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# Mitigating the Effects of an Economic Downturn on Charitable Contributions: Facing the Problem and Contemplating Solutions

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Articles

# MITIGATING THE EFFECTS OF AN ECONOMIC DOWNTURN ON CHARITABLE CONTRIBUTIONS: FACING THE PROBLEM AND CONTEMPLATING SOLUTIONS

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*Charitable giving has been a foundation of American society almost since the nation began, but the issue of how such giving should be treated for tax purposes has been the subject of frequent debate. Scholars have proposed various theories explaining why the positive effects of this deduction on both donors and donees outweigh the negative impact on government coffers of this tax expenditure, although many still criticize certain features of the deduction in its current form. However, one area of this research that has previously been neglected is how the charitable sector is affected by changes to the economy at large. Contributions to charitable organizations tend to decline during an economic downturn, and such a decline may be catastrophic to the charitable sector. In particular, an economic downturn can affect charitable organizations in three different ways. First, some organizations may experience an increase in donations but simultaneously experience an increase in demand for their services. Other organizations may experience an increase in demand for their services without experiencing an accompanying increase in donations. Finally, some organizations may experience such a steep decline in donations that their very survival is put in jeopardy, regardless of whether the demand for their services increases. In order to meet the recessionary needs of all three types of organizations, the government should: 1) convert the current charitable deduction to a* ***590** *refundable credit that is available to all taxpayers; 2) provide a tax credit to employers who second their employers to work for charitable organizations; and 3) provide direct funding to those charities that can demonstrate dire financial need.*

## Introduction

For almost one hundred years, the United States federal government has encouraged charitable giving by allowing taxpayers to deduct donations made to certain charitable organizations.[1] Since that time, Congress ***591** has made various changes to the deduction, including changes in the amount taxpayers may deduct, which organizations may receive deductible contributions, and who is eligible to take the deduction.[2] Currently, taxpayers who itemize their deductions on their tax returns may deduct contributions made to certain charitable organizations that have registered with the Internal Revenue Service (the "Service").[3] The amount a taxpayer may deduct is generally limited to 50% of that taxpayer's adjusted gross income, although in some cases the deduction is limited to 20% or 30% of adjusted gross income.[4] Although taxpayers may not deduct the value of the services they provide when they volunteer with a charitable organization, they may be able to deduct some of the costs incurred in providing those services.[5]

Scholars have debated the benefits and drawbacks of the deduction since its inception, and both proponents and critics have focused largely on the effect the deduction has both on taxpayers' incentives to give to charitable organizations and on those organizations' ability to sustain themselves through donations. While some examine the effect that the ***592** deduction has on donors,[6] others look at the impact the deduction has on either the organizations themselves[7] or donors' ability to direct government funds to particular organizations.[8] However, little attention has been paid to the effect that an economic downturn has on the incentives provided to donors and, consequently, on the charitable sector.

This Article addresses those deficiencies by looking at how different types of organizations are affected by an economic downturn and how charitable giving can be stimulated during such times. Unsurprisingly, charitable contributions tend to decline during a recession. At the same time, many organizations will experience an increase in demand for their services. In some cases, donors may anticipate the effects that a stagnant economy will have on charitable organizations and try to mitigate these effects on their own; for example, contributions to homeless shelters, animal shelters, and food banks ("high-profile" organizations) actually increase when the economy declines; the challenge these organizations face lies in ensuring that the increase in donations is sufficient to keep up with the heightened demand.[9] However, some organizations, such as domestic violence shelters and legal aid providers ("hidden-need" organizations), experience an increase in demand for their services that is not accompanied by a simultaneous increase in donations; these organizations must face the challenge of meeting increased demand on a reduced budget.[10] Finally, organizations dedicated to the arts ("low-profile" organizations) may not experience an increase in demand during a recession but nonetheless suffer as donors shift their contributions to high-profile organizations, with the result that some of these organizations are forced to drastically reduce their operations or even shut their doors altogether.[11]

Part I of this Article examines the effect that an economic downturn has on charitable organizations and concludes that the effects are both severe and diverse enough to warrant measures designed at increasing ***593** financial assistance to charitable organizations. Part II then considers what guidelines should be used when designing such measures by looking at the theories justifying the charitable deduction and criticisms of the deduction in its current form; this part also asks whether such measures should be aimed at helping all charitable organizations equally. Part III looks more closely at past proposals to stimulate giving among individual donors and asks whether, if enacted, those proposals could offer sufficient aid charitable organizations during an economic downturn. Ultimately, this part concludes that two proposals provide the greatest potential for providing assistance to charitable organizations during an economic downturn: converting the deduction to a credit that is available to all taxpayers and providing employers with a tax credit for seconding their employees to work for these organizations. However, because such measures may be insufficient to provide assistance to low-profile and hidden-need organizations, charitable organizations should also be given the option of applying for direct governmental assistance based on previous levels of funding. Finally, Part IV examines some possible criticisms of these proposals.

## I. The Effect of an Economic Downturn on Charitable Giving

While it is hardly surprising that charitable giving declines during recessionary years as the economy slows, charitable giving actually falls at a greater rate than gross domestic product ("GDP") during an economic downturn. For example, during the most recent recession, charitable giving fell by over $11 billion--roughly 4%--between 2008 and 2009, even though GDP declined by only 2.3% during that time.[12] The ***594** reasons for this drop in giving can be found by considering individual taxpayer behavior.

Unsurprisingly, "[T]he more financially secure [an individual] feels, the more is given to charity, not just in absolute amounts but also as a percentage of income and net worth;" conversely, an increase in financial insecurity leads to additional declines in charitable giving, for the following reasons.[13] First, a decrease in income may send a taxpayer into a lower tax bracket, at which point the charitable subsidy becomes less valuable to him or her.[14] Second, a decrease in income may lead a taxpayer to make changes that affect his or her ability to itemize his or her deductions. For example, the taxpayer may end up selling his or her home and renting instead, which means he or she can no longer deduct mortgage interest payments.[15] A loss of the ability to itemize deductions also means a loss of the tax incentive provided by the charitable deduction.[16] Third, an individual facing a sudden and unexpected decrease in income, as a result of a job loss for example, may be forced to allocate all his or her income to necessities and may drastically reduce or eliminate discretionary expenses, including charitable donations.[17]

Finally, even if a taxpayer's income does not actually decline, he or she may be less willing to spend money on charitable contributions if he or she feels poorer or more insecure about his or her economic future. For example, a taxpayer who sees his or her friends, neighbors or co-workers losing their jobs may be reluctant to spend money on charitable contributions, even if he or she has not yet experienced any actual decline ***595** in income him or herself. Similarly, even if a taxpayer's income has not actually declined, he or she may feel financially insecure, and therefore reluctant to give to charity, if the value of his or her assets, such as a home or retirement fund, has declined.

During lean economic times, taxpayers may change not only the amount that they give, but also the organizations to which they give, as can be seen by the fact that not all charitable organizations saw a decline in contributions during the most recent recession. For example, the majority of international organizations, environmental and animal-welfare organizations, health organizations, and human services organizations all saw an increase in contributions in 2009; these "high-profile" organizations are generally able to draw contributions from donors by highlighting the increased demand for their services during a recession.[18] Among these organizations, some such as those organizations devoted to animal welfare and human services, simultaneously experience an increase in demand for their services that matches, or in some cases exceeds, the increase in contributions. For example, 78% of organizations dedicated to the provision of Human Services reported an increase in demand for their services in 2010 compared to the previous year.[19] Additionally, the 2009 Annual Homeless Assessment Report to Congress stated that "almost 62,000 more family members were in shelter at some point during 2009 than had been during 2007, making up almost 40,000 families."[20] Similarly, some animal shelters saw the number of animals taken in rise

***596** by as much as 400% in recessionary years.[21] For these organizations, the increase in donations may be insufficient to keep up with rising demand.[22]

While donations to the high-profile organizations described above increase during an economic downturn, the total amount of donations decreases, which means that donations to other organizations must decline. For example, organizations devoted to culture, arts and humanities generally see a decline in contributions during this time; these low-profile organizations often suffer from an inability to appeal to donors, who may view the needs of high-profile organizations as more pressing during an economic downturn.[23] While these organizations do not necessarily experience an increase in demand for their services, the decline in donations may nonetheless be severe enough to lead to cutbacks, and, in some cases, a complete shutdown of the organization.[24] For example, the Getty Trust in Los Angeles reduced its 2010 budget by 25%, which included cuts in staffing, programming, and acquisitions.[25] Similarly, the Metropolitan Museum of Art in New York closed over one-third of its twenty-four stores and cut an additional 10% of its employees.[26] In ***597** addition to reducing staff, some museums, like the Brooklyn Art Museum, the Art Institute of Chicago, and the Philadelphia Art Museum have resorted to selling their artwork in order to generate funds, although such a move is often met with fierce criticism, protest and, occasionally, litigation.[27] For example, the National Academy Museum and School of Fine Arts sold two artworks in order to cover its operating costs despite sharp criticism from the Association of Art Museum Directors.[28] The state of New York even considered legislation that would have prohibited museums from selling pieces from their collections in order to cover operating costs.[29] When Brandeis University considered following suit, it faced such a public outcry that it was forced to reverse course.[30] Randolph College's plan to sell four works of art from its collection was greeted with a court injunction filed by disgruntled alumni, students, and donors.[31]

***598** Organizations devoted to the performing arts have been hit especially hard, with orchestras in Honolulu, Louisville, New Mexico, Philadelphia, and Syracuse all filing for bankruptcy in recent years.[32] Other organizations have managed to stave off bankruptcy, but only by laying off performers and staff members,[33] reducing performances,[34] or cutting salaries and benefits.[35] In addition to the fundraising problems faced by museums, orchestras must also deal with an aging and shrinking audience that has led to lower ticket sales and particularly steep declines in donations.[36]

Trapped in the middle are those organizations that experience both a decline in donations and an increase in demand for their services. Domestic violence shelters are prime examples of this type of hidden-need organization. Many shelters see both a decline in contributions during a recession[37] and increases in requests for assistance due to abuse stemming from financial issues, stress and job loss.[38] As a result, some domestic violence shelters end up reducing their services or closing their ***599** doors entirely.[39] Legal assistance organizations provide another example of hidden-need charities, as the number of Americans eligible for assistance from these organizations increased by 17% from 2008 to 2010, even as non-federal funding to these organizations remained flat or declined.[40]

In light of the fact that an economic downturn appears to have a significant negative effect on several different types of charitable organizations, the question then becomes what the government can do to mitigate those effects. Currently, the government provides two forms of support to charitable organizations through tax expenditures; first, by providing a tax exemption to qualifying charitable organizations, and second, by subsidizing taxpayer contributions to such organizations through the charitable deduction.[41] This Article focuses on the second of these benefits, the charitable deduction, and whether modifications to the deduction can mitigate the various effects that a recession has on charitable organizations in an effective and efficient manner.

### II. Guidelines for Formulating a Plan to Assist Charitable Organizations During a Recession

Having determined that an economic downturn has significant and varied negative effects on charitable organizations, the question then becomes whether and how to mitigate those effects. In particular, any proposed changes to the charitable deduction should be consistent with the theories that support the deduction in its current form, and, where possible, address some of the criticisms that have been raised against the deduction. ***600** [42] Another question that immediately arises is whether such proposals should focus only on one type of charitable organization (e.g., high-profile organizations), or whether such changes should aim to provide assistance to all types of organizations. This Part will address each of these questions in turn.

#### A. Tax Policy Regarding the Charitable Deduction

When examining the charitable deduction, we must keep in mind that all tax deductions, including the deduction for charitable contributions, are tax expenditures, and, therefore, have an impact on the federal budget. [43] In other words, "[T]axpayers that receive benefits from charitable relief assign the revenue costs to other taxpayers. The Treasury Department needs to tax other taxpayers at a higher effective tax rate to recoup these revenues." [44] The Joint Committee on Taxation estimated that the deduction in its current form will cost about $230 billion in lost revenue between 2010 and 2014, assuming current levels of charitable giving. [45]

Paul McDaniel argues that, were the deduction to be repealed, the unsubsidized portion of donors' contributions would remain unchanged, even though the total amount received by charitable organizations would ***601** undoubtedly go down. [46] In other words, because a taxpayer in the 70% tax bracket who makes a $100 donation generally does so with the knowledge that he or she will receive $70 of that $100 back, he or she will continue to make a $30 contribution in the absence of a deduction. [47] According to McDaniel, then, the debate is less about the extent to which we wish to stimulate taxpayer donations through the deduction as it is about the extent to which we wish to subsidize those donations with government funds. [48]

As a result, proponents of the charitable deduction must explain why assistance to charities should take the form of a tax expenditure rather than direct government spending, especially since reliance on tax expenditures

greatly decreases the ability of the Government to maintain control over the management of its priorities [and] run counter to the whole thrust of our concerns with the ordering of national priorities and with the wise allocation of our resources, which we have come to see as limited and therefore in need of careful management. [49]

Some proponents of the deduction argue that charitable contributions are fundamentally different from other expenses and should therefore not be subject to tax, while others argue that charitable contributions provide some societal benefits that make them worthy of a deduction. Still others argue that the charitable deduction provides a mechanism through which taxpayers can choose which charitable organizations will receive subsidized support from the government.

These various justifications that have been given for the charitable deduction can be broadly grouped into three categories: measurement theory, subsidy theory, and choice theory.

***602** 1. Measurement Theory [50]

According to measurement theorists, any discussion of the charitable deduction should focus not on whether charitable organizations should be subsidized but instead on whether charitable donors should be taxed for their contributions. William

Andrews, the leading proponent of measurement theory, rejects the idea that tax deductions should be used to implement social policy, arguing instead that they should be used only when necessary to ensure that the distribution of government funds is consistent with the distribution of tax burdens. [51] Andrews argues that charitable contributions should be deductible because the goods and services they provide do not benefit the donor directly; rather, the direct benefit goes to others, while the donor receives only nonmaterial satisfaction. [52] He notes that almost all charitable organizations produce collective goods or services that can be enjoyed by many without diminishment and that, as a result, the value of these goods and services should not be taxable to either their recipients or their donors. [53] Furthermore, he notes that measuring the individual benefits received by donors would be not only impracticable but also undesirable. [54]

Measurement theory has been subjected to heavy criticism, most notably by Mark Gergen and Mark Kelman. [55] Gergen argues that Andrews' ***603** theory ultimately does little more than "repackage" subsidy theory because, even though Andrews never defines exactly which collective goods should be excluded from income, he nonetheless argues that contributions used to provide these goods should be excluded from income. [56] Kelman, on the other hand, questions Andrews' basic definition of a charitable donation as a non-preclusive appropriation that does not divert resources away from the satisfaction of others' needs. [57] Instead, Kelman states that "[e]ven when the donor assumes no control over the donee's spending, I would argue that his donations are likely to be appropriative" and that "[i]f the donees, the charitable conduit, or other members of the donor's community expend any time or energy ensuring that the donor enjoys his donation, at least some of the donation ought to be included in the tax base." [58]

Because measurement theory argues that contributions to charitable organizations should be deductible due to the nature of the goods and services those organizations provide, [59] measurement theorists would be unlikely to support any changes to the deduction that are based on the state of the economy rather than any fundamental changes to those goods and services. Nonetheless, modifications to the deduction may be supported by other theories supporting the charitable deduction--like subsidy theory and choice theory-- both of which are discussed below.

***604** 2. Subsidy Theory

Subsidy theorists generally agree with measurement theorists that contributions to charitable organizations should be deductible because of the collective nature of the goods and services provided by those organizations. [60] However, unlike measurement theorists who argue that the public nature of these goods makes it impractical to tax the donors who fund the organizations that provide these goods, subsidy theorists argue that taxing those goods will lead to their underfunding. [61] Such goods are commonly referred to as public goods because "one person's consumption of the good does not reduce its availability to others (i.e., the good is nonrival or in joint supply); and no one can be excluded from the good (i.e., the good is nonexclusive)." [62] Generally, a good is considered public or nonrival if charging individual users for the benefits received would be more costly and/or burdensome than providing the good for free. [63]

Because of their nonexclusive nature, public goods can be provided to people who do not pay for them; as a result, some people will inevitably refuse to pay, essentially "freeriding" on the payments of others. [64] Others will give less than the true cost of the public good, in part because they may not account for its ancillary benefits. [65] The charitable deduction helps alleviate this problem by spreading the cost of providing public goods among all taxpayers, including freeriders. [66]

  

Proponents of subsidy theory argue that the charitable deduction "better matches expense with preference in cases of collective goods for which demand is universal but heterogeneous." [67] Private charity appears to be more responsive to differences in demand for collective goods than the government, in part because it allows smaller groups to act collectively while avoiding the political process. [68] Subsidization may be particularly attractive when the public good is highly desired by a small minority and only slightly preferred by a large majority, since, without a ***605** subsidy, "the minority may not be able to overcome its freerider problems to provide the appropriate amount of the good." [69]

Ilan Benshalom criticizes subsidy theory on the grounds that "there is no one 'optimal' way to supply a set of agreed upon public goods, and . . . there is no way of determining what goods are indeed undersupplied." [70] According to Benshalom, the deduction in its current state "does not necessarily promote more or better spending on charitable objectives and [also] creates serious negative externalities," such as tax loopholes. [71] Furthermore, he decries "the lack of a complete and coherent definition of charitable objectives" among those who espouse subsidy theory. [72]

As noted in Part II.C, infra, charitable giving drops during a recession; because this drop outpaces the decline in the economy as a whole, it appears that freeriding increases during a recession, since the amount people are paying for public goods declines without any apparent decline in the demand for those goods (and, in some instances, an actual increase in demand, as discussed in Part II.C, infra). [73] If the charitable deduction is intended to address the issue of freeriding, as the subsidy theorists argue, then an increase in the deduction is warranted when an increase in freeriding outpaces changes in the economy as a whole.

3. Choice Theory

Those critics, like Benshalom, who find subsidy theory deficient because it fails to address the process of charitable giving may be more ***606** comfortable with choice theory, which argues that the deduction is beneficial not only because it provides assistance to charities that provide collective goods, but also because it allows taxpayers to have a voice in deciding which organizations will be subsidized. [74] According to Benshalom, because the typical method of allowing majoritarian preferences to drive government spending prevents some preferences from being voiced and addressed, the charitable deduction "should be understood not only as a method of determining what public goods are undersupplied, but also as a way to respond to unheard and unaddressed preferences; this may be referred to as the process-subsidy justification." [75] In his view, "Charitable relief can correct some of the imperfections associated with democratic decision making in a way that does not undermine the centrality of the majority's decision." [76] In other words, "charitable relief-worthy transactions should promote 'good things'--meaning a general category of public goods--through a process that reveals that some donors consider these 'good things' as socially undersupplied." [77]

Similarly, Saul Levmore argues that charitable contributions can be viewed as a means of voting on which organizations are worthy of financial support and proposes that the charitable deduction "essentially casts the government as a financing partner, with taxpayer-donors serving as intermediaries or agents who choose the providers of, or indeed the very existence of, certain services." [78] The deduction, unlike direct government funding,

may induce citizens not only to choose for themselves where to apply personal and government funds, but also to develop a sense of commitment to the chosen charities. Thus, they become involved individually as volunteers in ways that they would not if their tax money were simply allocated to the charities by the legislature or by government bureaucrats. [79]

***607** As a result, "The charitable deduction scheme permits a kind of ongoing vote." [80] While some may argue the deduction is unfair to lower-income taxpayers who receive fewer of its benefits, Levmore counters that "the government may need all the help it can get in monitoring and choosing among hospitals, schools, social welfare agencies, and the like." [81]

Mark Hall and John Colombo propose donative theory, another variation on choice theory, which argues that "only those charitable organizations funded substantially by philanthropic donations deserve and should be entitled to the tax exemption." [82] While they focus primarily on the exemption from income tax that is available to many charitable organizations, the same standard can be, and essentially is, applied in determining whether an organization is entitled to the subsidy that results when donors are allowed to deduct donations to a tax-exempt organization. Hall and Colombo believe "the fact that an entity can attract a substantial level of donations demonstrates its worthiness of and need for donations--hence, deservedness." [83] Because freeriding prevents the level of charitable donations from rising to the level needed to optimally satisfy public needs, charitable organizations need the tax exemption, and, presumably, the charitable deduction, to fill the funding gap. [84] In sum,

although a majority of voters may resist paying the full cost of government directly providing certain goods and services, a majority may be willing for government to "contribute" to such production because, while they do not value the particular good or service enough to pay for all of it, they recognize that they would receive some marginal benefit from increased production and hence would be willing to pay for a portion of that increased production, especially if such agreement would permit a partial-cross-subsidy of their own special interest. [85]

Hall and Colombo describe donative theory as "operat[ing] at the intersection of the failure of both private markets and the government." [86] ***608** In other words, the subsidy is necessary to counteract the apathy of individuals who are not actively opposed to the activities of charitable organizations but do not value their services enough to support a direct government subsidy for those organizations. [87]

To the extent that the deduction is intended to promote pluralism among charitable organizations by providing donors a choice in which organizations receive governmental support, as choice theorists claim, McDaniel notes that such pluralism is currently confined mostly to that small percentage of donors who have a high enough income to benefit from the deduction. [88] Given the fact that high-income individuals generally give to different organizations than low-income individuals, the pluralism argument "has a decidedly elitist cast to it." [89] Alice Gresham Bullock adds that, not only do high-income individuals tend to support "high-brow" organizations like public television, orchestras, and museums, but they are also more likely to patronize the programs offered by these organizations. [90] William J. Turnier goes even further, arguing that the deduction for charitable contributions is the crass, political result of a "symbiotic relationship" between those taxpayers who claim the deduction and the charitable organizations themselves, and that the justifications given for the deduction are no more than "lofty platitudes . . . conjured up which serve[ ] as an altruistic fig leaf to cover over the self-interest of the masses and the politically powerful lobbying forces." [91]

Choice theorists argue that the charitable deduction serves not only as a subsidy to charitable organizations but also as a mechanism for providing a voice to donors who wish to express a preference regarding which organizations should receive governmental assistance. [92] Whether the deduction is seen as a means of "voting" or as a means of allowing taxpayers to demonstrate an organization's deservedness of a donation, choice theorists argue that it serves the goal of promoting pluralism ***609** among organizations. [93] However, just as more donors move from the category of active donors to freeriders during a recession, the number of taxpayers expressing their choice of particular charitable organizations through monetary donations also declines during a recession. If the goal of the charitable deduction is to promote pluralism among organizations by providing taxpayers a means for expressing their preferences for which organizations should be subsidized, then the loss of taxpayers who are able to express that choice should be an issue of concern for supporters of the charitable deduction.

In order to remain consistent with the various theories that support the charitable deduction, any modifications made to the deduction should aim to further the goals of those theories. In particular, any plan to modify the deduction should try to both reduce freeriding among taxpayers and promote the ability of donors to express their preferences for particular organizations through their contributions.

### B. Criticisms of the Charitable Deduction

The charitable deduction, like all tax expenditures, provides greater benefits to those in higher tax brackets, although this effect can be mitigated or eliminated by, for example, using a credit rather than a deduction, or by limiting the deduction to taxpayers below a certain income bracket. [94] In 1977, the top 1.4% of taxpayers received 73.3% of tax expenditures resulting from the charitable deduction for education, 58.8% of tax expenditures resulting from the charitable deduction for health, and 43.2% of tax expenditures resulting from the deduction for all ***610** other charitable contributions. [95] As suggested by Surrey and McDaniel, "Not only are the tax expenditure provisions the primary cause of perceived tax inequity, but it also seems safe to say that they fail to achieve what most Americans would perceive to be a fair distribution of funds . . . ." [96] As a result, "[T]he deduction appears to provide the greatest financial incentive to those who have the least financial need for one." [97] The situation is exacerbated by the fact that the vast majority of taxpayers who claim the deductions do so in amounts constituting less than the standard deduction. [98] Consequently, "[F]or this overwhelming majority of taxpayers the incentive is conditioned not on the act of charitable giving, but by the taxpayer's status in life as a home owner, installment purchaser, consumer of durable goods on which local sales taxes are levied, owner of a car, et cetera." [99]

A related argument, raised by Charles T. Clotfelter, among others, is that even among those who itemize their deductions and can therefore take advantage of the tax incentive, the amount of benefit they receive is greater for high-income individuals because of their marginal tax rate. [100] In the words of Richard and Peggy Musgrave, "A philosopher-economist might observe that the opportunity cost of virtue falls as one moves up the income scale." [101] Because of how progressive marginal tax rates are, those taxpayers in the highest tax brackets incur the lowest price per dollar for their charitable contributions, leading to an inefficient allocation of resources. [102]

***611** Bittker responds to this criticism of the "upside-down" nature of the deduction by arguing that it is the natural result of a progressive tax structure and protests that "you cannot hold up one as the authentic voice of the people, and condemn the other as a craven surrender to special privilege." [103] He also notes that the system could preserve the progressivity of the tax structure by increasing either the width of the upper tax brackets or raising marginal rates, both of which would increase the tax burden on wealthier taxpayers while simultaneously granting a select group of them (i.e., charitable donors) some relief from that burden. [104] Finally, he argues that, while the deduction's role in our tax structure may work against vertical equity, the deduction itself may actually increase progressivity by encouraging wealthier taxpayers to transfer funds to those in lower tax brackets. [105]

Like Bittker, John Simon argues that the inequitable effects of the charitable deduction on different tax brackets are the inevitable results of a progressive tax system:

> Short of revolution or undreamt-of redistributional legislation, affluent individuals will continue to have more discretionary income and wealth than poor individuals; they will therefore be better able to afford

> charitable gifts; and, accordingly, they will be in a better position to take advantage of any allowance or matching grant system . . . . [T]he present deduction arrangement represents only an exaggerated version of a more general power-and-privilege dilemma that will exist so long as people are allowed to take charitable gifts off their estate and income taxes . . . . [106]

Some critics claim that the purpose of the charitable deduction is to incentivize contributions, and that it achieves that purpose inefficiently because many of those contributions would be made even if they were not deductible. [107] In other words, they believe that charitable giving is ***612** inelastic because it does not increase or decrease in response to changes in cost and, as a result, tax incentives to encourage giving have little effect. [108] Bittker argues that the study most frequently cited in support of this claim, a doctoral dissertation by Michael K. Taussig, is both flawed and limited in scope. [109] He also explains that subsequent studies have reached the opposite conclusion by discovering that charitable giving at both the individual and corporate level is quite elastic. [110] Finally, he argues that "even those who profess faith in Taussig's conclusions seem simultaneously to accept the conventional view that the deduction has a powerful incentive effect" by characterizing the deduction as a "subsidy" to charitable institutions. [111] In his words, "The same dollar of public money, after all, cannot be both a windfall to donors and a subsidy to their donees." [112]

Gergen criticizes the charitable deduction for providing the same benefit to all charitable organizations, arguing that this ignores very important distinctions between those organizations and, in particular, the motivations behind giving. According to him, contributions made to churches may be the result of social pressure (since donations are often made public to other members), whereas donations made to public television are generally made with the expectation that the donor will receive something of value in the form of desired programming. In other words, he finds that subsidized donations are efficient in some situations and equitable in others. As a result, he finds the current form of deduction lacking in its failure to distinguish between the effects that donations to different organizations have on individual donors. [113]

Ideally, any changes to the charitable deduction that would be made during a recession would both comport with the theories underlying the deduction and address the criticisms that have been made about the deduction in its current form.

### *613 C. Should We Focus Our Efforts on Helping Particular Types of Charitable Organizations?

Because of the varied nature of the effects that an economic downturn has on charitable organizations, any measures that are put into place will invariably have a greater effect on some types of organizations than others. The question then becomes whether society should focus its efforts on helping only one type of charitable organization (e.g., high-profile organizations) or instead make an effort to implement measures that will provide assistance to all types of organizations: high-profile, low-profile and hidden-need organizations. In 2009, 1,238,201 organizations registered with the Service as nonprofit, charitable organizations under Section 501(c)(3) of the Internal Revenue Code (the "Code"), up from 865,096 in 2001. [114] Given this recent proliferation of charitable organizations, policy makers must ask whether all organizations should be entitled to favorable treatment during an economic downturn or whether measures should be aimed at assisting only particular types of charities.

One possible way to provide relief to at least some charitable organizations while reducing the burden on government coffers would be to limit any relief measures to only certain types of organizations, like high-profile and hidden-need organizations that generally experience increased demand for their services during a recession. The use of such measures is not unprecedented. For example, in 1954 Congress increased the maximum allowable deduction for charitable contributions from 20% to 30%, but limited the additional 10% deduction to those contributions made to churches, religious orders, educational institutions, and hospitals. [115] Congress targeted these organizations because they perceived that these particular institutions were incurring rising costs and modest returns on endowments. [116] Over time, Congress increased the number of organizations to which the increased deduction applied, eventually expanding it to apply to all exempt organizations "that receive a substantial part of their support from a governmental unit or from the general public." [117] Later, when Congress limited the maximum deduction for charitable contributions to 50% of adjusted gross income, it nonetheless allowed a carryover for contributions made to churches, educational ***614** organizations, health-care organizations, and private foundations. [118]

Other attempts to modify the treatment of charitable contributions focus specifically on poverty relief. For example, Halstead and Lind propose allowing a higher deduction for contributions to organizations, like the Salvation Army and soup kitchens, "[W]hich are entirely dedicated to providing direct care to the neediest," while retaining a lower deduction for contributions to organizations, like churches, schools, and arts organizations. These organizations only indirectly serve the public interest. [119] Additionally, in 1995 Representatives Joseph Knollenberg of Michigan and James T. Kolbe of Arizona introduced a proposal that would have provided a credit to taxpayers who donate to organizations that provide services to individuals with incomes that are near poverty levels. [120] Bullock (who ultimately supports such measures), among other commentators, criticized such proposals for the administrative problems they present and argues that such distinctions may create divisions among both the charities and the populations they are trying to help. [121] Similarly, Vada Waters Lindsey argues that such measures "would lead to a multitude of other special interests lobbying Congress to enact provisions favorable to their causes as well." [122]

Even if modifications to the charitable deduction are not restricted to contributions made to a particular subset of organizations, the very nature of the modification may have varying impacts on different charities. As noted by Clotfelter, the current tax system already discriminates among entities. In particular, high-income taxpayers receive a higher subsidy than low-income taxpayers due to their higher tax bracket. [123] Consequently, the charitable organizations supported by high-income taxpayers--including cultural institutions--are in essence "favored" by the current tax system over those charitable organizations favored by low-income taxpayers--primarily religious organizations. [124] Clotfelter notes that such favoritism may be justified if the former have a greater ***615** external benefit to those outside the organization, although he admits that there is currently no conclusive answer to that question. [125]

Some argue that the contraction or elimination of these organizations merely reflects the desires of the general public; after all, museums tend to focus their time and attention on high-income donors, so if those donors decide to scale back their support, perhaps these organizations are simply reaping what they sowed. [126] For example, Gergen argues that "it is ludicrous that sports museums, jazz festivals, and singing groups are treated as charities." [127] Since such organizations may receive adequate support in other ways, and because "it is implausible that gifts to these charities are altruistic in motive," he proposes removing such organizations from the realm of tax-exempt organizations, which he argues should be limited to what he calls "social welfare" organizations. [128]

Similarly, Charles Borek argues that Congress should "decouple[ ] the concept of charitable exemptions and deduction from other tax favored activities" by reserving the term "charitable" for those organizations whose primary purpose is to benefit the poor. [129] In his words, "It is nonsensical that, for legislative, budgetary, and policy evaluation purposes, private funding for the relief of poverty is lumped together with fostering amateur sports competition and the prevention of cruelty to animals, among other things." [130] Narrowing the definition of charitable in this manner allows both taxpayers and the government to better "assess the effectiveness of private aid to the poor, and determine when and if direct subsidies are advisable." [131] According to

Lindsey, Congress must ***616** focus on organizations aimed at serving the needy in light of the fact that "[c]haritable giving to organizations benefiting the neediest sector of the population is relatively modest." [132]

Rather than focusing on purpose, Shannon Weeks McCormack proposes providing different levels of funding to charitable organizations based on whether the organization would be able to sustain itself on unsubsidized contributions. [133] In McCormack's view, high-profile organizations, like food banks, and hidden-need organizations, like domestic violence shelters, provide little direct benefit to donors and are therefore likely to be underfunded. [134] Some low-profile organizations, like museums, orchestras, and ballets, provide significant direct benefits to some donors in the form of reduced admission fees; McCormack argues that these organizations are also likely to experience underfunding. [135] Other low-profile organizations, such as churches, schools, parent teacher associations, recreational sports teams, scouting troops, and neighborhood beautification projects, provide either direct benefits to donors or direct benefits to those with whom donors share substantial, ongoing relationships; McCormack argues that donors are motivated to fund these organizations and as a result additional subsidization of contributions to these groups may be unnecessary. [136] Ultimately, McCormack advocates tailoring the deduction to more accurately account for the benefits received by donors. [137]

Although we could easily limit any proposals aimed at helping charities during a recession to particular organizations, such as those that focus on poverty relief, doing so would be both ineffective and potentially disastrous for those low-profile and hidden-need organizations that already experience problems attracting donations. As noted by Simon, Dale, and Chisolm, any requirement that charitable organizations serve the needy

would surely be met with the objection that modern-day charity and modern-day charitable tax law serve other important values. Weighing this objection would take us back to basics--to the search for a rationale for exemption or deductibility, or indeed to even more fundamental ***617** issues relating to the primacy of redistributional norms in American law. [138]

Hall and Colombo add that, "In addition to guarding against subsidization of activities that are unworthy or that simply do not need support, an ideal concept of charity in the tax exemption arena should guard against over-subsidizing (or under-subsidizing) those activities that are deserving." [139] Because donors may already allocate money to those charities that seem most relevant to an economic crisis, additional attempts to further direct donations to particular types of charities seem both unnecessary and potentially harmful to those organizations that may not be as readily able to demonstrate increased need.

Low-profile organizations arguably suffer disproportionately during an economic downturn, for three reasons. First, they often rely heavily on endowments (both their own and outside foundations), which have suffered drops of as much as 30 to 50%. [140] Second, attempts to broaden their donor base have been largely unsuccessful either because such organizations lack the technological savvy to reach these donors effectively or because such appeals are seen as politically undesirable. [141] Finally, because museums in particular face so many fixed costs, any cuts in their budgets fall disproportionately into the category of operating expenses, like exhibitions, conservation, research, and curation. [142]

Moreover, line-drawing, if intended to stimulate giving to charities that provide basic human services, may ultimately be futile, according to a study by Michelle H. Yetman and Robert J. Yetman. They find that donations to charities that provide basic goods and services to humans in need appear to be unresponsive to tax incentives, while donations to charities that appeal to higher human needs, animals, and the environment are very sensitive to tax incentives. [143] In other words, those charities that many people consider the "worthiest" during an economic crisis ***618** are the least likely to receive much benefit from additional tax relief. [144] One of the strongest arguments against favoring certain charitable organizations over others is that those organizations that are commonly perceived as less "needy" during economic downturns are likely to receive fewer donations even as they continue to need support to maintain their services. [145] Similar criticism has been leveled against the measures implemented after various disasters; for example, Danshera Cords argues that "donations directed to benefit the victims of a mega disaster may leave less aid available to victims of less well publicized and smaller disasters." [146]

For these reasons, any proposals made should be viewed in light of their impact on all three categories of charitable organizations: high-profile, low-profile, and hidden-need.

Having reviewed the effects of an economic downturn on charitable organizations, the theories underlying the charitable deduction, the criticisms surrounding the deduction, and the reasons for tailoring measures that will assist all charitable organizations during an economic downturn, the next step becomes determining what form those measures should take. Part III, infra, reviews changes to the deduction that have been previously proposed and examines which of these proposals would best achieve the goals of the charitable deduction during recessionary times. The final question is whether such measures acting alone are sufficient, or whether additional government intervention is necessary.

## III. Proposals

Proposals aimed at individual donors should have the greatest impact on charitable giving, since individuals gave over $227.41 billion in 2010, representing about 73% of all contributions. [147] As a result, this Article focuses primarily on proposals aimed at stimulating charitable giving among individual donors; some of these measures may also be applied to organizational donors. While some of these measures, like lifting the cap on the current deduction for contributions, allowing volunteers to deduct the value of volunteering, and increasing the rate of the ***619** deduction, may have some impact on levels of charitable giving, I argue that the most effective ways to stimulate giving by individual donors during a recession are to convert the current deduction to a tax credit that is available to all donors and to provide a tax credit to employers who pay for their employees to work for charitable organizations. [148] Ultimately, however, because such stimulus is insufficient to provide relief to some types of charitable organizations, particularly low-profile and hidden-need organizations, I argue that such measures should be supplemented by direct government spending targeted at assisting those organizations during a recession.

### A. Proposals Aimed at Individual Donors

1. Lift Cap on Charitable Deduction

One administratively simple way to stimulate charitable giving would be to raise the cap on deductibility for charitable contributions, currently set at fifty percent. [149] One proponent of lifting the cap, Bittker, argues that "[f]or those who fear that we will be unable to carry on as a nation if everyone adopts the practice of giving all of his income to charities, I suggest there are greater dangers on the fiscal horizon to which they could turn their attention with profit." [150]

While lifting the cap on deductions may seem to be a fairly straightforward way to increase donations, particularly during an economic ***620** downturn, the measure does have its critics. Patrick Tolan, in his critique of the lifting of the cap as part of the Katrina Emergency Tax Relief Act of 2005, notes that the measure "violates vertical equity, because only those with donations above the suspended limits would benefit." [151] As he notes, "Those likely to benefit the most would have to have sufficient wealth to be able to subsist on less than fifty percent of their AGI." [152]

Fleischer argues that the charitable deduction represents a “bargain” between two groups of donors, the “classic majority and the new majority,” in which “[t]he classic majority will fund the new majority's minority-preferred projects only to the extent the new majority agrees to fund the classic majority's preferred projects, and vice versa.” [153] Given this system, “Limiting an individual's charitable deduction to half of her income implements this bargain by ensuring that the amount of governmental subsidy to her preferred minority projects will not exceed the amount of taxes she pays to fund the classic majority's projects.” [154] Under Fleischer's theory, lifting the cap could disrupt this delicate balance and lead to disproportionate levels of support going to preferred minority projects.

The greatest advantage, or disadvantage, of lifting the cap on the charitable deduction lies in the fact that it would have the largest effect on wealthy donors. Supporters of lifting the cap may argue that such a measure would stimulate giving by those donors who tend to give the most to charity. After all, while the median contribution among all households was less than $3000 in 2011, households with more than $200,000 annual income made a median contribution of over $14,000, more than five times the median amount across all income levels. [155] Moreover, targeting high-income donors by lifting the cap may be desirable from a distributional justice perspective, since “an appealing aspect of encouraging charity from the wealthy is that it induces them to increase their support of public goals.” [156] In other words, donations by wealthy individuals essentially act as a form of voluntary redistribution ***621** that places the burdens of giving on those who are best able to bear them. [157]

Critics of lifting the cap argue that focusing on the wealthy is unfair because it leads the wealthy to disproportionately receive the benefits of the subsidy (i.e., the pleasure of making a donation). [158] However, David Schizer counters that this does not in fact raise any such problems, since wealthy donors essentially “pay for” this benefit as a result of the progressive tax rate schedule. [159] David A. Good and Aaron Wildavsky, on the other hand, argue that any measure that disproportionately benefits wealthy donors erodes legitimacy in the tax system; they argue that, “By allowing some individuals to substantially decrease their tax bills by means of charitable contributions, public confidence in the fairness of the tax system is diminished.” [160]

Perhaps the most persuasive argument against lifting the cap is that it may not have much effect and would be nothing more than a superficial remedy aimed at those who are simply looking for a feel-good way to argue that they are taking some action to help charitable organizations without actually doing anything. As Nancy Knauer notes,

The most widely-touted tax incentive [of the Economic Recovery Tax Act of 1981] was the increase in the ceiling limitation on the corporate charitable contribution deduction from five percent to ten percent of the corporate taxpayer's “contribution base.” . . . In the end, the increase represented a case of wishful thinking because virtually no [corporate donor] sustained contributions that even approached the old five percent limit. [161]

Among all individuals who claimed a charitable contribution on their tax return, the average contribution was only $4,708 in 2007, far below 50% of adjusted gross income for most taxpayers. [162] Even taxpayers with incomes greater than $200,000 contributed an average of $14,088 in 2011. [163]

***622** In addition to providing a greater tax benefit to wealthier donors while providing little if any tax benefit to lower-income donors, raising the cap would likely provide the greatest relief to the low-profile organizations that are favored by these donors, like museums and other arts organizations. While that effect may be mitigated somewhat if high-income donors turn their attention to high-profile organizations, like homeless shelters, during an economic downturn, hidden-need organizations are likely to be left in the lurch. Ultimately, while lifting the current 50% cap may be an administratively simple measure to implement, the measure presents little upside in terms of increased aid to charitable organizations.

2. Increase Rate of Deduction

Another way to stimulate charitable giving by individuals during an economic crisis is to increase the value of the deduction by increasing the rate at which a contribution may be deducted. [164] Currently, this rate is tied to the donor's marginal tax rate, so the deduction would have to be decoupled from the income tax rate, perhaps through the use of uniform tax credits that are tied, for example, to the business cycle. [165] Listokin observes that such manipulation of tax subsidies in response to an economic downturn is hardly novel, since Congress frequently makes such adjustments during recessions. [166]

Paul McDaniel's proposal of matching grants achieves similar results by tailoring each donor's deduction to the relative value of the contribution to that individual. Under this system, "Each donor's gift would be matched by a predetermined amount from the government, the federal share to be transmitted directly to the charitable institution of the donor's choice." [167] However, the amount of the match would be based on the percentage of the donor's income represented by the grant because, in McDaniel's words,

[I]f there is to be a reward for charitable giving, the incidence and amount of the reward should bear some rational relationship to the act of charitable giving. The reward should be the same for persons who make a similar sacrifice, however measured. This appears to call for a system which increases the reward as the individual sacrifices a greater proportion of his income to charity. [168]

***623** Bittker, however, argues that "[a] system of matching grants would be a poor substitute for the deduction, but the proposal independently faces such serious constitutional and political obstacles that it can in any event be regarded as a dead end." [169]

While the data is inconclusive, an increase in the rate of deduction is likely to have the largest impact on wealthier taxpayers (and, under the current system, would have no impact on taxpayers who do not itemize). [170] As a result, such a measure would probably provide the greatest assistance to low-profile organizations, which tend to be favored by wealthier taxpayers. High-profile organizations may also benefit from the enhanced attention they receive during an economic downturn, but the measure is unlikely to have much effect on hidden-need organizations. Overall, during a recession, many middle-income taxpayers will be unable to make charitable contributions even with the added incentive that comes from an increased deduction, especially if they are part of the many taxpayers who lose their jobs during an economic downturn. As a result, while an increase in the rate of deduction appears to have its benefits, such an increase standing alone is unlikely to have a large impact on levels of charitable giving.

3. Extend Deduction to Non-Itemizers

Currently, only taxpayers who itemize their deductions may take advantage of the charitable deduction; since about seven out of ten taxpayers take the standard deduction, the vast majority of taxpayers have no monetary incentive to contribute to tax-exempt organizations. Non-itemizing taxpayers have been allowed to deduct their charitable contributions in the past, most recently between the years 1982 and 1986. [171] Since that time, various scholars have advocated extending the deduction to non-itemizers again. [172]

Despite supporters of the provision, Congress nonetheless eliminated it, allowing non-itemizers to deduct their charitable contributions in 1985, in part because they viewed it as a "double deduction" that created administrative burdens for both the Service and for taxpayers who could otherwise avoid filing a return. [173] Congress further noted that "[w]hile the proposal to repeal the non[-]itemizer deduction may have ***624** some adverse effect on the amount of charitable giving, we believe that contributions by non[-]itemizers, who generally have relatively low marginal rates, are not affected significantly by tax considerations." [174] Since then, various attempts have been made to introduce legislation that would once again allow such taxpayers to deduct at least some portion of their charitable contributions, although none of these attempts have been successful. [175] For example, one bill proposed allowing the deduction only for those contributions that exceed one percent of the taxpayer's income, based on the rationale that "using a fixed percentage of income as the threshold for the deduction would ensure a uniform incentive to contribute, regardless of income." [176]

By extending the base of taxpayers receiving a tax incentive to contribute to charitable organizations, the proposal furthers the goals of the charitable deduction by reducing freeriding and expanding the number of donors who are given an incentive to express their support of those organizations. Making the tax benefits associated with charitable giving available to all taxpayers during a recession has the added advantage of potentially providing additional tax relief to low-income taxpayers for contributions they may have been inclined to make anyway. The measure would most likely have the greatest impact on high-profile organizations, which would benefit from greater contributions made by the middle- and low-income taxpayers who tend to favor those organizations. However, a more effective measure may be to not only expand the donor base but also provide additional incentives to give through a tax credit.

4. Switch from Deduction to Credit

Several scholars have proposed not just increasing the rate of deduction but also changing the deduction to a credit. In essence, a full tax credit for the amount of a contribution is the equivalent of a deduction at a 100% rate. Converting the deduction to a uniform credit that would be divorced from marginal tax rates could address the previous criticism of the charitable deduction, namely that it is of greater value to those in higher tax brackets. [177] Moreover, at least some studies have shown that ***625** donors are more responsive to a credit than they are to a deduction or matching donation. [178]

Recently, Saul Levmore proposed "a partial credit, or a partial credit up to some ceiling . . . [combined with] a greater credit or deduction for filers whose charitable contributions exceed a specified percentage of their income." [179] However, he notes that such a system runs the risk of organizations competing too vigorously for a donor's funds, "[G]reatly reduc[[ing] the likelihood of either extracting information about respondents' true preferences or encouraging individual involvement in (or monitoring of) charitable works." [180] Viewing donors as "voters" and contributions as "votes," he argues that "voters might take their votes more seriously when required to pay for them," which does not happen when the donor receives a full credit for the amount of their donation. [181]

One of the most appealing features of a tax credit for charitable contributions is that a credit could be made available to all taxpayers. A tax credit that can be utilized by all taxpayers is likely to increase contributions to the high-profile organizations favored by low-income taxpayers, like organizations dedicated to poverty relief, while reducing contributions to the low-profile organizations favored by the wealthy, like educational institutions, hospitals and arts organizations. [182] This effect may be exacerbated by the fact that organizations like schools and hospitals are more sensitive to changes in the cost of giving than religious organizations. [183] For example, in one study, Martin Feldstein estimated that replacing the charitable deduction with a 30% tax credit would increase total giving by 15%, but would reduce contributions to schools and hospitals by about 20%. [184] In a subsequent study, Feldstein and Amy Taylor found that a 25% tax credit would leave total giving relatively unchanged, but would increase giving to religious organizations ***626** by almost 10% and would reduce giving to educational institutions by 24%. [185]

Some scholars have expressed concerns about converting the current tax deduction for charitable contributions to a credit. For example, McNulty notes that, while a tax credit "appears to be the most neutral or fair allowance if the allowance's purpose is . . . to subsidize or reward socially desirable behavior . . . a deduction would better serve to define income and cannot definitively be viewed as less efficient than a credit nor more inappropriate as an incentive or subsidy." [186] Bruce Chapman goes further, arguing that a deduction is preferable to a credit because it

not only encourages diversity, an advantage that the charitable sector has over politics--which can only avoid political instability by offering bland consensus-building policies--but also comes closest to charging high[-]income, high demanders the price for public goods that is closest to that which is required of them to achieve a community wide consensus. A tax credit fails sufficiently to take into account the higher share of the taxes that high demanders must pay to the general tax revenue to make up for the tax subsidy given to charitable contributions. The tax deduction offsets this higher share by the same marginal tax rate that generates the higher tax share in the first place and, therefore, is more tax neutral and more politically stabilizing. [187]

Although attempts to permanently institute a tax credit for charitable contributions have been met with resistance, a temporary credit that is only in place during an economic downturn may be more politically palatable and therefore easier to implement. In addition, a credit would go furthest towards advancing the goals of the charitable deduction, since it would give equal voice to all taxpayers, including those who may feel the most neglected during a recession because their incomes are too low to take advantage of the current itemized deduction for charitable contributions. Finally, a credit temporarily introduced during an economic downturn would almost certainly provide the greatest benefit to high-profile organizations, which would likely draw in the largest portion of new donations, although the impact it would have on low-profile and hidden-need organizations remains unclear.

***627** 5. Allow Donors to Deduct Volunteer Services

Another way of encouraging individuals to provide assistance to charitable organizations is by allowing them to deduct time spent volunteering at such organizations. Currently, taxpayers are not allowed to deduct the value of volunteer services they provide to charitable organizations, although they may deduct some of the expenses they incur as a result of volunteering. [188] Although the donation of time is not deductible, while the donation of money or goods is, the effect on those taxpayers who itemize their deductions (and therefore are allowed to deduct their tangible donations) is essentially the same regardless of the form their donation takes. [189] For those taxpayers who do not itemize their donations, and therefore would not be able to deduct donations of goods or services, volunteering is more advantageous from a financial standpoint. [190]

The number of Americans who formally volunteered with charitable organizations rose by about one million in 2008 over the previous year, to 61.8 million, or about 26.4% of the adult population. [191] These volunteers contributed about eight billion hours of service, which had an estimated value of $162 billion. [192] Charitable organizations also forecast increasing numbers of volunteers in the coming years. [193] Additionally, in contrast to declining charitable donations, between 2007 and 2008, the rate of volunteering actually increased slightly, from 26.2% to 26.4% during this time. [194] An explanation for this increase could be the rise in unemployment, which has allowed many people who were previously working to spend more time volunteering. [195]

Some scholars have suggested encouraging volunteering even further through tax incentives. For example, Alice M. Thomas proposes "a charitable volunteerism deduction (or tax credit) [that] would be available to people who volunteer at least thirty-five hours in a taxable year, engaged in meeting the needs of marginalized individuals and/ or communities." [196] She supports the deduction as part of a "profoundly American" tradition and argues that "[a] civil society requires its citizens to ***628** engage and connect with one another." [197] Additionally, she notes that people who volunteer tend to be "happier, have positive self-esteem, and are less depressed and less anxious." [198] Finally, Thomas suggests that a deduction for volunteer time would counteract the currently biased system, in which organizations that provide charitable services receive preferential tax treatment, while individuals who do so do not. [199]

The effect of any attempts to encourage volunteering through tax expenditures depends in part on how taxpayers view volunteering, i.e., whether they see it as "simply a competing use of time, such as leisure, work, and household production, or whether it is a form of investment in human capital." [200] If the former view is favored, then tax incentives for volunteering are likely to have little effect, since volunteers are making their decisions wholly independently from tax considerations. However, if the latter view is favored, then a tax deduction may cause taxpayers to see volunteering as a more "profitable" investment in human capital than other, similar investments of time.

Similarly, the effect of a tax deduction also depends on whether taxpayers view gifts of money and gifts of time as complements or as mere substitutes. If the former is true, then a tax deduction for volunteering would once again have little effect, since volunteers would neither increase their volunteering nor reduce their monetary contributions in response to the deduction. On the other hand, if donations of time are seen as a substitute for donations of money, then the former may increase in response to a tax deduction, at least among those taxpayers who would be eligible for the deduction. Thus far, little research has been done into these questions, so the true impact of a tax deduction for volunteering remains unclear. [201]

One advantage to encouraging volunteering through a tax deduction is that it may increase monetary donations as well. The Office of Research and Policy and the Corporation for National and Community Service note that "[v]olunteers were much more likely than non-volunteers to donate to a charitable cause in 2008, with 78.2% contributing $25 or more compared to 38.5% of non-volunteers." [202] While such a result may seem surprising, especially if so many volunteers are donating their time because they are unemployed, the generosity of volunteers may stem ***629** from their desire to aid an organization once they become personally involved in its success.

Critics argue that allowing a deduction of time would create inequities between those who give time and those who, unable to give time, give money instead. In order to understand this argument, we must understand the relationship between monetary contributions and volunteer services. One argument made in favor of the charitable deduction is that individuals who contribute the money they earn through time spent on for-profit activities should not pay higher taxes than similarly situated individuals who directly contribute their time to charitable organizations. [203] The deduction is justified under this view because it "equalizes both the relative incentives to contribute services, cash or property and the tax treatment of taxpayers who similarly surrender economic resources only in different forms." [204] In other words, the deduction is not so much an incentive as the removal of a disincentive to contribute cash or property that neutralizes the choice between giving money on the one hand or services on the other. [205]

However, donations of money and time may not be as equivalent as they initially seem. Gergen notes that volunteer services are typically estimated to be worth only about one-fifth to two-fifths the value of cash contributions, which suggests that the two types of contributions are not comparable. [206] Similarly, Clotfelter observes that the argument that volunteers and monetary contributors become equal under the current system of deduction holds true only if we consider itemizing taxpayers; for non-itemizers, volunteering is more cost-effective than contributing money or goods. [207]

There may also be hidden financial costs associated with volunteering as well. For example, Jerald Schiff notes that "attracting and utilizing volunteers is costly to a charity." [208] An organization must expend valuable resources to solicit, train, and supervise volunteers, resources ***630** that may be put to more effective use elsewhere. [209] As a result, "Organizations may, and often do, turn down volunteer labor, since it is unpaid, but not free." [210]

As an alternative to allowing taxpayers to deduct time spent volunteering with charitable organizations, Nancy Staudt proposes giving a "charitable service credit" to individuals who donate their services to charitable organizations. [211] Staudt acknowledges that such a program would pose administrative problems, in part because of the indeterminate value of labor. [212] She also recognizes the philosophical dilemma presented by rewarding individuals for fulfilling their social responsibilities, as well as the potential for corruption and budget overruns that would accompany what essentially amounts to publicly funded employment. [213] Nonetheless, she argues that a charitable service credit would be beneficial because it would "work as an incentive for individuals to participate in social and political institutions and at the same time give public recognition to their labor as socially valuable." [214] If implemented as a small, "almost symbolic," payment for service, the credit would increase community involvement and provide the poor with a way to fulfill their social obligations without creating an undue burden on federal revenues. [215]

The primary benefit of allowing a deduction for volunteer service is that it would provide financial relief to the underemployed while also providing assistance to charitable organizations. Ultimately, however, such a deduction may prove to be unworkable, even as a temporary measure during a recession, due to the necessary changes that would have to be made to both the Code and the way we conceive of the charitable deduction. A more viable proposal, discussed in the following section, ***631** may be to provide a tax credit to employers who second their employees to work for charitable organizations.

6. Provide a Tax Credit to Employers for Seconding

As an alternative to providing a tax incentive to individuals who volunteer their services to charitable organizations, the government could provide an incentive to employers that second their employees to work for charitable organizations. An employee who is seconded would temporarily provide services to a non-profit organization while still retaining his or her position with his or her employer; compensation, either in the form of a regular salary or a stipend, would come from the employer rather than from the non-profit organization. Seconding could alleviate some issues currently faced by unemployed youth, who are unable to get the training and experience they would generally receive during this stage in their lives and therefore face the danger of becoming a "lost generation," one without the skills to progress in the workforce even as the economy improves. Currently, employers who second their employees may deduct the salaries of those employees as an ordinary business expense; [216] however, providing those employers with a tax credit, rather than a deduction, would encourage even more employers to consider seconding as an alternative to laying off underutilized employees.

By encouraging employers to send underutilized employees to work for these organizations rather than laying them off, the government could simultaneously provide assistance to charitable organizations and potentially reduce unemployment, which is an increasing problem during a recession. For example, more than 1,288,030 layoffs were recorded in 2009, which was the most downsizing since 2002. [217] The negative effects of unemployment on a worker extend far beyond the loss of income; the unemployed also lose health benefits, feel stigmatized by family members and peers, are unable to develop their on-the-job skills during the time they are unemployed, and can suffer from depression precisely at a time when their lack of healthcare leaves them least able to ***632** afford mental health services. [218] Moreover, such workers often have difficulty finding a new job, even after the economy recovers. [219]

On the other side, employers suffer when they are forced to scale back their workforce. Not only might they have to pay severance to the workers who are let go, but employers may also suffer from lost morale among their remaining employees. [220]

Once the economy recovers and the employer begins to rebuild its workforce, it will face costs related to finding and hiring qualified employees. Moreover, the employer may suffer a reputational hit after a layoff, as prospective employees may not want to work for an employer with a reputation for downsizing. [221] Taken together, these factors suggest that the best proposals from the perspectives of both employees and employers are the ones that will prevent or reduce downsizing in the first place.

Encouraging volunteering within the private sector is not a novel concept; the ABA, for example, has encouraged attorneys to provide services on a pro bono basis for years. [222] Corporations could take a cue from some law firms that have allowed incoming associates to work for non-profit organizations in exchange for a stipend and other benefits provided by the firms.

A tax credit paid to employers who second their employees could lead to a glut of paid volunteers and could leave non-profits with the problem of how to effectively train and manage an increase in their workforce. [223] Conversely, these organizations may be less inclined to hire paid workers if they feel they can receive those services for free; as a result, individuals who are genuinely dedicated to working for charitable organizations may find themselves squeezed out by self-interested workers who return to the for-profit sector as the economy improves. Despite these concerns, an additional tax credit for companies who second their workers may be worth considering as an effective means of combating both the increased needs of the charitable sector during a recession and the increased unemployment that is likely to occur during those times.

***633** 7. Conclusion

Of the proposals discussed above, converting the deduction to a credit that is available to all taxpayers and providing a tax credit to employers who second their employees to charitable organizations appear to have the greatest potential to alleviate the burdens faced by charitable organizations during a recession. However, these changes are not enough to help all organizations in need, especially since most taxpayers are unaware of marginal tax rates or incentives related to charitable giving. [224] Moreover, taxpayers may be slow to respond to changes in the charitable deduction, not only because of delays in communicating those changes to the public but also because donors may need time to absorb the full impact those changes will actually have on their finances. [225] Instead, what is needed is the addition of direct governmental spending for charitable organizations.

### B. Direct Governmental Spending

One problem underlying all of the above proposals is that they rely on taxpayer responsiveness to incentives to give. Unfortunately, during an economic downturn, taxpayers may be unwilling to make charitable contributions because the incentive to give is outweighed by other concerns about the economy at large. As noted above, even a modest decline in income can lead to a disproportionately large decline in charitable giving, either because that decline in income has additional consequences (like a change in income bracket or the loss of other deductions, like the mortgage interest deduction) or because the decline is accompanied by general uncertainty about one's ability to meet mandatory expenses in the future. [226]

Moreover, even if some donors independently attempt to counteract the decrease in others' donations, they may be unable to accurately gauge the needs of charitable organizations. This problem may be particularly acute for hidden-need organizations, which may be unable to effectively communicate to donors the increased demand that arises for their services during a recession. Ideally, donors would have complete information regarding the needs of all charitable organizations and could direct ***634** their funds to those organizations that they decided were most worthy in light of all this information, but their giving is more likely based on erroneous assumptions about an organization's true need or ability to survive with reduced funding. Many organizations will attempt to pull at donors' heartstrings during times when the competition for funds is fierce, but some appeals will inevitably be more effective than others. [227]

For all these reasons, attempts to stimulate charitable giving by donors are insufficient during a recession and should be supplemented by direct government spending. The federal government can help stabilize charitable budgets by providing direct relief during a recession in order to counteract the reduction in charitable contributions that generally occurs during those times. Such measures would not be unheard of, given that many countries have higher levels of direct governmental support of charitable activities, oftentimes to compensate for the fact that they experience significantly lower levels of charitable giving. [228]

In order to retain the goals of subsidy and choice theory, any program involving direct government spending should aim to preserve the goals of limiting freeriding and allowing donors to express their preferences for organizations through their donations. A system of government spending may still preserve these goals if it is used simply to supplement, rather than replace, the charitable deduction and if the system continues to reflect the choices made by donors. In particular, this latter goal can be met by allowing charitable organizations to apply for funding based on the level of donations they received in a previous year. By requiring the amount of funding received to be pegged to the donations received in a previous year, governmental support can be used to help a charitable organization retain the programs that had been previously been supported by donors who may no longer be able to provide support during difficult economic times.

While some opponents of direct government funding of charitable organizations argue that it would involve too much "red tape," McDaniel notes that the current system is hardly a model of efficiency itself, since it requires the filing, processing, and auditing of tax returns. [229] He also notes that replacing the current system of deductions with direct government spending would eliminate at least one form of waste, the inefficiency ***635** that results from over reporting of donations. [230] Turnier counters that replacing the deduction with direct government grants would lessen pluralism, in part because charities would be more susceptible to changing political winds. [231] The deduction, "by resting on the choices made by millions of Americans of very diverse backgrounds, facilitates support for organizations which may not otherwise be on a favored governmental list, and also insures against radical contractions of support to charitable activities." [232]

While Benshalom argues that "charitable relief has a unique political function within the democratic decision-making process that cannot be replicated by a direct government-spending program," he ultimately finds that direct government spending provides several advantages over the charitable deduction. [233] For example, Benshalom describes the large role that fundraising plays in charitable organizations as a result of those organizations' reliance on private contributions, diverting resources from the promotion of charitable objectives. [234] He also notes that "because contributions are voluntary and may fluctuate because of unpredictable events, [[charitable organizations] cannot make ambitious long-term plans that are often necessary for optimally providing public goods." [235]

Moreover, while such organizations may have lower bureaucratic constraints than government, this lack of bureaucracy does not necessarily guarantee efficiency. [236] Whereas government employs certain mechanisms designed to ensure accountability and transparency, charitable organizations may be more susceptible to negative consequences like nepotism, non-professionalism, and waste, particularly since they may be reliant on a relatively small number of large donors. [237] Finally, Benshalom notes that some types of public goods, like disaster relief or comprehensive policy objectives, can be better provided through a strong centralized government rather than through a series of discrete charitable organizations. [238] Even though individual donors may have better knowledge than government officials about how to provide local public goods, many are either unable or uninterested in determining the most efficient ways to provide public goods on a national or international scale. [239]

***636** While replacing the charitable deduction with a system of direct government spending on charities runs somewhat counter to expenditure, subsidy, and choice theories, supplementing the support provided through the deduction with direct spending, particularly during an economic downturn, may help charitable organizations "smooth out" their budgets and weather the fiscal problems brought on by a recession. Such support may be particularly crucial for low-profile and hidden-need organizations that may be unable to survive without additional governmental assistance.

## IV. Criticisms

### A. Additional Expenditures Will Hurt Economic Growth

Some may argue that government should not be increasing tax expenditures or adding spending programs aimed at the non-profit sector during a recession, when both the government and the private sector are in dire need of financial help as well. [240] With respect to tax expenditures in particular, Surrey argues that, given the inequities, confusion, and administrative difficulties surrounding tax expenditures, they should be used only as a last resort. [241]

It is true that at least some of the tax expenditures proposed above would cost more in foregone revenue than would be received in the form of increased donations. For example, the Congressional Budget Office ("CBO") estimates that extending the deduction to include all taxpayers would cost the government about $5.2 billion, while increasing donations by about $2 billion. [242] However, the overall impact should be relatively small, as the amount of federal revenue lost due to the charitable deduction constituted less than 1.7% of the total estimated federal tax receipts in 2008, and there is little reason to believe the additional measures discussed above would have a significantly greater impact on the budget. [243] Moreover, the current provisions related to charitable relief are considerably smaller than other tax expenditures, such as the mortgage deduction ***637** and the exemption for health benefits. [244] While we should always tread lightly when dealing with tax expenditures, particularly during times of economic crisis, the benefits to both the non-profit and for-profit sectors of the expenditures outlined above seem to outweigh their costs.

### B. Direct Governmental Support of Charitable Organizations Would Increase Government Involvement in the Charitable Sector Beyond its Already High Levels

The United States Government already contributes almost as much to nonprofit organizations and activities as all private sources of philanthropy combined. [245] As noted by the Filer Commission, "The more an organization depends on government money for survival, the less 'private' it is, and the less immune to political processes and priorities." [246] The Commission argued in 1975 that "no single institutional structure should exercise a monopoly on filling public needs, that reliance on government alone to fill such needs not only saps the spirit of individual initiative but risks making human values subservient to institutional ones, individual and community purposes subordinate to bureaucratic conveniences or authoritarian dictates." [247] Furthermore, "government money obviously comes with strings attached, however invisible and unintentional they may be." [248] As a result, private support is often considered crucial in maintaining a nonprofit organization's independence. [249]

Schizer observes that the debate between direct government spending and private giving subsidized through a deduction resembles the debate between governance at the federal level and governance at the local level, "[E]xcept that here, of course, no government is making any substantive decisions, so that charity is even more flexible and local than state and local governments." [250] In addition to providing greater competition, flexibility, and experimentation than direct government spending, private giving allows charitable organizations to take advantage of local preferences and information. [251] Conversely, a centralized government structure may be better able to screen out unsuccessful programs than individual organizations, which may be hampered by a lack of coordination and communication.[252] Finally, Schizer notes that "some public ***638** goals involve network effects or economies of scale, so that the quality of the program is enhanced by standardization and size."[253]

In terms of minority decision-making, Schizer notes that our decision to support direct government spending or the current deduction reflects our view on government in general:

> If we believe that elected officials have unique legitimacy as decision[[-]makers, and that public goals need to be pursued communally, then we are likely to worry that donors, in allocating public resources, are usurping an authority more properly exercised by government. In contrast, if we are skeptical about the government's inclination and ability to reflect popular will, as opposed to the agendas of interest groups and professional politicians, then we are more likely to favor a robust role for donors as a useful and legitimate complement to the government's efforts.[254]

Another argument against providing direct government aid to charitable organizations is that any attempts to aid such organizations at the federal level will simply lead donors to scale back their contributions. This phenomenon, referred to as "crowding out," is best described by Richard Steinberg: "The relationship between government spending and private donations is not simple, but theory suggests that there will usually be partial simple [[crowdout]; that is, that government expenditure increases (decreases) are partly neutralized by donative decreases (increases)." Studies of the crowding out phenomenon are inconclusive, but at least some scholars suggest that fears of crowdout are overblown, perhaps because individuals have their own, personal motivations for giving.[255] For example, Tomer Blumkin and Efraim Sadka note that one motivation for making charitable contributions is to demonstrate ***639** wealth.[256] Similarly, Gergen notes that donors may be motivated by the pleasure they get from voluntary giving, a pleasure that would be lost in a system that substituted mandated government spending for a deductible contribution.[257]

Even though any additional governmental involvement in the funding of charitable organizations gives some cause for concern by those who wish to preserve the division between the two sectors, so long as any increases in direct governmental spending are limited in time to periods of economic stagnation and are limited in scope to what is needed to replicate historic levels of funding, then the benefits of such supplemental funding should outweigh the drawbacks.

## Conclusion

As the debate continues about the effectiveness of the charitable deduction in facilitating the relationship between the private, public, and non-profit sectors, we should take a closer look at how these relationships change during an economic downturn. In particular, we need to consider both how an economic crisis can negatively impact all the types of charitable organizations and what we can do to alleviate those effects. The most effective ways to stimulate charitable giving are to convert the current deduction into a tax credit for contributions that is available to all taxpayers and to provide employers with a tax credit for seconding their employees to charitable organizations. However, because such measures alone may not be enough to assist low-profile and hidden-need organizations, we should supplement such efforts with direct government spending. While all three of these proposals, as well as the others discussed in this Article, have their drawbacks, the worst thing we could do at the moment is nothing.

Footnotes

a1 Associate Professor, the University of Alabama School of Law. Work on this paper was partially funded by a grant from the University of Alabama School of Law. Versions of this paper were presented at the 2011 Florida Legal Scholarship Forum at Stetson University, the 2012 Law & Society Annual Meeting, and the 2012 Annual Meeting of the Southeastern Association of Law Schools; I would like to thank all the participants at these events for their support. A version of this paper was also presented to the faculty at the University of Alabama School of Law, and I would like to thank my colleagues, and particularly Dean Ken Randall, for their support as well. I received valuable comments from Carol Andrews, Linda Beale, Kelly Behre, William Brewbaker, James Bryce, Montre Carodine, Adam Chodorow, Nina Crimm, Steven Dean, Shahar Dillbary, Heather Elliott, Miranda Perry Fleischer, William Henning, Paul Horwitz, Marco Jiminez, Ron Krotoszynski, Charlene Luke, Stephanie Hunter McMahon, David Patton, Vandana Peterson, James Puckett, Gail Richmond, Ken Rosen, Norman Stein, Patrick Tolan, and Fred Vars. Rachel English, Jade Sipes and Daniel Thomas provided valuable research assistance, as did the staff of the Law Library at the University of Alabama School of Law.

1 War Income Tax Revenue Act of 1917, ch. 63, § 1201(2), 40 Stat. 300, 330 (1917), reprinted in J.S. Seidman, Seidman's Legislative History of Federal Income Tax Laws, 1938-1861, 944 (1938). See also Vada Waters Lindsey, The Charitable Contribution Deduction: A Historical Review and a Look to the Future, 81 Neb. L. Rev. 1056, 1061-62 (2003). Originally, the deduction was intended to sustain previous levels of charitable giving in the face of the recently implemented income tax. Commission on Private Philanthropy and Public Needs, Giving in America 18 (1975) [hereinafter Giving in America]. Additionally, it was believed that income used for charitable purposes did not enrich the giver and therefore did not deserve to be taxed. Id.

2 See, e.g., War Income Tax Revenue Act of 1917, ch. 63, § 1201(2), 40 Stat. 300, 330 (1917), reprinted in J.S. Seidman, Seidman's Legislative History of Federal Income Tax Laws, 1938-1861, 944 (1938) (implementing the charitable deduction and setting a cap of 15% of net income); Act of July 8, 1952, Pub. L. No. 82-455, § 4(a), 66 Stat. 442, 443 (1952) (raising the cap on the deduction from 15 to 20%); Revenue Act of 1964, Pub. L. No. 88-272, Title II, § 209(a), 78 Stat. 43 (1964) (extending the deduction to include any organization that receives a substantial part of their support from the general public or a governmental unit); Tax Reform Act of 1969, Pub. L. No. 91-172, Title II, § 201(a)(1), 83 Stat. 551 (1969) (setting the ceiling at 50% for all taxpayers); Economic Tax Recovery Tax Act of 1981, Pub. L. No. 97-34, Title I, § 121(a), 95 Stat. 196 (1981) (extending the deduction to include non-itemizers); Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, Title II, § 286(b)(1), 96 Stat. 570 (1982) (extending the deduction to athletic organizations); Tax Act of 1986, Pub.L. 99-514, Title I, § 142(d), 100 Stat. 2120 (1986) (repealing extension of the deduction to certain travel expenses); Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, § 10711(a)(1), 101 Stat. 1330-457 (1987) (disallowing deduction for contributions made to organizations involved in political activities).

3 I.R.C. § 170 (2010). Taxpayers may not deduct contributions made to specific individuals, contributions to nonqualified organizations, contributions from which the taxpayer receives financial or economic benefits, or contributions of partial interests in property. Id. Taxpayers who contribute property to such organizations may generally deduct the fair market value of such property at the time of the contribution. Id. Many state income tax laws allow for a similar deduction. See Charles T. Clotfelter, Federal Tax Policy and Charitable Giving 12 (1985).

4 I.R.C. § 170 (2010).

5 Treas. Reg. § 1.170A-1(g) (2010).

6 See, e.g., Williams D. Andrews, Personal Deductions in an Ideal Income Tax, 86 Harv. L. Rev. 309, 311 (1972) (discussing measurement theory).

7 See, e.g., Mark P. Gergen, The Case for a Charitable Contributions Deduction, 74 Va. L. Rev. 1393, 1416 (1988) (discussing subsidy theory).

8 See, e.g., Saul Levmore, Taxes as Ballots, 65 U. Chi. L. Rev. 387, 388 (1998) (discussing choice theory).

9 Ctr. on Philanthropy at Ind. Univ., Giving During Recessions and Economic Slowdowns, Giving USA Spotlight 11 (Issue 3, 2008) [hereinafter Giving During Recessions], available at http://www.ruotoloassoc.com/Spotlight3-2008Final.pdf. See Mary Kay, Inc., “Mary Kay Truth About Abuse” Survey: Nat'l Findings from Third Survey of Domestic Violence Shelters in the United States 3-6

(Apr. 2011) [hereinafter Truth About Abuse], available at http:// www.ncdsv.org/images/marykay_truthaboutabusesurvey_2011.pdf (demonstrating increased demand).

10 See Truth About Abuse, supra note 9, at 3-6; Legal Servs. Corp., 2010 Annual Report 6-7 (2011).

11 See Giving During Recessions, supra note 9, at 14.

12 Michelle Nichols, U.S. Charitable Giving Approaches $300 billion in 2011, Reuters, (June 19, 2012), http://www.reuters.com/article/2012/06/19/us-usa-charity-idUSBRE85I05T20120619; Gross Domestic Product (GPD): Current-dollar and "Real" GDP, Bureau of Economic Analysis, http:// www.bea.gov/national/index.htm#gdp. Although charitable giving will gradually increase as the economy recovers, such giving tends to lag a year or more behind economic growth and generally takes three to five years to reach pre-recession levels. The Ctr. on Philanthropy at Ind. Univ., Giving USA 2010: The Annual Report on Philanthropy for the Year 2009, at 23 [hereinafter Annual Report]. The strain currently felt by charitable organizations is typical of what happens during an economic downturn, as evidenced by similar changes in giving that occurred in the 1970s, during the middle of another recession. See Giving in America, supra note 1, at 70 ("[W]hile private giving is still large in the United States by comparison with other countries, and while it has grown continuously in current dollar measurements ever since estimates of philanthropy have been compiled, it has not kept pace with the growth of the economy over the last decade, and in constant, uninflated dollars, it has fallen off absolutely in the last few years"). At that time, the Commission on Private Philanthropy and Public Needs (the "Filer Commission") concluded that non-profits faced particular challenges during a recession because so many of their activities involved the provision of services rather than the manufacture of products. Id. at 83. The rising costs of labor left non-profits at a disadvantage in comparison to other sectors of the economy during a recession, particularly since those other sectors could take advantage of labor-saving technology and economies of scale. Id. These strains continue today, when "80 percent of nonprofits have experienced significant economic stress, with more than a third indicating the stress is 'severe' or 'very severe."' In Tough Times, Volunteering in America Remains Strong, Corp. for Nat'l & Cmty. Serv. (July 29, 2009), http://www.nationalservice.gov/about/newsroom/releases_ detail.asp?tbl_pr_id=1426.

13 John J. Havens, Mary A. O'Herlihy & Paul G. Schervish, Charitable Giving: How Much, by Whom, to What, and How?, in The Non-Profit Sector: A Research Handbook 542, 555 (Walter W. Powell & Richard Steinberg, eds., 2d ed. 2006).

14 See Yair Jason Listokin, Stabilizing the Economy through the Income Tax Code, 123 Tax Notes 1575, (2009); see also Paul R. McDaniel, Federal Matching Grants for Charitable Contributions: A Substitute for the Income Tax Deduction, 27 Tax L. Rev. 377, 383 (1972) (noting that the deduction is of greater value to those in higher tax brackets).

15 See Dorothy A. Brown, Shades of the American Dream, 87 Wash. U. L. Rev. 329, 339 (2009) (showing that hownership rates are positively correlated with annual income)

16 See A. Mechele Dickerson, The Myth of Home Ownership and Why Home Ownership is Not Always a Good Thing, 84 Ind. L. J. 189, 194 (2009) ( "Homeowners who may itemize may deduct interest on mortgage loans, including home equity loans or lines of credit, up to a certain dollar amount on their first and second homes"). See also Brown, supra note 15, at 342 ("Taxpayers who take the standard deduction on their tax returns reap no benefit from their mortgage interest payments, even though they have 'paid' for them in the purchase price of their homes").

17 See Brown, supra note 15, at 341 ("low-income homeowners have virtually all of their net worth tied up in their homes, while upper-income homeowners have very little net worth tied up in their homes").

18 Id. at 19. In fact, organizations dedicated to human services or public-society benefit actually show higher rates of growth during longer recessions. See Giving During Recessions, supra note 9, at 7.

19 November 2010 Fundraising Survey, The Nonprofit Research Collaborative 13, http://foundationcenter.org/gainknowledge/research/pdf/nrc_ survey2010.pdf. Interestingly, these organizations constitute a relatively small segment of the nonprofit sector as measured by donations. For example, less than one-third of donations from individuals went to organizations that focused on the economically disadvantaged. The Ctr. on Philanthropy at Ind. Univ., Patterns of Household Charitable Giving by Income Group--2005 i (2007) [[hereinafter Patterns of Charitable Giving]. This figure is admittedly both over- and underinclusive, excluding organizations like animal shelters that do not service basic human needs while potentially including some organizations that do not experience increases

in both supply (of contributions) and demand. Further empirical research is needed to provide more detailed information regarding this category.

20 U.S. Dep't of Hous. and Urban Dev. Office of Cmty. Planning and Dev., The 2009 Annual Homeless Assessment Report 5 (2010). The report further notes:
The continued growth in sheltered family homelessness almost certainly reflects the ongoing effects of the recession. When compared to 2008, a slightly higher proportion of families came from housed situations, most commonly staying with family. The fragile economic circumstances of the relatives of struggling parents may mean that, as soon as job losses begin in an economic downturn, support networks for families at risk of homelessness fall apart. Doubled-up housing situations cannot be sustained, cash is no longer available to help others with rent payments, and families turn to homeless shelters as the only way of keeping a roof over their heads.
Id.

21 Linton Weeks, Hard Times for Snoopy, Nat'l Pub. Radio (Apr. 6, 2009), http://www.npr.org/templates/story/story.php?storyId=102238430 (discussing the increase in 2008 from 2007 in an Albuquerque humane society).

22 See Giving During Recessions, supra note 9, at 11 ("Recent growth in giving to [human services], while very encouraging, reportedly does not do enough to help social service agencies keep up with growing needs for shelter, food support, and other types of assistance sought by people during economic crises.").

23 See id. This trend is also consistent with larger historical patterns, which indicate that contributions to organizations devoted to the arts, culture, and humanities drop more than contributions to other organizations during economic slowdowns (which are smaller than recessions). See also Annual Report, supra note 12, at 19.

24 For example, the Las Vegas Art Museum closed its doors in February 2009. See Ula Ilnytzky, U.S. Museums Struggle amid Recession, but Attendance is Up, Seattle Times (Apr. 6, 2009), http:// seattletimes.com/html/travel/2008993691_webmuseums06.html. Some evidence suggests that museums may actually experience some increase in demand during a recession. The Minnesota Museum of American Art in St. Paul and the Minnesota Center for Photography in Minneapolis also closed their doors in 2008. See Jason Edward Kaufman, Troubles Deepen for Museums: Layoffs, Budget Cuts and Cancelled Shows, The Art Newspaper (Apr. 15, 2009), http:// www.theartnewspaper.com/articles/Troubles-deepen-for-museums-layoffs-budget-cuts-and-cancelled-shows/17148; see also Museum Attendance Rises Despite Recession, CBS News (Feb. 25, 2010), http://www.cbsnews.com/2100-201_162-6242891.html. According to at least one survey, 57% of museums experienced an increase in attendance in 2009. Id. Although most museums charge a nominal fee for admissions, the increased attendance was not enough to make up for declines in other sources of funding, as twenty three museums closed in 2009. Id.

25 Kaufman, supra note 24.

26 Id. Other examples of museums that have been forced to lay off staff, reduce salaries, or institute furloughs during the latest recession are the Akron Art Museum; New York's Asia Society; the Bishop Museum in Honolulu, Hawaii; the Bowers Museum in Santa Ana, California; the Cleveland Museum of Art; the Corcoran Gallery of Art in Washington, D.C.; the Detroit Institute of Arts; the Guggenheim Museum in New York; the Henry Art Gallery at the University of Washington; the High Museum of Art in Atlanta, the Indianapolis Museum of Art; the Isabella Stewart Gardner Museum in Boston; the Miami Art Museum; the Museum of Contemporary Art in Denver; the Museum of Contemporary Art in Los Angeles; the Museum of Contemporary Art in San Diego; Boston's Museum of Fine Arts; the Newseum in Washington, D.C.; the Pacific Asia Museum in Pasadena, California; the University of Pennsylvania's Museum of Archaeology and Anthropology; the Portland Art Museum; the Philadelphia Art Museum; the Sterling and Francine Clark Art Institute in Williamstown, Massachusetts; the Taubman Museum of Art in Roanoke, Virginia; the Utah Museum of Fine Arts; the Walker Art Center in Minneapolis; and the Walters Art Museum in Baltimore. See also Timeline: Museums and the Recession, Artinfo (June 29, 2009), http:// www.artinfo.com/news/story/31099/timeline-museums-and-the-recession/.

27 See id. See also Kaufman, supra note 24. Chicago's Field Museum, the Contemporary Museum, Honolulu, the Denver Art Museum, the St. Louis Art Museum, and the Walters Art Museum cancelled upcoming exhibitions as a way of reducing costs. See Ilnytzky, supra note 24. The Art Institute of Chicago also eliminated raises for upper management and lowered temperatures in its galleries in an attempt to cut costs. Id.

28 Randy Kennedy, National Academy Sells Two Hudson River School Paintings to Bolster its Finances, N.Y. Times (Dec. 6, 2008), http:// www.nytimes.com/2008/12/06/arts/design/06acad.html; see also Robin Pogrebin, Branded a Pariah, the National Academy is Struggling to Survive, N.Y. Times (Dec. 23, 2008), http://www.nytimes.com/2008/12/23/arts/design/23acad.html (noting that the Association of Art Museum Directors urged its members to cease lending money to the National Academy and forego collaborations after the sale); Robin Pogrebin, National Academy Revises its Policies, N.Y. Times (Mar. 14, 2009), http:// www.nytimes.com/2009/03/14/arts/design/14acad.html (describing negotiations between the National Academy and the Association of Art Museum Directors).

29 Robin Pogrebin, Bill Seeks to Regulate Museums' Art Sales, N.Y. Times (Mar. 18, 2009), http:// www.nytimes.com/2009/03/18/arts/design/18rege.html; Robin Pogrebin, Bill to Halt Certain Sales of Artwork May Be Dead, N.Y. Times (Aug. 10, 2010), http:// www.nytimes.com/2010/08/11/arts/design/11selloff.html?_r=0.

30 See Ilnytzky, supra note 24; Randy Kennedy & Carol Vogel, Outcry over a Plan to Sell Museum's Holdings, N.Y. Times (Jan. 28, 2009), http:// www.nytimes.com/2009/01/28/arts/design/28rose.html?adxnnl=1&adxnnlx=1348857735-SGH4QuoaFQD/DDqHeYrHhg (noting the Massachusetts attorney general's plan to conduct a detailed review of the planned sale).

31 See Disputed Randolph College Works to be Sold at Christie's, Artinfo (Apr. 18, 2008), http://www.artinfo.com/news/story/27390/disputed-randolph-college-works-to-be-sold-at-christies.

32 Tony Woodcock, American Orchestras: Yes, It's a Crisis (Part IV), Tony's Blog: From the Office of the President of New England Conservatory (May 4, 2011, 4:07 PM), http://necmusic.wordpress.com/2011/05/04/american-orchestras-yes-it%E2%C80%99s-a-crisis/. Other performing arts organizations that have shuttered their doors in recent years include Ohio's The Bang and The Clatter Theatre, the Carousel Dinner Theatre, and Kalliope Stage. See Opera Cleveland Slashes Administrative Staff, Launches Restructuring Campaign, The Plain-Dealer (Aug. 6, 2010), http:// www.cleveland.com/arts/index.ssf/2010/08/opera_cleveland_slashes_admini.html.

33 See, e.g., Steve Bornfield, Recession Forces Cuts by Ballet Company, Las Vegas Review-Journal (April 9, 2012), http:// www.lvrj.com/news/41078012.html.

34 See, e.g., Daniel Chang, For Florida Opera, Recession Means Fat Lady Won't Sing, McClatchy Newspapers (May 12, 2009), http:// www.mcclatchydc.com/2009/05/12/68044/for-florida-opera-recession-means.html.

35 See, e.g., Bryan Johnson, Indianapolis Symphony Orchestra Hit by Recession, FunCityFinder.com, http://indianapolis-indiana.funcityfinder.com/2009/10/09/indianapolis-symphony-orchestra-recession/ (last visited Oct. 27, 2012). Other orchestras that have instituted pay cuts include the Baltimore Symphony Orchestra, Colorado Symphony Orchestra, and Detroit Symphony. Barbara Bell, Small Orchestras Must Beat the Recession to Survive, Suite 101 (Jan. 21, 2011), http://suite101.com/article/small-orchestras-must-beat-the-recession-to-survive-a336088.

36 See, e.g., Bell, supra note 35.

37 See Truth About Abuse, supra note 9, at 3-5 (reporting that three out of four domestic violence shelters reported an increase in women seeking assistance from abuse in 2010, with 73% of those shelters attributing the rise in abuse to financial issues and 48% to job loss); see also William Glaberson, The Recession Begins Flooding into the Courts, N.Y. Times, Dec. 28, 2009, at A1 (noting that cases involving charges like assault by family members increased by eighteen percent in New York state in 2009).

38 See Christina Davidson, Recession Increasing Domestic Violence, Decreasing Victim Options, The Atlantic (Dec. 17, 2009, 12:00 PM), http:// www.theatlantic.com/national/archive/2009/12/recession-increasing-domestic-violence-decreasing-victim-options/32205/# ("While shelters across the country have increased demand for beds, at the same time resources from the government and from corporate donors are down. Demand is up, support is down."); see also Truth About Abuse, supra note 9, at 6 (reporting that three out of four shelters indicate their funding has decreased the most from governmental organizations).

39 See, e.g., Truth About Abuse, supra note 9, at 13-14 (reporting that 47% of shelters decreased their services due to the economy, with 72% canceling or scaling back services and 63% eliminating staff positions); John Peters, Blue Ridge H.O.P.E. Closing June 30, Mt.

Airy News (June 20, 2012), http:// www.mtairynews.com/view/full_story/19042130/article-Blue-Ridge-H-O-P-E-- closing-June-30 (reporting on the closure of the only domestic violence shelter in Surry County, North Carolina).

40 Legal Services Corp., 2010 Annual Report 2 (2010). The Annual Report also notes that the number of mortgage foreclosure cases handled by their programs increased by 128%, while unemployment cases increased by 80% and domestic violence cases increased by 9%. Id. Moreover, the number of cases involving bankruptcy and debt relief matters increased by 24% during this time. Id. at 8. In addition to the problems brought on by decreased contributions and increased demand, charitable organizations also face increasing pressure from governmental regulators. In particular, Nina J. Crimm has found that state and local authorities increasingly challenge the tax-exempt status of non-profit organizations during economically difficult times, noting that "financially strapped state and local governments have targeted nonprofits as one means of resolving their pinched monetary and tax base dilemmas." Nina J. Crimm, Why All is Not Quiet on the "Home Front" for Charitable Organizations, 29 N.M. L. Rev. 1, 3 (1999).

41 See Ilan Benshalom, The Dual Subsidy Theory of Charitable Deductions, 84 Ind. L.J. 1047, 1048 (2009).

42 Another issue that arises when discussing the treatment of charitable contributions during an economic downturn is how to determine when an economic downturn has reached a phase where emergency measures should be implemented. One possibility is to implement certain measures automatically whenever the gross domestic product dips below a certain benchmark or falls below a certain percentage; this is essentially the approach adopted by Listokin in his proposals to stimulate the American economy. Yair Listokin, Stabilizing the Economy through the Income Tax Code, 123 Tax Notes 1575 (2009). Alternatively, such measures could be implemented whenever the gross national product falls for more than two consecutive quarters, consistent with the conventionally accepted definition of a recession. See Julius Shiskin, The Changing Business Cycle, N.Y. Times, Dec. 1, 1974, at A1. Although the need for a definitive benchmark is apparent, determining an appropriate one is beyond the scope of this Article.

43 See generally Stanley S. Surrey & Paul R. McDaniel, Tax Expenditures (1985). Paul McDaniel suggests in a subsequent article that discussion of the charitable deduction as an expenditure is misguided, since the true expenditure is "the nontaxation of the beneficiaries, again, either directly, or through a surrogate tax on the charitable organization." Paul R. McDaniel, The Charitable Contributions Deduction (Revisited), 59 SMU L. Rev. 773, 783 (2006). In his view, the individual benefits that motivate such contributes, such as altruism or increases in status or power, constitute "psychic income" that should be deductible unless "the value of the gift is not likely to be included in income on the donee's side of the transaction or administrative concerns justify such an approach." Id. at 778.

44 Benshalom, supra note 41, at 1073.

45 Cong. Budget Office, Options for Changing the Tax Treatment of Charitable Giving: Hearing Before the S. Comm. on Fin., 112th Cong., (2011) [[hereinafter Options for Charitable Giving] (statement of Frank J. Sammartino, Assistant Director for Tax Analysis, Congressional Budget Office) (citing Staff of J. Comm. on Taxation, 111th Cong., Estimates of Fed. Tax Expenditures for Fiscal Years 2010-2014, No.JCS-3-10, at 45-48 (2010).

46 McDaniel, supra note 14, at 380.

47 Id. It should be noted that McDaniel's calculations are based on the tax rates at the time. However, although the current rates differ slightly, the analysis remains sound.

48 Id. at 381 ("[C]haritable institutions are not concerned solely with maintenance of the level of out of pocket private giving, but with ensuring that federal funds will continue to be available at the level provided through the deduction mechanism.").

49 Stanley S. Surrey, Tax Incentives as a Device for Implementing Government Policy: A Comparison with Direct Government Expenditures, 83 Harv. L. Rev. 705, 731 (1970). Surrey points out that tax expenditures present some additional disadvantages when compared with government spending. Id. at 728. For example, because tax legislation goes through the House Ways and Means Committee and the Senate Finance Committee, rather than through the committee charged with examining the substantive issue involved, tax expenditures are vetted by legislators with little relevant knowledge regarding the goals and policies underlying the expenditures. Id. Furthermore, "[T]he tax incentive program considered by the tax committees would be isolated from the regular

flow of legislation and activity in the field involved, and this isolation would make coordination and the consideration of priorities difficult." Id.

50 Thanks to Miranda Perry Fleischer for suggesting the use of this term.

51 Andrews, supra note 6, at 311.

52 Id. at 314.

53 Id. at 314-15.

54 Id. at 360. Andrews further argues in support of the deduction by claiming that charitable contributions differ from most ordinary gifts, which are generally non-deductible by the donor, because such gifts tend to occur within a single household. Id. at 349. Charitable contributions are also distinct from non-household gifts because of the likely difference in tax rates between the donor and the likely recipient and because the organization provides a means of monitoring the redistribution of funds from donor to recipient. Id. at 351. He also argues that including taxable contributions as a proxy for taxing benefits would lead to an excessively high tax rate because charitable contributions disproportionately come from a small number of high-income donors. Id. at 361. He notes that donors faced with the prospect of a tax on their contributions will likely reduce those contributions rather than other expenditures, because a reduction in contributions will not lead to a reduction in benefits to them. Id. Finally, he argues that charitable organizations, unlike political organizations, "are numerous enough, and sufficiently voluntary in their membership relations, so that we need not have the same fear of oppressive domination by wealthy contributors" as we do in the political arena. Id. at 364. In a variation on measurement theory, Boris Bittker argues that corporate charitable contributions can be viewed as true business expenses because they serve as a form of advertising and that even individual contributions could be seen as business expenses if they are made at the prompting of one's employer and are rewarded with a work-related incentive, such as extra vacation days. Boris I. Bittker, Charitable Contributions: Tax Deductions or Matching Grants?, 28 Tax L. Rev. 37, 57 (1973).

55 See also Benshalom, supra note 41, at 1055 (calling Andrews' theory "inconsistent with fundamental tax-policy principles" and arguing that "[i]t neglects the fundamental notion that income is attributed to the taxpayer that earns it and not to the persons to whom it is assigned"); Stanley A. Koppelman, Personal Deductions Under an Ideal Income Tax, 43 Tax L. Rev. 679, 689 (1988) (criticizing Andrews' argument as circular because "[t]he effects of a tax follow from the definition of the base"). Koppelman also argues that charitable contributions are not justifiable under measurement theory because "[t]he expenditure of cash or property [as a charitable contribution] represents a clear personal benefit to the donor." Id. at 707.

56 Gergen, supra note 7, at 1416. In fact, Gergen describes Andrews' measurement theory as merely the reverse of the subsidy argument, which sees the deduction as a way "to encourage people to do voluntarily what we would otherwise have to coerce them to do." Id. at 1421. In particular, Gergen notes that Andrews fails to distinguish between "charitable" goods that are eligible for a subsidy and other goods that create positive externalities, like school tuition. Id. at 1424.

57 Mark G. Kelman, Personal Deductions Revisited: Why They Fit Poorly in an "Ideal" Income Tax and Why They Fit Worse in a Far from Ideal World, 31 Stan. L. Rev. 831, 838 (1979).

58 Id. at 850. Kelman is particularly skeptical of the characterization of donations as nonpreclusive when dealing with high-income donors. Id. at 856 ("[T]he character of gifts from high-income givers is inevitably reciprocal in a way not necessarily true for the low-income donor."). For example, he notes that gifts by the rich to educational institutions are often intended to benefit the upper class and "involve a great deal of reciprocity, at least in the form of attention and deference." Id. at 858. Such contributions "seriously undermine[ ] vertical tax equity because large amounts (and percentages) of income are at stake." Id. "Thus," he notes, "real world complexity undercuts even further an already questionable defense of the charitable deduction." Id. Others have also criticized Andrews' "ideal income tax" as applied to the charitable deduction, including McDaniel, who argues that "[t]he notion that a charitable contribution should be deductible because it creates a common or public good is suspect" and "finds no support in the Simons definition of income." Paul R. McDaniel, The Charitable Contributions Deduction (Revisited), 59 SMU L. Rev. 773, 783 (2006).

59 See Andrews, supra note 6, at 314-15.

60 See, e.g., Bittker, supra note 54, at 58-60 (arguing that contributions may be characterized as either a discharge of a moral obligation or as a reward for praiseworthy behavior; under either framework, a deduction for contributions would not need to operate efficiently in order to be considered worthy).

61 See, e.g., Gergen, supra note 7, at 1398 ("Charities that provide goods for which we cannot or do not wish to charge beneficiaries deserve government support because, without the subsidy, society will tend to underfund them.").

62 Id. at 1397.

63 See id.

64 See id. at 1398.

65 See id. Gergen gives as an example a student who fails to take into account the societal benefits of her education when determining whether to go to college.

66 See id. at 1403.

67 Id.

68 See id. at 1399.

69 Id. However, Gergen also notes that this very phenomenon of free riding can be used to argue against the notion that a deduction is necessary solely because the goods it provides can benefit society as a whole. Id. at 1411-12. In his words, "Especially in the case of churches, schools, and other charities that primarily benefit a small group and secondarily benefit society generally, attention must be paid to the possibility that the small group has sufficient incentive to fund the good at an optimal level without a deduction for its payments." Id. at 1412. Moreover, while the charitable deduction alleviates the problem of freeriding, it arguably harms those who either oppose the programs that receive greater contributions as a result of the deduction or the "marginally disinterested" who support some level of charitable funding but do not receive any benefit from the additional donations that occur as a result of the deduction. Id. at 1412. In a variation on subsidy theory, Johnny Rex Buckles argues that the benefits provided by charitable organizations, like many of the benefits provided by government (and even, in some cases, by private actors) constitute types of "community income" that are not subject to tax because they inure primarily to the general public rather than to individuals. Johnny Rex Buckles, The Community Income Theory of the Charitable Contributions Deduction, 80 Ind. L. J. 947, 969 (2005).

70 Benshalom, supra note 41, at 1051.

71 Id. at 1076.

72 Id.

73 See, e.g., Michelle Nichols, U.S. Charitable Giving Approaches $300 billion in 2011, Reuters, (June 19, 2012), http://www.reuters.com/article/2012/06/19/us-usa-charity-idUSBRE85I05T20120619; Gross Domestic Product (GPD): Current-dollar and "Real" GDP, Bureau of Economic Analysis, http://www.bea.gov/national/index.htm#gdp.

74 See, e.g., Bittker, supra note 54, at 61 (arguing that the charitable deduction could be seen not just as an incentive but as a tool that could be used by taxpayers "to divert funds which would otherwise be spent as Washington determines and to allocate them to other socially approved functions").

75 Benshalom, supra note 41, at 1077.

76 Id.

77 Id. at 1083.

78 Saul Levmore, Taxes as Ballots, 65 U. Chi. L. Rev. 387, 388 (1998). See also Miranda Perry Fleischer, Generous to a Fault? Fair Shares and Charitable Giving, 93 Minn. L. Rev. 165, 229 (2008) ("[C]haritable tax subsidies allow individuals whose preferences differ from [the median voter] to redirect a portion of funds otherwise flowing to the federal treasury toward their preferred visions of the public good.").

79 Levmore, supra note 78, at 406. Levmore has been criticized for failing to explain how the charitable deduction, an essentially nondemocratic allocation mechanism, is consistent with the principles of democratic governance. See, e.g., Benshalom, supra note 41, at 1062-63.

80 Levmore, supra note 78, at 411.

81 Id. at 406.

82 Nina J. Crimm, An Explanation of the Federal Income Tax Exemption for Charitable Organizations: A Theory of Risk Compensation, 50 Fla. L. Rev. 419, 435-36 (1998) (citing Mark A. Hall & John D. Colombo, The Donative Theory of the Charitable Tax Exemption, 52 Ohio St. L. J. 1379, 1383-84 (1991)).

83 Id. at 436 (citing Hall & Colombo, supra note 82, at 1384-85).

84 See Hall & Colombo, supra note 82, at 1398.

85 Mark A. Hall & John D. Colombo, The Charitable Tax Exemption 107-08 (1995).

86 Hall & Colombo, supra note 82, at 1386.

87 See Hall & Colombo, supra note 85, at 107-08.

88 McDaniel, supra note 14, at 391.

89 Id.; see also Surrey, supra note 49, at 725. Surrey also argues that tax incentives generally "Keep Tax Rates High by Constricting the Tax Base and Thereby Reducing Revenues." Id.

90 Alice Gresham Bullock, Taxes, Social Policy and Philanthropy: The Untapped Potential of Middle and Low-Income Generosity, 6 Cornell J. L. & Pub. Pol'y 325, 343-44 (1997).

91 William J. Turnier, Personal Deductions and Tax Reform: The High Road and the Low Road, 31 Vill. L. Rev. 1703, 1751 (1986). Similarly, David A. Good and Aaron Wildavsky argue the deduction is truly uncontrollable by Congress because "[i]t is not subject to annual or periodic Congressional review and, within the tax system, there is no limit on how much a taxpayer can receive." David A. Good & Aaron Wildavsky, A Tax by Any Other Name: The Donor Directed Automatic Percentage Contribution Bonus, a Budget Alternative for Financing Government Support of Charity, 7 Pol'y Sci. 251, 261 (1976).

92 See, e.g., Levmore, supra note 78, at 387-88; Hall & Colombo, supra note 82, at 1383.

93 See, e.g., Levmore, supra note 78, at 388-89; Hall & Colombo, supra note 81, at 1384-85.

94 See Surrey & McDaniel, supra note 43, at 103; see also Levmore, supra note 78, at 405 ("An obvious objection to the use of the charitable deduction as a social choice mechanism to determine government spending is that many citizens effectively are disenfranchised because they need not file returns or do not benefit from itemizing their deductions."). Evelyn Brody criticizes this feature of the deduction as unfair, since "the opportunity cost of virtue falls as one moves up the income scale." Evelyn Brody, Charities in Tax Reform: Threats to Subsidies Overt and Covert, 66 Tenn. L. Rev. 687, 716 (1999) (quoting Richard A. Musgrave & Peggy B. Musgrave, Public Finance in Theory and Practice 348 (Patricia A. Mitchell & Frances Koblin eds.) (4th ed. 1984)); see also Benshalom, supra note 40, at 1057 ("Because tax authorities can use means other than deductions to change behavior, deductions seem to be an inappropriate measure to achieve that end unless there is a special reason to change the particular behavioral patterns of high-bracket taxpayers."). However, Benshalom does suggest that such a reason may exist, since limiting the deduction to higher tax brackets may be an efficient way of targeting behavioral changes in taxpayers with more available income. He notes that "[s]

ome may even claim that this arrangement is equitable if, as a result, rich people end up saving and consuming less for themselves and investing more in society." Id. at 1068. Ultimately, he concludes that, "Regardless of its consequentialist outcomes, it is hard to see how the I.R.C. §170 deduction could be incorporated in a society that venerates the democratic, majority-based decision-making process." Id. at 1068.

95 Surrey & McDaniel, supra note 43, at 71.

96 Id. at 72.

97 McDaniel, supra note 14, at 383. In response to those who argue that this "upside-down" subsidy is the natural result of our progressive tax structure, Surrey and McDaniel respond as follows: "Although an individual's tax burden under a progressive income tax will rise with income, it does not follow that government assistance should also rise with income; such a view is contrary to generally accepted notions of the terms on which government assistance should be granted." Surrey & McDaniel, supra note 43, at 80. Similarly, they reject the argument that elimination of the charitable deduction would have the negative effect of increasing the "disposable income" of the rich in relation to the poor while reducing charitable contributions. Id. at 81; see also Surrey, supra note 49, at 720 (deductions "are worth more to the high income taxpayer than the low income taxpayer; they do not benefit those who are outside the tax system because their incomes are low, they have losses, or they are exempt from tax."). But see Gergen, supra note 7, at 1406 ("Any system in which people save taxes by giving to charity removes power from the majority and revests it in wealthy donors ... [but] the poor perhaps should not complain that a deduction makes giving by the wealthy less costly if that savings prompts the wealthy to fund charities like the Red Cross or the Salvation Army which primarily benefit the poor.")

98 See McDaniel, supra note 14, at 383.

99 Id.; see also Brody, supra note 94, at 716 (noting that itemizers generally tend to live in areas with high state and local income taxes, another factor associated with wealth).

100 Clotfelter, supra note 3, at 103-04.

101 Id. at 103 (quoting Musgrave & Musgrave, supra note 93, at 362).

102 See id.

103 Bittker, supra note 54, at 54; see also John K. McNulty, Public Policy and Private Charity: A Tax Policy Perspective, 3 Va. Tax Rev. 229, 244 (1984) (arguing that if philanthropy is only price sensitive in the higher income brackets, then concentrating the benefits of the deduction on those brackets may in fact be more efficient). Similarly, if we accept McDaniel's characterization of the charitable deduction as a mere part of the taxation system rather than a tax expenditure, then previous criticisms of the deduction as having an "upside-down" effect on donors or of being inefficient lose their relevance. McDaniel, supra note 43, at 783.

104 Bittker, supra note 54, at 55.

105 Id. at 55-56.

106 John G. Simon, Charity and Dynasty under the Federal Tax System 26-27 (Inst. for Soc. and Policy Studies Yale Univ., Working Paper No. 5, 1978).

107 See, e.g., McDaniel, supra note 14, at 384 ("To the extent there is an incentive effect, the deduction is an inefficient means of achieving the desired result"); Surrey, supra note 49, at 719-20 (charitable deduction is inefficient "because some of the tax benefits go to taxpayers for activities which they would have performed without the benefits").

108 See, e.g., Brody, supra note 94, at 715 ("If the policy behind the charitable-contribution deduction is to spur donations, then tax subsidies are wasted on donations that would have been made anyway."). Brody notes that even high-income taxpayers may not be increasing their total contributions so much as shifting the timing of their contributions into those time periods when tax rates are higher. Id. at 716-717. As evidence of the limited effect that the deduction has on giving, she notes that donations actually increased

among most income levels when the charitable contribution deduction for non-itemizers expired, removing for many taxpayers any tax incentive to make charitable contributions. Id. at 719.

109 Bittker, supra note 54, at 44.

110 Id. at 52.

111 Id.

112 Id.

113 Gergen, supra note 7, at 1433-34.

114 General Accounting Office, Political Organizations: Data Disclosure and IRS's Oversight of Organizations Should Be Improved 44 (2002), http:// www.gao.gov/assets/240/235163.pdf; Internal Revenue Service, 2009 Data Book 56 (2010), http://www.irs.gov/pub/irs-soi/09databk.pdf.

115 Vada Waters Lindsey, The Charitable Contribution Deduction: A Historical Review and a Look to the Future, 81 Neb. L. Rev. 1056, 1062-64 (2003) (discussing increases in maximum allowable deductions for charitable contributions).

116 See id. at 1063.

117 Id. at 1064.

118 Id. at 1065.

119 Ted Halstead & Michael Lind, Alter the Tax Code to Avert Elder-Care Crisis, The Chronicle of Philanthropy (Dec. 13, 2001), http://www.unz.org/Pub/NewAmerica-2001dec-00028.

120 See Choice in Welfare Tax Credit Act of 1995, H.R. 2225, 104th Cong. § 23(d)(2). A similar proposal was made separately by Representative Kolbe in 2001. Charity to Eliminate Poverty Tax Credit Act of 2001, H.R. 673, 107th Cong. (2001), http://thomas.loc.gov/cgi-bin/bdquery/z? d107:H.R.673:-.

121 Bullock, supra note 90, at 358.

122 Lindsey, supra note 115, at 1089.

123 See Clotfelter, supra note 3, at 103-04.

124 See id.

125 See id.

126 See Adrian Ellis, The Recession and US Museums, The Art Newspaper (Mar. 11, 2009), http://www.theartnewspaper.com/article.asp?id=17087 ("With conspicuous consumption less in favor, speculative fortunes trimmed and priorities adjusted, the social class that art museums have smooched with most intimately is also the group most likely to sit out the next few dances.").

127 Gergen, supra note 7, at 1450 (citing Rev. Rul. 372, 1968-2 C.B. 205; Rev. Rul. 271, 1965-2 C.B. 161; Rev. Rul. 46, 1966-1 C.B. 133).

128 Id.

129 Charles A. Borek, Decoupling Tax Exemption for Charitable Organizations, 31 Wm. Mitchell L. Rev. 183, 219-20 (2004). Other scholars focus on the distinction between religious and secular organizations. For example, Hochman and Rodgers argue that giving to religious organizations should be favored because such organizations do not benefit from direct governmental support. Clotfelter, supra note 3, at 282. On the other hand, Schaefer argues that religious giving should be treated less favorably because religious organizations often use funds to maintain their own internal structures and support activities aimed at their members. Id.

130 Borek, supra note 129, at 220. Borek does, however, note that "[o] ther non-charitable enterprises, such as those principally organized for religious, educational, or health related purposes, may, and in fact do, assist the poor with economic transfers and services. It would be administratively unfeasible to distill the charitable functions from the primary endeavors of these entities." Id. at 223.

131 Id. at 222-23.

132 Lindsey, supra note 115, at 1086 (finding that only three of the top twenty-five recipients of charitable contributions in 1999 were dedicated to poverty relief).

133 Shannon Weeks McCormack, Too Close to Home: Limiting the Organizations Subsidized by the Charitable Deduction to those in Economic Need, 63 Fla. L. Rev. 857, 910-912 (2011).

134 Id.at 910.

135 Id.

136 Id. at 910-11.

137 Id. at 913-14.

138 John Simon, Harvey Dale, & Laura Chisolm, The Federal Tax Treatment of Charitable Organizations, in The Non-Profit Sector: A Research Handbook 267, 278 (Walter W. Powell & Richard Steinberg, eds., 2d ed. 2006).

139 Mark A. Hall & John D. Colombo, The Charitable Status of Nonprofit Hospitals: Toward a Donative Theory of Tax Exemption, 66 Wash. L. Rev. 307, 329 (1991).

140 Ellis, supra note 126.

141 See id. Moreover, Ellis notes that

[o]utside of the restitution of art to Holocaust victims and the occasional censure of miscreants, museums have for the most part shown limited capacity for effective collective action. Industry-wide responses to problems (analogous to those for banks or the automotive industry) would require an appetite for solidarity that does not come naturally, even if the industry found a more willing ear in government.

Id.

142 See id.

143 Michelle H. Yetman & Robert J. Yetman, How Does the Incentive Effect of the Charitable Deduction Vary across Charities? 3, 23-24 (June 21, 2012) (unpublished working paper) (on file with the Social Science Research Network).

144 Clotfelter also found differences in elasticity among various nonprofit organizations, noting that donations to religious non-profit organizations are somewhat less elastic than donations to secular ones, although he concluded that "the evidence regarding the price elasticity does not, on the whole, support the notion that religious giving is less price-sensitive than giving for other purposes." Clotfelter, supra note 3, at 64-66. Although Clotfelter's study does not look specifically at charitable giving during a recession, it does suggest that charitable giving to secular non-profits, at least, might increase if the cost of such giving were to decrease due to changes in the charitable deduction. See id. at 10-13.

145 See Weeks, supra note 21.

146 Danshera Cords, Charitable Contributions for Disaster Relief: Rationalizing Tax Consequences and Victim Benefits, 57 Cath. U. L. Rev. 427, 439 (2008).

147 See Annual Report, supra note 12, at 11.

148 Some measures, while initially promising, are clearly non-starters. For example, in 2001, Representative Watts proposed allowing individuals over age fifty-five to make penalty-free withdrawals from their retirement accounts in order to make charitable contributions. Community Solutions Act of 2001, H.R. 7, 107th Cong. § 102 (2001), http://thomas.loc.gov/cgi-bin/query/F? c107:2:./temp/~c107TLzSkl:e5680:. The drawbacks of such a measure are clear; not only would it incentivize people to spend money intended for their retirement, it would, if implemented during an economic recession, encourage people to remove money from their accounts at a time when those accounts are likely to be at their lowest values. Another possibility may be to encourage non-cash contributions. In 2007, 23.8 million individuals reported $58.7 billion in deductions for their non-cash contributions. Pearson Liddell & Janette Wilson, Individual Noncash Contributions, 2007, Stat. of Income Bull.: Spring 2010, 52, 52-53 (2010). Corporate stock donations accounted for almost half of these contributions, followed by donations of clothing and land. See id. While adjustments to the treatment of non-cash contributions may be desirable, the focus of our inquiry should nonetheless be on the tax treatment of cash donations, since they constitute the bulk of all charitable contributions. See generally id. In 2011, the CBO reviewed eleven potential adjustments to the current deduction, which they grouped into the following four categories: 1) adding a floor to the current deduction, 2) extending the deduction to include all taxpayers, 3) replacing the deduction with a 25% credit, and 4) replacing the deduction with a 15% credit. Options for Charitable Giving, supra note 44, at vii.

149 I.R.C. § 170 (2010). The Obama administration is unlikely to support lifting the cap on the charitable deduction, since it recently proposed legislation that would extend the reach of the current cap. See Suzanne Perry, Obama's Plan to Reduce Charitable Deductions for the Wealthy Draws Criticism, The Chronicle of Philanthropy, Feb. 26, 2009, at 1, http:// philanthropy.com/article/Obamas-Plan-to-Reduce/63024/.

150 Bittker, supra note 54, at 62.

151 Patrick E. Tolan, Jr., The Flurry of Tax Law Changes Following the 2005 Hurricanes: A Strategy for More Predictable and Equitable Tax Treatment of Victims, 72 Brook. L. Rev. 799, 838 (2007).

152 Id.

153 Fleischer, supra note 78, at 229.

154 Id.

155 How America Gives, The Chronicle of Philanthropy, http:// philanthropy.com/article/Interactive-How-America-Gives/133709 (click “Contributions by household” then “Giving by income levels”; view “All Income Levels” and “$200,000 and above”) (last visited March 25, 2013).

156 David M. Schizer, Subsidizing Charitable Contributions: Incentives, Information, and the Private Pursuit of Public Goals, 62 Tax L. Rev. 221, 234 (2009).

157 See id.

158 See id.

159 Id. at 235.

160 Good & Wildavsky, supra note 91, at 261.

161 Nancy J. Knauer, Reinventing Government: The Promise of Institutional Choice and Government Created Charitable Organizations, 41 N.Y.L. Sch. L. Rev. 945, 961-62 (1997).

162 Grant Williams, Charitable Deductions Rose in 2007, IRS Report Says, The Chronicle of Philanthropy, Jan. 4, 2010.

163 How America Gives, supra note 155. Currently, the Obama administration has proposed reducing the rate at which individual donors may deduct their charitable contributions from 35%; such a proposal is estimated to decrease charitable giving by more than $7 billion a year. Martin Feldstein, A Deduction from Charity, Washington Post, March 25, 2009.

164 See Listokin, supra note 14, at 3-4.

165 See id. at 7.

166 Id. at 8.

167 McDaniel, supra note 14, at 378.

168 Id. at 394.

169 Bittker, supra note 54, at 56.

170 See McDaniel, supra note 14, at 383.

171 See Lindsey, supra note 115, at 1068 (citing H.R. Conf. Rep. No. 97-215, at 201-02 (1981), reprinted in 1981 U.S.C.C.A.N. 285, 291-92 (reporting on Economic Recovery Tax Act of 1981)).

172 See, e.g., M. Todd Henderson & Anup Malani, Corporate Philanthropy and the Market for Altruism, 109 Colum. L. Rev. 571, 611 (2009).

173 See Ronald A. Pearlman, Repeal of the Charitable Contribution for Nonitemizers Explained, 28 Tax Notes 1140, 1140 (1985).

174 Id.

175 See, e.g., The Savings Opportunity and Charitable Giving Act of 2001, S. 592, 107th Cong. (2001); CARE Act of 2005, S. 1780, 109th Cong. (2005); Tax Relief Act of 2005, S. 2020, 109th Cong. (2005). Lindsey, supra note 114, at 1092 (internal citations omitted).

176 Lily L. Batchelder, Fred T. Goldberg, Jr. & Peter R. Orszag, Efficiency and Tax Incentives: The Case for Refundable Tax Credits, 59 Stan. L. Rev. 23, 52 n.121 (2006) (citing President's Advisory Panel on Tax Reform).

177 See generally Batchelder et al., supra note 176 (arguing for a uniform refundable tax credit). Another alternative, proposed by the Filer Commission, would be to allow donors at certain income levels to deduct some multiple of the amount of their contribution. See Giving in America, supra note 1, at 30.

178 See, e.g., Kimberley Ann Scharf & Sarah L. Smith, Rational Inattention to Subsidies for Charitable Contributions (Ctr. for Econ. Policy Research, Discussion Paper No. DP7760, 2010). The CBO estimates that a 25% credit would increase charitable contributions by $2.7 billion, while costing the Government about $7.1 billion in foregone revenue. Options for Charitable Giving, supra note 44, at 18.

179 Levmore, supra note 78, at 416.

180 Id. at 410-11.

181 Id. at 411.

182 See Good & Wildavsky, supra note 91, at 264. See also Daniel Halperin, A Charitable Contribution of Appreciated Property and the Realization of Built-in Gains, 56 Tax L. Rev. 1, 9-10 (2002) (noting that a credit would likely increase support to religious organizations and arguing that "it may not make sense to support a credit, which would be disruptive and controversial, unless one also asserts that this shift in priorities is desirable.").

183 See Martin Feldstein, The Income Tax and Charitable Contributions: Part II--The Impact on Religious, Educational, and Other Organizations, 28 Nat'l Tax J. 209, 224 (1975).

184 Id.

185 Martin Feldstein & Amy Taylor, The Income Tax and Charitable Contributions, 44 Econometrica 1201, 1219 (1976).

186 McNulty, supra note 103, at 247.

187 Bruce Chapman, Between Markets & Politics: A Social Choice Theoretic Appreciation of the Charitable Sector, 6 Geo. Mason L. Rev. 821, 866-67 (1998).

188 See Treas. Reg. § 1.170A-1(g) (2012).

189 See McNulty, supra note 103, at 241.

190 See id. at 241 n.52.

191 Corporation for Nat'l & Cmty Serv., Volunteering in America Research Highlights, at 1-2 (June 2009) [hereinafter Volunteering in America], http:// www.volunteeringinamerica.gov/assets/resources/VolunteeringInAmericaResearchHighlights..

192 Id.

193 See id.

194 Id.

195 See id.

196 Alice M. Thomas, Re-Envisioning the Charitable Deduction to Legislate Compassion and Civility: Reclaiming Our Collective and Individual Humanity Through Sustained Volunteerism, 19 Kan. J.L. & Pub. Pol'y 269, 332 (2010).

197 Id. at 303. For example, Thomas notes that "[p]romoting a spirit of civic participation and service has been a longstanding policy of the federal government that came together in a formal program most recently in the early 1990's." Id. at 307.

198 Id. at 304.

199 Id. at 320-21.

200 Clotfelter, supra note 3, at 275.

201 See id. (finding that, among women, "contributions and volunteering are complements, implying that the charitable deduction encourages volunteering as well as donations").

202 Volunteering in America, supra note 192, at 1.

203 See McNulty, supra note 103, at 241 n.52 (comparing a doctor who volunteers his time to an attorney who volunteers the money he earned by spending the same amount of time on paid work).

204 Id. at 241.

205 See id.

206 Gergen, supra note 7, at 1420; see also Kristin Choo, Pro Bono: Pay Cut for Public Service: These Associates See Great Gain in the Trade-Off, 95 A.B.A. J. 27 (June 2009).

207 Clotfelter, supra note 3, at 152.

208 Jerald Schiff, Charitable Giving and Government Policy 59-60 (1990). For example, Jean Baldwin Grossman and Kathryn Furano note that "benefits are not automatically bestowed when volunteers show up. No matter how well-intentioned volunteers are, unless there is an infrastructure in place to support and direct their efforts, they will remain at best ineffective or, worse, become disenchanted and withdraw, potentially damaging recipients of services in the process." Jean Baldwin Grossman & Kathryn Furano, Making the

Most of Volunteers, 62 Law & Contemp. Probl., Autumn 1999, at 199, 217. They further note that mentoring programs, for example, cost about $300 per year per volunteer. Id.

209 See Schiff, supra note 208, at 60.

210 Id.

211 Nancy C. Staudt, The Hidden Costs of the Progressivity Debate, 50 Vand. L. Rev. 919, 988 (1997).

212 Id.

213 Id.

214 Id.

215 Id. Another alternative to allowing a deduction for individual volunteer service would be to pay individuals that donate their time to non-profit organizations a salary through a government agency. The Clinton Administration created the Corporation for National and Community Service, a charitable government corporation, as a partnership between the government and non-profit sectors to work closely with state and local authorities. Knauer, supra note 161, at 969. The Corporation, whose purpose is to allow young people to serve their communities while also earning money for education, manages three volunteer programs: AmeriCorps, Learn and Serve, and the National Senior Service Corps. Id. at 970. Given the relatively young age of this corporation, its effectiveness is not yet known, although it does provide one example of an innovative way to encourage charitable contributions of time rather than money.

216 See I.R.C. § 162(a)(1) (permitting deductions on "all the ordinary and necessary expenses" including "a reasonable allowance for salaries or other compensation for personal services actually rendered.").

217 December Job Cuts: Lowest Job Cut Year Since 1997, The Challenger Index (Challenger, Gray & Christmas, Inc.), Jan. 2011, at 1. Moreover, employees who lose their jobs often remain unemployed for six months or longer. Id.

218 See, e.g., Elizabeth Landau, Unemployment takes a tough mental toll, CNN (June 15, 2012), available at http://www.cnn.com/2012/06/14/health/mental-health/psychology-unemployment.

219 See, e.g., Winnie Hu, When Being Jobless is a Barrier to Finding a Job, N.Y. Times (Feb. 17, 2013), available at http://www.nytimes.com/2013/02/18/nyregion/for-many-being-out-of-work-is-chief-obstacle-to-finding-it.html.

220 See, e.g., Lauren Tara LaCapra, Layoffs Sweep Wall Street, Along with Low Morale, Reuters (Aug. 21, 2011), http://www.reuters.com/article/2011/08/21/us-wallstreet-layoffs-idUSTRE77K1OU20110821.

221 See, e.g., Rules for Laying Off Employees, PayScale.com (April 21, 2009), http://www.payscale.com/compensation-today/2009/04/rules-for-laying-off-employees.

222 See, e.g., Model Rules of Prof'l Conduct R. 6.1 ("A lawyer should aspire to render at least (50) hours of pro bono publico legal services per year").

223 See Schiff, supra note 208, at 60.

224 But see Charles T. Clotfelter and C. Eugene Steurle, Charitable Contributions, in How Taxes Affect Economic Behavior 408, 436 (Henry J. Aaron & Joseph A. Pechman, eds., 1981) (citing Morgan, Dye & Hybels, Results from Two National Surveys of Philanthropic Activity (1979)) ("[I]t seems just as likely that many taxpayers, particularly itemizers, use approximations and rules of thumb that render their behavior very similar, on average, to a perfectly informed optimizer.").

225 See Clotfelter, supra note 3, at 73-75 (finding that "taxpayers do not adjust to changes in tax policy immediately, resulting in smaller effects in the short run than in the long run.").

226 See supra Part I.

227 See David E. Pozen, Remapping the Charitable Deduction, 39 Conn. L. Rev. 531, 557-58 (2006).

228 See Clotfelter, supra note 3, at 97 (quoting Arthur Anderson & Company, Overview of governmental support and financial regulation of philanthropic organizations in selected nations, in Commission on Private Philanthropy and Public needs, 2 Research papers 2975 (1997) ("direct and indirect governmental support of the private philanthropic sector varies inversely with the involvement of government itself in providing social services")).

229 McDaniel, supra note 14, at 389.

230 Id. at 390.

231 William J. Turnier, Personal Deductions and Tax Reform: The High Road and the Low Road, 31 Vill. L. Rev. 1703, 1723 (1986).

232 Id.

233 Ilan Benshalom, The Dual Subsidy Theory of Charitable Deductions, 84 Ind. L.J. 1047, 1057 (2009).

234 Id. at 1070-71.

235 Id. at 1071.

236 See id.

237 See id.

238 Id. at 1071-72

239 See id. at 1072.

240 See, e.g., Listokin, supra note 14, at 4 ("All else equal, a government spending program is preferable to a tax expenditure program from a stabilization perspective.").

241 Surrey, supra note 49, at 734; see also Patrick Tolan, Questioning Tax Expenditures for Economic Recovery, 127 Tax Notes 67, 70 (2010) (observing that tax expenditures are "must pay" items that cannot be easily adjusted later and that such expenditures are generally not subjected to the same congressional scrutiny as direct expenditures).

242 Options for Charitable Giving, supra note 43, at 10 (using 2006 as a benchmark). Alternatively, combining this expansion with a $500 (for individual filers) or $1000 (for married couples filing jointly) floor would lower the cost of giving to the government by $2.5 billion while still increasing donations by about $800 million.

243 Benshalom, supra note 41, at 1081 n.125 (citing Office of Mgmt. & Budget, Exec. Office of the President, Analytical Perspectives: Budget of the United States Government Fiscal Year 2008, 239, 296-99 (2007)).

244 See id.

245 See Giving in America, supra note 1, at 16.

246 Id. at 17.

247 Id. at 119.

248 Id. at 96.

249 See id. at 17.

250 David M. Schizer, Subsidizing Charitable Contributions: Incentives, Information, and the Private Pursuit of Public Goals, 62 Tax L. Rev. 221, 243 (2009).

251 See id. at 244.

252 See id. at 244-45.

253 Id. at 245.

254 Id. at 246. As an alternative to direct government spending, Schizer proposes setting a threshold number of donors that a charitable organization would need to have in order to be eligible for tax-deductible donations; such participation requirements would "[make] it more difficult for an idiosyncratic or self-interested donor to pursue an unwise idea with public money." Id. at 249. (This problem is often referred to as the "ketchup museum problem"). Id. at 230. Alternatively, Schizer suggests the government could play a larger role in determining funding for charitable organizations by offering greater tax benefits to particular causes that are deemed high priority. Such an approach would, according to Schizer, "reduce the risk of allocation error and also could enhance legitimacy by constraining the discretion of wealthy donors." Id. at 251.

255 Richard Steinberg, Donations, Local Government Spending, and the "New Federalism," in Philanthropic Giving: Studies in Varieties and Goals 143, 154 (Richard Magat ed., 1989). But see Clotfelter, Federal Tax Policy and Charitable Giving 12 (1985) (finding little evidence of crowding out in response to increased government spending).

256 Tomer Blumkin & Efraim Sadka, On the Desirability of Taxing Charitable Contributions 2 (Ctr. for Econ. Studies and Ifo Inst. for Econ. Research, Working Paper No. 1900, Jan. 2007).

257 Gergen, supra note 7, at 1407.

22 CNLJLPP 589

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