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A Lay Word for a Legal Term: How the Popular Definition of Charity Has Muddled the Perception of the Charitable Deduction

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A Lay Word for a Legal Term: How the Popular Definition of Charity Has Muddled the Perception of the Charitable Deduction

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*A good catchword can obscure analysis for fifty years.*¹

I. INTRODUCTION

In the United States there is a deeply held conviction “that taxpayers who donate to charity should generally not be subject to the same income tax liability as similarly situated taxpayers.”² This innate sense about the Internal Revenue Code’s § 170,³ otherwise known as the charitable deduction, resonates with Americans’ sense of fairness and creates strong barriers to curtailing its function.⁴

This same sense of fairness is tied to the perceived effects of the charitable deduction.⁵ Yet, how “charitable” is the charitable deduction, and how charitable do we expect it to be? This Article argues that the discrepancy between the popular meaning of the word “chari-

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1. AMITY SHLAES, *THE FORGOTTEN MAN* 349–50 (2007) (quoting Wendell L. Willkie).
 2. Johnny Rex Buckles, *The Community Income Theory of the Charitable Contribution Deduction*, 80 *IND. L.J.* 947, 952 (2005).
 3. I.R.C. § 170 (2006). See generally Oliver A. Houck, *With Charity for All*, 93 *Yale L.J.* 1415, 1428 (1984) (noting that within the charitable sector the tax deduction is a more important provision than tax-exempt status because most charities have little, if any, net earnings).
 4. See, e.g., David E. Pozen, *Remapping the Charitable Deduction*, 39 *CONN. L. REV.* 531, 588 (2006) (“Most Americans, whether through historic conditioning or Tocquevillian conceptions of U.S. civil society or an innate sense of charity’s place in the Code, believe in the charitable deduction.”); *COMM’N ON PRIVATE PHILANTHROPY AND PUBLIC NEEDS, GIVING IN AMERICA: TOWARDS A STRONGER VOLUNTARY SECTOR* 65 (1975) (“The spirit of giving . . . [is] embedded in American ways as part of a growing self-image of Americans as a generous and altruistic people.”).
 5. See also 155 *Cong. Rec.* 2911 (2009) (statement of Rep. Burton) (“[W]here are the people going to go who depend on these charitable institutions if they don’t have the money to help them? Well, you guessed it, the government.”). But see Pozen, *supra* note 4, at 563 (“A significant portion of charitable contributions from wealthy donors goes to universities and cultural institutions—organizations that generate significant positive externalities but that do not do very much redistribution.”).

table” and the legal meaning has distorted both the perception of, and the political justifications for, the provision.

The charitable deduction’s definitional discrepancy is perhaps not immediately apparent, because often the legal and layperson’s definitions of the word are the same. However, on occasion, the legal and popular definitions vary.⁶ One such example is the difference between the Tax Code’s and layperson’s definition of the word “charitable.”⁷ The laypersons’ definition is simple; the Merriam-Webster dictionary defines charity as “generosity and helpfulness especially *toward the needy or suffering*.”⁸ The legal definition is not quite as succinct. The Treasury regulations define charitable as:

[r]elief of poor and distressed or of the underprivileged; advancement of religion; advancement of education or science, erection or maintenance of public buildings, monuments, or works; lessening of the burdens of Governments; and promotion of social welfare by organizations designed to accomplish any of the above purposes, or (i) to lessen neighborhood tensions; (ii) to eliminate prejudice and discrimination; (iii) to defend human and civil rights secured by law; or (iv) to combat community deterioration and juvenile delinquency.⁹

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6. For instance, the legal definition of the word “gift” requires a “detached and disinterested generosity,” *Comm’r. v. Duberstein*, 363 U.S. 278, 285 (1960) (citation omitted), whereas the layperson’s understanding of the same word is not nearly as onerous.
 7. STAFF OF JOINT COMM. ON TAXATION, 109TH CONG., HISTORICAL DEVELOPMENT AND PRESENT LAW OF THE FEDERAL TAX EXEMPTION FOR CHARITIES AND OTHER TAX EXEMPT ORGANIZATIONS 7 (Comm. Print 2005), [hereinafter JCT HISTORICAL DEVELOPMENTS] (“[T]here are two approaches to the meaning of the term charitable—the legal sense and ordinary and popular sense. The legal definition is derived from the law of charitable trusts and is broader than the ordinary sense of the term, which generally means the relief of the poor and distressed.”). See generally Nina J. Crimm, *An Explanation of the Federal Income Tax Exemption for Charitable Organizations: A Theory of Risk Compensation*, 50 FLA. L. REV. 419, 428 & 429 n.30 (1998) (explaining that for the first twenty years after enactment the Treasury via its regulations interpreted charity in the popular and ordinary sense, defining a charitable organization as corporations “organized and operated exclusively for . . . charitable . . . purposes” and, in general, organizations for “the relief of the poor.”) (citation omitted).
 8. *Charity*, MERRIAM-WEBSTER ONLINE DICTIONARY, <http://www.merriam-webster.com/dictionary/charity> (last visited April 7, 2010) (stating that other definitions include: “benevolent goodwill toward or love of humanity”; “generosity and helpfulness especially toward the needy or suffering”; “aid given to those in need”; “an institution engaged in relief of the poor”; “public provision for the relief of the needy”; “a gift for public benevolent purposes”; “an institution (as a hospital) founded by such a gift”; and “lenient judgment of others”) (emphasis added); see also Tommy F. Thompson, *The Unadministrability of the Federal Charitable Tax Exemption: Causes, Effects and Remedies*, 5 VA. TAX REV. 1, 14 (1985) (“Charity in its popular and ordinary sense admits of only one class of beneficiaries, the poor or distressed, and only one type of activity, the relief of their condition, usually through direct assistance.”).
 9. Treas. Reg. § 1.501(c)(3)–1(d)(2) (2005); see also *Legislative Activity by Certain Types of Exempt Organizations: Hearings before the H. Comm. on Ways & Means*, 92d Cong., 2d Sess. 5 (1972) (statement of Edwin S. Cohen, Assistant Secretary of the Treasury for Tax Policy) (“We have tried to avoid interpreting the word chari-

Thus, although the legal definition does cover direct relief of the poor,¹⁰ it also has a much wider mandate, including advancing religion, science and education, constructing public buildings, lessening neighborhood tensions, and other public benefit purposes.¹¹ These types of causes may provide a service to society, but they are neither charitable under the popular meaning of the word nor would most individuals consider organizations that provide such services a charity.¹²

This broad legal definition of “charitable” has created a misperception in the American psyche of where the benefits of the charitable deduction are allocated.¹³ The very use of the word “charitable” in the statutory language creates a powerful association in most non-lawyers that ties the deduction to churches and poverty relief organizations, when in reality this is only a small portion of the tax subsidy.¹⁴ Further, the emotive rhetoric used by politicians when attacking proposed amendments curtailing the charitable deduction is grossly out of sync with the primary beneficiaries of the provision.

This Article argues that that the definitional gap between the legal and lay definition of “charitable” impedes meaningful discussion of

table in a fixed, immutable fashion. . . . We have tried to give it meaning that changes and expands as the needs of society change and expand.”)

10. Despite the many ways to define poverty or neediness, this Article uses the federal poverty line as the benchmark. See *The 2009 HHS Poverty Guidelines: One Version of the [U.S.] Federal Poverty Measure*, U.S. DEP’T OF HEALTH & HUM. SERVS. (Feb. 3, 2011), <http://aspe.hhs.gov/poverty/09poverty.shtml>.
11. For examples of organizations that have been recognized as charitable under the legal definition but would probably not qualify under the popular definition, see JCT HISTORICAL DEVELOPMENTS, *supra* note 7, at 64, which outlines various examples, including organizations that are “exhibiting and selling artwork,” (citing *Goldsboro Art League, Inc. v. Comm’r*, 75 T.C. 337, 343–44 (T.C. 1980)), “providing money management advice,” (citing Rev. Rul. 69-441, 1969-2 C.B. 115), “assisting in operation of mass transportation system,” (citing Rev. Rul. 71-29, 1971-1 C.B. 150), “posting bail for individuals who were otherwise incapable of paying,” (citing Rev. Rul. 76-21, 1976-1 C.B. 147), and “providing medical and dental referral services” (citing *Fraternal Med. Specialist Servs. v. Comm’r*, 49 T.C.M. (CCH) 289 (T.C. 1984)).
12. See Miranda Perry Fleischer, *Theorizing the Charitable Tax Subsidies: The Role of Distributive Justice*, 87 WASH. U. L. REV. 505 (2010) (commenting that charities must provide some sort of community benefit but not necessarily services to the poor); see also TERESA ODENDAHL, *CHARITY BEGINS AT HOME: GENEROSITY AND SELF-INTEREST AMONG THE PHILANTHROPIC ELITE* 3–4, 9, 11 (1990) (characterizing the donations of the very wealthy as self-serving because their gifts to elite colleges, universities, and the arts augment their social status rather than provide needed social services).
13. See *infra* section II.C. This Article only addresses individual giving. Corporate charity is beyond the scope of the argument.
14. See *infra* section III.D (finding that the total percentage of the charitable deduction subsidy allocated to direct poverty relief efforts is close to 8%).

amendments to the charitable deduction.¹⁵ This has led to mistaken or underestimated assumptions about the allocation of the subsidy. A clearer understanding of where the § 170 subsidy is allocated would allow politicians and the public to more critically examine this tax expenditure.¹⁶ In light of this confusion, the Article proposes Congress should rename § 170 the “qualified donation deduction”—a term that would not create the same poverty relief associations as the charitable deduction misnomer.

This Article is structured as follows: Part II looks at how Congress and commentators justify the charitable contribution, examining the historical, theoretical and political justifications of the section. Part III examines the data associated with the charitable deduction and calculates the percentage of the charitable deduction expenditure that is allocated to direct poverty relief. Part IV proposes that Congress rename the charitable deduction to break the association between the charitable deduction and poverty relief. This section also addresses the main critiques of this proposal. Part V concludes.

II. WHY HAVE THE CHARITABLE DEDUCTION

The Joint Committee on Taxation (JCT) estimated that between 2005 and 2009, the charitable deduction saved individual taxpayers in the United States \$228 billion.¹⁷ In a more recent study, the JCT estimated that the charitable deduction saved individual taxpayers in the United States \$36.2 billion in 2008.¹⁸ Although these figures are ad-

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15. See, e.g., Ryan Messmore, *Obama's Proposal to Reduce Charitable Deductions Would Hurt Civil Society, Expand Government*, HERITAGE FOUND. (Apr. 3, 2009), <http://www.heritage.org/Research/Reports/2009/04/Obamas-Proposal-to-Reduce-Charitable-Deductions-Would-Hurt-Civil-Society-Expand-Government> (“Obama’s proposed [amendment to section 170] penalizes those who can give the most, shifts dollars from citizens and local private charities to distant government bureaucracy, and prioritizes mandatory taxation to voluntary tithing and giving.”); Suzanne Perry, *Obama's Plan to reduce Charitable Deductions for the Wealthy Draws Criticism*, CHRON. OF PHILANTHROPY, Feb. 26, 2009, <http://philanthropy.com/article/Obamas-Plan-to-Reduce/63024/>.
 16. An assumption in this Article is that the charitable deduction is a tax expenditure. See *infra* note 26 and accompanying text for a discussion and definition of tax expenditure.
 17. *Historical Development and Present Law of the Federal Tax Exemption for Charities and Other Tax Exempt Organizations: Hearings Before the H. Comm. On Ways & Means*, 109th Cong. 47 (2005), available at <http://www.jct.gov/x-29-05.pdf>; see also OFFICE OF MGMT. & BUDGET, ANALYTICAL PERSPECTIVES: BUDGET OF THE UNITED STATES GOVERNMENT: FISCAL YEAR 2008, at 296 (2007) (projecting that between 2008 and 2012, the Treasury will forfeit \$312 billion dollars because of the charitable deduction).
 18. STAFF OF JOINT COMM. ON TAXATION, ESTIMATES OF FEDERAL TAX EXPENDITURES FOR FISCAL YEARS 2009–2013, at 1, 39–42 (Comm. Print 2010) [hereinafter JCT ESTIMATES 2009–2013]. The \$36.2 billion figure was calculated by adding the “deduction for charitable contributions to health organizations” (\$3.2 billion) with

mittedly small when looking at overall government expenditures, nevertheless they are a sizeable sum.¹⁹ For instance, in 2006 the deduction cost more than the government spent on “managing public lands, protecting the environment and developing new energy sources.”²⁰

Section 170 “costs” the government these revenues²¹ because it allows individuals who itemize their tax returns²² and donate to churches or qualified public charities and private foundations under § 501(c)(3)²³ to reduce their taxable income by the amount contributed.²⁴ This reduction of taxable income has been described as a tax expenditure by a number of commentators, including Professor Paul McDaniel²⁵ and the Joint Committee on Taxation (JCT).²⁶ Tax ex-

the “deduction for charitable contributions other than for education and health” (\$28.0 billion) with the “deduction for charitable contributions to educational institutions” (\$5.0 billion), for a total of \$36.2 billion in “cost” to the federal government. *Id.* Including deductions for corporate contributions, the total figure is \$39.2 billion when corporate contributions are taken into account. *Id.* Of course, the opposite side of the coin is that rather than costing the government \$36.2 billion in lost revenue, the charitable contribution deduction saved the taxpayer \$36.2 billion.

19. See Ilan Benshalom, *The Dual Subsidy Theory of Charitable Deductions*, 84 IND. L.J. 1047, 1081 n.125 (2009) (explaining that although the cost of the charitable deduction is less than 1.5% of the total tax receipts in 2008, it is more than the “federal government’s spending on [the] main welfare transfer program—the Earned Income Tax Credit”).
20. Stephanie Strom, *Big Gifts, Tax Breaks and a Debate on Charity*, N.Y. TIMES, Sept. 6, 2007, <http://www.nytimes.com/2007/09/06/business/06giving.html>.
21. Professor Buckles explains that this loss in revenue must be accounted for by the federal government elsewhere and that “if all else is held constant, the availability of the charitable contributions deduction means that tax rates must be increased to compensate for the diminished income tax base.” Buckles, *supra* note 2, at 951.
22. Approximately 65% of taxpayers do not itemize and are thus unable to take advantage of this provision. Lily L. Batchelder et al., *Efficiency and Tax Incentives: The Case for Refundable Tax Credits*, 59 STAN. L. REV. 23, 53 (2006).
23. I.R.C. § 501(c)(3) (2006); see also Evelyn Brody, *Charities in Tax Reform: Threats to Subsidies Overt and Covert*, 66 TENN. L. REV. 687, 715 (1999) (noting that deduction and exemption was an expression of America’s predilection towards charitable organizations); Oliver Houck, *With Charity for All*, 93 YALE L.J. 1415, 1429–30 (1984) (suggesting that § 501(c)(3) organizations receive a secondary benefit that is much harder to quantify—namely, a government imprimatur on their purpose and work).
24. The application of § 170 is not quite this simple and is subject to a multitude of rules and regulations. These rules include ensuring that the taxpayer makes the transfer without “adequate consideration” in exchange for the gift. *Hernandez v. Comm’r*, 490 U.S. 680, 690–92 (1989). Section 170 also caps the amount of total giving an individual taxpayer can make in a tax year to 50% of taxable income. I.R.C. § 170(b)(1)(A), (b)(2) (2006). For a more thorough discussion of the mechanics of § 170, see Pozen, *supra* note 4, at 539.
25. Paul R. McDaniel, *The Charitable Contribution Deduction (Revisited)*, 59 SMU L. REV. 773, 774 (2006).

penditures are “revenue losses attributable to provisions of the federal tax laws which allow a special exclusion, exemption, or deduction from gross income or which provide a special credit, a preferential rate of tax, or a deferral of tax liability.”²⁷ In other words, tax expenditures are any reductions of “income tax liabilities that result from special tax provisions or regulations that provide tax benefits to particular taxpayers.”²⁸ Further, tax expenditures “are considered analogous to direct outlay programs, and the two can be viewed as alternative means of accomplishing similar budget policy objectives.”²⁹

The charitable deduction results in a subsidy for donors, and the amount of the subsidy is a function of donors’ marginal tax rates.³⁰ For instance, suppose a taxpayer who is in the 35% tax bracket gives \$100 to charity. Under § 170, that taxpayer can then reduce his taxable income by a \$100, reducing his tax liability by \$35. In real terms, the taxpayer is only out of pocket \$65 and the government has paid \$35 in lost revenues. For the example given above, the \$35 loss of revenue is a \$35 tax expenditure and is no different, assuming no transactional costs, to a situation where the taxpayer pays the charity \$65 and the government paid the same charity \$35.

Although there is growing consensus that the charitable deduction is a tax expenditure,³¹ there is still no accepted rationale for the charitable deduction and why the United States has some of the world’s most generous tax breaks for charitable giving.³² In fact, from its very inception the charitable deduction has been ideologically misunderstood. This section first looks to the legislative history of § 170 to show that the confusion between the legal and popular view of the term “charitable” existed from the enactment of the charitable deduction. Section B provides a brief outline of the two pillars on which

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26. John D. Colombo, *The Marketing of Philanthropy and the Charitable Contributions Deduction: Integrating Theories for the Deduction and Tax Exemption*, 36 WAKE FOREST L. REV. 657, 661 (2001); Daniel Shaviro, *Assessing the “Contract Failure” Explanation for Nonprofit Organizations and Their Tax-Exempt Status*, 41 N.Y.L. SCH. L. REV. 1001, 1004–05 (1997); Brian D. Galle, *Foundation or Empire? The Role of Charity in a Federal System* (Fla. St. U. College of Law, Public Law Research Paper No. 394, 2010), available at <http://ssrn.com/abstract=1473107>. This Article agrees that the charitable deduction is a tax expenditure and treats it as such throughout the analysis.
 27. Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, § 3(3), 88 Stat. 297 (codified at 2 U.S.C. § 622(3)).
 28. JCT ESTIMATES 2009–2013, *supra* note 18, at 3.
 29. STAFF OF JOINT COMM. ON TAXATION, ESTIMATES OF FEDERAL TAX EXPENDITURES FOR FISCAL YEARS 1993–1997, at 2 (Comm. Print 1992).
 30. McDaniel, *supra* note 25, at 775–76.
 31. Rob Atkinson, *Altruism in Nonprofit Organizations*, 31 B.C. L. REV. 501, 505 (1990) (explaining that viewing the charitable deduction as a tax expenditure is “[t]he emerging orthodox account”).
 32. See Pozen, *supra* note 4, at 533 (citing CHARLES T. CLOTFELTER, FEDERAL TAX POLICY AND CHARITABLE GIVING 1, 25 (1985)).

commentators have built their theoretical justification for the deduction. Lastly, section C looks at the political justifications for the deduction as currently codified.

A. Historical Justifications for the Deduction – What Did Congress Mean by Charitable?

Congress first adopted the charitable deduction in 1917³³ to lessen the blow of an increase in the marginal rates of the still nascent income tax.³⁴ Congress was worried that the increase would suppress gifts to charitable organizations and therefore provided a tax incentive to encourage taxpayers to continue to support charities.³⁵ Senator Hollis explained:

Usually people contribute to charities and educational objects out of their surplus. After they have done everything else they want to do . . . if they have something left over, they will contribute it to a college or to the Red Cross or for some scientific purposes. Now, when war comes and we impose these very heavy taxes on incomes, that will be the first place where the wealthy men will be tempted to economize, namely in donations to charity. They will say, "Charity begins at home."³⁶

Thus, the charitable deduction granted individual taxpayers a deduction for gifts to organizations that "operated exclusively for religious, charitable, scientific, or educational purposes, or . . . for the prevention of cruelty to children or animals."³⁷ However, although the statutory language included other sectors, "America's nonprofit sector at the time was far smaller and more homogenous—comprising mainly churches and donative charities that provided clear public goods or aid to the poor."³⁸ The fact that the sector was at the time mainly geared towards churches and poverty relief may have inhibited analysis when codifying the section. There was little debate as to the provision, and the legislative history is sparse.³⁹ The statutory language itself did not clarify whether Congress originally intended the popular meaning of relief of poverty when the act was first codified.⁴⁰ Hence, even from

33. The charitable deduction was renumbered to § 170 in 1954. H.R. Rep. No. 83-1337 (1954), *reprinted in* 1954 W.S.C.C.A.N. 4017, 4190. *See generally* Vada Waters Lindsey, *The Charitable Contributions Deduction: A Historical Review and a Look to the Future*, 81 NEB. L. REV. 1056 (2003) (chronicling the historical changes in the charitable deduction provision from inception to 2003).

34. War Revenue Act of 1917, ch. 63, § 1201(2), 400 Stat. 300, 330, *reprinted in* J.S. SEIDMAN, SEIDMAN'S LEGISLATIVE HISTORY OF FEDERAL INCOME TAX LAWS, 1861–1938, at 944 (1938).

35. 55 CONG. REC. 6728 (1917); *see also* Lindsey, *supra* note 33, at 1057 (arguing that as "originally enacted, the provision was designed to allow 'wealthy' taxpayers to receive a deduction for charitable giving").

36. 55 CONG. REC. 6728 (1917) (statement of Sen. Hollis).

37. War Revenue Act of 1917 § 1201(2).

38. Pozen, *supra* note 4, at 538.

39. JCT HISTORICAL DEVELOPMENTS, *supra* note 7, at 65.

40. *Id.*

the section's inception there was a degree of confusion about whether the purpose of the statute was poverty relief or a broader mandate.⁴¹

Commentator Bruce Hopkins posits that when Congress first enacted § 170 they originally intended the popular meaning of the word "charitable."⁴² The Internal Revenue Service's (IRS) early reading of the word buttresses Hopkins' argument. Until 1938, the Treasury regulations⁴³ stated that charity should be construed "in the ordinary and popular sense."⁴⁴ The regulations also stated that to benefit from the deduction, the donor must give to "[c]orporations organized and operated *exclusively* for the charitable purposes [which] comprise, in general, *organizations for the relief of the poor.*"⁴⁵

Similarly, the sponsor of § 501(c)(3)'s predecessor, the code provision that defines charities subject to the charitable deduction, stated that that the exemption was intended for organizations "devoted *exclusively* to the relief of suffering, to the alleviation of our people, and to all things which commend themselves to every charitable and just impulse."⁴⁶ Thus, even from Congress's codification of both sections there existed some degree of confusion as to whether the provision covered solely poverty relief or had a wider social mandate.⁴⁷

Subsequent amendments to the charitable deduction clarified this confusion. First, amendments enacted during the Great Depression encouraged charitable giving to fund the increased demands on social programs.⁴⁸ Specifically, during this period, the definition of the pro-

41. See BRUCE R. HOPKINS, *THE LAW OF TAX-EXEMPT ORGANIZATIONS* § 5.2 (8th ed. 2003) ("There is little concrete evidence to support a proposition that Congress intended the application of either definition."); Lars F. Gustafsson, *The Definition of "Charitable" for Federal Income Tax Purposes: Defrocking the Old and Suggesting Some New Fundamental Assumptions*, 33 Hous. L. Rev. 587, 618 (1996) ("Congress gave no indication when it passed an income tax in 1894, 1909 or 1913 of the appropriate definition of charitable for purposes of the exemption provision nor when it provided for the deductibility of charitable contributions in 1917.")

42. HOPKINS, *supra* note 41, § 5.2.

43. The Treasury regulations inform the public of the IRS's interpretation of the Internal Revenue Code.

44. JCT HISTORICAL DEVELOPMENTS, *supra* note 7, at 65; see also Crimm, *supra* note 7, at 429 (indicating that the Treasury has determined the word "charity" is to be applied broadly in "its generally accepted legal sense").

45. JCT HISTORICAL DEVELOPMENTS, *supra* note 7, at 67 (emphasis added) (citing Crimm, *supra* note 7, at 429 n.30).

46. 44 CONG. REC. 4150 (1909). Similarly, evidence for the narrow construction of the term charitable exists in Senator Willis's proposal (which he later withdrew) to expand the narrow definition adopted by the IRS, to include: "preventative and constructive service for relief, rehabilitation, health, character building and citizenship." 65 CONG. REC. 8171 (1924) (statement of Sen. Willis).

47. See HOPKINS, *supra* note 41, § 5.2 ("There is little concrete evidence to support a proposition that Congress intended the application of either definition."); Gustafsson, *supra* note 41, at 619.

48. E.C. Lashbrooke, *An Economic and Constitutional Case for Repeal of the I.R.C Section 170 Deduction for Charitable Contributions to Religious Organizations*,

vision expanded, and the legislative history expressly stated that the provision now covered not just organizations that gave relief to the poor, but also organizations that promoted “general welfare.”⁴⁹

By 1969, there was no confusion about the charitable definition. The House Report on the Tax Reform Act of 1969 used the legal definition describing charitable as a legal term “that has been used in the law of trusts for hundreds of years.”⁵⁰

Thus, although the original meaning of the word charitable as used in the statute was never clear, and the IRS interpreted charitable under the narrow popular definition for many years, there is currently no debate about its legal meaning. Nevertheless, perhaps because of this muddled history, commentators have found it very difficult to provide an accepted, inclusive justification for the deduction.⁵¹

B. Theoretical Rationales for the Charitable Deduction

As mentioned previously, despite the numerous scholarly contributions, there is no widely accepted rationale for the charitable deduction.⁵² For purposes of length, this Article does not address all the available literature.⁵³ However, this Article does examine the two main approaches towards justifying the deduction: measurement of income theories and subsidy theories.⁵⁴ This subsection also summarizes the main critiques of each of the theories discussed.

27 DUQ. L. REV. 695, 702–03 (1989); *see also* Colombo, *supra* note 26, at 682 (stating that the federal government was seeking “voluntary transfers from the private sector” in order to fund various social programs).

49. H.R. REP. NO. 1860, at 19–20 (1938).

50. H.R. REP. NO. 91-413, at 43 (1969).

51. JCT HISTORICAL DEVELOPMENTS, *supra* note 7, at 7 (“[T]here is no agreed upon explanation of the rationale behind the charitable tax exemption and tax deduction.”).

52. *Id.*

53. There are several notable examples of theories omitted. *See, e.g.*, Buckles, *supra* note 2; Mark G. Kelman, *Personal Deductions Revisited: Why They Fit Poorly in an “Ideal” Income Tax and Why They Fit Far Worse in a Far From Ideal World*, 31 STAN. L. REV. 831 (1979); Stanley A. Koppelman, *Personal Deductions in an Ideal Income Tax*, 43 TAX L. REV. 679 (1988); John K. McNulty, *Public Policy and Private Charity: A Tax Policy Perspective*, 3 VA. TAX REV. 229 (1984).

54. *See* Pozen, *supra* note 4, at 546–47; *see also* Fleischer, *supra* note 12, at 7–10 (discussing both the measurement and subsidy theories separately). Professor Fleischer also discusses Professors John Colombo and Mark Hall’s “donative theory.” *Id.* at 18. The basic premise of the donative theory is that institutions that are able to “attract . . . a substantial level of donative support from the public” deserve tax-exempt status. Mark A. Hall & John D. Colombo, *The Donative Theory of the Charitable Tax Exemption*, 52 OHIO ST. L.J. 1379, 1383–84 (1991). They argue that the very fact the taxpayers donate to such charities justifies their presence and indicates that the service the charity provides is underprovided for in the marketplace. *Id.* at 1385.

1. *Measurement of Income*

a. *Professor Andrews's Ideal Income Tax Model*⁵⁵

Professor William Andrews's landmark rationale for the charitable contributions deduction relies on the Haig-Simons definition of income.⁵⁶ He argues that taxpayers' gifts to charities are not personal consumption because they create public or common goods.⁵⁷ Thus, because they are not personal consumption, charitable gifts cannot be included in taxable income.⁵⁸

Andrews bolsters his argument by using economic neutrality principles. He analogizes to a circumstance where a taxpayer volunteers time to a charitable cause rather than provide a gift. If the taxpayer had foregone income to volunteer, the Treasury would not tax the forfeited income, and therefore the Treasury should treat financial donations in the same manner.⁵⁹

Although Andrews's theory remains a significant step in the scholarship of the charitable deduction,⁶⁰ two main critiques weaken its normative pull. First, using Andrews's definition of income would bar from taxation "many acts we commonly think as consumption . . . [but might not] include some forms of charitable giving."⁶¹ Second, Andrews's theory ignores the well-established tax law principle that once a taxpayer establishes dominion over a resource, the subsequent use of that resource is irrelevant.⁶² For these reasons, although commen-

55. The corresponding theory for nonprofit entities is the income measurement theory propounded by Boris Bittker and George Rahdert. Their theory posits that taxable income is a concept that rests on the notion of a profit seeking taxpayer. Thus, because neither the income nor expenses generated by nonprofits are created in search of a profit, it becomes too impractical to determine their taxable income. Boris I. Bittker & George K. Rahdert, *The Exemption of Nonprofit Organizations from the Federal Income Taxation*, 85 *YALE L.J.* 299, 305 (1976).

56. The Haig-Simons formula is the sum of personal consumption plus wealth accumulated over a given period of time. HENRY C. SIMONS, *PERSONAL INCOME TAXATION* 49-50 (1938).

57. William D. Andrews, *Personal Deductions in an Ideal Income Tax*, 86 *HARV. L. REV.* 309, 346 (1972).

58. *Id.* 356 (1972). Andrews disagrees with valuing the taxpayer's psychic benefit as equal to the amount she donates, stating that because the act is not private consumption, it is irrelevant. *Id.* at 346, 375-76.

59. *Id.* at 352-54.

60. *See, e.g.*, Pozen, *supra* note 4, at 550 (stating that Andrews's "article continues to frame scholarship on the charitable deduction").

61. *Id.* at 549 (arguing that, at times, "looking altruistic," after all, is itself a scarce resource" and thus could be included as consumption) (quoting Kelman, *supra* note 53, at 880).

62. *Id.* at 835, 839-42; *see, e.g.*, *Lucas v. Earl*, 281 U.S. 111, 114-15 (1930).

tators largely acknowledge Andrews's contribution in this field, his theory has been widely refuted.⁶³

b. Professor Bittker's Public Service–Morality Model

Similar to Andrews, Professor Boris Bittker relies on the Haig–Simons formula to distinguish consumption from donations.⁶⁴ He argues that, as a matter of equity, the Treasury ought to exclude charitable donations from income for three main reasons. First, regardless of the taxpayer's motive, the taxpayer lost the benefit of his charitable donation, and is worse off than if he had not made the donation in the first place.⁶⁵ Accordingly, the taxpayer should not be taxed on such gift.⁶⁶ Bittker secondly argues that "something can be said for rewarding activities which in a certain sense are selfless, even if the reward serves no incentive function."⁶⁷ Lastly, Bittker suggests that many donations are discharges of moral obligations.⁶⁸ If that is the case, then they are not truly voluntary, and the government should not tax involuntary transactions.⁶⁹

Although both theories rely on the Haig–Simons definition of income, a key difference between Andrews's and Bittker's theories is Bittker's reliance on the equitable qualities of the charitable deduction.⁷⁰ Bittker's reliance on equity in his argument is both a strength and a weakness.⁷¹ The JCT notes that the most frequent statements justifying the charitable deduction is that it "is the right thing to do."⁷² Similarly, commentators are becoming more accepting of the idea that charitable donations are qualitatively different from regular

63. See, e.g., Mark P. Gergen, *The Case for a Charitable Contributions Deduction*, 74 VA. L. REV. 1393, 1416 (1988) (arguing that Andrews simply "repackage[s] the arguments for subsidizing charities"); Thomas D. Griffith, *Theories of Personal Deductions in the Income Tax*, 40 HASTINGS L.J. 343, 375–77 (1989); Kelman, *supra* note 53, at 849–51 (disagreeing with Andrews's assertion that donors received no psychic or other benefits such as respect, attention, and deference).

64. Boris I. Bittker, *Charitable Contributions: Tax Deductions or Matching Grants?*, 28 TAX L. REV. 37 (1972) (explaining why donations to charitable organizations should not be taxable).

65. *Id.* at 46–49.

66. *Id.*

67. *Id.* at 60.

68. *Id.* at 58.

69. *Id.* at 58–60.

70. See Pozen, *supra* note 4, at 550–51 ("Unlike Andrews, however, [Bittker] arrives at this conclusion not as a matter of logic, but as a matter of judgment The equitable arguments are what mark Bittker's theory.")

71. See also Rob Atkinson, *supra* note 31, at 605 (justifying the charitable deduction because the "altruistic provision of good[s] and services [is] inherently desirable").

72. JCT HISTORICAL DEVELOPMENTS, *supra* note 7, at 68.

consumption and cannot be assessed under rational, utility maximization models.⁷³

However, despite this support, Bittker's equity rationale requires "a normative assessment of the goodness of charities' activities," which in turn requires "value based judgments about which activities merit a subsidy."⁷⁴ Whether an opera house, museum,⁷⁵ or a soup kitchen are "good" activities, or even equally "good," is a value judgment that commentators have shied away from en masse.⁷⁶ Nevertheless, this issue must be resolved for Bittker's rationale to be justified.⁷⁷ Lastly, Bittker's proposition that the government should not tax spending motivated by moral obligations loses force when "one considers just how many of our (non-deductible) expenditures derive from some source of felt obligation."⁷⁸

2. Subsidy Theories

a. Charity Performs Government Functions

An intuitively appealing rationale for the charitable deduction is that it relieves the government of necessary public functions.⁷⁹ A House Report from 1939 explains this rationale as follows:

The exemption from taxation of money or property devoted to charitable and other purposes is based upon the theory that the Government is compensated

73. See, e.g., James Andreoni, *Impure Altruism and Donations to Public Goods: A Theory of Warm-Glow Giving*, 100 *ECON. J.* 464 (1990) (discussing that all the factors in charitable giving, such as guilt, sympathy, peer pressure, and a desire for "warm glow" makes taxpayers' donative activities very difficult to reduce to a rational utility model); Gergen, *supra* note 63, at 1426–28; Pozen, *supra* note 4, at 551 (commenting that Bittker's notion that charitable giving was "qualitatively different from regular spending has gained forced among social scientists").

74. Fleischer, *supra* note 12, at 11.

75. See Gergen, *supra* note 63, at 1446 ("[T]he distributional benefits of cultural charities such as museums, symphonies, and libraries are often overstated. . . . [T]he beneficiaries tend to be the middle class and not the poor.").

76. Fleischer, *supra* note 12, at 34.

77. The difficulty of these value judgments is illustrated by the classic example of an eccentric millionaire that donates his money to a ketchup museum. Just because an individual or a group of individuals want it, does that mean that the government should subsidize it? See *id.* at 25 (citing David M. Schizer, *Subsidizing Charitable Contributions: Incentives, Information, and the Private Pursuit of Public Goals*, 62 *TAX L. REV.* 221, 230 (2009)); see also Benshalom, *supra* note 19, at 1064 (suggesting that because some charitable gifts can be consumer by the donor, then rational taxpayers will "promote and consume those activities that directly or indirectly privilege them").

78. Pozen, *supra* note 4, at 551.

79. See, e.g., *Duffy v. Birmingham*, 190 F.2d 738, 740 (8th Cir. 1951) ("The common element of charitable purposes . . . is the relief of the public of a burden which otherwise belongs to it."); *McGlotten v. Connally*, 338 F. Supp. 448, 456 (D.D.C. 1972) ("[T]he Government relieves itself of the burden of meeting public needs which in the absence of charitable activity would fall on the shoulders of the Government.").

for the loss of revenue by its relief from financial burden which would otherwise have to be met by appropriations from public funds, and by the benefits resulting from the promotion of the general welfare.⁸⁰

This theory is also evident in Treasury regulations, which define a charitable organization as including organizations that “lessen . . . the burdens of government.”⁸¹

There are several valid criticisms of this government subsidy theory. First, under this rationale, the charitable deduction could *only* fund charities that provide a substitute service of a usual government service,⁸² because the basic premise of the deduction is that it encourages individuals to “do voluntarily what we would otherwise have to coerce them to do (i.e., fund collective goods).”⁸³ Thus, under this rationale, any charity that provides an activity outside the remit of government would be excluded.⁸⁴

Second, the government subsidy theory assumes there is a set of “public goods that require[s] more spending.”⁸⁵ There are also a couple of inherent assumptions in this theory. First, it assumes donors are in a better position than the government to ascertain what these public goods are and where they are required. Second, it assumes there are political or other constraints on the government funding these public goods at the optimal level. However, since under the theory, contributions are determined by donors and not the government, “there may be certain cases in which some goods would be overprovided beyond the socially optimal level,”⁸⁶ or even worse, where “sectarian provincial, eccentric, or frivolous uses of money may be

80. H.R. REP. NO. 1869 (1938); *see also* Treas. Reg. § 1.501(c)(3)-1(d)(2) (1959) (stating that an organization is charitable if it “lessen[s] . . . the burdens of government”); Wendy Gerzog Shaller, *Tax Exemption of Charitable Organizations and the Deductibility of Charitable Donations: Dangerous New Tests*, 8 U. BRIDGEPORT L. REV. 77, 77–78 (1987) (stating that the charitable deduction has been and is “justified on the ground that certain private organizations perform the same public services as public institutions”). *But see* Harvey P. Dale, *Foreign Charities*, 48 TAX LAW. 655, 660–61 (1995) (arguing that none of the tax benefits conferred to charities was ever predicated on a theory of government burden relief).

81. Treas. Reg. § 1.501(c)(3)-1(d)(2) (1959).

82. Peter J. Wiedenbeck, *Charitable Contributions: A Policy Perspective*, 50 MO. L. REV. 85, 137 (1985).

83. Gergen, *supra* note 63, at 1421.

84. *See, e.g.*, Harold M. Hochman & James D. Rodgers, *The Optimal Tax Treatment of Charitable Contributions*, in *THE ECONOMICS OF NONPROFIT INSTITUTIONS: STUDIES IN STRUCTURE AND POLICY* 227 (Susan Rose-Ackerman ed., 1986) (“[E]xternal benefits must accrue in the demands for the specific services that charity finances or through prior constitutional choice, as with religious activities, to justify the public subsidization of charity.”).

85. Benshalom, *supra* note 19, at 1050.

86. *Id.* Professor Benshalom discusses the optimal level of spending for a certain public good and posits that the charitable deduction is a non-democratic provision, since it allows individuals to allocate public funds rather than submitting to democratic majoritarian discretion. *Id.* at 1050–51.

aided along with the most worthy.”⁸⁷ Thus, because there is no general oversight of the subsidy, it may not be allocated in the most efficient manner or to the neediest organizations and causes.

Third, determining where the subsidy is allocated, as this author discovered, is no easy process. This means that most taxpayers do not know where the \$36 billion of subsidy is being spent, and taxpayers are unaware of which charities the government is supporting. Lastly, the theory does not explain why neither non-itemizers nor low-income taxpayers benefit from the deduction.⁸⁸ If the deduction is premised on a government subsidy, then it should be available to all donors that contribute funds to organizations providing services that the government otherwise would provide itself.⁸⁹

b. Professor Levmore's Promotion of Pluralism Theory

In his seminal article, Professor Saul Levmore advanced an alternate subsidy theory—that the charitable deduction allowed individual taxpayers to effectively “vote” on which charities should receive the public subsidy by giving donations to the charities of their choice.⁹⁰ The taxpayers, via their charitable contributions, are able to channel the government subsidy to areas where they believe it is most required.⁹¹ This direct channeling of government funds provides a secondary benefit—it signals policymakers where “public goods are undersupplied and which [non-profit organizations] warrant funding.”⁹² This leads to Levmore’s second argument: that taxpayers are in the best position to determine where government spending is lacking, and this provision allows taxpayers to address these issues quickly and efficiently.⁹³

Supporters of Levmore’s theory provide two important considerations. First, Professor Eric Posner finds that when individuals support charities through a deductible donation, it creates an increased form of self-government, because it is the taxpayer who decides where their taxes are allocated.⁹⁴ Second, Professor Peter Wiedenbeck suggests that the “reduced political visibility of a subsidy provided

87. RICHARD GOODE, *THE INDIVIDUAL INCOME TAX* 162 (rev. ed. 1976).

88. *Id.* at 552–54.

89. *Id.*

90. Saul Levmore, *Taxes as Ballots*, 65 U. CHI. L. REV. 387 (1998).

91. *Id.* at 406.

92. Benshalom, *supra* note 19, at 1050.

93. Levmore, *supra* note 90, at 406.

94. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 496 (2007) (finding that the charitable deduction is “politically important because it transfers from the government to the individual taxpayer some of the power to decide who shall be recipients of altruistic transfers, a decision that in most societies is made at the political level”).

through the tax code may be an important advantage.”⁹⁵ The argument is that reduced political visibility allows minority or unpopular ideas to gain traction outside of the glaring and easily manipulated eye of politics.

All the justifications for Levmore’s theory rely on, at least in part, an even distribution of giving across social and economic groups.⁹⁶ Levmore himself recognizes these objections, explaining them as follows:

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. Another familiar objection in slightly new clothing is that because higher bracket taxpayers are given more reason to “vote,” and wealthier taxpayers can afford more votes, there is distasteful deviation from the one-person-one-vote ideal.⁹⁷

He replies to these objections by suggesting that under his theory, taxpayers will implicitly inform the government, via their donations, which hospitals, schools, and social agencies the government should subsidize (using the charitable deduction).⁹⁸ He also believes that the taxpayers’ personal contributions will lead to greater personal investment in that charity, thereby leading to other incidental benefits such as increased volunteering.⁹⁹

Approximately 48% of all charitable gifts by value are not deductible.¹⁰⁰ Thus, under Levmore’s theory, these donations would not be

95. Wiedenbeck, *supra* note 82, at 97 (“The charitable contribution deduction fosters the coexistence of non-majoritarian values—it encourages experimentation by the private sector in new solutions to our social problems.”).

96. Levmore, *supra* note 90, at 405–06. *But see* Schizer, *supra* note 77 (challenging Levmore’s notion that low-income taxpayers are disenfranchised by § 170 by asserting that the higher proportion of wealthy beneficiaries is an advantage rather than a disadvantage). Schizer notes that wealthy private donors possess skill sets that nonprofit managers could exploit and that “private donors . . . monitor the quality of nonprofits, so that the government can piggyback on these quality control efforts.” Schizer, *supra* note 77, at 224, 258–59. However, this places the nonprofit manager in the difficult position of restricting a donor’s managerial role without alienating their funding. Although some nonprofit managers may be able to walk this managerial tightrope, it is a stretch to assume that all could. *See generally* Robin Pogrebin, *Trustees Find Boards Seats are Still Luxury Items*, N.Y. TIMES, Apr. 2, 2010, <http://www.nytimes.com/2010/04/03/arts/03center.html?src=me&ref=arts> (reporting that many New York non-profits expect board members to donate to the organization in return for their seat on the board and illustrating that the “cost” of a board seat at the Museum of Modern Art in New York is \$10 million, a board seat at the New York Public Library is \$5 million, and the Lincoln Center’s “board members are generally asked to contribute \$250,000 up-front and on an annual basis”).

97. Levmore, *supra* note 90, at 405–06.

98. *Id.* at 406.

99. *Id.*

100. Charitable donations totaled \$307 billion in 2008. CTR. ON PHILANTHROPY, IND. UNIV., *GIVING USA 2009: THE ANNUAL REPORT ON PHILANTHROPY FOR THE*

considered votes. Further, if a justification of the theory is that minority ideas flourish under the cloak of the deduction, then minority donations should at least proportionally benefit from the provision.

However, at least some ethnic minorities would not proportionally benefit under the current codification—thereby undercutting the argument of cultivating and nurturing minority ideas. Of the \$162 billion covered by the deduction in 2008, taxpayers with annual income above \$100,000 gave \$100 billion, or 62.5%.¹⁰¹ Studies show that “minorities earn less and are more likely to be unemployed.”¹⁰² Thus, minorities are less likely to earn more than \$100,000 per year and accordingly less likely to be the main beneficiaries of § 170. When considering the groups affected by this provision, this perceived benefit becomes a strong counterargument. Thus, as currently codified, § 170 leads to the “over-representation of the views of the wealthy in the funding process, thus undercutting [the] goal of reflecting popular preferences.”¹⁰³

As a final note with regard to the theoretical justifications for the deduction, there may be a simpler explanation for the lack of an accepted theoretical justification for the charitable deduction. Accepting the argument that at the time of enactment charity encompassed only assistance to the poor, the lack of satisfactory justification for the charitable deduction as currently codified makes perfect sense. Commentators have attempted to explain the current scope of the provision with limited success.¹⁰⁴ Measurement of income theories imply a much broader deduction, which would encompass all giving to others. Subsidy arguments imply a radically different subsidy—one that is equal for all as a percentage of donations. However, none of these theories satisfactorily explain the current form and scope of the provision,

YEAR 2008, at 4 (2009) [hereinafter GIVING USA 2009]. However, the total amount subject to the charitable deduction was \$162 billion. MICHAEL PARISI, INDIVIDUAL INCOME TAX RETURNS, PRELIMINARY DATA, 2008, at 4 (2008), available at <http://www.irs.gov/pub/irs-soi/10winbulindincretpre.pdf>. Expressed as a percentage, the amount subject to the deduction is 48%.

101. See PARISI, *supra* note 100; *infra* app. I fig.1.

102. Mylinh Uy, *Tax & Race: The Impact on Asian Americans*, 11 *ASIAN AM. L.J.* 117, 125 (2004); see also Patricia A. Taylor, *Changes in the Structure of Earnings Inequality by Race, Sex and Industrial Sector, 1960–1980*, in 5 *RESEARCH IN SOCIAL STRATIFICATION AND MOBILITY* 105, 107 (Robert V. Robinson ed., 1986) (“Research consistently shows that racial minorities earn less than whites in the workplace, even after adjustments for education, occupation, experience and other variables.”).

103. Fleischer, *supra* note 12, at 20. *But see* Schizer, *supra* note 77, at 248 (proposing that providing an incentive to the rich is simply “a price we must pay” for the charitable deduction).

104. Fleischer, *supra* note 12, at 14, 20 (arguing that unless commentators engage in making value judgments about the various virtues of different charitable causes, theories justifying the charitable deduction will be incomplete).

particularly as invoked in the political discourse on the matter.¹⁰⁵ Thus, until commentators acknowledge and account for the confused theoretical underpinnings of the deduction when § 170 was codified, each new theory will not completely fulfill its mandate.

C. Public Justifications—The Misguiding Rhetoric in Defense of the Charitable Deduction

President Barack Obama's 2010 budget contains a proposed reduction of the charitable deduction for the highest income-level taxpayers.¹⁰⁶ The proposal plans to reduce the deduction value of high income-level taxpayers from the current 35% rate to 28%.¹⁰⁷ Regardless of the merits and flaws of such tax policy, the critics of the amendment all sang from the same hymnbook—the President should not penalize churches and welfare organizations because they aid those who need it most. For example, Rep. Ted Poe, of Texas, stated:

Thus, charities . . . such as churches, the YMCA and groups that that [sic] *feed the hungry and help in disasters, take care of crime victims and help the homeless*, will be struggling for funds.¹⁰⁸

Similarly, Rep. Joe Pitts, of Pennsylvania, quoted one of his constituents in the disapproval of the proposed legislation:

“We donate a very large percentage of our income to the *hungry, homeless, orphaned and widowed*. We are in the top tax bracket. Any increase in our taxes or decrease in our charitable deductions will not hurt our standard of living, it will indeed, hurt the very people that the government is trying to help.”¹⁰⁹

Along the same lines, Rep. Gus Bilirakis, of Florida, said:

105. *Id.*

106. OFFICE OF MGMT. & BUDGET, *Jumpstarting the Economy and Investing for the Future*, in A NEW ERA OF RESPONSIBILITY: RENEWING AMERICA'S PROMISE 17, 29 (2009) (“The Administration’s Budget includes a proposal to limit the tax rate at which high-income taxpayers can take itemized deductions to 28 percent”); see also Johanna Neuman, *Are Charitable Contributions Really at Risk Under the Obama Budget*, L.A. TIMES, Feb. 26, 2009, <http://latimesblogs.latimes.com/washington/2009/02/charitable-cont.html> (“Under the president’s plan, itemized tax deductions for charitable giving and mortgages would be capped for those earning more than \$250,000 a year. Changes would be phased in gradually over the next few years. So in 2010, instead of getting a 33% or 35% deduction for charitable donations, Americans in the top income brackets, according to a *Wall Street Journal* analysis, would get somewhere in the neighborhood of 28%.”).

107. OFFICE OF MGMT. & BUDGET, *supra* note 106, at 29; see also Brad Hirschfield, *Obama’s Budget Devalues Charity*, WASH. POST, Mar. 17, 2009, http://newsweek.washingtonpost.com/onfaith/brad_hirschfield/2009/03/budget_devalues_charity_when_w.html (“At precisely the moment when we need to reaffirm the importance of individuals stepping up to address those in need, this does the opposite—literally devalues charitable giving”).

108. 155 CONG. REC. H3150 (daily ed. Mar. 11, 2009) (statement of Rep. Ted Poe) (emphasis added).

109. 155 CONG. REC. H2931 (daily ed. Mar. 4, 2009) (statement of Rep. Joe Pitts) (emphasis added). He continued, stating that “our churches, charities and other com-

Every year, Americans give hundreds of billions of dollars to charity. In turn, they provide funding to *shelters, food banks, health care clinics* and a host of other charitable programs *which benefit the needy*. During this recession, their services are needed more than ever.¹¹⁰

Opposition to this provision in the Senate used similar rhetoric in their critique of the bill. For instance, Sen. John Ensign stated:

Most Americans believe that the private sector can deal with problems in our communities person to person through charitable giving We have some amazing charities that give *compassionate care to those who truly need it*.¹¹¹

Sen. Mitch McConnell reiterated:

At a time of economic distress, when more people than ever depend on these organizations, the administration's budget reduces the incentive for people to donate to them.¹¹²

Each of the Congressmen quoted above focused on the role of charities that help the neediest members of society, and these statements represent a sample of the typical arguments against the proposed modifications of § 170. The author acknowledges that members of Congress also mentioned health and educational organizations. However, the most prevalent and impassioned rhetoric was reserved to explain how the charitable deduction helps those who need it most and that any change to this provision would cripple these organizations.¹¹³ Accepting that these Congressmen were simply using the best rhetorical tools available—one of which was pulling on the heartstrings of the American public—if the Congressional justification for not amending the charitable deduction is that the deduction helps the neediest, then the data should show a significant correlation between the articulated justification and § 170's primary beneficiaries. As shown in the next section, the actual percentage of the charitable deduction used to benefit “those who really need it” is nowhere close to the attention it received in Congress.

munity organizations that assist many individuals quicker and more effectively than government programs will be harmed.” *Id.*

110. 155 CONG. REC. H11986 (daily ed. Oct. 28, 2009) (statement of Rep. Gus Bilirakis) (emphasis added).

111. 155 CONG. REC. S3041 (daily ed. Mar. 12, 2009) (statement of Sen. John Ensign) (emphasis added).

112. 155 CONG. REC. S3099 (daily ed. Mar. 16, 2009) (statement of Sen. Mitch McConnell) (emphasis added).

113. Based on congressional reports, a quantitative analysis of the discussion of amendments to § 170 in 2008 found that Congress discussed direct poverty relief 44% of the time. The nearest other charitable purpose was education at 24%, followed by disaster and war relief at 17%, churches at 6%, health at 2%, and other at 7%. The methodology of this study is found *infra* in Appendix II.

III. DOES IT FULFILL THE PUBLIC RATIONALE?

Although the JCT in its annual tax expenditure report to Congress has done some preliminary work in this area,¹¹⁴ no study has ever comprehensively subdivided § 170 donations according to their charitable purpose. The JCT's report, *Estimates of Federal Tax Expenditures for Fiscal Years 2009–2013*, subdivides the donations subject to the charitable deduction into three categories: (1) “[d]eduction for charitable contributions to educational institutions,”¹¹⁵ (2) “[d]eduction for charitable contributions other than for education and health,”¹¹⁶ and (3) “[d]eduction for charitable contributions to health organizations.”¹¹⁷ This is a useful starting point, but it does not convey an accurate picture of how the estimated \$36.2 billion of tax savings¹¹⁸ from the charitable deduction is allocated among the nonprofit sector¹¹⁹ and, specifically, among organizations that provide direct assistance to the poor.¹²⁰

In order to provide an accurate account of such giving, this Part first looks at the percentage of total giving that is subject to the charitable deduction. Section III.B provides a brief synopsis of total giving in the United States and discusses the sectors that provide direct assistance for poverty. Section III.C subdivides donors' donative preferences according to income level. Section III.D compares donative preferences by income level and contrasts such figures against total giving by income level. This comparison, specifically when looking at direct poverty relief organizations, allows the study to determine the total percentage of the charitable deduction that is apportioned to poverty relief. The result is that approximately 8% of the charitable deduction is apportioned to direct poverty relief organizations. Finally,

114. JCT ESTIMATES 2009–2013, *supra* note 18, at 28–45.

115. *Id.* at 39.

116. *Id.* at 41.

117. *Id.* at 42.

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

119. This Article does not account for any taxpayer reporting abuse of the charitable deduction, and it acknowledges that this is a simplification of an increasing area of noncompliance. Indeed, as noted in a recent IRS report, IRS examiners “are seeing an upturn in instances where taxpayers try to disguise private tuition payments as contributions to charitable or religious organizations.” *Phishing Scams, Frivolous Arguments Top the 2008 “Dirty Dozen” Tax Scams*, IRS.gov (Mar. 13, 2008), <http://www.irs.gov/newsroom/article/0,,id=180075,00.html>.

120. This Article only addresses direct assistance of poverty. The author acknowledges that many programs provide indirect assistance that aid in the fight against poverty. Nevertheless, this Article does not include these figures in the calculation for two reasons. First, there is no satisfactory definition of indirect assistance of poverty, and this term can be as broad or as narrow as the study desires. Second, the language used by members of Congress criticizing the proposed reduction in the charitable deduction looked at the effect on programs that provide direct assistance to poverty programs.

because there is a perception that many churches contribute large sums of money to poverty relief efforts, the last section looks at the role of churches in this area and attempts to quantify these efforts.

A. Amount of Giving Subject to the Charitable Deduction

Giving USA 2009, an annual survey of total giving in the United States, found that in 2008, some \$307 billion was donated to charities.¹²¹ However, according to the Internal Revenue Service, the total amount donated in 2008 under the charitable deduction was \$161.9 billion, or about 52% of all giving in the United States.¹²² As many commentators have discussed, because of itemization, total giving is not the same as the amount subject to the charitable deduction.¹²³ In 2008, approximately 142.4 million residents, out of a population of 307 million,¹²⁴ filed a tax return in the United States.¹²⁵ Of these 142.4 million returns, some 39.2 million claimed a charitable deduction on their tax return.¹²⁶ However, it should be remembered that tax returns can include income information for more than one person. For instance, in 2007, approximately 53% of returns included more than one person on the return.¹²⁷ Thus, although there were 39.2 million returns filed with the IRS, this does not fully provide the number of individuals that benefit from the deduction.

By conducting the simple calculation described in footnote 127, we can work out approximately how many individuals, rather than re-

121. GIVING USA 2009, *supra* note 100, at 4.

122. See PARISI, *supra* note 100, at 15 tbl.1 (The Parisi document, published by the IRS, provides a much more organized presentation of the this data than the original figures published by the IRS.).

123. *E.g.*, Charles T. Clotfelter, *Tax-Induced Distortions in the Voluntary Sector*, 39 CASE W. RES. L. REV. 663, 672 (1989).

124. Cent. Intelligence Agency, *North America: United States*, WORLD FACTBOOK, available at <https://www.cia.gov/library/publications/the-world-factbook/geos/us.html> (last visited Jan. 27, 2011).

125. PARISI, *supra* note 100, at 6 fig.A (stating that the total number of returns was 142,350,256).

126. *Id.* at 7 fig.A. The number of returns claiming the total standard deduction was 91,975,014, and 39,223,228 returns claimed the charitable contribution deduction. *Id.*

127. INTERNAL REVENUE SERV., INDIVIDUAL COMPLETE REPORT, PUB. NO. 1304, TABLE 1.2, ALL RETURNS: ADJUSTED GROSS INCOME, EXEMPTIONS, DEDUCTIONS, AND TAX ITEMS, (2007) [hereinafter SOI TAX STATS], available at <http://www.irs.gov/taxstats/indtaxstats/article/0,,id=96978,00.html>. The calculation was as follows: of the 143 million returns in 2007, 54.0 million were returns of married persons filing jointly; 2.7 million were returns of married persons filing separately; 21.2 million were returns of head of household; 87,000 were returns of surviving spouses; and 64.9 million were returns of single persons. Adding the number of returns filed under “single persons” with “surviving spouses” and those “married filing separately” results in the total number of returns that account for one taxpayer. This number was then divided by the total number of returns to give a percentage.

turns, benefited from the charitable deduction. For purpose of simplicity, this Article assumes that each joint return claiming a charitable deduction represents two individuals.¹²⁸ This results in about 60 million individuals who made a donation to charity and benefitted from the charitable deduction in 2008.¹²⁹

In other words, out of the 307 million people in the United States, only 60 million—less than 20%—benefit directly from this tax deduction. This is despite the fact that during the 2009 holiday season, even though the country was experiencing an economic recession, just under 90% of Americans planned on giving to charity.¹³⁰ Further, each year approximately 89% of American households give to charity.¹³¹ That means that as many as 70% of American donors give to charity without claiming a deduction. Thus, even though the charitable deduction is ingrained in the American consciousness, less than one in five individuals each year enjoy the benefits of the provision, despite the fact that many more give to charity.

B. Breakdown of Total Charitable Giving According to Organizational Purpose

The breakdown of total charitable giving in 2008 is illustrated in Table 1:

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128. This is likely a generous assumption. Assuming three donors for every two returns results in 16% of the population deriving a charitable deduction for their gift.
129. This figure was arrived at by first taking the total number of tax returns (39.2 million) and multiplying that total by the percentage number of tax returns that only involve one individual (47%). This resulted in 18.4 million individuals. Secondly, the total number of tax returns (39.2 million) was multiplied by the percentage number of tax returns that involve more than one individual (53%) and this figure was then multiplied by two. This resulted in 41.6 million. The sum of these two figures equals 60 million.
130. AM. RED CROSS, HOLIDAY GIVING POLL 13 (2009), *available at* http://www.redcross.org/www-files/Documents/pdf/other/HolidayGivingPollExcerptsNov_18_09.pdf.
131. *Philanthropic Statistics*, NATIONAL PHILANTHROPIC TRUST, http://www.npt.org/philanthropy/philanthropy_stats.asp (last visited Mar. 1, 2010).

Table 1¹³²

Type of Charitable Organization	Amount of Contribution (in billions of dollars)	Percentage of Total Charitable Giving
Religion	106.89	35.0
Education	40.94	13.0
Health	21.64	7.0
Human Services	25.88	9.0
Foundations	32.65	11.0
Arts	12.79	4.0
Public Society Benefit	23.88	8.0
Other	42.98	13.0
TOTAL	307.65	100.0

Religion received the largest amount, amassing 35% of total giving, which was just over \$106 billion.¹³³ Excluding religious organizations, addressed in section III.E, the two categories of charitable organizations that provide services to the needy are human service organizations and public and society benefit organizations. In the latest Center on Philanthropy report, this accounted for 17% of the total charitable giving.¹³⁴

However, human service organizations and public and society benefit organizations have a larger mandate than the direct relief of poverty. Public society charities engage in various activities including the promotion of philanthropy and volunteerism, “conduct[ing] research in the biological, physical and social sciences, [and] public policy research. They may also engage in community and economic development, civil liberties and civil rights, voter education and consumer protection.”¹³⁵ Similarly, the human service sector includes organizations that:

focus on courts and legal services; employment and vocational training; food and nutrition; long-term housing and temporary shelter; public safety and community disaster relief; recreation and sports; youth development; family and children’s services; emergency assistance for families; and independent living and self-sufficiency for women seniors, veterans and individuals with disabilities.¹³⁶

132. GIVING USA 2009, *supra* note 100, at 4.

133. *Id.*

134. *Id.*

135. *Id.* at 147.

136. *Id.* at 119.

There is evidence that most human service organizations “do not focus on the needs of low-income individuals, and only a small portion of human service organizations attempt to alleviate poverty by providing food, clothing, or other basic necessities.”¹³⁷ For instance, the Center on Philanthropy found that only 8% of individuals’ donations directly address poverty relief.¹³⁸ Thus, according to the Center on Philanthropy, less than 10% of total giving in the United States directly addresses the causes that so worried many members of Congress.

C. Taxpayers’ Donative Preferences Relate to Taxpayers’ Levels of Income

Individuals’ donative preferences correlate with income levels.¹³⁹ One study conducted in 2007 by the Center on Philanthropy at Indiana University (the Indiana Study) measured individual taxpayers’ charitable donations in 2005 and broke down the donations according to income level and charitable purpose.¹⁴⁰ It found that very wealthy donors¹⁴¹ primarily gave contributions to educational institutions (25.2%), health organizations (25.3%), and to a lesser extent the arts (15.4%).¹⁴² Wealthy and very wealthy donors gave a much smaller proportion of their charitable contributions to organizations that address basic human needs, such as shelter, food, and medical care for the indigent—3.4% of individuals with income over \$1 million and

137. Lindsey, *supra* note 33, at 1085–86 (citing Alice Gresham Bullock, *Taxes, Social Policy and Philanthropy: The Untapped Potential of Middle and Low Income Generosity*, 6 CORNELL J.L. & PUB. POL’Y 325, 346–47 (1997)).

138. CTR. ON PHILANTHROPY, IND. UNIV., PATTERNS OF HOUSEHOLD CHARITABLE GIVING BY INCOME GROUP, 2005, at i (2007) [hereinafter PATTERNS] (“Only 8 percent of households’ donated dollars were reported as contributions to help meet basic needs—providing food, shelter, or other necessities.”). The *New York Times* and other newspapers have also reported that less than 10% of American charitable contributions address basic human needs such as providing care for the indigent sick, feeding the poor, and providing shelter for the homeless. See, e.g., Robert B. Reich, *Is Harvard a Charity*, L.A. TIMES, Oct. 1, 2007, <http://articles.latimes.com/2007/oct/01/opinion/oe-reich1>; Strom, *supra* note 20.

139. See, e.g., Bullock, *supra* note 137, at 342–44 (providing a summary of studies researching patterns of giving in the United States).

140. PATTERNS, *supra* note 138.

141. *Id.* at 5 (defining the very wealthy as individuals with income in excess of \$1,000,000).

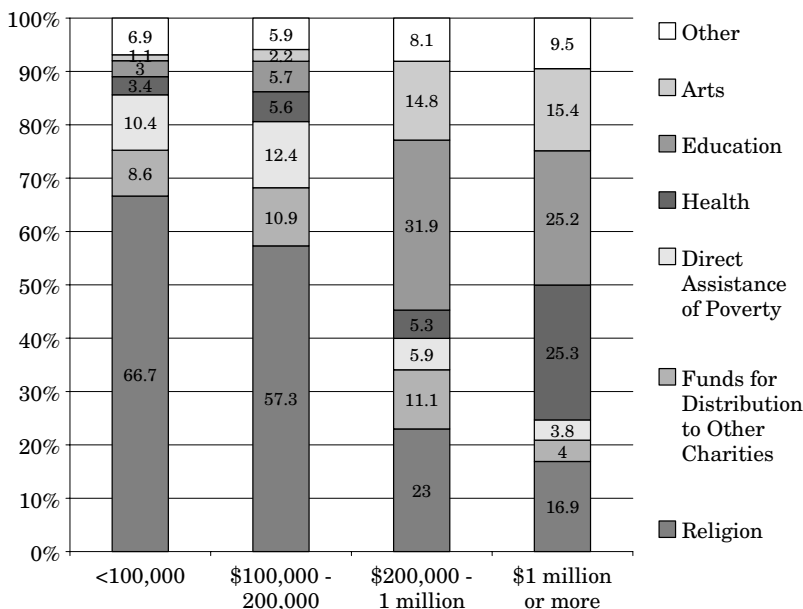
142. *Id.* at 17 fig.2; see Wiedenbeck, *supra* note 82, at 101 (“[H]igh-income groups devote a greater proportion of their gifts to educational institutions, hospitals and the arts.”); *infra* app. I fig.1; see also CLOTFELTER, *supra* note 32, at 283 (arguing that if the charitable activities supported by high-income taxpayers “cannot be distinguished on the basis of their external benefits,” then “differing rates of subsidy would not be efficient”); Marting Feldstein, *The Income Tax and Charitable Contributions: Part II—The Impact on Religious, Educational and Other Organizations*, 28 NAT’L TAX J. 209, 224 (1975).

5.8% of individuals with income between \$200,000 and \$1 million gave to these causes.¹⁴³

The Indiana Study also showed that low- and middle-income taxpayers primarily supported religious organizations.¹⁴⁴ Low- and middle-income households gave just under \$9.5 billion, or about 49% of total giving, to direct assistance of poverty charities.¹⁴⁵ Figure 2 illustrates the breakdown of charitable organizations giving by income level.

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143. PATTERNS, *supra* note 138, at 17 fig.2; *see also* Strom, *supra* note 20 (quoting William H. Gross, a philanthropic billionaire as saying, “I don’t think we’re getting the bang for the buck for gifts to build football stadiums and concert halls, with all due respect to Carnegie Hall and other institutions, I don’t think the public would vote for spending tax dollars on those things.”).
144. PATTERNS, *supra* note 138, at 17 fig.2; *see* Colombo, *supra* note 25, at 685 (“Empirical studies confirm that some organizations, particularly churches, are largely funded by relatively small donations from middle and lower-income groups, whereas arts and education organizations rely more heavily on large gifts from wealthy contributors.”); Charles T. Coltfelter & Richard Schmalbeck, *The Impact of Fundamental Tax Reform on Nonprofit Organizations*, in ECONOMIC EFFECTS OF FUNDAMENTAL TAX REFORM 211, 214–15 (1996) (corroborating the Indiana Study’s findings that individuals’ donations to charitable organizations vary according to income level); Gergen, *supra* note 63, at 1434–43 (providing data on donations to churches).
145. PATTERNS, *supra* note 138, at 15 tbl.10, (finding that 49% of all giving by value to direct relief of poverty is provided for by individuals with income below \$100,000); *see* Lashbrooke, *supra* note 48, at 707–08; Todd Izzo, Comment, *A Full Spectrum of Light: Rethinking the Charitable Contribution Deduction*, 141 U. PA. L. REV. 2371 (1993).

Figure 2. Distribution of Donations According to Income Level and Charitable Purpose¹⁴⁶



D. Value of the Charitable Deduction Accruing to Organizations Engaged in Poverty Relief

In order to calculate the percentage of deductible donations given to the charities that provide direct assistance to poverty, this study used data compiled by the IRS.¹⁴⁷ This data provides a snapshot view of tax returns in a given year, including total amount of deductions, exemptions, as well as line items. Importantly for this study, the data breaks down the charitable contribution deduction, not only in number of returns and amount, but also by income level.¹⁴⁸ Thus, by combining the total amounts given per income group with the Indiana Study, we can calculate the amount of deductible contributions given to specific subsectors of § 170.

However, in order to work out the amount of the charitable deduction allocated to each subsector, one further step is required. Because the charitable deduction reduces a taxpayer's taxable income, the per-

146. PATTERNS, *supra* note 138, at 17 fig.2. Unless otherwise indicated, all charts, graphs, and tables in this Article have been created by this Article's author using data and information from sources cited.

147. PARISI, *supra* note 100.

148. *Id.* at 15 tbl.1. See Figures 1-3 in Appendix I for a pictorial representation of these figures.

centage of the taxpayer's "savings" is tied to a taxpayer's tax bracket.¹⁴⁹ Thus, a taxpayer in the highest tax bracket—i.e., taxed at the 35% marginal rate—who contributes \$100 will in real terms only be contributing \$65. An equally generous taxpayer in the lowest tax bracket—i.e., taxed at the 0% marginal rate—contributes the full \$100. This is known as an upside-down subsidy, and although not an intended consequence of the provision, it has subsequently been justified as an incentive for the wealthy to donate.¹⁵⁰ Thus, in order to work out the total amount of charitable deduction expenditure allocated to organizations that provide direct assistance to the poor, we must determine which tax bracket the individual donor was likely in, allowing for applicable filing status.¹⁵¹

This study used four tax filing statuses: single, married filing jointly, married filing separately, and head of household.¹⁵² Using the IRS's *Individual Statistical Tables by Filing Status*, it was possible to calculate the percentage of returns under each status, which were: single, 37.8%; married filing jointly, 45.4%; married filing separately, 1.9%; and head of household, 14.8%.¹⁵³

The study then produced two calculations—the highest applicable tax rate estimate (HAT estimate) and an average applicable tax rate estimate (AAT estimate). The purpose of these two estimates was to provide a range of figures. The HAT estimate was calculated as follows: first we selected the highest applicable tax bracket under each income range for each filing status. For instance, for the income range of \$30,000 to \$50,000, the highest applicable tax rate to taxpayers in that income group was 15% for married filing jointly and 25% for the rest.¹⁵⁴

The purpose of using the HAT estimate was to figure out the maximum amount of allocated subsidy. The reason this provides the maximum amount of subsidy is because the amount of the subsidy is a product of the donor's tax rate, and thus, by using the highest tax rate

149. Wiedenbeck, *supra* note 82, at 99–100.

150. See, e.g., C. Eugene Steurele & Martin A. Sullivan, *Toward More Simple and Effective Giving: Reforming the Tax Rules for Charitable Contributions and Charitable Organizations*, 12 AM. J. TAX POL'Y 399, 403–04 (1995); Wiedenbeck, *supra* note 82, at 100–01. *But see* STANLEY S. SURREY, *PATHWAYS TO TAX REFORM* 225 (1973) (denouncing the upside-down subsidy as inefficient and unfair because "[t]he amount of public funds which a private person can allocate depends on his marginal tax bracket and hence his income position and wealth generally").

151. See Table 3 in Appendix I for income ranges for each tax bracket under each filing status. Table 4 lists the highest applicable tax brackets for each income range used in the calculation.

152. Although "surviving spouse" is another tax filing status, it represents less than 0.06% of all filers and was excluded from the calculations.

153. SOI TAX STATS, *supra* note 127; *infra* app. I tbl.2.

154. See Table 4 in Appendix I for each income group.

per income range, the amount of the subsidy would also be the highest.

The second figure, the AAT estimate, calculated what percentage of earnings by income level was in each income bracket and proportioned the tax brackets accordingly.¹⁵⁵ Thus, the AAT estimate is more likely to produce the accurate amount of the total subsidy.

Continuing the calculation, the total amount contributed by each income range subject to § 170 was multiplied by the percentage amount in each filing status.¹⁵⁶ For instance, the total amount given by filers from the income range of \$0 to \$15,000 was multiplied by the percentage amount of filers that were single, married filing jointly, married filing separately, and head of household. This process was repeated for each income range. These figures were then multiplied by the applicable tax rate percentage, applying both the HAT estimate and the AAT estimate. This final step resulted in two figures. The first number, which used the HAT estimate, was the maximum amount of subsidy allocated to the total charitable deduction expenditure granted to each income range.¹⁵⁷ The second figure, which used the AAT estimate, was a figure more likely to be closer to the actual amount of the subsidy allocated to § 170 by income group.¹⁵⁸

The last step of the calculation was to multiply the amount of subsidy, under both the HAT and AAT estimates, allocated to each income group by the Indiana Study's estimates by donor income of the share of charitable contributions made by different types of organizations. Thus, the total amount of the subsidy per income range was multiplied by the percentage amount given by individuals in each income range to direct relief of poverty organizations. These two numbers were the maximum estimates (under HAT) and the likely amount (under AAT) of the charitable deduction expenditure allocated to organizations that engage in direct assistance to the poor.¹⁵⁹

According to the JCT's estimates for 2008, the total cost of the deduction is \$36.2 billion.¹⁶⁰ Using the JCT's estimates, the maximum total percentage (HAT) allocated to direct poverty relief is 10.8%,¹⁶¹

155. For example, returns filed as married filing separately that are in the income range of \$100,000 to \$200,000 are potentially subject to three income tax rates, 35%, 33%, and 28%. This study subdivides by income level the percentage in each bracket. Admittedly, this is a simplification of the calculation (assuming that taxpayers will be evenly proportioned across the income range). However, allowing for variation allows a more accurate calculation. See *infra* app. I tbls.6a–c.

156. See *infra* app. I tbl.5.

157. See *infra* app. I tbls.7a–b.

158. See *infra* app. I tbls.7a–b.

159. These calculations are provided *infra* in Tables 7a and 7b in Appendix I.

160. JCT ESTIMATES 2009–2013, *supra* note 18, at 39 tbl.1.

161. This percentage was calculated by dividing the total number of returns using the maximum amount of the deduction per income range total amount (3.9 billion),

and, using the subdivided tax brackets (AAT), the total amount is 9.9%.¹⁶² However, this study's calculations do not account for certain effects that would lower the total amount subject to § 170.¹⁶³ This Article's calculations result in a total giving amount, assuming the highest tax rate for each income range using maximum tax rate per income range, of \$48.2 billion. Further, if we used the tax rate per income range, it results in a total of \$45.5 billion.¹⁶⁴ These total amounts have the same internal assumptions as our total figures, and thus by comparing them against each other, as a percentage, these assumptions should cancel out. Accordingly, comparing the total amount of deduction allocated to poverty relief organizations against our total amount subject to a deduction results in 8.1% under the maximum tax rate and a 7.8% allocation using the subdivided tax brackets. These figures are more in tune with the research of the Indiana Study, which found that total giving to organizations that provide direct poverty assistance was approximately 8%.¹⁶⁵ Finally, although we are constrained by the data available and cannot determine the tax rate of all charitable donors, the total amount is likely to be within the 7.8%–10% range, with the actual amount for the reasons explained above being close to 8%.

E. Distribution of Contributors to Religious Organizations by Income Level

There is a presumption that churches function, at least in part, to provide direct relief to the poor.¹⁶⁶ Undoubtedly, many churches organize soup kitchens, arrange for homeless shelters, and provide other types of aid to the poor.¹⁶⁷ However, not all religious organizations have this social mandate, and the available evidence regarding churches' participation in poverty relief efforts is conflicting and diffi-

see infra app. I tbl.8, by the JCT's estimate for the total cost of the subsidy (\$36.2 billion).

162. This percentage was calculated by dividing the total number under Table 8 using the amount of the deduction per income range total amount (3.5 billion), *see infra* app. I tbl.8, by the JCT's estimate for the total cost of the subsidy (\$36.2 billion).

163. For instance, the annual minimum tax.

164. *See* app. I tbls.7a–b.

165. PATTERNS, *supra* note 4.

166. *See, e.g.*, Ram A. Cnaan, Jill W. Sinha & Charlene C. McGrew, *Congregations as Social Service Providers: Services, Capacity, Culture, and Organizational Behavior*, 28 ADMIN. IN SOC. WORK 47, 50 (2004), available at http://repository.upenn.edu/cgi/viewcontent.cgi?article=1009&context=spp_papers (stating that "public opinions show that most Americans expect congregations to provide welfare services to needy people").

167. This is a very large topic of research. The point of this section is to give the reader an understanding of the potential ranges of church spending in this area.

cult to ascertain.¹⁶⁸ Scholars that have attempted to determine the contributions of religious organizations' in this field have found differing results.

For example, Professor Charles Clotfelter found that "sacramental functions account for a preponderance of church expenditures."¹⁶⁹ He estimated that non-sacramental expenditures, such as social welfare, nonreligious education, and health related activities accounted for less than 20% of expenditures.¹⁷⁰ Professors Ram Cnaan, Jill Sinha, and Charlene McGrew researched the impact of religious organizations on community services in Philadelphia.¹⁷¹ They found that "[c]ongregations are highly involved in social service provision. Almost nine of every ten congregations, regardless of size and ethnic composition, are engaged in at least one social service provision. *Often the service is quite modest*—meeting the need of some twenty community residents. . . ."¹⁷² They also asked congregations to self-report the percentage of their annual budget that they allocated to social services.¹⁷³ Of the congregations that responded, the mean was 21.6%.¹⁷⁴ Despite the consensus between Clotfelter's estimate and the Philadelphia study, other national studies have found churches to be nowhere near as generous.

For instance, Professor Mark Chaves found that although 57% of congregations reported participation or support of social welfare activities,¹⁷⁵ spending on such projects accounted for, on average, between 2% and 4% of the total budget of the congregation.¹⁷⁶ He concludes that "[e]xpecting congregations to operate social service programs in large numbers is unrealistic since most do not currently operate such programs."¹⁷⁷ Similarly, Professor Mark Gergen, citing research

168. CHARLES T. CLOTFELTER, *FEDERAL TAX POLICY AND CHARITABLE GIVING* 22–23 (1985).

169. *Id.* at 23–25.

170. *Id.*

171. Cnaan, Sinha & McGrew, *supra* note 166.

172. *Id.* at 53 (emphasis added).

173. *Id.*

174. *Id.* at 55. The study does not state whether this was the mean of all self reported percentages or the mean of the total amount of giving against the total.

175. Professor Chavez defined social welfare activities as providing food, housing, and homelessness services. Mark Chaves, *Congregations' Social Service Activities*, CHARTING CIV. SOC'Y (Urban Inst./Ctr. on Nonprofits & Philanthropy), Dec. 1999, at 2.

176. *Id.* Professor Chavez acknowledges that congregations do mobilize a volunteer workforce, which provides for poverty relief services at a low cost for the congregation. *Id.* at 2–3; see also Ellen P. Aprill, *Churches, Politics, and the Charitable Contribution Deduction*, 42 B.C. L. REV. 843, 865 (2001) (noting that in most cases the churches mainly provide benefits for members).

177. Chavez, *supra* note 175, at 4. Reverend Drew Smith looked at the accessibility of church programs in Indianapolis, and his study found that there was a "lack of interaction between churches and low-income families." Drew Smith, *Churches*

showing that church demographics tend to be of the same race and income level, acknowledged that, although churches engage in some distribution, when “well-to-do people give to churches, their donations tend to benefit people like themselves and not the poor.”¹⁷⁸

Accepting the difficulty in calculating the percentage of churches’ budgets spent on poverty relief, even using Clotfelter’s high 20% estimate results in an 8% increase in the percentage of the deductible donations allocated to direct poverty relief.¹⁷⁹ In summary, even though religion receives 35% of total giving in the United States, religion represents only 25% of the charitable deductible expenditure.¹⁸⁰ Using the highest estimate (20%) of congregation poverty relief spending would add 5% to the 8% to equal a total amount of 13%.¹⁸¹ Using Professor Chavez’s 4% estimate results in a 1% increase.¹⁸²

Clearly, the lack of a consensus on the amount churches spend on direct assistance to the poor makes any conclusion from these figures difficult. What can be ascertained is that the amount churches spend on these social programs is nebulous. Before politicians rely on these figures to justify the charitable deduction, the author calls for more research in this area.

IV. A REVENUE NEUTRAL PROPOSAL

Reviewing the literature, there is considerable discussion regarding either eliminating, changing, or capping the charitable deduction.¹⁸³ The detractors note the upside-down subsidy, and this research will only fuel their concerns. However, the charitable deduction may be justifiable for the simple reason that taxpayers want it, including in its present form.¹⁸⁴

For this reason, this Article does not address the normative question of whether the deduction is equitable; this argument is well-ad-

and the Urban Poor: Interaction and Social Distance, 62 SOC. OF RELIGION 301, 310–12 (2001). Thus, even though churches may provide and spend on these services, they may not be actually connecting with their intended recipients. *Id.*

178. Gergen, *supra* note 63, at 1441; *see also* Charles T. Clotfelter, *Tax-Induced Distortions in the Voluntary Sector*, 39 CASE W. RES. L. REV. 663, 689 (1989) (“[M]ost contributions are directed to institutions geographically close to the donor.”).

179. *See infra* app. I tbl.9.

180. *Infra* app. I tbl.9.

181. Twenty-five divided by one hundred and then multiplied by twenty equals five.

182. Twenty-five divided by one hundred and then multiplied by four equals one.

183. *See, e.g.*, C. Harry Kahn, PERSONAL DEDUCTIONS IN THE FEDERAL INCOME TAX (1960); Lashbrooke, *supra* note 48; Joel S. Newman, *A Proposal for Direct, Deductible Charitable Contributions*, 96 DICK. L. REV. 209 (1992); Stanly S. Surrey, *Federal Tax Reform: The Varied Approaches Necessary to Replace Tax Expenditures with Direct Governmental Assistance*, 84 HARV. L. REV. 352, 381–93 (1970).

184. Pozen, *supra* note 4, at 588.

dressed elsewhere.¹⁸⁵ Instead, this Article proposes that the word “charitable” dupes many Americans into believing the deduction is spent on a certain traditional set of charitable causes. By changing the name of § 170 to the “qualified donation deduction” this misunderstanding will be reduced. Further, it allows Congress to debate the merits of the provision, including each of its individual components, and to determine whether each subsection should continue to receive the benefits of a subsidy without fear of political backlash.¹⁸⁶ In short, this Article advocates transparency. Only once taxpayers know how the charitable deduction subsidy is allocated can the provision be justified on popular grounds.

Consequently, Part IV of this Article discusses the power of word association and articulates why Congress should rename the charitable deduction to the “qualified donation deduction,” while addressing some potential objections to this proposal.

A. The Importance of Labels

The importance of language, word association, and labeling has been a subject of research for many years.¹⁸⁷ This Article does not attempt to address the complexity of this field but instead highlights a few studies to instruct the reader. Within this field of study, researchers agree that language, and in particular labels, can have a large impact on behavior.¹⁸⁸ For instance, in a seminal study by John Ridley Stroop, psychologists placed a card in front of participants with the word RED written in blue and asked the participants to state the color of the word. The study showed that participants’ reaction-time to saying blue was statistically significantly slower than that of control participants, and a higher number of participants said the word red even though they knew the color to be blue.¹⁸⁹ Similarly, psychologist Paul Rozin conducted an experiment where subjects watched a researcher pour sugar from a packet into two bottles of water. Researchers then

185. See, e.g., Fleischer, *supra* note 12, at 28–34; Wiedenbeck, *supra* note 82, at 115 (suggesting that the deduction be replaced with dollar for dollar tax credit).

186. See, e.g., Philip Rucker, *Obama Defends Push to Cut Tax Deductions for Charitable Gifts*, WASH. POST, Mar. 26, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/03/25/AR2009032503103.html> (“Diana Aviv, president of Independent Sector, a national coalition of charities, [stated that] any decrease in charitable giving caused by Obama’s proposal, no matter how small, would be ‘seen as a stake in the heart.’”).

187. See, e.g., VANCE PACKARD, *THE HIDDEN PERSUADERS* (1957).

188. See, e.g., Matthew Hudson, *Advertising is Magic*, PSYCHOL. TODAY, July 16, 2008, www.psychologytoday.com/print/1336 (explaining the power of labels in consumer decision making by describing experiments where, in blind taste tests, consumers state that they prefer Pepsi over Coca-Cola, “yet they still buy Coke more”).

189. John Ridley Stroop, *Studies of Interference in Serial Verbal Reactions*, 18 J. OF EXPERIMENTAL PSYCHOL. 643, 643–62 (1935).

asked the subjects to label one bottle “poison” and the other “sucrose.” Despite acknowledging the irrationality, subjects were reluctant to drink from the bottle that they labeled “poison.”¹⁹⁰ Thus, even when the subjects themselves labeled the product, the effect of the label “poison” was sufficient to create hesitancy, evidenced by their reluctance to drink from the bottle.¹⁹¹

The word “charitable” in § 170 similarly labels the provision, and the associations inherent in the word may be obfuscating taxpayers’ understanding of where their taxes are being spent. Like the subjects in Rozin’s experiment, the public understands that the charitable deduction is just a label, and in this case, a label on a provision that covers more than direct poverty relief.¹⁹² Nevertheless, the label, just like the label on the bottle of water,¹⁹³ distorts individuals’ perception of reality, thereby clouding taxpayers’ ability to accurately determine where the Code allocates this subsidy.

B. The Proposal

To mitigate this labeling effect, this Article proposes that § 170 be renamed the “qualified donation deduction.”¹⁹⁴ Eliminating the word charitable from the provision would reduce confusion that has existed

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190. Paul Rozin, Linda Millman & Carol Nemeroff, *Operation of the Laws of Sympathetic Magic in Disgust and Other Domains*, 50 J. OF PERSONALITY & SOC. PSYCHOL. 703, 704–12 (1986). This study was replicated four years later. See Paul Rozin, Mark Markwith & Bruce Ross, *The Sympathetic Magical Law of Similarity, Nominal Realism and the Neglect of Negatives in Response to Negative Labels*, 1 PSYCHOL. SCI. 383, 384 (1990).
 191. Rozin, Millman & Nemeroff, *supra* note 190; see also R. W. Pollay & T. Dewhirst, *The Dark Side of Marketing Seemingly “Light” Cigarettes: Successful Images and Failed Fact*, 11 TOBACCO CONTROL 118, 129 (highlighting an example of labeling in the marketing of cigarettes). Marketers have described cigarettes using “technically meaningless, but seemingly virtuous descriptors like ‘Mild’, ‘Ultra’, ‘Light’ or ‘Super Light’” to encourage smokers to continue or take up smoking. *Id.* This works even though consumers were to some degree savvy that there was a little health benefit in these products. *Id.*
 192. It would be interesting to conduct a survey asking respondents to apportion percentages to certain categories where they believe the charitable deduction allocates the tax subsidy.
 193. Admittedly, the word “poison” carries strong connotations. However, the impact of the word “charitable” should not be underestimated.
 194. This is not the first time a provision has been renamed to enhance understanding. For instance, the Illinois Criminal Code renamed the “Fraudulent Schemes and Artifices” section to the “Mail and Wire Fraud” section to enhance clarity. See James R. Thompson et al., *The Illinois Criminal Code of 2009: Providing Clarity in the Law*, 41 J. MARSHALL. L. REV. 815, 865 (2008); see also Pub. L. No. 110–246, §§ 4001–4407, 2008 U.S.C.C.A.N (122 Stat.) 1651 (to be codified at 7 U.S.C. §§ 2011–2036); *Supplemental Nutrition Assistance Program*, U.S. DEP’T OF AGRIC. (July 23, 2009), <http://www.fns.usda.gov/snap/snap.htm> (“Only the name of the Food Stamp Program is changing. SNAP is not a new Program. The name change will have no effect on [an individual’s] benefits.”).

from the moment Congress codified the statute.¹⁹⁵ Further, it would reduce any misunderstanding of where the subsidy is allocated, allowing the American public to reach a better understanding of where their effective tax dollars are spent. If the public disagrees with current practice once it is labeled more accurately, they can pressure their congressional representatives accordingly to promote the goods and services they believe should be subsidized.

Another potential benefit of renaming the deduction is to rectify any misunderstanding of the potency of the charitable deduction in the effort to win the war against poverty. For instance, currently, some portions of society believe that government should not allocate more funding to welfare programs because private entities, subsidized by the charitable deduction, are in place to provide such services.¹⁹⁶ Overestimating the effect of the charitable deduction might lead to overestimation of the effect of these private organizations. Thus, once the electorate understands that only 8% of the subsidy is spent on direct poverty relief, the American public might readjust their attitudes towards other welfare programs. In other words, providing the public with this information could change public perception not just on the charitable deduction but also with regard to welfare spending. Rather than tailoring the deduction to focus only on the poverty relief organizations, individuals might believe that a better solution is to leave § 170 unchanged, and increase funding for government welfare programs. They could then express these views to Congress and campaign for reform.

Critics of this proposal may suggest that such a change would be too costly, would confuse the public in what is an already bewildering area of the law, or that the public is apathetic to the allocation of the deduction. This Article addresses these objections in reverse order.

Americans are not apathetic about charitable giving. The United States consistently ranks as the most generous nation in the world, and Americans are rightly proud of this tradition.¹⁹⁷ In 2006, the

195. See *supra* section II.A.

196. See e.g., Michael Boulette, Essay, *What Conservative Social Justice Means to Me*, 3 U. ST. THOMAS J.L. & PUB. POL'Y 107, 109 (2009) ("We must always prefer individual charity to government welfare (and become practitioners of that charity."); Symposium, *Economic Justice in America's Cities: Visions and Revisions of a Movement*, 30 HARV. C.R.-C.L. L. REV. 293, 334 (1995) ("However, as we phase out inefficient government welfare programs, private charities must be able to step in and fill the void."); DCH, *What does Obama Have Against Charity?*, BEARING DRIFT (Mar. 22, 2009), <http://bearingdrift.com/2009/03/22/what-does-obama-have-against-charity/> (stating that under the new proposals the soup kitchens will disappear, "but you'll be eligible for food stamps"). But see Galle, *supra* note 26, at 38 (stating that the "argument that charity fill in where government cannot has been vastly oversold").

197. See, e.g., Symposium, *supra* note 196, at 334 ("America is the most generous nation on earth."); Elisabeth Eaves, Op-Ed., *Who Gives the Most?*, FORBES MAG.,

nonprofit sector accounted for about 5% of the United States' gross domestic product,¹⁹⁸ and, as mentioned, approximately 90% of households in the United States give to charities.¹⁹⁹ The fact that Americans' enthusiasm for charity extends not only to giving, but also to the charitable deduction, is evident from the attention President Obama's proposed modifications to the deduction received.²⁰⁰ The proposed reduction received a flurry of media attention in the United States. Journalists' reactions ranged from lambasting the proposal to cautious support.²⁰¹ In short, Americans closely guard and care about the charitable deduction, the very opposite of apathy.

Renaming the deduction would not confuse the American public. Instead, it would clarify an existing practice. By better describing where the charitable deduction allocates the government subsidy, any existing misperceptions regarding the effect of the provision would be reduced. Accordingly, renaming the provision would reduce rather than increase confusion.

Lastly, the proposal is costless. Under Congressional rules, any proposed changes of legislation must include a cost estimate.²⁰² This cost is calculated by comparing the current revenue and outlays against the estimated revenue and outlays after the legislative change.²⁰³ This proposal affects neither revenues nor outlay, and thus it would be "scored" as revenue neutral. Admittedly, some administrative changes would be required to adopt this provision. However, because of the evolving nature of the tax code, the IRS is accustomed to dealing with changes in tax law. Each year technical

Dec. 26, 2008, http://www.forbes.com/2008/12/24/america-philanthropy-income-oped-cx_ee_1226eaves.html ("Americans give more to charity, per capita and as a percentage of gross domestic product, than the citizens of other nations.").

198. *Fact Sheet—Nonprofit Size and Scope*, NONPROFIT CAREER GUIDE, http://www.nonprofitcareerguide.org/fact_sheet-scope.php (last visited Jan. 28, 2011).

199. *Philanthropic Statistics*, *supra* note 131.

200. *See, e.g.*, Martin Feldstein, *A Deduction from Charity*, WASH. POST, Mar. 25, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/03/24/AR2009032402462.html>; Derek Thompson, *Will America's Charities Survive Washington's Ideas*, ATLANTIC, Mar. 18, 2010, <http://www.theatlantic.com/business/archive/2010/03/will-americas-charities-survive-washingtons-ideas/37702/>.

201. Compare Thompson, *supra* note 200 (stating that "the Standard Deduction Solution to our byzantine tax system could both solve and create problems for both public sector politicians and private sector interests"), with Feldstein, *supra* note 200 ("Many tax features of the Obama budget should be changed to stimulate the near-term recovery of demand and to strengthen long-term incentives for productivity and growth. But the proposed tax on charitable gifts hits at the foundation of our pluralistic society. The administration should recognize its mistake and withdraw this proposal.").

202. 111th Cong., Rules of the House of Representatives, R. XIII(3)(d)(2)(A), at 26 (2008), available at clerk.house.gov/legislative/rules111/111th.pdf; Rules of the Senate, R. XXVI(11)(a)(1), at 37 (2007), available at <http://rules.senate.gov/public/index.cfm?p=RuleXXVI>.

203. JCT ESTIMATES 2009–2013, *supra* note 18, at 21.

elements of the tax code change and these changes have to be advertised and explained to the taxpayer. Changing the name of § 170 could be incorporated into these yearly edits. Further, if Congress enacts President Obama's proposal regarding itemized deductions, then it would be a perfect opportunity to rename the provision.

None of the drawbacks outlined above, either alone or in conjunction, justify retaining § 170's name. Changing the name to "qualified donation deduction" will mitigate individuals' misplaced perceptions of where the charitable deduction is allocated, and the charitable deduction's relationship to direct poverty relief efforts. This would allow the electorate to reexamine its perception of how the charitable deduction ranks the different sectors within § 501(c)(3).²⁰⁴ It could then see whether such prior perceptions match the reality of the subsidy.²⁰⁵ If it does not, they can take action via the political process. For these reasons, the charitable deduction should be renamed the qualified donation deduction.

V. CONCLUSION

A former chief economist at the U.S. Department of Labor stated that if any proposed amendments curtailing the charitable deduction passed, "the government would gain billions in tax revenue, but charities and others would lose. That would lessen the ability of charities to help the neediest . . ." ²⁰⁶ It is these types of misleading assertions that this Article hopes to address. The neediest receive only 8% in direct assistance from the charitable deduction. High-income individuals contribute less as a percentage of their total giving to direct assistance of poverty organizations than their middle- and low-income counterparts. To continue justifying the 35% deduction for high-income individuals under the assumption that it protects the neediest is a fallacy, and to continue advertising it as such constitutes fraud. Renaming the charitable deduction to the qualified donation deduc-

204. By apportionment of the subsidy.

205. Another key issue with the charitable deduction is also one of the most obvious. Scholars and politicians do not want to, or have not, engaged in an analysis of what "good" in the charitable sector means. Fleisher, *supra* note 12, at 20 n.95 ("While our society superficially agrees that certain 'good activities' are entitled to tax exemptions [and accompanying deductions], this superficial agreement masks considerable confusion over precisely what good activities qualify as charitable and why they are deserving of tax exemption.") (quoting Colombo & Hall, *supra* note 54, at 6). Even if there was a method of placing activities in a "good" category, that would not be the end of the analysis. Once an activity is categorized as "good," then some "good" charities will be more worthy of the subsidy than others. Simply put, no one wants to rank a charity's goals and objectives.

206. Diana Furchtgott-Roth, Op-ed., *Keep the Charity Tax Deduction*, REUTERS, Apr. 2, 2009, available at <http://blogs.reuters.com/great-debate/tag/chief-economist/>.

tion makes this deception more difficult and allows the American public to decide, based on more informed information, where their tax dollars are spent.

APPENDIX I

Figure 1. Percentage of Charitable Giving Subject to the Charitable Deduction by Income Level²⁰⁷

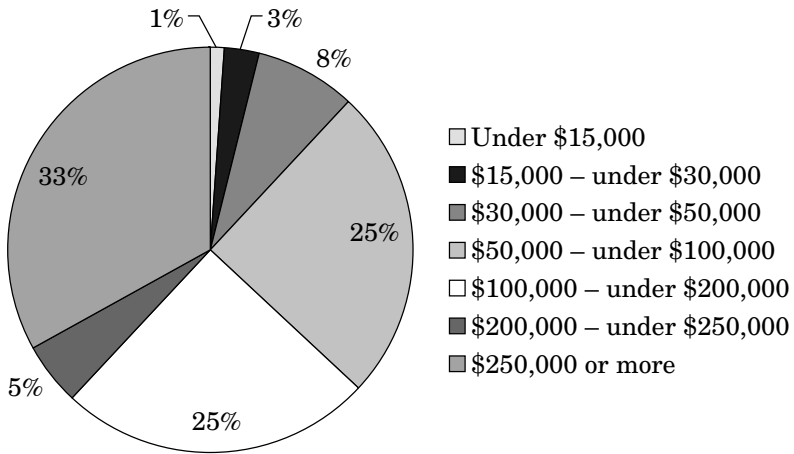
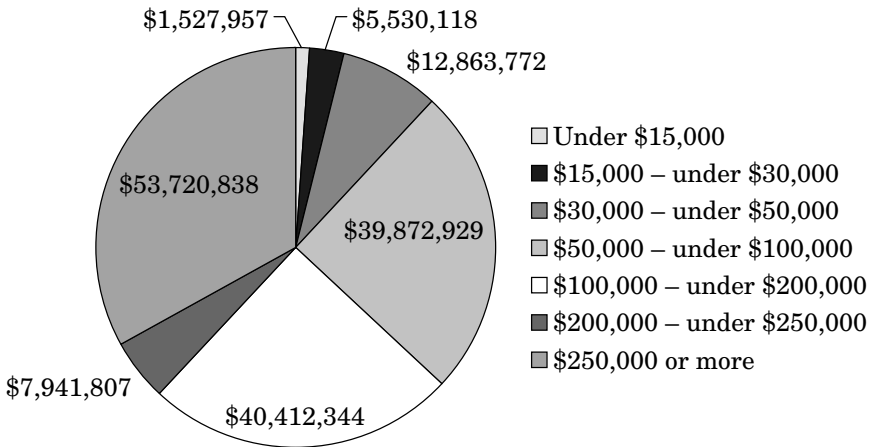


Figure 2. Amount of Charitable Giving Subject to the Charitable Deduction by Income Level²⁰⁸

All figures in thousands of dollars.



207. *PARISI*, *supra* note 100, at 15 tbl.1.

208. *Id.*

Figure 3. Number of Charitable Deduction Returns and Total Amount of Giving Subject to § 170, According to Income Level

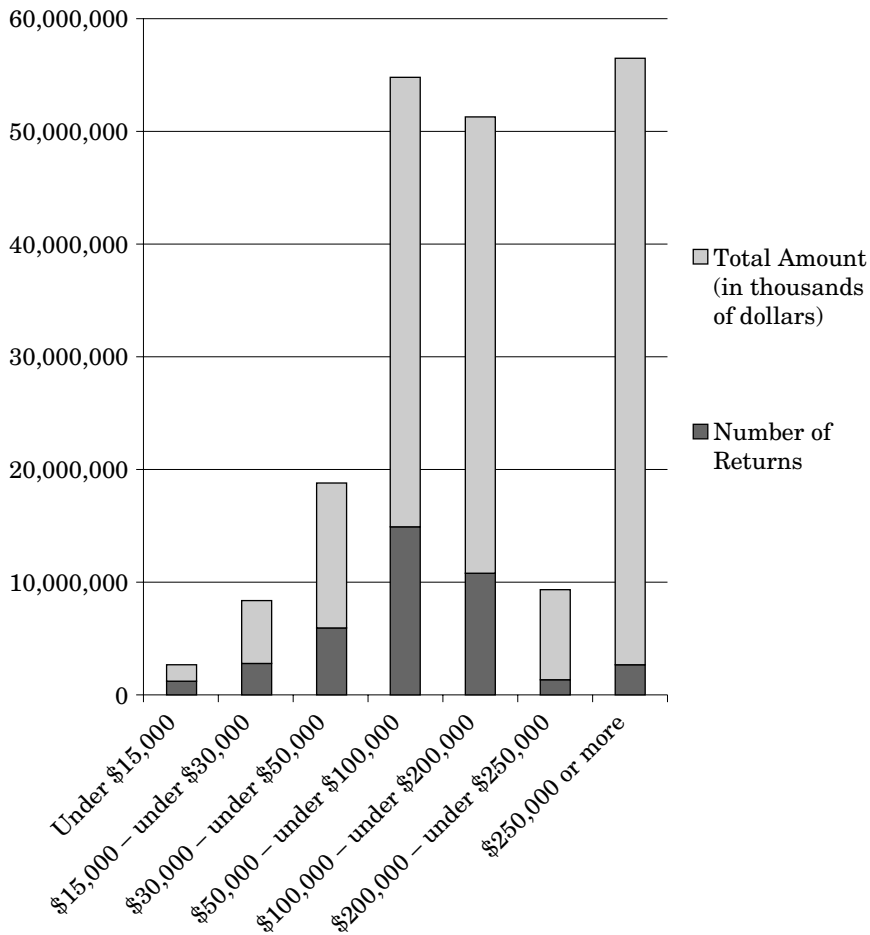


Table 2 - Number of Returns According to Status²⁰⁹

Total Number of Returns	Married Filing Jointly	Married Filing Separately	Head of Household	Surviving Spouse	Single
142,978,806	54,065,030	2,730,935	21,169,039	86,923	64,926,879
%	37.81%	1.91%	14.80%	0.06%	45.41%

Total Joint Returns = 52.62%

Total Single Returns = 47.38%

Table 3. Tax Rate Brackets According to Filing Status in 2008²¹⁰

Married Filing Jointly		Married Filing Separately		Single		Head of Household	
Marginal	Tax Brackets	Marginal	Tax Brackets	Marginal	Tax Brackets	Marginal	Tax Brackets
Tax Rate	Range	Tax Rate	Range	Tax Rate	Range	Tax Rate	Range
10%	0–16,050	10%	0–8,025	10%	0–8,025	10%	0–11,450
15%	16,051 – 65,100	15%	8,026 – 32,550	15%	8,026 – 32,550	15%	11,451 – 43,650
25%	65,101 – 131,450	25%	32,551 – 65,725	25%	32,551 – 78,850	25%	43,651 – 112,650
28%	131,451 – 200,300	28%	65,726 – 100,150	28%	78,851 – 164,550	28%	112,651 – 182,400
33%	200,301 – 357,700	33%	100,151 – 178,850	33%	164,551 – 357,700	33%	182,401 – 357,700
35%	357,701+	35%	178,851+	35%	357,701+	35%	357,701+

209. SOI TAX STATS, *supra* note 127.

210. *Tax Data—U.S. Federal Individual Income Tax Rates History, 1913–2011*, TAX FOUND. (Jan. 1, 2011), http://www.taxfoundation.org/publications/show/151.html#fed_individual_rate_history-20091231.

Table 4. Highest Tax Rate Brackets According to Income Level from Figure 1 in 2008²¹¹

	Married Filing Jointly	Married Filing Separately	Single	Head of Household
Income Level	Highest Tax Bracket	Highest Tax Bracket	Highest Tax Bracket	Highest Tax Bracket
< \$15k	10%	15%	15%	15%
\$15-30k	15%	15%	15%	15%
\$30-50k	15%	25%	25%	25%
\$50-100k	25%	28%	28%	25%
\$100-200k	28%	33%	33%	33%
\$200-250k	33%	35%	33%	33%
\$250+	35%	35%	35%	35%

Table 5. Total Number of Returns and Total Amount Donated²¹²

(All figures are in thousands of dollars)	Number of Returns	Total Amount Donated	Dollar Amount per Return
Under \$15,000	1,139,605.00	\$1,527,957.00	\$1.34
\$15,000 – under \$30,000	2,732,665.00	\$5,530,118.00	\$2.02
\$30,000 – under \$50,000	5,876,730.00	\$12,863,772.00	\$2.19
\$50,000 – under \$100,000	14,804,523.00	\$39,872,929.00	\$2.69
\$100,000 – under \$200,000	10,755,712.00	\$40,412,344.00	\$3.76
\$200,000 – under \$250,000	1,347,292.00	\$7,941,807.00	\$5.89
\$250,000 or more	2,566,701.00	\$53,720,835.00	\$20.93
TOTAL	39,223,228.00	\$161,869,762.00	\$4.13
Amount Donated to Charity Subject to s170		\$161,869,762	
Total Amount Donated To Charity		\$307,650,000.00	
Percentage		52.61	

211. *Id.*212. PARISI, *supra* note 100, at 15 tbl.1.

Table 6. Percentage Amounts in Income Tax Brackets According to Filing Status

a. Low Tax Bracket

% Amount in Filing Status	Married Filing Jointly		Married Filing Separately		Single		Head of Household	
	Low Tax Bracket	% Amount in that tax bracket	Low Tax Bracket	% Amount in that tax bracket	Low Tax Bracket	% Amount in that tax bracket	Low Tax Bracket	% Amount in that tax bracket
< \$15,000	0%	0%	10%	54%	10%	54%	10%	76%
\$15,000-\$30,000	10%	2%	10%	0%	10%	0%	10%	0%
\$30,000-\$50,000	10%	0%	15%	8%	15%	5%	15%	17%
\$50,000-\$100,000	15%	19%	25%	31%	25%	25%	25%	0%
\$100,000-\$200,000	25%	31%	28%	0%	28%	65%	25%	13%
\$200,000-\$250,000	33%	0%	33%	0%	33%	0%	28%	0%
\$250,000+	33%	0%	33%	0%	33%	0%	33%	0%

b. High Tax Bracket

	Married Filing Jointly		Married Filing Separately		Single		Head of Household	
	Low Tax Bracket	% Amount in that tax bracket	Low Tax Bracket	% Amount in that tax bracket	Low Tax Bracket	% Amount in that tax bracket	Low Tax Bracket	% Amount in that tax bracket
% Amount in Filing Status	37.81%		1.91%		45.41%		14.8%	
< \$15,000	10%	100%	15%	47%	15%	47%	15%	24%
\$15,000-\$30,000	15%	98%	15%	100%	15%	100%	15%	100%
\$30,000-\$50,000	15%	100%	25%	92%	25%	95%	25%	83%
\$50,000-\$100,000	25%	81%	28%	69%	28%	75%	25%	100%
\$100,000-\$200,000	28%	69%	35%	22%	33%	36%	33%	18%
\$200,000-\$250,000	33%	100%	35%	100%	33%	100%	33%	100%
\$250,000+	35%	100%	35%	100%	35%	100%	35%	100%

Table 7. Total Amount of Deduction Multiplied by Tax Bracket Rates**a. Maximum Tax Bracket Allowance**

(all figures are in thousands of dollars)	Married Filing Jointly	Married Filing Separately	Single	Head of Household	Total
< \$15,000	\$57,772.05	\$4,377.60	\$104,076.79	\$33,920.65	\$200,147.09
\$15,000–\$30,000	\$313,640.64	\$15,843.79	\$376,683.99	\$122,768.62	\$828,937.04
\$30,000–\$50,000	\$729,568.83	\$61,424.51	\$1,460,359.72	\$475,959.56	\$2,727,312.62
\$50,000–\$100,000	\$3,768,988.61	\$213,240.42	\$5,069,763.18	\$1,475,298.37	\$10,527,290.59
\$100,000–\$200,000	\$4,278,374.03	\$270,156.52	\$6,055,910.99	\$1,973,738.88	\$12,578,180.42
\$200,000–\$250,000	\$990,923.08	\$53,090.98	\$1,190,103.60	\$387,877.85	\$2,621,995.52
\$250,000+	\$7,109,146.70	\$359,123.78	\$8,538,120.91	\$2,782,739.25	\$18,789,130.65
TOTAL	\$17,248,413.96	\$977,257.60	\$22,795,019.17	\$7,252,303.19	
				TOTAL	\$48,272,993.92

b. Tax Bracket Allowance

(all figures are in thousands of dollars)	Married Filing Jointly	Married Filing Separately	Single	Head of Household	Total
< \$15,000	\$57,772.05	\$3,596.93	\$85,516.43	\$25,290.10	\$172,175.51
\$15,000–\$30,000	\$311,549.70	\$15,843.79	\$376,683.99	\$122,768.62	\$826,846.10
\$30,000–\$50,000	\$729,568.83	\$59,458.93	\$1,429,400.09	\$444,355.85	\$2,662,783.70
\$50,000–\$100,000	\$3,488,575.86	\$206,066.41	\$4,932,879.57	\$1,475,298.37	\$10,102,820.21
\$100,000–\$200,000	\$4,134,437.31	\$258,871.70	\$5,464,083.32	\$536,767.26	\$10,394,159.59
\$200,000–\$250,000	\$990,923.08	\$53,090.98	\$1,190,103.60	\$387,877.85	\$2,621,995.52
\$250,000+	\$7,109,146.70	\$359,123.78	\$8,538,120.91	\$2,782,739.25	\$18,789,130.65
TOTAL	\$16,821,973.54	\$956,052.51	\$22,016,787.91	\$5,775,097.31	
				TOTAL	\$45,569,911.27

Table 8. Total Amount Subject to § 170 Multiplied by Percentage Amount Donated to Charities that Directly Relieve Poverty

(all figures are in thousands of dollars)	Percentage Amount Donated to Charities that Directly Relieve Poverty	Percentage Donated to Poverty Relief Charities times Maximum Amount Deducted According to Income Level	Percentage Donated to Poverty Relief Charities times Amount Deducted According to Income Level
< \$15,000	10.40%	\$20,815.30	\$17,906.25
\$15,000–\$30,000	10.40%	\$86,209.45	\$85,991.99
\$30,000–\$50,000	10.40%	\$283,640.51	\$276,929.50
\$50,000–\$100,000	10.40%	\$1,094,838.22	\$1,050,693.30
\$100,000–\$200,000	12.40%	\$1,559,694.37	\$1,288,875.79
\$200,000–\$250,000	5.80%	\$152,075.74	\$152,075.74
\$250,000+ ²¹³	3.80%	\$713,986.96	\$713,986.96
TOTAL		\$3,911,260.56	\$3,586,459.55
Percentage of total § 160 subsidy		8.10%	7.87%

213. The Indiana Study and data from the IRS have matching income ranges up to \$200,000. Above \$200,000 the Indiana Study breaks the income brackets into \$200,000 through \$1 million and above \$1 million. The IRS data breaks down their result into two income ranges \$200,000 through \$250,000 and above \$250,000. To the author's knowledge, no other recent study has subdivided the breakdown of charitable giving according to income level. Thus, although the income ranges do not exactly match (this study pairs \$200,000 through \$1 million percentages with the \$200,000 through \$250,000 figures and the above \$1 million percentages with the above \$250,000 figures), the effect of these simplifications is the overestimation of the subsidy received by the charitable deduction. Even with this built-in error margin, the percentage of the subsidy remains below 9%. See PARIS, *supra* note 100; PATTERNS, *supra* note 138.

Table 9. Total Amount Subject to § 170 Multiplied by Percentage Amount Donated to Religion

(all figures are in thousands of dollars)	Percentage amount donated to religion	Percentage Donated to Religion times Maximum Amount Deducted According to Income Level	Percentage Donated to Religion times Amount Deducted According to Income Level
< \$15,000	66.70%	\$133,498.11	\$114,841.07
\$15,000–\$30,000	66.70%	\$552,901.00	\$551,506.35
\$30,000–\$50,000	66.70%	\$1,819,117.52	\$1,776,076.72
\$50,000–\$100,000	66.70%	\$7,021,702.82	\$6,738,581.08
\$100,000–\$200,000	57.30%	\$7,207,297.38	\$5,955,853.44
\$200,000–\$250,000	23%	\$603,058.97	\$603,058.97
\$250,000+	16.90%	\$3,175,363.08	\$3,175,363.08
TOTAL		\$20,512,938.88	\$18,915,280.71
Percentage of total § 160 subsidy		42.49%	41.51%

APPENDIX II

This informal study looks at the attention Congress gave to debating the merits of the charitable deduction in 2009. Although it does suffer from one main methodological drawback in that the author both wrote the code for determining the classification and then subsequently did the coding, it is still valuable to illustrate the large disparity in congressional speech when discussing the charitable deduction on the floor. This Appendix briefly explains the methodology of the study.

First, the author conducted a search on the congressional records webpage²¹⁴ using the terms “charitable deduction” and “charitable contribution.” This resulted in 140 documents that possessed either of these search terms. Within these 140 documents, 16 contained a discussion of the merits of the charitable deduction. Whenever a member of Congress discussed the deduction, the author categorized their justification for the deduction into one of five categories: church, poverty relief, disaster / war relief, education, and other. Even one word about poverty relief was sufficient to count in the applicable category. For instance, if a congressman stated that “this would aid in poverty relief,” then the entire sentence would be placed in the poverty relief category. To calculate the number of words, the author counted all the words in the sentence when discussing one of the categories listed above. If a congressman simultaneously used two categories, then the author included them under both categories. For example, if a congressman discussed the role of churches and charities in providing help to the poor and hungry, the author included the amount of words in both the poverty relief and church categories. The results are displayed below.

214. See *Thomas*, LIBRARY OF CONGRESS, <http://thomas.loc.gov/> (last visited Jan. 28, 2011).

Congressman	House	Date	Church	Poverty Relief	Disaster / War Relief	Health	Education	Other
Burton (R-Ind.)	Rep.	Mar. 03, 2009	1	2	0	0	0	0
Pitts (R-Pa.)	Rep.	Mar. 04, 2009	49	126	0	0	0	0
Burton (R-Ind.)	Rep.	Mar. 05, 2009	2	47	0	0	0	2
Burton (R-Ind.)	Rep.	Mar. 09, 2009	0	173	173	0	0	0
Bachmann (R-Minn.)	Rep.	Mar. 10, 2009	22	85	0	19	0	0
Poe (R-Tex.)	Rep.	Mar. 11, 2009	1	12	4	0	0	5
Mitchell (R-Ariz.)	Rep.	Mar. 12, 2009	0	0	65	0	0	0
Ensign (R-Nev.)	Sen.	Mar. 12, 2009	2	65	0	2	0	8
Burton (R-Ind.)	Rep.	Mar. 12, 2009	0	59	0	0	0	0
McConnel (R-Ky.)	Sen.	Mar. 16, 2009	0	2	0	4	5	75
Alexander (R-Tenn.)	Sen.	Mar. 16, 2009	0	0	0	0	74	16
McConnell (R-Ky.)	Sen.	Mar. 19, 2009	1	2	0	4	193	0
Ensign (R-Nev.)	Sen.	Mar. 19, 2009	0	2	0	2	1	0
Corynn (R-Tex.)	Sen.	Mar. 25, 2009	0	0	0	0	71	0
Thune (R-S.D.)	Sen.	Mar. 25, 2010	14	0	0	0	0	0
Bilirakis (R-Fla.)	Rep.	Oct. 28, 2009	0	58	0	0	0	0
TOTAL			92	633	242	31	344	106
PERCENTAGE			6.4	43.7	16.7	2.1	23.8	7.3