hosp. Ctr., 281 A.D.2d 127, 140–41 (N.Y. App. Div. 2001) (allowing the executrix of a donor's estate to sue in that capacity).

[5] Robin Pogrebin, *Lincoln Center To Rename Avery Fisher Hall*, N.Y. TIMES (Nov. 13, 2014), https://www.nytimes.com/2014/11/14/arts/music/lincoln-center-to-rename-avery-fisher-hall.html (on file with *Ohio State Law Journal*) ("Lincoln Center is essentially paying the family $15 million for permission to drop the name . . . .").

[6] Pogrebin, *supra* note 1.

[7] *See Frederick P. Rose Hall*, LINCOLN CTR., http://www.lincolncenter.org/venue/frederick-p-rose-hall [http://perma.cc/68BZ-LDDJ].

[8] *See* Lucy Cohen Blatter, *A Room by Any Other Name*, WALL STREET J. (Feb. 25, 2014), https://www.wsj.com/articles/a-room-by-any-other-name-1393382627 (on file with *Ohio State Law Journal*).

[9] *See id.*

[10] *Id.*

[11] *Id.*

[12] *See* Linda Sugin, *Your Name on a Building and a Tax Break, Too*, N.Y. TIMES (Mar. 11, 2015), https://www.nytimes.com/2015/03/11/opinion/rethinking-taxes-and-david-geffens-gift-for-avery-fisher-hall.html (on file with *Ohio State Law Journal*).

[13] I.R.C. § 501(a) (2012).

the goods that charities provide.[15] Charities must have public purposes under the law,[16] and private funding of those public purposes relieves burdens on government, fosters socially beneficial experimentation, and challenges government orthodoxy.[17] The exemption for charities and the deduction for donors are two of the most enduring provisions in the tax law.[18] They empower individuals to choose causes that will receive indirect government subsidy, while still demanding that individuals provide their primary support.[19]

Fostering competitive philanthropy holds tremendous potential to improve charitable tax law and to combat inequality. The tax law does not do enough to distinguish large gifts—which are crucial to charities, important to donors, and vital to beneficiaries—from small ones. It does not recognize the power dynamic that characterizes the relationship of mega-gift donors with the institutions they support, in which donors have all the leverage. And the law does not appreciate the burden that large gifts with restrictions impose on

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[14] *Id.* § 170(a)(1).

[15] The traditional justification for tax benefits is a subsidy theory that focuses on the goods that charities provide. *See* JAMES J. FISHMAN ET AL., NONPROFIT ORGANIZATION 275–76 (5th ed. 2015) (excerpt from Chauncey Belknap, *The Federal Income Tax Exemption of Charitable Organizations: Its History and Underlying Policy*, *in* 4 DEP'T OF TREASURY, COMM'N ON PRIVATE PHILANTHROPY & PUB. NEEDS, RESEARCH PAPERS (1977)). Other theories justify the benefits on other grounds. *See, e.g.*, FISHMAN ET AL., *supra*, at 278–89 (citing excerpts from Boris I. Bittker & George K. Rahdert, *The Exemption of Nonprofit Organizations from Federal Income Taxation*, 85 YALE L.J. 299 (1976), and Henry Hansmann, *The Rationale for Exempting Nonprofit Organizations from Corporate Income Taxation*, 91 YALE L.J. 54 (1981)).

[16] I.R.C. § 501(c)(3) (listing allowable purposes); Treas. Reg. § 1.501(c)(3)-1(d)(1)(ii) (2017) (including requirement that an organization "serve[] a public rather than a private interest" to receive the charitable tax exemption).

[17] *See* Dennis R. Young & John Casey, *Supplementary, Complementary, or Adversarial?: Nonprofit-Government Relations*, *in* NONPROFITS AND GOVERNMENT 37, 37–80 (Elizabeth T. Boris & C. Eugene Steuerle eds., 2017) (describing role of nonprofit organizations in society); *see also* Linda Sugin, *Rhetoric and Reality in the Tax Law of Charity*, 84 FORDHAM L. REV. 2607, 2607–08 (2016) (comparing public purposes with private operation and funding).

[18] The exemption was part of the first income tax in 1913. Kenneth Liles & Cynthia Blum, *Development of the Federal Tax Treatment of Charities: A Prelude to the Tax Reform Act of 1969*, LAW & CONTEMP. PROBS., Autumn 1975, at 7–20 (detailing history of charitable exemptions). The deduction was adopted in the infant stages of the income tax in 1917. War Revenue Act, ch. 63, sec. 1201(2), § 5, 40 Stat. 300, 330 (1917); Joseph J. Thorndike, *How the Charity Deduction Made the World Safe for Philanthropy*, TAX ANALYSTS (Dec. 13, 2012), http://www.taxhistory.org/thp/readings.nsf/ArtWeb/972168BEA0B68D8585257B160048DD4A?OpenDocument [https://perma.cc/3CT7-Q5FB] ("The deduction for charitable contributions is one of the oldest preferences in the tax law . . . .").

[19] The charitable deduction subsidizes giving to the extent of the donor's marginal rate of tax. For example, if the taxpayer has a marginal rate of 35%, a $100 gift to charity has an after-tax cost of $65 to the donor, and a tax subsidy of $35. For a discussion of the incidence of the government subsidy, see Linda Sugin, *Tax Expenditures, Reform, and Distributive Justice*, 3 COLUM. J. TAX L. 1, 23–26 (2011).

charitable organizations, or the race to the bottom that charities engage in to attract them.

Fostering competitive philanthropy would also help deconcentrate wealth by encouraging greater charitable giving. The law's one-size-fits-all approach to charitable gifts is a missed opportunity to address the growing problem of high-end income inequality[20] and the wealth concentration it fosters. The highest .1% and .01% of the income distribution have garnered an increasing share of total wealth and income over time.[21] While the highest earners have enjoyed all the economic gains in recent years, and those at the very top have been the biggest winners, the law has not responded by increasing taxes on those at the top. In 2017, the highest marginal income tax rate applied to taxpayers who earn $400,000 as well as those who earn $400,000,000.[22] Unfortunately, it is harder than one might expect to simply tax this inequality away. Top earners have an arsenal of avoidance schemes, both legal and illegal, to minimize their liabilities, and incentives for tax minimization and evasion rise along with rates.[23]

In identifying a deficiency in existing charitable tax law and offering a solution, this Article breaks new ground by integrating and analyzing what seem to be disparate concerns. Lawmakers need to think beyond tax rates to ameliorate inequality. Tax provisions that are uniquely relevant to the elite should be designed to reduce concentrations of income and wealth. By

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[20] "High-end inequality" is a term coined by Daniel Shaviro to refer to the increasing concentration of income and wealth at the highest levels. *See* Daniel Shaviro, *The Mapmaker's Dilemma in Evaluating High-End Inequality*, 71 U. MIAMI L. REV. 83, 86 (2016).

[21] Emmanuel Saez & Gabriel Zucman, *Wealth Inequality in The United States Since 1913: Evidence From Capitalized Income Tax Data*, 131 Q.J. ECON. 519, 520–21 (2016) (breaking down the very top by wealth based on income data); *see also* THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY, 170–77 (Arthur Goldhammer trans., 2014) (concluding that when returns to capital exceed growth, inequality increases). The richest .1% owned 22% of the total wealth in 2012, 15% more than in 1978. Saez & Zucman, *supra*, at 519. The top .01%'s income peaked in 2007, immediately before the financial crisis, when its share of total income was even higher than it was in the 1920s, the age of plutocrats. Emmanuel Saez, Striking it Richer: The Evolution of Top Incomes in the United States fig.3 (Jan. 25, 2015) https://eml.berkeley.edu/~saez/saez-UStopincomes-2013.pdf [https://perma.cc/N635-GXB6] (updated with 2013 Preliminary Estimates). The highest earning .01% earned at least $8.5 million in 2013—about 5% of total income, up from about 1% in the 1970s. *Id.*

[22] For 2017, individual taxpayers have a 39.6% marginal rate of tax for all income in excess of $418,400. Rev. Proc. 2016-55, 2016-45 I.R.B. 707, § 3.01(1)(c). The top rate for single filers begins at $500,000 under the Tax Cuts and Jobs Act, Pub. L. No. 115-97, sec. 11001, § 1, 131 Stat. 2054, 2055 (2017).

[23] *See* GABRIEL ZUCMAN, THE HIDDEN WEALTH OF NATIONS: THE SCOURGE OF TAX HAVENS 3 (Teresa Lavender Fagan trans., 2015) ("On a global scale, 8% of the financial wealth of households is held in tax havens."). *See generally* Alex Raskolnikov, *Crime and Punishment in Taxation: Deceit, Deterrence, and the Self-Adjusting Penalty*, 106 COLUM. L. REV. 569, 571 (2006) (discussing a variety of tax avoidance and evasion techniques and recommending specific penalties to deter such behavior).

focusing on the particular problems and potential benefits of mega-gifts to charity, the tax law of charity could do three things. First, it could reduce income inequality, a policy that the tax law is suited to address, but challenged in implementing. Second, it could disincentivize long-term gift restrictions that burden charities. Third, and most importantly, the law could create expectations of competition in generosity that maximize total charitable gifts over time. A more nuanced legal regime could define different standards that vary according to income and wealth, and demand that the very rich show great generosity to justify the prestige and power that their charitable gifts confer. In these ways, the tax law could increase the public value of private philanthropy.

While scholars have traditionally analyzed the charitable contribution deduction by evaluating it in terms of economic incentives,[24] this Article maintains that the deduction may be more important in defining social norms. Donors give to charity for many reasons, both economic and noneconomic.[25] Mega-gifts to charity are the sole prerogative of a tiny slice of the very rich[26] for whom philanthropy is a central and defining cultural institution.[27] In 2016, there were twelve charitable gifts in excess of $100,000,000, and six more at exactly that amount.[28] That may seem like too few for the law to worry about, until you consider that the total amount of those mega-gifts was over $4.2 billion.[29] The United Way, historically the leading fundraiser,[30] raised a mere $3.7 billion that year.[31]

This Article argues that the law of charity should encourage and celebrate competitive philanthropy. Competitive philanthropy is a more specific notion of the good than exists in the current tax law concerning charity, and it suggests that some gifts to charity are better than others, and should be recognized as such by the law.[32] The rules for charitable naming rights are a

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[24] *See infra* Part II.B.1.

[25] *See infra* Part II.A.2.

[26] *See* Maria Di Mento, *Megagifts Rise in 2016, with 12 Topping $100 Million*, CHRON. PHILANTHROPY (Dec. 30, 2016), https://www.philanthropy.com/article/Megagifts-Rise-in-2016-With/238768 (on file with *Ohio State Law Journal*).

[27] *See generally* FRANCIE OSTROWER, WHY THE WEALTHY GIVE: THE CULTURE OF ELITE PHILANTHROPY (1995) (offering several arguments and themes whose purpose is to provide a larger picture of contemporary elite philanthropy).

[28] Di Mento, *supra* note 26.

[29] $42,277,200,000 to be exact. *See id.*

[30] It has now been bested by Fidelity's donor-advised fund. Drew Lindsay et al., *Fidelity Charitable Pushes United Way out of Top Place in Ranking of the 400 U.S. Charities That Raise the Most*, CHRON. PHILANTHROPY (Oct. 27, 2016), https://www.philanthropy.com/article/Fidelity-Charitable-Knocks/238167 (on file with *Ohio State Law Journal*).

[31] Drew Lindsay et al., *Fidelity Overtakes United Way as New Charity Champion*, CHRON. PHILANTHROPY (Oct. 27, 2016), [on file with *Ohio State Law Journal*].

[32] Maimonides introduced a hierarchy of giving, though his ideal valued anonymity, which competitive philanthropy rejects. *See Matnot Anyim* 10:7–14 (Mishneh Torah); *see*

model for implementing a competitive philanthropy regime because naming rights are exclusive to the largest gifts to charity.[33] By focusing on the largest gifts, policy makers can better design the tax law to address inequality while furthering the dual tax and nonprofit policy goals of distributing away from the very rich and protecting charities.

The Article proceeds as follows. Part II argues that the tax law of philanthropy should focus on the rich to reduce concentrations of wealth, benefit charities, and reinforce social norms. It challenges the conventional economic framework of the charitable deduction by considering noneconomic motivations for charitable giving, and it recommends eschewing the standard taxpayer-centric perspective in the law. In addition, Part II explains why rising income and wealth inequality is important and troublesome, and why the tax law of charity is an appropriate vehicle for addressing it. Part III reviews the law of charitable naming rights, a paradigm for both the opportunities and hazards in elite philanthropy. It argues that naming rights are good for charities because naming gifts encourage other large donations, and naming rights are less burdensome for charities than other restrictions. However, naming rights can also be costly for charities, primarily on account of perpetuity and the increasing contractualization of large gifts. Part IV advocates for competitive philanthropy and proposes a legal regime to promote it that includes both more and less generous elements than current law. It recommends that the charitable deduction be calibrated according to the benefit received by charities, and that donors who practice competitive philanthropy should be entitled to tax bonuses. In creating a legal hierarchy for giving, a tax regime built on competitive philanthropy would both benefit charities and reduce the concentrations of wealth that high-end inequality has stimulated. Anticipating concern from the charitable sector, Part IV.D responds to potential critiques. Part V briefly concludes.

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also Jacob Neusner & Alan J. Avery-Peck, *Altruism in Classical Judaism*, *in* ALTRUISM IN WORLD RELIGIONS, 31, 35–36 (Jacob Neusner & Bruce D. Chilton eds., 2005) (discussing Maimonides's "eight stages of *tzedakah*" which works to identify a place for altruism in the transactions of philanthropy).

[33] This Article's reference to naming rights includes when institutions honor donors on the front of buildings, in the title of institutional programs, and by including a donor's name in the name of the institution. The Canadian Minister of Health wants the government to ban hospitals from renaming themselves for wealthy donors. *See* Robert Benzie, *Hoskins Wants To Ban Ontario Hospitals from Being Renamed for Donors*, TORONTO STAR (Feb. 1, 2017), https://www.thestar.com/news/queenspark/2017/02/01/hoskins-wants-to-ban-ontario-hospitals-from-being-renamed-for-donors.html [https://perma.cc/XD22-PUDC] ("The purpose of this directive is to . . . ensure the names used by hospitals reflect their role as publicly supported organizations operating within a universal, publicly funded health care system . . . .").

II. CHARITY LAW NEEDS NEW DIRECTION

A. *The Tax Law of Philanthropy Should Focus on the Rich*

It makes sense to narrowly tailor the law of philanthropy to the very wealthy for three reasons. First, that's where the money is. Second, that's where the law can tap into a cultural phenomenon that is already strong. And third, that's where there is the greatest imbalance in power between donors and charities that law could ameliorate. The only place where the law of charity seems to currently distinguish the rich from the merely affluent is in the rules for private foundations, which are restrictive and skeptical of the generosity of those who establish them.[34] A more complete regime designed with the very rich in mind is overdue.

1. *Follow the Money*

The 400 richest people in America—members of the Forbes 400—held an average of $6 billion in wealth *each* in 2016, the most ever.[35] The poorest among them had $1.7 billion and 153 billionaires weren't rich enough to be included in the list.[36] According to the Internal Revenue Service's (IRS) most recent analysis, there were 51,965 individuals with net wealth in excess of $20 million.[37] Incomes at the top have also risen; in order to be among the 16,300 families in the top hundredth of a percent (.01%) of the income distribution in 2013, a person had to have earned at least $8.5 million dollars that year.[38] These statistics indicate that there is a lot of money at the top that could go to charity.

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[34] The current version of the rules for private foundations was adopted in 1969 in response to concerns that the rich were using private foundations to privately benefit from their wealth while simultaneously enjoying a charitable deduction. *See* STAFF OF JOINT COMM. ON INTERNAL REVENUE TAXATION, 91ST CONG., GENERAL EXPLANATION OF THE TAX REFORM ACT OF 1969, AT 29–62 (Comm. Print 1970) (describing new rules and reasons for their adoption).

[35] Their combined net worth was $2.4 trillion. Kerry A. Dolan & Luisa Kroll, *Inside The 2016 Forbes 400: Facts and Figures About America's Richest People*, FORBES (Oct. 4, 2016), http://www.forbes.com/sites/kerryadolan/2016/10/04/inside-the-2016-forbes-400-facts-and-figures-about-americas-richest-people/?ss=forbes400#5afde1a23973 [https://perma.cc/G47U-LRFV].

[36] *Id.*

[37] *SOI Tax Stats—All Top Wealthholders by Size of Net Worth*, IRS, https://www.irs.gov/statistics/soi-tax-stats-all-top-wealthholders-by-size-of-net-worth (click "2013 link") (on file with *Ohio State Law Journal*) (last updated Oct. 31, 2017). Every three years, the IRS estimates the net worth of individuals in connection with reporting under the estate and gift tax. *SOI Tax Stats—Personal Wealth Statistics*, IRS, https://www.irs.gov/uac/soi-tax-stats-personal-wealth-statistics [https://perma.cc/RW33-ZACF].

[38] Saez & Zucman, *supra* note 21, fig.3.

The information on charitable giving by income level is not as detailed at the top as the data on income and wealth. Nevertheless, there is sufficient data to indicate that the most giving comes from the highest earners. A 2002 study concluded that taxpayers with over $1 million of income gave 16.2% of all contributions, even though they were just .4% of all families.[39] The top 2% of U.S. households "contribute an average of 4.4[%] of their income to charitable causes and in aggregate approximately 37[%] of all charitable dollars . . . ."[40] The .4% of wealthiest families, who had net worth over $10 million, gave 20.5% of all charitable contributions.[41] Only 7% of households donated 50% of all gifts in 2000.[42] Based on IRS data, the National Center for Charitable Statistics of the Urban Institute has estimated charitable giving by income level, aggregating all households with income in excess of $200,000.[43] That analysis reveals two important facts: first, that a substantial portion of the total dollars contributed to charity comes from the highest-income taxpayers, $76 billion out of $179 billion.[44] And second, that high-income taxpayers donate a greater percentage of their income than do average taxpayers.[45] Consequently, it is pretty clear that the law of philanthropy should consider the rich distinctly significant.

2. *Competitive Philanthropy is a Social Phenomenon*

Philanthropy is a uniquely important social institution for the rich. Twenty years ago, the sociologist Francie Ostrower interviewed a sample of philanthropists and described a fascinating world of expectations, norms, and hierarchies among the wealthy.[46] She found that giving was an important indicator of class status that creates community among the wealthy.[47] Her philanthropists had a particularly American character, emphasizing private initiative and skepticism of government, and they were motivated by a sense

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[39] *See* John J. Havens et al., *Charitable Giving: How Much, by Whom, to What, and How?*, *in* THE NONPROFIT SECTOR: A RESEARCH HANDBOOK 542, 547 tbl.23.4 (Walter W. Powell & Richard Steinberg eds., 2d ed. 2006).

[40] *Id.* at 546.

[41] *Id.* at 548 tbl.23.5.

[42] *Id.* at 546.

[43] Nat'l Ctr. for Charitable Statistics, *Charitable Giving in America: Some Facts and Figures*, NCCS, http://nccs.urban.org/data-statistics/charitable-giving-america-some-facts-and-figures [https://perma.cc/QZ3X-XKYP] [hereinafter *Charitable Giving*].

[44] Returns with $200,000 or more adjusted gross income constitute 3.7% of the total number of returns filed. They included 30% of total income and 42% of all charitable contributions reported. Urban Institute, *Charitable Giving and Adjusted Gross Income by Income Level*, NCCS, http://nccsweb.urban.org/tablewiz/showreport.php.

[45] The average is 2.3%, while high-income taxpayers donate 4.4%. Havens et al., *supra* note 39, at 245–46 & fig.23.1.

[46] *See* OSTROWER, *supra* note 27, at 6.

[47] *Id.*

of obligation, which she described as independent of tax benefits.[48] She also found that the rich participated in philanthropy primarily to impress each other—not to justify their outsize gains compared to the rest of society.[49] Ostrower concluded that "wealthy donors are generally more focused on their peers, rather than those outside their class, as the audience for their philanthropy."[50] Among the wealthy, community credibility and participation depend on giving and serving on boards, and there is a status ratchet going back and forth between elite organizations and wealthy individuals.[51] "[P]hilanthropy is not merely an isolated activity, but part of a way of life for donors."[52]

Other scholars reinforce Ostrower's conclusions. They have shown that people pay attention to the gifts that others give,[53] and use philanthropy as a signal to show that they are virtuous.[54] "Research has shown time and again that charitable giving is connected to a donor's involvement in various social networks, to opportunities for participation, and to identifying with a cause."[55] Charitable giving is a good way for individuals to signal wealth[56] and altruism.[57] People donate publicly to show that they are both generous and successful,[58] even where "conspicuous consumption" signaling success would not be socially acceptable.[59] Fundraisers are well aware of the contest among philanthropists. They use mechanisms such as matching grants, auctions, class levels of gifts, public shows of support, and standup fundraising to encourage competition among donors.[60] Board members at elite institutions are expected

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[48] *Id.* at 8, 12, 114, 121.

[49] *Id.* at 13.

[50] *Id.*

[51] *See id.* at 42, 68 ("While philanthropy needs money to survive, it needs status to attract money.").

[52] OSTROWER, *supra* note 27, at 72.

[53] *See* Lise Vesterlund, *Why Do People Give?*, *in* THE NONPROFIT SECTOR, *supra* note 39, at 568, 577.

[54] ERIC A. POSNER, LAW AND SOCIAL NORMS 34 (2000).

[55] Havens et al., *supra* note 39, at 553.

[56] *See* Amihai Glazer & Kai A. Konrad, Short Paper, *A Signaling Explanation for Charity*, 86 AM. ECON. REV. 1019, 1019 (1996).

[57] *See* Dan Ariely et al., Short Paper, *Doing Good or Doing Well? Image Motivation and Monetary Incentives in Behaving Prosocially*, 99 AM. ECON. REV. 544, 544–46 (2009) (finding that monetary incentives interact negatively with image concerns even though participants did not reduce prosocial public acts on account of monetary incentives).

[58] *E.g.*, William K. Jaeger, *Status Seeking and Social Welfare: Is There Virtue in Vanity?* 85 SOC. SCI. Q. 361, 364 (2004); *see also* William T. Harbaugh, *The Prestige Motive for Making Charitable Transfers*, 88 AM. ECON. REV. 277, 281 (1998) ("The results support the hypothesis that donors have a taste for prestige, and they show that a substantial portion of donations can be attributed to it.")

[59] *See* Glazer & Konrad, *supra* note 56, at 1019.

[60] *See e.g.*, OSTROWER, *supra* note 27, at 58 (describing card-calling in Jewish fundraising); Vesterlund, *supra* note 53, at 577 (noting that matches and raffles increase contributions).

to donate at certain levels and one of their central jobs on the board is to inspire donations from others.

The "giving pledge" epitomizes the social phenomenon. The pledge is an initiative that was started in 2010 by Bill Gates and Warren Buffett, two of the wealthiest men in America.[61] Signatories to it promise to give at least half of their wealth to charity.[62] In the first year, 57 families in the United States made the pledge.[63] It now includes 168 individuals and families.[64] A website tracks those who have signed on, describes the causes they support, and monitors their wealth. It is a very exclusive club that only the extremely rich and exceptionally philanthropic can join.[65] The website, operated by the Foundation Center, functions as a reminder to other wealthy individuals that they have fallen behind their peers.[66]

Eric Posner writes that charitable giving is a powerful way "in which people convert cash into reputation."[67] He describes the competition for status among philanthropists as a "prisoners' dilemma" that promotes giving.[68] Posner observes that potential donors make gifts to assert status, regardless of whether they succeed.[69] If their gifts exceed the gifts given by others, they succeed in gaining status.[70] If they do not give, they will lose status relative to others who do give.[71] So people choose to give.[72] It is a prisoner's dilemma because if others give also, a donor does not increase his relative status, failing

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[61] Catherine Clifford, *These 14 Billionaires Just Promised To Give away More than Half of Their Money Like Bill Gates and Warren Buffet*, CNBC (May 31, 2017), https://www.cnbc.com/2017/05/31/14-billionaires-signed-bill-gates-and-warren-buffetts-giving-pledge.html [https://perma.cc/95SM-CC6T]. Bill Gates is #1 and Warren Buffett is #3, having just been bumped from his long-time perch at #2 by Jeff Bezos. Kate Vinton, *Jeff Bezos Becomes Second Richest Person on the Forbes 400, Ending Warren Buffett's 15-Year Reign*, FORBES (Oct. 4, 2016), https://www.forbes.com/sites/katevinton/2016/10/04/jeff-bezos-becomes-second-richest-person-on-the-forbes-400-ending-warren-buffetts-15-year-reign/?ss=forbes400#4ec898d35775 [https://perma.cc/EKZ8-N89E].

[62] *A Commitment to Philanthropy*, GIVING PLEDGE, https://givingpledge.org/ [http://perma.cc/693F-SFAB].

[63] *Eye on the Giving Pledge*, GLASSPOCKETS, http://glasspockets.org/philanthropy-in-focus/eye-on-the-giving-pledge/profiles/(sortby)/dateoldest [https://perma.cc/32MZ-F68J] (click "view all 168 profiles").

[64] *A Closer Look*, GLASSPOCKETS, http://glasspockets.org/philanthropy-in-focus/eye-on-the-giving-pledge/a-closer-look [https://perma.cc/JX9X-JCB9].

[65] *Eye on the Giving Pledge*, GLASSPOCKETS, http://glasspockets.org/philanthropy-in-focus/eye-on-the-giving-pledge [https://perma.cc/7EVK-L7PR] ("With an estimated net worth of more than $800 billion, the 168 Giving Pledge participants represent a potentially game-changing force in philanthropy.").

[66] *See id.*

[67] POSNER, *supra* note 54, at 49.

[68] *Id.* at 61.

[69] *Id.*

[70] *Id.*

[71] *Id.*

[72] *Id.*

in his purpose.[73] Posner concludes that all donors would be better off if they did not give. [74]

If private consumption and charitable provision were equivalent, Posner's conclusion might be compelling. But given the role of charities in producing important public goods, and the law's fundamental policy supporting charities, Posner's prisoner's dilemma is actually a good thing. By vying with each other for status, donors forego private consumption and increase their support for charities. The status contest produces important positive externalities in the form of increased donations that benefit individuals other than donors. Charities and their beneficiaries are clearly better off on account of this status-seeking dynamic. Rather than lament the contest, the law should harness it more effectively. Philanthropy is already an important way of life for the rich, apart from the legal rules, but those rules can reinforce and mold the culture of philanthropy and define its ideals to maximize the benefits that have produced charity's privileged place under the law.

3. *The Law Can Give Charities Some Power*

The third reason to think about creating more law to govern the largest gifts is the danger of suboptimal agreements between donors and charities, which are most likely when donations are large. Only very large gifts to charity merit individual contracts that place obligations on recipient organizations that they do not choose. Small donors can make gifts to restricted funds, but those funds are defined by the organization in a way that maximizes its charitable goals. For example, a university is likely to have a dedicated fund for financial aid that small donors can contribute to if they want to restrict the use of their gifts to that purpose. But small donors are in no position to demand that the organization use their gifts for purposes of their own choosing. To the contrary, large donors can induce charities to take on new responsibilities—even ones that are arguably inconsistent with an organization's charitable mission. These gifts divert the attention of managers, even if they do not divert other resources held by the organization. Few institutions have the wealth or the courage to turn down gifts that encroach on their managerial prerogative.[75] The law could do more to empower charitable institutions going into negotiations so they can insist only on terms that further

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[73] POSNER, *supra* note 54, at 61.

[74] *Id.*

[75] Yale University returned a $20 million gift that Lee Bass had given to fund a course in Western Civilization. Bass' demand that he be allowed to approve the program's faculty was too much for Yale to tolerate. The university negotiated with the donor for months over the terms of the program before returning the gift. Jacques Steinberg, *Yale Returns $20 Million to an Unhappy Patron*, N.Y. TIMES (Mar. 15, 1995), http://www.nytimes.com/1995/03/15/us/yale-returns-20-million-to-an-unhappy-patron.html (on file with *Ohio State Law Journal*).

their mission and resist terms that impose long-term obligations and significant costs on their charitable programs.[76]

There are aspects of the charitable deduction under current law that effectively distinguish high-income from low-income taxpayers, but they create categories that are too broad to target the unique issues relevant only to those at the top. For example, the charitable deduction is only available to itemizers, which only about one-third of taxpayers choose.[77] That percentage is projected to go down under the Tax Cut and Jobs Act.[78] Since most taxpayers claim the standard deduction, they have no use for the charitable contribution deduction.[79] The deduction provides no incentive for non-itemizers to give because it does not reduce the price of their charitable giving. But most high-bracket taxpayers do itemize,[80] so the charitable deduction reduces their cost of giving by their marginal rate of tax.

The higher the marginal rate of tax, the more the deduction reduces the price of giving.[81] Stanley Surrey treated this phenomenon as an upside-down subsidy because it gives the highest income taxpayers the greatest tax savings on account of their charitable gifts.[82] Many believe that a subsidy dependent on a taxpayer's marginal rate of tax makes the deduction unfair.[83] But if it is

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[76] *See infra* Part IV.C.

[77] It is not included in the deductions allowed to determine adjusted gross income. I.R.C. § 62(a) (2012).

[78] Section 11021 increases the standard deduction for taxable years 2018–2025. Tax Cuts and Jobs Act, Pub. L. No. 115-97, sec. 11021, § 63(c), 131 Stat. 2054, 2072–73 (2017). The Tax Policy Center estimates that twenty-seven million fewer taxpayers will itemize deductions in 2018. Howard Gleckman, *How Changes to SALT Will Affect Itemizers*, TAX POL'Y CTR.: TAXVOX (Dec. 21, 2017), http://www.taxpolicycenter.org/taxvox/how-changes-salt-will-affect-itemizers [https://perma.cc/P8MH-3B98]. Twenty-one million fewer will claim a deduction for charitable giving. Howard Gleckman, *21 Million Taxpayers Will Stop Taking the Charitable Deduction Under the TCJA*, TAX POL'Y CTR.: TAXVOX (Jan. 8, 2018), http://www.taxpolicycenter.org/taxvox/21-million-taxpayers-will-stop-taking-charitable-deduction-under-tcja [https://perma.cc/6A8Z-XU87].

[79] In 2013, 68.5% of taxpayers chose not to itemize. Scott Greenberg, *Who Itemizes Deductions?*, TAX FOUND. (Feb. 22, 2016), http://taxfoundation.org/blog/who-itemizes-deductions [https://perma.cc/3HSQ-SK5S]. The charitable deduction is a below-the-line itemized deduction, so taxpayers must choose between it and the standard deduction, but not both. *See* I.R.C. §§ 62–63.

[80] Indeed, 93.5% of those with income over $200,000 did itemize. Greenberg, *supra* note 79.

[81] With a 40% marginal rate of tax, a $100 contribution has an after-tax cost of $60; with a 15% marginal rate, the after-tax cost is $85. This means that high-bracket taxpayers can gross up their contributions more than low-bracket taxpayers, at the same after-tax cost.

[82] STANLEY S. SURREY, PATHWAYS TO TAX REFORM: THE CONCEPT OF TAX EXPENDITURES 136 (1973).

[83] Proposals for refundable credits imply that the subsidy should be uniform. *See* Lily L. Batchelder et al., *Efficiency and Tax Incentives: The Case for Refundable Tax Credits*,

an effective incentive for giving, then donors increase their contributions on account of it, and the benefit is passed along to the recipient charities. Only if the deduction is ineffective in inducing people to increase their gifts is it a benefit to the donors, and not the institutions to which they give.[84]

In addition, the upside-down nature of the subsidy is not so clear. Larger gifts cannot be as narrowly self-serving as smaller gifts because it is harder for a donor to capture all the (charitable) benefits from a large gift. For example, a person who gives $50 to the local public radio station finances a small amount of music broadcast, and he is likely to receive $50 of listening pleasure. His gift may be equivalent to his allocable cost of the station's production. But a $1 million gift can finance a lot of music and is likely to provide benefits beyond the donor's own.

The upside-down subsidy disappears for some of the very wealthiest philanthropists because they are unable to deduct their gifts. Thanks to President Trump, we know that Warren Buffett cannot use the charitable contribution deduction. In 2015, Buffett gave $2.86 billion to charity, but deducted only $3.5 million.[85] Since the deduction is limited by statute to a maximum of 50% of income,[86] philanthropists who donate out of their wealth (and not their income) may find themselves in the same position as low-income non-itemizers; their marginal contributions are not deductible at all. For these very wealthy taxpayers, § 170 offers no price adjustment and consequently no financial incentive to give. The next Part argues that the law is still an important signal of social value, even where it provides no economic incentive.

B. *The Charitable Deduction Creates Both Incentives and Social Signals*

1. *The Economic Analysis Is Not Dispositive*

Scholarly examination of the charitable deduction often starts and ends with an economic analysis. It goes like this: the deduction reduces the price of giving, so it encourages people to give more than they otherwise would. This increases the private funding of charities, and causes the government to

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59 STAN. L. REV. 23, 24 (2006) (arguing that proposals for refundable credits imply that the subsidy should be uniform).

[84] As a policy matter, this would make the deduction a waste of government resources. *See* Sugin, *supra* note 19, at 23 (arguing that identifying the recipient of the subsidy is important, if a tax expenditure subsidizes).

[85] Buffett publicly released his returns as a challenge to candidate Trump. Jen Wieczner, *How Warren Buffett's Released Tax Returns Prove Trump Wrong*, FORTUNE (Oct. 10, 2016), http://fortune.com/2016/10/10/warren-buffett-taxes-trump/ [https://perma.cc/4E42-AJFS].

[86] I.R.C. § 170(b)(1)(A) (2012). Some gifts are subject to a 20% or 30% limitation, depending on the property and the recipient organization. *Id.* § 170(b)(1)(B), (D).

subsidize their activities. The deduction is an appropriate use of government resources because it is a way to overcome the tendency of individuals to free ride on the benefits provided by others. Private funding of charities overcomes the problem of underfunding that would occur if the government funded directly because enthusiastic donors can choose to pay more privately than they would indirectly through tax collections that imposed costs on all taxpayers.[87]

If we think about the charitable deduction solely in economic incentive terms, we would expect that high-bracket taxpayers would give money and low-bracket taxpayers would volunteer because the value of the deduction is highest for high-bracket taxpayers and less for low-bracket taxpayers. We would also expect that non-itemizers would not give money at all, since they get no tax benefit for it. But that is not the case.[88] Giving and volunteering seem to be in a symbiotic relationship, so that people give to the organizations with which they are involved.[89]

The economic model also assumes that both government funding and giving by others should crowd out private giving.[90] This suggests that donors should reduce their contributions when others increase theirs. But the evidence suggests that there is, in fact, very little crowding out.[91] People seem to give without caring whether the recipient is already sufficiently funded.[92] People give for many reasons that are not accounted for in the economic models, such as social norms, community interaction, and the status of other contributors.[93] Other scholars have observed that "[b]ecause humans think about gifts in a way that fundamentally differs from how they think about exchange,

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[87] *See* Burton A. Weisbrod, *Toward a Theory of the Voluntary Non-Profit Sector in a Three-Sector Economy*, *in* ALTRUISM, MORALITY, AND ECONOMIC THEORY, 171, 171–76 (Edmund S. Phelps ed., 1975) (explaining the median voter problem). Private giving allows for price discrimination among donors, who can decide how much they value a charitable output.

[88] *See* Havens et al., *supra* note 39, at 545–56 (explaining that low-income people are less likely to give than higher-income people, but those that do give a higher than average percentage of their income).

[89] OSTROWER, *supra* note 27, at 18.

[90] *See generally* Richard Steinberg, *Does Government Spending Crowd Out Donations? Interpreting the Evidence*, 62 ANNALS PUB. & COOPERATIVE ECON. 591 (1991) (reviewing the literature on the relationship between government spending and private giving crowd out).

[91] *See id.* at 608–09.

[92] For example, Harvard University already has the largest endowment, and yet it continues to receive substantial contributions, both large and small. For details from recent years, see *Annual Financial Report*, HARVARD UNIV., http://finance.harvard.edu/annual-report [https://perma.cc/GS4V-UHVV].

[93] *See* Vesterlund, *supra* note 53, at 580–81 ("The classical model of charitable giving relies on a series of assumptions, some of which may be a poor approximation to the environment in which giving takes place . . . . We find that a number of factors may reverse the prediction that an increase in a donor's contribution causes those of others to decrease.").

straightforward economic arguments are often systematically incorrect when applied to gift-giving situations."[94]

Economists do not agree on the incentive effects of the charitable deduction. Some studies have found that the deduction is a very effective inducement to giving, and the revenue lost is more than compensated for by larger gifts.[95] Others have disputed that finding, concluding that individuals do not increase their real giving enough to compensate for the government's loss in tax revenue,[96] and that the form of subsidy may be what primarily determines the impact.[97] The best conclusion on a review of the evidence seems to be that "it is still unclear how much changes in price affect charitable giving. More research . . . will be needed to definitively answer this difficult and important question."[98]

The inconclusiveness of the data on whether the deduction actually incentivizes people to give, and the evidence that people do not behave as the

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[94] Reid Kress Weisbord & Peter DeScioli, *The Effects of Donor Standing on Philanthropy: Insights from the Psychology of Gift-Giving*, 45 GONZ. L. REV. 225, 256 (2009/10).

[95] *See, e.g.*, MOLLY F. SHERLOCK & JANE G. GRAVELLE, CONG. RESEARCH SERV., R40919, AN OVERVIEW OF THE NONPROFIT AND CHARITABLE SECTOR 49 (2009) ("The most recent estimates of the price elasticity of charitable giving by living individuals . . . suggest that the elasticity is below one."); JANE G. GRAVELLE & DONALD J. MARPLES, CONG. RESEARCH SERV., R40518, CHARITABLE CONTRIBUTIONS: THE ITEMIZED DEDUCTION CAP AND OTHER FY2010 BUDGET OPTIONS 7–9, 18–19 (2009) (reviewing the literature on price elasticity); Jon Bakija & Bradley T. Heim, *How Does Charitable Giving Respond to Incentives and Income? New Estimates from Panel Data*, 64 NAT'L TAX J. 615, 617 (2011) (finding a persistent price elasticity in excess of one in absolute value); Joseph J. Cordes, *Re-Thinking the Deduction for Charitable Contributions: Evaluating the Effects of Deficit-Reduction Proposals*, 64 NAT'L TAX J. 1001, 1002–04 (2011) (reviewing the literature on the charitable deduction); *see also* CHARLES T. CLOTFELTER, FEDERAL TAX POLICY AND CHARITABLE GIVING xi (1985) (changes in tax policy can significantly impact the level and composition of giving); Gerald E. Auten et al., Short Paper, *Charitable Giving, Income, and Taxes: An Analysis of Panel Data*, 92 AM. ECON. REV. 371, 371 (2002) (testing whether individuals adjust their giving due to transitory fluctuations); Charles T. Clotfelter, *The Impact of Tax Reform on Charitable Giving: A 1989 Perspective*, *in* DO TAXES MATTER? 203, 215 (Joel Slemrod ed., 1990) (explaining that the economic model of charitable giving is an incomplete model, therefore contributions through time cannot be predicted); John Peloza & Piers Steel, *The Price Elasticities of Charitable Contributions: A Meta-Analysis*, 24 J. PUB. POL'Y & MARKETING 260, 260 (2005) (using a meta-analysis of studies on the price elasticity of charitable tax deductions to determine the effects of changes in their deductibility).

[96] *See, e.g.*, Joel Slemrod, *Are Estimated Tax Elasticities Really Just Tax Evasion Elasticities? The Case of Charitable Contributions*, 71 REV. ECON. & STAT. 517, 522 (1989).

[97] *See* Kimberley Scharf & Sarah Smith, *The Price Elasticity of Charitable Giving: Does the Form of Tax Relief Matter?* 22 INT'L TAX & PUB. FIN. 330, 346 (2015) (concluding that offering the subsidy in the form of a match would generate more charitable giving).

[98] Vesterlund, *supra* note 53, at 570.

economic model would predict, should give us pause in relying too heavily on economic justifications of the law. If the only reason for the deduction is its incentive effect, it may be too ineffective to remain. Until we are able to prove that donors increase their gifts by more than the government loses in revenue, the economic analysis should make us skeptical of the tax benefits for philanthropy.

However, if—despite the lack of clear economic evidence—the deduction seems important, the uncertainty may instead indicate that legal scholarship about the deduction has skewed too economic, overlooking an important perspective on the role of the tax law. Instead of condemning the deduction, the indeterminacy of its economic analysis should lead us to a more social and philosophical approach to it. Regardless of whether the deduction actually causes people to give more to charity, it is an important element of the law. The deduction signals the social importance of pluralism, private initiative, arts and culture, education, and community. It also signals a skepticism of private consumption to the exclusion of communal support. The deduction is how the law honors, as well as encourages, the social functions of charity.

Philanthropy by the elite is public, while charitable giving by the moderately wealthy is more private. This could explain why the charitable deduction might be even less important as an economic incentive for the super-wealthy than it is for the merely affluent. According to a study by Dan Ariely, "private monetary incentives seem to interact negatively with image concerns, leading to the result that monetary incentives are more effective in motivating private prosocial decisions than ones made in a public setting."[99] This is relevant to the design of the law for elite philanthropy because it reinforces that the economic value of deductions under the income tax are much less significant for the wealthiest than they are for less wealthy charitable donors. For the most elite philanthropists, image concerns are the strongest drivers of philanthropic giving, and the law can define for donors a hierarchy of most favored philanthropy.

2. *Charities Produce Multiple Social Goods*

The law of charity is much concerned with the purposes of charities—both state and federal law limit their legal categories to organizations that are organized to do socially useful things.[100] The traditional justification for the charitable contribution deduction is that it subsidizes the activities of the charitable organization—the good work that charities do.[101] So it may seem odd to think about designing the law of charity to redistribute *away* from donors and deconcentrate the wealth of the philanthropist class, rather than to

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[99] Ariely et al., *supra* note 57, at 546.

[100] *See* I.R.C. § 501(c)(3) (2012) (listing purposes required for exemption as a charity).

[101] *See* FISHMAN ET AL., *supra* note 15, at 275–78 (describing traditional subsidy theory).

redistribute *to* socially desirable purposes. But we should recognize that one of the social goods that charities produce is wealth deconcentration.

The policy of wealth deconcentration made compelling by increasing high-end inequality is not concerned with the purposes or activities of recipient organizations, but it offers an additional reason for the law to nudge toward increased giving. This is important because many people, and even some scholars, link charity law with poverty relief.[102] They are critical of the elite institutions that are the favored charities of the wealthiest donors.[103] Poverty relief has never been the central concern of charity law—the definition of charity has included much broader purposes since its early development in England.[104] The tax law of charity is not about redistribution from rich to poor. If charity law is intended to achieve redistribution, redistribution away from the super-rich to anyone else is a reasonable redistributive goal. If the top .1% finance goods that are enjoyed by the top half of the income distribution, that redistribution increases overall social welfare, and is worthwhile, even from a utilitarian perspective.

In addition, there are many benefits to charitable provision of goods and services, apart from the distributional effects on beneficiaries. For example, "[p]hilanthropy has a positive long-term externality for society, that is, it creates a better society in the long run."[105] Charities are an important check on government overreach,[106] they empower communities,[107] and they foster

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[102] *See* John D. Colombo, *The Role of Redistribution to the Poor in Federal Tax Exemption for Charities* 4–15 (Annual Conference of the Nat'l Ctr. on Philanthropy & the Law, 2009), https://ssrn.com/abstract=2350493 [https://perma.cc/4VXP-J2J5] (reviewing the literature on redistribution models via federal exemption law).

[103] *See* Teresa Odendahl, *Charity Begins at Home: Generosity and Self Interest Among the Philanthropic Elite*, *as reprinted in* JAMES J. FISHMAN ET AL., NONPROFIT ORGANIZATIONS 755, 755 (5th ed. 2016). Education is the most favored sector among the highest-income donors, and religion is the most favored sector among the lowest-income donors. Charles T. Clotfelter, *The Distributional Consequences of Nonprofit Activities*, *in* WHO BENEFITS FROM THE NONPROFIT SECTOR? 1, 14–16 & tbl.1.5 (Charles T. Clotfelter ed., 1995); *see also* Havens et al., *supra* note 39, at 558 ("Numerous other studies about the wealthy confirm that education is the number–one priority in their charitable giving. In a study that asked wealth holders about the policy issues they would like to influence, the highest-ranking policy area was improvement of education . . . ."). In 2015, religion received 32% of total giving, exceeding every other category. *Giving USA: 2015 Was America's Most-Generous Year Ever*, GIVING USA (June 13, 2016), https://givingusa.org/giving-usa-2016/ [https://perma.cc/PZ55-YBQ5] [hereinafter *Giving USA*]. Education and culture combined received only 20%. *Id.*

[104] *See* Charitable Uses Act 1601, 43 Eliz. c. 4, §§ 1–10 (Eng.).

[105] ZOLTAN J. ACS, WHY PHILANTHROPY MATTERS 4 (2013).

[106] *See* Sugin, *supra* note 17, at 2627 ("Private organizations are necessary to challenge and check government."); Young & Casey, *supra* note 17, at 45–48.

[107] *See* Rob Atkinson, *Tax Favors for Philanthropy: Should Our Republic Underwrite De Tocqueville's Democracy?*, 6 WM. & MARY POL'Y REV. 1, 8–9 (2014). Minority communities, in particular, lack sufficient political power to achieve their goals politically.

pluralism in society.[108] These civic functions of charities are arguably more important than their redistributive effects because their antimajoritarian functions cannot be accomplished by government. Contrary to the rhetoric in charity law that champions charity for "[r]elieving the burdens of government," the private nonprofit sector is a crucial part of the social order because it can do things that government cannot, not because it duplicates what government does best.[109] Distribution remains a core obligation of government.

3. *Income Tax Analysis Is Too Donor-Centric*

Scholarly analysis of the charitable deduction has been hampered by its treatment as a "personal" deduction of the donor. The conventional approach in income tax analysis takes an agnostic approach to the sources and uses of economic resources.[110] That approach focuses only on the perspective of taxpayers, judging individuals according to resources at their disposal.[111] William Andrews' leading article analyzing the charitable deduction established a framework that divides expenditures into the costs of producing income (which are not taxed) and the costs of consumption (which are taxed).[112] He argued that the deduction for charitable giving was appropriate because amounts given to charity do not represent private preclusive consumption.[113] The corollary to this argument is that the deduction should be disallowed if evidence shows that the benefit of philanthropy is private. And the data seems to indicate that people donate because it benefits them in some way, by bolstering their reputation, or giving them a warm glow.[114]

But this consumption-defining approach is too limiting in evaluating the charitable deduction because it ignores the perspective of society as a whole, and the broader purposes of taxation. Taxes exist to finance public goods and redistribution. Current law focuses on individuals in an attempt to treat people in the same position fairly.[115] But the larger goals of taxation should inform the rules adopted. From that perspective, the consequences of the charitable deduction for society as a whole become much more important than the effects

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Cf. Weisbrod, *supra* note 87, at 174 (explaining underprovision of public goods on account of the preferences of the median voter).

[108] *See* John Simon et al., *The Federal Tax Treatment of Charitable Organizations*, *in* THE NONPROFIT SECTOR, *supra* note 39, at 267, 267.

[109] *See* Sugin, *supra* note 17, at 2618.

[110] All income is included, regardless of sources and uses. *See* Boris I. Bittker, *A "Comprehensive Tax Base" as a Goal of Income Tax Reform*, 80 HARV. L. REV. 925, 932 (1967) (critical of that false neutrality).

[111] *See id.*

[112] William D. Andrews, *Personal Deductions in an Ideal Income Tax*, 86 HARV. L. REV. 309, 313 (1972).

[113] *Id.* at 314–15.

[114] *See supra* Part II.A.2.

[115] *See* Atkinson, *supra* note 107, at 55–56.

on individual consumption. Instead of asking whether individuals receive consumption from a particular expenditure, the tax treatment could depend on whether society can more effectively provide public goods and redistribution with the deduction in place. When the issue is framed that way, the charitable deduction is more easily defended.

The broader perspective allows the law to send a signal that certain kinds of benefits—even private ones—are more socially desirable (or tolerable) than others. The law can establish a hierarchy of concededly private benefits that elevates those that create public goods and devalues those that create public harms. If individuals get equal satisfaction from giving to charity (because it gives them status, return benefits, warm glow) and buying yachts (because they have private preclusive use of them), it is legitimate that the law recognizes the costs and benefits to others from the private benefits. Tax benefits for charity acknowledges the social preference for charitable goods over simple consumer goods.[116]

Much of the criticism of elite philanthropy loses its force when we adopt the social perspective because the charitable deduction clearly favors public goods over private ones.[117] In addition, when future beneficiaries are considered, the social benefits of charitable gifts increase. Distributional effects that spread benefits out of the very top are worthwhile in a world of increasing high-end inequality, whether that distribution reaches current beneficiaries outside the elite or future beneficiaries. Reductions in inequality itself are a social benefit. The charities favored by the rich, education and culture,[118] create goods that produce growing benefits over time. An investment in education today increases the educational level of the living generation, which will translate into higher education levels and greater knowledge in the next generation.[119] Culture is often criticized as the most elitist and exclusive recipient of charitable funds, but cultural organizations are the repository of both objects and ideas that challenge and enrich society. As protectors of history and imagination, cultural organizations both preserve the past and create potential for the future. They are in the business of preventing rivalry, embodying the very definition of public goods.

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[116] *Id.* at 48.

[117] The economic definition of a public good is something that is nonexclusive and nonrival. Nonexclusive means nobody can be excluded from consuming the good and nonrival means that one person's consumption of the good does not reduce another person's enjoyment of it as well. Vesterlund, *supra* note 53, at 572.

[118] *See Giving USA*, *supra* note 103.

[119] *See* Michael Klausner, *When Time Isn't Money: Foundation Payouts and the Time Value of Money*, STAN. SOC. INNOVATION REV., Spring 2013, at 51, 51–59.

C. *Charity Law Should Address Inequality*

1. *Why Care About High-End Inequality?*

There are good arguments that we should *not* care about high-end inequality. Since nobody has a right to a private jet, it is not a fairness problem that most of us do not have one. A few lucky people are earning much more than the rest of us, but inequality is consistent with distributive justice. By some measures, most people have been made better off, even as income inequality has increased. As the CEOs and hedge fund managers have enjoyed phenomenal returns,[120] the rest of us have seen our standards of living rise also. Technology has put a smartphone in the pocket of the average American teenager, and a flat-screen TV on the wall of virtually every American home. If some people are unhappy about the extraordinary gains of a few, it might be because they are envious, hardly a problem that a just government should be obligated to solve. Government has responsibility for ameliorating suffering at the bottom of the income spectrum,[121] and the tax law has been a surprisingly effective tool in ameliorating poverty.[122] But that concern does not extend to escalating differences among the wealthy, or the degree of difference in the gains enjoyed by those who have gained.

Divergent theories of distributive justice are consistent in mostly ignoring high-end inequality. Such inequality can result even if governments are just, according to those theories. For example, equal opportunity is the cornerstone of economic justice for some theorists.[123] Where there is equal opportunity, there should be no post hoc government interference—those who make the most out of their equal opportunity should be entitled to enjoy all the fruits of their labors.[124] This version of an equal opportunity imperative is quite extreme, and not all proponents of equal opportunity understand it to imply a hands-off approach once opportunity is guaranteed. Ronald Dworkin supports taxation as a necessary mechanism to guarantee equality on a recurring basis, even where there is equal opportunity to prosper; he rejects the "starting gate" theory that the libertarian view of equal opportunity offers.[125] But even Dworkin is hardly concerned with inequality in outcomes for its own sake—

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[120] Much inequality in the United States has been driven by returns to labor. *See* PIKETTY, *supra* note 21, at 304–35.

[121] *See* JOHN RAWLS, A THEORY OF JUSTICE 78–79 (1971) (maximizing expectation of the least well off is required by justice).

[122] David Kamin, *Reducing Poverty, Not Inequality: What Changes in the Tax System Can Achieve*, 66 TAX L. REV. 593, 596 (2013).

[123] *See* James R. Repetti, *Democracy and Opportunity: A New Paradigm in Tax Equity*, 61 VAND. L. REV. 1129, 1131 (2008).

[124] This is the libertarian view. *See* ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 160–61 (1974) (showing how liberty upsets initially equal distributions).

[125] Ronald Dworkin called Nozick's approach a "starting gate" theory. Ronald Dworkin, *What Is Equality? Part 2: Equality of Resources*, 10 PHIL. & PUB. AFF. 283, 309 (1981) (rejecting laissez-faire policy after initial equal distribution of resources).

his standard of equality of resources anticipates that individuals will make different choices that produce different returns.[126] Dworkin's concern is where inequality results from factors and forces beyond an individual's control.[127] Similarly, John Rawls expects that a just society will have unequal outcomes.[128] His main concern in economic justice is with the least well off.[129] But the most well off are the focus of the high-end inequality debate, so they are not at the center of his principles. Some people have suggested that economic justice requires a basic minimum guaranteed by government,[130] and current interest in a universal basic income by both business leaders[131] and governments[132] reinforces the tendency to focus on the bottom of the income distribution.[133] Rawls's theory is consistent with guaranteeing a minimum, since he demands that individuals have the ability to participate in society, which presumably requires some baseline resources.[134]

The main reason to care about high-end inequality is political. While Rawls is primarily concerned with the least well off, he does suggest that an estate or inheritance tax might be necessary.[135] He explains that the purpose of such a tax on the wealthiest would be "solely to prevent accumulations of wealth that are judged to be inimical to background justice."[136] He may have

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126 *See id.* at 333 ("[A]ny theory of distribution must be ambition-sensitive . . . .").

127 *See id.* at 293–98 (brute luck); *id.* at 314–17 (handicaps).

128 RAWLS, *supra* note 121, at 60–65.

129 This is Rawls's "difference principle." *See* RAWLS, *supra* note 121, at 75–80.

130 *See* LIAM MURPHY & THOMAS NAGEL, THE MYTH OF OWNERSHIP: TAXES AND JUSTICE 12–15 (2002). Murphy and Nagel had intellectual predecessors. *See* G.W.F. HEGEL, PHILOSOPHY OF RIGHT 159–69 (S.W. Dyde trans., Batoche Books 2001) (1821); PHILIPPE VAN PARIJS, REAL FREEDOM FOR ALL: WHAT (IF ANYTHING) CAN JUSTIFY CAPITALISM? 1–2 (1995).

131 *See* Jathan Sadowski, *Why Silicon Valley Is Embracing Universal Basic Income*, GUARDIAN (June 22, 2016), https://www.theguardian.com/technology/2016/jun/22/silicon-valley-universal-basic-income-y-combinator [https://perma.cc/K8CR-EG6W]; Chris Weller, *8 High-Profile Entrepreneurs Who Have Endorsed Universal Basic Income*, BUS. INSIDER (Nov. 9, 2016), http://www.businessinsider.com/entrepreneurs-endorsing-universal-basic-income-2016-11/#andrew-ng-1 [https://perma.cc/75RM-MWCP].

132 Switzerland considered implementing a universal basic income, but voters rejected it in a referendum. Raphael Minder, *Guaranteed Income for All? Switzerland's Voters Say No Thanks*, N.Y. TIMES (June 5, 2016), https://nyti.ms/2kFy07e (on file with *Ohio State Law Journal*). Finland and the Netherlands are experimenting with similar pilot projects. *Id.*

133 While a universal basic income would be paid to everyone, for high-income individuals, the amount received would be more than offset by tax payments. Thus, only low-income individuals would receive a net transfer from the government.

134 *See* RAWLS, *supra* note 121, at 61 (discussing "equal liberties of citizenship").

135 *See* JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT 160–61 (Erin Kelly ed., 2001) (supporting an accessions tax).

136 *Id.* at 161.

intended such a tax to help operationalize equal opportunity.[137] But it is also possible that he believed that excessive concentrations of wealth are too dangerous for democratic government.

While it might be possible to maintain political equality alongside extreme economic inequality, the United States today suggests that such a combination is challenging. Since money is speech and speech is constitutionally protected, the very rich can influence the political process in ways unavailable to the poor, or even the moderately well off. In 2016, a tiny percentage of voters had an outsized role in financing the election.[138] Regulation—or even transparency—might allow money and politics to mix with less toxicity, but those controls are currently impossible.[139] Until there is a way to directly control the political power that comes with money, indirect attempts to deconcentrate that power will be important. The tax system, because it is effective at moving money out of private pockets, can act as a second-best tool for addressing the political dangers associated with increasing concentration of wealth and income at the top.

A second reason to care about high-end inequality is social welfare; more inequality may make us worse off. There is evidence that poor health correlates with low income in a highly unequal society; inequality might be making people sick.[140] Health researchers hypothesize that reducing inequality may make us healthier.[141] Economist Robert Frank has argued that increasing inequality has made us all worse off because our happiness depends on our relative consumption, rather than our direct consumption.[142] As income inequality has increased, we have suffered because it has become more difficult to "keep[] up with the Joneses."[143] Frank observes that as people have gotten richer, they consume more and better things, which you might expect would make them better off.[144] But instead, he believes that increasing conspicuous consumption actually reduces overall social welfare.[145] He

[137] This is how I analyzed it in Linda Sugin, *Theories of Distributive Justice and Limitations on Taxation: What Rawls Demands From Tax Systems*, 72 FORDHAM L. REV. 1991, 2009 (2004).

[138] *See* Nicholas Confessore et al., *Buying Power*, N.Y. TIMES (Oct. 10, 2015), http://nyti.ms/1jVHlUn (on file with *Ohio State Law Journal*).

[139] Thanks to the Supreme Court's decision in *Citizens United v. FEC*, 558 U.S. 310, 371–72 (2010).

[140] *See* Kate E. Pickett & Richard G. Wilkinson, *Income Inequality and Health: A Causal Review*, 128 SOC. SCI. & MED. 316, 316 (2015) ("The evidence that large income differences have damaging health and social consequences is strong . . . .").

[141] *See id.*

[142] *See* ROBERT H. FRANK, FALLING BEHIND: HOW RISING INEQUALITY HARMS THE MIDDLE CLASS 3–5 (2007); ROBERT H. FRANK, CHOOSING THE RIGHT POND: HUMAN BEHAVIOR AND THE QUEST FOR STATUS 4–5 (1985) [hereinafter FRANK, CHOOSING].

[143] FRANK, CHOOSING, *supra* note 142, at 5.

[144] *See* Robert H. Frank, LUXURY FEVER: WHY MONEY FAILS TO SATISFY IN AN ERA OF EXCESS 3–5 (1999).

[145] *Id.*

reasons that when the super-rich improve their lifestyle to include yachts and estates, the less rich covet those things as well.[146] Which makes the not so rich want to buy bigger houses and fancier cars than they can comfortably afford.[147] And so on down the income spectrum. Frank's central point is that increasing inequality encourages everyone to want to live beyond their means, which produces dissatisfaction and bankruptcy throughout the income spectrum.[148] Frank would tax consumption to make it more expensive and encourage less of it.[149]

2. *Taxes Are Not Enough To Deconcentrate Wealth*

If high inequality produces social harms, the most straightforward response would be to tax it away. Taxing the rich to ameliorate inequality has some virtues that charitable giving does not share. Taxes are coercive, so (theoretically) the rich cannot refuse to contribute. Taxes go into the public fisc, so democratic institutions decide how to spend the revenue collected. A substantial tax on estates or inheritances reduces the resources available to the heirs of the wealthiest decedents, and scholars naturally turn to a tax on transfers of wealth (or wealth itself) to address the problems of increasing wealth concentrations.[150] But we have long had an estate tax, and it has never effectively broken up concentrations of wealth; despite it, there is greater concentration of wealth today than ever.[151] A tighter estate tax base along with higher rates might do more to deconcentrate wealth, but there is little political will to strengthen estate taxation.[152] To the contrary, there is widespread

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146 *Id.* at 3–4.

147 *Id.* at 3–5.

148 *Id.*

149 The tax could make people better off if it operated to reduce consumption. But it could also make people worse off by imposing additional burdens and deadweight losses without any offsetting welfare from increased consumption. Frank's recommendations rest on the assumption that people would be just as happy with smaller houses and cheaper cars as long as their neighbors have them also. *See id.* That may be true, but there may actually be a welfare loss in foregoing the nicer car that exceeds the welfare gain from reducing the consumption differences among people. It is hard to predict.

150 Thomas Piketty proposes a worldwide wealth tax as the solution for increasing inequality of wealth. PIKETTY, *supra* note 21, at 515. A tax on wealth is constitutionally suspect because of the apportionment rule, so American scholars primarily focus on taxing transfers of wealth. *See, e.g.*, Lily L. Batchelder, *What Should Society Expect from Heirs? The Case for a Comprehensive Inheritance Tax*, 63 TAX L. REV. 1, 3 (2009) (making a compelling case for an accessions tax).

151 *See* Saez & Zucman, *supra* note 21, at 520.

152 Donald Trump promised to repeal it, even though it was retained in the 2017 tax cut legislation. *See* WHITE HOUSE, 2017 TAX REFORM FOR ECONOMIC GROWTH AND AMERICAN JOBS (2017), http://newsletters.usdbriefs.com/2017/Tax/TNV/170426_1suppA.pdf [https://perma.cc/YJJ7-D3RH]; Brian J. O'Connor, *Once Again, the Estate Tax May Die*, N.Y. TIMES, (Feb. 18, 2017), https://www.nytimes.com/2017/02/18/your-

hostility to the tax, even among people who never will be lucky enough to have to pay it.[153]

Philanthropy is more limited in scope than taxing and spending, and it may not support the most redistributive priorities. The private philanthropic sector is voluntary and privately controlled, and while it is large in the United States compared to other countries,[154] it cannot compare in size to government budgets.[155] A robust fiscal system can be quite progressive and redistributive, if it is large enough.[156] These are reasons to use charity law to supplement taxation, but not to replace it. Multiple instruments directed to wealth deconcentration are necessary where there is no single approach that offers an effective solution. The political reality is that many people are willing to support private initiatives that are encouraged and subsidized by law, even while they are against direct government intervention that achieves the same ends.[157]

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money/taxes/once-again-the-estate-tax-may-die.html (on file with *Ohio State Law Journal*).

[153] *See* MICHAEL J. GRAETZ & IAN SHAPIRO, DEATH BY A THOUSAND CUTS: THE FIGHT OVER TAXING INHERITED WEALTH 3–5 (2005) (explaining how repealing the estate tax became a populist cause in 2001).

[154] *Statistics*, PHILANTHROPY ROUNDTABLE, http://www.philanthropyroundtable.org/almanac/statistics/ [https://perma.cc/RR3C-5KGS] (comparing U.S. private charitable giving to the United Kingdom, Japan, Germany, Canada, France, and the Netherlands).

[155] The federal government spent $980 billion on health in fiscal year 2015. *How Much Does the Federal Government Spend on Health Care?*, TAX POL'Y CTR.: BRIEFING BOOK, http://www.taxpolicycenter.org/briefing-book/how-much-does-federal-government-spend-health-care [https://perma.cc/96W5-M7RN] (noting that the federal government spent $980 billion on health in fiscal 2015). The Chan-Zuckerberg Initiative has promised a mere $3 billion toward eradicating diseases. Erika Check Hayden, *Facebook Couple Commits $3 Billion To Cure Disease*, NATURE (Sept. 21, 2016), http://www.nature.com/news/facebook-couple-commits-3-billion-to-cure-disease-1.20649 [https://perma.cc/TVL9-VDZE]. The Gates Foundation only has $40.3 billion. *Foundation Fact Sheet*, BILL & MELINDA GATES FOUND., http://www.gatesfoundation.org/Who-We-Are/General-Information/Foundation-Factsheet [https://perma.cc/C3HB-FYQP] (last updated Dec. 31, 2016).

[156] *See* EDWARD D. KLEINBARD, WE ARE BETTER THAN THIS: HOW GOVERNMENT SHOULD SPEND OUR MONEY 336 (2015) (arguing for a larger fiscal system instead of more progressive taxes).

[157] *See* Eduardo Porter, *Charity's Role in America, and Its Limits*, N.Y. TIMES (Nov. 13, 2012), http://www.nytimes.com/2012/11/14/business/charitys-role-in-america-and-its-limits.html (on file with *Ohio State Law Journal*) ("[W]e Americans view ourselves as generous, yet we mistrust the government to help those in need. . . . We pay less tax as a share of our income than citizens of virtually every other rich economy in the world. But we contribute more to charity than citizens of any other country); *see also* Rick Cohen, *Government Funding or Philanthropy: What's Better for Society?*, NONPROFIT Q. (Apr. 2, 2013), https://nonprofitquarterly.org/2013/04/02/government-funding-or-philanthropy-what-s-better-for-society/ [https://perma.cc/6WGB-RWA4] (quoting president and CEO of the Northwest Area Foundation, Kevin Walker's views about favoring charitable giving over funding Uncle Sam).

More importantly, I am skeptical that we can actually tax the rich effectively. In recent decades, the tax rate structure has been relatively flat—the highest marginal rate was reduced to 28% from 50% in 1986, and has not exceeded 40% since.[158] The top marginal rate on individual income is now 37%.[159] When incomes were more compressed, there was less reason to slice taxpayers into narrow income groups. But today, income inequality has increased dramatically,[160] so higher rates are necessary to maintain the same distribution of the burden.

More graduated rates are unlikely to make much difference, as a practical matter, because current law fails to tax much of the increase in wealth of the highest-income individuals. Roadblocks to taxing the rich are part of the fundamental structure of the tax law. They include the realization rule,[161] the exclusion of loan proceeds from income,[162] and the step-up in basis of assets received by heirs.[163] All these elements are basic to the law.[164]

An additional impediment to taxing the rich is the massive industry peddling quasi-legal and evasive opportunities that use tax shelters, offshore strategies, and tax havens. Diversion of income through low-tax countries to enjoy low rates of tax, while actually earned in high-tax countries, is a daunting challenge to tax authorities.[165] While Congress did try to crack down

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[158] *See* Tracey M. Roberts, *Brackets: A Historical Perspective*, 108 NW. U. L. REV. 925, 937–39 (2014).

[159] Tax Cuts and Jobs Act, Pub. L. No. 115-97, sec. 11001, § 1, 131 Stat. 2054, 2055 (2017) (reducing rates for 2018–2025).

[160] *See* Chad Stone et. al., *A Guide to Statistics on Historical Trends in Income Inequality*, CTR. ON BUDGET & POL'Y PRIORITIES, https://www.cbpp.org/research/poverty-and-inequality/a-guide-to-statistics-on-historical-trends-in-income-inequality [https://perma.cc/7UH8-YQ4C] (last updated Feb. 16, 2018).

[161] The realization rule limits the taxation of gains so that increases in the value of assets are taxed only on their sale, and not over time as they appreciate. Jeffrey L. Kwall, *When Should Asset Appreciation Be Taxed?: The Case for a Disposition Standard of Realization*, 86 IND. L.J. 77, 78–79 (2011). An ideal income tax would include all accretions to wealth in taxable income, whether realized or not. *See* HENRY C. SIMONS, PERSONAL INCOME TAXATION 49 (1938); Bittker, *supra* note 110, at 932.

[162] *See* David S. Miller, Opinion, *The Zuckerberg Tax*, N.Y. TIMES (Feb. 7, 2012), http://www.nytimes.com/2012/02/08/opinion/the-zuckerberg-tax.html [https://perma.cc/G7JS-PJW9] (describing Larry Ellison's tax planning strategy to buy a yacht with pretax dollars, and the fact that if Mark Zuckerberg dies holding the stock he used as collateral for the loan, neither he nor his heirs will ever pay income tax on the stock appreciation that accrued in his hands).

[163] *See* I.R.C. § 1014(a)(1) (2012).

[164] David Cay Johnston has chronicled myriad provisions that allow the rich to avoid tax within the scope of the law. *See* DAVID CAY JOHNSTON, PERFECTLY LEGAL: THE COVERT CAMPAIGN TO RIG OUR TAX SYSTEM TO BENEFIT THE SUPER RICH—AND CHEAT EVERYBODY ELSE (2003).

[165] *See generally* Edward D. Kleinbard, *The Lessons of Stateless Income*, 65 TAX L. REV. 99, 99 (2011) (explaining why international tax policy recommendations that do not take stateless income into account will not be useful in practice); Edward D. Kleinbard,

on taxpayers hiding their assets offshore when it adopted the Foreign Account Tax Compliance Act (FATCA) in 2010,[166] opportunities for the rich to hide assets in complex structures remain. The government lacks sufficient resources to fully enforce the law,[167] even where the illegal activity might be easily proven. Congress has slashed the IRS's budget, hobbling enforcement against complex and sophisticated targets.[168] Enduring Republican hostility to the tax-collecting agency is axiomatic, even while it is at odds with the government's interest in collecting the revenue that taxpayers owe.[169]

These challenges to taxing the rich more effectively suggest that taxation (alone) might not be the silver bullet for reducing high-end inequality and wealth concentration. Antipathy to taxation has become a central ideological obsession of the Republican party,[170] but alternative mechanisms for reducing high-end inequality might be attractive, even to anti-tax crusaders. Policy makers should consider a variety of complementary policies—both within the tax law and outside it. There are multiple tools that can ameliorate high-end inequality, and a focus on tax rates in particular, and taxation more generally, is too limiting.

Stateless Income, 11 FLA. TAX REV. 699, 700–01 (2011) (arguing that the possibility of stateless income tax planning changes the entire face of the U.S. tax system).

166 The Foreign Account Tax Compliance Act (FATCA) requires foreign financial institutions to disclose information about U.S. taxpayers (and some others) to the IRS so that taxpayers cannot hide their income from U.S. authorities. *See Foreign Account Tax Compliance Act (FATCA)*, U.S. DEP'T TREASURY, https://www.treasury.gov/resource-center/tax-policy/treaties/Pages/FATCA.aspx [https://perma.cc/SX97-PJ24] (last updated Mar. 12, 2018).

167 David Jolly & Brian Knowlton, *Law To Find Tax Evaders Denounced*, N.Y. TIMES (Dec. 26, 2011), http://www.nytimes.com/2011/12/27/business/law-to-find-tax-evaders-denounced.html [https://perma.cc/EAV9-5CA2] (calling into question whether Congress has provided the IRS with sufficient resources to handle these complicated filings).

168 *See* TREASURY INSPECTOR GEN. FOR TAX ADMIN., REFERENCE NO. 2015-30-035, REDUCED BUDGETS AND COLLECTION RESOURCES HAVE RESULTED IN DECLINES IN TAXPAYER SERVICE, CASE CLOSURES, AND DOLLARS COLLECTED, 19 (May 2015), https://www.treasury.gov/tigta/auditreports/2015reports/201530035fr.pdf [https://perma.cc/96YR-VEZJ].

169 Some Republicans in Congress tried to impeach the Commissioner of Internal Revenue for doing his job, but other Republicans sided with Democrats to block the motion. Stephen Dinan & Seth McLaughlin, *House Republicans Derail Impeachment Effort Against IRS Commissioner*, WASH. TIMES (Dec. 6, 2016), https://www.washingtontimes.com/news/2016/dec/6/john-koskinen-irs-commissioner-spared-impeachment/ [https://perma.cc/H82X-ZAGV]. Inadequate funding by Congress is a perennial problem for the IRS. *See* TAXPAYER ADVOCATE SERV., 2017 ANNUAL REPORT TO CONGRESS 1 ("Funding cuts have rendered the IRS unable to provide acceptable levels of taxpayer service, unable to upgrade its technology to improve its efficiency and effectiveness, and unable to maintain compliance programs that both promote compliance and protect taxpayer rights.").

170 The no-new-taxes pledge of Grover Norquist's Americans for Tax Reform has been signed by 255 Republican members of Congress. *Pledge Database*, AMS. FOR TAX REFORM, https://www.atr.org/pledge-database [https://perma.cc/3GXF-GRWK].

The tax law of charity is a good candidate for this policy because it is already part of a redistributive mechanism that moves money from rich people to institutions devoted to public purposes. The law of charity can be a powerful tool for addressing high-end inequality because it can encourage the deconcentration of wealth, without coercing it. When the very richest individuals make hundred-million-dollar gifts to charity, that money is not available for their heirs to spend. If a legitimate policy goal of estate taxation is breaking up concentrations of wealth,[171] then it should also be a legitimate policy goal of the tax law of charities.[172]

Unlike taxation, charity allows resources to move from the rich to institutions that are privately controlled. To the extent that policy makers object to growing the size of government, substituting charitable gifts for taxation promotes redistribution without enlarging government power. People deciding whether to make a charitable gift are not faced with the binary choice of giving and reducing tax or not giving and paying tax. Instead, they have many choices for ways in which they can enjoy benefits at various tax costs. Charitable gifts must be understood as one among many options that balance private benefits and tax liability. In this world, the tax benefits for charitable giving are less important as an economic matter since there are so many alternatives that are economically equivalent or better.

III. CHARITABLE NAMING RIGHTS

A. *Naming Rights Are an Outlier in the Law of Charitable Quid Pro Quos*

Donors are allowed a deduction for amounts they give to charity, but only if those amounts are "contribution[s] or gift[s]."[173] If a person buys something from a charity, there is no deduction; tickets to the Philharmonic's concerts are not allowed to be deducted as charitable contributions because they are not gifts. A gift must be made with "detached and disinterested generosity."[174] No deduction is allowed if the donor expected or received a substantial return benefit.[175] However, some payments to charity are part gifts and part

[171] *See* James R. Repetti, *Democracy, Taxes, and Wealth*, 76 N.Y.U. L. REV. 825, 826–27 (2001).

[172] A key observation about that policy is that it says nothing about the spending side. A policy to deconcentrate wealth might coexist with a separate policy to maximize the well-being of the poor, but the first policy does not inexorably lead to the second.

[173] I.R.C. § 170(c) (2012); Treas. Reg. § 1.170A-1(h) (as amended in 2008).

[174] Comm'r v. Duberstein, 363 U.S. 278, 285 (1960).

[175] United States v. Am. Bar Endowment, 477 U.S. 105, 116 (1986) ("A payment of money generally cannot constitute a charitable contribution if the contributor expects a substantial benefit in return."); Rusoff v. Comm'r, 65 T.C. 459, 469 (1975), *aff'd sub nom.* Rusoff v. C.I.R., 556 F.2d 559 (2d Cir. 1977) ("If the transfer is impelled primarily by the anticipation of some economic benefit or is in fact an exchange in the form of a substantial quid pro quo, it is not a contribution."); Treas. Reg. § 1.170A-1(h); *see also* Murphy v.

purchases—the cost of a charity dinner includes a donation as well as the price for a meal. Only the donation part is deductible.[176] The law looks to whether there is a return benefit, a quid pro quo, and disallows the deduction to the extent that a donor receives something in return.[177]

Disqualifying benefits can take various forms, and do not have to be received directly from the charity or have clear monetary value.[178] In *Singer Co. v. United States*, the Court of Claims held that the sale of sewing machines to high schools at a discounted rate was not charitable because the taxpayer's predominant purpose was to encourage students to purchase the taxpayer's machines in later years.[179] The expectation of this inchoate benefit—even though it was in the future and not directly provided by the recipient organization—was a sufficient quid pro quo to preclude the deduction.[180] Services relating to the donated property can destroy the charitable nature of a contribution if the donor receives sufficiently valuable return benefits in connection with retained rights.[181] Disqualifying return benefits can be intangible as long as they are consideration for the payment.[182] The Supreme

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Comm'r, 54 T.C. 249, 254–55 (1970) (holding that payments made to an adoption agency as a prerequisite to adopting a child were not charitable because they were in exchange for services provided by the agency).

[176] *Am. Bar Endowment*, 477 U.S. at 117 (establishing rule for dual character payments); Rev. Rul. 67-246, 1967-2 C.B. 104, 105 (taxpayer must prove that amount deducted is the excess of the amount paid over the consideration received); *see also* Kristin Balding Gutting, *Relighting the Charitable Deduction: A Proposed Public Benefit Exception*, 12 FLA. TAX REV. 453, 476 (2012) (taxpayers must demonstrate difference in value).

[177] Rev. Rul. 67-246, 1967-2 C.B. 104, 105–06 (requiring that charities inform donors whether they have received any goods or services in exchange for the payment). Donors may only deduct the amount in excess of the market price of whatever they receive. *See* I.R.C. § 170(f)(8).

[178] *See* Scheidelman v. Comm'r, 682 F.3d 189, 199 (2d Cir. 2012) ("The consideration need not be financial; medical, educational, scientific, religious, or other benefits can be consideration that vitiates charitable intent.").

[179] Singer Co. v. United States, 449 F.2d 413, 423 (Ct. Cl. 1971).

[180] *Id.* at 424 ("[P]laintiff expected a return in the nature of future increased sales. This expectation, even though perhaps not fully realized, provided a *quid pro quo* for those discounts which was substantial.").

[181] *See* Transamerica Corp. v. United States, 902 F.2d 1540, 1545 (Fed. Cir. 1990) (holding that the transfer of certain rights in film stock transferred to the Library of Congress, when the film required special care that the Library had to provide to maintain the film while the taxpayer retained commercial and access rights to the film, was not deductible as a charitable contribution); Rusoff v. Comm'r, 65 T.C. 459, 461–63, 472 (1975) (holding that the transfer of interests in an invention to Columbia University was not a charitable contribution where Petitioners reserved for themselves a significant percentage of royalties earned pursuant to the licensing arrangement with the university), *aff'd sub nom.* Rusoff v. C.I.R., 556 F.2d 559 (2d Cir. 1977).

[182] *See* Derby v. Comm'r, 95 T.C.M. (CCH) 1177, 1188–89 (2008) (holding that taxpayers' transfer of assets to an organization, for which they received "economic security" in the form of future guaranteed employment and the freedom to undo the

Court has held that even purely religious benefits can constitute a disqualifying quid pro quo if the charity charges fixed prices for them, and they resemble a market exchange.[183]

Naming rights are an exception to these strict quid pro quo rules. Donors can receive acknowledgements, including naming rights, without diminution in their deductions.[184] Currently, no statutes or regulations apply a quid pro quo analysis to naming rights received by a donor in exchange for a donation.[185] The IRS's most relevant authority is a 1968 ruling that discussed levels of membership in organizations and return benefits that come with those membership levels, and whether those benefits are substantial enough to reduce the charitable deduction for the membership fee.[186] The IRS stated that membership fees that bring with them rights and privileges that are "incidental to making the organization function according to its charitable purposes" are contributions because the only return benefit is the "satisfaction of participating in furthering the charitable cause."[187] The ruling states: "Such privileges as being associated with or being known as a benefactor of the organization are not significant return benefits that have a monetary value within the meaning of this Revenue Ruling."[188]

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transaction at any time, had an "inherently reciprocal nature"); *see also* Ruddel v. Comm'r, 71 T.C.M. (CCH) 2419, 2421 (1996) (holding that a payment made as part of a plea agreement for a lesser sentence was not a contribution, but "nothing more than part of the consideration given by him to avoid incarceration").

[183] Hernandez v. Comm'r, 490 U.S. 680, 680–81 (1989) (holding that payments to the Church of Scientology for auditing and training services were not charitable as there was a fixed "market" price for the sessions, refunds would be issued if services went unperformed, the Church issued "account cards," and it barred the provision of sessions for free—all indicators of the reciprocal nature of the exchange).

[184] JAMES J. FISHMAN & STEPHEN SCHWARZ, NONPROFIT ORGANIZATIONS 240 (4th ed., Teachers Manual 2010) ("Traditional forms of donor acknowledgement, such as naming a building or professorship after the donor, do not negate a donor's detached and disinterested generosity or constitute the type of quid pro quo that will cause reduction in the charitable deduction." (citing Rev. Rul. 67-246, 1967-2 C.B. 104)); 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, 658 n.4 (2001) (charities apparently do not describe naming as quid pro quos in their disclosure forms); William A. Drennan, *Where Generosity and Pride Abide: Charitable Naming Rights*, 80 U. CIN. L. REV. 45, 56 (2011) ("Rather than apply the dual character approach without detailed statutory rules, the Treasury Department and the IRS have adopted a series of authorities effectively valuing naming rights at zero, which allows naming donors to deduct their total transfers to charity.").

[185] Drennan, *supra* note 184, at 56.

[186] Rev. Rul. 68-432, 1968-2 C.B. 104 ("Advice has been requested whether membership fees or subscriptions paid to a charitable, educational, scientific, or literary organization described in section 170©(2) of the Internal Revenue Code of 1954 in an amount out of proportion to the benefits or privileges offered may be deducted as charitable contributions under section 170 of the Code.").

[187] *Id.* at 105.

[188] *Id.*

Under this ruling, there are two reasons that public donor recognition is not considered a quid pro quo: 1) because it is "incidental" to the charitable donation, and 2) because it is not significant or substantial.[189] Courts have held that "incidental" benefits are those received by taxpayers when their donations were made without the expectation of a substantial benefit, or motivated by a desire to benefit the public, and that such incidental benefits do not reduce the amount of the allowable deduction.[190] A donor's request to have her name associated with the charity, even if this were the sole motivation in the transfer, does not negate the charitable nature of her transfer.[191] John Eason explains that this is generally because the resulting benefit to a community is the primary interest of courts, and naming motives do not detract from that benefit but in fact may increase that benefit by inducing others to make gifts.[192] The IRS has stated explicitly that being known as a benefactor is not a significant return benefit.[193]

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[189] Public recognition has also been considered "incidental" under the rules that prohibit private foundations from engaging in self-dealing. Treas. Reg. § 53.4941(d)-2(f)(2) (as amended in 1995) ("[T]he public recognition a person may receive, arising from the charitable activities of a private foundation to which such person is a substantial contributor, does not in itself result in an act of self-dealing since generally the benefit is incidental and tenuous."); Rev. Rul. 73-407, 1973-2 C.B. 383, 383–84 (holding that a donation from a private foundation to a public charity that requires the charity to change its name to that of a substantial contributor to the foundation for one hundred years, did not constitute self-dealing because the benefits to the disqualified person were "incidental and tenuous").

[190] *See* Citizens & S. Nat'l Bank of S.C. v. United States, 243 F. Supp. 900, 906–07 (W.D.S.C. 1965) (holding that economic benefits received by a bank, when the bank transferred land to the highway department out of a feeling of moral obligation "were only incidental to the public purpose and public benefit" and therefore did not reduce the bank's charitable deduction).

[191] *See* Eason, *supra* note 2, at 392 ("Determination of the charitable nature of a contribution ultimately turns upon the *effect* of the gift as advancing the public welfare. If that end is served, the donor's personal *motivation* to perpetuate her name will not defeat characterization of the gift as 'charitable' under common-law notions of that concept." (footnotes omitted)).

[192] *Id.* at 393.

[193] I.R.S. Priv. Ltr. Rul. 2010-0172 (Sept. 24, 2010) ("[P]rivileges such as being associated with or being known as a benefactor of an organization (for example, being memorialized on a plaque or similar commemorative item) are not significant return benefits that have a monetary value; therefore, [the Service] do[es] not consider these privileges as *quid pro quo* exchanges that disqualify full deductibility of a charitable contribution."); I.R.S. Priv. Ltr. Rul. 93-50-009 (Sept. 14, 1993) ("[I]t is well settled that the benefits of being known as a benefactor of a charitable organization and the satisfaction of furthering a charitable cause are not by themselves enough to prevent the entire payment from being a charitable contribution for purposes of section 170 . . . . Accordingly, the fact that A and the recommending Director receive these benefits does not affect the deductibility of the payments . . . .").

An important assumption in Revenue Ruling 68-432 was that public donor recognition has no monetary value.[194] While naming rights have no market outside of the charitable context, that does not mean they have no monetary value at all. As the Avery Fisher story illustrates, there are valuable benefits associated with naming rights that donors receive in the form of reputation and status enhancement that are worth money.[195] These benefits are clearly valuable in the eyes of donors, who negotiate for them.[196] Donors condition their gifts on the naming rights they are promised, and have been known to revoke their gifts when the naming is impossible[197] or otherwise derailed.[198] Development offices have fee schedules that go with various naming rights, making the transaction closely resemble a market exchange.[199]

If we were to treat naming rights as a quid pro quo, we would need to value them in order to separate the gift from the return benefit. And this is a big problem; generally, we don't know what they are worth. In most cases, it is impossible to separate out the correct price of the return benefit because there is no noncharitable market that prices donor honors.[200] The market for getting your name on a major New York institution is pretty well

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[194] Rev. Rul. 68-432, 1968-2 C.B. 104, 105.

[195] *See* Colombo, *Marketing of Philanthropy*, *supra* note 184, at 663 ("[I]ndirect benefits such as publicizing a donor's name or the "warm glow" that a donor might feel as a result of the gift do not result in a denial of deduction."); Drennan, *supra* note 184, at 60 ("Charitable naming rights can enhance the donor's personal reputation. Professor Posner and others recognize that a substantial charitable gift signals wealth, generosity, and social status to others." (footnote omitted)).

[196] Kate Harvey, *What's in a Name?: The Delicate Dance Behind Some of Today's Largest Gifts*, PHILANTHROPY, Spring 2017, at 16, 18 ("Naming-rights contracts are complex business deals. . . . Big bucks are always on the line. These negotiations can feel unphilanthropic . . . ." (internal quotation marks omitted).

[197] Joan Weill refused to give a pledged $20 million donation when her demand that her name be added to the school's name was denied because it conflicted with the named donor's prior agreement, and a court would not grant a *cy pres* petition to release the restriction. Maria Di Mento, *What Goes into a Naming Policy*, CHRON. PHILANTHROPY (July 26, 2016), https://www.philanthropy.com/article/What-Goes-Into-a-Naming-Policy/237253 [https://perma.cc/7U37-EQQ8]; Benjamin Mueller & Kristin Hussey, *Judge Rejects Request by Paul Smith's College To Change Its Name*, N.Y. TIMES (Oct. 7, 2015), https://nyti.ms/1VDTZYZ (on file with *Ohio State Law Journal*). See *infra* notes 222–238 and accompanying text for a discussion of the Paul Smith's College gift.

[198] University of Michigan lost a $3 million gift after students protested the name change proposed. David Jesse, *U-M's Mark Bernstein Withdraws $3 Million over Naming Flap*, DETROIT FREE PRESS (July 22, 2016), http://on.freep.com/2aeCWfG [https://perma.cc/X64D-NYJT].

[199] My own school has placed its donation schedule in connection with our new building online. Drew Lindsay, *As Menu of Naming Rights Expands, Fundraisers Pitch Options Online*, CHRON. PHILANTHROPY (June 1, 2015), https://www.philanthropy.com/article/As-Menu-of-Naming-Rights/230469 (on file with *Ohio State Law Journal*).

[200] Hernandez v. Comm'r, 490 U.S. 680, 706–07 (1989) (O'Connor, J., dissenting)

established—it costs around $100 million.[201] But that does not mean the quid pro quo valuation is $100 million; there is no charitable gift when David Geffen writes a $100 million check to a charity. The payment includes *some* donation, even if we generally don't know how much. As Justice O'Connor explained:

> It becomes impossible, however, to compute the "contribution" portion of a payment to a charity where what is received in return is not merely an intangible, but an intangible (or, for that matter a tangible) that is not bought and sold except in donative contexts so that the only "market" price against which it can be evaluated is a market price that always includes donations. Suppose, for example, that the charitable organization that traditionally solicits donations on Veterans Day, in exchange for which it gives the donor an imitation poppy bearing its name, were to establish a flat rule that no one gets a poppy without a donation of at least $10. One would have to say that the "market" rate for such poppies was $10, but it would assuredly not be true that everyone who "bought" a poppy for $10 made no contribution. . . . [The] "going rate" *includes* a contribution.[202]

Thanks to the children of Avery Fisher, we actually do know how much your name on Philharmonic Hall at Lincoln Center is worth. It cost $15 million for Lincoln Center to buy the naming rights back, so that must be how much David Geffen's name on the building is worth.[203] In that one case, at least, there is little justification for *not* treating the naming right as a quid pro quo with an ascertainable value that reduces the amount of the allowable deduction. While the Avery Fisher dispute did not produce a legal precedent, it did tell us a lot about how to think about the market value of naming rights.

B. *Naming Rights Are Good for Charities*

It is no accident that the largest philanthropic gifts are acknowledged by naming rights.[204] Donors like to see their names in lights.[205] The insignificant

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[201] That was the amount that produced the Schwarzman Building at the New York Public Library (yes, the one with the lions), and the Koch Theater and Geffen Theater, both at Lincoln Center. *See* Robin Pogrebin, *A $100 Million Donation to the N.Y. Public Library*, N.Y. TIMES (Mar. 11, 2008), http://www.nytimes.com/2008/03/11/arts/design/11expa.html (on file with *Ohio State Law Journal*); Pogrebin*, supra* note 1; Robin Pogrebin, *David H. Koch To Give $100 Million to Theater*, N.Y. TIMES (July 10, 2008), http://www.nytimes.com/2008/07/10/arts/10linc.html (on file with *Ohio State Law Journal*).

[202] *Hernandez*, 490 U.S. at 706–07 (O'Connor, J., dissenting).

[203] *See* Pogrebin, *supra* note 1.

[204] *See* Di Mento, *supra* note 26 (describing the largest gifts endowing named centers, buildings, etc.).

[205] David Geffen's name is raised, backed by lights, and prominently displayed on the outer wall of the building. *See Once You're Here*, N.Y. PHILHARMONIC, https://nyphil.org/plan-your-visit/once-here [https://perma.cc/KE8F-HV9C].

number of large anonymous contributions is a testament to the value of public recognition.[206] Charities understandably try to make their donors happy, but donor satisfaction is not the best reason for applauding naming rights.

Naming rights may be the perfect return benefit for charities to give to donors because they are something a charity can give away without actually diminishing itself. First, naming rights are reserved for the largest gifts. They carry so much prestige that donors must give very generously to be eligible for them.[207] The power to grant a naming right, and bestow the reputational benefit that goes along with it, gives charities substantial leverage to raise large gifts.[208] Naming rights make a donor's generosity very visible, and produce only visibility. According to Dan Ariely's "effectiveness hypothesis," extrinsic rewards (like financial subsidies) are less effective the greater the visibility of the prosocial act.[209] The donor can stroll past and confirm that the charity has upheld its part of the deal.

Second, because naming rights are valuable, donors who receive them may not demand other return benefits from the charity, making the gift less costly for the charity overall. While sometimes a building is constructed on a donor's promise, naming rights are often the mechanism that charities use to spearhead a capital project already chosen by the institution.[210] If we care about charities having sufficient resources and being able to do their work without excessive interference in their missions, we should celebrate naming rights. Compared to other types of gift restrictions,[211] naming rights are preferable because they are less likely to divert the organization from its core charitable mission. Naming rights have the potential to impinge only minimally on the fiduciary discretion of charitable directors since they do not implicate the governance structure of an organization. Neither do naming rights require substantial ongoing attention by the organization to monitoring and fulfillment, unlike gifts that require

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[206] *See* Glazer & Konrad, *supra* note 56, at 1021 (explaining that anonymous donations often make up significantly fewer than 1% of total donations).

[207] Drennan, *supra* note 183, at 47.

[208] *See* Michelle Lemming, *Asking Price on the Naming of Harvard's Med School Could Reach $1B*, NONPROFIT Q. (Jan. 27, 2016), https://nonprofitquarterly.org/2016/01/27/asking-price-on-the-naming-of-harvards-med-school-could-reach-1b/ [https://perma.cc/XS88-PM82] (noting that naming opportunities continue to escalate).

[209] *See* Ariely et al., *supra* note 57, at 545, 547 ("The results strongly support the hypotheses that image motivation is important for prosocial behavior . . . .").

[210] The Philharmonic hall's need for renovation was long-standing. The orchestra even considered abandoning Lincoln Center for Carnegie Hall. Ralph Blumenthal & Robin Pogrebin, *The Philharmonic Agrees To Move to Carnegie Hall*, N.Y. TIMES (June 2, 2003), https://nyti.ms/2jZnPGL [https://perma.cc/DUD2-WSDB] ("For the Philharmonic, going to Carnegie Hall means it can exchange the flawed acoustics of Avery Fisher Hall for a stage of undisputed sound quality, without having to foot the bill for a costly renovation.").

[211] *See, e.g.*, Treas. Reg. § 1-170A-1(e) (as amended in 2005) (providing the example of a donor who transfers land to a city government for as long as it is used by the city as a public park).

charities to treat particular assets in a special way[212] or to operate endowed programs.

Third, naming gifts can jump–start a larger fundraising campaign.[213] Studies show that subsequent donors are more likely to make larger gifts if they follow major donors, so naming rights help bring in more than just the named donor's gift.[214] Naming rights gifts are meaningful support for charities, and while the agreements take time to negotiate and conclude, [215] once the name is on the building, there may be little ongoing expense. Once a name is in place, there is no expense in keeping it emblazoned where it is.

So naming rights are an optimal tool. Charities are well aware of the power of naming rights, and they may be the single most valuable asset that charities have to monetize. The law should do more to help prevent them from being squandered.

C. *Naming Rights Are Also Costly for Charities*

Despite all these benefits, naming rights impose hidden costs on charities. While they are initially a low-cost benefit that charities can give donors, they become more costly for charities over time. There is a balance to be struck between maximizing the value received by donors and maximizing the power of charities to use naming rights to their advantage. While donors care about memorializing themselves (forever) after death,[216] that desire is a noncharitable interest that must be evaluated with attention to the long-term burden that perpetual naming rights impose.

The law of naming rights offers bad incentives and socially detrimental norms. It encourages restrictions that reduce the value of gifts and impose long-term burdens on charities. Additionally, it encourages increasing contractualization of charitable gifts, undermining generosity. It fosters a competitive race to the bottom among charities, who are competing with each other to lure donors. Finally, it fails to honor or incentivize the Allen Room story of competitive philanthropy because relinquishing a name has no legal consequence.

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[212] Richard M. Horwood & John R. Wiktor, *Gift Acceptance Agreements Avoid Headaches for Charitable Donors, Their Descendants, and the Charities They Wish To Support*, 24 J. TAX'N INV. 355, 357–58 (2007) (providing an example of a "restrictive gift," and noting that "the restrictive aspect of a gift will not show its dark side until many years after it was made, at which time the restrictions may become very onerous, or render the gift virtually unusable as circumstances change").

[213] This was why it was so important for Lincoln Center to secure the Geffen gift. *See* Eason, *supra* note 2, at 378; Pogrebin, *supra* note 1.

[214] Vesterlund, *supra* note 53, at 578 ("[A] large initial contribution can increase the donations of those who follow.").

[215] *See supra* note 196 and accompanying text.

[216] *See* OSTROWER, *supra* note 27, at 101 ("[A]n identification with the recipient organization literally becomes a way to perpetuate the donor's own name and identity after death.").

1. *Forever Is Too Long for Anything*

Perpetuity is bad. Every restricted gift that continues in perpetuity creates long-term liabilities for an organization. Times change, along with the methods for carrying out even timeless charitable purposes.[217] Buildings do not last forever, and rights related to buildings should be consistent with the physical limitations of buildings. Unfortunately, the way that perpetual naming rights agreements work, charities have only one chance to get any value out of them. Even at $100 million, if the rights are perpetual, they are undervalued. In fifty years, what will today's $100 million be worth? Fifty years ago, Avery Fisher gave $10.5 million, and his name was on the building for fifty years[218]—that seems like a lot of value received by the Fisher family—particularly since we know that the same naming opportunity garners $100 million today.[219] The best kind of naming rights are limited in time, so the charity can resell them, and so philanthropists can compete for them sequentially.

Philippe de Montebello, the Metropolitan Museum of Art's former director, famously quipped that perpetuity means fifty years.[220] But most philanthropists and legal authorities disagree. State legislatures or courts *could* impose a limited duration interpretation onto the legal meaning of "perpetuity," but they do not, and donors, charities, and the courts seem to think that perpetuity actually means forever.[221]

Consider the recent New York case in which Paul Smith's College wanted to rename itself to include Joan Weill, who had promised a $20 million gift.[222] The board of trustees of the college had voted unanimously to approve the

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[217] The Metropolitan Opera Guild recently filed a *cy pres* petition to release it from the restrictions contained in a gift of opera memorabilia since nobody seems to believe (anymore) that it matters to opera education what opera stars owned. *See* Petition at 17, *In re* Metro. Opera Guild, Inc., No. 159855/2016 (N.Y. Sup. Ct., N.Y. Cty., Nov. 22, 2016) (on file with author).

[218] Eason, *supra* note 2, at 449.

[219] *See supra* note 201 and accompanying text.

[220] Rebecca Mead, *Den of Antiquity: The Met Defends Its Treasures*, NEW YORKER (Apr. 9, 2007), https://www.newyorker.com/magazine/2007/04/09/den-of-antiquity [perma.cc/5SY7-674S].

("[Leon] Levy, in his 2002 memoir, 'The Mind of Wall Street,' recalled when Philippe de Montebello, paying a call to Levy's home in search of funding, promised that the sculpture court would be named for him 'in perpetuity.' (Levy asked how long in perpetuity was. Fifty years, de Montebello replied. Levy bargained him up to seventy-five.)").

[221] *See generally* Susan N. Gary, *History and Policy: Who Should Control Charitable Gifts?*, 81 ALB. L. REV. (forthcoming 2018) (manuscript at 6).

[222] *In re* Paul Smith's College of Arts and Sciences, No. 2015-0597, at 5 (N.Y. Sup. Ct., Franklin Cty., Oct. 6, 2015), https://www.nacua.org/docs/default-source/new-cases-and-developments/new-documents/new-cases-october-2015/in_re_paul_smithcollegeartssciences.pdf [https://perma.cc/TAS7-EK3D] (unpublished decision).

name change and the New York Attorney General had no objection.[223] But the school needed court approval to change the name because the 1928 bequest that established the college provided that it "be forever known as 'Paul Smiths [sic] College of Arts and Sciences.'"[224] Restricted gifts bind charities indefinitely, unless a court releases the restriction in a proceeding brought by the organization.[225]

The legal doctrine for releasing restrictions in charitable gifts is strict: the donor's general intent must have been broad enough to overcome a limitation that has become impracticable or impossible to carry out.[226] The New York *cy pres* law applied by the *Paul Smith's* court states:

> [W]henever it appears to such court that circumstances have so changed since the execution of an instrument making a disposition for religious, charitable, educational or benevolent purposes as to *render impracticable or impossible* a literal compliance with the terms of such disposition, the court may, on application of the trustee or of the person having custody of the property subject to the disposition and on such notice as the court may direct, make an order or decree directing that such disposition be administered and applied in such manner as in the judgment of the court will most effectively accomplish its general purposes . . . .[227]

The court also relied on the less demanding standard in New York's Prudent Management of Institutional Funds statute, which allows modification of a "wasteful" restriction in an endowment fund.[228]

The college had argued that the restrictions on the gift prevented it from modernizing and diversifying.[229] It offered evidence of its declining

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[223] *Id.* The Attorney General is the state's primary enforcer of the law of charities. MARION R. FREMONT-SMITH, GOVERNING NONPROFIT ORGANIZATIONS 54 (2004).

[224] *In re Paul Smith's*, No. 2015-0597, at 2.

[225] For example, see the recently adopted N.Y. NOT-FOR-PROFIT CORP. LAW § 555(c) (McKinney 2015) ("If a particular purpose or a restriction contained in a gift instrument on the use of an institutional fund becomes unlawful, impracticable, impossible to achieve, or wasteful, the court, upon application of an institution, may modify the purpose of the fund or the restriction on the use of the fund in a manner consistent with the purposes expressed in the gift instrument."). Not all statutes include waste as a justification for granting a petition. New York's provision regarding *cy pres* concerning a bequest limits relief to cases in which it is impracticable or impossible to comply literally with the terms of the gift. N.Y. EST. POWERS & TRUSTS LAW § 8-1.1(c)(1) (McKinney Supp. 2018).

[226] *See In re Paul Smith's*, No. 2015-0597, at 3 ("Three conditions must be met before applying the doctrine of *cy pres*: (1) the gift or trust must be charitable in nature; (2) the donor must have demonstrated a general, rather than a specific, charitable intent, and; (3) circumstances have changed subsequent to the gift that render literal compliance with the restriction impossible or impracticable.").

[227] N.Y. EST. POWERS & TRUSTS LAW § 8-1.1(c) (emphasis added).

[228] N.Y. NOT-FOR-PROFIT CORP. LAW § 555(c) (McKinney Supp. 2018); *see also In re Paul Smith's*, No. 2015-0597, at 6.

[229] *See In re Paul Smith's*, No. 2015-0597 at 4.

enrollment and the changing nature of college students since the time of the original gift.[230] Nevertheless, the New York court refused to allow the name change.[231] The court approached the college's petition narrowly, treating the request as clearly violating the original restriction, even though Paul Smith's name would continue alongside Joan Weill's.[232] It also held the school to a high standard of impossibility—requiring that its "continued existence [be] largely dependent on changing its name."[233] The court implied that the petition could only be granted if the naming restriction undermined the charitable purposes of the original testator,[234] a standard arguably more demanding than the statute requires. Applying that higher standard, the court concluded that enforcing the restriction did not frustrate the testator's general purpose, even though the court acknowledged that the purpose of the original bequest was "to bring the advantages of higher education within the reach of those young people who might not otherwise have had it," a purpose requiring substantial resources.[235] The college chose to accept the ruling and not appeal the decision.[236]

The story of Joan Weill and Paul Smith's College resembles the story of Avery Fisher Hall. They both reflect the tension between an incentive to make a large initial gift and an incentive to make and encourage later, larger gifts. The problem for Paul Smith's College derived from the fact that the court was upholding a prior restriction on naming. That decision deprived the college of the power to control its own name and consequently denied it the value it might have enjoyed from allowing a new donor to name the college. The law and the legal system were crucially involved in denying the college control over a resource that it should have owned. If the legal standard reflected a reasonable limitation on naming rights, the court would have been in a better position to grant the college's request in a *cy pres* proceeding.

The litigation itself is part of the problem for charities. If a charity wants to change the terms of an agreement, it needs to get a court to approve it in a *cy pres* proceeding, which can be very expensive. *Cy pres* litigation of this type, particularly if it has a high profile,[237] also puts charities in a difficult position because their willingness to pursue a *cy pres* action to release a prior donor's restrictions may chill current donors who perceive that action as

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[230] *Id.*

[231] *Id.* at 5.

[232] *Id.* (interpreting "forever known as 'Paul Smiths College of Arts and Sciences'" as precluding the addition of Joan Weill's name, and dismissing the argument that such a restriction would be "wasteful and impractical").

[233] *Id.*

[234] *Id.* at 6.

[235] *See In re Paul Smith's*, No. 2015-0597, at 6.

[236] *See* Kristin Hussey, *After Ruling, Paul Smith's College Won't Get Weills' $20 Million Renaming Gift*, N.Y. TIMES (Oct. 22, 2015), https://nyti.ms/20174vh (on file with *Ohio State Law Journal*).

[237] *The New York Times* reported on the litigation, so other potential donors would be aware of it.

disrespectful of donors and insufficiently serious about the negotiated terms of a gift.[238] So it is no surprise that the board of Paul Smith's College chose not to appeal the trial court's order.

Limited duration naming rights are sometimes part of an agreement, but they seem less common than perpetual rights. Recent examples limiting duration seem to be a feature of naming agreements where the state is a party to the agreement—because it owns the building or the land underneath it. The New York State Theater became the David Koch Theater for only fifty years[239] because the theater is publicly owned.[240] That agreement shows that the government is inclined to protect its own interests, but it has not extended that protection to charities generally.

2. *Increasing Contractualization Is Harmful*

Major gift contracts are governed by agreements that can run one hundred pages, describing the precise size, material, and style of the donor's name on a building.[241] These agreements are expensive to negotiate and create rights to private enforcement of charitable gifts that expose charities to future costs. Increasing contractualization may simply be a product of the evolution of the charitable sector from voluntary associations to more professional, well-managed institutions. More charities have lawyers on their staffs than they did a generation ago.

Contractualization of philanthropy makes the law more private, even though charitable organizations have public missions that are overseen by state regulators and that such philanthropy must support.[242] While the private nature of charities has many advantages, contractualization weakens charities. They are always in the position of supplicant as they enter gift agreements, and the dynamic inevitably leads donors to believe they can and should oversee charitable strategy.[243] Charities and philanthropists are equally responsible for

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[238] JEFFREY J. CAIN, PROTECTING DONOR INTENT 2 (2012) ("Every violation of donor intent creates a marginal disincentive for future philanthropy.").

[239] *See* Pogrebin, *supra* note 1.

[240] New York City owns it. Koch's gift contributed to renovating and endowing its operation and maintenance. *Explore the Theater*, DAVID H. KOCH THEATER, https://davidhkochtheater.com/Explore-the-Theater.aspx [https://perma.cc/9CLN-6NV2].

[241] Remarks at the National Center on Philanthropy and the Law Conference (Oct. 28, 2016) (attended by author).

[242] The nondistribution constraint is the single most important restriction on charities. *See* I.R.C., § 501(c)(3) (2012) (prohibiting private inurement). *See also* Henry B. Hansmann, *The Role of Nonprofit Enterprise*, 89 YALE L.J. 835, 838–73 (1980).

[243] *See* Hal Harvey, *Why I Regret Pushing Strategic Philanthropy*, CHRON. PHILANTHROPY (Apr. 4, 2016), https://www.philanthropy.com/article/Opinion-Why-I-Regret-Pushing/235924 (on file with *Ohio State Law Journal*) ("The grant-making business already starts with a deep imbalance of power, with one party wielding the decision-making authority and the other more or less on bended knee. Add the presumption

this trend, since charities are as enthusiastic about offering naming rights as donors are in receiving them.[244] But they are nevertheless harmed.

The contractual nature of the relationship between Paul Smith's College and Joan Weill made it seem reasonable for Weill to withdraw her gift when the *cy pres* petition failed.[245] Commentators were incensed by her lack of generosity,[246] but her response to the deal's failure was simply the consequence of the contractual frame and the negotiating posture it creates. Similarly, a large gift to the University of Michigan was recently withdrawn when the naming opportunity was frustrated. Donors had promised $3 million for a multicultural institution, which would bear their name on the building.[247] When Michigan students learned that the donors' name would replace the name of the only African American to be acknowledged on a university building, there were protests, and the donors withdrew their gift.[248] The failure of these gifts is hard to accept—they suggest that Weill and the college were not able to figure out some other way to acknowledge her generosity short of changing the name of the college. The University of Michigan is a big school; there must be plenty of opportunities to honor donors. Insisting on a particular naming opportunity—or withdrawing the gift if that opportunity becomes unavailable—too strongly resembles a purchase. The donors withdrew their gifts because they considered their transactions with the organizations to involve a negotiated exchange, indistinguishable from a business contract.

By ignoring return benefits to donors, the law provides an incentive to treat a naming gift as an exchange transaction, rather than as an altruistic act. Donors can demand return benefits without reducing their tax deduction, so the law creates the impression that the naming benefits are unimportant.[249] Those demands give donors greater control over recipient institutions and threaten the charitable missions they have. As one commentator wrote:

> What is clear is that the focus of major donors has become more a consideration of their own status, needs, and satisfactions than a concern about the institutions and people they are funding. This shift in attitude is partly the result of society's relatively recent embrace of celebrity and public

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of strategy, and in no time, grant seekers become whipsawed approval-seekers and grant makers become demigods—with all the theocratic arbitrariness that term implies.").

[244] Pablo Eisenberg, *An Ugly Naming Rights Fiasco Plays Out at Paul Smith's College*, NONPROFIT Q. (Oct. 26, 2015), https://nonprofitquarterly.org/2015/10/26/an-ugly-naming-rights-fiasco-plays-out-at-paul-smith-college/ [https://perma.cc/N352-Z95J] ("In days past, potential big donors were offered naming rights as a strategy of last resort; today, it is common practice for them to be offered these rights as an opening gambit."). *See generally* Lindsay, *supra* note 199 (exploring the new practice of organizations showcasing naming rights opportunities online).

[245] *See supra* notes 222–238 and accompanying text.

[246] *See* Eisenberg, *supra* note 244 (questioning Weill's "integrity" and "good will").

[247] Jesse, *supra* note 198.

[248] *See id.*

[249] *See supra* notes 184–194 and accompanying text.

> recognition, but it is also driven by the new fundraisers who will do anything to secure money for their clients.[250]

The increasing contractualization of the relationship between donors and charities is worrisome, and the law should help to recalibrate that relationship so that charities have a more equal role.

IV. FOSTERING COMPETITIVE PHILANTHROPY

A. *Principles for the Law of Competitive Philanthropy*

Competition among philanthropists runs in two directions. On one hand, philanthropists are clearly engaged in a competition with each other over flaunting their generosity, and major gifts continue to grow.[251] At the same time, donor demands for recognition apparently have increased also. Standing in the middle of the plaza at Lincoln Center, one sees David Koch's 2008 gift and David Geffen's 2015 gift facing off against one another. Koch's name on the south building is strikingly less prominent than Geffen's name on the north building. Koch's name is under the building's portico and shaded for much of the day. Pedestrians on the plaza need to be quite close to the building to see the name. To the contrary, Geffen's name is on the outside of the building, above the main entrance and surrounded by lights, so that it glows in the dark. It is possible to see it from the seventh floor a block away.[252] There's a tension between these two forms of competition between philanthropists: the first one creates potential benefits for charitable institutions while the second creates costs for them.

Perpetuity fits into this competition because it stymies future competitors.[253] While each philanthropist might be trying to outdo the one who came before him, he is also trying to prevent being outdone by the one to follow. Preventing displacement by the next philanthropist is difficult, particularly if that person arrives after today's philanthropist is dead. The more permanent the restrictions imposed by the first donor, the harder it becomes for future philanthropists to publicly outdo ones that came before them. Once the naming rights have been claimed, the earlier donor can preclude them from ever being available again. Thus, while the two types of competition differ importantly for charities, for large donors they are two parts of a single concern. Outbidding other philanthropists and gaining permanent recognition both contribute to a donor's reputational benefits. It is because these two things are related from the perspective of donors that it is important that the law create a mechanism to distinguish them.

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[250] Eisenberg, *Ugly*, *supra* note 244.
[251] *See* Di Mento, *supra* note 26.
[252] That's my office.
[253] *See supra* Part III.C.1.

By adopting the perspective of charities, the law can emphasize the desirability of competitive philanthropy in increasing gifts and growing charitable organizations, while at the same time tamping down the donor aggrandizement that so naturally goes along with this kind of competition. The law should distinguish the super-rich from other taxpayers to craft the law with attention to both the social context of philanthropy for the elite and the weaker economic incentives from the deduction for them.

While it might be too late to change the exchange nature of transactions between philanthropists and institutions, the law can still alter the baseline of expectation for duration. The charitable deduction is indifferent between two qualitatively different things, because it treats the gift with naming rights in perpetuity the same as an equivalent gift without them.[254] In this way, the law has created an expectation of permanence for restricted gifts generally and naming rights in particular. Perpetuity is normal for restricted gifts because the law treats it as though it is. Under current law, it is legitimate for donors to expect that their names will remain on buildings forever because the tax benefits for perpetual names are undiminished and state courts will enforce naming restrictions.[255] Donors who demand perpetuity either fail to appreciate the burden of perpetual naming rights on the organizations that grant them,[256] or else are more concerned with their own prestige than supporting the mission of the organization. If donors make gifts because they are committed to the organization's charitable mission, as they claim to be,[257] they should care about the costs of restrictions their gifts impose on recipients. If they do not care,[258] the law should intrude to control those costs. Given how valuable naming rights can potentially be to a charity, the design of the law is crucial to helping them reap the greatest value.

The law needs to play a bigger role in the traditionally private sphere of philanthropic gifts because charities are unable, or unwilling, to manage the long-term liabilities they assume from perpetual restrictions. Though undoubtedly still hurting from the Avery Fisher debacle, Lincoln Center gave David Geffen naming rights in perpetuity also.[259] Like individuals, charities seem to engage in in hyperbolic discounting, valuing the future too little compared to the present.[260] Today's gift officers will no longer be employed

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[254] *See supra* Part III.A.

[255] *See supra* Part III.A.

[256] *See supra* Part III.C.1.

[257] *See* OSTROWER, *supra* note 27, at 35 ("[G]iving perpetuates itself, for donations lead to a greater sense of involvement, identification, and obligation.").

[258] If they only care about their private benefits, then they may not care about the costs to recipients. *See generally* Harbaugh, *supra* note 58 (exploring benefits that donors get from giving, including both intrinsic benefits and prestige benefits); William T. Harbaugh, *What Do Donations Buy? A Model of Philanthropy Based on Prestige and Warm Glow*, 67 J. PUB. ECON. 269 (1998) (charitable giving as a mechanism to demonstrate success).

[259] *See* Pogrebin, *supra* note 1.

[260] *See generally* Shane Frederick et al., *Time Discounting and Time Preference: A Critical Review*, 40 J. ECON. LITERATURE, 351 (2002) (reviewing the research on time

by the charity when the restrictions become burdensome. They are so interested in the current receipt of gifts that they ignore the long-term burden those gifts impose. Perhaps the law needs to be more paternalistic and require that charitable institutions properly value both the current benefits that they receive, as well as the long-term liabilities they incur in all restricted gifts they accept. The law should make a hierarchy of gifts transparent, as a way to educate institutions and donors about the net benefits and burdens of restricted gifts.

While states could prohibit charities from granting perpetual rights,[261] such a prohibition would be inconsistent with the current mode of charitable regulation under state law.[262] Charities are fundamentally private institutions, even though they have public purposes. There are many good reasons for keeping them that way.[263] An institution's relationship with donors is primarily defined by the trustees who control the institution and their agreements with those donors, with the law providing a background constraint on the distribution of profits.[264] While the law could continue to minimally regulate, it could be more effective in shaping that relationship.[265]

B. *Creating a Legal Hierarchy of Restricted Gifts*

Gifts with naming rights are a subset of restricted gifts given to charity. All restricted gifts constrain the recipient charity in some way. From the perspective of charities, however, restrictions on the use, investment, and disposition of donations can differ significantly; some restrictions impose more burdensome obligations than others. Compare a restricted gift to fund (1) a program that already exists, (2) a program that does not yet exist, and (3) a gift to name a building. A restricted gift to fund a program that exists imposes

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discounting); David Laibson, *Golden Eggs and Hyperbolic Discounting*, 112 Q.J. ECON. 443 (1997) (analyzing decisions of the hyperbolic consumer).

[261] Presumably, it could also ban naming rights altogether. *See* Benzie, *supra* note 33.

[262] *See* FREMONT-SMITH, *supra* note 223, at 54.

[263] *See* Burton A. Weisbrod, *Institutional Form and Organizational Behavior*, *in* PRIVATE ACTION AND THE PUBLIC GOOD 69, 70 (Walter W. Powell & Elisabeth S. Clemens eds., 1998). *See generally* Evelyn Brody & John Tyler, *Respecting Foundation and Charity Autonomy: How Public Is Private Philanthropy?*, 85 CHI.-KENT L. REV. 571, 571–73 (2010) (discussing the claim that intrusions on charities are justified because their assets are "public money"); David M. Schizer, *Subsidizing Charitable Contributions: Incentives, Information, and the Private Pursuit of Public Goals*, 62 TAX L. REV. 221, 225–27 (2009) (discussing why subsidized charity is justified and how it benefits the public).

[264] *See* I.R.C. § 501(c)(3) (2012) (prohibition on private inurement). The law also prohibits campaign participation, but is otherwise quite permissive, limiting private benefit and lobbying without foreclosing either. *See id.*

[265] *See* Roger Colinvaux, *Using Tax Law To Discourage Donor-Imposed Restrictions on Charitable Gifts*, NAT'L CTR. ON PHILANTHROPY & L. ANN. CONF., WRESTLING WITH DONOR INTENT: STRATEGIES FOR ENFORCEMENT OR RELAXATION 25–31 (proposing more limitation on the charitable deduction); Colombo, *supra* note 184, at 689 (suggesting disallowance of any deduction in some cases).

the smallest burden on a charity. There is no marginal cost to the charity from the restriction as long as the charity had expected to spend at least as much as the gift on the program. This is likely the case with many gifts "restricted" for financial aid since universities generally have large financial aid budgets. A donor-restricted gift for aid is unlikely to increase total financial aid assistance. Money is fungible, so the restricted gift could free up funds for nonfinancial aid purposes. From the perspective of charities, this is a good thing—charitable directors are obligated to make policy decisions for the organizations they oversee, and restricted gifts that support their choices strengthen their governance and reinforce their priorities. Some naming opportunities fall into this category, such as named scholarships or chairs at universities that fund students or faculty positions. They are not finite, and one chair or scholarship can lead to others. In these cases, the cost to charities of restricted gifts is the minimal investment in recordkeeping and reporting necessary to confirm that the gift was accounted for properly.

Contrast the financial aid gifts with restricted gifts that endow a new project or program that the charity was not otherwise planning to fund. It is not unusual for institutions to take on projects that attract funding, and large donors may encourage institutions to grow in a particular direction. This is not always a bad thing—donors can perform important monitoring functions that keep organizations vital and relevant.[266] But sometimes these donor-driven projects can distract from the organization's central mission, and donors are not always in the best position to understand the challenges and needs of an institution.[267] Donor activism is a hallmark of the new generation of young philanthropists, but the jury is still out on whether it produces more good than the traditional model of greater deferral to charity directors and managers.[268] The benefits that donors receive in this situation, while not a quid pro quo

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[266] *See* Schizer, *supra* note 263, at 258–62 (exploring the role of donors in monitoring charitable objectives).

[267] *See* Pablo Eisenberg, *'Strategic Philanthropy' Shifts Too Much Power to Donors*, CHRON. PHILANTHROPY (Aug. 20, 2013), https://www.philanthropy.com/article/Strategic-Philanthropy-/154451 (on file with *Ohio State Law Journal*) ("[W]e now face a dangerous shift of the balance of power in the nonprofit world").

[268] *See* Dale Russakoff, *Schooled*, NEW YORKER (May 19, 2014), https://www.newyorker.com/magazine/2014/05/19/schooled [http://perma.cc/DP67-F7K3] (Mark Zuckerberg's difficulties trying to improve Newark schools); Nicole Wallace, *A Grant Maker Focuses on Helping To Build Nonprofit's Operations*, CHRON. PHILANTHROPY (Oct. 2, 2011), https://www.philanthropy.com/article/Omidyar-Network-Takes-a/157755 [on file with *Ohio State Law Journal*] (Pierre Omidyar). Google's charitable arm is not a charity under state or federal law. *See* Shruti Rana, *From Making Money Without Doing Evil to Doing Good Without Handouts: The Google.org Experiment in Philanthropy*, 3 J. BUS. & TECH. L. 87, 88 (2008); Dana Brakman Reiser, Essay, *For-Profit Philanthropy*, 77 FORDHAM L. REV. 2437, 2449, 2452 (2009). The Chan-Zuckerberg Initiative is a regular limited liability company that says it will do social good, but is not required to under the law. *See* David van den Berg, *The Unknowns of Zuckerberg's LLC*, 77 EXEMPT ORG. TAX REV. 11, 11–13 (2016).

under the legal standard,[269] include the value of seeing their vision carried out by an organization with public prestige, a well-functioning administration, and professional expertise.

More important than the benefit to the donors is the burden on charities that are bound by restrictions. The charity's obligation to comply with the terms of a gift can be substantial when donors are furthering their own strategic objectives through the charity. Even where the donor provides the money, complying with the terms of the gift requires institutional energy that might have gone to other priorities.[270] The burden can be particularly heavy when the gift provides only seed funding, and the institution commits itself to raising the remaining funds or diverting resources from elsewhere. Where a university commits to run an institute, it assumes a long-term commitment of time and money.

Recall that naming rights are ignored under the quid pro quo rules because they are categorized as acknowledgements.[271] An acknowledgment is "[t]he expression of gratitude or appreciation for something."[272] An expression of gratitude should be unique and personal to the donor. At some point in time, naming rights cease to be recognition for donors' generosity and become permanent monuments to their memory. For example, if the party attempting to enforce a naming obligation is not the donor, but a descendent of the donor, the arrangement goes beyond the concept of an acknowledgement.[273] The morphing of acknowledgements into more robust and permanent rights is the product of the increasing contractualization of charitable gifts, discussed

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[269] *See supra* Part III.A. Because the benefit is the charitable work itself, it is also not considered a "private benefit" under the law that would jeopardize the organization's exemption. Private benefits are limited under the 501(c)(3) regulations, even when they are not financial benefits. *See* Treas. Reg. § 1.501(c)(3)-1(d)(1) (2017).

[270] *See supra* Part III.C.2.

[271] *See supra* Part III.A.

[272] *See* *Acknowledgement*, ENG. OXFORD LIVING DICTIONARIES, https://en.oxforddictionaries.com/definition/acknowledgement [http://perma.cc/VDE8-TAKQ].

[273] The issue of donor standing is one of the most contentious in nonprofits law, and beyond the scope of this Article. For some contributions to that literature, see Brody, *supra* note 4, at 1186–87; Brian D. Galle, *Valuing the Right To Sue: An Empirical Examination of Nonprofit Agency Costs*, 60 J.L. & ECON. (forthcoming), https://ssrn.com/abstract=2845033 [https://perma.cc/8ZW9-SYQP]; Iris J. Goodwin, *Donor Standing to Enforce Charitable Gifts: Civil Society vs. Donor Empowerment*, 58 VAND. L. REV. 1093, 1094–95 (2005); William Josephson, *Donor Intent and Donor Standing to Enforce It*, 59 EXEMPT ORG. TAX REV. 307 (2008); Reid Kress Weisbord, *Reservations About Donor Standing: Should the Law Allow Charitable Donors to Reserve the Right To Enforce a Gift Restriction?*, 42 REAL PROP. PROB. & TR. J. 245, 246 (2007). The ALI's Project on Charitable Organizations most recent draft does not expand donor standing, but acknowledges that some states have done so, and consequently authorizes standing pursuant to state law. *See* RESTATEMENT OF THE LAW, CHARITABLE NONPROFIT ORGS. §5.03 (AM. LAW INST., Preliminary Draft No. 3, 2016).

above.[274] Unlike personal expressions of gratitude, contractual rights can survive the parties to the contract and extend to their successors. To bolster the purpose of gratitude in acknowledgements, the rules for naming rights should be sensitive to the lifespan of donors. While donors sometimes claim to care about their legacies after they are dead,[275] others recognize that they can get no benefit after death.[276] The law should establish that an acknowledgement cannot primarily constitute legacy building after death.

Restricted gifts of property, rather than money, can be even more burdensome to charities. Categorizing charitable gifts by the burden imposed on recipients should extend beyond naming rights so that the law favors less burdensome gifts. For example, the law should recognize the substantial burdens that certain types of property gifts impose on recipients.[277] Buildings that represent donor-driven capital growth similarly impose perpetual carrying costs.[278] A donor who insists that a particular gifted building be used by the charity gives a much less valuable gift, from the perspective of the charity, than the donor who allows the charity to sell the building and use the proceeds as it sees fit.[279] Gifts of art are particularly susceptible to turning from assets into liabilities because they can be fragile and require costly conservation.[280] They become an increasing long-term burden over time because standards in the museum community impose strict limits on an institution's ability to monetize artworks and devote the proceeds to purposes other than

[274] *See supra* Part III.C.2.

[275] *See* OSTROWER, *supra* note 27, at 101 ("One man, who said that a desire for immortality plays a role in his thinking, spoke of giving 'a wing in a hospital, a gallery in a museum' as a way of leaving 'footprints on the sand of time.' Another told me that his works of art would be going to museums upon his death, and 'I am thrilled at the idea that in the future I'll be associated with them.' In cases such as these, philanthropy becomes a vehicle for attaining stature after death, as well as during life.")

[276] *Id.* at 102 ("Another donor said, 'You get more gratification from lifetime. What do I care if they stick up a brass plate after I'm dead?'").

[277] *See, e.g.*, Peter Olsen-Phillips, *Say No to a Free Mustang? Avoiding Pitfalls of Noncash Gifts*, CHRON. PHILANTHROPY (Jan. 26, 2017), https://www.philanthropy.com/article/What-to-Do-With-a-Mustang-/239003 (on file with *Ohio State Law Journal*) (describing the problems incurred on account of appraisals that valued property less than donors expected).

[278] *See* Mark B. Schneider, *Endowments Can Become Too Much of a Good Thing*, CHRON. PHILANTHROPY (June 2, 2006), https://www.philanthropy.com/article/Endowments-Can-Become-Too-Much/171393 (on file with *Ohio State Law Journal*).

[279] *See* Smithers v. St. Luke's-Roosevelt Hosp. Ctr., 281 A.D.2d 127, 140–41 (N.Y. App. Div. 2001) (upholding restriction on sale of building donated to house addiction center at hospital).

[280] Linda Sugin, *Lifting the Museum's Burden from the Backs of the University: Should the Art Collection Be Treated as Part of the Endowment?*, 44 NEW ENG. L. REV. 541, 560 (2010) (arguing that the restrictions on deaccessioning art undermine the governance responsibilities of university trustees).

reinvestment in other works.[281] Consequently, accepting a work of art often means committing to insuring it, storing it, and caring for it (or another substitute work) in perpetuity. Given this burden, the law should encourage donors of artwork to accompany their gifts with endowments of money to pay these associated expenses;[282] donors who gift art without an endowment should have a diminished tax deduction.

Tax benefits for donors should reflect the balance of benefits and burden to the charity. Gifts that burden charities least should be encouraged more by the law than gifts that hamstring the charity, or otherwise limit its discretion to decide how to provide the best charitable program. I have never understood why the tax law would encourage donors to give appreciated property more than it encourages gifts of cash.[283] Similarly, it makes no sense for the law to favor gifts of food or computer equipment over money.[284] Gifts of money that charities are allowed to use as they see fit give charities the most value because the charities are then able to decide what is most essential, and use the gift to achieve the most benefit. Most restricted gifts—either restricted as to

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[281] The Association of Art Museum Directors has announced: "Funds received from the disposal of a deaccessioned work shall not be used for operations or capital expenses. Such funds, including any earnings and appreciation thereon, may be used only for the acquisition of works in a manner consistent with the museum's policy on the use of restricted acquisition funds." ASS'N. OF ART MUSEUM DIRS., REPORT OF THE AAMD TASK FORCE OF DEACCESSION 5 (June 2010), https://www.scribd.com/document/33789958/2010-AAMD-Deaccessioning-Policy (on file with *Ohio State Law Journal*). The American Alliance of Museums has a similar policy. *See* AM. ALL. OF MUSEUMS, CODE OF ETHICS FOR MUSEUMS, http://www.aam-us.org/resources/ethics-standards-and-best-practices/code-of-ethics [http://perma.cc/MQB6-3XX8] ("Proceeds from the sale of nonliving collections are to be used consistent with the established standards of the museum's discipline, but in no event shall they be used for anything other than acquisition or direct care of collections.").

[282] Museums are well aware of this. When Crystal Bridges Museum agreed to buy a 50% interest in a collection owned by Fisk University, it also agreed to provide care and maintenance of the collection. *See Stieglitz Collection Art-Sharing Agreement Finalized*, CRYSTAL BRIDGES BLOG (Aug. 3, 2012), http://crystalbridges.org/blog/stieglitz-collection-art-sharing-agreement-finalized/ [http://perma.cc/4VHV-QR35]; *see also* Nina Siegal, *$25 Million Gift to Ackland Art Museum at University of North Carolina*, N.Y. TIMES (Jan. 25, 2017), https://nyti.ms/2jZe3rj (on file with *Ohio State Law Journal*) (gift of $17 million worth of art accompanied by $8 million cash endowment).

[283] *See* Roger Colinvaux, *Charitable Contributions of Property: A Broken System Reimagined*, 50 HARV. J. ON LEGIS. 263, 268 (2013) (advocating repeal of the appreciated property rule); Daniel Halperin, *A Charitable Contribution of Appreciated Property and the Realization of Built-In Gains*, 56 TAX L. REV. 1, 35–38 (2002); Linda Sugin, *Encouraging Corporate Charity*, 26 VA. TAX REV. 125, 158 (2006) ("There is little reason why the law should encourage corporations to give property rather than cash to charity because the charitable organization can better determine the goods it needs to carry out its purposes.").

[284] *See* I.R.C. § 170(e)(3)–(4) (2012).

purpose or restricted in property—are less valuable to a charity than the equivalent in cash.[285] The law should elevate those gifts accordingly.

C. *Add Sticks and Extra Carrots to the Charitable Deduction*

How might the charitable deduction account for all these concerns? We should reconsider the quid pro quo rules to better account for the effects of different restrictions on charities, and favor unrestricted gifts.[286] In addition, the law should encourage "restrictions" that actually produce greater benefit to charities by encouraging others to give, including naming rights. Restrictions that impose long-term obligations or liabilities should be disfavored by a diminished deduction, even if there is nothing that constitutes a return benefit that fits in the quid pro quo framework.

The law could be quite specific depending on the type of gift.[287] For example, it could encourage donors to endow their gifts of art with gifts of money for conservation by tax-favoring gifts with money endowments. The regulations could discount the value of the collection for deduction purposes, depending on the ratio of the endowment to the art. Art experts would need to help design the regulations to determine an optimal ratio for the endowment, but a possible rule could work as follows. If the ideal endowment is half the value of the collection, then a gift with a 2:1 ratio of art to money would get a full deduction. If the endowment were only 25% of the art (4:1), the deduction might be limited to 50% of the art, and so on.[288] Because the money in endowments for preservation and care of art are always valuable to recipient institutions, the deduction should be allowed in full for gifts of money. Such a rule would alert both donors and charities to the long-term liabilities created by gifts of art collections. If that rule had been in place, it might have prevented some of the foulest fights we have seen in charity law, where cash-strapped institutions were unable to either monetize their valuable art collections or afford to care for them properly.[289]

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[285] *See* Colinvaux, *supra* note 265, at 2 (advocating for cash gifts).

[286] *Id.*

[287] The rules under I.R.C. § 170(e) are analogous. They limit the deduction for donated tangible personal property to basis where the property is not related to the recipient's exempt purpose. I.R.C. § 170(e)(1)(B). Publicly traded stock is more easily valued and sold than tangible personal property, so it is a better gift for charities to receive.

[288] Experts would determine the metric for measuring the appropriate endowment. It could vary by the type or size of the work, rather than the value. Under alternative metrics, the endowment could be larger than the value of the gift, which would signal to charities that the property might not be worth accepting.

[289] *See In re* Barnes Found., No. 58,788, 2004 WL 1960204, at *6 (Pa. C.P. Montgomery Cty., Jan. 29, 2004) (deviation proceeding to move priceless collection of art to new location); *see also In re* Fisk Univ., 392 S.W.3d 582, 584–85 (Tenn. Ct. App. 2011) (*cy pres* proceeding involving the Stieglitz collection at Fisk University). For discussion of many cases concerning art, see Sugin, *supra* note 280, at 560–73.

Building naming rights create liabilities that depend on the duration of those rights, so the deduction should be sensitive to that duration.[290] If we were to rely on a strict quid pro quo analysis to limit the deduction for naming rights, valuation would be a substantial problem. We can't get the amount precisely right for the diminution in value on account of restrictions. But adopting the liability perspective of charities makes the valuation of return benefit to the donor less important than it is under current jurisprudence. In its place, the law should consider the long-term burden imposed on the charity by any obligation, and categorize the gift in a hierarchy of restrictions that limits the deduction.[291] The Fisher family settlement can give us an idea of how to think about the value of restrictions, but the amount of the deduction's reduction is less important than the fact that the law will recognize restrictions and treat them as a limitation on the gift that diminishes its social value. Once we treat the charitable deduction as an arbiter of social meaning, and not only an economic incentive, the precise value of a quid pro quo matters less. The Internal Revenue Service clearly has sufficient authority to implement such a hierarchy without any statutory change—it is an interpretation of what a "gift" is under Internal Revenue Code § 170(c).

While the details are flexible, a template for naming rights might be designed with an expected duration of forty years. The tax law presumes that buildings waste over 27.5 to 39 years,[292] so that is a reasonable standard to use for the presumed duration of building naming rights. After that period, the charity will need a new infusion of funds to renovate and upgrade the named structure, without even considering other needs that the organization might have. Most donors cannot expect to live longer than forty years after their gifts (Mark Zuckerberg notwithstanding), and any naming rights that extend beyond forty years should be considered both too self-regarding and liability creating for charities. Since forty-year naming rights have both benefits and costs, the law could give a modest discount for those gifts, compared to cash, say 90% of cash value. A discounted deduction would create a clear signal that restrictions are costly for charities. Consequently, a forty-year naming gift would be allowed a deduction with a 10% discount. That discount would increase as the duration of the naming right increases. Since a name in perpetuity imposes very substantial costs on a charity, donors should have to relinquish a substantial part of their deduction to account for the long-term burden they are imposing on the recipient organization. I would propose at least 50%.

Calibrating the charitable deduction is a good mechanism in this context because it changes the price of the restriction, without prohibiting it altogether. Donors could still demand perpetuity, and charities could still agree to it. If donors really value perpetuity, they can indicate that by accepting a diminished deduction. But they will know that perpetuity is disfavored by the

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[290] *See supra* Part III.C.1.
[291] *See supra* Part IV.B.
[292] That is the recovery period for buildings for depreciation purposes. I.R.C. § 168(c).

law and considered exceptional by the charitable community. The diminished deduction gives charities the power to resist perpetuity in two ways: by appealing to both the donor's interest in tax benefits and reputation for generosity. Because agreements between donors and charities would continue to be private, in keeping with the overwhelmingly private character of charities and charities law, it is necessary that charities have tools that give them some power when they come to the negotiating table.

The carrots in this proposal are as important as the sticks. The law could encourage shorter duration names by granting greater tax benefits for them. Short duration names give charities the most benefit because they can be resold relatively soon. Because of the extra benefits for charities' fundraising that naming gifts produce, a full deduction should be allowed for cash gifts with naming rights that do not exceed twenty years. The law could even authorize a deduction bonus for short-lived names.[293] A bonus deduction for cash gifts with short-duration names might strike some people as oddly generous, but it should be evaluated against the current law regime that allows full fair market value deductions for gifts of property with built-in untaxed appreciation.[294] Those deductions already contain a bonus because donors need not include any gain in income, but receive a deduction for the full fair market value of the donated property.[295] A gift with a short-lived name is clearly superior to gifts of appreciated property—it encourages others to step up quickly both in the same campaign and in the one to follow when the name expires. Competitive philanthropy at its best encourages the most giving overall.

Relinquishing a name should also have a tax benefit so that the law effectively signals that good. Too much attention to Avery Fisher Hall has eclipsed the encouraging competitive philanthropy story of the Allen Room. Donors who relinquish restrictions are giving something important to charity both by releasing direct burdens and by challenging the philanthropic community to support the organization. They should be encouraged.

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[293] Explicit deduction bonuses already exist in the tax law. *See* I.R.C. § 168(k) (bonus depreciation). Credits can operate as implicit bonuses where they provide tax benefits that more than offset the tax liability on the income devoted to the creditable expenditure. *See, e.g.*, I.R.C. § 25A(i) (education credit makes education cheaper than it would be in the absence of taxes).

[294] *See* Halperin, *supra* note 283, at 14–16 (explaining the effect of the law and proposing change to mitigate the bonus effect).

[295] For example, if a taxpayer donates property with a fair market value of $100 and a basis of $20, she can deduct $100 under § 170, but does not need to pay tax on the $80 appreciation built into the stock. If taxpayer gives a $100 cash gift, the deduction eliminates the tax that was paid on the earning of the $100; but the gift of property gives the taxpayer a better result because the $80 appreciation is deducted without ever having been included. This is a well-known quirk in the tax law, and has been critically assessed. *See, e.g.*, Colinvaux, *supra* note 283, at 319–21 (arguing for repeal of the appreciated property rule).

There are two ways to think about relinquishment under the charitable deduction. One would treat relinquishment as completing the earlier partial gift. Under that approach, if a donor with perpetual rights received a 50% deduction on the initial gift, a subsequent relinquishment would trigger the other 50% of the original value of the gift. An alternative approach to relinquishment would determine a deduction for the first donor with reference to the subsequent gift. For example, the first donor could receive a new deduction equal to the same percentage of the new gift that he was earlier denied. So, if the old gift allowed a deduction equal to 80% of the donation, the new gift would trigger an additional donation for the first donor equal to 20% of the new donor's gift.

The second rule would give relinquishing donors an incentive to work toward raising new gifts that exceed the donor's own, in keeping with competitive philanthropy. If the new donor's gift exceeds the old donor's, then the old donor gets a bonus because his total deduction is larger than his out of pocket cost.[296] This should not trouble us because the tax system often allows tax benefits that more than compensate taxpayers for prior tax paid on the expenditure.[297] The point of competitive philanthropy is to encourage past donors to prod new ones to top their gifts and to reward them when they succeed. Herb Allen was the catalyst for the Appel Room's new gift, [298] and the tax law should recognize that value.

D. *Charities Should Support This Reform*

Charities generally panic at any suggestion that the law change, even when the change is clearly to their benefit.[299] The proposal here arguably reduces the benefits of the charitable deduction, which inevitably causes alarm. However, charities should appreciate that this proposal is to their benefit, in both the long and short term. The long-term benefit is apparent: charities will be able to sell

[296] This will not always be true in present value terms. A later, larger deduction might not compensate fully for the time value of the earlier deduction's limitation. For example, if a taxpayer makes a $100 million gift in year one and receives a $50 million deduction, a deduction ten years later would have to be $67.2 million (at 3%) to be equivalent to the $50 million deduction foregone earlier.

[297] Debt-financed investments in depreciable property also give rise to current deductions on amounts not previously included in income because borrowing is not taxed. *See* Halperin, *supra* note 283.

[298] *See* Blatter, *supra* note 8.

[299] Some charities opposed a proposal to extend the charitable deduction to gifts given until April 15, of the year following the tax year, even though the proposal was incontrovertibly to their benefit. Eugene Steuerle, *An April 15 Deadline for Charitable Giving Would Be a Boon to Nonprofits*, CHRON. PHILANTHROPY (Dec. 8, 2014), https://www.philanthropy.com/article/An-April-15-Deadline-for/152105 (on file with *Ohio State Law Journal*) ("Nonprofits like the Jewish Federations of North America support the option, but some other charities have expressed concern about whether it would harm end-of-year appeals.").

their names more often for higher total prices than they have in the past. But in the short term, a competitive philanthropy tax regime would also benefit charities because it gives them more leverage in negotiating restricted gifts and helps them minimize burdensome restrictions.

Like scholars, charities generally assume the economic framework, so they have taken for granted that the monetary value of the tax benefit and the size of the direct return benefit are the most important incentives to donors. But the research on giving suggests this is not true,[300] and at the very top of the wealth pyramid, the deductibility limits in § 170 prevent full enjoyment of the deduction.[301] If charities considered the evidence on the signaling effects of charitable gifts[302] and the sociological observations about the culture of philanthropy among the elite,[303] they would understand that that the economic incentive in the charitable deduction is only one of many factors that affect giving.

At this moment, charities would be well advised to shift their focus to capitalizing on noneconomic incentives for giving because the value of the charitable deduction is going down under the new tax law. That legislation increases the exemption under the estate tax,[304] reducing the economic incentive for leaving a bequest to charity; without a larger exemption, decedents are able to leave larger estates to their heirs free of tax.[305] It also reduces the top marginal rate to 37%,[306] reducing the government's economic subsidy for charitable giving, relative to the taxpayer's out-of-pocket cost.[307] The lower the marginal rate of tax, the less economic incentive a deduction provides for giving.[308] Limitation of the state and local tax deduction,[309] along with the increased standard deduction in the new law,[310] will make itemizing

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[300] *See supra* Part II.A.2.

[301] *See supra* text accompanying note 85.

[302] *See* Ariely et al., *supra* note 57, at 547.

[303] *See* OSTROWER, *supra* note 27, at 6.

[304] Tax Cuts and Jobs Act, Pub. L. No. 115-97, sec. 11061, § 2010(c)(3), 131 Stat. 2054, 2091 (2017).

[305] The estate tax is levied on the value of the decedent's total estate, with an unlimited deduction for the value of bequests to charity out of the estate. *See* I.R.C. § 2055 (2012).

[306] Tax Cuts and Jobs Act, sec. 11001, § 1.

[307] At a 40% marginal rate, every dollar of contribution can be understood as paid sixty cents by the taxpayer and forty cents by the government. As the rate goes down to 33%, the government's portion is reduced by seven cents.

[308] While lower marginal rates would reduce the overall tax burden on high-income taxpayers, giving them more money to donate to charity, Joseph Cordes, a leading nonprofits economist, opined that he believed that the reduction in the subsidy from reduced marginal rates would have a larger effect on giving than the reduction in overall tax burden. That means the incentive to give less will exceed the countervailing ability to give more. Professor Joseph J. Cordes, George Washington University, Address at ARNOVA's 45th Annual Conference: Nonprofits, Philanthropy, and Government: Policy and Partnerships in an Era of Change (Nov. 17, 2016).

[309] Tax Cuts and Jobs Act, § 11042.

[310] *Id.* § 11021.

deductions less common. All of these changes make the charitable deduction less economically potent.

Research on the psychology of gift giving suggests that these reforms to the charitable deduction would not reduce giving, so charities may have nothing to fear, even if the deduction is curtailed. Empirical studies in psychology show that donors give less to charity when they view the transaction as an exchange, rather than a pure gift.[311] The desire for communal participation is in tension with reciprocity, and donations with fewer return benefits from charities are more altruistic and praiseworthy to third parties.[312] Consequently, the less a donor receives from both a charity and government, via tax subsidy, the more reputational benefit that gift provides. Those studies suggest that the charitable deduction may not be nearly as economically important as we believe it to be.

V. CONCLUSION

When the tax law is not raising revenue, the most important thing it can do is shape norms and expectations. The charitable deduction is a revenue loser. While it can provide an economic incentive to charitable giving, it can do more than that. Modified rules for deducting charitable gifts can begin to change the dynamic between donors and charities by reducing the relative power of donors and elevating the charitable mission of recipient organizations. Better rules can design guidelines for realigning the relationship of philanthropists and institutions to the advantage of beneficiaries and the public. The tax law should explicitly define the good for high-end giving as competitive philanthropy: A successful philanthropist is one who encourages others to give even larger gifts.

Charity law should better account for the importance of philanthropy in the culture of the elite. With more money concentrated at the top of the income distribution, the tax law needs to be more discriminating among taxpayers with means. While rates, deductions, and exclusions in current law should be on the table as we grapple with the challenge of increasing inequality and wealth concentration, reforming the tax law to effectively collect more tax from the top is a daunting task. Scattering some of that wealth out from the richest individuals will require inroads on multiple fronts. Because the wealthy have myriad opportunities for tax minimization under the law, the charitable deduction's nudge toward redistribution out of the very top is important. And since there is so much uncertainty about the deduction's economic consequences, its social function should be better appreciated.

Charity law has been insufficiently targeted to fostering redistribution from the rich. By failing to make distinctions between different types of gifts, it encourages and validates gifts with substantial return benefits and limited

[311] *See* Weisbord & DeScioli, *supra* note 94, at 229–30.
[312] *See id.* at 274.

public advantages. Some restrictions on gifts should be understood as long-term liabilities imposed on charities. The deduction allowed to donors should reflect the balance of benefits and burdens. Naming rights are good for charities, but only if they are not granted in perpetuity and only if they help charities to raise further gifts. Rules encouraging and celebrating competitive philanthropy, like the one proposed in this Article, which includes both carrots and sticks, would be a welcome addition to the law.