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Please Don't Squeeze the Charities: Taxing Charitable Contributions During an Economic Downturn

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PLEASE DON’T SQUEEZE THE CHARITIES: TAXING CHARITABLE CONTRIBUTIONS DURING AN ECONOMIC DOWNTURN

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Abstract

Non-profit charitable organizations often experience enhanced financial strain during an economic crisis like the current one, since they frequently suffer not only a drop in donations but also an increase in demand for their services. This Article addresses this “squeeze” on the non-profit sector by proposing ways to increase levels of charitable giving by individuals and corporations during a recession, primarily through changes to the charitable deduction. In particular, this Article proposes converting the current

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deduction to a credit that is available to all taxpayers and providing a tax credit to employers who second their employees to work for charitable organizations. While neither of these proposals is flawless, implementation of one or both of these measures could alleviate the financial burden on charities during their times of greatest need.

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As we now know all too well, the United States has recently undergone
the “worst financial crisis since the Great Depression.”\(^1\) This crisis affects not only individuals and for-profit businesses, but non-profit charitable institutions as well. In fact, the impact on the non-profit sector has been particularly acute, with non-profit organizations experiencing their biggest drop in donations in over fifty years.\(^2\) Such a decline in contributions could not come at a worse time, since many organizations that provide charitable services see a greater demand for those services during tough economic times. This Article examines the problem and examines possible solutions aimed at stimulating charitable giving during an economic downturn. Most of these proposals focus on the role that the tax deduction for charitable contributions, enumerated in Section 61 of the Internal Revenue Code, plays in charitable giving.\(^3\) Ultimately, the two most promising solutions involve 1) converting the current deduction for charitable contributions into a credit that is available to all taxpayers, and 2) providing a tax credit to employers who second their employees to work at charitable organizations.

Part I of this article explains the rules governing the tax deduction for charitable contributions and describes the current status of the non-profit

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3 A subsequent article will explore the role that private and corporate foundations may play in increasing aid to charitable organizations during economic downturns.
Part II considers whether any proposed changes to the tax deduction should include all charities or only focus on those that suffer the most during a recession. Part III describes various proposals aimed at both individual and corporate donors and discusses the advantages and disadvantages of those proposals. Finally, Part IV examines some possible criticisms of those proposals.

I. INTRODUCTION TO THE NON-PROFIT SECTOR

Taxpayers have been granted tax relief for donations made to charitable organizations since 1917, when the first legislative act allowing a deduction for charitable contributions was passed. Currently, taxpayers who itemize their deductions on their tax returns may deduct contributions made to certain non-profit organizations that have registered with the Internal Revenue Service (the “Service”). Taxpayers may not deduct contributions made to specific individuals, contributions to nonqualified organizations,

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4 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.

contributions from which the taxpayer receives financial or economic benefits, or contributions of partial interests in property. Taxpayers who contribute property to such organizations may generally deduct the fair market value of such property at the time of the contribution. 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. Although taxpayers may not deduct the value of the services they provide when they volunteer with a non-profit organization, they may be able to deduct some of the costs incurred in providing those services, including transportation costs.

A. Current Status of the Non-Profit Sector

The current recession has had a noticeable negative effect on charitable giving. Total charitable donations in 2009 totaled around $304 billion, a drop of about 3.6% (3.2% adjusted for inflation) from the previous year, and over half of non-profit organizations reported receiving lower donations in 2009 than in the previous year. This drop in donations is the largest

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6 Id.
7 Id.
8 Id.
10 Annual Report, supra note 2, at 27.
recorded in over fifty years.\textsuperscript{11}

The decline in charitable contributions is hardly unexpected, since contributions tend to increase in non-recessionary years and decrease or remain stagnant during recessionary years.\textsuperscript{12} Yair Listokin notes that, because charitable contributions are positively related to income, a negative shock to investment and total output leads to lower charitable donations. Because each dollar of charitable donations is subsidized by the government, lower donations mean that the government subsidy of public goods via the charitable deduction decreases. Thus, subsidies for public goods

\begin{itemize}
\item \textsuperscript{11} \textit{Id.} The decline was not consistent across all types of donors, however. While contributions from individuals declined around 0.4% (0.0% adjusted for inflation) and foundation grants declined by 8.9% (8.6% adjusted for inflation), corporate donations actually rose by 5.5% (5.9% adjusted for inflation). \textit{Id.} at 8. Moreover, not all non-profit organizations saw a decline in contributions; in fact, international organizations, environmental and animal-welfare organizations, health organizations and human services organizations all saw an increase in contributions in 2009. \textit{Id.} at 19. Religious and educational organizations and organizations devoted to culture, arts and humanities, however, did see a decline in contributions last year. \textit{Id.} Religious organizations nonetheless received the largest percentage of charitable contributions, about $100.95 billion, or about 33% of all contributions. \textit{Id.} at 13. Educational organizations received $40.01 billion, or about 13% of all contributions, and grantmaking foundations received about $31.00 billion, or about 10% of all contributions. Organizations dedicated to human services, public-society benefit organizations, health organizations, organizations dedicated to the arts and culture, international affairs organizations, and organizations dedicated to the environment and animal welfare each received less than 10% of all contributions. \textit{Id.}

\item \textsuperscript{12} Annual Report, \textit{supra} note 2, at 23. \textit{See also} Yair Jason Listokin, \textit{Stabilizing the Economy through the Income Tax Code}, 123 \textit{TAX NOTES} 13 (2009) (“Because [charitable] contributions are tax deductible, the implicit government subsidy to charitable organizations also moves with the business cycle…”).
\end{itemize}
go down in response to a negative shock to investment—exacerbating the initial effect of a negative shock to the economy.\textsuperscript{13}

While this suggests that 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.\textsuperscript{14}

The strain currently felt by non-profit organizations is similar to the situation that existed in the 1970’s, in the midst of another economic downturn.\textsuperscript{15} 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 much of their activities involved the provision of services rather than the manufacture of products.\textsuperscript{16} The rising costs of labor left non-profits at a disadvantage in comparison to

\textsuperscript{13}Listokin, supra note 12, at 13. Listokin also notes that the negative effect of an economic downturn on contributions is exacerbated for those individuals whose incomes drop so precipitously that their marginal tax rates also fall. For these individuals, the price of charitable giving actually increases, and they are likely to give less to charitable organizations as a result. \textit{Id.}

\textsuperscript{14}Annual Report, supra note 2, at 23.

\textsuperscript{15}Commission on Private Philanthropy and Public Needs, \textit{GIVING IN AMERICA} 70 (1975) [hereinafter \textit{GIVING IN AMERICA}] (“[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, un-inflated dollars, it has fallen off absolutely in the last few years”).

\textsuperscript{16}Id. at 83.
other sectors of the economy during a recession, particularly since those other sectors could take advantage of labor-saving technology and economies of scale. 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.’”

Moreover, many charitable organizations experience an increase in demand for their services during an economic downturn. For example, the Greater Chicago Food Depository, a food bank located in Chicago, Illinois, saw an increase of about 35% in the number of people seeking supplemental and emergency food between 2009 and 2006. Animal shelter admissions at PAWS Chicago, an animal shelter also located in Chicago, increased from 887 in 2006 to 3107 in 2008. Along similar lines, use of both domestic violence shelters and legal service providers has risen, the latter by as much as 400%.

\[\text{Id.}\]
\[\text{In addition to the problems brought on by decreased contributions and increased demand, charitable organizations also face increasing pressure from governmental regulators. In particular, Nina J. Crimm has found that state and local authorities}\]
B. Tax Policy Regarding the Non-Profit Sector

One argument that has been made in favor of the charitable deduction is that it promotes private support to non-profit organizations providing services that would otherwise have to be provided by the government.\(^22\) Alternatively, the expenditure theory argues that “[t]he personal consumption at which progressive personal taxation with high graduated rates should aim may well be thought to encompass only the private consumption of divisible goods and services whose consumption by one household precludes their direct enjoyment by others.”\(^23\) Contributions to charitable organizations fall outside this definition because they generally 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.” Why All is Not Quiet on the "Home Front" for Charitable Organizations, 29 N.M. L. REV. 1, 29 (1999). Additional challenges may come from cuts in federal spending for social programs, as occurred under President Ronald Reagan in the 1980’s, which “reduced an important revenue source for nonprofit organizations at the same time it increased demand for many of their services.”\(^22\) Id. at 103 (1975). See also Bob Jones Univ. v. United States, 461 U.S. 591 (1983) (“Charitable exemptions are justified on the basis that the exempt entity confers a benefit—a benefit which the society or the community ay not itself choose or be able to provide, or which supplements and advances the work of public institutions already supported by tax revenues”) (discussing the tax exemption for non-profit entities). Another argument that has been advanced in favor of the deduction is that it allows individual donors to support a variety of organizations, some of which may not be favored enough to receive direct government support, while also insuring against “radical contractions of support to charitable activities.” William J. Turnier, Personal Deductions and Tax Reform: The High Road and the Low Road, 31 VILL. L. REV. 1703, 1723 (1986).\(^23\) William D. Andrews, Personal Deductions in an Ideal Income Tax, 86 HARV. L. REV. 309, 346 (1972).
“produce something in the nature of common or social goods or services.” Such common goods can be enjoyed by more than those who paid for them and “are free goods in the sense that one person’s enjoyment of them will not directly impair another’s enjoyment.”

An alternative to expenditure theory, subsidy theory, posits that the charitable deduction is well suited to a heterogeneous society because it “provides for diverse, decentralized decision making about which visions of public benefit merit support.” Mark P. Gergen, one of the leading proponents of the subsidy theory, defines a public good as one in which “one person’s consumption of the good does not reduce its availability to others… and no one can be excluded from the good….” Because of these characteristics, it becomes cheaper to supply public goods freely than to charge people for their use. However, because these public goods are

\[\text{Cite:}\]

24 Id. at 357.

25 Id. at 358. Several scholars have criticized the expenditure theory, most notably Mark Kelman, who argues that “Professor Andrews’ notion of private preclusive appropriation is unconvincing, and in any event would not logically justify the charitable deduction.” 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, 834 (1979). See also Evelyn Brody, Of Sovereignty and Subsidy: Conceptualizing the Charity Tax Exemption, 23 IOWA J. CORP. L. 585, 591 (1998); Mark P. Gergen, The Case for a Charitable Contributions Deduction, 74 VA. L. REV. 1393, 1416 (1988) (“Andrews’s theory fails at the critical task of defining what collective goods should be excluded from income”). He further notes that “a taxpayer’s net receipts, minus the costs of obtaining the receipts, tautologically consists of consumption plus savings.” Id.

26 Simon, Dale & Chisolm, from Non-Profit handbook

27 Gergen, supra note 25, at 1397.

28 Id.
provided free of charge, some people will be tempted to “free ride” on the generosity of others to supply them; left to its own devices, this system would lead to an underfunding of these goods, since those who are willing to provide the good may be unwilling to supply it at levels that would satisfy the entire population, including free riders.  

Since the organization that ultimately supplies such goods cannot realistically charge for their use, “a deduction may be the only mechanism available to spread [] cost across freeriders” by shifting some of the costs.

Professor Gergen further notes that contributions to non-profit organizations dedicated to improving social welfare should be encouraged through the deduction system because they have a desirable redistributive effect, “shift[ing] resources from the wealthy to the needy.” Similarly, Miranda Perry Fleischer argues that “charitable tax subsidies allow individuals whose preferences differ from [the median voter] to redirect a portion of funds otherwise flowing to the federal fisc toward their preferred visions of the public good.” Those individuals are assisted by the deduction, while those who choose not to contribute “are indirectly charged

\[29\text{ Id.}\]
\[30\text{ Id. at 1403.}\]
\[31\text{ Id. at 148-49 (“Any movement of resources far down the income scale is likely to enhance aggregate welfare because a poor man will think more of what a dollar buys than does a rich man”).}\]

\[32\text{ Miranda Perry Fleischer, Generous to a Fault? Fair Shares and Charitable Giving, 93 MINN. L. REV. 165, 229 (2008).}\]
for their free ride by bearing a somewhat higher level of taxation.”

Mark A. Hall and John D. Colombo have proposed the donative theory, a variation of the subsidy theory, which argues that “donative institutions deserve a tax subsidy because the willingness of the public to contribute demonstrates both worthiness and neediness.” In other words,

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

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33 Simon, Dale & Chisolm, from Non-Profit handbook

By selecting particular organizations from among the many available alternatives, donors “reveal those that are of special worth in the public’s estimation.” The organization’s neediness is apparent because its “resort to solicitations evidences that its needs are not being met elsewhere.”

However, the donations themselves will not fully satisfy the organization’s needs, due in part to the fact that some donors will “free ride” on the contributions of others; as a result, an additional “shadow subsidy” is needed “to take up the donative slack.” Professors Hall and Colombo describe donative theory as “operat[ing] at the intersection of the failure of both private markets and the government.” In other words, the subsidy is necessary to counteract the apathy of individuals who are not actively opposed to the activities of non-profit organizations but do not value their services enough to support a direct government subsidy for those organizations.

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36 Id.
37 Id.
38 Id.
39 Id.
40 The subsidy/ donative theory also has its critics. For example, Evelyn Brody argues that “[w]ithout applying a sovereignty perspective, neither the subsidy theory nor the base-defining theory can fully explain the current tax-exemption scheme for charities.” Brody, supra note 40, at 591. Moreover, several scholars have provided alternatives to the
C. Criticisms of the Charitable Deduction

The current system of allowing some taxpayers a limited deduction for charitable contributions has its critics. Some, like Stanley A. Koppelman, argue that charitable contributions are not justified under the expenditure theory because “[t]he expenditure of cash or property [as a charitable contribution] represents a clear personal benefit to the donor.”41 Others, like Stanley S. Surrey, argue that, to the extent the deduction is intended to serve as an incentive to give, it does so inefficiently, “because some of the tax benefits go to taxpayers for activities which they would have performed expenditure and subsidy/ donative theories. Saul Levmore has argued that the deduction “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,” allowing them to “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.” Taxes as Ballots, 65 U. Chi. L. Rev. 387, 406 (1998). Under this view, “[t]he charitable deduction scheme permits a kind of ongoing vote.” Id. at 411.

Other theories explaining the charitable deduction have also been proposed. John McNulty compares charitable contributions to other deductible expenses, such as state or municipal taxes or casualty or theft losses, arguing that “[f]or some donors, charitable contributions may also be somewhat involuntary,” even though they decrease one’s ability to otherwise consume or save. Public Policy & Private Charity: A Tax Policy Perspective, 3 Va. Tax Rev. 229, 237 (1984). Alternatively, Johnny Rex Buckles’ community income theory argues that the charitable deduction serves as “a mechanism for excluding the portion of income received by an individual that is properly attributed to the tax-exempt community.” The Community Income Theory of the Charitable Contributions Deduction, 80 Ind. L.J. 947, 986 (2005). Nonetheless, many of these theories can be characterized as variations of either the expenditure or subsidy/ donative theories, at least for purposes of examining the role that the charitable deduction can play during an economic downturn.

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. He also argues 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.”

Perhaps the most vocal critic of the charitable deduction has been Ilan Benshalom, who argues that non-profit organizations may actually be less efficient than government actors. He argues that “[c]haritable relief does not necessarily promote more or better spending on charitable objectives and creates serious negative externalities,” such as tax loopholes.

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43 Turnier, *supra* note 22, at 1751. David A. Good & 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.” *A Tax by any other Name: The Donor Directed Automatic Percentage Contribution Bonus, A Budget Alternative for Financing Government Support of Charity*, 4 Commission on Private Philanthropy and Public Needs: Research Papers 22389, at 2400 (1977).


45 Id. at 1076.
However, the greatest problem in the charitable sector, according to Professor Benshalom, is “the lack of a complete and coherent definition of charitable objectives.”\textsuperscript{46}

Defenders of the deduction note that, despite its flaws, it is nonetheless “a proven mechanism familiar to donor and donee, easy to administrate and less likely than credits or matching grants to run afoul of constitutional prohibitions as far as donations to religious organizations are concerned.”\textsuperscript{47}

John Simon argues that the inequitable effects of the deduction on different tax brackets are an inevitable result 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

\textsuperscript{46} Id. In order to address these flaws, he proposes widening the range of charitable donors beyond high-income taxpayers and limiting the deductibility of contributions. \textit{Id}.

\textsuperscript{47} \textit{GIVING IN AMERICA}, supra note 15, at 19.
charitable gifts off their estate and income taxes…\textsuperscript{48}

Despite the shortcomings of the charitable deduction, it allows the voices of at least some taxpayers to be heard in determining the character of the non-profit sector. Moreover, given the long history of the deduction, its widespread use by many non-itemizing taxpayers, and the devastating impact its abolition would have on the nonprofit sector, it is unlikely to disappear anytime soon. The question then becomes whether the deduction can be modified to adapt to the changes that occur in the charitable sector during a recession. The rest of this Article attempts to answer that question by turning first to the issue of how those changes should be structured and in particular whether they should be designed to reach all charitable organizations.

II. \textbf{Which Organizations Should Benefit?}

In 2009, 1,238,201 organizations had registered with the Service as nonprofit, charitable organizations under Section 501(c)(3) of the Internal Revenue Code (the “Code”), up from 819,008 in 2000, an increase of over

The massive growth in both the number and types of tax-exempt nonprofit organizations begs the question of whether all organizations registered as tax-exempt with the Service should be entitled to favorable treatment during an economic downturn.

Various attempts have been made to distinguish among non-profit organizations in the past. In addition to the typical subdivisions, the Filer Commission separated out organizations, like those dedicated to welfare rights and minority business enterprises, that strive “to empower the powerless of American society, often non-white, non-middleclass groups that through their own resources have been able to exercise little influence on the priorities and processes of majoritarian government or of other institutional areas of our society.” The Commission, such organizations differ from “old-style charity” that aims to fill the basic needs of the underprivileged, since they are focused instead on “helping groups to organize and act so as to be able to effectively exact social and economic and political benefits or ‘rights’ from society and its institutions.”

Congress has also previously distinguished among various groups recognized as tax-exempt under Section 501(c)(3). For example, in 1954, they increased the maximum allowable deduction for charitable

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49 Annual Report, supra note 2, at 27.
50 GIVING IN AMERICA, supra note 15, at 67-68.
51 Id.
contributions from 20% to 30%, but limited the additional 10% deduction to those contributions made to churches, religious orders, educational institutions, and hospitals.\textsuperscript{52} Congress specifically targeted these organizations because they perceived that these particular institutions were suffering from rising costs and modest returns on endowments.\textsuperscript{53} 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.”\textsuperscript{54} Later, when Congress limited the amount of the maximum deduction for charitable contributions to 50% of adjusted gross income, it nonetheless allowed a carryover for contributions made to churches, educational organizations, health care organizations, and private foundations.\textsuperscript{55}

Similarly, the Service has occasionally drawn distinctions among charitable purposes, usually in the wake of a disaster. For example, after

\footnotesize
\begin{itemize}
\item \textsuperscript{53} Id.
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the terrorist attacks on September 11, 2001, the Service agreed to treat payments made to victims or their families as being “related to the charity’s exempt purpose.”

Similarly, after Hurricane Katrina in 2005, the deduction limitation for charitable contributions was temporarily lifted, presumably to encourage giving to victims of the disaster, and an additional tax exemption was given to individuals and organizations who housed those who had been displaced. Additionally, the mileage rate for charitable use of a vehicle was increased, and, in the alternative, taxpayers were allowed to exclude from their income reimbursement for charitable use of a vehicle used in hurricane relief. Other measures included providing tax relief to those who either donated books to public schools or who donated food inventory. After Hurricanes Rita and Wilma, Congress instituted the GO Zone Act, which provided even broader tax incentives to those who contributed to hurricane relief efforts.

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58 Id.


60 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 (2007). Such targeted measures have not been limited to domestic
These efforts to encourage charitable giving in the wake of national emergencies, while clearly done with the best of intentions, have nonetheless created some significant problems. For example, Patrick Tolan describes difficulties in coordination between the government and charitable organizations, and among the charitable organizations themselves. Furthermore, so long as such measures take the form of increased deductions, they are subject to the same criticisms that are often leveled at the deduction system as a whole, namely that they favor the rich over the poor.

Professor Tolan further notes that contributions are not always spent immediately, despite the fact that the tax measures are often intended to stimulate the local economy. Implementing similar measures in response to an economic “disaster” presents similar concerns, since one of the main

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61 Tolan, supra note 56, at 799 (2007). Professor Tolan also notes that, with respect to geographically specific opportunity zones that are often created after natural disasters, “strong incentives without adequate controls could be counterproductive, harming those the legislation was intended to benefit.” Patrick Tolan, Questioning Tax Expenditures for Economic Recovery, 127 TAX NOTES 67, 69 (2010).

62 Ellen P. Aprill & Richard L. Schmalbeck, Post-Disaster Tax Legislation: A Series of Unfortunate Events, 56 Duke L. J. 51, 88-89 (2006). See also Tolan, supra note 56, at 799 (noting that only extremely wealthy taxpayers benefit from the removal of the cap on deductions and that only taxpayers who itemize their deductions benefit from such tax relief measures).

63 Tolan, supra note 56, at 799 (noting as well that only taxpayers who itemize their deductions benefit from such tax relief measures).
goals of fiscal policy during a recession is to stimulate spending. Yet another problem with the tax provisions implemented after Hurricanes Katrina, Rita, and Wilma was that they created artificial distinctions based on which specific disaster was involved. As Professor Tolan notes, “it is nonsensical that mileage allowances are higher for volunteers who engaged in Hurricane Katrina relief efforts than those who responded to Hurricanes Rita or Wilma, or to any other disaster for that matter.” He further argues that direct payments to individuals affected by the disaster may have been counterproductive with respect to the local economy because they “may have served as a disincentive to laborers, whom local businesses could have put to productive use.” Another concern that may arise from targeting particular non-profit organizations for tax relief is whether organizations will be equipped to handle the resulting increase in contributions.

64 Listokin, supra note 12, at 13.

65 Tolan, supra note 56, at 799 (noting as well that only taxpayers who itemize their deductions benefit from such tax relief measures). Professor Tolan cites similar problems with respect to federally designated enterprise zones, since “similar taxpayers should be treated similarly, yet in these zones there is an indisputable advantage to taxpayers who can enjoy the many tax incentives.” Tolan, supra note 61, at 78.

66 Id. (noting as well that only taxpayers who itemize their deductions benefit from such tax relief measures).

67 See, e.g., Robert A. Katz, A Pig in a Python: How the Charitable Response to September 11 Overwhelmed the Law of Disaster Relief, 36 Ind. L. Rev. 251, 331 (2003) (noting that “[t]he outpouring of charitable contributions following 9/11 not only strained the logistical abilities of many charitable organizations, it also overwhelmed key parts of the legal regime that governs them”). Such problems may be exacerbated when the goals of the charity and involve particularly sympathetic and media-genic individuals. Gergen, supra note 25, at 1409 (noting the case of Jessica McClure, the girl rescued from a well in Texas). With few exceptions, such intense media focus on a few individual victims is less
Other attempts to distinguish between charitable organizations have focused more specifically on poverty relief, including a proposal made in 1995 by Representatives Joseph Knollenberg of Michigan and James T. Kolbe of Arizona that would have provided a credit to taxpayers who donate to organizations that provide services to individuals whose incomes are near poverty levels. Such proposals have been criticized by, among others, Professor Bullock (who ultimately supports such measures). She describes the administrative problems associated with determining how such organizations are actually using their funds and argues that “many national charities that fight poverty do not limit their services to just the needy and thus may not qualify as donees for the credit.” She further notes that such distinctions “may create a deeper divide between the poor and the rest of the community.” Lawrence B. Lindsey further criticizes the proposals, arguing that such measures “would lead to a multitude of other special interests lobbying Congress to enact provisions favorable to their causes as well.”

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68 House Bill 2225. A similar proposal was made separately by Representative Kolbe in 2001.


70 Id.

71 Lindsey, supra note 52, at 1089.
Professor Gergen, on the other hand, argues that “it is ludicrous that sports museums, jazz festivals, and singing groups are treated as charities.” Because 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 altogether from the realm of tax-exempt organizations, which he argues should be limited to what he calls “social welfare” organizations. Similarly, Halstead and Lind propose allowing a higher deduction for contributions to organizations, like the Salvation Army and soup kitchens, “which 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, which only indirectly serve the public interest.

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. In his words, “[i]t is nonsensical that, for

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72 Gergen, supra note 25, at 1450.
73 Id.
74 Simon, Dale & Chisolm, from Non-Profit handbook 277
75 Charles A. Borek, Decoupling Tax Exemption for Charitable Organizations, 31 WM. MITCHELL L. REV. 183, 219-20 (2004). Other scholars have focused on the distinction between religious and secular organizations. For example, Hochman and Rodgers argue that giving to religious organization should be favored because such organizations do not benefit from direct governmental support. On the other hand, Schaefer argues that religious giving should be treated less favorably because religious
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.”

Narrowing the definition of charitable in this manner would allow 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.”

According to Borek, focusing on organizations aimed at serving the needy may be warranted in light of the fact that “[c]haritable giving to organizations benefiting the neediest sector of the population is relatively modest.”

Professor Simon counters that 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 organizations often use funds to maintain their own internal structures and support activities aimed at their members.

Id. 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.

Id.

Id. Lindsey, supra note 52, at 1086. (finding that only three of the top twenty-five recipients of charitable contributions in 1999 were dedicated to poverty relief).
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 issues relating to the primacy of redistributional norms in American law.\textsuperscript{79}

Professor Clotfelter points out that, to some extent, 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.\textsuperscript{80} Consequently, the charitable organizations supported by high-income taxpayers—including higher education and cultural institutions—are in essence “favored” by the current tax system over those charitable organizations favored by low-income taxpayers—primarily religious organizations.\textsuperscript{81} Clotfelter notes that such favoritism may be justified if the former have a greater external benefit to those outside the organization, although he admits that there is currently no conclusive answer to that question.\textsuperscript{82}

The public, at least, seems to have some strong ideas regarding which

\textsuperscript{79} Simon, Dale & Chisolm, from Non-Profit handbook
\textsuperscript{80} See Section I.B, supra.
\textsuperscript{81} Clotfelter, supra note 5, at 18.
\textsuperscript{82} Id.
organizations deserve the most support during economic downturns, as demonstrated by the fact that their giving to some organizations, such as those directed at serving the poor, increases, while their giving to other organizations, such as those focused on the arts, decreases during those times. A survey conducted by *Parade* magazine seems to bear this out, finding that respondents, when given a hypothetical amount of money, allocated the greatest amount to food and shelter for the needy and to research on curing disease and allocated the least amount of money to promoting world democracy and to the visual and/or performing arts.\textsuperscript{83} Corporate donors may also shift their charitable donations in response to an economic downturn, with some refocusing their donations “towards the provision of urgent needs, such as homelessness, hunger, and job development initiatives, and away from arts and culture.”\textsuperscript{84} This “focus on vital needs” is similar to what occurred during the Great Depression, according to Patrick M. Rooney of the Center on Philanthropy.\textsuperscript{85} Perhaps in response to these trends, Professors Colombo and Hall have argued that


\textsuperscript{85} Annual Report, *supra* note 2, at 27.
only organizations that receive a substantial level of support from the general public merit subsidization.\(^8^6\)

Further 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.”\(^8^7\) In other words, those charities that many people consider the “worthiest” during an economic crisis are the least likely to receive much benefit from additional tax relief.\(^8^8\) Additionally, the administrative costs related to distinguishing among charitable organizations (and enforcing those distinctions) should be taken into consideration, since those costs may be greater than any benefit that would be derived from such distinctions.\(^8^9\)

\(^{86}\) Hall & Colombo, supra note 34, at 1385.


\(^{88}\) Professor Clotfelter also found differences in elasticity to 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 5, at 12. Although Professor 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.

\(^{89}\) Clotfelter, supra note 5, at 12.
One of the strongest arguments against favoring certain non-profit 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. This criticism has been leveled against the measures implemented after various disasters; for example, Danshera Cords argues that “[d]onations directed to benefit the victims of a mega disaster may leave less aid available to victims of less well publicized and smaller disasters.”\

Similarly, aiming tax relief at certain types of organizations, such as those dedicated to poverty relief, may lead to drastically fewer donations for other organizations that, while less appealing to those donors who want to feel like they are helping those in need, are nonetheless both worthy of and in need of donations. For example, arts and culture organizations tend to be particularly hard hit during economic downturns and generally face additional hurdles in raising donations.

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91 Giving USA 2010: Giving by Corporations, The Center on Philanthropy at Indiana University, at 3, available at http://www.givingusa2010.org (citing Bloomberg News, Berman Says Corporate Giving May Fall 5%-10% in 2009, December 23, 2009, available at http://www.clipsyndicate.com/video/playlist/10834/1226135; S. Hoye, Painting a Grim Picture, The Chronicle of Philanthropy, January 15, 2009). Nonetheless, Professor Tolan finds little evidence of “donor fatigue,” i.e., of donors shortchanging other charitable causes in order to focus on disaster relief, since contributions aimed specifically at disaster relief made up only three percent of all contributions even after special measures were implemented. Tolan, supra note 56, at 799 (noting as well that only taxpayers who itemize their deductions benefit from such tax relief measures). See also Stephanie Strom, Many Dismissing ‘Donor Fatigue’ as Myth, N.Y. Times, April 30, 2006, at A22 (noting that over
According to Professors Colombo and Hall, the charitable deduction is necessary to compensate for the failures of not only the private markets (due to free riding) but also the public sector (due to a lack of information about donor preferences). The question then becomes whether this dual failure strikes some organizations harder than others during an economic downturn. As noted in the previous paragraph, free riding may impact some organizations more than others in a recession. At the same time, if only those donors who continue to have funds available to donate during a recession will have their preferences heard, then perhaps we should focus on maintaining aid to all organizations.

As Professors Hall and Colombo note in their discussion of which charitable organizations in general are worthy of tax exemption, “[i]n 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 oversubsidization (or undersubsidizing) those activities that are deserving.”

Because donors may already allocate money to those charities that seem most relevant to an

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three-fourths of charitable organizations raised as much or more in 2005, the year of Hurricane Katrina, than they had in the previous year. Strom notes that “[m]ore and more leaders of nonprofit groups are dismissing donor fatigue as a myth” that is unsupported by any evidence. Id. For example, Delane Butler of the United Way suggests that disasters like Katrina can lead to increased donations to other, unrelated organizations by raising awareness of philanthropy in general. Id.

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.

III. PROPOSALS

Some scholars, like Professor Listokin, have proposed measures like increasing the payout requirement for private foundations during economic downturns. While such a measure would provide at least some additional assistance to charities during a time of need, it suffers from the fact that it would require private foundations to deplete their funds at a time when those portfolios are likely to be at their lowest values. A better approach would be to stimulate giving across the board through measures that have the potential to reach all taxpayers.93 This section explores some of those

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93 One of the first issues 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 Professor Listokin in his proposals to stimulate the American economy. Listokin, supra note 12, at 13. Alternatively, such measures could be implemented whenever the gross domestic product falls for more than two consecutive quarters, consistent with the conventionally accepted definition of a recession. Subsidy theory and donative theory both argue in part that a deduction for charitable contributions is necessary to alleviate the problem of free-riding with respect to certain communal goods and services. Arguably, free-riding becomes a greater problem during a recession, because many people who would have been donors during flush times switch over to become free riders during a recession, in part because many donors lose their jobs and hence their sources of income. If the goal of the charitable deduction is to address this particular issue, then perhaps special measures are most justified when unemployment numbers dip below a certain rate, since this would presumably be correlated with many former donors becoming
measures, focusing first on individual donors and then turning to organizational actors.

A. Individual Donors

Arguably, proposals aimed at individual donors may have the greatest impact on charitable giving, since individuals gave over $227.41 billion in 2009, representing about 75% of all contributions.\(^\text{94}\) While some measures aimed at individuals, like lifting the cap on the current deduction for contributions, allowing volunteers to deduct the value of volunteering, and increasing the rate of the deduction, may have some impact on levels of charitable giving, I argue that the more effective way to stimulate giving by individual donors is to convert the current deduction to a tax credit that is available to all donors.\(^\text{95}\)

\(^{94}\) Annual Report, supra note 2, at 11.

\(^{95}\) Some measures, while initially promising, are clearly non-starters. For example, in 2001, Congress proposed allowing individuals over age fifty-five to make penalty-free withdrawals from their retirement accounts in order to make charitable contributions. Annual Report, supra note 2, at 11. 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. Id. Corporate stock donations accounted for almost half of these contributions, followed by donations of clothing and land. Pearson Liddell & Janette Wilson, INDIVIDUAL NONCASH CONTRIBUTIONS, 2007 (2010). While adjustments to the treatment of non-cash
1. Lift Cap on Charitable Deduction

One administratively simple way to possibly stimulate charitable giving would be to raise the cap on deductibility for charitable contributions, currently set at 50 percent. One proponent of lifting the cap, Boris 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.”

While lifting the cap on deductions may seem to be a fairly straightforward way to increase donations, particularly during an economic downturn, the measure does have its critics. Professor 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.” As he notes, “[t]hose likely to benefit the most would have to have sufficient wealth to

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96 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.
97 Id. at 62.
98 Tolan, supra note 56, at 799.
be able to subsist on less than fifty percent of their AGI.”

Professor 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.” Given this system, “[l]imiting 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 project.” Lifting the cap, then, could potentially disrupt this delicate balance.

Of course, some may argue that the problems associated with lifting the cap are outweighed by the benefits that arise when we focus on those taxpayers with the deepest pockets. After all, while the average individual taxpayer who claimed a charitable contribution gave less than $5000 on average in 2007, households with more than $100,000 annual income gave an average of almost $9000, while households with more than $200,000 annual income gave an average of over $22,000, over four times the average

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99 Id.
100 Fleischer, supra note 32, at 229.
101 Id.
amount across all taxpayers.\textsuperscript{102} Moreover, targeting high-income donors 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 goods.”\textsuperscript{103} In other words, donations by wealthy individuals essentially act as a form of voluntary redistribution that places the burdens of giving on those who are best able to bear them.\textsuperscript{104}

Some may argue that focusing on the wealthy is unfair because they will then disproportionately receive the benefits of the subsidy, i.e., the pleasure of making a donation.\textsuperscript{105} 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.\textsuperscript{106} Others, such as David A. Good and Aaron Wildavsky, argue that any measure that benefits wealthy donors more erodes legitimacy in the tax system; they argue that, “[b]y allowing some individuals to substantially decrease their tax bills by means of charitable contributions, public confidence in the


\textsuperscript{104} Id.

\textsuperscript{105} Id.

\textsuperscript{106} Id.
fairness of the tax system is diminished.” Furthermore, if free riding results from donors at lower-income levels dropping out of the donor pool, then we should focus on getting those donors back in, in part to ensure that their voices continue to be heard and their choices properly addressed.

The strongest argument against lifting the cap is that it may not have much effect and would be nothing more than a faux panacea 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,

[t]he most widely-touted tax incentive [of the Economic Recovery Tax Act of 1981] was the increase in the ceiling limitation on the 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.  

107 Good & Wildavsky, supra note 43, at 2400.

Among all individuals who claimed a charitable contribution on their tax return, the average contribution was only $4708 in 2007, far below 50% of adjusted gross income for most taxpayers.\textsuperscript{109} Even taxpayers with incomes greater than $200,000 contributed an average of only $22,418 in 2007, which is less than even the 20% threshold set for donations to some organizations.\textsuperscript{110} Therefore, while lifting the current 50% cap may be a relatively costless measure with little downside, the upside to such a measure appears to be negligible.

Lifting the cap on the charitable deduction is consistent with subsidy theory, since it would simply allow taxpayers to maximize the extent to which they can express their preferences for particular charities, although it does raise some concerns as well, since the benefits of lifting the cap would accrue primarily to the wealthiest taxpayers. Of course, it seems unlikely that even the wealthiest taxpayers feel that their ability to make charitable contributions is hampered by the current cap. Lifting the cap during economic downturns would be a fairly easy step to take, and indeed it seems foolish to limit contributions to charities during a time when they


\textsuperscript{110} Id. Currently, the Obama administration has proposed reducing the rate at which individual donors may deduct their charitable contributions from 35 percent to 28 percent; such a proposal is estimated to decrease charitable giving by more than $7 billion a year. Giving USA 2010: Giving by Individuals, The Center on Philanthropy at Indiana University, at 5, available at http://www.givingusa2010.org (citing Martin Feldstein, A Deduction from Charity, WASHINGTON POST, March 25, 2009).
need donations the most. Nonetheless, this measure is likely to have a negligible effect on charitable contributions, so we should continue to consider other options as well.

2. Allow Donors to Deduct Volunteer Services

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.\(^{111}\) 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.\(^{112}\) 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.\(^{113}\)

The number of Americans who formally volunteered with charitable organizations rose by about 1 million in 2008 over the previous year, to

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\(^{111}\) Treas. Reg. § 1.170A-1(g) (2010).

\(^{112}\) Clotfelter, supra note 5, at 12 (citing Long).

\(^{113}\) Id.
61.8 million, or about 26.4 percent of the adult population. These volunteers contributed about 8 billion hours of service, which had an estimated value of $162 billion. These numbers represent an increase of almost half a million volunteers over the previous year, and non-profit organizations forecast increasing numbers of volunteers in the coming years. In comparison to charitable donations, which declined between 2007 and 2008, the rate of volunteering actually increased slightly, from 26.2 percent to 26.4 percent. The most obvious explanation for this increase is that the rise in unemployment has led many people who were previously working in paying jobs to switch to volunteering. Ideally, such commitment and contributions will continue even after the economy recovers and volunteers transition back into the workforce.

Some scholars have suggested encouraging volunteering even further through tax incentives. For example, Alice M. Thomas proposes “a


\[\text{\begin{footnotesize}115\footnotesize\hspace{1em}}\text{Office of Research & Pol'y, Corporation for Nat'l & Cmty Serv., Volunteering in America Research Highlights, available at http://www.volunteeringinamerica.gov/assets/resources/VolunteeringInAmericaResearchHighlights (2009) [hereinafter Volunteering in America].}\]

\[\text{\begin{footnotesize}116\footnotesize\hspace{1em}}\text{Id.}\]

\[\text{\begin{footnotesize}117\footnotesize\hspace{1em}}\text{Id.}\]

\[\text{\begin{footnotesize}118\footnotesize\hspace{1em}}\text{Id.}\]
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.”

She supports the deduction as part of a “profoundly American” tradition and argues that “[a] civil society requires its citizens to engage and connect with one another.” Additionally, she notes that people who volunteer tend to be “happier, have positive self-esteem, and are less depressed and less anxious.”

Finally, Professor 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.

The effect of such measures 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.” If the former is true, then tax incentives for volunteering are likely to have little effect, since volunteers are making


120 Id. at 303. For example, she 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.

121 Id.

122 Id. at 320-21.

123 Clotfelter, supra note 5, at 21.
their decisions wholly independently from tax considerations. However, if the latter is true, 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.124

One potential 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 notes that “[v]olunteers were much more likely than non-volunteers to donate to a charitable cause in 2008, with 78.2 percent contributing $25

124 Id. (finding that, among women, “contributions and volunteering are complements, implying that the charitable deduction encourages volunteering as well as donations”).
or more compared to 38.5 percent of non-volunteers.\textsuperscript{125} 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 from their desire to aid an organization once they become personally involved in its success.

While encouraging individuals to volunteer at charitable organizations seems to be a relatively costless way to benefit these organizations, some may 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. Some proponents of the charitable deduction for monetary contributions argue 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 non-profit organizations.\textsuperscript{126} The deduction is justified under this view because it “equalizes both the relative incentive to contribute services, cash or property and the tax treatment of taxpayers who similarly surrender

\begin{footnotesize}
\begin{itemize}
\item[\textsuperscript{125}] Volunteering in America, supra note 115.
\item[\textsuperscript{126}] McNulty, supra note 40, at 241 (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).
\end{itemize}
\end{footnotesize}
economic resources only in different forms.” 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.

However, donations of money and time may not be as equivalent as they initially seem. Professor 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. Similarly, Professor 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.

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.” An organization must expend valuable

\begin{itemize}
\item[Gergen, supra note 25, at 1420. \textit{See also} Rachel M. Zahorsky, \textit{Pro Bono: Help Goes Corporate: In-House, Outside Firms Link for Pro Bono Work}, 96 A.B.A.J. 35 (2010) (“some nonprofits may not have the resources, or even the physical space, to use volunteers effectively”).]
\item[Clotfelter, supra note 42, at 677.]
\item[Jerald Schiff, \textit{CHARITABLE GIVING AND GOVERNMENT POLICY} 59-60 (1990).]
\end{itemize}
resources to solicit, train, and supervise volunteers, resources that may be put to more effective use elsewhere.\textsuperscript{132} As a result, “[o]rganizations may, and often do, turn down volunteer labor, since it is unpaid, but not free.”\textsuperscript{133}

Moreover, individuals’ motivations for volunteering appear to differ from their motivations for donating money and goods; Schiff notes that “donors view contributions of money, rather than time, as the preferred means for increasing charitable output, while volunteering may be seen as a means for obtaining influence or information.”\textsuperscript{134} He also observes that an individual’s level of volunteering is affected by factors, like the presence of children, which may have different effects on the level of monetary contributions.\textsuperscript{135} Finally, he finds that female volunteers are more likely than male volunteers to perform clerical or manual tasks, while male volunteers are more likely to serve in leadership roles.\textsuperscript{136} Such a finding is problematic if, as Schiff argues, volunteering in leadership roles has a

\begin{quote}
example, Jean Baldwin Grossman & 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.” \textit{Making the Most of Volunteers}, 62 \textit{Law \& Contemp. Probl.}, 199, 217 (1999). They further note that mentoring programs, for example, cost about $300 per year per volunteer. \textit{Id.}
\end{quote}

\textsuperscript{132} Schiff, \textit{supra} note 131, at 60.

\textsuperscript{133} \textit{Id.}

\textsuperscript{134} \textit{Id.} at 96.

\textsuperscript{135} \textit{Id.}

\textsuperscript{136} \textit{Id.} at 102. Schiff does not provide an explanation for this phenomenon, although he suggests it may be due to either women’s inability to capitalize on their previously acquired skills when volunteering or discrimination within the charitable sector. \textit{Id.}
positive impact on an individual’s future wages, both because it develops skills and contacts and because it serves as a “signal to future employers.”

Allowing donors to deduct volunteer time does not necessarily advance the goals of the charitable deduction as expressed by the donative theory. To the extent that the deduction serves as a medium through which donors express their preferences for particular charitable organizations, allowing donors to deduct their volunteer time may complicate that relationship, depending on how the charities value volunteer time. If, from the charity’s perspective, an hour of volunteer time is in fact worth what the volunteer claims on his or her tax return, then the deduction simply serves as an equalizer that ensures that all “votes” to a charity are counted, whether taken in the form of time or money. However, as noted above, donated time may actually cost the charity, in which case it is not receiving the full value of the volunteer’s vote. Another potentially complicating issue is the fact that people, when forced through circumstances such as job loss to donate time rather than money, may choose to volunteer at places that differ from those to which they would contribute money, due to factors such as their particular skill sets, their physical proximity to volunteer locations, and the availability of volunteer opportunities.

137 Id.
Unlike the relatively straightforward process of lifting the cap on charitable deductions described above, allowing taxpayers to deduct time spent volunteering, even if such a deduction were only instituted temporarily during a recession, would involve major changes to the Code and to the way we conceive of the charitable deduction. Moreover, while unemployed taxpayers may appreciate the opportunity to deduct their volunteer time, they almost certainly would prefer to keep their jobs in the first place. As a result, measures that increase job retention, like the one discussed below, are generally a better alternative than measures that only help unemployed taxpayers after the fact. For this reason, and for the other reasons described above, allowing taxpayers to deduct time spent volunteering for charitable organizations does not seem to be a viable means of assisting such organizations, even during times of recession.

138 One alternative to allowing a deduction for individual volunteer service would be to pay individuals a salary who donate their time to non-profit organizations 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 108, 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.
3. 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 could be deducted.\textsuperscript{139} 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.\textsuperscript{140} Professor 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.\textsuperscript{141}

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, “[e]ach 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.”\textsuperscript{142} However, the amount of the match would be based on the percentage of the donor’s income represented by the grant, the argument for this being that

\textsuperscript{139} Listokin, \textit{supra} note 12, at 13.

\textsuperscript{140} \textit{Id.}

\textsuperscript{141} Listokin, \textit{supra} note 12, at 13.

\textsuperscript{142} McDaniel, \textit{supra} note 42, at 378.
if 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.\textsuperscript{143}

Professor 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.”\textsuperscript{144}

While the data is unclear, 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). Certainly, 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

\textsuperscript{143} Id. at 394.

in the rate of deduction appears to have its benefits, such an increase, without more, is unlikely to have a large impact on levels of charitable giving.

4. Switch from Deduction to Credit

Several scholars have proposed not just increasing the rate of deduction but changing the deduction to a credit. In essence, a full tax credit for the amount of a contribution is the equivalent of a 100% tax deduction. Such a measure may be particularly appealing during a time of economic crisis, for reasons that will be discussed further below. 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.\footnote{145} Moreover, at least some studies have shown that donors are more responsive to a credit than they are to a deduction or matching donation.\footnote{146}

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

\footnote{145}{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.}

\footnote{146}{Kimberley A. Scharf & Sarah Smith, \textit{Rational Inattention to Subsidies for Charitable Contributions}, CEPR Discussion Paper No. DP7760 (2010).}
However, he notes that such a system runs the risk of organizations competing too vigorously for a donor’s funds, “greatly reduc[ing] the likelihood of either extracting information about respondents’ true preferences or encouraging individual involvement in (or monitoring of) charitable works.”

Viewing donors as “voters” and contributions as “votes,” he argues that “voters might take their votes more seriously when required to pay for them.”

One of the most appealing features of a tax credit for charitable contributions would be that a credit could be made available to all taxpayers. Currently, only taxpayers who itemize their deductions may take advantage of the deduction for charitable contributions; 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. Since that time, various scholars have advocated extending the deduction to non-itemizers again.

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147 Levmore, supra note 40 at 416.
148 Id. at 410-11.
149 Id. at 411.
150 Lindsey, supra note 4, at 1068.
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 lower-income taxpayers for contributions they may have been inclined to make anyway. 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.\footnote{152} In 1975, the Filer Commission proposed that taxpayers taking the standard deduction should also be allowed to deduct their charitable contributions, with low-income families being able to deduct as much as twice the amount of their contributions.\footnote{153} Others have proposed allowing an above-the-line 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.”\footnote{154}

Many scholars have observed that the deduction in its current form provides no incentive to give for the numerous taxpayers who fail to itemize


\footnote{153} GIVING IN AMERICA, supra note 15, at 20-21.

their deductions or who file nontaxable returns.155 Because the vast majority of taxpayers who claim charitable deductions do so in amounts constituting less than the standard deduction, “for [these] 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, etc.”156 As a result, “the deduction appears to provide the greatest financial incentive to those who have the least financial need for one.”157

A related argument, raised by Charles T. Clotfelter, among others, is that even among those who itemize their deductions and therefore can take advantage of the tax incentive, the amount of benefit they receive depends on their marginal tax rate, which is greater for high-income individuals.158 In the words of Musgrave and Musgrave, “[a] philosopher-economist might observe that the opportunity cost of virtue falls as one moves up the income

155 McDaniel, supra note 42, at 382. See also Levmore, supra note 40, 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”).


157 McDaniel, supra note 42, at 383. See also Surrey, supra note 42, at 719-20 (deductions “are worth more to the high income taxpayer than the low income taxpayer” and “do not benefit those who are outside the tax system because their incomes are low, they have losses, or they are exempt from tax”).

158 Clotfelter, supra note 42, at 672.
Because of the progressivity of marginal tax rates, those taxpayers in the highest tax brackets incur the lowest price per dollar for their charitable contributions, leading to an inefficient allocation of resources.\textsuperscript{160}

Despite its supporters, Congress nonetheless eliminated the provision 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.\textsuperscript{161} Congress further noted that “[w]hile the proposal to repeal the nonitemizer deduction may have some adverse effect on the amount of charitable giving, we believe that contributions by nonitemizers, who generally have relatively low marginal rates, are not affected significantly by tax considerations.”\textsuperscript{162}

A tax credit that can be utilized by all taxpayers is likely to increase contributions to organizations favored by lower-income taxpayers, like religious organizations, while reducing contributions to organizations favored by the wealthy, like educational institutions, hospitals and arts

\textsuperscript{159} Id.
\textsuperscript{160} Id.
\textsuperscript{162} Id.
organizations. 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. For example, in one study, Martin Feldstein estimated that replacing the charitable contribution deduction with a thirty percent tax credit would increase total giving by fifteen percent but would reduce contributions to schools and hospitals by about twenty percent. In a subsequent study, Professor Feldstein and Amy Taylor found that a twenty-five percent tax credit would leave total giving relatively unchanged, but would increase giving to religious organizations by almost ten percent while reducing giving to educational institutions by twenty four percent.

In order to determine the extent to which a tax credit will affect the nature of charitable giving, we must first determine the impact a credit will have on those taxpayers who will be most affected by its implementation, namely those low-income taxpayers who previously had no tax incentive to

163 Good & Wildavsky, supra note 43, at 2400. See also Daniel Halperin, A Charitable Contribution of Appreciated Property and the Realization of Built-in Gains, 56 Tax L. Rev. 1, 9 (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”).


165 Id.

contribute.\textsuperscript{167} While earlier studies found that marginal tax rates for taxpayers in the lowest income brackets were too low to have any major effect on charitable giving, subsequent studies found a relationship between tax rates and giving at all income levels.\textsuperscript{168} As Professor Clotfelter notes, “[s]ince donors at various income levels differ markedly in their propensities to make gifts to various kinds of charitable organizations, tax changes that affect the distribution of giving among income classes will tend to affect the distribution of support to various parts of the philanthropic sector.”\textsuperscript{169}

Some scholars have expressed concerns about converting the current tax deduction for charitable contributions to a credit. For example, Professor 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

\textsuperscript{167} Clotfelter, \textit{supra} note 5, at 12.

\textsuperscript{168} Id. (finding “no firm conclusion regarding the important issue of variation in the price elasticity by income level”) (citing Aaron, Taussig, Schwartz)

\textsuperscript{169} Id. Not only do high-income households tend to give more than middle- or low-income households, but they also have a greater variation in how much they give to charitable organizations. Gerald Auten & Gabriel Rudney, \textit{The Variability of the Charitable Giving by the Wealthy}, in \textit{PHILANTHROPIC GIVING: STUDIES IN VARIETIES AND GOALS} 72, 74 (Richard Magat ed., 1989). This variation takes two forms: on one hand, the level of giving can vary widely among high-income donors, with “a small proportion of high-income givers who are exceptionally generous [accounting] for a large proportion of high-income individuals who give less than 1 percent of income.” At the same time, the level of giving also can vary for the same donor across the years, suggesting that donors tend to “even out” their giving over the course of time, perhaps in response to changes in the tax treatment of their contributions. \textit{Id.} at 88.
cannot definitively be viewed as less efficient than a credit nor more inappropriate as an incentive or subsidy.” 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.  

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The need to reach all donors, including those taking the standard deduction, is clear under the subsidy theory, which depends on all taxpayers being allowed to express their preferences among different non-profit organizations. Although attempts to permanently institute a credit for charitable contributions have met with resistance, it may be easier to implement a credit temporarily during economic downturns. A temporary credit would give voice to those taxpayers who may feel the most neglected during a recession, namely those whose incomes are too low to take advantage of the current itemized deduction for charitable contributions.

5. Conclusion

Because individuals serve as the greatest source of funding for charitable organizations, it is almost impossible to discuss aid to the non-profit sector without looking at how their charitable contributions are taxed. The best way to stimulate giving among these individual donors is by converting the current deduction into a credit that is available to all taxpayers. However, focusing solely on the role that individuals play in the non-profit sector neglects the important contributions that organizations can also play in this field, so the next section looks at how organizational actors can aid the charitable sector during an economic downturn.
B. Organizational Donors

Corporations also present a lucrative source of contributions to nonprofits, giving a total of $14.10 billion in 2009, including $4.42 billion from corporate foundations.172 As a result, we should consider ways to stimulate charitable giving by corporations, which can be done largely through the measures already discussed above. However, corporations can serve not only as a potential source of funding for charitable organizations but can also help those organizations in other ways, most notably by providing free or cheap labor through its underutilized workforce. Providing corporations a tax incentive for seconding their labor force to the charitable sector may not only help those organizations but may also reduce unemployment, which tends to rise during a recession. This section describes the various ways the Code can incentivize organizations to assist charitable entities, either through direct monetary donations or through promoting volunteering among their employees.

172 Annual Report, supra note 2, at 11. While this amount represents only 4% of total contributions, corporate contributions, unlike individual contributions, actually rose in 2009 by 5.5% (5.9% adjusted for inflation). Id. at 8. Much of this increase can be attributed to increased non-cash contributions from pharmaceutical companies, as well as to expansion in the financial and healthcare industries. Id. at 3. In fact, the majority of corporations actually reduced their charitable giving in 2009. Id.
1. Provide Corporations with Tax Credit for Contributions

Many of the proposed changes to the tax deduction listed above, including implementation of a tax credit in lieu of the current deduction, could apply to corporate as well as individual donors. In fact, such measures could have an even greater impact at the corporate than at the individual level, since “[t]he tax law has long contained a bias in favor of charitable giving by corporations compared to distributions by corporations followed by charitable giving by individual shareholders.” Because corporate income is taxed both when it is earned by the corporation and when it is distributed to the shareholder, a charitable contribution made by the corporation avoids an additional layer of taxation, thereby encouraging the corporation to distribute those funds directly to the charity rather than distributing them to shareholders to be contributed later.

Corporate donations do appear to be at least somewhat responsive to the price of giving, which suggests that levels of corporate giving could be easily manipulated by changes to the current charitable deduction.

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173 Many of these proposals were considered, and rejected, by the Filer Commission, which found “that none of the tax alternatives... was both clearly effective enough and sufficiently in tune with the spirit and philosophy of philanthropy, so as to merit the commission’s endorsement.” GIVING IN AMERICA, supra note 15, at 54.


175 Id.

176 Clotfelter, supra note 5, at 12.
Professors Porter and Kramer note that corporations are better positioned than individuals (or even foundations) to monitor how non-profit organizations utilize their contributions and tap into those organizations’ capabilities particularly when there is a connection between the activity of the organization and the for-profit corporation. Corporations can also take advantage of their higher profile to publicize effective non-profit organizations, “attracting greater funding and thus creating a more effective allocation of overall philanthropic spending.” Finally, corporations can work in conjunction with non-profit organizations to make them more effective, particularly when they can use their knowledge and skills, clout and connections, and presence within the community to help non-profit organizations address social problems. We should at least consider, then, how corporate philanthropy can be encouraged during an economic downturn.

Some scholars, such as Professor Clotfelter, extol the virtues of corporate giving, noting that “[b]ecause of corporations’ visibility in political and economic activities, corporate gifts are viewed as a barometer of business sentiment and, to some extent, as a model for individual

177 Porter & Kramer, supra note 190, at 63.
178 Id. at 64.
179 Id. at 65-66.
Similarly, Professors Henderson and Malani argue that corporations may actually be better than nonprofit organizations and the government at delivering philanthropy because “their ordinary profitmaking activities sometimes give corporations an edge at helping the less fortunate.” They also argue that corporations, “[b]y aggregating a number of different shareholders’ and consumers’ donations, [] have greater leverage over charity managers” and can “use their greater size to more efficiently produce network effects in warm glow.” According to them, increasing philanthropy by corporations is the natural result of demand by investors, employees, and customers for more charitable activity.

Linda Sugin, on the other hand, argues that the charitable deduction for corporations is problematic because “[t]here was never any compelling reason to subsidize corporate contributions more than contributions made by shareholders out of dividends they have received;” instead, this phenomenon is the accidental result of the dual system of taxation. Seeing no connection between federal policy and the bias towards corporate philanthropy, she argues “there is no reason to have a federal policy in the

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180 Clotfelter, supra note 5, at 12. (noting President Ronald Reagan’s call for increased corporate giving as a way to make up for reductions in federal support of social programs).
181 Henderson and Malani, supra note 151, at 611.
182 Id. at 599-600.
183 Id. at 612.
184 Id.
Code that prefers giving at the corporate level."  

She also notes that “[c]orporate charity overwhelmingly supports projects that are related to either employees, customers, or communities in which the business operates.”

According to Professor Sugin,

there is no reason to believe that corporations are better at prioritizing different charitable purposes, determining appropriate levels of support for diverse needs, or resisting the temptation to support conventional tastes than either the government or individuals. In addition, the concentration of charitable funding from corporations inevitably leads to the exertion of power by those corporations over the charitable institutions, while the individual deduction is more likely to produce small gifts that fail to buy influence. The anthropomorphic conception of the corporation is an inadequate model for the Code because it fails to appreciate

185 Id.

186 Linda Sugin, Encouraging Corporate Charity, 26 VA. TAX REV. 125 (2006) (citing Ian Wilhelm, Company Giving Habits Influence Workers, Consumers, Two Studies Find, THE CHRONICLE OF PHILANTHROPY (2004)). Such cynicism regarding the motivations behind corporate philanthropy is hardly new, for example, Franklin Roosevelt also opposed attempts by corporations to “purchase” goodwill and argued that charitable giving should be left to individual shareholders. Clotfelter, supra note 5, at 12.
the differences between human persons and corporate persons.¹⁸⁷

Ultimately, she argues that “[t]he corporate deduction for charitable gifts was never completely consistent with the theory or doctrine of section 170 and changes in both the tax law’s treatment of dividends and the accepted practices of businesses suggest that the special deduction for charitable giving be replaced by the ordinary business deduction, which broadly governs ordinary and necessary business expenses.”¹⁸⁸

Professor Sugin is not the only critic of corporate philanthropy; Faith Stevelman Kahn opposes the current treatment of corporate charitable contributions, noting that

the absence of substantive regulation under state corporation law, in combination with the absence of a disclosure requirement under the federal securities (or other) regulations—has created the potential for abuse with respect to both shareholders’ property interests and in regard to their interests in avoiding compelled subsidization of entity-level

¹⁸⁷ Sugin, supra note 174, at 856.
¹⁸⁸ Id. at 835.
Michael Porter and Mark Kramer also profess concerns about corporate philanthropy, quoting Milton Friedman’s statement that “[t]he corporation is an instrument of the stockholders who own it. If the corporation makes a contribution, it prevents the individual stockholder from himself deciding how he should dispose of his funds.” With respect to cause-related marketing programs, for example, they express “genuine doubts about whether [such programs] actually work or just breed public cynicism about company motives.” Similarly, with respect to corporate matching programs, they argue that

[t]he majority of corporate contribution programs are diffuse and unfocused. Most consist of numerous small cash donations given to aid local civic causes or provide general operating support to universities and national charities in the hope of generating goodwill among employees, customers,

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191 Id. at 57.
and the local community. ¹⁹²

Unlike Professors Sugin, Kahn, Porter, and Kramer, Professor Knauer sees some advantages to encouraging corporate philanthropy, noting that “[i]t takes fewer resources to secure several large contributions from corporations than smaller gifts from many individuals” and that “the federal government may have more influence over the donative patterns of corporate taxpayers.” ¹⁹³

Most recently, Ilan Benshalom has argued that corporations should be denied charitable relief because “[m]anagers are not political agents of their shareholders; they obtain no better knowledge of what social goods are underprovided and they tend to come from a relatively thin privileged social class.” ¹⁹⁴ He also argues that the deduction may be improperly used to purchase political influence.¹⁹⁵ To avoid these issues, Professor Benshalom proposes analyzing corporate contributions using the same tools as general business expenses.¹⁹⁶ Professors Henderson and Malani seem to agree,

¹⁹² Id.
¹⁹³ Knauer, supra note 108, at 957.
¹⁹⁴ Benshalom, supra note 44, at 1091.
¹⁹⁵ Id.
¹⁹⁶ Id. Conversely, Professor Bittker proposed repealing section 162(b), which prevents corporate taxpayers from deducting disallowed charitable contributions as ordinary and necessary business expenses. Bittker, supra note 144, at 62.
arguing that direct contributions from corporations to non-profit organizations should only be allowed if the corporation can “explain why it should not step out of the way and let shareholders make these donations directly.”

2. Promote Partnerships between Private Businesses and Charitable Organizations

Any attempts to increase the involvement of for-profit corporations in the non-profit sector should acknowledge that corporate philanthropy is increasingly “used as a form of public relations or advertising, promoting a company’s image or brand through cause-related marketing or other high-profile sponsorships.” The motivations behind corporate giving may differ some from those for individuals, since corporations contribute to charities not only for marketing or public relations purposes, but also as part of broader tax strategies and to demonstrate their status among other corporate entities. As noted above, these programs have occasionally been criticized for serving the needs of the corporation rather than the needs

197 Henderson and Malani, supra note 151, at 576.
198 Porter & Kramer, supra note 190, at 57.
of the non-profit organization.\footnote{See, e.g., Porter & Kramer, supra note 190, at 58 (arguing that cause-related marketing leads to public cynicism).} Although corporations tend to reduce their marketing budgets during economic downturns, a tax deduction aimed specifically at cause-related marketing could provide the incentive needed to encourage such programs at a time when they are likely to otherwise be cut.

Similarly, the Code could provide greater incentives to corporations that supply “altruistic” goods, like fair trade coffee or hybrid cars.\footnote{Henderson and Malani, supra note 151, at 590.} These altruistic goods provide an added advantage of being “bundled” with private goods so that consumers who may not have paid separately for the public benefits that derive from the public good are willing to subsidize that benefit via purchase of the bundled private good.\footnote{Id. at 594.} In other words, a consumer who may not directly contribute to help fair trade farmers or environmental groups may nonetheless be willing to pay more for a cup of coffee or a car that indirectly benefits those groups.\footnote{Id. at 596.} Moreover, unlike the government, private corporations can adjust the extent to which they offer these altruistic goods in response to the needs of individual consumers.\footnote{Id. at 596.}

Professors Henderson and Malani argue that “the government should
allow consumers to deduct the charitable component of the green goods they purchase." While this deduction would be taken by individual consumers rather than corporations, the deduction would presumably benefit corporations as well, since consumers would be more likely to purchase these “green” goods, which would provide more profits to the corporation. Henderson and Malani point out that implementation of such a deduction would require coordination with the IRS; moreover, the same constraints on charitable deductions in general would also limit the scope of the benefits associated with a deduction solely for green goods.

While the debate continues over whether corporate contributions should be treated the same as individual contributions under the Code, there does not seem to be any reason to exempt corporations from the proposed tax credit for contributions, especially since including them should increase the level of giving to charitable entities at the time when they need donations the most.

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205 Id. at 609.
206 Id.
207 See supra Section III.B.1.
3. Provide Tax Credit to Businesses that Second their Employees to Non-profit Organizations

While encouraging corporations to donate money and goods to non-profit organizations is certainly desirable, these organizations may actually benefit more if corporations are encouraged to donate services. Donations of services may have added benefits if employers are simultaneously deterred from reducing their payrolls. Unsurprisingly, unemployment increases during periods of recession; for example, more than 1,288,030 layoffs were recorded in 2009, which is the largest year for downsizing since 2002.\(^{208}\)

One of the most severe consequences arising from the current recession has been a drastic increase in unemployment, a trend that occurs whenever the American economy undergoes a downturn. The negative effects of unemployment on a worker extend far beyond the loss in 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 afford to address mental health issues). Moreover, they often have difficulty finding a new job, even

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\(^{208}\) Challenger, Gray & Christmas, Inc., *December Job Cuts drop 34%, 5 The Challenger Index 4* (January, 2011). Moreover, employees who lose their jobs often remain unemployed for six months or longer. *Id.*
after the economy recovers.

On the other side of the equation, employers also 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. 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. 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.

One way the Code could encourage volunteering is by providing additional tax benefits to employers that “second” underutilized employees that would otherwise be downsized to work for non-profit organizations. In other words, the employee would temporarily provide services to a non-profit organization while still retaining his 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 the issues currently faced by the current generation of unemployed youth, who are not receiving the training
they would generally receive during this stage in their lives and therefore face the danger of becoming a “lost generation” without the skills to move up in the workforce as the economy improves.\textsuperscript{209}

Volunteering within the private sector is not necessarily a novel concept; law firms, for example, have encouraged attorneys to provide services on a \textit{pro bono} basis for years.\textsuperscript{210} 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. For example, in February of 2009, the law firm Simpson Thacher & Bartlett offered stipends and health benefits to associates who agreed to leave the firm to work for non-profits for one year.\textsuperscript{211}

One of the problems with seconding is that non-profit organizations face additional costs in training volunteers. Conversely, these organizations may be less inclined to hire paid workers if they feel they can receive those additional costs in training volunteers. Conversely, these organizations may be less inclined to hire paid workers if they feel they can receive those

\begin{footnotesize}
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\item See American Bar Ass’n Model rule 6.1: Voluntary Pro Bono Publico Service (“[a] lawyer should aspire to render at least (50) hours of pro bono publico legal services per year”). New organizations like the Taproot Foundation have attempted to tap into the desire for corporate volunteering by supporting large-scale corporate volunteering programs that emphasize contributions of technical expertise, and individual companies like Capital One and Deloitte encourage skills-based volunteering in their corporate strategies. However, such programs are still in their nascent stage, and many are not as effective as they could be. Giving USA 2010: Giving by Corporations, The Center on Philanthropy at Indiana University, at 8, \textit{available at} http://www.givingusa2010.org (internal citations omitted).
\item Zahorsky, \textit{supra} note 129, at 27.
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services for free. Nonetheless, an additional tax deduction 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.

4. Conclusion

While the concept of corporate philanthropy continues to be problematic, corporations serve as too large a source of aid to be ignored completely during an economic crisis, particularly if the benefits can be used to both help non-profit organizations and retain jobs. In conjunction with the measures discussed above in Part III.A. that would affect both individual and corporate donations, measures aimed specifically at corporations, like enhanced tax deductions for cause-related marketing could enhance donations to non-profit organizations while also improving corporations’ public images (and, ultimately, their bottom lines). Moreover, a tax credit for employers who second their employees could not only aid non-profit organizations that are in need of assistance but also help both employers and employees avoid the negative consequences associated with downsizing.
IV. CRITICISMS

A. Additional Tax Expenditures Will Hurt Economic Growth

Some may argue that government should not be increasing tax expenditures 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. After all, “[t]ax preferences, which are legally known as tax expenditures—result in forgone revenue for the federal government…” In other words, tax expenditures like the charitable deduction are really nothing more than “a replacement cost for the federal spending that otherwise would have been made to attain the same social, economic, or policy goals.” Some, like Professors Tolan and Surrey, argue that, given the inequities, confusion and administrative difficulties surrounding tax expenditures, they should be used only as a last resort.

While we should certainly bear in mind Professors Tolan and Surrey’s

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212 See, e.g., Listokin, supra note 12, at 13 (“All else equal, a government spending program is preferable to a tax expenditure program from a stabilization perspective”).

213 Tolan, supra note 61, at 69 (quoting General Accounting Office, Tax Expenditures Represent a Substantial Federal Commitment and Need to be Reexamined, Doc 2005-19600).

214 Tolan, supra note 61, at 69.

215 Id. (citing Surrey, supra note 42, at 734). Professor Tolan also observes 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. Id. at 70.
concerns about relying too much on tax expenditures to accomplish financial goals, the proposed reforms would probably have a relatively small impact on the federal fisc.\textsuperscript{216} 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.\textsuperscript{217} Moreover, the current provisions related to charitable relief are considerably smaller than other tax expenditures, such as the mortgage deduction and the exemption for health benefits.\textsuperscript{218} 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.

\textbf{B. Charitable Organizations Would Benefit More from Direct Government Intervention}

Others may argue that it would be more practical for the government to provide direct assistance to charities. In other words, the federal

\textsuperscript{216} See supra Section IIIA

\textsuperscript{217} Benshalom, supra note 44, at 1081 n. 125. (citing Office of Mgmt. & Budget, \textit{Analytical Perspectives: Budget of the United States Government Fiscal Year 2008}, 239, 296-99 (2007)).

\textsuperscript{218} Id.
government could attempt to stabilize charitable budgets by providing direct relief during a recession in order to counteract the reduction in charitable contributions from other sources. Such measures would not be unheard of, given that most countries have significantly lower levels of charitable giving than the United States, in part because they have higher levels of direct governmental support of charitable activities.\footnote{Clotfelter, \textit{supra} note 5, at 12 (“direct and indirect governmental support of the private philanthropic sector varies inversely with the involvement of government itself in providing social services”).}

While direct governmental spending may seem appealing at first, such support would increase government involvement in the non-profit sector beyond its already high levels.\footnote{\textit{Giving in America}, \textit{supra} note 15, at 16. (“As a direct supporter of nonprofit organizations and activities, government today contributes almost as much as all sources of private philanthropy combined”).} As noted by the Filer Commission, “[t]he more an organization depends on government money for survival, the less ‘private’ it is, and the less immune to political processes and priorities.”\footnote{\textit{Id.} at 17.} 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.”\textsuperscript{222} Furthermore, “government money obviously comes with strings attached, however invisible and unintentional they may be.”\textsuperscript{223} As a result, private support is often considered crucial in maintaining a nonprofit organization’s independence.\textsuperscript{224}

Another reason for preferring measures that can be implemented through the Code over direct government spending is that individuals often have their own, personal motivations for giving, which can be stimulated through tax relief. For example, Tomer Blumkin and Efraim Sadka note that one motivation for making charitable contributions is to demonstrate wealth.\textsuperscript{225} Similarly, Professor 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.\textsuperscript{226}

\textsuperscript{222} Id. at 103.
\textsuperscript{223} Id. at 96.
\textsuperscript{224} Id. at 17.
\textsuperscript{226} Gergen, \textit{supra} note 25, at 1407. However, direct government spending does have its proponents. For example Susan Rose-Ackerman suggests that government grants may in fact encourage greater private giving. Rose Ackerman, from Economics of Non-Profits 325. Matching grants may stimulate giving by lowering the cost of giving, while fixed sum grants may stimulate giving by, for example, increasing public confidence in the beneficiaries of government grants or allowing for economies of scale. Rose Ackerman, from Economics of Non-Profits 325.
Finally, any attempts to aid non-profit organizations at the federal level may 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).” For all these reasons, enhancing the current system of encouraging charitable contributions by private actors is vastly preferable to a system of direct government intervention.

C. Donors Will Alleviate the Burden on Charitable Organizations on their Own

Others may argue that emergency measures are not necessary because donors, aware of the economic crises brought on by a recession, will respond by increasing donations to those non-profit organizations that are likely to experience an increase in need. Some scholars speculate that giving is influenced, at least in part, on one’s “relative income,” so that

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donors may give more when they feel that their income is greater than the
incomes of others.\textsuperscript{228} Alternatively, donors may give more when they feel
that others are also increasing their giving, either because they are inspired
by the example of others or feel a certain peer pressure to match the
apparent altruism of others.\textsuperscript{229}

Some evidence of this can be seen in the fact that health organizations
and organizations providing human services saw an increase in donations in
2009, shortly after the current economic crisis began.\textsuperscript{230} The closest
analogy may be to large-scale disasters, like the terrorist attacks of
September 11, 2001, the Asian tsunami in 2004, Hurricanes Katrina and
Rita in 2006, and the Haitian earthquake in 2009. Donations to
organizations that provide emergency services to victims of these disasters
tend to see a rise in donations immediately after their occurrence, and this
effect has been attributed at least in part to media coverage of these
disasters and the immense suffering they cause.\textsuperscript{231} Certainly, the current
recession has received its share of media coverage; however, the
widespread effect of the recession and the relative lack of powerful images
showing dramatic pain and suffering will undoubtedly dampen the urgency

\textsuperscript{228} Clotfelter, supra note 5, at 12.
\textsuperscript{229} Id.
\textsuperscript{230} Annual Report, supra note 2, at 19.
\textsuperscript{231} Id.
that people might otherwise feel to help those who have become victims of the economic crisis (and people may feel that, unlike in the case of an event that affects only a limited geographic area, we have all become victims of this “disaster”). As a result, we cannot rely on the public to meet the needs of non-profit organizations in the wake of an economic crisis and must take additional measures in order to make sure that already struggling non-profits do not risk further financial hardship.

D. These Measures Will Have Little Effect

Another potential criticism of these above measures is that they will have little actual effect on the charitable sector. Although there is some disagreement as to how elastic charitable contributions are, most studies estimate elasticity to be around -1.0, i.e., that charitable contributions decline by a dollar for each dollar reduction in income.232 This finding of elasticity is important, since “[i]f the policy behind the charitable contribution deduction is to spur donations, then tax subsidies are wasted on

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donations that would have been made anyway.”

Moreover, donors tend to “smooth their annual giving relative to transitory changes in income,” making bigger adjustments to their donations in response to temporary changes in the cost of giving, but adjusting their giving in response to changes in income only when such changes appear to be relatively permanent.

All this suggests that changes that appear to affect the cost of giving (e.g., changes in the rate associated with the charitable deduction or the conversion of the deduction to a credit) may have a larger effect on charitable contributions than temporary changes in donors’ income (e.g., a temporary tax rebate). Furthermore, despite arguments to the contrary, studies have found that households at all income levels respond to tax incentives to contribute, although the effect may differ between low and high income households.

Although some research suggests that most taxpayers are unaware of marginal tax rates or incentives related to charitable contributions and therefore would not adjust their giving in response to those rates or incentives, Professors Clotfelter and Steurle argue

233 Brody, supra note 156, at 715.


235 Clotfelter, supra note 42, at 686. Elasticity does vary across organizations, as “gifts to religious organizations and to health and welfare organizations have lower price and income elasticities than gifts to the other types of charities.” Martin Feldstein & Amy Taylor, The Income Tax and Charitable Contributions, 44 ECONOMETRICA 1201, 1217 (1976).
that “it 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.”236 This finding suggests that, while changes to the charitable deduction may have only marginal effects on donor behavior, such effects reflect rational decisions by those donors about the costs and benefits, including the tax benefits, of giving.237

CONCLUSION

Just as there is no perfect solution to the current economic crisis in general, there is no perfect solution to the problem of decreased contributions and increased demand facing non-profits during an economic downturn. Nonetheless, we can try to alleviate the problem, at least on the supply side, by encouraging both individuals and corporations to increase the amounts of their charitable contributions. The most effective way to stimulate charitable giving by individuals is to convert the current deduction


237 Another important factor to keep in mind is that 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. Clotfelter, supra note 5, at 12 (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”).
into a tax credit for contributions that is available to all taxpayers. In addition, providing a credit to corporations who second their employees to non-profit organizations may not only benefit charities but also reduce unemployment rates, thereby alleviating one of the most devastating impacts of an economic downturn. While both 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.