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CHURCHES, POLITICS, AND THE CHARITABLE CONTRIBUTION DEDUCTION

ELLEN P. APRILL*

Abstract: Churches often bear the burden of the Internal Revenue Code's electioneering prohibition without their contributors enjoying the benefit of a tax deduction. Although contributions to religious congregations may be deducted, many, perhaps most of them, are not because many of those who give to churches do not itemize their income tax deductions. In the past two years, Congress has had before it several bills that would permit nonitemizing taxpayers to deduct their charitable contributions. This Article argues that extending the deduction to nonitemizers raises important issues of tax policy that should concern religious organizations. The author contends that religious congregations will benefit from considering some of the difficult questions about the relationship of the charitable contribution deduction to the standard principles of tax policy. If they do, they might support either a deduction only above a floor or a charitable contribution credit rather than a 100% deduction for nonitemizers.

Congress has explained the prohibition on Internal Revenue Code section 501(c)(3)¹ organizations including churches, from engaging in electioneering² on the grounds that it "reflects a Congressional policy that the U.S. Treasury should be neutral in political affairs."³ The variety of exempt organizations that can engage in electioneering while remaining tax-exempt undermines this ration-

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¹ All references are to the Internal Revenue Code of 1986, as amended, unless otherwise indicated.

² Section 501(c)(3) of the Internal Revenue Code requires of the organization as a condition for exemption that "no substantial part" of its activities consist of "carrying on propaganda, or otherwise attempting, to influence legislation" and that it "not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office." I.R.C. § 501(c)(3). I shall refer to the first condition as a limit on lobbying and the second as a prohibition on electioneering.

³ H.R. REP. NO. 100-391 (II), at 1625, 1627 (1987), *reprinted in* 1987 U.S.C.C.A.N. 2313-1.

ale.⁴ A more persuasive justification for the prohibition is that Congress did not wish tax-deductible contributions to be used for electioneering activities. As the Supreme Court wrote in the context of limits on lobbying activities, Congress can refuse to pay for these activities "out of public moneys."⁵ That is, the burden of the electioneering prohibition is the price Congress requires for permitting donations to section 501(c)(3) organizations, unlike donations to other exempt organizations, to be deducted from federal income taxes.⁶

Religious organizations depend particularly heavily on charitable contributions from individual donors. One study reports that in 1996 the total revenue of religious congregations reached \$81.2 billion: of that amount, more than \$68.2 billion came from private donations, 94% of which came from individuals.⁷ A study of 1982 data concluded that "[a]mong the major recipient groups, religious organizations

⁴ Section 501(c)(4), (c)(5) and (c)(6) organizations are all exempt from income tax and can engage in electioneering, so long as it is not their primary activity. I.R.C. § 501(c)(4)-(6). Section 527 organizations are exempt organizations whose very purpose is to engage in electioneering. I.R.C. § 527. See generally Anne Berrill Carroll, *Religion, Politics, and the IRS: Defining the Limits of Tax Law Controls on Political Expression by Churches*, 76 MARQ. L. REV. 217 (1992).

⁵ *Regan v. Taxation With Representation of Washington*, 461 U.S. 540, 545 (1983). Unlike section 501(c)(3) organizations, sections 501(c)(4), (c)(5), (c)(6) and section 527 organizations cannot receive deductible contributions. See I.R.C. §§ 501(c)(3)-(c)(6), 527; cf. I.R.C. § 170. Courts and commentators have suggested mechanisms to permit charitable organizations to engage in electioneering with nondeductible money. See *Taxation with Representation*, 461 U.S. at 545; see also *Branch Ministries v. Rossotti*, 211 F.3d 137, 143-44 (D.C. Cir. 2000); Laura Brown Chisolm, *Politics and Charity: A Proposal for Peaceful Coexistence*, 58 GEO. WASH. L. REV. 308, 324-26 (1990). Others have questioned whether such arrangements would be feasible for churches. See Wilfred R. Caron & Deirdre Dessingue, *I.R.C. § 501(c)(3): Practical and Constitutional Implications of "Political" Activity Restrictions*, 2 J.L. & POL. 169, 192-93 (1985). See generally Deirdre Dessingue, *Prohibition in Search of a Rationale: What the Tax Code Prohibits; Why; To What End?*, 42 B.C. L. REV. 903 (2001).

⁶ See STAFF OF JOINT COMM. ON TAX'N, 107TH CONG., DESCRIPTION AND ANALYSIS OF PRESENT LAW AND PROPOSALS TO EXPAND FEDERAL INCENTIVES FOR CHARITABLE GIVING (JCX-13-01) 2 (Comm. Print 2001) [hereinafter JOINT COMM. ON TAX'N, PRESENT LAW AND PROPOSALS], available at <http://www.house.gov/jct/x-13-01.pdf>. Section 170 permits deductions of charitable contributions, subject to percentage limits. In defining "charitable contribution," section 170(c)(2)(D) explicitly refers to the lobbying limitation and electioneering prohibition. I.R.C. § 170(c)(2)(D).

⁷ See INDEP. SECTOR, AMERICA'S RELIGIOUS CONGREGATIONS: MEASURING THEIR CONTRIBUTION TO SOCIETY 4 (2000) [hereinafter INDEP. SECTOR, AMERICA'S RELIGIOUS CONGREGATIONS], available at <http://www.independentsector.org/programs/research/ReligiousCong.pdf>.

were most dependent on charitable gifts for support, receiving some 94[%] of all revenues from contributions."⁸

At the same time, religious gifts have consistently represented the largest percentage of giving.⁹ Consider a recent survey from Independent Sector.¹⁰ According to the survey, in 1998, religious organizations received 60% of total charitable contributions, the largest share of any category of charitable organizations, as well as the largest average contribution, \$1,002.¹¹ Between 1995 and 1998, the religious organizations increased both their share of total contributions and the average amount given per contributing household, although fewer of those responding reported making contributions to religious organizations.¹²

In contrast, churches often bear the burden of the electioneering prohibition without their contributors enjoying the benefit of a tax deduction. Although contributions to religious congregations are eligible for deduction, many, perhaps most of them, are not in fact deducted. Taxpayers currently choose between taking itemized deductions and taking the standard deduction.¹³ Only 30% of taxpayers itemize their deductions.¹⁴ The benefits of itemizing increase with the

⁸ CHARLES T. CLOTFELTER, *FEDERAL TAX POLICY AND CHARITABLE GIVING* 10-11 (1985). See also BURTON A. WEISBROD, *THE NONPROFIT ECONOMY* 197 (1988) (reporting 93% of all receipts of religious organizations in 1980 from private giving).

⁹ See CLOTFELTER, *supra* note 8, at 22.

¹⁰ See INDEP. SECTOR, *GIVING AND VOLUNTEERING IN THE UNITED STATES*, at Introduction (1999) [hereinafter INDEP. SECTOR, *GIVING AND VOLUNTEERING*], at http://www.independentsector.org/GandV/s_inte.htm (last visited Aug. 14, 2001). Independent Sector describes itself as "[a] coalition of leading nonprofits, foundations and corporations strengthening not-for-profit-initiative, philanthropy, and citizen action." See <http://www.independentsector.org>. Independent Sector has made passing the deduction for nonitemizers its top legislative priority, and has more than 500 organizations as signatories to a letter supporting this legislation. See <http://www.independentsector.org/media/TestimonyPR.html> (last visited Aug. 14, 2001); http://www.independentsector.org/programs/gr/NCH_supporters.html (last visited Aug. 14, 2001). It also conducts and sponsors many research projects regarding the non-profit sector, including surveys that have been conducted over many years, and I will be using much of its material in the pages that follow. See <http://www.independentsector.org/programs/research/research.html> (last visited Aug. 14, 2001).

¹¹ INDEP. SECTOR, *GIVING AND VOLUNTEERING*, *supra* note 10, at Household Contributions by Type and Charity.

¹² *Id.* The percentage making such contributions fell from 48% in 1995 to 45% in 1998. *Id.*

¹³ Section 63(c) defines the standard deduction and section 63(e) provides an election to itemize. I.R.C. § 63(c), (e).

¹⁴ See Charles T. Clotfelter & Richard L. Schmalbeck, *The Impact of Fundamental Tax Reform on Nonprofit Organizations*, in *ECONOMIC EFFECTS OF FUNDAMENTAL TAX REFORM* 228 (Henry J. Aaron & William G. Gale eds., 1996); Joseph Cordes et al., *Extending the Charita-*

level of taxable income; the value of taking a one-dollar charitable contribution deduction saves taxpayers from 15 cents to almost 40 cents in federal taxes, depending on their marginal rate. For a taxpayer at the 15% marginal tax rate who deducts \$1.00 of charitable contributions, the after-tax cost of the contribution is 85 cents; for a taxpayer at a 40% marginal rate, the after-tax cost is only 60 cents. For taxpayers who take the standard deduction, in contrast, the after-tax cost of a \$1.00 charitable contribution is the same as its before-tax cost—\$1.00. Itemization, naturally, rises with income, and lower bracket taxpayers are less likely to itemize.

Lower-income taxpayers, those taxpayers least likely to itemize, are also the taxpayers who favor religious organizations in making their charitable contributions.¹⁵ Direct data on the magnitude of charitable contributions by nonitemizers are generally not available.¹⁶ Charles T. Clotfelter and Richard L. Schmalbeck, with caution and caveats, recently made estimates for nonitemizers based on simulations and data from 1986, the one year in which nonitemizers were permitted to fully deduct their charitable contributions. Based on these simulations, they conclude: "Contributions to religious organizations constituted over three-fourths of contributions from taxpayers with incomes below \$40,000. At the highest income levels, gifts to colleges and universities, hospitals, and arts and cultural organizations account for a much larger share of gifts."¹⁷ In the 1970s, Boris Bittker similarly observed that the information available supported the hypothesis that "gifts by low-income taxpayers go primarily to the churches of which they are themselves members."¹⁸

In the past two years, Congress has had before it several bills that would permit nonitemizers to deduct their charitable contribution deductions, bills which differ in their structures and specifics.¹⁹ Al-

ble Deduction to Nonitemizers: Policy Issues and Options, in CHARTING CIVIL SOCIETY 6 (The Urban Inst./Ctr. on Nonprofits and Philanthropy, Wash., D.C.) May 2000, available at <http://www.urban.org/periodcl/cnp/cnp7.pdf>; INDEP. SECTOR, GUIDING PRINCIPLES FOR PUBLIC POLICY ON CHARITABLE GIVING 5 (Mar. 2001) [hereinafter INDEP. SECTOR, GUIDING PRINCIPLES], available at <http://www.independentsector.org/programs/gr/Guiding-Principles.pdf>.

¹⁵ See CLOTFELTER, *supra* note 8, at 23, 283.

¹⁶ See JOINT COMM. ON TAX'N, PRESENT LAW AND PROPOSALS, *supra* note 6, at 16.

¹⁷ Clotfelter & Schmalbeck, *supra* note 14, at 215.

¹⁸ Boris I. Bittker, *Charitable Contributions: Tax Deductions or Matching Grants*, 28 TAX L. REV. 37, 55 (1972).

¹⁹ See Neighbor to Neighbor Act, H.R. 824, 107th Cong. (2001); Charitable Giving Tax Relief Act, H.R. 777, 107th Cong. (2001); JOINT COMM. ON TAX'N, PRESENT LAW AND PRO-

though such a change would not affect the burden of the electioneering prohibition, we would expect churches to welcome enthusiastically a change that would expand the benefit of deducting charitable contributions. As Clotfelter wrote in his classic 1985 study, “[p]rovisions that affect giving at lower incomes tend to have their major effect on religious groups,” and the nonitemizer deduction would primarily affect those in lower income groups, who are less likely to itemize.²⁰

This Article, however, argues that extending the charitable contribution deduction to nonitemizers raises important issues of tax policy that should concern churches and other religious organizations. Part I reviews the history of the charitable contribution deduction and of the standard deduction. Part II reviews the tax policy issues raised by extending the deduction to nonitemizers. Specifically, it considers the proposed legislative changes in light of both the efficiency and the equity justifications of the charitable contribution deduction, in light of the possible impact on the level of volunteering in the charitable sector, and in light of administrative concerns.

Churches and religious organizations may well differ in how they view the policy justifications for the charitable contribution deduction. These differences, in turn, should influence which form of legislation for extending the charitable contribution deduction they would favor. In fact, religious groups most concerned about the lobbying limitation and electioneering prohibitions in the tax code, because of a strong commitment to social action and an equitable society, might find the charitable contribution deduction inconsistent with the very beliefs they would like to advocate. Another—albeit, I am sure unwelcome—inference from this review of the various arguments and rationales regarding the charitable contribution deduction is that it would be appropriate to place religious organizations in a special category of charities not eligible for the charitable contribution deduction. Some solace from this conclusion would be that perhaps under such a scheme, the prohibition on electioneering also would be no longer applicable.²¹

POSALS, *supra* note 6, at 7–11 (reviewing 2001 Senate proposals to expand the federal tax benefits to charitable giving).

²⁰ CLOTFELTER, *supra* note 8, at 129–32. Clotfelter has estimated that extending the charitable contribution deduction to nonitemizers would increase long-run giving to religious organizations by 14%, in contrast to an increase of 8% for higher educational institutions. *Id.* at 131 tbl.3.10.

²¹ See generally Dessingue, *supra* note 5.

Religious congregations, I believe, will benefit from considering some of the difficult questions and giving themselves thoughtful answers about the relationship of the charitable contribution deduction to the standard principles of tax policy. In turn, the treatment of religious congregations makes us rethink these standard principles of tax policy.

I. THE HISTORY OF THE CHARITABLE CONTRIBUTION DEDUCTION AND THE STANDARD DEDUCTION

A. *War Revenue Act of 1917*

The deduction for charitable contributions is one of the oldest deduction provisions in the tax laws. Although an attempt to enact a deduction for gifts to "religious, charitable, scientific, or educational" institutions in 1913 was unsuccessful,²² such a provision was included in the War Revenue Act of 1917.²³ It provided a deduction for:

Contributions or gifts actually made within the year to corporations or associations organized and operated exclusively for religious, charitable, scientific, or educational purposes, or to societies for the prevention of cruelty to children or animals, no part of the net income of which inures to the benefit of any private stockholder or individual, to an amount not in excess of fifteen per centum of the taxpayer's taxable net income as computed without the benefit of this paragraph. Such contributions or gifts shall be allowable as deductions only if verified under rules and regulations prescribed by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury.²⁴

²² See J.S. SEIDMAN, SEIDMAN'S LEGISLATIVE HISTORY OF THE FEDERAL INCOME TAX LAWS 1938-1861, at 945 (1938).

²³ See War Revenue Act of 1917, ch. 63, § 1201(2), 40 Stat. 300, 330 (1917).

²⁴ *Id.* The percentage limits were increased from time to time until they reached the current limits, which for churches and other specified organizations is 50% of the individual's adjusted gross income for gifts of cash and ordinary income property. See I.R.C. § 170(b)(1)(A). Since those who currently take the standard deduction are unlikely to be concerned about the percentage limits, I will not discuss them further in any detail. Although Clotfelter observes that "households earning a relatively small portion of total income account for a disproportionate share of contributions" and that "households contributing more than 20 percent of their income accounted for about 11 percent of income but over 60 percent of all contribution," he does not suggest that such households approach the 50% limit. See CLOTFELTER, *supra* note 8, at 20.

The 1917 Act levied taxes only on incomes above \$68,680 in 2001 dollars and applied a tax rate of 15% only for net incomes above \$546,528 in 2001 dollars.²⁵

Legislative history indicates that this provision was prompted by the concern that without a deduction, wealthy taxpayers subject to these levels of taxation would no longer contribute to institutions of higher learning.²⁶ Senator Hollis, for example, explained that the country had permitted institutions of higher learning "to grow up and become firmly established on the plan of depending upon private contributions."²⁷ He feared that the war would affect colleges "more seriously than it does any other character of institution," both by taking its students from them to be soldiers and by reducing its financial support.²⁸ He continued:

Usually people contribute to charities and educational objects out of their surplus. After they have done everything else they want to do, after they have educated their children and traveled and spent their money on everything they really want or think they want, then, 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, . . . that will be the first place where wealthy men will be tempted to economize, namely, in donations to charity.²⁹

Senator Hollis made no mention of religious organizations, although some of the editorials and letters he submitted for the record did so.³⁰

The charitable contribution deduction has remained part of the Internal Revenue Code ever since, with the percentage of adjusted gross income that can be deducted as charitable contributions in a single year eventually being raised to 50% for churches and other public charities for contributions of cash and ordinary income property.³¹

²⁵ See CLOFFELTER, *supra* note 8, at 31 (1917 dollar amounts are adjusted for inflation).

²⁶ 55 CONG. REC. 6728 (1917).

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ See *id.* at 6728-29.

³¹ See I.R.C. § 170(b)(1) (as amended by the Tax Reform Act of 1969, Pub. L. No. 91-172, § 201(a)(1)(B), 83 Stat. 487, 549-51). The legislative history explains that the reason for raising the limit from 30% to 50% was to "strengthen the incentive effect of the charitable contributions deduction." STAFF OF JOINT COMM. ON TAX'N, 91ST CONG., GENERAL EXPLANATION OF THE TAX REFORM OF 1969 (JCX-16-70) 75 (Comm. Print 1970).

B. Individual Income Tax Act of 1944

While World War I gave rise to the charitable contribution deduction, World War II prompted the standard deduction, which was introduced in 1944. With World War II, Congress extended the income tax enormously. Between 1939 and 1945, the coverage of the tax system grew from about 5% to 74% of the population.³² Particularly as a result of a reduction in the personal exemption, Congress anticipated a large increase in tax return filers.³³ Congress enacted the standard deduction to simplify tax return filing.³⁴ The House Report explained that the intent of the Individual Income Tax Act of 1944 was "confined to simplification of the individual income tax" with three objectives: "[t]o relieve the great majority of taxpayers from the necessity of computing their income tax . . . [t]o reduce the number of tax computations . . . [and] [t]o simplify the return form."³⁵ According to the Senate Report, "[t]he standard deduction is in lieu of the nonbusiness deductions and certain credits against net income and against tax" so that a taxpayer "is not required to itemize and substantiate his nonbusiness deductions."³⁶

The impact of a new standard deduction on charities received considerable attention. Churches and other nonprofit groups actively opposed the provision, seeing it as a threat to their continued existence.³⁷ Representative Carl Curtis, the congressman most concerned about the provision's effect on charities, made both of the basic arguments regarding the justification for the charitable contribution: the argument for fairness or equity, and the argument for efficiency or the incentive effect.³⁸ He seemed most disturbed about inequitable treatment.³⁹ In his view, the legislation treated two differently situated taxpayers as if they were in the same position. He worried that the bill,

³² See Alan L. Feld, *Fairness in Rate Cuts in the Individual Income Tax*, 68 CORNELL L. REV. 429, 433-34 (1983).

³³ See *id.* at 438-39.

³⁴ See *id.* at 439-40.

³⁵ H.R. REP. NO. 78-1365, reprinted in 1944 C.B. 821 (1944).

³⁶ S. REP. NO. 78-885, reprinted in 1944 C.B. 858, 860 (1944).

³⁷ See 90 CONG. REC. 4029 (1944) (noting the objection of United Stewardship Council representing twenty-one Protestant church members, the Council on Taxes and Philanthropy, a number of Catholic churches and organizations, and the American Association of Colleges); CLOTFELTER, *supra* note 8, at 32 (citing articles from the *New York Times* from December of 1943 to December 1945); C. HARRY KAHN, PERSONAL DEDUCTIONS IN THE FEDERAL INCOME TAX 46 (1960).

³⁸ See 90 CONG. REC. 3972-73, 4028-30 (1944).

³⁹ See *id.* at 3972-73.

when carried into effect, meant that the individual who gives a portion of his hard-earned money in contributions would have the same amount of his taxes "withheld from his wages as if he had given nothing."⁴⁰ Charitable organizations objected to the bill, he argued, because of the belief that "everybody, regardless of whether they give a nickel, is entitled to a blanket deduction."⁴¹ The bill's approach, he believed, erred fundamentally:

It has been the basic policy in America that our tax program is one that considers a gift to the U.S.O., the Red Cross, a children's home, a hospital, a home for the aged, a college, a mission, a church, or any other institution rendering service and mercy, an expenditure for the public good, and, therefore exempt from taxation.⁴²

Representative Curtis also argued that this change would "cripple all of these worth-while [sic] institutions so that they must come to the Federal Government for a subsidy."⁴³

Proponents of the bill rejected these arguments. To them, the need for simplification was far greater than any equitable argument and they also rejected the incentive argument. Representative Robertson, for example, responded that although the members of the committee considered Representative Curtis' viewpoint, they "found it absolutely impossible to work out this simplification plan on any basis other than what we [have] used."⁴⁴ More fundamentally, they rejected the need for the deduction as an incentive to giving, at least for those at the lower income levels who would make use of the standard deduction.⁴⁵ Representative Robert L. Doughton, then chairman of the House Ways and Means Committee, expressed a belief that contributions were made not "for the purpose of securing a tax reduction, but because of the worthy causes such contributions advance."⁴⁶ Senator Walter F. George, chairman of the Senate Finance Committee, spoke even more forcefully:

The committee does not believe that it can be proved that a tax incentive has been an important factor in the making of

⁴⁰ *Id.* at 3972.

⁴¹ *Id.*

⁴² *Id.* at 4029.

⁴³ 90 CONG. REC. 4029 (1944).

⁴⁴ *Id.* at 3973.

⁴⁵ *Id.* at 3975-76.

⁴⁶ *Id.* at 3975; see also KAHN, *supra* note 37, at 46-47.

such gifts by individuals having less than \$5,000 of adjusted gross income, and certainly the \$500 standard deduction will not remove the tax incentive for persons in the higher brackets, upon whom the charities depend for contributions in substantial amounts.⁴⁷

Moreover, proponents felt that in setting the standard deduction they had taken account of the average charitable contribution of two and a half percent.⁴⁸

C. *Economic Recovery Tax Act of 1981*

In 1981, however, Congress was persuaded to allow nonitemizers to deduct charitable contributions, at least in part and at least until 1986, when Congress was to study the effect of the provision.⁴⁹ The Treasury Department objected to the provision. Donald Lubick, Assistant Secretary for Tax Policy, argued that inflation, not the standard deduction, constituted the greatest threat to giving in the voluntary sector.⁵⁰ Assistant Secretary Lubick further argued that those with lower incomes respond less to a tax break because of their low bracket, that giving seems to be primarily a function of personal income, and that the revenue loss would go to those already making gifts rather than creating new gifts.⁵¹

Congress, after hearing elaborate testimony about price elasticity at lower income levels from both Martin Feldstein and Charles Clotfelter, disagreed.⁵² According to the Joint Committee on Taxation, "[t]he Congress believed that allowing a charitable deduction to non-itemizers stimulates charitable giving, thereby providing more funds for worthwhile nonprofit organizations, many of which provide serv-

⁴⁷ 90 CONG. REC. 4704 (1944); see also KAHN, *supra* note 37, at 47.

⁴⁸ 90 CONG. REC. 3973 (1944) (statement of Rep. Robertson).

⁴⁹ See Economic Recovery Act of 1981, Pub. L. No. 97-34, § 121, 95 Stat. 172 (1981). The provision as passed phased in the deduction with 100% of charitable contribution deductions to be permitted for nonitemizers only in 1986, and termination of the provision after 1986, "so that the Congress will have the opportunity to review its effectiveness in stimulating contributions and any administrative problems it may have caused." STAFF OF JOINT COMM. ON TAX'N, 97TH CONG., GENERAL EXPLANATION OF THE ECONOMIC RECOVERY TAX ACT OF 1981 (JCS-71-81) 49 (Comm. Print 1981) [hereinafter JOINT COMM. ON TAX'N, 1981 ACT].

⁵⁰ See *Charitable Contribution Deductions: Hearing on S. 219 Before the Senate Subcomm. on Tax'n and Debt Mgmt. Generally of the Comm. on Finance, 96th Cong.* 51 (1980).

⁵¹ See *id.* at 52-53.

⁵² See *id.* at 217-35.

ices that otherwise might have to be provided by the Federal Government."⁵³

D. Tax Reform Act of 1986

The Tax Reform Act of 1986 did not continue the charitable contribution deduction for nonitemizers. As one lawyer who specializes in representing exempt organizations commented, "[t]he big idea of the '86 Act was to pare away deductions and credits to broaden the base so you could bring the top rates down. . . . And that was a pretty powerful tide and the nonitemizer [deduction] just wasn't strong enough to swim against that current."⁵⁴ In 1986, as in 1944, simplification of the tax code was a key goal, and the standard deduction helped to achieve that goal. In the 1986 Act, Congress sought a simpler system for individuals. Beginning in 1988, the Act established two individual income tax rates—15% and 28%—to replace more than a dozen tax rates in each of the prior-law rate schedules, which extended up to 50%. Significant increases in the standard deduction and modifications to certain personal deductions provided further simplicity by greatly reducing the number of taxpayers who would itemize their deductions.⁵⁵

Simplification and base-broadening were far more important than incentives for charitable giving.⁵⁶ Reducing the top individual rates, for example, lowered the incentive for making charitable gifts, by raising the after-tax cost of contributions.⁵⁷ As intended, the 1986

⁵³ JOINT COMM. ON TAX'N, 1981 ACT, *supra* note 49, at 49.

⁵⁴ Fred Stokeld, *Should Nonitemizers Get the Charitable Deduction?*, 76 TAX NOTES 157, 160 (1997) (alteration in original) (quoting Robert A. Boisture, exempt organization tax law specialist with Caplin & Drysdale, Washington, D.C.).

⁵⁵ See STAFF OF JOINT COMM. ON TAX'N, 100TH CONG., GENERAL EXPLANATION OF THE TAX REFORM ACT OF 1986 6 (COMM. PRINT 1987).

⁵⁶ See generally Ronald A. Pearlman, *Repeal of Charitable Contributions for Nonitemizers Explained*, 28 TAX NOTES 1140 (1985) (emphasizing administrative burdens for both IRS and taxpayers).

⁵⁷ Charles Clotfelter has written:

As debate over tax reform intensified during the 1980s, influential spokespersons for nonprofit organizations came to view such reform as a serious threat to that source of revenue, a view that was bolstered by economic models of charitable giving. Finding it uncomfortable to oppose tax reform itself, the nonprofits nevertheless fought to maintain tax incentives for giving, with the result that the treatment of charitable contributions provided some of the gloomiest predictions and most heated debate among the provisions involved in tax reform during the 1980s.

Tax Reform Act increased the number of taxpayers taking the standard deduction.⁵⁸

E. Current Proposals

Now the tide may have turned again. Voices from both parties proclaim the need to permit nonitemizers to deduct charitable contributions. President Clinton's Fiscal 2001 Budget Proposal included a provision permitting nonitemizers to deduct 50% of their charitable contributions above certain floors.⁵⁹ President Bush in his Agenda for Tax Relief also called for expanding the federal charitable deduction to nonitemizers.⁶⁰ On February 28, 2001, Representative Philip Crane introduced the Charitable Giving Tax Relief Act to permit nonitemizers to deduct 100% of their charitable contributions up to the amount of the standard deduction.⁶¹

Proponents justify these proposals by looking primarily to the incentive effects. A Clinton White House press release noted that lower-income nonitemizers "cannot get the tax incentive for charitable giving that higher-income itemizers can claim."⁶² President Bush's Tax Agenda states that the President wants to expand the deduction "to encourage an outpouring of giving," and notes that this change

Charles Clotfelter, *The Impact of Tax Reform on Charitable Giving: A 1989 Perspective*, in *DO TAXES MATTER? THE IMPACT OF THE TAX REFORM ACT OF 1986*, at 203 (Joel Slemrod ed., 1990).

⁵⁸ See MICHAEL J. GRAETZ & DEBORAH H. SCHENK, *FEDERAL INCOME TAXATION* 428-29 (3d ed. 1995) (observing that the 1986 Act was praised for decreasing the number of itemizers); IRS *INDIVIDUAL INCOME TAX RETURNS 1988*, at 2 (1991) (showing that the number of taxpayers who itemized deductions decreased by 20% from 1985 to 1988).

⁵⁹ See *Treasury Explains Clinton Budget Revenue Proposals*, 2000 TNT 27-26 (Feb. 9, 2000), available at FEDTAX; TNT, LEXIS; see also STAFF OF JOINT COMM. ON TAX'N, 106TH CONG., *SUMMARY OF TAX PROVISIONS CONTAINED IN THE PRESIDENT'S FISCAL YEAR 2001 BUDGET PROPOSAL* (JCX-13-00) 17 (Comm. Print 2000), available at <http://www.house.gov/jct/x-13-00.pdf>; Analytical Perspectives, Budget of the United States Government Fiscal Year 2001, at 66, available at <http://www.access.gpo.gov/usbudget/fy2001>; DEP'T OF THE TREASURY, *GENERAL EXPLANATIONS OF THE ADMINISTRATION'S FISCAL YEAR 2001 REVENUE PROPOSALS* 110 (Feb. 2000), available at <http://www.treas.gov/taxpolicy/library/grnbk00.pdf>.

⁶⁰ See President's Agenda for Tax Relief, at 4, available at <http://www.whitehouse.gov/news/reports/taxplan.html> (last visited Aug. 15, 2001).

⁶¹ Charitable Giving Relief Act, H.R. 777, 107th Cong. (2001).

⁶² Press Release, White House, President Clinton's Tax Agenda for Community, Opportunity, and Responsibility, 2000 TNT 19-16, (Jan. 27, 2000) available at FEDTAX; TNT, LEXIS.

“will generate billions of dollars annually in additional charitable contributions.”⁶³ Representative Crane explains:

Non-itemizers are predominantly low- and middle-income taxpayers who as a group give generously to charitable causes. However, lacking a specific deduction for their charitable contributions, there can be no question that they face a disincentive to making charitable contributions relative to itemizers, who tend to be upper-middle-income and upper-income taxpayers. This certainly appears unfair. But, more importantly, it means charitable organizations supported predominantly by lower-income individuals are even more strapped for financial support than they need be. For example, churches serving lower-income communities have fewer resources to address the needs of their congregations as a result of this disincentive. . . . Charity is thus a blessed act that should suffer no discouragement from something so mean as the tax code.⁶⁴

Among these government policymakers, only Representative Crane mentions the argument about fairness or equity.

For other proponents of the charitable contribution deduction for nonitemizers, however, the fairness argument is as important as the incentive argument. Independent Sector, for example, in its *Guiding Principles for Public Policy on Charitable Giving*, includes a paragraph advocating the need for an incentive for nonitemizers with the following:

Individuals giving to charity are foregoing private consumption and voluntarily committing the donated resources to the public good. For income tax purposes, the donor's income net of the gift—that is, the income available for private consumption—represents a much fairer basis than pre-gift income for determining the donor's tax obligation. As such, charitable giving should not be considered as part of an individual's tax base.⁶⁵

The next part of this Article considers in more detail these two categories of justification for the charitable contributions deduction

⁶³ President's Agenda, *supra* note 60, at 4.

⁶⁴ 147 CONG. REC. E243-44 (2001).

⁶⁵ INDEP. SECTOR, GUIDING PRINCIPLES, *supra* note 14, at 5.

and the implications for churches in particular of extending it to non-itemizers.

II. POLICY RATIONALES FOR THE CHARITABLE CONTRIBUTION DEDUCTION

A. *Deduction as an Incentive: The Argument from Efficiency*

As noted above, governmental officials, whether Republican or Democrat, whether in the legislative or executive branches, have supported extending the charitable contribution deduction to nonitemizers as a means of encouraging charitable giving. That is, they view the deduction as an incentive.⁶⁶ Implicit in this position is the belief that the charitable contribution deduction is "dollar-efficient" because the "charitable organizations receive more in donations than the Treasury loses in revenue due to a tax policy change."⁶⁷ In other words, policymakers do not look solely to increases in charitable giving. They compare any predicted increase with the predicted loss in government revenue. Whether the increased giving is greater than the revenue loss depends on how much charitable contributions are sensitive to changes in price. The assumption is that, because the permitted deduction lowers the price of the contribution, taxpayers will give more when the price is lower. In economic terms, the question of sensitivity to changes in the after-tax cost of making a charitable contribution is one of price elasticity. The efficiency argument, however, also requires consideration of administrative concerns, of the effect on volunteering, and of economic efficiency.

⁶⁶ Both the Treasury Department and the Joint Committee on Taxation treat the charitable contribution deduction as a tax expenditure, a provision "analogous to direct outlay programs," and thus as a subsidy. See STAFF OF JOINT COMM. ON TAX'N, 107TH CONG., ESTIMATES OF FEDERAL TAX EXPENDITURES FOR FISCAL YEARS 2001-2005 (JCS-1-01) 2-4 (Comm. Print 2001), available at <http://www.house.gov/jct/s-1-01.pdf>. The Joint Committee on Taxation estimates the tax expenditure in 2001 for charitable contributions by individuals at \$29.7 billion. *Id.* at 20-23 tbl.1 (adding figures for charitable contributions to educational institutions, charitable contributions to health organizations, and deductions for charitable contributions, other than to educational and health organizations); see *id.* at 25 tbl.3.

⁶⁷ Don Fullerton & Shira D. Goodman, *The Economic Recovery Tax Act of 1981: Implications for Charitable Giving*, 16 TAX NOTES 1027, 1028 (1982). Similarly, Independent Sector in its *Guiding Principles for Public Policy on Charitable Giving* defines efficiency "in this context" as "stimulating increased charitable giving with as little tax revenue loss to the Treasury as possible." INDEP. SECTOR, GUIDING PRINCIPLES, *supra* note 14, at 6.

1. Evidence on Elasticity

Many economists have studied the elasticity of charitable contributions. As the Joint Committee on Taxation recently explained, "the preponderance of evidence suggests that the charitable contribution deduction has been a stimulant to charitable giving, at least for higher income individuals."⁶⁸ These studies, however, differ considerably in the level of sensitivity of taxpayer response reported.⁶⁹ According to one review of the literature:

The middle to high end of the range of estimated responses suggests that increasing (decreasing) the cost of giving by 10 percent decreases (increases) contributions by at least 10 percent. The lower end of the range implies considerably more modest responses with a (permanent) 10 percent increase (decrease) in the cost of giving leading to only a 3 percent decrease (increase) in contribution.⁷⁰

One proponent of the lower end of the range has argued that earlier studies confused timing effects with permanent effects and suggested that, on a permanent basis, charitable contributions do not exhibit as much price elasticity as previously believed.⁷¹

Moreover, the price elasticity of those who do not itemize is even more uncertain. As the Joint Committee on Taxation has noted, "[i]nferences drawn from such [existing] studies may be inappropriate when applied to [the lower-income] taxpayers who currently claim the standard deduction."⁷² Some studies suggest that lower-income taxpayers are less responsive to price incentives than higher-income taxpayers, and that for these taxpayers, their level of income influences charitable giving more than the price of the charitable

⁶⁸ JOINT COMM. ON TAX'N, PRESENT LAW AND PROPOSALS, *supra* note 6, at 14. Martin Feldstein's work has been particularly influential. See generally Martin Feldstein, *The Income Tax and Charitable Contributions: Part I—Aggregate and Distributional Effects*, 28 NAT'L TAX J. 81 (1975); Martin Feldstein, *The Income Tax and Charitable Contributions: Part II—The Impact on Religious, Educational and Other Organizations*, 28 NAT'L TAX J. 209 (1975); Martin Feldstein & Charles Clotfelter, *Tax Incentives and Charitable Contributions in the United States*, 5 J. OF PUB. ECON. 5 (1976).

⁶⁹ Evelyn Brody & Joseph J. Cordes, *Tax Treatment of Nonprofit Organizations: A Two-Edged Sword*, in NONPROFITS AND GOVERNMENT: COLLABORATION AND CONFLICT 141, 146 (Elizabeth T. Boris & C. Eugene Steuerle eds., 1999).

⁷⁰ *Id.* at 146.

⁷¹ See William C. Randolph, *Dynamic Income, Progressive Taxes, and the Timing of Charitable Contributions*, 103 J. OF POL. ECON. 709, 710-11 (1995).

⁷² JOINT COMM. ON TAX'N, PRESENT LAW AND PROPOSALS, *supra* note 6, at 14.

contribution.⁷³ Along these lines, Clotfelter and Schmalbeck write that "high-income-elasticity, low-price-elasticity estimates perform better for income classes below \$100,000."⁷⁴ Other studies have taken the opposite position and argued that lower-income taxpayers are price-sensitive.⁷⁵

Because of the data on which they must rely and the assumptions that they must make, none of these studies provides clear answers. Independent Sector, for example, as strong evidence for its support for extending the charitable contribution to nonitemizers, cites a study it commissioned from PricewaterhouseCoopers. This study concludes that extending the charitable contribution deduction to nonitemizers would stimulate an 11.19% increase in charitable giving and stimulate eleven million new givers, with the greatest in percentage terms coming from the \$20,000–\$30,000 income tax bracket.⁷⁶ Despite these results, the methodology used in the study urges caution about its conclusions. Its model is based on the 1994 Public Use Tax File issued by the Internal Revenue Service, which includes information on 96,000 tax returns.⁷⁷ The study, however, had to impute information about giving by nonitemizers, because such information does not appear on 1994 tax returns. To make this imputation, PricewaterhouseCoopers used "characteristics of nonitemizers as disclosed on tax returns in 1986, the last year that they could fully deduct charitable contributions under prior law."⁷⁸ This statement could be read to suggest that PricewaterhouseCoopers had many years with data regarding the nonitemizer deduction from which to choose for its model.

In fact, 1986 was the only year in which nonitemizers could fully deduct their charitable contributions since the standard deduction was introduced. Moreover, there are many reasons to believe that the

⁷³ See Charles T. Clotfelter & Eugene Steuerle, *Charitable Contributions, in* HOW TAXES AFFECT ECONOMIC BEHAVIOR 403, 436–37 (Henry J. Aaron & Joseph A. Pechman eds., 1981); Christopher M. Duquette, *Is Charitable Giving by Nonitemizers Responsive to Tax Incentives? New Evidence*, 52 NAT'L TAX J. 195, 203–04 (1999).

⁷⁴ Clotfelter & Schmalbeck, *supra* note 14, at 220.

⁷⁵ See Yong S. Choe & Jinook Jeong, *Charitable Contributions by Low- and Middle-Income Taxpayers: Further Evidence with a New Method*, 46 NAT'L TAX J. 33 (1993); Charles T. Clotfelter, *Tax-Induced Distortions in the Voluntary Sector*, 39 CASE W. RES. L. REV. 663, 685–86 (1989).

⁷⁶ PRICEWATERHOUSECOOPERS, INCENTIVES FOR NONITEMIZERS TO GIVE MORE: AN ANALYSIS 4 (Jan. 2001), available at http://www.independentsector.org/programs/gr/pwc_study.pdf.

⁷⁷ See *id.*

⁷⁸ *Id.*

1986 data are not representative. Giving in general surged in 1986, possibly in anticipation of many changes to the tax code that year that made giving more expensive after-tax, such as the end of the nonitemized deduction and the lowering of tax rates.⁷⁹ Nonitemizers might have overstated their deductions and some might have switched from itemizing for that one year only, because of the one-time ability to take both the standard deduction and all charitable contributions.⁸⁰ To be fair, other considerations suggest that the 1986 figures are understated: individuals might lag behind tax changes and individuals new to the need for keeping records of charitable contributions may have understated their giving. In any case, relying on just one year's data is problematic. As discussed in greater detail below, the Urban Institute, using a charitable giving model similar to that of PricewaterhouseCoopers and 1995 income levels, produces much lower numbers.⁸¹

Using the PricewaterhouseCoopers study, Independent Sector concludes that the cost to the Treasury would be \$75 billion and the increase in giving would be "on the order of \$160 billion."⁸² PricewaterhouseCoopers, however, did not estimate the lost government revenue; the figure Independent Sector used was that of the Joint Committee on Taxation. The gains in contributions and the losses in revenue were not computed using the same methods or data and may not, therefore, be comparable.

Of course, religious organizations are particularly interested in price and income elasticity of gifts to religious organizations. Some studies have in fact found that religious giving reflects large price elasticity; others have found the opposite.⁸³ Thus, the incentive argument that dominates the public debate about extending the charitable contribution deduction is possible but not proven.

2. Adding Administrative Concerns to the Mix

Even if the case was proven, competing concerns must also be considered. Any change in tax policy must take into account administrability, from the point of view of both the government and the tax-

⁷⁹ See JOINT COMM. ON TAX'N, PRESENT LAW AND PROPOSALS, *supra* note 6, at 17 n.35 (commenting on high level of donations in 1986); Clotfelter, *supra* note 57, at 203; Randolph, *supra* note 71, at 710-11.

⁸⁰ See Clotfelter & Schmalbeck, *supra* note 14, at 238-39.

⁸¹ See *infra* text accompanying notes 84-92.

⁸² See PRICEWATERHOUSECOOPERS, *supra* note 76, at 4.

⁸³ See CLOTFELTER, *supra* note 8, at 64-65 (comparing studies).

payer, considering the potential for gaming of the system, cheating, and the burdens of compliance. Inaccurate reporting of charitable contribution deductions is a continuing and, in the aggregate, a significant problem for the tax system. The Joint Committee on Taxation noted:

Evidence from audits and in taxpayer compliance studies establishes that many taxpayers overstate their actual charitable contributions when claiming itemized deductions. . . . Moreover, experience with taxpayers who itemize suggests that, if nonitemizers were allowed to claim a deduction for their charitable contributions, many nonitemizers would also overstate their actual charitable contributions for the purposes of claiming a tax benefit.⁸⁴

This is a real problem. The Independent Sector has stated that rules requiring substantiation from the charity for gifts of \$250 or more as well as other existing safeguards "have effectively ensured the integrity of the existing charitable contribution deduction,"⁸⁵ but these safeguards do not sufficiently address the issue of overstating small gifts. To protect against this waste, nonitemizers would have to keep records of their charitable deductions, incurring administrative costs for the taxpayers and the Internal Revenue Service alike, burdens that led to the standard deduction in 1944 and its expansion in 1986. Tax policymakers must be confident that benefits outweigh additional administrative complexity.

Special concerns arise as a result of the choice to itemize or not. Ironically, extending the charitable contribution deduction for nonitemizers could bestow a windfall on itemizers who can reduce their tax liability without increasing their giving. As Joseph Cordes, John O'Hare and Eugene Steuerle of the Urban Institute explain:

Suppose that the standard deduction is \$6,000 and that a household has itemized deductions of \$7,000, \$2,000 of which are charitable contributions. If all charitable contributions were deductible by nonitemizers, then the individual could take a \$2,000 charitable deduction and a standard de-

⁸⁴ JOINT COMM. ON TAX'N, PRESENT LAW AND PROPOSALS, *supra* note 6, at 17.

⁸⁵ Statement of Peter Goldberg and Sara E. Melendez, submitted on behalf of Independent Sector to the Committee on Ways and Means, U.S. House of Representatives, February 27, 2001, available at <http://www.independentsector.org/media/TestimonyPR.html> (last visited Aug. 15, 2001).

duction of \$6,000, thus increasing total deductions by \$1,000 to \$8,000. If the taxpayer were in the 28% tax bracket, the \$1,000 increase in total deductions would result in tax savings (revenue cost) of just under \$300 without change to the financial incentive to give (except to the extent that the taxpayer had somewhat more after-tax income).⁸⁶

That is, a proposal to permit nonitemizers to deduct all charitable contributions introduces a concern about those taxpayers who switch to decrease their tax liability, but do not increase their giving.⁸⁷ These authors note it is possible to design a charitable contribution deduction for nonitemizers that significantly increases charitable giving at little or even no tax revenue while also addressing concerns about administration and compliance, and they recommend permitting both itemizers and nonitemizers to deduct charitable contributions only above a floor.⁸⁸ According to the authors, who ran their models under several ranges of price elasticity, such a floor would reduce the ability to claim hard-to-document contributions (along with the need to document them and the IRS to audit them), reduce revenue loss, provide more of a subsidy to extra giving, and achieve consistent treatment of charitable deductions for itemizers and nonitemizers. This approach, as the authors admit, would raise the tax bills of itemizers.⁸⁹

*At one time, some representatives of nonprofit groups supported the idea of a floor for at least nonitemizer charitable contribution de-

⁸⁶ Cordes et al., *supra* note 14, at 2.

⁸⁷ *See id.*

⁸⁸ *See id.* at 3. They suggest either a floor of \$500 for joint filers and a floor of \$250 for single filers or floors of \$650 and \$325, respectively. *See id.* For the former, the increased giving is greater than the revenue loss; the latter is revenue neutral. *See id.* at 4. Although the Urban Institute Study describes itself as using a model of charitable giving quite similar to the model used by PricewaterhouseCoopers for Independent Sector, their conclusions contrast sharply. *See* PRICEWATERHOUSECOOPERS, *supra* note 76, at 4-5. The Urban Institute study found that revenue loss exceeded the change in giving if deductions are permitted for all contributions by nonitemizers, in part because of those taxpayers who switch, and that with a low enough floor, the incentive to bunch deductions rather than to give annually will not be a significant problem. *See* Cordes et al., *supra* note 14, at 4. Independent Sector and the PricewaterhouseCoopers study come to different conclusions on both these points. *See* PRICEWATERHOUSECOOPERS, *supra* note 76, at 4-5. Importantly, where PricewaterhouseCoopers finds that the nonitemizer deduction without a floor would increase giving by \$14.6 billion in the first year, the Urban Institute shows increases in giving ranging from about \$2.3 billion to \$8 billion, using 1995 income levels, depending on the level of price sensitivity assumed. *Compare* PRICEWATERHOUSECOOPERS, *supra* note 76, at 4, with Cordes et al., *supra* note 14, at 4.

⁸⁹ Cordes et al., *supra* note 14, at 6.

ductions,⁹⁰ and the Clinton administration's nonitemizer proposals included such a floor.⁹¹ The current proposals do not. Exempt organizations supporting a charitable contribution deduction for nonitemizers should consider, as a matter of tax policy, whether they might not wish to support some kind of floor. Given both history and policy, a floor like the one suggested by the Urban Institute study might help ensure the longevity of a nonitemizer deduction, protecting it against future repeal in the name of simplicity.⁹²

3. Effect on Volunteering—Time vs. Money

In considering the nonitemizer deduction, charitable organizations will also have to ask themselves whether giving time and giving money are substitutes or complements. Charitable organizations, particularly religious organizations, depend heavily on volunteers. According to Independent Sector's 1999 survey, the volunteer workforce represented the equivalent of over nine million full-time employees at a value of \$225.9 billion.⁹³ The survey found that frequency of attendance at religious services influenced the proportion of those who volunteered as well as those who gave.⁹⁴ Of those who volunteered, 55% said they learned about their volunteer activities at a religious institution.⁹⁵ The connection between religion and volunteering is not new. A 1981 Gallup Poll found that informal assistance and religious volunteering were among the most popular categories of volunteering.⁹⁶ Using data from the same time period, Burton A. Weisbrod found that the value of volunteer labor to religious organizations was over twice the amount paid as wages and salaries.⁹⁷

Under current law, taxpayers receive no deduction for the value of the time they donate.⁹⁸ On the other hand, the value of their time is not included in income, and expenses incurred in volunteering,

⁹⁰ Stokekl, *supra* note 54, at 158.

⁹¹ See *supra* note 59 and accompanying text.

⁹² See Cordes et al., *supra* note 14, at 6.

⁹³ INDEP. SECTOR, GIVING AND VOLUNTEERING, *supra* note 10, at Volunteering.

⁹⁴ *Id.* at The Relationship Between Religious Involvement and Charitable Behavior.

⁹⁵ *Id.* at Importance of the Ask. See generally Elizabeth J. Reid, *Nonprofit Advocacy and Political Participation*, in NONPROFITS AND GOVERNMENT: COLLABORATION AND CONFLICT 291 (Elizabeth T. Boris & C. Eugene Steuerle eds., 1999) (considering political activity of nonprofit organizations).

⁹⁶ See CLOTFELTER, *supra* note 8, at 144.

⁹⁷ WEISBROD, *supra* note 8, at 203 (using wages and salaries paid and data on volunteering from 1980–1981).

⁹⁸ See I.R.C. § 170.

such as unreimbursed costs of transportation, telephone, etc., are deductible. That is, the tax code permits a deduction for money or property, but not for time. For those who itemize, such treatment is neutral. Imagine a doctor who can earn \$1,000 for a day's work. If the doctor works for pay for five days and donates one day's earnings to a charity, she will be able to deduct the \$1,000 and have \$4,000 of taxable income. If she instead works for pay for four days and donates one day at a clinic, she will also have \$4,000 of taxable income. The charitable donation equalizes the decision between contributions of time and contributions of money.

Currently, for those who do not itemize, the income tax is not neutral. A nonitemizer earning \$10 a hour at a 30% marginal tax rate must choose between volunteering for an hour or working for an hour, keeping \$3 to pay the taxes on that additional hour and donating \$7 to the charity. If his volunteer labor is worth \$10 per hour to the charity, tax on the hour worked makes volunteering more advantageous. Thus, the income tax system creates a distortion in favor of gifts of time.

As such, charities in general and religious organizations in particular need to ask themselves whether a nonitemizer deduction might reduce the volunteer labor they receive. Like econometric studies of price elasticity of giving, most studies of volunteer work are problematic. Not all findings are statistically significant, and many are based on only one data set. A National Study of Philanthropy undertaken by the Census Bureau and the University of Michigan's Survey Research Center in the 1970s, had the most complete data set with information on tax-related variables.⁹⁹ Those taxpayers on the borderline between itemizing and not itemizing, the same group problematic in the Urban Institute study, were also a problem in these studies.¹⁰⁰ Nonetheless, studies of volunteer work seem to indicate that giving cash and giving money are complements rather than substitutes.¹⁰¹ The 1999 Independent Survey of Giving and Volunteering offered further confirmation, although, in the report available on its website, it did not report tax-related variables.¹⁰² The 1999 study found that volunteers made larger financial contributions on average

⁹⁹ See CLOTFELTER, *supra* note 8, at 163-70.

¹⁰⁰ *See id.*

¹⁰¹ *See id.* at 170.

¹⁰² *See* INDEP. SECTOR, GIVING AND VOLUNTEERING, *supra* note 10.

than those who did not volunteer.¹⁰³ Indeed, contributing households with a volunteer consistently gave more than twice the percentage of household income as households in which respondents did not volunteer.¹⁰⁴ Moreover, between 1995 and 1996, among those attending religious services weekly, there was an almost eight percent increase (from 68% to over 75%) in those who reported volunteering, even though there was a three percent decline in those giving to religious organizations from 1995 to 1998.¹⁰⁵

Thus, so long as the discussion focuses on the efficiency of extending the charitable contribution deduction to nonitemizers, there does not seem to be a lot of evidence to raise concern about its effect on volunteering. As will be discussed below, however, the charitable contribution deduction raises some equitable concerns, and some responses to those concerns could have an impact on volunteering.

4. Moving from Dollar Efficiency to Economic Efficiency

As noted earlier, proponents justify the charitable contribution deduction in terms of dollar efficiency, using an unusually narrow definition of efficiency for purposes of tax policy. Generally, tax policymakers go further and look for economic efficiency. By economic efficiency, they mean "maximizing the difference between social benefits and social costs."¹⁰⁶ Economic efficiency asks how much citizens benefit from foregone government revenue compared to alternative uses of that lost revenue. It asks who ultimately benefits from the charitable contribution deduction. Independent Sector, for example, in answering the question of why the charitable deduction should be treated differently from other deductions for nonitemizers, replied: "The charitable deduction is the only deduction that provides no personal benefit to the contributor. Instead, Americans give to charitable causes to strengthen their communities and to help the needy."¹⁰⁷ Sometimes, in the case of the charitable contribution deduction, this question takes a narrower form and asks whether the "government is compensated for the loss of revenue by its relief from

¹⁰³ INDEP. SECTOR, GIVING AND VOLUNTEERING, *supra* note 10, at The Relationship Between Giving and Volunteering.

¹⁰⁴ *See id.*

¹⁰⁵ INDEP. SECTOR, GIVING AND VOLUNTEERING, *supra* note 10, at The Relationship Between Religious Involvement and Charitable Behavior.

¹⁰⁶ Fullerton & Goodman, *supra* note 67, at 1028.

¹⁰⁷ Independent Sector, The Charitable Deduction for Nonitemizers Q & A, at <http://www.independentsector.org/programs/gr/NCDEFAQs.html> (last visited Aug. 14, 2001).

financial burden which would otherwise have to be met by appropriations from public funds."¹⁰⁸

When looking at the charitable deduction from the view of economic efficiency, some economists have questioned the charitable deduction for churches.¹⁰⁹ As Professor Mark P. Gergen explained, from the viewpoint of economic efficiency, high price sensitivity is beside the point: "High elasticity suggests only that a deduction is a source of significant revenue to churches. The efficiency of a deduction depends on the relative magnitude of the cost of what is purchased, and what is foregone because of the additional deducted contribution. High elasticity is entirely consistent with waste."¹¹⁰

A 1972 estimate put "nonsacramental" expenditures, those for social welfare, health functions, and nonreligious education," at less than 20%, and available data indicate that "sacramental functions account for a preponderance of church expenditures."¹¹¹ That is, contributions by members of churches primarily benefit other members. A 2000 study by Independent Sector reported that of \$9.6 billion in donations by America's more than 350,000 religious congregations, 66% was distributed within the denomination, 23% to organizations outside the denomination, and 11% was given in direct assistance to individuals. In the study, 40% of congregations described programs addressing social needs as an important activity.¹¹² A 1999 survey with a nationally representative sample of congregations reported that 57% participated in or supported social service projects of some sort.¹¹³ Spending on these projects, moreover, constituted on average only between 2% and 4% of a congregation's total budget.¹¹⁴

Thus, "one might speculate that the primary motive for giving to religion is for the donor to provide himself [with] a spiritual club-

¹⁰⁸ See SEIDMAN, *supra* note 22, at 17.

¹⁰⁹ See Mark P. Gergen, *The Case for a Charitable Contributions Deduction*, 74 VA. L. REV. 1393, 1393 n.3 (1988).

¹¹⁰ *Id.* at 1439-40.

¹¹¹ CLOTFELTER, *supra* note 8, at 23-25.

¹¹² See INDEP. SECTOR, AMERICA'S RELIGIOUS CONGREGATIONS, *supra* note 7, at 7.

¹¹³ Mark Chaves, *Congregations' Social Service Activities*, in CHARTING CIVIL SOCIETY 2 (The Urban Inst./Ctr. on Nonprofits and Philanthropy, Wash., D.C. Dec. 1999), available at http://www.urban.org/periodicl/cnp/cnp_6.pdf. The study further reported that only a very small minority of congregations administer their own projects in these areas and only 12% have a staff person devoting at least 25% of his or her time to social service projects. See *id.*

¹¹⁴ See *id.*

house.”¹¹⁵ In this view, the deduction for contributions to churches benefits the members of the church at the expense of nonmembers. Even leaving aside Establishment Clause concerns, such contributions do not provide services that would otherwise have to be provided by the government. If given the choice, nonmembers might well prefer the foregone revenue to be spent in other ways. With religious congregations, “the issue . . . may be described generally as whether a club-like collective good which benefits and is supported by a small and socially close group deserves the public support of not taxing its members’ contributions.”¹¹⁶

Many agree that our country urgently needs to encourage institutions that foster a community and a civil society.¹¹⁷ In fact, the tax code exempts a variety of institutions that achieve this end, such as social welfare organizations under section 501(c)(4), social clubs under section 501(c)(7), or fraternal organizations under section 501(c)(8). These organizations, however, are not allowed the double benefit of tax exemption and receiving tax-deductible contributions.¹¹⁸

Of course, many believe that the moral education received by members from their churches benefits society as a whole. Churches provide a “spillover” benefit to the entire community. Such benefit, however, may not require the incentive of a charitable contribution deduction. Again, to quote Professor Gergen, “[r]eligious education is the sort of thing we would expect parents and church members to provide on their own.”¹¹⁹ It should be worth the price and not require nonmembers to pay for it through the charitable contribution deduction in order to provide the optimal level of such education.¹²⁰ Churches, moreover, are enormously successful in obtaining contributions from their members, as the recent survey data show, even

¹¹⁵ Mark A. Hall & John D. Colombo, *The Donative Theory of the Charitable Tax Exemption*, 52 OHIO ST. L.J. 1379, 1401 (1991).

¹¹⁶ Gergen, *supra* note 109, at 1433–34.

¹¹⁷ See generally ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* (2000).

¹¹⁸ For example, section 170(c)(4) permits a charitable contribution for gifts to fraternal associations operating under the lodge system “only if such contribution or gift is to be used exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals.” I.R.C. § 170(c)(4).

¹¹⁹ Gergen, *supra* note 109, at 1437.

¹²⁰ Indeed, under current law, tuition paid for giving one’s own children a religious education is not deductible as a charitable contribution. See *Sklar v. CIR*, 79 T.C.M. (CCH) 1815, 1815 (2000).

though many of their members currently do not enjoy the benefit of an income tax deduction.¹²¹

In sum, efficiency arguments, whether of dollar efficiency or economic efficiency, do not unequivocally support a charitable contribution deduction in general or for churches in particular. Since churches are likely to be the major benefactor of a nonitemizer deduction, such analyses urge caution in their extension, particularly when administrative concerns are also considered.

Equity concerns must be considered as well. As discussed further below, questions of distribution and redistribution, which were raised above in connection with economic efficiency, figure as well in considerations of equity.

B. *Allowing Nonitemizers to Deduct Is Only Fair—The Argument from Equity*

“Fairness” arguments, when applied to the charitable contribution deduction, involve three quite different considerations: the comparison of itemizers and nonitemizers, the rationale for excluding charitable contributions from income, and the impact of the charitable contribution deduction on progressivity. As with the arguments from efficiency, the equitable arguments do not unambiguously support extending the charitable contribution deduction to nonitemizers.

1. Equal Treatment of Itemizers and Nonitemizers

“Shouldn’t all Americans,” asks Independent Sector, “itemizers and nonitemizers alike, receive a tax deduction for charitable gifts?” The group’s answer: “It’s only fair.”¹²² The argument is one of horizontal equity—that itemizers and nonitemizers are similarly situated and should be treated similarly.

While this argument has superficial appeal, it does not withstand scrutiny. Many nonitemizers, like itemizers, owe state income taxes, incur medical costs, have unreimbursed employee expenses, and pay a mortgage on their home. They could itemize these costs as deductions, but do not. Nonitemizers have decided that it is in their economic interest to use the standard deduction.

¹²¹ See *supra* notes 7–12 and accompanying text.

¹²² Independent Sector, Public Policy, Nonitemizer Charitable Deduction, at http://www.independentsector.org/programs/gr/Nonitemizer_Deduction.html (last visited Aug. 14, 2001).

The purpose of the standard deduction, as discussed earlier, has always been to provide tax simplification for those Americans who choose to use it. As the legislative history shows, from its inception the level of the standard deduction was set to take charitable giving into account. The standard deduction is sufficient "to provide most taxpayers with a larger deduction than they would be able to claim by itemizing medical and work expenses, state and local taxes, charitable contributions, and other uses of income."¹²³ Thus, to permit nonitemizers to deduct all charitable contributions, without a floor or some adjustment to the standard deduction, would give these taxpayers, in effect, a double deduction and put them in a position better than rather than equal to itemizers.¹²⁴ Equity, like efficiency, requires some kind of floor beneath nonitemizer deductions. Alternatively, the standard deduction might be lowered by the estimated average charitable contribution by nonitemizers.

2. Deductions as Inequitable to Lower-Income Taxpayers

Even if the tax code permitted both itemizers and nonitemizers to deduct charitable contributions, an important inequity would remain. Income tax deductions are worth more to those with higher taxable incomes and therefore higher marginal rates of tax, and the "philosopher-economist might observe that the opportunity cost of virtue falls as one moves up the income scale."¹²⁵ Another economist has noted that the present system of deductible contributions results in a "serious plutocratic bias to the activities of privately supported philanthropic, educational, and religious institutions."¹²⁶ Clotfelter observes that eliminating the charitable contribution deduction would increase the progressivity of the income tax.¹²⁷

The impact of the charitable contribution deduction should be of particular concern to religious congregations, both because many espouse a moral belief in equality of all and because this system favors the charitable activities favored by the wealthy. The wealthy favor cul-

¹²³ Cordes et al., *supra* note 14, at 1.

¹²⁴ In 1997 David Arons of Independent Sector supported a floor for nonitemizer deductions so that people did not have "a double dip or a double reward." See Stokeld, *supra* note 54, at 158.

¹²⁵ RICHARD A. MUSGRAVE & PEGGY B. MUSGRAVE, *PUBLIC FINANCE IN THEORY AND PRACTICE* 362 (3rd ed. 1980).

¹²⁶ WILLIAM VICKREY, *AGENDA FOR PROGRESSIVE TAXATION* 131 (1947); see also CLOTFELTER, *supra* note 8, at 287.

¹²⁷ CLOTFELTER, *supra* note 8, at 286.

tural institutions and institutions of higher learning instead of religious and social welfare organizations.

For both interested and disinterested reasons, then, religious congregations might want to consider supporting a charitable contribution credit for all taxpayers rather than extending the charitable contribution deduction to nonitemizers. Unlike a deduction, a credit saves taxpayers the same amount of tax regardless of tax rate.¹²⁸ Many have called for replacing the deduction with a credit.¹²⁹ Of course, a credit instead of a deduction itself raises many difficult questions. If higher income taxpayers are more price sensitive than other taxpayers, substituting a charitable contribution credit for the deduction might decrease overall giving. Since the relationship between giving time and money is also uncertain, substituting a credit for a deduction might also impact volunteering. Currently, the lack of a charitable contribution deduction for nonitemizers produces a bias in favor of giving time. A deduction for all charitable contributions is neutral between giving time and money. A tax credit for charitable contributions could produce a bias in favor of giving money instead of time. Additionally, even a credit will not help taxpayers with incomes so low that they owe no income taxes, unless the credit is refundable.¹³⁰

Comparing the effect of a deduction and a credit, however, should remind religious organizations that extending the charitable contribution deduction to nonitemizers does not completely level the playing field between higher and lower income taxpayers. It should give churches and other religious organizations pause before supporting the current versions of the legislation.

3. Defining the Tax Base

A quite different version of the "It's Not Fair" argument is that the income tax is based on the taxpayer's ability to pay, which in turn

¹²⁸ To illustrate, a deduction for a \$100 charitable contribution saves a taxpayer \$15 at the 15% tax rate, but saves \$35 for a taxpayer in a 35% bracket. If instead each got a credit for 25% of their contribution, both would save \$25 in taxes. See Todd Izzo, Comment, *A Full Spectrum of Light: Rethinking the Charitable Contribution Deduction*, 141 U. PA. L. REV. 2371, 2372 (1993).

¹²⁹ See Harold M. Hochman & James D. Rodgers, *The Optimal Tax Treatment of Charitable Contributions*, in *THE ECONOMICS OF NONPROFIT INSTITUTIONS: STUDIES IN STRUCTURE AND POLICY* 238, 243 n.29 (Susan Rose-Ackerman ed., 1986).

¹³⁰ Those with the lowest incomes account for a high percentage of giving and households at either end of the scale, under \$10,000 and over \$100,000, gave most as a percentage of total household income. See INDEP. SECTOR, GIVING AND VOLUNTEERING, *supra* note 10, at Key Findings.

is measured by savings and consumption; thus, money given to charity does not belong in the tax base. Under this view, charitable gifts must be deducted to arrive at the proper base upon which to impose the income tax. With this argument, a tax credit is not an option, and the charitable contribution deduction, by definition, needs to apply to both itemizers and nonitemizers. The Joint Committee on Taxation nicely summarizes this rationale: "Income given to a charity should not be taxed because it does not enrich the giver. Or, stated differently, the charitable contribution deduction reduces the taxpayer's ability to pay income tax."¹³¹

Under this view, the charitable contribution deduction differs from most other itemized deductions, such as those for mortgage interest or even medical expenses and casualty losses, because they are not personal. It is viewed like state and local income taxes, for which a deduction is also permitted, as enhancing the public good.¹³²

The flaw many find with this analysis is that charitable contributions are made voluntarily, as a discretionary use of income. As a personal expenditure, it would be a form of consumption and properly part of the income tax base. Independent Sector's own data support this characterization. Its 1999 *Survey of Giving and Volunteering* included a finding that the "decision to give is influenced by whether individuals have sufficient disposable income."¹³³

The support for, and the evidence, however mixed, of the incentive effect of the charitable deduction also undermine the equitable argument that charitable contributions should be not part of the base for imposing the income tax because charitable contributions do not represent a form of personal consumption. That contributions respond to incentives by exhibiting at least some price elasticity show that they are discretionary and represent personal expenditures.

The notion that contributions to charities do not represent personal use or consumption is particularly difficult to sustain for religious congregations, because, as discussed above, donations to religious congregations stay within the congregation.¹³⁴ Although some redistribution within congregations occurs, with the top 10% of relig-

¹³¹ JOINT COMM. ON TAX'N, PRESENT LAW AND PROPOSALS, *supra* note 6, at 12. Many associate this view of charitable contributions with William D. Andrews, *Personal Deductions in an Ideal Income Tax*, 86 HARV. L. REV. 309, 309 (1972).

¹³² See Brody & Cordes, *supra* note 69, at 153-54.

¹³³ INDEP. SECTOR, GIVING AND VOLUNTEERING, *supra* note 10, at Economic Conditions and Charitable Behavior.

¹³⁴ See *supra* notes 109-114 and accompanying text.

ious donors accounting for over 25% of the amounts given, the redistributive effect is more pronounced in other charities.¹³⁵ Moreover, in some studies, contributions to religious organizations show high elasticity (that is, are very sensitive to price), which suggests that these donations are discretionary and therefore properly part of an income tax base.¹³⁶

Thus, a variety of equitable arguments also produce questions about the policy choice of extending the charitable contribution deduction to nonitemizers. These concerns lead to very different responses. Consideration of the level at which the standard deduction is set suggests retaining the status quo or reducing the current level of the standard deduction of nonitemizers. The regressive effect of the current deduction might argue for replacing the deduction with a charitable contribution credit. Some definitions of the tax base would call for eliminating the charitable contribution deduction either altogether or perhaps only for religious institutions.

CONCLUSION

The purpose of this Article has been to show that the arguments in favor of extending the charitable contribution to nonitemizers, a change that would benefit religious organizations in particular, is not as simple as proponents have made it seem. Neither the arguments from efficiency nor those from equity unambiguously support this extension. At the very least, issues raised under both sets of arguments suggest changes in the structure of the federal tax benefit given to charitable contributions. Religious congregations, for example, need to ask themselves whether they might wish to support a charitable contribution credit instead of either a deduction or a charitable contribution deduction only above a floor.

In fact, that members of religious institutions contribute in order to benefit themselves permits an argument that no contributions to these institutions should be deductible. I am not suggesting that there is any likelihood of such result nor arguing that there should be. Although neither the efficiency nor equity arguments standing alone clearly support these deductions, either for charities in general or for

¹³⁵ See Gergen, *supra* note 109, at 1441. For educational institutions, the top one-tenth of one percent of donors accounts for over 25% of the amounts given. *See id.*

¹³³ Nonetheless, even Professor Gergen argues that the equity argument for deducting religious contributions is stronger than the efficiency argument because such gifts are "self-abnegating," given in good measure out of obligation and commitment rather than payment for services received. Gergen, *supra* note 109, at 1442.

religious congregations in particular, it may well be that the two approaches combined do. Thus, religious institutions provide needed community, moral and ethical education, and attract donations not only for the donor's own benefit, but also for that of future generations. For all forms of charities, it seems, "the political support that the deduction has enjoyed over the years is due in large part to the combined appeal of these quite different justifications."¹³⁷

Moreover, although I have focused on religious organizations, much of the criticism made of religious organizations is equally applicable to other recipients of the charitable contribution deduction. It is far from clear that gifts favored by the wealthy have any greater redistributive component than those, such as religious institutions, favored by the less wealthy.¹³⁸ Our society has not limited the organizations eligible to receive tax-deductible donations to those who aid the needy or relieve the burdens of government. The organizations and activities for which the tax laws permit a charitable contribution deduction have never been a neat set necessarily capable of one clear-cut set of justifications. History and tradition have as much to do with the set of charitable organizations entitled to receive deductible contributions as do notions of efficiency and equity.¹³⁹ Thus, theories of

¹³⁷ CLOTFELTER, *supra* note 8, at 101 (describing George Break, *Charitable Contributions Under The Federal Individual Income Tax: Alternative Policy Options*, in RESEARCH PAPERS, VOLUME III, SPECIAL BEHAVIORAL STUDIES, FOUNDATIONS, AND CORPORATIONS 1523 (Comm'n on Private Philanthropy and Public Needs, Dep't of the Treasury 1977)).

¹³⁸ See CLOTFELTER, *supra* note 8, at 287.

¹³⁹ Consider the famous 1601 Statute of Charitable Uses. Its preamble lists all of the following as charitable purposes for which property has been given:

[S]ome for relief of aged, impotent and poor people, some for maintenance of sick and maimed soldiers and mariners, schools of learning, free schools, and scholars in universities, some for repair of bridges, ports, havens, causeways, churches, sea-banks and highways, some for education and preferment of orphans, some for or toward relief, stock, or maintenance for houses of correction, some for marriages of poor maids, some for supportation, aid and help of young tradesman, handicraftsmen and persons decayed, and others for relief or redemption of prisoners or captives, and for aid or ease of any poor inhabitants concerning payments of fifteens, setting out of soldiers, and other taxes.

The Statute of Charitable Uses, 1601, 43 Eliz., c. 4, *quoted in* AUSTIN WAKEMAN SCOTT & WILLIAM FRANKLIN FRATCHER, LAW OF TRUSTS § 368.1 (4th ed. 1987). The authors comment, "[i]t is interesting to note that the only mention of religion is the repair of churches, and yet it soon was held by the courts that the promotion of religion, or at least what was regarded as the proper religion, is charitable." SCOTT & FRATCHER, *supra*, § 368.1. They also observe that the tendency of courts through the ages has been to enlarge the scope of charitable purposes. *See id.*

equity and efficiency may need to be supplemented by other approaches.¹⁴⁰

Further, it may well be that a tax subsidy through a tax deduction or a tax for religious organizations stands on different ground from those for other kinds of charities. Economists Harold M. Hochman and James D. Rogers, for example, make this distinction: "External 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."¹⁴¹ For other charitable activities—be they health care, educational, or cultural activities—it is appropriate both to treat the lost revenue from the deduction as analogous to direct outlay programs and to ask the extent to which the activities financed by contributions relieve government of burdens that would otherwise be satisfied by public funds. Direct provision by government is not available as an alternative for religious activities. A tax deduction or credit ingeniously satisfies the values of both the Free Exercise and Establishment Clauses of the First Amendment.

At the same time, it is of the utmost importance for religious organizations to remember that government policymakers have viewed the charitable contribution deduction from its beginning as an incentive and a subsidy, albeit an indirect subsidy. As recipients of such government largesse, religious congregations should remember to think carefully about their role in and responsibility to American society, including support for good government policy. Congress has limited, not prohibited, the ability of religious congregations to lobby. They can and should work to promote good policy, even if good tax policy means limitations on tax provisions that benefit them directly.

¹⁴⁰ See Evelyn Brody, *Of Sovereignty and Subsidy: Conceptualizing the Charity Tax Exemption*, 23 J. OF CORP. L. 585, 587–96 (1998) (arguing for a theory of sovereignty for exemption); Hall & Colombo, *supra* note 115, at 1383–84 (arguing for a donative theory for exemption). Arguments regarding the justification for exempting an organization under section 501(c)(3) are closely related to arguments regarding the justification for permitting charitable contribution deductions.

¹⁴¹ Hochman & Rodgers, *supra* note 129, at 227.