A CRITIQUE OF THE TAX CUTS AND JOBS ACT: MODIFYING THE CHARITABLE DEDUCTION TO RESTORE TAXPAYER PLURALISM

Alexander Busvek*

> As a consequence of the drastic changes brought in by the Tax Cuts and Jobs Act (TCJA), the local soup kitchen will most likely knock on the Treasury's door to request "[p]lease, sir, I want some more."[1]

I. INTRODUCTION

Charities play a pivotal role in our society. The objective of most charitable organizations is to raise subsidies for religion, education, disaster relief, artistic revival, and healthcare.[2] In an ongoing effort to enhance social welfare by rewarding individual philanthropy, the Internal Revenue Code (IRC) has undergone countless revisions.[3]

---

* Associate, Stetson Law Review, 2018–19. Juris Doctor Graduate, cum laude, Stetson University College of Law, 2019. Honors in Business Administration (HBA), with high honors, Ivey Business School, Western University, 2016. Many thanks to my loved ones who have supported me through this entire process: Monica and Michael Cara, Edward and Robberta Busvek, Maxwell Busvek, Lynn Miller, and Ekaterina Todorova. Many thanks to those who reviewed this Article for its accuracy and who otherwise consulted with me at various stages of completion: Professor Gail Richmond, Professor Andrew Appleby, and Dean Christopher Pietruszkiewicz. Many thanks to my faculty writing advisor Professor Theresa Radwan and Executive Editor Brian Remler for their extensive feedback and tireless work, to Articles and Symposia Editor Sean P. Mullen and Editor in Chief Kelly Jackson for their editorial work, and to the many law review associates that trudged through the mountains of tax literature to review this Article for its accuracy.

1. CHARLES DICKENS, THE ADVENTURES OF OLIVER TWIST 15 (1838).

2. Miranda Perry Fleischer, *Charitable Giving and Utilitarianism: Problems and Priorities*, 89 IND. L.J. 1485, 1486 (2014) [hereinafter Fleischer, *Charitable Giving and Utilitarianism*].

3. Vada Waters Lindsey, *The Charitable Contribution Deduction: A Historical Review and a Look to the Future*, 81 NEB. L. REV. 1056, 1057 (2003).

In this Article, particular emphasis will be placed on the charitable deduction.[4] The purpose of this statute is to provide a tax incentive for individuals that give to a qualified organization prescribed under the IRC.[5] Essentially, taxpayers are able to reduce their total tax liability by donating cash or property to one of the aforementioned charitable subsectors.[6] The rationale underlying this deduction is grounded in the notion of taxpayer pluralism, whereby taxpayers are afforded an opportunity to subsidize charities that would otherwise suffer from government or market failures.[7]

The major changes posed by the reform undercut the above-mentioned purpose of the charitable deduction. In particular, the recent enactments increased the standard deduction, lowered marginal tax rates, and placed additional restrictions on itemized deductions.[8] These changes will most likely place a damper on giving from moderate- and low-income taxpayers. High-income taxpayers, however, will remain unaffected because they are more likely to itemize their deductions.[9] Consequently, the TCJA will likely create a fiscal landscape that predominantly subsidizes charities favored by high-income taxpayers at the expense of organizations like the local soup kitchen.[10]

This Article is organized as follows: Part I provides a historical and theoretical overview of the charitable deduction. Part II examines how the major changes brought in by the TCJA are

---

4. 26 U.S.C. § 170(a)(1) (2018) (currently this tax incentive takes the form of a below-the-line deduction).

5. 26 U.S.C. § 501(a)–(d) (2018).

6. 26 U.S.C. § 170(b)(1)(B) (stating that a below-the-line deduction reduces the taxpayer's total tax liability by a dollar amount that is contingent on the taxpayer's marginal tax rate).

7. NEIL BROOKS, THE LOGIC, POLICY AND POLITICS OF TAX LAW: AN OVERVIEW 50 (2000) (noting economists define market failures as cases where the marketplace requires government intervention to regulate the exchange of goods and services).

8. Alex Brill & Derrick Choe, *Charitable Giving and the Tax Cuts and Jobs Act*, AEI ECONOMIC PERSPECTIVES 3 (June 2018), https://www.aei.org/wp-content/uploads/2018/06/Charitable-Giving-and-the-Tax-Cuts-and-Jobs-Act.pdf (explaining that the standard deduction was increased from $6,350 to $12,000 for single taxpayers and $12,700 to $24,000 for a married couple filing a joint return).

9. Emily Cauble, *Itemized Deductions in a High Standard Deduction World*, 70 STAN. L. REV. 146, 152 (2018).

10. Todd Izzo, Comment, *A Full Spectrum of Light: Rethinking the Charitable Contribution Deduction*, 141 U. PA. L. REV. 2371, 2402 (1993).

incompatible with the foundations of distributive justice.[11] More specifically, this Article critiques the reform through the philosophical lenses of utilitarianism, egalitarianism, and libertarianism.

Part III proposes a nonrefundable charitable tax credit,[12] which would be optimal from an economic standpoint, in place of the charitable deduction. This Part differentiates the proposed tax credit from the current charitable deduction by making macroeconomic and fiscal efficiency comparisons.

Finally, Part IV provides the foundations of a tax credit system that prioritizes charitable giving to certain charitable subsectors based on the following factors: (1) the price elasticity of giving to the charitable subsector; (2) the extent to which giving to the charitable subsector will yield positive externalities; and (3) the government's ability to subsidize the charitable subsector in the absence of an individual tax incentive. Under this structure, taxpayers will be eligible to claim larger tax credits for giving to charitable organizations that provide a broad public benefit.

II. HISTORICAL AND THEORETICAL OVERVIEW

A. Historical Overview

The initial onset of charitable giving in the United States can be traced back to the late-seventeenth- and early-eighteenth-century.[13] During this time period, the country underwent a dramatic transformation that was largely due to massive trade growth and colonial integration into the British commercial system.[14] Economic growth reached an enormous scale that

11. Fleischer, *Charitable Giving and Utilitarianism*, *supra* note 2, at 1485 (stating that distributive justice stresses equality and the allocation of goods across society).

12. Sattah Sarmah Hightower, *Deductions and Credits You May Be Able to Carry Forward from Year to Year*, CREDIT KARMA (July 16, 2018), https://www.creditkarma.com/tax/i/tax-carry-forward/ (stating a charitable tax credit reduces the taxpayer's total tax liability by a dollar-for-dollar amount and is applied after the taxpayer's tax liability has been computed).

13. Peter Dobkin Hall, *A Historical Overview of Philanthropy, Voluntary Associations, and Nonprofit Organizations in the United States, 1600–2000*, *in* THE NONPROFIT SECTOR 32, 33 (Walter W. Powell & Richard Steinberg eds., 2d ed. 2006).

14. Hall, *supra* note 13, at 34.

ultimately formed the nation's legal, political, social, and religious institutions.[15]

While the nation experienced monumental economic growth, natural population increases and trade had dire consequences. For instance, there was an epidemic of disease outbreaks, disruption to the traditional forms of community, and a visible population of impoverished inhabitants.[16] These negative externalities eventually triggered a prevailing sentiment that philanthropy was needed to remedy societal issues.[17] For example, the role of the church transformed from an institution dedicated to spiritual enlightenment to one that provided social welfare support to minority groups that were politically and economically repressed.[18] As the gap between the rich and poor widened, philanthropy effectively counterbalanced the excesses of capitalism and expanded its reach into both the public and private spheres.[19] Clearly, many Americans were compelled by a moral obligation to "help thy neighbor," but eventually government intervention was necessary to sustain individual charitable giving.

Shortly after the Sixteenth Amendment[20] was enacted—giving Congress the power to lay and collect income tax—the charitable deduction was codified into the IRC.[21] From a public policy standpoint, the charitable deduction was viewed as an effective way to provide monetary rewards and recognition to taxpayers who gave generous amounts to social enterprises.[22] Effectively, the charitable deduction relieved the government of its burden to provide direct subsidies to charity by delegating the redistribution of wealth role to the individual taxpayer.

The charitable deduction was first introduced under the War Revenue Act of 1917.[23] Congress initially enacted this statute as a means to raise tax revenues to subsidize war-related expenses

15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.* at 35.
19. *Id.* at 48.
20. U.S. CONST. amend. XVI.
21. Brill & Choe, *supra* note 8, at 1.
22. *Id.* at 2.
23. *Id.*

after the United States entered World War I.[24] The stated purpose of the Act was "[t]o provide revenue to defray war expenses, and for other purposes."[25]

Proponents for the charitable deduction were concerned that higher marginal tax rates enacted to finance military needs would cause individuals to economize their charitable giving because they had less disposable income.[26] Consequently, the 1917 Act was amended in several ways, including the allowance for a taxpayer to take a charitable deduction in computing net income under the income tax of such amount, not to exceed 15% of the taxpayer's taxable net income.[27] This provision was accessible so long as the taxpayer gave either to corporations or associations that were organized and operated exclusively for religious, charitable, scientific, or educational purposes, or to societies for the prevention of cruelty to children or animals. In 1954, Congress renumbered the charitable deduction statute as Section 170.[28]

Further legislative efforts were later enacted to counter the following two issues. First, the Internal Revenue Service (IRS) sought to prevent high-income taxpayers from receiving a disproportional benefit from the charitable deduction. For instance, in 1974, Congress phased out the unlimited charitable deduction by lowering the deductible amount to 50% of the taxpayer's Adjusted Gross Income (AGI).[29] This was a necessary amendment to address the pitfall of the unlimited charitable deduction, whereby high-income taxpayers were essentially using the deduction to avoid paying income taxes altogether.[30]

Second, Congress sought to achieve greater equity amongst all taxpayers from different tax brackets by amending the charitable

---

24. David E. Pozen, Comment, *Remapping the Charitable Deduction*, 39 CONN. L. REV. 531, 537 (2006).

25. Michael Goon, *A Social Argument for the Charitable Deduction*, 70 N.Y.U. ANN. SURV. AM. L. 247, 249 (2014) (quoting War Revenue Act of 1917, Pub. L. No. 50, 40 Stat. 300, 300 (codified as 26 U.S.C. § 170 (2018)).

26. *Id.* at 250; 55 CONG. REC. 6437, 6728 (1917) (citing the concerns expressed by Senator Henry F. Hollis during the Congressional hearing over the Revenue Act of 1917). Specifically, Senator Hollis raised the issue that charitable institutions became dependent on private funding and during World War I would suffer financially. *Id.*

27. Lindsey, *supra* note 3, at 1061 (explaining that Congress believed this amendment would increase charitable giving and would not be abused by high-income taxpayers that regularly gave to charity).

28. *Id.* at 1062.

29. *Id.* at 1065.

30. *Id.*

contribution as an above-the-line deduction.[31] Under this reform, nonitemizing taxpayers[32] could deduct charitable contributions.[33] This enactment was intended to offset the disincentivizing effect created by increases to the standard deduction over the decade prior to 1981. Between 1970 and 1980, the standard deduction rose from $1,000 to $3,400 in current dollars.[34] As the standard deduction rose, the proportion of taxpayers who elected to take the standard deduction increased from 52% in 1970 to 69% in 1980.[35] The 1981 Economic Tax Recovery Act was treated as an experiment and was set to expire in 1986.[36] After the IRC underwent significant revisions in 1986, the above-the-line charitable deduction was discontinued.[37] Comments from the United States Treasury ("the Treasury") indicated that maintenance over the nonitemized charitable deduction was too administratively burdensome and only "stimulat[ed] little additional giving."[38]

Between 1993 and 1998, Congress passed the Omnibus Budget Reconciliation Act, which required taxpayers to provide written verification to the IRS in order to be allowed a deduction for any contribution exceeding $250.[39] Additionally, the Act required charities to inform the IRS by written statement of any contributions they received that exceeded $75.[40] In 1998, an amendment was made to the charitable deduction that allowed taxpayers to donate capital stock to private foundations.[41]

---

31. *Charitable Contribution Deductions: Hearings on S. 219 Before the Subcomm. on Taxation and Debt Mgmt. Generally of the Comm. on Fin.*, 96th Cong. 9 (1980) [hereinafter *Charitable Contribution Deductions*].

32. 26 U.S.C. § 63(a)–(c) (2018). The formula for computing taxable income equals adjusted gross income minus the taxpayer's below-the-line "itemized" deductions. *Id.* However, if the taxpayer's itemized deductions do not exceed the standard deduction, it makes more sense for the taxpayer to opt for the standard deduction in computing their taxable income.

33. *Charitable Contribution Deductions*, *supra* note 31, at 9.

34. Christopher M. Duquette, *Is Charitable Giving by Nonitemizers Responsive to Tax Incentives? New Evidence*, 52 NAT'L TAX J. 195, 196 (1999).

35. *Id.*

36. *Id.* at 195.

37. Goon, *supra* note 25, at 278.

38. *Id.* at 278–79 (quoting Tax Reform for Fairness, Simplicity, and Economic Growth 82 (U.S. Dep't of Treasury Nov. 1984)).

39. Lindsey, *supra* note 3, at 1070.

40. *Id.* (noting the donee organization that received more than $75 in either the form of cash or services was obligated to report the amount to the IRS).

41. *Id.*

In 2005, Congress enacted the Katrina Emergency Tax Relief Act that temporarily suspended the charitable contribution limits on individuals and corporate deductions, so long as cash donations were made to the Hurricane Katrina disaster relief initiative.[42] Later, in 2009, shortly after the Affordable Care Act was enacted, President Obama proposed placing a cap on itemized deductions at a 28% tax rate to curb high-income taxpayers from receiving a disproportional benefit from the charitable deduction.[43]

The TCJA was signed by President Trump in December 2017, and is widely regarded as the most significant change to the Code since the Tax Reform Act of 1986.[44] "Congress acted with unprecedented speed" to pass the TCJA, foregoing the long deliberations that usually accompany a reform of this magnitude.[45] Among the major changes brought in by this reform, the most drastic change included doubling the standard deduction.[46] The marginal tax rates across the seven major tax brackets were modestly reduced.[47] For instance, the marginal rate for the highest tax bracket was reduced to 37% from 39.6%.[48] Furthermore, the deductible amount was extended from 50% to 60% of the taxpayer's AGI.[49] Taken together, these amendments are very likely to influence philanthropic behavior, and this Article seeks to explore the anticipated impact they will have on the charitable sector.

---

42. Urban Institute & Brookings Institution, *Major Enacted Tax Legislation, 2000–2009*, TAX POLICY CENTER, https://www.taxpolicycenter.org/laws-proposals/major-enacted-tax-legislation-2000-2009 (last visited Aug. 19, 2019).

43. Leonard E. Burman, *Would Obama's Plan to Curb Deductions Hurt Charities?*, TAX POLICY CENTER (Mar. 3, 2009), https://www.taxpolicycenter.org/taxvox/would-obamas-plan-curb-deductions-hurt-charities.

44. Arpita A. Shroff, *The Tax Cuts and Jobs Act—Individual Tax Reform*, 129 J. TAX'N 30, 30 (2018).

45. Cauble, *supra* note 9, at 146.

46. Shroff, *supra* note 44, at 36. Other major changes brought in by the TCJA included repealing the $4,050 personal exemption that was previously available to all taxpayers from the seven major tax brackets. *Id.* at 33.

47. *Id.* at 36.

48. *Id.* at 30.

49. *Tax Cuts and Jobs Act: Itemized Deductions*, DEANDORTON (Feb. 8, 2019), https://deandorton.com/tax-cuts-jobs-act-itemized-deductions/.

B. Theoretical Overview

Behavioral science and economic research have revealed a multitude of factors that influence individual philanthropy.[50] This complexity presents a conundrum for legislators seeking to define a well-crafted tax incentive that accounts for individual differences in private giving. Thus, in order to provide a complete theoretical overview of the charitable deduction, it is necessary to begin by examining the many theories that attempt to explain the motivation underlying individual giving. Furthermore, this Part will conclude by examining the theoretical underpinnings for offering individual tax incentives to stimulate charitable giving.

First, the altruist theory postulates that people give because they experience a "warm glow"[51] when they give to charity. According to this theory, people are intrinsically motivated to increase the welfare of others through selfless giving. This theory plausibly explains instances where people give to charities that are geared towards eradicating poverty. Under this approach, donors are uninfluenced by financial incentives, and they believe that direct government subsidies are an imperfect substitute for maximizing social welfare.[52]

Second, many theorists believe people are compelled to give because of an inner sense of "moral duty."[53] Individual giving to religious institutions falls neatly within this category. Considering the government is constitutionally restrained from making direct grants to religious institutions,[54] the local congregation is necessarily dependent on private giving from its devout followers. Furthermore, the fact that many people feel morally compelled to

---

50. Rubén Hernández-Murillo & Deborah Roisman, *The Economics of Charitable Giving, What Gives?*, THE REGIONAL ECONOMIST 12–13 (Oct. 1, 2005), https://www.stlouisfed.org/publications/regional-economist/october-2005/the-economics-of-charitable-giving-what-gives.

51. Rahul Deb, Robert S. Gazzale & Matthew J. Kotchen, *Testing Motives for Charitable Giving: A Revealed-Preference Methodology with Experimental Evidence*, 120 J. PUB. ECON. 181, 181 (2014).

52. James Andreoni, *Privately Provided Public Goods in a Large Economy: The Limits of Altruism*, 35 J. PUB. ECON. 57, 70 (1988).

53. Hernández-Murillo & Roisman, *supra* note 50, at 12–13.

54. Pozen, *supra* note 24, at 559 (noting that the government cannot make direct grants to religious institutions without running afoul of the Establishment Clause under the First Amendment).

subsidize disaster relief programs during times of national tragedy lends further credibility to this theory.[55]

Third, other theories posit that people give to certain charities because they agree with their organizational values.[56] For these individuals, giving is not only an endorsement of the charity. Rather, in settings where their giving is conspicuous and observable by the general public, the act of giving represents a form of speech. This theory accounts for instances when prominent figures shed light on their donations to major political campaigns.[57] However, in cases where donors make their philanthropic initiatives readily known to the public, competing theorists argue that this form of giving is motivated by a desire to obtain social recognition and to signal prestige.[58]

Finally, many theorists argue that financial incentives serve as the primary motivation for individual giving.[59] This theory is largely supported by empirical research that has consistently revealed that income is the most significant predictor of charitable giving.[60] The relationship between financial incentives and charitable giving serves as the cornerstone for the arguments made throughout this Article.

The current tax incentive for charitable giving offers a below-the-line deduction to taxpayers that satisfies the statutory requirements of the IRC.[61] High-income taxpayers are more likely to itemize, and they thus incur a lower cost of giving in comparison to taxpayers that elect to take the standard deduction.[62] This relationship between income and charitable giving provides further insights about the differences between taxpayers in the seven major tax brackets. For instance, it is consistently found that

55. Lindsey, *supra* note 3, at 1059 (noting that in the aftermath of the Sept. 11, 2001, terrorist attacks, there was an enormous influx of charitable subsidies of over $500 million to help the victims).

56. Hernández-Murillo & Roisman, *supra* note 50, at 12–13.

57. *Id.* at 12.

58. *Id.* at 13.

59. *Id.*

60. Robert McClelland & Arthur C. Brooks, *What Is the Real Relationship Between Income and Charitable Giving?*, 32 PUB. FIN. REV. 483, 483 (2004).

61. 26 U.S.C. § 170(a)(1) (2018).

62. Hernández-Murillo & Roisman, *supra* note 50, at 13 (explaining that the cost of giving for taxpayers that itemize their deductions equals the amount of the donation multiplied by one (minus applicable marginal tax rate), while in contrast, the cost of charitable giving for taxpayers that take the standard deduction equals the dollar amount they give to charity).

high-income taxpayers are more likely to give to public television, museums, and the arts, while low-income taxpayers are more likely to give to religious institutions and social welfare programs.[63]

There are competing viewpoints concerning whether tax incentives are more advantageous than direct government spending for subsidizing the various charitable subsectors. The remainder of this Part addresses the multiple theories that primarily favor using tax incentives to increase individual giving.

In short, numerous theories support tax incentives, either in the form of a tax deduction or credit,[64] as a means to subsidize charity. Many theorists argue that taxpayers should be compensated for their acts of generosity because they are relieving the government of its burden, namely reducing poverty via direct government expenditures.[65] Others contend that charitable tax incentives actively promote pure democracy because individual taxpayers vote on which organizations should receive charitable subsidies through making donations.[66]

Charitable subsidy theory takes a unique approach. According to this theory, when the market for charitable subsidies is scarce, the tax incentive fosters a system where charitable organizations are required to compete for subsidies and therefore must produce higher quality goods and services.[67]

Modern donors are more results oriented and are more likely to fund organizations that are on the brink of developing solutions to complex social problems.[68] In particular, donors recognize that

63. Izzo, *supra* note 10, at 2391.

64. A below-the-line deduction provides a tax benefit that is contingent on the taxpayer's marginal tax rate. The deduction is applied to the taxpayer's adjusted gross income to compute the taxpayer's taxable income. A tax credit reduces a taxpayer's liability on a dollar-for-dollar basis. Credits are applied after the taxpayer's taxable income has been calculated. Urban Institute & Brookings Institution, *What Are Tax Credits and How Do They Differ from Tax Deductions?*, TAX POLICY CENTER, https://www.taxpolicycenter.org/briefing-book/what-are-tax-credits-and-how-do-they-differ-tax-deductions (last visited Aug. 19, 2019).

65. Pozen, *supra* note 24, at 556.

66. Adam Parachin, *Funding Charities Through Tax Law: When Should a Donation Qualify for Donation Incentives?*, 3 CAN. J. NONPROFIT AND SOC. ECON. RES., Spring 2012, at 57, 64.

67. *Id.* at 63 (citing Saul Levmore, *Taxes as Ballots*, 65 U. CHI. L. REV. 387, 410–12 (1998)).

68. *The Future of Philanthropy*, FIDELITY CHARITABLE 9, https://www.fidelitycharitable.org/docs/future-of-philanthropy.pdf (last visited Aug. 15, 2019) (stating that 41% of donors

alleviating poverty and improving healthcare are the most critical issues faced by contemporary society.[69] This is further illustrated by consumer polls showing that developing treatments or cures for diseases, reducing hunger by increasing access to nutritious food, and increasing access to basic health services are ranked as the most important challenges for charities to address.[70] Later, this Article points to the inherent difficulties with prioritizing the main charitable subsectors based on the social benefits they generate.

Many theorists argue that individual giving influences charities to develop innovative methods to attract and retain support from a wide array of donors.[71] The emergence of digital fundraising best illustrates the use of technological innovation in the charitable sector. More specifically, charities have actively developed digital fundraising platforms to target younger audiences, leading to the discovery of new donors while controlling fundraising and administrative costs.[72] This Article will examine the challenges for future legislators to design charitable tax incentives that provide more equitable benefits to all individual donors in the seven major tax brackets. Thus, in order to effectuate this proposed reform, continued efforts by charities to attract and retain a large number of donors are crucial and should continue to be encouraged.

From a cost allocation standpoint, tax scholars argue that a deduction is more effective than a government grant.[73] A direct government subsidy spreads the costs of charitable giving evenly across all taxpayers, ultimately leading to either the over- or under-subsidization of certain charitable organizations.[74] A tax incentive, in contrast, allows the individual taxpayer to shoulder the cost associated with giving to the extent they are able to receive a tax deduction or credit. This Article compares the probable fiscal

say they have changed their giving due to increased knowledge about nonprofit effectiveness).

69. *Id.* at 5.

70. *Id.*

71. *Id.* at 22.

72. John McCarthy, *Save the Children Unveils Donation Button Prototype to Counteract Direct Debit Dropout*, THE DRUM (May 23, 2017), https://www.thedrum.com/news/2017/05/23/save-the-children-unveils-donation-button-prototype-counteract-direct-debit-dropou-0 (reviewing Save the Children's new innovation that allows donors to expediently make a donation by the simple click of a button without having to get up from their chair).

73. Parachin, *supra* note 66, at 64.

74. *Id.*

efficiency outcomes generated by a charitable tax credit to the below-the-line deduction.

Finally, tax theorists argue that a charitable tax incentive is a necessity because it places a check on the government's spending power in an ongoing effort to enhance taxpayer pluralism.[75] Under this approach, scholars recognize there are many charitable organizations that fall outside the government's purview for subsidization.[76] Allowing taxpayers to have a say in deciding which charities merit subsidy prevents these organizations from suffering government or market failures. Thus, offering tax incentives for charitable giving puts more fiscal power in the hands of the individual taxpayer and also signals to the market which charities face the risk of underfunding.[77] However, a critical position taken in this Article is that taxpayer pluralism is violated when high-income taxpayers are empowered to decide which charitable organizations merit subsidization.

III. TCJA CONTRARY PROVISIONS THAT UNDERMINE DISTRIBUTIVE JUSTICE

The major changes posed by the TCJA are incompatible with the foundations of distributive justice. Tax scholars identify the following distributive justice principles that are aimed at enhancing the effectiveness of the charitable tax incentive: utilitarianism, libertarianism, and egalitarianism.

A. Utilitarianism Approach to the TCJA

Traditional utilitarianism proposes that organizations designed to assist the underprivileged deserve special tax

75. Miranda Perry Fleischer, *Libertarianism and the Charitable Tax Subsidies*, 56 B.C. L. REV. 1345, 1353 (2015) [hereinafter Fleischer, *Libertarianism and the Charitable Tax Subsidies*].

76. *Id.* at 1354.

77. Adam Pickering, *Philanthropic Power: The Awkward Consequences of Pluralism*, CHARITIES AID FOUNDATION (Sept. 6, 2016), https://www.cafonline.org/about-us/blog-home/giving-thought/why-civil-society-matters/philanthropic-power-the-awkward-consequences-of-pluralism; Fleischer, *Charitable Giving and Utilitarianism*, *supra* note 2, at 1496.

treatment.[78] However, the current tax incentive is not structured in this manner.[79] Under the current incentive, so long as donor-taxpayers give to a qualified organization, they are eligible to deduct an amount that does not exceed 60% of their AGI.[80] Consequently, the charitable deduction places the soup kitchen on equal footing with the opera.[81]

It is important to note that while the opera serves the charitable purpose of subsidizing artistic revival, this produces a limited public benefit.[82] The opera donors and attendees are predominantly older, wealthy, and educated individuals.[83] Moreover, the major barriers that preclude other demographic groups from enjoying the benefits associated with attending the opera include high admissions cost and limited awareness of the arts organizations.[84] Under the current charitable tax incentive, high-income taxpayers are able to subsidize the charitable organization where they are the main beneficiaries.[85] In other words, the opera financier gets to enjoy either orchestra or mezzanine seating at *Madama Butterfly*, while the opera chaperone is reduced to waiting outside of the auditorium in the main lobby.

The TCJA has exacerbated this reality. The reform is expected to diminish the number of households claiming an itemized deduction to charities from 37 million to 16 million in 2018.[86] As a consequence of significantly fewer itemizing taxpayers coupled with lower marginal tax rates, charitable giving is expected to drop

78. Fleischer, *Charitable Giving and Utilitarianism*, *supra* note 2, at 1485 (noting that while there are different conceptions of utility, viewing utility as a measure of wellbeing, happiness, and income in isolation poses inherent difficulty).

79. 26 U.S.C. § 501(c)(3) (2018).

80. 26 U.S.C. § 170(b)(1)(G)(i) (2018).

81. Fleischer, *Charitable Giving and Utilitarianism*, *supra* note 2, at 1487.

82. Shannon Weeks McCormack, *Taking the Good with the Bad: Recognizing the Negative Externalities Created by Charities and Their Implications for the Charitable Deduction*, 52 ARIZ. L. REV. 977, 991–92 (2010) (defining a limited public benefit as one that is enjoyed by a subsection of the population to the exclusion of others).

83. JONI MAYA CHERBO & MONNIE PETERS, AMERICAN PARTICIPATION IN OPERA AND MUSICAL THEATRE 4 (1992).

84. OPERA America, *What Do Millennials Want?*, MEDIUM (July 11, 2017), https://medium.com/@OPERAAmerica/what-do-millennials-want-69623590d458 (citing the challenges facing the opera in targeting the millennial generation).

85. McCormack, *supra* note 82, at 991.

86. Howard Gleckman, *21 Million Taxpayers Will Stop Taking the Charitable Deduction Under the TCJA*, TAX VOX (Jan. 8, 2018), https://www.taxpolicycenter.org/taxvox/21-million-taxpayers-will-stop-taking-charitable-deduction-under-tcja.

by $17.2 billion in 2018, marking a 4% decrease from the previous calendar year.[87] While the marginal tax benefits are anticipated to decline for low- and middle-income taxpayers, the top 10% of taxpayers who continue to itemize will largely remain unaffected.[88] Considering that wealthy taxpayers donate to different charities,[89] this is especially concerning for the future outlook of charities supported by low- to moderate-income taxpayers. Based on the previously cited quantitative predictions, the reform will likely entail a fiscal landscape whereby a small fraction of taxpayers are empowered to decide which charities receive subsidies. Consequently, subsidies will mainly be dispensed to the opera, museum, and symphony at the expense of the local soup kitchen[90]—a clear distributive injustice.

B. Libertarianism Approach to the TCJA

Libertarianism seeks to maximize political freedom, free market, and complete autonomy with respect to individual tax treatment.[91] One of the most notable changes brought by the reform included doubling the standard deduction for taxpayers filing single and joint returns.[92] While the rationale underlying this change was to simplify the process for taxpayers in computing their tax liability while reducing the IRS's administrative burden for auditing tax returns,[93] this provision places too broad of a constraint over most taxpayers. Essentially, the low- to moderate-

87. Brill & Choe, *supra* note 8, at 1 (predicting that 83% of the decrease in charitable giving stems from the increase to the standard deduction and the remainder is accounted for by lowered marginal tax rates for high-income taxpayers).

88. Gleckman, *supra* note 86 (predicting the marginal benefit for itemized deductions will drop from 30.5% to 28.9% for the top 1% of taxpayers).

89. Miranda Perry Fleischer, *Generous to a Fault? Fair Shares and Charitable Giving*, 93 MINN. L. REV. 165, 196 (2008) (noting that wealthy taxpayers generally donate to colleges, universities, and health and cultural institutions, whereas lower-income taxpayers typically give to religious and human service organizations).

90. Izzo, *supra* note 10, at 2391–92.

91. Fleischer, *Libertarianism and the Charitable Tax Subsidies*, *supra* note 75, at 1359.

92. *Tax Cuts & Jobs Act Overview: Biggest Tax Bill in 30+ Years Redefines Tax Landscape*, ORBA 2 (2018), https://www.orba.com/wp-content/uploads/2017/10/2018-Tax-Cuts-and-Jobs-Act-Overview.pdf (stating that the standard deduction was increased from $12,000 for singles and married couples filing separately, $18,000 for head of household filers, and $24,000 for married couples filing jointly).

93. Mike Shepherd, *Tax Cuts and Jobs Act: Simplification or Complication?*, DEANDORTON (Feb. 5, 2018), https://deandorton.com/tax-cuts-jobs-act-simplification-complication/.

income taxpayer's decision whether to itemize or take the standard deduction has already been determined under the reform. Clearly, this change runs afoul to the notion of libertarianism, stressing that taxpayers should be afforded reasonable autonomy in managing their fiscal affairs.

Proponents for the standard deduction's increase may argue that this provision does not deprive taxpayers of receiving itemized benefits. Rather, the reform presents new tax planning opportunities.[94] For instance, taxpayers are able to time payments of qualifying deductible expenses and may wish to bundle these expenses, including charitable gifts, into alternate tax years.[95] To accomplish this, taxpayers may utilize investment vehicles such as donor-advised funds. In this scenario, the taxpayer contributes cash or publicly traded securities to a fund that is managed by a financial services firm. When the fund reaches a target fair market value, the donor may instruct the fund manager to make a distribution to a qualified charitable organization.[96] Finally, proponents for increases to the standard deduction may argue that the non-itemizing taxpayer ultimately benefits from this reform because a higher standard deduction lowers his or her taxable income.[97]

The above arguments are vulnerable for the following reasons. First, these alternative solutions delay the taxpayer from receiving a charitable tax benefit because taxpayers must bundle their itemized deductions—which would normally be incurred in multiple tax years—into one year in order to exceed an exorbitantly high standard deduction. This bundling effect will likely disrupt the predictable flow of charitable subsidies from private donors to charities that are reliant on private philanthropy.

Second, the main drawback of proposing the use of donor-advised funds is that it does not account for the fact that taxpayers from the seven major tax brackets differ with respect to their

94. Sarah Shannon, *Guidance for Giving Under the New Tax Law*, BROOKLYN COMMUNITY FOUNDATION (Jan. 24, 2018), http://www.brooklyncommunityfoundation.org/blog/2018/01/guidance-giving-under-new-tax-law.

95. *Id.*

96. *Endowed Fund*, BROOKLYN COMMUNITY FOUNDATION, https://brooklyncommunityfoundation.org/endowed-fund (last visited Aug. 15, 2019).

97. Cauble, *supra* note 9, at 154.

financial literacy. Higher-income taxpayers are more likely to seek out advice from financial advisors and accountants, and consequently, they are more astute to the benefits associated with dispensing funds into sophisticated investment vehicles.[98] Finally, while it is true that non-itemizing taxpayers will lower their taxable income by opting to take a higher standard deduction, this does not negate the fact that high-income taxpayers will receive a disproportional benefit for their charitable giving.[99]

Under classical liberalism theory, subsidies that provide public goods to institutions that suffer from market failures are deemed to be legitimate.[100] However, as previously mentioned, the charitable institutions predominantly favored by high-income taxpayers are most likely to receive subsidies. Accordingly, these organizations that receive the largest subsidies are least vulnerable to underfunding. To amplify this point, notable academics have publicly stated that generous subsidies entail a greater social benefit when the subsidies are dispensed to universities experiencing financial difficulty.[101] However, many taxpayers are persuaded to give to the most prestigious universities in the nation based on a desire to signal prestige amongst their wealthy constituents. This leads to a waste of resources as many of these elite institutions already report the largest funding on a per capita basis.[102] Furthermore, the previously cited examples and many others demonstrate that the TCJA's reforms will most likely create a fiscal landscape whereby high-income taxpayers will take advantage of the charitable deduction in a manner that creates excessive waste and allows the high-income taxpayer to boast about their latest charitable donation to Harvard University.[103]

---

98. *See* Brian H. Jenn, Comment, *The Case for Tax Credits*, 61 TAX LAW. 549, 556 (2008).

99. Cauble, *supra* note 9, at 154.

100. Fleischer, *Libertarianism and the Charitable Tax Subsidies*, *supra* note 75, at 1415.

101. Richard Feloni, *Malcolm Gladwell Says Billionaires 'Sound Like Idiots' When They Explain Why They Donate to Large Universities*, BUSINESS INSIDER (Aug. 17, 2016), https://www.businessinsider.in/Malcolm-Gladwell-says-billionaires-sound-like-idiots-when-they-explain-why-they-donate-to-large-universities/articleshow/53746043.cms.

102. *Id.*

103. Pickering, *supra* note 77.

C. Egalitarianism Approach to the TCJA

Egalitarianism,[104] otherwise known as "equal opportunity," is a theory that posits organizational and individual success should be meritorious and not based on superficial characteristics. The TCJA's reforms mark a clear departure from this philosophical basis for the charitable deduction. First, charitable giving to organizations that are predominantly favored by low- to moderate-income taxpayers is likely to decrease as a consequence of the reform. Second, the current tax incentive is inequitable because only taxpayers whose itemized deductions exceed the newly enacted standard deduction will be able to receive a tax benefit for their charitable giving.[105] Finally, the reform is inequitable because higher-income taxpayers will continue to receive a larger tax benefit because the size of the deduction is contingent on their marginal tax rate.[106]

For the above-mentioned reasons, the key changes brought by the TCJA reform are contrary to the principles of distributive justice. As noted throughout this Part, these philosophical principles underlying the charitable deduction stress the importance of equity considerations in defining a well-crafted tax incentive.

IV. AN ECONOMIC ANALYSIS OF CHARITABLE GIVING

This Part argues that, from an economic standpoint, a charitable tax credit is a more attractive legislative solution than a charitable deduction. In particular, this Part of the Article delves into the macroeconomic implications of replacing the current below-the-line deduction with a 25% nonrefundable charitable tax credit. Furthermore, this Part argues that a nonrefundable charitable tax credit is a more fiscally efficient[107] solution than the current deduction.

---

104. Miranda Perry Fleischer, *Equality of Opportunity and the Charitable Tax Subsidies*, 91 B.U.L. REV. 601, 604, 607 (2011).

105. James S. Sanzi, *Preserving Tax Incentives for Charitable Giving*, 60 R.I. B.J., Nov./Dec. 2011 at 13, 13–14.

106. *Id.* at 13.

107. Jenn, *supra* note 98, at 567 (noting fiscal efficiency is an economic term that looks to the cost to the government in offering a tax incentive relative to its contemporaneous

A. Macroeconomic Analysis

Based on a macroeconomic analysis conducted by the Tax Foundation, repealing the charitable deduction would have the following consequences. First, it would result in an increase of federal tax revenues of $39 billion, a decrease in Gross Domestic Product[108] (GDP) growth of $40.3 billion, and a reduction in employment by 131,100 full-time workers.[109] The increase in federal tax revenue would be a consequence of discontinuing the charitable deduction because the federal government would be able to collect more from taxpayers. Second, replacing the charitable deduction with a static increase in federal tax revenue, coupled with implementing a 3.7% decrease in marginal tax rates, would increase GDP by $19 billion per year, boost federal revenues by $4.5 billion, and increase employment by approximately 200,000 full-time workers.[110]

Based on these figures, repealing the charitable deduction in exchange for static federal tax revenue gains combined with cuts to marginal tax rates would significantly increase the aforementioned economic indicators.[111] This Article proposes that a 25% nonrefundable tax credit would accomplish the same result. The reasoning is that both a reduction in marginal tax rates and a tax credit have the effect of reducing individual tax liability. Hence, rather than reduce marginal tax rates after repealing the charitable deduction, this Article proposes implementing a tax credit system that would be the equivalent of reducing current

impact on charitable giving; in this context, the cost to the government is an opportunity cost of foregone tax revenue that results from offering a charitable tax incentive).

108. Stephanie H. McCulla & Shelly Smith, *Measuring the Economy: A Primer on GDP and the National Income and Product Accounts*, BUREAU OF ECONOMIC ANALYSIS 2 (Dec. 2015), https://www.bea.gov/sites/default/files/methodologies/nipa_primer.pdf (defining the gross domestic product as the market value of all goods and services produced within a country's borders at a specified period of time). The formula for calculating gross domestic product is an aggregate of total government spending, consumer outlays, business investment, and net exportation/importation. *Id.* at 3.

109. Michael Schuyler & Stephen J. Entin, *Case Study #11: Deduction for Charitable Contributions*, TAX FOUNDATION (Aug. 9, 2013), https://taxfoundation.org/case-study-11-deduction-charitable-contributions/.

110. *Id.*

111. An economic indicator is a metric used to diagnose a nation's current economic health. Economic indicators additionally provide financial analysts with information about future investment opportunities. Adam Barone, *Economic Indicator*, INVESTOPEDIA, https://www.investopedia.com/terms/e/economic_indicator.asp (last updated Apr. 23, 2019).

marginal tax rates by 3.7% with respect to reducing the individual taxpayer's total tax liability.

Proponents for keeping the current charitable deduction may argue that this tax credit system would not achieve the same macroeconomic results because, while marginal tax rate cuts would apply to every taxpayer that files a tax return, not every taxpayer makes charitable contributions. Additionally, these same proponents would likely argue that a tax credit system would be too administratively burdensome. These concerns are unfounded for the following reasons. First, these arguments ignore the fact that under the current system, the vast majority of taxpayers claiming a charitable deduction over-report the amount they are eligible to deduct.[112] Second, roughly 89% of Americans make a monetary contribution to at least one charity per year.[113] Third, in 2017, charitable giving in the United States reached a record high of $410 billion, in which roughly 70% of total giving came from individual taxpayers.[114]

Finally, while this tax credit system may pose an administrative challenge, this difficulty could be resolved through implementing automation procedures that replicate the French and Danish tax credit system.[115] In 1983, the French tax administration required taxpayers to attach written proof of their charitable contribution to their tax return in order to be eligible for tax benefits associated with charitable giving.[116] Under this reform, charities were obligated to strictly comply with reporting requirements to the administration about the subsidies these charities received from donor-taxpayers.[117] This method was adopted to reduce misstatements made by taxpayers pertaining to

112. Goon, *supra* note 25, at 280.
113. Aline Sullivan, *Affair of the Heart*, BARRON'S ONLINE (Dec. 9, 2002), http://itsyourmoneyandestate.org/wp-content/uploads/2012/12/Affair-of-the-Heart-Charitable-Giving.pdf.
114. *Giving USA 2018: Americans Gave $410.02 Billion to Charity in 2017, Crossing the $400 Billion Mark for the First Time*, GIVING USA (June 13, 2018), https://givingusa.org/giving-usa-2018-americans-gave-410-02-billion-to-charity-in-2017-crossing-the-400-billion-mark-for-the-first-time/ [hereinafter *Giving USA*]
115. Goon, *supra* note 25, at 281.
116. *Id.*
117. *Id.*

their charitable contribution amounts.[118] Under the proposed tax credit system, charities would be required to both dispense receipts to donor-taxpayers for their charitable contributions and report these amounts to the IRS in order to keep tabulated records of individual giving for the purpose of computing tax liability.[119]

B. Fiscal Efficiency Comparisons

A charitable tax credit system would be a more fiscally efficient[120] solution than the current charitable deduction. Proponents for the current charitable deduction argue that the current incentive is more efficient than a tax credit because high-income taxpayers are more responsive to decreases in the tax cost of giving.[121] These proponents also argue that because lower-income taxpayers are more likely to give to religious institutions based on a sense of moral duty, providing a tax incentive to induce giving would result in a waste of foregone tax revenue.[122] This is largely based on the assumption that a financial incentive in this context would merely reward existing giving and would not induce new giving.[123]

These arguments have very little empirical support. First, as noted by researcher Brian Jenn, the "economic science is simply not precise enough to measure . . . responsiveness based on income levels."[124] Second, according to the Center on Philanthropy Panel Study Module of the Panel Study of Income Dynamics, high- and low-income taxpayers demonstrate similar charitable giving patterns in response to tax incentives; more specifically, empirical

---

118. Gabrielle Fack & Camille Landais, *The Effect of Tax Enforcement on Tax Elasticities: Evidence from Charitable Contributions in France*, 133 J. PUB. ECON. 23, 24 (2016).

119. *Cf. id.* (describing how the French government implemented its 1983 tax reform).

120. Fiscal efficiency is defined as a ratio expressed as a $1 decrease in the cost of giving in the form of foregone tax revenue over the expected benefit to result in more than $1 being donated to charity. A tax incentive that produces a ratio greater than 1, where the increase in giving exceeds the costs of providing the tax incentive, is deemed to be fiscally efficient. Jenn, *supra* note 98, at 567.

121. *Id.* at 575–76 ("[T]axpayers may systematically vary by income class in their response to tax incentives—as some apparently believe is the case for charitable giving incentives.").

122. *Id.* at 576; John A. List, *The Market for Charitable Giving*, 25 J. ECON. PERSPS., Spring 2011, at 157, 167.

123. Jenn, *supra* note 98, at 576.

124. *Id.* at 577.

data on charitable giving and income level reveals a U-shaped function.[125] This is further supported by the fact that on average, low-income taxpayers who itemize claim a charitable deduction that roughly equals 12% of their AGI.[126] In contrast, high-income taxpayers that itemize on average take a charitable deduction that roughly equals 5% of their AGI.[127]

An alternative explanation for these findings may also suggest that lower-income taxpayers who are giving generously to charity are in fact asset-rich retirees who dispense a large amount of their wealth to charitable causes.[128] Moreover, the presumption underlying the proponents' arguments that low-income taxpayers only give to one charitable cause is specious.[129] Even though low-income taxpayers are more likely to donate to religious institutions and this type of giving is generally price inelastic,[130] they are also likely to donate to other charitable subsectors that are not subject to the same elasticity constraints. Furthermore, these figures illustrate that low-income taxpayers are responsive to tax incentives, and thus a tax credit would successfully stimulate individual giving.

A tax credit is more fiscally efficient than a deduction because the former is less susceptible to economic downturns. Deductions are cyclical in nature, meaning they are sensitive to market fluctuations.[131] The reason underlying this distinction is that

---

125. List, *supra* note 122, at 165–67.

126. *Id.* at 166. Data compiled from calendar year 2010 revealed that 3.9% of taxpayers from the 0% tax bracket and 16.2% of taxpayers in the 10% bracket itemized their deductions while, in sharp contrast, 70.9% of taxpayers in the 33% bracket and 89.4% in the 35% bracket itemized their deductions. Benjamin H. Harris & Daniel Baneman, *Who Itemizes Deductions?*, TAX POLICY CENTER (Jan. 17, 2011), https://www.taxpolicycenter.org/sites/default/files/alfresco/publication-pdfs/1001486-Who-Itemizes-Deductions-.pdf.

127. List, *supra* note 122, at 167.

128. *Id.*

129. Belayet Hossain & Laura Lamb, *Price Elasticities of Charitable Giving Across Donation Sectors in Canada: Is the Tax Incentive Effective?*, 2012 INT'L SCHOLARLY RES. NOTICES ECON., 2012, at 1, 6.

130. *Id.* at 6 (explaining that economists rely on the price elasticity model to evaluate the effectiveness of tax incentives on charitable giving). The price elasticity model is defined as the increase in giving influenced by the reduction of the cost of giving. The price elasticity equation is the increase in individual taxpayer giving, divided by the total foregone tax revenue multiplied by the total subsidies donated to charity. A calculation that produces an absolute value of greater than one, whereby individual charitable giving exceeds the total foregone tax revenue, is deemed to be price elastic. *Id.* at 3, 6.

131. List, *supra* note 122, at 161.

taxpayers may experience income volatility during a recession, and thus they would experience variation in the value of a tax deduction because this value is largely contingent on their marginal tax rate.[132] Consequently, under the current deduction, charitable giving decreases during times of fiscal austerity, as illustrated by the decline in philanthropy during the financial crisis.[133]

There is a statistically significant, positive correlation between the variables of private giving and values on the Standard & Poor's 500 Index (S&P 500).[134] Between 1976 and 2016, individual giving decreased during recessionary periods and increased during expansionary periods.[135] These historical patterns indicate that a future market correction or technical recession is an inevitable reality,[136] and therefore legislators should attempt to enact a tax incentive that best insulates charitable giving from the effects of a downturn in the economy.

A nonrefundable, charitable tax credit would be most suitable to respond to these economic shocks. In contrast to the current below-the-line deduction, the giving incentive generated by a tax credit remains constant each year a taxpayer has positive tax liability because a credit is not influenced by marginal tax rate volatility.[137] Thus, this incentive is also more likely to promote a stable flow of charitable giving. The additional benefit to this type of incentive is that because the taxpayer's response to a tax credit is more predictable (because the benefit is uninfluenced by income volatility), from a fiscal administrative standpoint the Treasury

---

132. Jenn, *supra* note 98, at 572–73.

133. *See* Rob Reich & Christopher Wimer, *Charitable Giving and the Great Recession*, THE STAN. CTR. ON POVERTY AND INEQ. 1 (Oct. 2012), https://inequality.stanford.edu/sites/default/files/CharitableGiving_fact_sheet.pdf (citing that the Great Recession reduced giving by 7.0% in 2008 and by an additional 6.2% in 2009).

134. *The Annual Report on Philanthropy for the Year 2016*¸ 62 GIVING USA, 2017, at 1, 49, http://www.cftompkins.org/wp-content/uploads/2018/04/Giving-USA-Annual-Report-on-Philanthropy-2017.pdf [hereinafter *Annual Report on Philanthropy*] (noting the stock market returns recorded under the S&P 500 indicate that financial and economic security are significant predictors of household giving).

135. *Id.*

136. *Id.* A technical recession is a period marked by "two consecutive quarters of negative economic growth as measured by . . . [the] gross domestic product." *Recession*, INVESTOPEDIA, https://www.investopedia.com/terms/r/recession.asp (last updated May 6, 2019).

137. Jenn, *supra* note 98, at 573.

would be able to predict foregone tax revenue with greater certainty.[138]

In contrast, the incentive generated by a below-the-line deduction is more prone to marginal tax rate fluctuations; consequently, there is a greater risk of government error that would result in either under- or over-incentivizing taxpayers.[139] Here, a uniform tax credit would minimize these risks and create more stability with respect to managing the congressional budget.

Tax theorists may argue that equity concerns addressed in this Article could be resolved by moving the charitable deduction to above-the-line. In this scenario a taxpayer would still be able to take a deduction whether they itemize or elect to take the standard deduction. There are inherent flaws with this proposal that have already been addressed by the Treasury. First, while this tax incentive would promote greater uniformity and would be accessible to all taxpayers, there is little support that an above-the-line deduction would stimulate additional giving.[140] Second, the above-the-line deduction would still be inequitable because higher-income taxpayers would receive a larger deduction as the size of their tax benefit would be contingent on their larger marginal tax rate.[141]

In deciding whether a tax credit would be a more fiscally efficient solution than a below-the-line deduction, due regard should be given to the nature of a progressive taxation system.[142] Progressive taxation emphasizes that higher-income taxpayers have a greater ability to pay income taxes, and it therefore justifies the imposition of higher marginal tax rates against the top tax brackets.[143] Thus, under this principle, the tax price of giving should be greater for higher-income taxpayers because they have a greater ability to pay more income tax.

138. Schuyler & Entin, *supra* note 109, at 2 (determining the foregone tax revenue of issuing a 25% nonrefundable tax credit would be similar to determining the costs to the government of providing a below-the-line deduction).

139. Jenn, *supra* note 98, at 575.

140. Goon, *supra* note 25, at 278–79.

141. *Id.*

142. Lindsey, *supra* note 3, at 1082 (noting that while there have been discussions to impose a flat tax, the progressive taxation has remained intact based on the reasoning that higher income taxpayers are in the position to pay a larger percentage of income taxes).

143. *Id.*

The current below-the-line deduction is incompatible with this principle. First, progressive taxation is weakened by the fact that high-income taxpayers who may itemize can claim the deduction; meanwhile, taxpayers who are unable to itemize are not afforded a benefit for their charitable giving.[144] Second, low-income taxpayers who are able to itemize nonetheless receive a smaller benefit because of their lower marginal tax rate.[145]

Replacing the charitable deduction with a 25% nonrefundable tax credit would better align the charitable tax incentive with the progressive taxation principle. First, as previously mentioned, taxpayers who claim the below-the-line deduction receive a tax benefit contingent on their marginal tax rate.[146] Thus, under the current tax incentive scheme, the tax price of giving for the taxpayer equals 1 minus the taxpayer's marginal tax rate. In contrast, the tax price of giving for a 25% nonrefundable tax credit would be 0.75 for everyone who has a positive tax liability.[147] Therefore, the tax price of giving would increase for taxpayers that have a marginal tax rate greater than 25%, and it would decrease for taxpayers that have a marginal tax rate below that threshold.[148]

From a fiscal efficiency standpoint, it is advantageous to structure a charitable tax incentive scheme that is consistent with the progressive taxation theory—a principle that has served as the crucial lynchpin for imposing greater marginal tax rates on high-income taxpayers. The proposed 25% nonrefundable tax credit best accomplishes this by increasing the price of giving for high-income taxpayers, who are in a better position to give vast amounts to charity. Furthermore, this incentive structure is more inclusive as it decreases the price of giving for low- to moderate-income taxpayers.

Proponents for maintaining the current below-the-line deduction may argue that lowering the tax cost of giving for high-income taxpayers is desirable because philanthropic giving is largely driven by high-income taxpayers.[149] This trend is likely to be exacerbated by the persistence of income inequality in the

144. *Id.*
145. *Id.* at 1082–83.
146. Brill & Choe, *supra* note 8, at 2.
147. *Id.* at 7.
148. *Id.*
149. *Annual Report on Philanthropy*, *supra* note 134, at 97.

United States.[150] This argument, however, fails to address the inherent dangers of continued reliance on giving from high-income taxpayers.

First, while high-income taxpayers are known to give generous amounts to charity, their giving patterns are often sporadic and occur at unpredictable times.[151] In order for charities to make the most optimal use of subsidies, it is more advantageous that taxpayers give smaller amounts at more regular intervals.[152] Moreover, continued reliance on subsidies made primarily by high-income taxpayers creates a risk that charitable organizations will become subservient and depart from their mission statement to accommodate the interests held by these high-income donors.[153]

Finally, a charitable tax credit would be a more fiscally efficient solution than the current charitable deduction because tax credits generally offer more transparent benefits.[154] While the lay tax person can easily conceptualize a dollar-for-dollar reduction of their tax liability, they are less likely to be aware of their marginal tax rate. This lack of taxpayer awareness stems from the following realities.

First, relatively few taxpayers actually prepare their own tax returns and it would be unreasonable to assume that most taxpayers are aware of their marginal tax rate at any given point during the calendar year.[155] For instance, roughly 56% of taxpayers utilize a certified professional accountant to prepare their returns, and nearly 34% of taxpayers use tax preparation software.[156] Second, while tax credits are applied on a static basis, the taxpayer's marginal tax rate is likely to fluctuate. Consequently, the taxpayer is more likely to be unaware of or confuse his or her marginal rate and will accordingly be unlikely to respond to the tax incentive.[157]

150. *Id.*
151. *Id.*
152. *Id.*
153. Chuck Collins, Helen Flannery & Josh Hoxic, *Gilded Giving: Top-Heavy Philanthropy in an Age of Extreme Inequality*, INEQUALITY.ORG (Nov. 16, 2016), https://inequality.org/research/report-gilded-giving/.
154. Jenn, *supra* note 98, at 580.
155. *Tax Stats at a Glance*, IRS, https://www.irs.gov/statistics/soi-tax-stats-tax-stats-at-a-glance (last visited Aug. 16, 2019).
156. *Id.*
157. Schuyler & Entin, *supra* note 109, at 2.

In France, taxpayers may be able to reduce their tax liability by 40% by making a charitable contribution to a qualified organization. According to opinion polls, roughly 85% to 90% of French citizens are aware of the charitable tax credit.[158] Donors learn about changes in the tax law since information about the tax credit rate is usually sent by charities in the mail.[159] Currently in the United States, while most taxpayers inaccurately predict their marginal rates, they are more astute to available tax credits.[160] As previously mentioned, a tax credit system would seek to emulate other international policies that require greater transparency between charitable sectors and the appropriate government agency.[161] In this context, direct automation that communicates information pertaining to taxpayers' charitable contributions, evidenced by a receipt and electronic recording by the IRS, would allow government agents to accurately assess the credit amount that the taxpayer is eligible to receive in computing total tax liability. Furthermore, a system that is more proactive in recording charitable subsidies would provide other benefits including preventing corruption and overstated deductible amounts.

For the above-mentioned reasons, a charitable tax credit would produce more optimal macroeconomic and fiscal efficiency outcomes than the current below-the-line charitable deduction. The challenge for future legislators is to implement such a tax credit system that induces charitable giving from a wide array of donors while simultaneously prioritizing organizations that produce the most desirable social benefits.

158. Gabrielle Fack & Camille Landais, *Are Tax Incentives for Charitable Giving Efficient? Evidence from France*, AM. ECON. J., May 2010, at 117, 123–24.

159. *Id.* at 124.

160. Jenn, *supra* note 98, at 579; Timothy J. Rupert & Carol M. Fischer, *An Empirical Investigation of Taxpayer Awareness of Marginal Tax Rates*, 17 J. AM. TAX. ASS'N 36, 49 (1995) (citing a study that compared a sample of taxpayer predictions of their marginal rates with the rates actually applied in their filed tax returns). The results revealed that only one-third of taxpayers were able to accurately predict their marginal tax rates within 5 percentage points. *Id.*

161. Jenn, *supra* note 98, at 580.

V. DESIGNING A TAX CREDIT SYSTEM TO RESTORE TAXPAYER PLURALISM

This Part proposes the design and implementation of a charitable tax credit that prioritizes giving to certain charitable subsectors. Throughout this Article, it has been emphasized that the charitable deduction is grounded in the notion of taxpayer pluralism, whereby individual taxpayers are afforded an opportunity to subsidize charities that would otherwise suffer from government or market failure.[162] Taxpayer pluralism is a principle that is intended to protect the minority interest of taxpayers and provide adequate charitable subsidies to organizations that fall outside of the government's purview.[163]

Due to the major changes brought in by the TCJA, a small class of high-income taxpayers will be empowered to determine which organizations merit charitable subsidies.[164] These changes undoubtedly violate the notion of taxpayer pluralism, and future legislators can correct this distortion by implementing the proposed charitable tax credit system.

The proposed tax credit system prioritizes charitable subsectors to the extent they generate a broad public benefit.[165] Currently, there is a plethora of charitable organizations that qualify for favorable tax treatment under the IRC.[166] The broad interpretation of this statutory provision has led to a "rapid proliferation"[167] of qualified organizations that a taxpayer may choose from to make tax-deductible charitable contributions.[168] Under this broad interpretation, the taxpayer has wide latitude in deciding which charities merit subsidy. However, the

162. BROOKS, *supra* note 7, at 50.

163. McCormack, *supra* note 82, at 985 (describing a direct assistance plan as a system where Congress creates a list of charitable organizations that merit direct subsidies).

164. *See* Cauble, *supra* note 9, at 152.

165. In contrast to a limited public benefit, a broad public benefit is enjoyed by a wide array of individual taxpayers. McCormack, *supra* note 82, at 980.

166. 26 U.S.C. § 501(c)(3) (2018) (providing a tax incentive to "[c]orporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals").

167. McCormack, *supra* note 82, at 980.

168. *Annual Report on Philanthropy*, *supra* note 134, at 66 (citing the number of charitable organizations amounted to 1.24 million in 2016).

interpretation does not account for the fact that charities vastly differ with respect to the social benefits they generate.[169] Obviously, most people agree that an organization designed to eradicate poverty provides a larger societal benefit than the opera, and therefore, the tax incentive should reflect this principle.

As previously mentioned, the charitable tax credit would be nonrefundable, meaning the taxpayer must have a positive tax liability to be eligible to receive the proposed tax credit.[170] This feature is intended to prevent the potential abuse of taxpayers using the charitable tax credit in a manner to claim tax refunds. This Article recommends that, with regards to setting appropriate caps and floors on the tax credit, future legislators should correspond with the Treasury to review budgetary demands and acceptable foregone tax revenue amounts. Setting a reasonable floor would entail the following benefits: taxpayers (1) would increase their giving to satisfy the requisite threshold for receiving a tax benefit;[171] and (2) would lower the fiscal cost of foregone tax revenue.

The remainder of this Article lays the foundation of a tax credit system that is aimed at achieving equity and efficiency objectives examined in the previous parts.[172] While drawing distinctions between the charitable subsectors poses difficulty, this part provides the following list of factors that legislators should take into consideration for drafting a well-defined tax incentive.

The proposed charitable tax incentive should prioritize giving to the charitable subsectors based on the following factors. First, the tax credit system should prioritize giving based on the price elasticity of charitable giving, meaning the degree to which taxpayer giving to a charitable subsector is responsive to decreases in the tax cost of giving. Second, the tax credit system should prioritize giving to the extent that giving to the charitable subsector will entail positive externalities.[173] Finally, the tax credit system should take into consideration the government's ability to

---

169. McCormack, *supra* note 82, at 992.

170. Brill & Choe, *supra* note 8, at 7.

171. *Charities on the Frontline and Making the Best Use of Tax Policy to Help Them: Testimony Before the Subcomm. on Soc. Sec. and Family Policy of the S. Fin. Comm.*, 109th Cong. 7 (2005) (statement of C. Eugene Steuerle).

172. Izzo, *supra* note 10, at 2402.

173. McCormack, *supra* note 82, at 992.

subsidize the charitable sector in the absence of a tax incentive.[174] While these three factors alone do not provide an exhaustive list of every possible consideration with regard to prioritizing giving to the charitable subsectors, philanthropy researchers have relied on these factors as relative benchmarks for crafting a charitable incentive that best reflects societal preferences.[175]

This Part begins with assessing individual giving to the religion, human services, health education, and arts and humanities charitable subsectors[176] based on the above-mentioned criteria.

A. Giving to the Religion Subsector

Donors that give to qualified religious institutions should receive the full benefit from the proposed 25% nonrefundable charitable tax credit. As previously mentioned, studies examining the price elasticity differences between the charitable segments have consistently found that giving to religion is price inelastic,[177] meaning donors that give to religion do not increase their giving in response to Congress' decision to lower the tax cost of giving.[178] Thus, proponents for the price elasticity model would argue that tax incentives should not be offered to donors that primarily give to religious institutions because the tax incentive would reward existing giving but would not induce additional giving.[179]

However, the positive externalities associated with the religion charitable subsector justify offering the full benefit of a 25% charitable tax credit to donors that give to a qualified religious institution. Charitable giving to religion subsidizes the production of worship services, religious instruction, social activities, and other club services.[180] These services prompt religious participation that generates the following positive externalities: first, religious participation encourages building social networks

174. Emmanuel Saez, *The Optimal Treatment of Tax Expenditures*, 88 J. PUB. ECON. 2657, 2680 (2004).

175. *Id.*

176. *Annual Report on Philanthropy*, *supra* note 134, at 89, 171, 193, 217, 251, 289.

177. Hossain & Lamb, *supra* note 129, at 5.

178. *Id.* at 6.

179. *See* Jenn, *supra* note 98, at 576.

180. *See* Lindsey, *supra* note 3, at 1073.

that serve as catalysts for economic growth.[181] For instance, scholars point out that, in pursuit of predestination,[182] ascetic Protestants were called to live virtuous lives without institutionally sanctioned pardons for immoral behavior.[183] As a consequence of adhering to these stringent religious practices, ascetic followers respected the conditions of contracts, which scholars believe contributed to building social networks that were vital to economic growth in early-modern Europe.[184]

Second, religious instruction promotes principles about work ethic, honesty, and collaboration, which, taken together, have the effect of increasing economic productivity.[185] According to this explanation, the local congregation's teachings about honesty may generate the positive externality of promoting ethical business practices, which remove hindrances to productivity including, but not limited to, criminal activity and corruption.[186] Third, religious participation increases human capital because religious institutions actively encourage their followers to educate themselves by reading religious scriptures.[187] This emphasis on knowledge and education has the spillover effect of religious participants being more likely to obtain gainful employment.

It may be argued that religious participation generates negative externalities, considering violent behavior and animosity may ensue between followers from different religious groups.[188] However, while the threats associated with these negative externalities are omnipresent, federal laws and societal norms have evolved to protect individual liberty and deter discriminatory practices motivated by religious convictions.[189]

181. Habibullah Khan & Omar K. M. R. Bashar, *Religion and Development: Are They Complementary?* 4 (U21 GLOBAL, Working Paper No. 006/2008, Oct. 2008), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1601048.

182. Predestination is a religious doctrine that the Protestant biblical interpretation set out that God had predestined a certain set of people for salvation. This interpretation has been viewed as narrower in contrast to other sects of Christianity that viewed salvation as being possible even after one committed a sin. *Id.* at 3.

183. Ulrich Blum & Leonard Dudley, *Religion and Economic Growth: Was Weber Right?*, 11 J. EVOLUTIONARY ECON. 207, 217 (2001) (citing MAX WEBER, THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM 69 (1930)).

184. *Id.*

185. Khan & Bashar, *supra* note 181, at 3.

186. *Id.* at 4.

187. *Id.*

188. *Id.* at 5.

189. 42 U.S.C. §§ 1981(a), 2000bb-1(a) (2018).

Finally, donors that give to qualified religious institutions should receive the full benefit of a 25% charitable tax credit because the government is constitutionally restrained from providing direct subsidies.[190] As previously mentioned, the government cannot use a direct assistance plan to either advance or inhibit religion without necessarily running afoul of the Establishment Clause.[191] Consequently, indirectly subsidizing religious institutions by offering a 25% nonrefundable charitable tax credit to individual donors would prevent the risk of religious organizations experiencing government or market failure.[192]

B. Giving to the Human Services Subsector

Donors that give to a qualified human services organization should receive the full benefit of the 25% charitable tax credit. The empirical results suggest that giving to human services organizations is price elastic, meaning that lowering the tax cost of giving will incentivize donors to give larger amounts to human services organizations.[193]

Moreover, human services organizations provide services that entail large positive externalities. For instance, the services offered by this charitable subsector include crime prevention, youth services, community recreation, low-income housing, disaster relief, nutrition, and vocational training.[194]

In contrast to religious institutions, which are primarily dependent on donor contributions, human services organizations are more likely to rely on direct government subsidization.[195] However, in 2017, giving to human services increased by an estimated 5.1%, totaling $50.66 billion.[196] These figures indicate that giving from individual donors still plays an instrumental role in adequately subsidizing human services organizations.

190. Pozen, *supra* note 24, at 559.

191. Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971) (noting that the standard tests for statutes under the Establishment Clause are that the statute must have a secular purpose, must not primarily advance or inhibit religion, and must not create "excessive government entanglement with religion").

192. Brooks, *supra* note 7, at 50–51.

193. *See* Hossain & Lamb, *supra* note 129, at 4.

194. Lindsey, *supra* note 3, at 1085.

195. Eric C. Twombly, *Religious Versus Secular Human Service Organizations: Implications for Public Policy*, 83 SOC. SCI. Q. 947, 947 (2002).

196. *Giving USA*, *supra* note 114.

Additionally, considering the rapid proliferation of organizations that qualify for Section 501(c)(3) status, local human services organizations are more likely to fall outside of the government's purview for making direct expenditures and, thus, are more likely to be susceptible to government and market failure. For the above reasons, donors should be provided the full benefit of a 25% charitable tax credit for giving to qualified human services organizations.

C. Giving to the Health Subsector

Donors that give to health organizations should receive the full benefit of a 25% charitable tax credit. First, empirical research reveals that giving to health organizations is price elastic, meaning that individual donors give more in response to lowering the tax cost of giving.[197]

The positive externalities associated with the goods and services provided by health organizations are infinite. For instance, subsidies from individual giving have been imperative for health organizations to expedite research findings, drug trials, and new treatment plans.[198] Thus, the discovery of new medical knowledge directly benefits physicians and patients. Additionally, vaccinations create positive externalities, because if one person chooses to get vaccinated from a disease, he or she is less likely to become a carrier and infect others.[199] Finally, national healthcare was found to be positively correlated with aggregate economic output. Thus, giving to health care organizations that improve the health and well-being of workers will most likely create increases in productivity.[200]

The federal government continues to make enormous outlays to healthcare, which comprises a large portion of the federal

197. *See* Hossain & Lamb, *supra* note 129, at 4.

198. *Annual Report on Philanthropy*, *supra* note 134, at 260.

199. SHERMAN FOLLAND, ALLEN C. GOODMAN & MIRON STANO, *The Economics of Health and Health Care, Epidemiology and Economics: HIV/AIDS in Africa*, *in* 7 THE ECONOMICS OF HEALTH AND HEALTH CARE 531, 533–34 (David Alexander ed., 2013).

200. David E. Bloom, David Canning & Jaypee Sevilla, *The Effect of Health on Economic Growth: A Production Function Approach*, 32 WORLD DEV. 1, 10–11 (2004) (noting a strong correlate of human capital as healthier workers tended to be more robust and energetic and, consequently, are more productive and earn higher wages).

budget.[201] Healthcare spending is projected to increase as Medicare, Medicaid, and health insurance exchange subsidies created under the Affordable Care Act continue to place large fiscal demands on the congressional budget. In 2017, individual giving to health organizations increased by 7.3% from the previous calendar year to total $38.27 billion.[202] Clearly, individuals giving to health organizations should receive the full benefit of the proposed 25% charitable tax credit to alleviate the enormous fiscal burden placed on the federal government with respect to healthcare spending.

D. Giving to the Education Subsector

Individual donors that continue to give to the education charitable subsector should receive a partial to full benefit of the 25% charitable tax credit. Giving to education is price elastic, meaning that individual taxpayers increase their giving in response to Congress lowering the tax cost of giving.[203]

Charitable giving to the education subsector subsidizes higher education, including public and private universities, community colleges, K–12 organizations, and independent schools.[204] The positive externalities associated with education are numerous. First, educational participation results in the large accumulation of human capital. Proponents for the human capital theory posit that a larger investment in human capital is a necessity for improving the individual's knowledge and skill.[205] Essentially, large investments in higher education are viewed by many economists as necessary means for promoting human capital that, in turn, contributes to wide-scale productivity.[206]

Second, educational attainment is positively correlated with increased participation in civic engagement, which is fundamental

---

201. *American Health Care: Health Spending and the Federal Budget*, COMM. FOR A RESPONSIBLE FED. BUDGET 1 (May 16, 2018), https://www.crfb.org/papers/american-health-care-health-spending-and-federal-budget (noting that the United States spent $3.5 trillion on healthcare in 2017, and that $1.5 trillion came from direct and indirect expenditures of the federal government).

202. *Giving USA*, *supra* note 114.

203. Hossain & Lamb, *supra* note 129, at 5.

204. *Annual Report on Philanthropy*, *supra* note 134, at 195–96.

205. D.A. Olaniyan & T. Okemakinde, *Human Capital Theory: Implications for Educational Development*, 5 PAK. J. SOC. SCI. 479, 479–80 (2008).

206. *Id.*

to the smooth functioning of a democracy.[207] For instance, empirical studies reveal that educational attainment is a significant predictor of increased political participation and voting.[208]

This Article stands for the proposition that donor-taxpayers should not receive the full benefit of the 25% tax credit when their giving to education would likely entail negative externalities. As previously mentioned, some charitable organizations produce goods and services that serve a limited public benefit, whereby a subsection of the population is empowered to enjoy the benefit to the exclusion of others.[209] Thus, this form of giving is likely to trigger negative externalities that will adversely impact the excluded group.

Giving to institutions such as Harvard or Stanford University,[210] for instance, produces a benefit that is enjoyed by an elite-class of taxpayers but does not produce a benefit that trickles down to moderate- and low-income taxpayers.[211] Considering these universities receive the largest funding on a per capita basis, these institutions are not susceptible to the risks associated with underfunding. Consequently, increased giving to these institutions will most likely result in a waste of resources that would be more effectively allocated to higher learning institutions experiencing financial difficulty.[212]

The federal government continues to expend large amounts of resources to the education subsector. In 2017, the congressional budget allocated $69.4 billion toward the Department of Education for discretionary spending.[213] The Department of Education relies heavily on these subsidies to provide support for teachers and education leaders, improve learning facilities, and promote access to higher education institutions.[214] Additionally, individual giving to the education charitable subsector increased by 3.6% from the

207. Joshua C. Hall, *Positive Externalities and Government Involvement in Education*, 21 J. PRIVATE ENTERPRISE 165, 166 (2006).

208. *Id.* at 167.

209. McCormack, *supra* note 82, at 991.

210. *Annual Report on Philanthropy*, *supra* note 134, at 198 (citing that in 2016, Harvard University raised $1.19 billion and Stanford University raised $951.15 million).

211. Lindsey, *supra* note 3, at 1086.

212. Feloni, *supra* note 101.

213. Fiscal Year 2017 Budget Summary and Background Information, ED 2 (ED 2017).

214. *Id.* at 1–2.

previous calendar year to total $59.77 billion.[215] These figures, taken together, indicate that individual giving comprises a large portion of the total subsidies dispensed to the education charitable subsector. Consequently, the government should continue to provide tax incentives to induce individual giving to education.

The major challenge for legislators is to identify and create a priority list of educational institutions that demonstrate the greatest financial need for charitable subsidies. Under the proposed tax incentive scheme, taxpayers that give to the prioritized educational institutions will be eligible to receive the full benefit of the 25% tax credit.

E. Giving to the Arts, Humanities, and Culture Subsector

Individual donors that continue to give to the arts charitable subsector should receive a partial benefit of the proposed 25% charitable tax credit. Individual giving to the arts subsidizes the production of public goods and services including arts education, museums, dance, music, opera, symphony orchestra, theatre, and public radio stations.[216] Giving to the arts is generally price elastic, meaning that taxpayers increase their giving in response to Congress' decision to lower the tax costs associated with giving.[217]

Proponents for increased government and individual subsidization argue that the arts charitable subsector produces the following positive externalities.[218] First, the arts charitable organizations preserve and protect the nation's cultural heritage.[219] This argument is based on the assumption that subsequent generations cannot act to preserve the arts, and without adequate funding, rich cultural heritage will eventually become lost.[220] Second, the arts create opportunities to propel economic growth because vibrant art forums are a central feature for drawing in a large number of tourists to cities and

---

215. *Annual Report on Philanthropy*, *supra* note 134, at 193.
216. *Id.* at 297, 303.
217. Hossain & Lamb, *supra* note 129, at 3.
218. Charles T. Clotfelter, *Government Policy Toward Art Museums in the United States*, *in* THE ECONOMICS OF ART MUSEUMS 237, 240 (Martin Feldstein ed., 1991).
219. Clotfelter, *supra* note 218, at 240.
220. *Id.*

communities.[221] Finally, proponents argue that the arts have enormous educational value that promotes higher-level social discourse.[222]

This Article argues that the negative externalities generated by the arts should prevent taxpayers from receiving the full benefit of the proposed 25% charitable tax credit. As previously mentioned, negative externalities are likely to result when the goods and services produced by a charitable subsector are excludable, meaning the benefits accrue to a subsector of the population to the exclusion of others.[223] The demographic characteristics of opera attendance in the United States amplify this point. For instance, in 2012, "[a]lmost three-quarters of the opera audience ha[d] at least a college degree [and] . . . [o]ver 40 percent of opera-goers earn at least $100,000 per year."[224] Clearly, these figures provide credence to the arts being necessarily elitist.[225]

The Trump Administration intends to reduce government spending on the arts, humanities, and culture charitable subsector.[226] The underlying reason in support of spending cuts is that individuals from the private sector will continue to have the discretion to donate to arts organizations as they wish.[227] In 2017, total subsidization to the arts from both state and federal government amounted to $5 billion, thus comprising a small percentage of the congressional budget.[228] Additionally, individual giving to the arts amounted to $18.21 billion and grew by a rate of 6.4% from the previous calendar year.[229] These figures indicate that private philanthropy plays a pivotal role to subsidize the goods and services provided by the charitable subsector. Consequently, critics of this tax credit system would likely argue that maintaining the current charitable tax incentive is necessary

221. Don Fullerton, *On Justifications for Public Support of the Arts*, 15 J. CULTURAL ECON., Dec. 1991, at 67, 74.
222. *Id.* at 75.
223. McCormack, *supra* note 82, at 989.
224. A Decade of Arts Engagement: Findings from the Survey of Public Participation in the Arts, 2002–2012, National Endowment of the Arts Research Report No. 58 NEA 10 (NEA Jan. 2015).
225. Clotfelter, *supra* note 218, at 241–42.
226. Alan Greenblatt, *Funding the Arts*, 27 CQ RESEARCHER 581, 583 (2017).
227. *Id.* at 584.
228. *Id.* at 583–85.
229. *Annual Report on Philanthropy*, *supra* note 134, at 289.

in order to ensure that the arts continue to receive adequate funding.

This Article takes the position that because the arts produce a limited public benefit that is not widely shared by all individuals in the seven major tax brackets, precluding a segment of taxpayers from receiving the full benefit of the proposed 25% charitable tax credit is necessary. Additionally, based on historical trends showing an upward trajectory of private giving to the arts,[230] implementing the proposed tax credit would likely have minimal impact on the opera's subsidization demands. For the above reasons, taxpayers that give to the arts, humanities, and culture charitable subsector should be eligible for a partial charitable tax credit.

Critics may argue that a tax credit system that prioritizes charities based on a specific set of criteria violates the notion of pluralism because the government is deciding which organizations receive subsidies. This argument may have merit, but considering the current fiscal landscape subsidizes organizations predominantly favored by high-income taxpayers, the notion of taxpayer pluralism has already been violated. Thus, the only way to correct these distortions brought in by the TCJA is to allow for government intervention. This form of intervention requires the design and implementation of a charitable tax credit system that prioritizes charitable subsectors based on the aforementioned criteria.[231] Ultimately, this Article proposes that such a system will restore taxpayer pluralism while adhering to the philosophical and economic underpinnings of the Code.

While there are many advantages of the proposed tax credit system that prioritizes certain charitable subsectors, this resolution poses significant challenges. Critics of the proposed tax credit system would likely argue that the government should provide direct subsidies to organizations that suffer from government and market failure for the following reasons. First, there are numerous administrative problems in defining which charitable subsectors should be eligible for favorable tax

230. *Id.* at 290.
231. Clotfelter, *supra* note 218, at 240–41; Fullerton, *supra* note 221, at 74–75; Hossain & Lamb, *supra* note 129, at 5–6; Saez, *supra* note 174, at 2673.

treatment.[232] Second, there are charities that provide societal value, but donors to these organizations will not be eligible to receive the full charitable tax benefit under the proposed system.[233] Finally, if Congress were to amend the rules to prioritize giving to certain charitable subsectors to the exclusion of others, this would inevitably result in special interest groups lobbying for Congress to enact legislation that provides favorable tax treatment for taxpayers that give to their cause as well.[234]

These arguments in favor of government subsidization as the sole mechanism to prevent charities from suffering government and market failure are vulnerable to the following issues. First, the government lacks adequate information with regards to which charities require subsidization and how much is needed to maximize social welfare.[235] Second, the government may be constrained from subsidizing certain charitable organizations in the event that doing so would run contrary to their expressed political agenda.[236] There may be budgetary constraints to subsidize organizations like the local soup kitchen when, for instance, government officials have made it widely known that their administration intends to cut government spending.

VI. CONCLUSION

This Article has provided a comprehensive overview of how the major changes brought by the TCJA pose significant challenges for future legislators. The enactments included doubling the standard deduction, lowering marginal tax rates, and placing additional restrictions on itemized deductions. High-income taxpayers will remain unaffected by the reform because they are more likely to itemize their deductions and will continue to reap the tax benefits from their charitable giving. Low- to moderate-income taxpayers, however, will likely elect to take the standard deduction and will not receive a tax benefit for their charitable giving. Consequently, high-income taxpayers will be empowered to

232. Lindsey, *supra* note 3, at 1088.
233. *Id.*
234. *Id.*
235. Hall, *supra* note 207, at 170–71.
236. *Id.* at 171.

determine which charities merit subsidization, thereby violating the notion of taxpayer pluralism.

A non-refundable charitable tax credit that prioritizes giving to charitable subsectors based on a specified list of criteria would effectively restore taxpayer pluralism. This Article persuasively shows that the major changes brought by the TCJA are contrary to the principles of distributive justice. The proposed tax credit would promote the key equity considerations that serve as the cornerstone of offering tax incentives to induce charitable giving. Moreover, from a macroeconomic and fiscal efficiency standpoint, the proposed charitable tax credit would produce optimal results based on quantifiable data.

The future challenges of effectuating the proposed charitable tax credit will require legislators and the Treasury to balance the competing interests of prioritizing charitable giving to certain charitable subsectors with congressional budget demands. This Article acknowledges that prioritizing charitable organizations may be met with harsh criticism. However, based on evaluating the various charitable subsectors using the aforementioned criteria, it has become abundantly clear that not all charities are created equal with respect to their societal impact. Therefore, the charitable giving tax incentive offered to taxpayers should accurately reflect this reality.