Remapping the Charitable Deduction

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Remapping the Charitable Deduction

DAVID E. POZEN

If charity begins at home, scholarship on the charitable deduction has stayed at home. In the vast legal literature, few authors have engaged the distinction between charitable contributions that are meant to be used within the United States and charitable contributions that are meant to be used abroad. Yet these two types of contributions are treated very differently in the Code and raise very different policy issues. As Americans’ giving patterns and the U.S. nonprofit sector grow increasingly international, the distinction will only become more salient.

This Article offers the first exploration of how theories of the charitable deduction apply to internationally-targeted donations. In so doing, the Article aims to contribute not only to a methodological shift in nonprofit tax scholarship (a strategic remapping), but also to a reappraisal of the deduction literature (an analytic remapping): just as existing theories of the deduction can inform our understanding of foreign charity, considerations of foreign charity can shed light back on the existing theories. I argue that the standard rationales are underdetermined and undertheorized, and propose a new, integrated approach to the charitable deduction. Internationally-targeted donations emerge from the analysis holding a strong claim to deductibility—often a stronger claim than domestically-targeted donations hold—on almost every relevant dimension, which calls into question current regulations that privilege domestic giving. Oversight and foreign policy concerns, however, complicate the ideal of geographic neutrality and illuminate the charitable deduction’s role as an instrument of statecraft. Admitting foreign charity into the debate over the deduction thus changes the debate’s terms; it gives deduction theory new urgency as well as new complexity.
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I. INTRODUCTION

Along with the income and property tax exemptions accorded nonprofit organizations, the charitable contributions deduction stands as the cornerstone of U.S. nonprofit tax law.¹ The deduction was instituted shortly after the Sixteenth Amendment and, despite facing repeated attacks in Congress and the media, has only been strengthened over time. Last year, it saved taxpayers more than $38 billion.² No other country has a charitable deduction remotely as substantial; many countries have none at all.³ On its face, the deduction appears to violate several major tenets of tax policy: vertical equity, economic efficiency, and the ability-to-pay principle. Yet it remains popular, and its generosity is widely seen as an engine of America’s nonprofit sector, the most robust such sector in the world.⁴ Given these characteristics, it is not surprising that the charitable deduction is by far the most significant of these, in revenue impact as well as scholarly interest, and so is the focus of this Article—and the referent whenever I generically invoke “the charitable deduction.” I disaggregate the deduction only where legal, political, or ethical aspects of its variants meaningfully diverge.

¹ There are, in fact, eight different types of charitable deductions in the tax code: individual deductions under the income, gift, and estate taxes at the federal and (typically) state levels, plus corporate deductions under the federal and (sometimes) state income taxes. The individual federal income tax deduction is by far the most significant of these, in revenue impact as well as scholarly interest, and so is the focus of this Article—and the referent whenever I generically invoke “the charitable deduction.” I disaggregate the deduction only where legal, political, or ethical aspects of its variants meaningfully diverge.

² The $38 billion figure includes $34.4 billion in individual federal income tax savings, STAFF OF JOINT COMM. ON TAXATION, 109TH CONG., ESTIMATES OF FEDERAL TAX EXPENDITURES FOR FISCAL YEARS 2005–2009, at 43 tbl.3 (Comm. Print 2005), available at http://www.access.gpo.gov/congress/joint/hjoint01cp109.html (reporting 2004 expenditures), and $3.5 billion in corporate federal income tax savings, id. at 36–38 tbl.1 (reporting 2005 estimates). If savings from the other federal and state charitable deductions were included, this figure would surely top $40 billion. Because most charities earn little in net revenues, the deduction is more important to them than the income tax exemption. See Oliver A. Houck, With Charity for All, 93 YALE L.J. 1415, 1428 (1984).


⁴ See Simon, Dale & Chisolm, supra note 3, at 1 (describing the “extraordinary—probably unique—centrality of the nonprofit sector in American social and economic life”). No country has more nonprofit organizations, employees, or expenditures than the United States, though in four countries nonprofits command a higher percentage share of total employment. S. Wojciech Sokolowski & Lester M. Salamon, The United States, in GLOBAL CIVIL SOCIETY: DIMENSIONS OF THE
deduction has spawned one of the largest, most contentious literatures in all of tax law.

What is surprising is that this literature has almost completely ignored an increasingly salient distinction in the type of charitable contributions Americans make: donations that are meant to be used within the United States (domestically-targeted donations) versus donations that are meant to be used abroad (internationally-targeted donations). Over the past several decades, the world has witnessed a “global associational revolution,” in which American nonprofit organizations, foreign nonprofit organizations, and transnational nonprofit organizations have increased exponentially in number and degree of interconnectedness. In some regions, most notably the former Soviet bloc, independent nonprofit sectors are thriving for the first time. The United States has facilitated this revolution in no small part through private charity. Even as U.S. government spending on foreign

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5 This term was coined by Professor Lester Salamon, the nonprofit scholar who has most assiduously documented the revolution. See, e.g., Lester M. Salamon, The Rise of the Nonprofit Sector, FOREIGN AFF., July–Aug. 1994, at 109, 109; Lester M. Salamon et al., Civil Society in Comparative Perspective, in GLOBAL CIVIL SOCIETY, supra note 4, at 3, 4.


7 See Jessica T. Mathews, Power Shift, FOREIGN AFF., Jan.–Feb. 1997, at 50, 52–54 (providing an overview of foreign nonprofit proliferation); Salamon, supra note 5, at 109–12 (same).

8 See DAVID HELD ET AL., GLOBAL TRANSFORMATIONS: POLITICS, ECONOMICS AND CULTURE 54 fig.1.1 (1999) (reporting that the number of international nongovernmental organizations increased from roughly 100 in 1960 to roughly 5500 in 1996).


aid has continued to plummet, American individuals and corporations have been channeling an increasing proportion of their donations to foreign causes. These developments raise—or, rather, raise more starkly—an intriguing policy question: should the tax system treat internationally-targeted donations the same as or differently than domestically-targeted donations?

Since the 1930s, Congress’s answer has been to do a little of both. Under our “water’s edge policy,” gifts made directly to a foreign charity may never be deducted, yet gifts made to a U.S.-based nonprofit may be deducted even if that nonprofit re-donates the entire gift to a foreign charity or uses the entire gift for its own foreign programs, and the donor intends this result. However, the donor may not mandate this result; if the intermediate U.S. donee is merely a conduit for the foreign beneficiary, there can be no deduction. While not precluding deductibility for internationally-targeted donations, the water’s edge policy makes these donations more complicated and more costly.

Descriptively, then, our tax system privileges domestic altruism over international altruism, but incompletely. Why this has been our policy for seven decades, and whether it should continue to be our policy, is tougher to say. On the underlying question of how internationally-targeted donations ought to be compared with domestically-targeted donations for purposes of the deduction, there is little relevant legislative history, less judicial commentary, and, most striking, hardly any tax scholarship. This silence is unfortunate not only because it has submerged deep ethical and empirical difficulties, but also because it has insulated the water’s edge policy—a policy affecting thousands of organizations and billions of dollars each year—from principled scrutiny. In a globalized world of charity, deduction theory has remained oddly, even irresponsibly, parochial.

This Article seeks to begin the process of redress by offering the first exploration of how theories of the charitable deduction apply to internationally-targeted donations. In so doing, the Article aims to contribute not only to a methodological shift in nonprofit tax scholarship (a strategic remapping), but also to a reappraisal of the deduction literature


12 See infra text accompanying notes 169–81.

13 See infra Part II.B.
(an analytic remapping): just as existing theories of the deduction can inform our understanding of foreign charity, considerations of foreign charity can shed light back on the existing theories. The glare, it turns out, is harsh. When the scope of analysis is expanded to include internationally-targeted donations, the descriptive and prescriptive failings of deduction theory emerge with new clarity. The leading theories appear underdetermined, in that none of the rivals offers a demonstrably more compelling account, and undertheorized, in that their coiners have almost never articulated, much less developed, a supporting normative framework. No theory, moreover, has specified the relevant community to which it is meant to apply, which is especially ironic given that the “community benefit” defense of the charitable deduction has come to predominate in the literature. Admitting foreign charity into the analysis both intensifies and recasts the problematics of deduction theories; but it suggests new possibilities for resolution. It can also inform and, ideally, generate debate on the water’s edge policy. That is the most practical and least revisionist intervention the Article seeks to make.

The path of argument is straightforward. Part II explains the charitable deduction and how it affects domestically- and internationally-targeted donations. While the water’s edge policy has not attracted much critical attention, the deduction itself has been the subject of a voluminous literature. Part III synopsizes the leading theories of the charitable deduction, which have never been assessed systematically, and reshuffles the arguments into an original—and, I argue, more productive—taxonomy. This critical roadmap of deduction theory may be taken as a freestanding contribution to the literature, apart from any geographic considerations. (Readers interested chiefly in the geographic considerations may therefore want to skip ahead.)

After providing an overview of internationally-targeted donations, Part IV explores what the leading theories of the deduction reveal about these donations and, conversely, what the donations reveal about the theories. Even if one restricts the community of interest exclusively to the United States, I am nevertheless able to show that foreign gifts possess a strong claim to deductibility, and perhaps a stronger claim, under virtually all the theories. Part V draws out the implications of this analysis and, turning from deconstruction to reconstruction, outlines a new, integrated theory of the charitable deduction that I hope will prove descriptively more satisfying and prescriptively more useful than the existing approaches. The water’s edge policy looks increasingly antiquated in light of the integrated theory. Although complications of oversight and foreign policy counsel caution, reform—not just rethinking—is long overdue.
II. THE MECHANICS OF THE CHARITABLE DEDUCTION

This Part summarizes the charitable contributions deduction and explains how the water’s edge policy and other rules constrain international altruism. These constraints have a haphazard character to them. Individual donations to foreign charities may not be deducted under the federal income tax, even if the donee has been granted U.S. tax-exempt status, yet all such donations may be deducted under the estate and gift taxes. Corporate donations may not be deducted unless the donee uses the money for domestic purposes, except if the donee is also a corporation (as distinguished from a trust or unincorporated association) the domestic-use restriction does not apply.

The debate over the water’s edge policy, meanwhile, has been quiet and unsatisfying. Some tax scholars have criticized the policy as an irrational impediment to transnational charity, while others have rebutted that it is necessary for administrative reasons. No non-tax scholars have weighed in; and no one has addressed the logically antecedent question of how to evaluate internationally-targeted donations’ claim to the deduction.

A. The Deduction Generally

Among the many legal privileges that U.S. nonprofit organizations receive, the charitable contributions deduction shares preeminent status with their tax exemptions. Enshrining in the tax code the Tocquevillian ideal of American nonprofit exceptionalism, both the deduction and the exemptions are unparalleled in their size and scope (and complexity) anywhere else in the world. Congress first adopted a charitable deduction in 1917 as part of a bill raising federal income tax rates to finance the costs of entering World War I. Concerned that these tax increases would suppress philanthropic giving, Congress allowed deductions for donations to public charities and private foundations “organized and operated exclusively for religious, charitable, scientific or educational purposes, or . . . for the prevention of cruelty to children or  


15 See sources cited supra note 3.


animals.18 Estate tax charitable deductions were added the next year, and gift tax deductions in 1924.20 The product of business and fundraiser lobbying rather than New Deal reformism,21 the corporate charitable deduction appeared three years later, in 1935.22 As with the federal income tax exemption, there appears to have been little legislative debate, or public debate generally, concerning the passage of the deductions.23 Compared with today, America’s nonprofit sector at that time was far smaller and more homogeneous—comprising mainly churches and donative charities that provided clear public goods or aid to the poor24—and the deductions’ expected fiscal impact was not great. Since introducing the charitable deductions, Congress has in the intervening years strengthened all of them by raising the contribution limits and expanding the ranks of permissible donees, even as it has mired the deductions in regulation.25

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23 See, e.g., JAMES J. FISHERMAN & STEPHEN SCHWARZ, TAXATION OF NONPROFIT ORGANIZATIONS: CASES AND MATERIALS 68 (2003) (“The early history of the charitable tax exemption in the United States is surprisingly uninformative. Congress, preoccupied with the wisdom and constitutionality of an income tax, appears to have been acting based on some intuitive sense that it was simple not appropriate as a matter of history or tax policy to tax charitable organizations.”); id. at 672 (“Legislative history [on the passage of the charitable deduction] is typically sparse, but excerpts from the floor debate reveal Congress’s belief that the steeper tax rates would reduce funds donated to needy schools, hospitals, churches, and other charitable organizations.”); Edward H. Rabin, Charitable Trusts and Charitable Deductions, 41 N.Y.U. L. REV. 912, 912–34 (1966) (criticizing the dearth of commentary on the introduction of the charitable deduction).

24 See Peter Dobkin Hall, A Historical Overview of the Private Nonprofit Sector, in THE NONPROFIT SECTOR, supra note 18, at 3, 16; Henry Hansmann, Economic Theories of Nonprofit Organization, in THE NONPROFIT SECTOR, supra note 18, at 27, 27–28, 40 [hereinafter Hansmann, Economic Theories]. Donative nonprofits, in Professor Hansmann’s famous typology, are “[n]onprofits that receive most or all of their income in the form of grants or donations.” Henry B. Hansmann, The Role of Nonprofit Enterprise, 89 YALE L.J. 835, 840 (1980) [hereinafter Hansmann, Nonprofit Enterprise].

When present-day American individuals and corporations contribute money or property (but not services) to a nonprofit, they may be entitled to a deduction under the income, gift, or estate tax at the federal and state levels. Taxpayers who elect to take the standard federal income tax deduction, introduced in 1944 to simplify tax compliance, are not eligible to deduct their contributions. The principal provision for deductibility is I.R.C. § 170, which defines the entities eligible to receive deductible contributions. By far the largest class of eligible entities remains the public charities, now catalogued along with charitable foundations in § 170(c)(2). Gifts to other organizations typically are not deductible, except for those made to U.S. states and their political subdivisions, veterans organizations, fraternal organizations (if used exclusively for charitable purposes), or cemetery associations. The language of § 170(c)(2) mimics that of its more famous cousin, § 501(c)(3), so that while many types of nonprofits—all 501(c) organizations—are tax-exempt, only charities and these select others can also receive deductible gifts. This is “the most celebrated result” of 501(c)(3) recognition; more so than any other privilege, deductibility sets charities apart as our legal system’s most favored breed of nonprofit organization.

Deductibility is subject to a labyrinthine web of rules and regulations; for our purposes it suffices to sketch the key features. All contributions, to be deductible, must pass the IRS’s quid pro quo test, which requires that the donor make the transfer “without adequate consideration” in exchange. For individuals and corporations, contributions to public charities are deductible under § 170 only to the extent that they do not exceed 50% or 10%, respectively, of taxable income. Under the gift and estate taxes, no such caps apply. Charitable gifts of property receive especially generous tax treatment: if a donor owns property for more than

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27 I.R.C. § 170 determines federal income tax deductibility. I.R.C. § 170 (2000). The gift tax deduction, id. § 2522(a), and the estate tax deduction, id. § 2055(a), employ similar definitions of eligible recipients.
28 See supra note 18 (explaining the terms “charities” and “public charities”). The only differences between the current § 170(c)(2) and the original provision are that “corporations and associations” has now been expanded to “corporation[s], trust[s], or community chest[s], fund[s], or foundation[s]” and a new category of organizations that “foster national or international amateur sports competition” has been added. Compare War Revenue Act, ch. 63, § 1201(2), 40 Stat. 300, 330 (1917), with I.R.C. § 170(c)(2) (2000).
30 Simon, Dale & Chisolm, supra note 3, at 6.
33 Id. §§ 2522, 2055.
twelve months prior to donating it, the amount of her deduction will equal the fair market value of the property, allowing her both to receive a deduction for the appreciation and to escape taxation on it.34 Reflecting private foundations’ “third-class” status in charitable tax law,35 gifts to them may be denied such market-value deductibility36 and are subject to lower percentage-of-income deductibility limits.37

B. Deductions for Internationally-Targeted Gifts

For an individual or corporate charitable contribution to be deductible under the income tax, § 170 stipulates that the donee must be “created or organized in the United States or in any possession thereof, or under the law of the United States, any State, the District of Columbia, or any possession of the United States.”38 This is our water’s edge policy:39 it conditions income tax deductibility on the donee’s domestic situs. The only exception, created through bilateral tax treaties, is that donations to charities incorporated in Canada, Mexico, or Israel are deductible to the extent that the donor has income from sources in that country.40 The gift and estate tax deductions, by contrast, contain no such geographic limitation.41 And foreign charities have always been eligible for U.S. income tax exemption under § 501(c)(3).42

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34 See id. § 170(c); Treas. Reg. § 1.170A-1(c) (2002); see also I.R.C. § 170(e)(1)(B)(i) (2000) (requiring donated tangible personal property to be related to a charity’s goals for the donor to deduct its appreciation).
35 Boris I. Bittker, Should Foundations Be Third-Class Charities?, in THE FUTURE OF FOUNDATIONS 132 (Fritz F. Heimann ed., 1973); see also FISHMAN & SCHWARZ, supra note 23, at 373–74, 382–83 (outlining the ways in which the tax system disadvantages foundations relative to other types of nonprofits).
37 Id. § 170(b)(1)(B)–(D).
38 Id. § 170(e)(2)(A).
39 I take this term from Simon, Dale & Chisolm, supra note 3, at 15. Other tax scholars have referred to § 170’s water’s edge policy, less colorfully, as the “geographical limitation” or “geographical restriction,” see, e.g., Harvey P. Dale, Foreign Charities, 48 TAX LAW. 655 passim (1995), or the “domestic organization restriction,” see, e.g., Lester M. Salamon & Susan L.Q. Flaherty, Introduction to LESTER M. SALAMON, THE INTERNATIONAL GUIDE TO NONPROFIT LAW 8, 28–29 (1997), or some variation thereof.
41 Nonresidents, however, do face geographical restrictions under the gift and estate tax. For their gifts to be deductible under the gift tax, donees must be domestic and non-corporate donees must use the gift exclusively within the United States. I.R.C. § 2522(b)(2)–(3) (2000). When nonresidents make charitable bequests to trustees, the estate tax deduction is limited to domestic use. Id. § 2106(a)(2)(A)(ii). While residents’ bequests to foreign governments have generally been denied deductibility, see, e.g., Edwards v. Phillips, 373 F.2d 616 (10th Cir. 1967), some courts have held such
Even though the Code strictly bars income tax deductions for gifts made directly to foreign charities, two important qualifications to the water’s edge policy help temper its isolationism and facilitate the flow of international funds. U.S.-based nonprofits may, first, engage in charitable activities abroad and, second, re-donate received funds to foreign charities without jeopardizing the deductions of individual donors. For corporate donors, however, the deduction will be lost if the donee uses or sends the contribution abroad—with the emphatic, if strange, exception that this domestic-use requirement does not apply when the donee is also a corporation.\textsuperscript{43} In the case of re-donation, moreover, the IRS will deny individual and corporate deductions if the intermediate U.S. charity is a mere conduit—if “the domestic organization is only nominally the donee [and] the real donee is the ultimate foreign recipient.”\textsuperscript{44} The seminal authority for determining when a domestic organization is impermissibly acting as a conduit is Revenue Ruling 63-252, which distinguishes between, on the one hand, cases where the U.S. charity has no discretionary authority and must transmit certain earmarked funds to the foreign charity and, on the other hand, cases where the U.S. charity reserves the power to review and approve grants to the foreign charity or where the foreign organization is a controlled subsidiary.\textsuperscript{45} The former cases are non-deductible, the latter deductible. Within the latter camp, deductions may be allowed even if the intermediate U.S. donee operates as a “friends of” organization and gives funds only to a particular named foreign entity.\textsuperscript{46} To preserve deductibility, all international gifts by a U.S. intermediate donee must fall within the charitable mission and purpose of the U.S. entity, and the U.S. entity must exercise ongoing scrutiny over its bequests deductible when restricted to charitable purposes. See, e.g., Old Colony Trust Co. v. United States, 438 F.2d 684 (1st Cir. 1971).


\textsuperscript{43} See Rev. Rul. 69-80, 1969-1 C.B. 65. Congress has never explained why the donee’s legal form should matter in this way. Dale, supra note 39, at 672–73. Many think it was a drafting error. See Peter J. Wiedenbeck, Charitable Contributions: A Policy Perspective, 50 Mo. L. Rev. 85, 105 & n.64 (1985) (describing the “well-recognized drafting error” and failed congressional efforts to correct it).


\textsuperscript{45} Id.; see also Dale, supra note 39, at 662–63 (interpreting the Ruling and highlighting its importance).

gift unless it can show that the foreign donee meets the terms of § 501(c)(3).

In addition to the substance of the water’s edge policy, the complexity of these rules is itself a deterrent to international altruistic investment. So is the third-class status of foundations. Because foreign charities not recognized by the IRS may be classified as private foundations and because much of Americans’ foreign giving runs through foundations, the disincentive effects of their inferior deductibility are magnified in the international context.

C. The Undertheorized Water’s Edge Policy

From 1917 to 1938, there was no water’s edge policy for the individual income tax deduction. Then, following the Revenue Act of 1935, which in promulgating the corporate charitable deduction restricted it to domestic donees (and when the donee is not a corporate entity, to domestic use),

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47 This scrutiny is known as “expenditure responsibility,” and the § 501(c)(3) determination as the “foreign equivalency” test. See Dale, supra note 39, at 663, 685. For more detailed explication of U.S. deduction policy for international gifts, see generally Kimberly S. Blanchard, U.S. Taxation of Foreign Charities, 8 EXEMPT ORG. TAX. REV. 719 (1993); Chang et al., supra note 40; Nina J. Crimm, Through a Post-September 11 Looking Glass: Assessing the Roles of Federal Tax Laws and Tax Policies Applicable to Global Philanthropy by Private Foundations and Their Donors, 23 VA. TAX REV. 1, 47–113 (2003); Dale, supra note 39; and Peebles, supra note 42. Professor Crimm also provides a broad legislative history of the geographic restrictions on federal deductibility in Crimm, supra, at 37–47.


49 See supra notes 35–37 and accompanying text. Note also that the corporate-donee exception to the corporate domestic-use requirement, see supra note 43 and accompanying text, does not apply to foundations. Nina Crimm has documented in great detail the tax rules bearing on foundations’ international grantmaking activity. Crimm, supra note 47, at 72–113. Her interviews with decisionmakers at domestic private foundations found these rules to have a significant disincentive effect:

Respondents uniformly indicated that in past years their foundations’ global philanthropy programs have been less constrained by their own finances than they have by administrative considerations imposed by the Code rules and Treasury Regulations. Moreover, they consistently indicated that international grant-making was significantly more time consuming and financially costly than domestic grant-making, with the result being that domestic philanthropy is a more attractive alternative for some.

There appears to be a consensus [among foundation administrators] that some of the tax rules are unnecessarily complex and perhaps even inappropriate in the global philanthropy context. Id. at 124–25.

50 See Dale, supra note 39, at 690 (describing the IRS’s inconsistent application of § 508(b), the “[p]resumption that [unregistered] organizations are private foundations,” I.R.C. § 508(b) (2000), to foreign organizations); Jones, supra note 48, at 119 (asserting that “a foreign recipient is more likely [than a comparable domestic recipient] to be classified as a private foundation”).


the Revenue Act of 1938 introduced the water’s edge policy for individuals.\textsuperscript{53} A famous passage of the House Report addressed this change explicitly:

The exemption from taxation of money or property devoted to charitable and other purposes is based upon the theory that the Government is compensated for the loss of revenue by its relief from financial burden which would otherwise have to be met by appropriations from public funds, and by the benefits resulting from the promotion of the general welfare. The United States derives no such benefit from gifts to foreign institutions, and the proposed limitation is consistent with the above theory. If the recipient, however, is a domestic organization the fact that some portion of its funds is used in other countries for charitable and other purposes (such as missionary and educational purposes) will not affect the deductibility of the gift.\textsuperscript{54}

Professor Harvey Dale, in the best-known article to discuss international deductions, has criticized this passage as both bad history, because charities’ tax privileges were never in fact predicated on their relieving government burdens, and bad logic, because “it makes no sense to deny the deduction on the basis of where the donee is organized but to permit it even if the funds are expended abroad.”\textsuperscript{55} Even though, as Dale acknowledges, requiring a U.S. intermediate donee may simplify IRS oversight, he argues that any number of reporting systems—such as one requiring more detailed substantiation of foreign gifts under existing Code provisions—could achieve the same end more directly, and in any event the legislative history offers no indication that Congress had in mind such oversight concerns.\textsuperscript{56} The fact that the income tax exemption and the gift and estate tax charitable deductions contain no geographical restrictions, moreover, belies the water’s edge policy’s claim to administrative necessity or indeed to any principled basis.\textsuperscript{57} Dale concludes that “[i]n a world in which charity increasingly crosses—and ought to cross—national borders, U.S. donors should not be forced to resort to formalisms, such as

\textsuperscript{54} H.R. REP. NO. 75-1860, at 19–20 (1938).
\textsuperscript{55} Dale, supra note 39, at 660–61.
\textsuperscript{56} Id. at 663 & nn.39–40.
\textsuperscript{57} Id. at 663. But see Blanchard, supra note 47, at 728 (“[I]t is at least arguable that monitoring is less of a concern under the estate and gift tax rules simply because fewer U.S. taxpayers are subject to these taxes than are subject to income taxes.”).
Writing with Professors John Simon and Laura Chisolm more recently, Dale further charges that “Congress has never provided a satisfactory explanation for a rule that, at least on gross examination, has an isolationist scent and that is, on the other hand, easily bypassed.”

Others have echoed and extended Dale’s critique of the water’s edge policy—though I do not want to overstate the vigor of this critical strain, which has been confined to a handful of articles in mostly specialized journals. Following Dale (for whose research center they were interning at the time), Joannie Chang and co-authors find logically unsupportable the Code’s disparate treatment of direct versus indirect international contributions, especially because all such contributions “may assist the United States.” Kimberly Blanchard decries the “complexity, ambiguity, and irrationality” of the water’s edge policy, and suggests, like Dale, that monitoring concerns could be addressed by requiring any foreign organization seeking tax-deductible U.S. donations to secure IRS recognition of its exempt status, just as foreign charities can do currently under § 501(c)(3). Professor Penina Kessler Lieber calls the water’s edge policy “archaic,” a “product of the Depression mentality of the mid-late 1930’s, when America was still focused inward on national recovery [and] had a New Deal domestic agenda and an isolationist foreign policy.”

Professor Darryll Jones locates the water’s edge policy in a broader matrix of regulations impeding international altruistic investment, of which the water’s edge policy is the most direct and perhaps the most dire. Jones shows how the IRS’s classification of certain unregistered charities as foundations, the foreign tax credit’s disqualification of international donations, and the penalties levied against foundations making non-U.S. grants—avoided only if the foundation exercises burdensome “expenditure responsibility”—all conspire to make international donations more costly than domestic donations.

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58 Dale, supra note 39, at 663.
59 Simon, Dale & Chisolm, supra note 3, at 15–16 (citation omitted).
60 A Westlaw key cite search, conducted on August 29, 2006, indicates that Dale’s article has been cited nine times in the decade since its publication. No other article critiquing the water’s edge policy has garnered as many citations, and media coverage of the issue appears to have been negligible. Dale notes at the start of his article that despite the recent explosion of international charitable activity, “only a few articles and secondary sources address the relevant tax and other issues raised.” Dale, supra note 39, at 659. The only other issues Dale discusses are the implications of several statutes (the Export Administration Act, the International Emergency Economic Powers Act, and the United Nations Participation Act) for gifts to foreign charities. Id. at 694–96.
61 Chang et al., supra note 40, at 569.
62 Blanchard, supra note 47, at 728.
64 Jones, supra note 48, at 119–24.
I am sympathetic to all of these critiques, yet I believe them fundamentally deficient. While the opponents of the water’s edge policy are in broad agreement that it makes international giving unduly difficult, they never explain why internationally-targeted donations deserve tax treatment comparable to, or different from, that offered domestically-targeted donations. If anything, Professors Dale, Lieber, and Jones intimate that international gifts may have an even stronger claim to deduction than domestic gifts, on account of foreign charities’ greater need for support. But need for support has never driven deductibility or almost any other aspect of nonprofit tax policy. That none of the authors feels compelled to argue for international donations’ deduction-worthiness evinces how commonsensical it must appear to them. They are not alone in this: even the water’s edge policy’s supporters (such as there are; the literature in favor of the policy is even sparser than the literature against it) have reduced the question to one of implementation.

In contrast to the scholars who would later interrogate their handiwork, the drafters of the water’s edge policy said nothing about implementation and focused instead on the prior question of deservedness. They just did so ineptly. No one today would defend the drafters’ argument that foreign charities should not receive deductible gifts because, unlike domestic charities, they do not alleviate governmental burdens. Basing deductibility solely on this criterion would be both underinclusive, in that many nonprofits eligible to receive deductible gifts—religious organizations, for example—plainly do not provide governmental services, and overinclusive, in that many for-profit contractors plainly do provide governmental services.

Still, the drafters were on to something. However much cross-border giving might complicate them, oversight and administrability are contingent questions, questions of process; figuring out the best scheme for implementing an international deduction policy presupposes a normative view of what that policy should achieve. Yet as the next Part will show, the major theorists of the charitable deduction, like the participants in the

65 See Simon, Dale & Chisolm, supra note 3, at 31–34.
66 See, e.g., Crimm, supra note 47, at 139 & n.432 (defending the water’s edge policy as necessary for IRS enforcement of § 170); Wiedenbeck, supra note 43, at 103–06 (same); Gabriel Rudney, Tax Rules and Overseas Philanthropy, PHILANTHROPY MONTHLY, Aug. 1978, at 16, 17 (claiming that U.S. authorities have “virtually no way to make a foreign voluntary organization accountable and assure that money going abroad would be used for the philanthropic purpose”). In a recent speech, after reminding the audience that his 1995 article had critiqued the water’s edge policy’s legislative record as “bad history, bad philosophy, and bad logic,” Harvey Dale exclaimed: “I actually don’t know anyone who disagrees!” Harvey P. Dale, Global Giving and Governance, Address Before the Committee on Exempt Organizations, American Bar Association Tax Section 5 (May 9, 2003), available at http://www.abanet.org/tax/groups/co/0305dale.pdf.
water’s edge policy debate, have similarly scanted the distinction between foreign and domestic charity. The remarkable variation in how countries treat internationally-targeted donations’ deductibility suggests there are no necessary, or easy, answers here.67

III. THEORIES OF THE CHARITABLE DEDUCTION: A CRITICAL ROADMAP

Beginning in earnest after World War II and, like the nonprofit sector itself, taking off in the 1970s, controversy has long surrounded the charitable deduction and the nonprofit tax exemptions.68 The controversy remains, but supporters of the deduction (and the exemptions) have largely won out. Politically, this was evident last year when, in forming an advisory commission to pursue fundamental tax reform, President Bush explicitly admonished it not to undermine the deduction.69 Academically, although some prominent tax scholars have argued against the deduction as improper, inequitable, or inefficient70—and advocated alternative means of government support for charity such as direct provision or direct funding—most have defended it. Professors William Andrews and Boris Bittker, as Sections A and B explain, dominated the first generation of the debate with

67 SALAMON, supra note 39, provides a valuable resource in documenting the diversity of tax policy approaches to internationally-targeted charitable contributions. On one end of the spectrum, Brazil, Russia, and Thailand allow no deductions unless all donated funds are used within the home country. Id. at 67, 262, 309. On the other end of the spectrum, Italy, Poland, and South Africa place no geographic restrictions whatsoever on the deduction. Id. at 192, 251, 274. In between, there is great variation. Ireland, for example, allows no deductions for internationally-targeted donations, but its government will give matching grants for gifts to certain developing-world charities. Id. at 159. But cf. THE EUROPEAN FOUNDATION: A NEW LEGAL APPROACH 23 (Klaus J. Hopt et al. eds., 2006) (noting the uncertainty over whether European Union countries’ geographic restrictions on deductibility contravene the free movement of capital, a fundamental freedom under the European Community Treaty, and proposing transnational “European Foundations” as a solution). India allows foreign charities to receive deductible gifts if they register with the Home Ministry and provide financial statements for each contribution. SALAMON, supra note 39, at 148. Germany has similar policies to ours. Id. at 124. When viewed in comparative context, the remarkable aspect of the United States’ water’s edge policy is not its descriptive content—many countries that have a charitable deduction privilege domestically-targeted contributions in some way. The remarkable aspect is the near-total lack of normative content in the congressional and academic debates surrounding the policy.

68 For a brief overview of the political controversies and citations to sources, see Hall, supra note 24, at 18–21; and John K. McNulty, Public Policy and Private Charity: A Tax Policy Perspective, 3 VA. TAX REV. 229, 229–30 (1984).

69 Most observers understood the reference to “recognizing the importance of homeownership and charity in American society” in the Executive Order creating the commission, Exec. Order No. 13,369, § 3(b), 3 C.F.R. 155, 155 (2006), to impose a mandate on the commission to preserve the home mortgage and charitable deductions. See, e.g., Fred Barnes, Back to Business, WALL ST. J., Sept. 7, 2005, at A16, available at LEXIS, News Library, WJSNL File (“The president has instructed the panel only that it must preserve the home mortgage and charitable deductions.”).

70 See Boris I. Bittker, Charitable Contributions: Tax Deductions or Matching Grants?, 28 TAX L. REV. 37 (1972) (identifying these three lines of criticism and providing rebuttals). “At first blush,” Bittker begins his classic article, “the question of the deduction’s ‘propriety’ . . . has been so frequently debated that one wonders whether anything new remains to be said.” Id. at 37. That was in 1972, before scholarship on the deduction had taken off. A basic descriptive goal of this Article is to highlight just how much has been left unsaid.
efforts to cast the charitable deduction as a tool to ensure the proper treatment of donors. A second generation of scholars has moved away from donor-focused theories and instead defended the deduction as a tool of public policy—as a government subsidy creating community benefits sufficient to justify its costs. Subsidy theories come in many stripes. Section C outlines the four main variants.71

As the taxonomy provided in this Part suggests, commentators have invoked a great range of theories in support of the charitable deduction. Yet as will also become clear, each of these theories would be insufficient on its own to account for the practice of the deduction, in part because the scope and variety of qualifying donees are now so vast that any unitary theory is bound to be descriptively unsatisfying. Many of the theories lack a coherent normative basis. All are blind to the international/domestic distinction. In consequence, even as consensus has started to solidify that the deduction is a subsidy best justified by reference to its community benefits, there has emerged a subtle but profound dissensus over what these benefits are and why exactly they are beneficial. For all their richness, the deduction theories remain not only underdetermined, but also undertheorized.

Hence, in addition to synopsizing the leading theories of the deduction, this Part seeks to impose some analytic structure on what has been a sprawling, often inconsistent, deeply disjointed literature. When the normative foundations of deduction theories are exposed and their descriptive weaknesses interrogated, it becomes clear that not only does the charitable deduction (as we know it) lack a decisive, stand-alone justification; no such justification is possible.

71 My focus is thus on theories that would preserve the charitable deduction in some form. Although I incorporate their criticisms into the analysis, I do not directly discuss the leading proponents of repealing the deduction altogether. Among the best-known works to this effect are C. Harry Kahn, Personal Deductions in the Federal Income Tax (1960); Mark G. Kelman, Personal Deductions Revisited: Why They Fit Poorly in an “Ideal” Income Tax and Why They Fit Worse in a Far from Ideal World, 31 Stan. L. Rev. 831 (1979); Paul R. McDaniel, Federal Matching Grants for Charitable Contributions: A Substitute for the Income Tax Deduction, 27 Tax L. Rev. 377 (1972); and Stanley S. Surrey, Tax Incentives as a Device for Implementing Government Policy: A Comparison with Direct Government Expenditures, 83 Harv. L. Rev. 705 (1970). I also do not engage at much depth proposed alternatives to the deduction such as matching grant or voucher schemes, except to consider in Part V their implications for foreign contributions.

72 Professor Thomas Griffith was the first—and, to my knowledge, last—commentator to point out that the leading theories of the deduction all “share [this] critical flaw: none is grounded on a coherent normative principle.” Thomas D. Griffith, Theories of Personal Deductions in the Income Tax, 40 Hastings L.J. 343, 345 (1989).
A. Andrews’s Base-Defining Rationale

Although its popularity has ebbed in recent years, the most famous theory of the charitable deduction remains that of William Andrews, whose 1972 article *Personal Deductions in an Ideal Income Tax* sought to justify the charitable and medical deductions on tax-base-defining grounds.\(^\text{73}\) Andrews begins by adopting, like many tax theorists, Henry Simons’s definition of income as the sum of personal consumption plus wealth accumulation over a given time period.\(^\text{74}\) He then reasons that charitable contributions should be excluded from the concept of taxable personal consumption because they divert resources from private, preclusive appropriation to “common goods”—goods and services “whose enjoyment is not confined to contributors nor apportioned among contributors according to the amounts of their contributions.”\(^\text{75}\) Whatever psychic or reputational benefit a taxpayer might receive from donating to charity is irrelevant; she does not consume anything of scarcity in transferring economic resources from her own household to society at large. Nor does she increase her net worth. Applying the Simons formula, therefore, the income she devotes to charity does not constitute taxable income: it is not part of the tax base.\(^\text{76}\) To bolster this formalistic conclusion, Andrews also appeals to economic neutrality. If the taxpayer had forgone income in order to donate more time to charity, that volunteering would not have been taxed, so donations of income should likewise escape taxation.\(^\text{77}\) Andrews’s argument leads him to criticize the percentage limits on the deduction and the ability of appreciated property gifts to be deducted for fair market value,\(^\text{78}\) but otherwise to find our deduction system essentially sound.

More important, Andrews’s argument leads him to reject the conventional view of the charitable deduction as a government subsidy (or “tax expenditure”\(^\text{79}\)) because the tax-base-defining logic implies that the


\(^{74}\) Id. at 313, 320–21.

\(^{75}\) Id. at 346.

\(^{76}\) Id. at 346, 375–76.

\(^{77}\) Id. at 352–54.

\(^{78}\) Id. at 372–74

\(^{79}\) Tax expenditures are deviations from the normal tax structure that are “designed to favor a particular industry, activity, or class of persons” and can be seen as economically equivalent to direct government outlays. Stanley S. Surrey & Paul R. McDaniel, *Tax Expenditures* 3 (1985). The canonical presentation of the tax expenditure view appears in Stanley S. Surrey, *Federal Income Tax Reform: The Varied Approaches Necessary To Replace Tax Expenditures with Direct Governmental Assistance*, 84 Harv. L. Rev. 352, 381–94 (1970) (critiquing the charitable deduction specifically); and Surrey, *supra* note 71 (critiquing tax expenditures generally). Because Professor Surrey, a Harvard colleague of Andrews, was such a fierce and respected critic of indirect subsidies like the deduction, Andrews was working within an academic context in which the tax expenditure view must have carried a strong anti-deduction taint.
government never has a claim to donated monies. In this, Andrews echoes proponents of the original deduction in 1917 who saw private donations as coming from the “surplus” of individual income. Whereas subsidies require extrinsic justifications, the charitable deduction is, for Andrews, intrinsic to the tax system. It is a “matter of principle,” of conceptual integrity, and so needs no further account. To the contrary, not to have the deduction would be the policy requiring justification.

Three criticisms in particular have blunted the normative pull of Andrews’s theory. First, as Professor Mark Kelman originally pointed out, Andrews’s definition of consumption as the preclusive appropriation of real economic resources is far narrower than Andrews seems to realize and would exclude many acts we commonly think of as consumption. On the other hand, it might include some forms of charitable giving; “looking altruistic,” after all, is itself a scarce resource. Furthermore, Andrews’s definition of consumption disregards the fundamental tax-law principle that once a taxpayer voluntarily takes dominion over resources, her subsequent use of those resources is irrelevant. Finally, as Professor Mark Gergen has illustrated, “all Andrews really does is to repackage the arguments for subsidizing charities.” That is, Andrews advocates allowing deductions for charitable gifts precisely because these gifts generate collective benefits (“common goods”), which, as we will see in Section C, is the basic subsidy theory. Yet by avoiding the subsidy label, Andrews avoids doing the hard work of defining which types of collective benefits and which types of organizations should merit deductions. Subsequent scholars have also impugned Andrews’s economic neutrality argument by noting that economic neutrality has never been a very meaningful tax principle—imputed income and leisure, for example, get a free ride—though this argument was less important to Andrews.

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80 Andrews, supra note 73, at 345–46, 365–67. For any tax-base-defining view, that is, “the deduction is allowed precisely because we have enacted a tax on ‘income,’” the concept of income demands (or at least permits) a deduction for charitable contributions.” Johnny Rex Buckles, The Community Income Theory of the Charitable Contributions Deduction, 80 IND. L.J. 947, 952 (2005).

81 See FISHMAN & SCHWARZ, supra note 23, at 672.


83 Kelman, supra note 71, at 844–46.

84 Id. at 880.

85 Id. at 835, 839–42. Justice Holmes provided the classic formulation of the principle that ability to control the disposition of assets is the touchstone of taxability in Lucas v. Earl, 281 U.S. 111, 114–15 (1930).


87 See, e.g., Wiedenbeck, supra note 43, at 92.
Nevertheless, Andrews’s thesis lives on. His article continues to frame scholarship on the charitable deduction, and indeed on personal deductions more generally, and numerous tax scholars still accept his base-defining rationale.88 Professor Edward McCaffery has recast Andrews as the founder, albeit unconsciously, of tax interpretivism.89 Professor Johnny Rex Buckles has recently proposed a “community income” tax-base-defining defense of the deduction.90 John Simon has extended Andrews’s argument to the estate tax deduction, and linked it with income-measurement theories of the exemption.91 Simon has also come to Andrews’s aid with two descriptive defenses for the base-defining rationale: it may not conflict with the percentage limitations on deductibility if these limitations are meant only as checks on “some forms of abuse that are correlated with donations beyond certain percentages of incomes or estates”,92 and it comports with the common law idea that money devoted to God—and much charitable giving is religious giving—has “ceased to be under human control.”93

B. Bittker’s Praiseworthy Donor

In the same year that William Andrews published Personal Deductions in an Ideal Income Tax, fellow tax luminary Boris Bittker proposed another novel defense of the charitable deduction.94 While Bittker’s theory has not commanded the attention that Andrews’s theory has, it remains a foundational view.95 Like Andrews, Bittker believes that money donated to charity should not be counted as taxable consumption under the Haig-Simons formula. Unlike Andrews, however, he arrives at this conclusion not as a matter of logic, but as a matter of judgment. Money donated is qualitatively different from money spent; it does not deserve to be taxed. Why not? Because, first, by handing over her resources to charity, the

90 Buckles, supra note 80, at 970–71 (“My thesis is that community income ought not to be included in the individual income tax base because it is properly attributed not to individual community members, but to the community itself, and the community is not an appropriate object of taxation.”).
91 John G. Simon, Charity and Dynasty Under the Federal Tax System, PROBATE LAW, Summer 1978, at 1, 22–23; Simon, supra note 18, at 68.
92 Simon, supra note 18, at 74 n.8 (paraphrasing the argument in a personal memo by Professor Michael Krashinsky).
93 Id. at 75–76.
95 See Gergen, supra note 86, at 1394, 1426–33; Saul Levmore, Taxes as Ballots, 65 U. CHI. L. REV. 387, 404 n.54 (1998); McNulty, supra note 68, at 241–42 & n.55; Simon, supra note 18, at 73–74; Simon, Dale & Chisolm, supra note 3, at 20.
donor loses the benefit of those resources and so is made worse-off, regardless of her motive for giving. Second, inasmuch as charitable contributions represent a discharge of moral obligation, they cannot be said to be voluntary expenditures, and as a matter of basic fairness the government should not tax what is not voluntary. And third, “something can be said for rewarding activities which in a certain sense are selfless, even if the reward serves no incentive function.” For Bittker, these three equitable considerations are necessary and sufficient to justify an unlimited charitable deduction, irrespective of its second-order consequences. Bittker also makes several policy arguments for the deduction (that it enhances economic neutrality and citizen empowerment), and he defends against several policy criticisms (that the deduction is inefficient and violates progressivity), but these points were already conventional by 1972. The equitable arguments are what mark Bittker’s theory.

Each of Bittker’s three equitable arguments is subject to powerful rebuttal. The first argument is vulnerable to the charge that the tax system should not be concerned with the subjective satisfaction people get from their use of money and, as Bittker acknowledges, to criticism from the social-science crowd that charitable spending is indistinguishable from other forms of spending. The second argument, that charitable contributions should not be taxed because they derive from moral obligation, loses much of its force when one considers just how many of our (non-deductible) expenditures derive from some source of felt obligation. Or, more powerfully, from biological obligation: there is no food-and-shelter deduction. Bittker’s third equitable argument, that giving should be rewarded as a praiseworthy act, follows from his first two claims. If by donating you are made worse off, and if there is a moral undergirding to this, then the act of donating looks a lot like selflessness. Bittker, however, never supplies the further argument needed to show why selflessness should command a tax break. Wouldn’t a deduction only sully things?

Yet Bittker’s equitable arguments are not completely overwhelmed by these criticisms. In the years since 1972, Bittker’s notion that charitable giving is qualitatively different from regular spending has gained force among social scientists, so that the concept of “impure altruism” is now

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96 Bittker, supra note 70, at 46–49.
97 Id. at 58–60.
98 Id. at 60.
99 Id. at 62. Bittker also defends the charitable deduction for corporations, not as a matter of equity but on the view that their contributions represent business expenses. Id. at 57–58.
100 Id. at 60.
widely credited.\textsuperscript{101} Selflessness commingles with social pressure, guilt, sympathy, and the desire for a “warm glow” in a donative calculus not readily reducible to rational utility maximization.\textsuperscript{102} Applying these insights, Mark Gergen has defended the idea that the tax system should take into account subjective satisfaction when feasible, and argued that general rules based on well-founded psychological assumptions—in this case, that giving money away will lead to less satisfaction than retaining it—can serve adequately as proxies.\textsuperscript{103}

Gergen may be Bittker’s best ally in the academy, but in the general public Bittker needs no reinforcement to imbue his argument with continued valence, for mere intuition will suffice. At an intuitive level, many, if not most Americans buy his premise that charitable donors deserve a deduction because donated money is not consumption but something else, something self-sacrificial and good, and the tax code should honor this.\textsuperscript{104}

C. Subsidy Theories

Andrews’s and Bittker’s theories are essentially individualistic. As matters of tax logic (for Andrews) and tax equity (for Bittker), they hold that individual donors are owed a full deduction for all gifts to charity. Although Andrews and Bittker suggest that this arrangement would also be good for society, their donor-focused theories in no way depend on promotion of the social good; they are deontological defenses of the charitable deduction.

For most supporters of the deduction, this is far too abstracted an approach. In Congress, the courts, the media, and now academia, the deduction is widely viewed not as a means to reify the ideal tax base or reward praiseworthy donors, but as a tax expenditure used to promote charitable giving and thereby the ultimate well-being of society. That is,\

\textsuperscript{101} The economist most associated with this concept is James Andreoni. See, e.g., James Andreoni, \textit{Giving with Impure Altruism: Applications to Charity and Ricardian Equivalence}, 97 \textit{J. Pol. Econ.} 1447 (1989).


\textsuperscript{103} Gergen, \textit{supra} note 86, at 1426–28. Gergen was writing before Andreoni and so did not apply the “warm glow” idea specifically, but he was working off a growing literature that questioned the importation of economic utility maximization models into the charitable giving context. See id. at 1428–33.

\textsuperscript{104} See Buckles, \textit{supra} note 80, at 952 (“There seems to be a deeply held conviction in this country that taxpayers who donate to charity generally should not be subject to the same income tax liability as similarly situated taxpayers who do not.”). In a related context, Professor Rob Atkinson has argued that “we are likely to be uncomfortable with theories that explain our intuitions about ‘charity’ out of the charitable exemption.” Rob Atkinson, \textit{Theories of the Federal Income Tax Exemption for Charities: Thesis, Antithesis, and Synthesis}, 27 \textit{Stetson L. Rev.} 395, 399 (1997). Professors James Fishman and Stephen Schwarz note that arguments from intuition have played an important role from the start in U.S. debates over nonprofit tax privileges. FISHMAN & SCHWARZ, \textit{supra} note 23, at 68.
the deduction is widely viewed as a government subsidy, which must stand or fall on consequentialist grounds. The subsidy view finds support in the deduction’s legislative history and in its structure—for instance, the inclusion of corporate donors and the exclusion of mutual benefit organizations. The Supreme Court, moreover, has unequivocally indicated that it sees both the charitable deduction and the nonprofit tax exemptions as subsidies. In *Regan v. Taxation with Representation*, the Court proclaimed that “[b]oth tax exemptions and tax deductibility are a form of subsidy that is administered through the tax system. . . . Deductible contributions are similar to cash grants of the amount of a portion of the individual’s contributions.” In the immediately following decision, *Bob Jones University v. United States*, the Court reiterated that “[w]hen the Government grants exemptions or allows deductions all taxpayers are affected; the very fact of the exemption or deduction for the donor means that other taxpayers can be said to be indirect and vicarious ‘donors.’”

Subsidy-based arguments for the deduction, consequently, need to explain why the benefits of compelling “vicarious” donations—of forcing taxpayers to cross-subsidize each other’s charitable contributions—exceed the costs; they need to show why the United States would be a worse place if there were no charitable deduction. This is not as straightforward a task as it might seem, for the deduction, as observers have long pointed out, is a highly atypical, highly problematic subsidy.

The most obvious concerns are equity and fairness: only itemizing taxpayers, who tend to be wealthier, can claim the deduction, and the size of the deduction varies with the taxpayer’s marginal rate, meaning

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108 *Bob Jones*, 461 U.S. at 591.

Higher earners get to deduct at higher rates. This latter characteristic, critics charge, renders the deduction an “upside-down” subsidy. Some think this deviation from the ability-to-pay principle inequitable and undemocratic in itself; others think it inequitable and undemocratic in effect, as a mechanism by which the rich preserve, if not exacerbate, their cultural, social, and educational dominance. Second, unlike with most other matching grant programs, with the deduction the government retains hardly any control over its funds. So long as the charity and the contribution meet the terms of § 170, the government makes the “grant” and lets the charity do with the money what it will. Other than through § 170’s categorical constraints on which organizations may receive a deductible gift, the deduction is in no way linked to the recipient’s quality, cost-effectiveness, neediness, redistributiveness, public good characteristics, or any other such metric. Nor does any performance monitoring happen after the fact. The inevitable result is allocative inefficiency: “Sectarian, provincial, eccentric, or frivolous uses of money may be aided along with the most worthy”—and even if the most worthy organizations are, through donors’ savvy, disproportionately aided, many still believe it inevitable that the nonprofit sector will be less productively efficient than the for-profit sector owing to the former’s nondistribution constraint. Third, the subsidy is opaque, in that taxpayers never know which charities the government is supporting, and to what extent, through other taxpayers’ deductions. Fourth, the subsidy is almost completely decentralized. Within the prescribed limits, the deduction follows all charitable donations made by all taxpayers, so that the total subsidy comprises millions of uncoordinated, individualized subsidies. Fifth, inasmuch as the subsidy represents state support for religious gifts—by far the largest category of contributions—it raises possible First Amendment entanglement concerns. Finally, some have speculated that charitable

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113 See, e.g., Evelyn Brody, Agents Without Principals: The Economic Convergence of the Nonprofit and For-Profit Organizational Forms, 40 N.Y.L. SCH. L. REV. 457, 535 (1996); Hansmann, Economic Theories, supra note 24, at 38. The nondistribution constraint refers to the statutory bar preventing nonprofits from distributing residual earnings to owners. As the Supreme Court has noted, most nonprofit scholars now follow Hansmann in identifying it as the defining characteristic of nonprofit organizations. Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 675 n.6 (1990).

114 See Surrey, supra note 71, at 714 n.9 (arguing that the tax expenditures occasioned by the charitable deduction should be seen as equivalent to direct government subsidies for Establishment Clause purposes). For an overview of the law governing the deductibility of gifts to religious
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giving, tethered as it is to a rich amalgam of moral, religious, and communal norms, is tax-price inelastic, so that deductions will do little to increase charitable giving, though they may do quite a lot to distort or trivialize it. 115

On ethical, pragmatic, and constitutional levels, then, the charitable deduction appears to be a particularly vexing form of subsidy. Yet most subsidy theorists, including the Supreme Court, have defended the deduction on account of its “community benefits” or “public benefits.” 116 All subsidy theories start from the proposition that, on account of market failures and government failures, certain public goods provided by nonprofits will be underfunded in the absence of legislative intervention. 117 From this baseline insight, they must then show that the deduction creates benefits to the community sufficient to outweigh whatever inefficiencies, inequities, improprieties, or revenue losses it might engender, and sufficient to make it more attractive than alternative forms of intervention.

The community benefit literature is as heterogeneous as it is voluminous, and has never before been systematically parsed. There are two main types of community benefit theories: theories that emphasize the deduction’s benefits to the government, in the form of reduced programmatic or revenue burden; and theories that emphasize the deduction’s benefits to the broader public, in the form of increased social welfare, redistribution, pluralism, or some other such desideratum. The first set of theories falls under the rubric of “treasury efficiency.” The second set of theories falls under no established analytic frame. I offer

organizations, see Allan J. Samansky, Deductibility of Contributions to Religious Institutions, 24 VA. TAX REV. 65 (2004).


116 See FISHMAN & SCHWARZ, supra note 23, at 692; SALAMON, supra note 9, at 3–4; Colomb, supra note 14, at 692; Simon, supra note 18, at 75–76; Simon, Dale & Chisolm, supra note 3, at 23–34. The Supreme Court has used the term “public benefit.” See, e.g., Bob Jones Univ. v. United States, 461 U.S. 574, 591–92 (1983). I prefer “community benefit,” the Treasury standard for granting organizations § 501(c)(3) status, see Rev. Rul. 69-545, 1969-2 C.B. 117, because it better conveys how these inquiries are implicitly bounded by the notion of a relevant community. The origins of the Treasury’s community benefit standard date back to late-19th-century English common law. FISHMAN & SCHWARZ, supra note 23, at 121.

117 I discuss the major government failure theories infra Part III.C.2. For a succinct summary of the market failures to which nonprofit organizations respond, see Avner Ben-Ner & Benedetto Gui, The Theory of Nonprofit Organizations Revisited, in THE STUDY OF NONPROFIT ENTERPRISE: THEORIES AND APPROACHES 3, 5–16 (Helmut K. Anheier & Avner Ben-Ner eds., 2003); and Nina J. Crimm, An Explanation of the Federal Income Tax Exemption for Charitable Organizations: A Theory of Risk Compensation, 50 FLA. L. REV. 419, 440–43 (1998). The most conspicuous of these market failures are (1) producers’ inability to prevent freeriding for nonrival, nonexclusive goods; (2) producers’ and consumers’ disinclination to internalize the externalities generated by their behavior; and (3) information asymmetries that prevent consumers from being able to trust for-profit firms to provide certain goods and services in sufficient quality or quantity.
here what I believe to be the most productive taxonomy, disaggregating these theories by their underlying normative commitments—utilitarianism, distributive justice, or communitarianism. All of the subsidy theories share an instrumental approach: they support the charitable deduction inasmuch as it generates the desired extrinsic outcome, and no further. And all of these theories, it bears repeating, are partial theories—inadequate to justify the charitable deduction in its present form, silent on the appropriate status of internationally-targeted donations.

1. Treasury Efficiency

The oldest and most determinate of the subsidy theories rests on the notion that the deduction indirectly generates charitable goods and services that the government would otherwise have to pay for directly. We saw this replacement-of-government-burdens notion earlier, in the legislative history of the water’s edge policy, where the House Report stipulated: “The exemption from taxation of money or property devoted to charitable and other purposes is based upon the theory that the Government is compensated for the loss of revenue by its relief from financial burden which would otherwise have to be met by appropriations from public funds.” I noted then that, as a justification for the charitable deduction, the replacement-of-government-burdens argument is both over- and under-inclusive. Nonetheless, it contains a core of truth. If the charitable deduction did not exist, the evidence we have on donor tax-price elasticities—estimated in most empirical studies to have an absolute value greater than 1.0—suggests that overall contributions would decline by 25% or more. Many nonprofits would have to contract. Some might fold.

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118 Utilitarianism, distributive justice, and communitarianism are, of course, major philosophic constructs, and I am only able to treat them here in a general fashion. This is not such a problem, however, because that is how they have been invoked in the deduction literature—as general normative guides, not as rigorous principles of tax policy. I aim to make explicit in this Section the way in which these constructs have implicitly undergirded much of subsidy theory.

119 H.R. Rep. No. 75-1860, at 19–20 (1938); see also supra note 54 and accompanying text. Many courts and commentators have subsequently echoed this argument, for the exemptions as well as the deduction. See FISHPMAN & SCHWARZ, supra note 23, at 68, 71, 672–73; Chang et al., supra note 40, at 567; Salamon & Flaherty, supra note 39, at 28–29; Wiedenbeck, supra note 43, at 93–95.

120 See supra Part II.C. (penultimate paragraph).

121 Although there is some disagreement between panel studies and cross-section time-series studies, most research has found donor tax-price elasticities in the –1.0 to –1.5 range, with averages around –1.25 and wealthier donors more price-sensitive. For summaries of the literature, see CLOTTFLER, supra note 3, at 49–63; April, supra note 25, at 857–59; Christopher Jencks, Who Gives to What?, in THE NONPROFIT SECTOR, supra note 18, at 321, 328–32; Richard S. Steinberg, Economic Theories of Nonprofit Organizations: An Evaluation, in THE STUDY OF NONPROFIT ENTERPRISE, supra note 117, at 277, 283–84; and Wiedenbeck supra note 43, at 95 n.41. Fishman and Schwarz indicate that in 2001 individuals and corporations together gave $170 billion to charity, while in 2003 they received $41 billion in income tax savings from the deduction. FISHPMAN & SCHWARZ, supra note 23, at 12 tbl.1.2, 689. If one estimates that 80% of the $161 billion in individual donations came from itemizers, see supra note 109, that puts the ratio of deduction savings (~$40 billion) to total deductible giving (~$150 billion) at approximately 30%. This figure would be higher if gift, estate, and state tax
Given the public good character of much nonprofit activity and the United States’ intense reliance on the nonprofit sector for the provision of basic social services, the resultant level of nonprofit activity would be both economically suboptimal and, for some citizens, a threat to sustenance. The government would face severe political pressure to make up for at least some of the sector’s contraction though direct subsidies or direct provision. Either way, the revenue savings from cutting the deduction would be eroded.

Implicit in the findings that donor tax-price elasticities exceed 1.0 (in absolute value) is the existence of treasury efficiency, the idea that the deduction stimulates more in donations than it consumes in tax revenue. The economic theory behind treasury efficiency is straightforward. Tax inducements such as the charitable deduction generally have income and substitution effects, both of which should increase giving if it is a normal good. The greater the elasticity of giving, the more additional giving will occur per dollar of lost tax revenue, and so the greater the treasury efficiency.

This line of argument bolsters the case for the deduction, but not by much. Treasury efficiency is a very narrow form of efficiency. It suggests that the deduction maximizes the ratio of charitable giving to government spending, but fails to address the more significant ratio of charitable output to total spending—what might be termed investment efficiency. If transaction costs associated with the deduction are sufficiently high, treasury efficiency and investment efficiency may diverge. Nonprofit organizations often spend a high proportion of their budgets on fundraising deductions were included. Assuming (conservatively) an average tax-price elasticity of −1.0, elimination of the deduction would, ceteris paribus, decrease charitable giving by the same 30%. This calculation is crude, but the result is in line with Charles Clotfelter’s and Martin Feldstein’s econometric simulations of the effects of repealing the deduction, which predict that total giving would fall by about one quarter. 

122 See Sokolowski & Salamon, supra note 4 (describing the U.S. nonprofit sector in comparative context).
124 More sophisticated proponents of treasury efficiency compare the deduction to the financing of nonprofits through tax-funded government grants, and argue that donations are sufficiently price-elastic and crowding out sufficiently large that the deduction generates higher nonprofit revenues per tax dollar. See Steinberg, supra note 121, at 295 (summarizing econometric studies).
and administration. By decentralizing the allocation of charitable contributions, the deduction reduces the government’s administrative costs, but it drives up nonprofits’ overhead by magnifying the importance of broad-based public fundraising. Hence, while tax scholars who support the charitable deduction have often touted it as a low-cost means to subsidize giving, it is at least plausible that a direct subsidy or direct provision alternative would have superior investment efficiency.

2. Utilitarianism

Investment efficiency may be a more meaningful evaluative construct than treasury efficiency, but it too provides a limited window onto the desirability of the deduction. A more robust conception of efficiency, notes Mark Gergen, would look to see “not how much extra money is spent on charity as a result of a deduction [but] rather, how much people benefit from that extra expenditure compared to the alternative use of the lost revenues.” This aggregate cost-benefit analysis is a utilitarian inquiry; the normative criterion on which it evaluates the deduction is social welfare maximization. It is by now the most important theory of the deduction in the literature.

Scholars who have defended the deduction on utilitarian grounds—almost never explicitly, for deduction theorists have been coy about their normative premises—have raised two main arguments. The first concerns the mix of goods and services generated by the deduction. Professor Burton Weisbrod has famously argued that because government entities in a majoritarian democracy tend to provide public goods only at the level that satisfies the median voter, nonprofit organizations arise to fulfill residual demand with supplementary provision. Nonprofits, and

125 The National Center for Charitable Statistics notes that watchdog groups typically recommend that nonprofits spend no more than 40% or 50% of their annual revenues on fundraising and administration. NCCS FAQs, http://nccsdataweburban.org/FAQ/Detail.php?category=48&itemID=409 (last visited Feb. 25, 2006). That this is the benchmark implies that a not insignificant percentage of nonprofits spend 40% or more on overhead.

126 See sources cited supra note 123.

127 Gergen, supra note 86, at 1404; see also CLOFFELTER, supra note 3, at 281 (echoing Gergen’s call to widen the efficiency inquiry); Wiedenbeck, supra note 43, at 95 & n.41 (same).

128 A more accurate label for the family of theories discussed in this Subsection might be “consequentialism,” given that classical utilitarianism posits a single metric of social welfare, and happiness, wealth, human flourishing, and preference satisfaction (among others) are all plausible grounds on which to justify the charitable deduction. I stick with “utilitarianism” because of its familiarity and because I want to distinguish this set of theories—which largely focus on the efficient provision of public goods, see Gergen, supra note 86, at 1394—from the distributive and communitarian theories discussed in the following Subsections.

129 See supra note 72 and accompanying text.

130 Burton A. Weisbrod, Toward a Theory of the Voluntary Non-Profit Sector in a Three-Sector Economy, in ALTRUISM, MORALITY, AND ECONOMIC THEORY 171 (Edmund S. Phelps ed., 1975). But cf. Hansmann, Economic Theories, supra note 24, at 28–29 (discussing the two main problems with Weisbrod’s theory: many nonprofits seem to provide private, not public goods—especially commercial
the deductions that support them, correct for government failure by facilitating the closer matching of voter preferences. The more heterogeneous the community, the more value nonprofits will add. The charitable deduction also corrects for another form of governmental failure, by stimulating the production of goods and services that are widely demanded but that the government is constrained from providing by the Constitution (as with religion) or by its very nature (as with monitoring and criticism of the government itself). In its facilitation of a larger, richer mix of public goods than the government alone would provide, the deduction’s opaqueness may prove a virtue. The reality of taxpayers being coerced into supporting each other’s pet causes—some of which they may not care for, some of which they may positively dislike—is masked by the deduction’s decentralized operation. As a matter of game theory and practical politics, this opacity likely makes the deduction a more effective broker of compromise, and a more powerful enhancer of social welfare, than a more explicit process would be.

The second main strain of utilitarian argument for the charitable deduction focuses not on the quantity and type of outputs that the deduction supports, but on the quality of these outputs. As a market-based mechanism for allocating the subsidy, the deduction spurs nonprofits to compete for donations from individual donors, rather than from a centralized charity apparat. If individual donors are reasonable judges of nonprofit performance, higher-quality organizations should benefit from this system. And, indeed, the deduction helps turn donors into better judges of performance because it empowers them as consumers and raises the stakes of their decisional role. The deduction’s “ongoing” nature also enhances decisionmaking, Professor Saul Levmore has argued, by allowing the uncertain donor to “receive information regarding charities’ receipts as the year progresses” and thereby assess in a dynamic process which nonprofits, whose share of the sector has risen; and the theory does not explain why nonprofit, rather than for-profit firms fill the unsatisfied demand).

131 See Bittker, supra note 70, at 40–42; Simon, supra note 18, at 76; William Vickrey, Private Philanthropy and Public Finance, in ALTRUISM, MORALITY, AND ECONOMIC THEORY, supra note 130, at 149, 158–59. Yet another form of governmental failure (related to Weisbrod’s median voter problem but arguably distinct) that the charitable deduction may help to remedy is the political and bureaucratic tendency to emphasize immediate, quantifiable results, at the expense of public goods that yield diffuse benefits over a long time horizon. It is unlikely that the United States’ liberal arts system of higher education, for example, would have turned out so stable and robust if not for the deduction’s support of private philanthropy to universities.

charities would be able to use her donation most effectively. In addition, the deduction incorporates two legal checks on quality in the utilitarian sense of aggregate welfare effects. The common law “public policy” doctrine, articulated by the Supreme Court in *Bob Jones University v. United States*, disallows deductions for gifts to organizations that violate fundamental public policies such as racial nondiscrimination. The statutory prohibition on deductions for gifts to political or lobbying organizations, meanwhile, prevents subsidies from flowing to causes that will have a predictably widespread, mobilized opposition—causes whose furtherance will substantially decrease as well as increase social welfare. The nonpartisan charities that garner the vast majority of the deduction subsidy are more likely to command a broad base of support or, at least, not to arouse a broad base of opposition.

Combining these two strains of utilitarian argument, the deduction is seen to foster community benefits by generating a greater quantity, quality, and diversity of public goods than would result in its absence. Although it is practically impossible to measure these benefits or even to locate their recipients, the basic argument is sensible: the nonprofit activity facilitated by the deduction contributes to the increase of social welfare both by fulfilling the demand schedules of a greater number of individuals (a pluralism of ends) and by generating innovation and experimentation in the delivery of goods and services, thereby spurring the marketplace to higher-quality modes of production (a pluralism of means). But the utilitarian defense of the deduction is vulnerable at the level of fact as well as the level of political ethics.

At the level of fact, aspects of the deduction work to decrease, not increase, social welfare. Subsidizing nonprofits clashes with our general preference for majoritarian governance and may exacerbate factionalism; it increases the flow of funds to a charitable marketplace that may be neither productively efficient nor amenable to objective quality control; it raises serious equity concerns and may inspire resentment over the reinforcement of cultural, social, and economic hierarchies; and if social welfare maximization is the goal, it is unclear why private benefit transactions are

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133 Levmore, *supra* note 95, at 411.
135 As I note in the following Subsection on distributive justice, a more compelling justification for the exclusion of political activity—a classic, if costly public good—is the concern not to subsidize disproportionately the politics of the rich. But the utilitarian interpretation may help explain why the government does not provide a more equitable (“right-side-up”) subsidy for political contributions, as through a tax credit.
136 See Andrews, *supra* note 73, at 314; Henry Hansmann, *The Rationale for Exempting Nonprofit Organizations from Corporate Income Taxation*, 91 Yale L.J. 54, 86 (1981); Wiedenbeck, *supra* note 43, at 89 (“Obviously any attempt to allocate the benefits conferred by charitable organizations would quickly become hopeless or arbitrary—who benefits, and in what degree, from basic scientific research, or a liberal college education, or the community conscience instilled by religious institutions?”).
prohibited or why the deduction is subject to percentage limits. More fundamentally, the deduction is in no way linked to the degree to which the donee needs subsidization (for example, because of its outputs’ susceptibility to freeriding) or the degree to which the donee may be expected to create collective benefits. This is, for the efficiency-minded, the scandal of the charitable deduction: if § 170 aspires to rule utilitarianism, it is hard to discern the logic behind its choice of rules.

Except for a crude public charity qualification, the deduction does not try to identify organizations—much less activities or units within organizations—that will make best use of the subsidy.137 To the contrary, it supports many nonprofits known to generate little in the way of collective benefits, either because they carry high overheads or because their benefits are largely confined to a narrow class of patrons. Think of an opera house, for example, or indeed of most cultural institutions located in affluent neighborhoods. Moreover, not only does the deduction fail to target organizations that generate widespread or deep increases in social welfare; the subsidy it compels also in certain cases serves to decrease welfare. Because of the presence of “radically or marginally disinterested parties,” as Mark Gergen observes, the “deduction never can be justified as a Pareto improvement” that makes some better off and none worse off, and is only justifiable to the utilitarian, if at all, under the less demanding Kaldor-Hicks standard of net welfare improvement.138

This is a significant concession. At the level of ethico-political theory, of course, not everyone accepts the utilitarian telos of social welfare maximization, for tax or any other policy. Adopting a Kaldor-Hicks standard, as a utilitarian proponent of the deduction must, is especially problematic. Even if this proponent believes that meaningful data can be gleaned on who benefits from the deduction and to what extent, and that the deduction’s net benefits exceed that of any alternative policy—contestable beliefs, both—she still has to reckon with the existence of

137 In the context of the nonprofit tax exemptions, Professors Mark Hall and John Colombo have argued that an organization’s donation-dependence (or “donativeness,” see supra note 24) offers the best metric for evaluating its claim to subsidy. Mark A. Hall & John D. Colombo, The Charitable Status of Nonprofit Hospitals: Toward a Donative Theory of Tax Exemption, 66 WASH. L. REV. 307 (1991) [hereinafter Hall & Colombo, Charitable Status]; Mark A. Hall & John D. Colombo, The Donative Theory of the Charitable Tax Exemption, 52 OHIO ST. L.J. 1379 (1991) [hereinafter Hall & Colombo, Donative Theory]. Because the deduction, even more directly than the exemptions, will tend to reward noncommercial organizations, one could likewise envision § 170 as using donative thickness as a proxy for subsidy deservedness. But § 170 does not actually tie the deduction to donativeness, and there is no reason to believe that a more centralized method of allocating the charitable subsidy would not, on average, target relatively more donative recipients.

138 Gergen, supra note 86, at 1412. As Gergen explains, the Kaldor-Hicks inquiry asks “whether winners under the policy [in question] gain enough in dollars to pay off the losers and still be ahead. (Actual payment is not required.) If winners win more than losers lose, a policy is a Kaldor-Hicks improvement. If no further improvement is possible a position is Kaldor-Hicks efficient.” Id.
taxpayers who will disapprove of various organizations (and various donors) being supported by their money. Many observers—almost all libertarians, for instance—reject as unethical the Kaldor-Hicks assumption that the state may injure one person if doing so benefits another person more.\footnote{See id. at 1413. But cf. Hall & Colombo, Donative Theory, supra note 137, at 1428–30 (arguing, counterintuitively, that a libertarian in the mold of Robert Nozick would approve of tax exemptions for sufficiently donative nonprofits).}

While virtually any tax policy will disbenefit some group, the charitable deduction’s exceptionally permissive, pluralistic system for allocating its subsidy renders exceptionally stark its deviation from the Pareto ideal. Morally and empirically, the utilitarian defender of the deduction is on shaky ground.

3. Distributive Justice

In response to several of the weaknesses in the utilitarian position, some proponents of the charitable deduction have shifted the emphasis from the utility of the entire society to the utility of its worst-off members. Professors Thomas Griffith and Anthony Atkinson have explicitly made this “Rawlsian” move; many others have incorporated elements of distributive justice sub silentio into their theories of the deduction.\footnote{A.B. Atkinson, The Income Tax Treatment of Charitable Contributions, in PUBLIC AND URBAN ECONOMICS 13 (Ronald E. Grieson ed., 1976); Griffith, supra note 72; see also Simon, Dale & Chisolm, supra note 3, at 30–37 (synopsizing the role of redistribution in theories of the nonprofit sector and of the charitable deduction). My warning about the looseness of the philosophical terms employed in this Part, see supra note 118, may be particularly apt here. Unlike Professors Griffith and Atkinson, most deduction theorists concerned with distributional effects have not actually engaged distributive justice as a systemic concept. I classify these arguments under “distributive justice,” rather than “redistribution,” not to suggest any well-developed theory of procedural fairness or consequentialist desert, but rather to signify a normative commitment to progressive resource redistribution and to the charitable deduction as a vehicle thereof.}

Griffith offers a stylized utility model to demonstrate how the deduction might satisfy Rawls’s maximin principle, which “ranks social states according to the welfare of the least well-off individual in the social state” rather than weighting everyone’s welfare equally.\footnote{Griffith, supra note 72, at 386 (recapitulating JOHN RAWLS, A THEORY OF JUSTICE 75, 152–54 (1971)).}

The maximin principle preserves the welfarist ethic of utilitarianism and the view of social welfare as the summation of individual welfare functions—two premises which, again, some find suspect—but in evaluating public policies it assigns lexical priority to their effects on underprivileged groups. The question for the charitable deduction thus becomes: to what extent does it foster the advancement of or redistribution to these groups relative to alternative policies?

In what should by now be a familiar theme, the answer to this question is unclear. On the one hand, the tax savings produced by the deduction accrue disproportionately to the wealthiest taxpayers (and not at all to
those taxpayers who do not itemize), and many of the organizations that benefit from the deduction cater primarily to the wealthy. A significant portion of charitable contributions from wealthy donors goes to universities and cultural institutions—organizations that generate significant positive externalities but that do not do very much redistribution. Lower-income donors, by contrast, give mainly to local churches and community welfare agencies—organizations that generate more bounded positive externalities but that tend to be more focused on the needy. The deduction’s upside-down effect, accordingly, may on balance be good for utilitarianism, bad for distributive justice. Western European countries offer a suggestive counterexample to Rawlsian deduction theories: these countries have weaker deduction systems than the United States yet stronger social safety nets for their poor.

On the other hand, many charities subsidized by the deduction do cater to worse-off persons and thereby effect a progressive redistribution of resources. For every opera house in America, there are thousands of social welfare organizations. Section 170’s exclusion of political contributions prevents the rich from (directly) using the deduction to magnify their political clout. The prohibition on quid pro quo transactions guarantees at least a minimal degree of redistribution by channeling contributions toward activities that will benefit others, most often others who are of equal or lesser financial and social status relative to the donor. The Supreme Court’s public policy doctrine ensures that the deduction will not subsidize racially discriminatory organizations. If there were no deduction, as mentioned above, the evidence on donor tax-price elasticities

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143 While there are many types of nonprofits eligible to receive deductible gifts whose benefits are clearly non-redistributive, opera houses have come in for especially rough treatment in the literature. See, e.g., Brody, supra note 105, at 760; Colombo, supra note 14, at 670; Hansmann, Nonprofit Enterprise, supra note 24, at 856–57. This characterization of opera’s beneficiaries may not be entirely fair: Martha Nussbaum notes that “[m]ost opera companies have extensive programs in the public schools” and that certain opera houses have focused on working-class audiences. E-mail from Martha Nussbaum, Professor, University of Chicago, to David Pozen (June 30, 2006, 2:12 PM) (on file with Connecticut Law Review).

144 There is a vast literature on Americans’ giving patterns. For a concise summary of the class disparities and citations to studies, see Bullock, supra note 110, at 342–44.

145 Id. at 344.


148 See supra text accompanying note 134 (explaining the Supreme Court’s holding in Bob Jones University v. United States, 461 U.S. 574 (1983)).
suggests that less money overall would go to charity. And of the charity that would remain, it is not clear that it would be distributed as progressively. Saul Levmore has argued that the more control taxpayers exert over the objects of their munificence, the more likely they may be to tolerate redistribution and spending on public goods. Taxpayer empowerment, Levmore surmises, promotes the ends of distributive justice—and perhaps makes the deduction comport with a relaxed maximin principle. In this view, the “redistribution strategy” embodied in the charitable deduction can be seen not as a regressive ruse, but “as a precommitment device by a majority that knows that when left to its private devices it is not so mean-spirited after all.”

4. Communitarianism

Whether explicitly or implicitly, most nonprofit tax scholars and policymakers have operated from a normative baseline that is liberal welfarist—usually utilitarian, sometimes (quasi-)Rawlsian. There is, however, another major normative thrust in the literature, hinted at by countless writers yet even less fleshed out than the others, that supports the deduction without advancing the view of social welfare as an exclusive function of individual welfare. It is communitarianism.

Under an assortment of labels like “sociological” benefits, “secondary benefits,” and “metabenefits,” commentators have hailed the community benefits generated by the deduction and the exemptions that do not fit neatly into an efficiency framework. These benefits include organizational pluralism, altruism, sovereignty, and stability. Pluralism results from the decentralization of charitable funding and provision, altruism from the government’s symbolic and pecuniary reinforcement of

149 See supra note 121 and accompanying text.
150 Levmore, supra note 95, at 406.
151 Id.
152 See Griffith, supra note 72, at 386–87. Of course, I (like Griffith) mean this in a generalized sense; most tax analysts do not actually assess policies with reference to Rawls’s Theory of Justice or Mill’s Utilitarianism. Cf. supra notes 118, 140.
153 Colombo, supra note 14, at 692.
155 Pluralism has been the most ballyhooed of the sociological/secondary benefits. See id. at 403 & n.22 (providing citations); Levmore, supra note 95, at 404 n.54; Simon et al., supra note 3, at 24 (“The virtue of the nonprofit sector that is, perhaps, most often put forth as a secondary benefit worthy of support is pluralism.”); Turnier, supra note 88, at 1723, 1728–29; Wiedenbeck, supra note 43, at 96–97.
giving;\textsuperscript{157} sovereignty from the government’s subsidizing the nonprofit sector with only minimal regulation and oversight—treating it almost as a co-equal “third sector”\textsuperscript{158};\textsuperscript{159} stability from the preservation of a decades-old policy tradition in the face of enormous sectoral and societal change.\textsuperscript{159} For many commentators, these values are seen both as inherently meritorious (and worthy of subsidy) and as conducive to second-order values such as the creation of a kinder, gentler, more self-reliant populace and a richer, livelier, more participatory civil society—values which, in turn, support still higher-level values such as enhanced capacity for collective self-determination and increased levels of social capital. All of these benefits may well serve to increase prosperity and/or distributive justice in the long run and thereby feed back into utilitarian and Rawlsian arguments for the deduction. But they are more often praised without resort to either argument.

While the “sociological benefits” of the charitable deduction thus serve diverse ends and have been applauded by commentators of diverse ideological sensibilities, the normative framework that best encapsulates them is communitarianism. (Pluralism is the most difficult benefit to encapsulate because of its strong appeal across much of the ideological spectrum; my claim is that deduction theorists who have celebrated pluralism on grounds other than welfare maximization have tended to emphasize the communitarian values of local community building, cultural particularism, civic engagement, and republican public-spiritedness more than, say, the liberal values of choice, self-reliance, and private ordering.) Communitarian theories come in many varieties, but they share the common insight that human subjectivity is constituted by multiple, overlapping value sources, ranging from one’s family and friends to the national and international order.\textsuperscript{160} Within this schema, voluntary organizations play a crucial role mediating between lower- and higher-level value sources, between thicker, organic communities and thinner, politically constructed communities. Voluntary organizations, for the communitarian, provide unique spaces for the formation of communal relationships and morals and for the preservation of communal traditions.

\textsuperscript{157} See Rob Atkinson, \textit{Altruism in Nonprofit Organizations}, 31 B.C. L. REV. 501 (1990); Gergen, \textit{supra} note 86, at 1426–33. \textit{But cf.} Colombo, \textit{supra} note 14, at 691 (expressing skepticism that the deduction and exemption are able “to recognize altruistic behavior as opposed to selfish behavior”).


\textsuperscript{159} See Simon, \textit{supra} note 18, at 84; Stone, \textit{supra} note 105, at 1537–38.

and identities; they are necessary, though not sufficient, for human flourishing. By displacing the provision of public goods from the government sector to the nonprofit sector and by empowering and affirming charitable giving, the deduction fosters not only pluralism, altruism, sovereignty, and stability, but also the social solidarity, personal responsibility, and civic virtue that are the core values of the communitarian program.

Or, at least, the deduction would do so in an ideal world. Not all nonprofits breed civic virtue and social harmony; some nonprofits trumpet extreme voices or special interests and thereby exacerbate factionalism, the “dark side” of civic engagement. The charitable deduction, of course, makes no effort to distinguish between these two breeds of recipient. Because nonprofits have increasingly moved from local membership-based organizations to virtual advocacy organizations, their ability to enrich communal relationships and generate social capital has waned at the same time that their ability to polarize has grown. As a result, the deduction may be increasingly supporting less deserving organizations: it may be fostering the wrong kind of civil society, no matter how flush with cash. Add to this concern the standard allegations that the deduction acts to perpetuate elite domination (undermining social solidarity), to cheapen the act of giving (undermining personal responsibility), and to decrease the amount of volunteerism (undermining civic virtue), and the deduction begins to look less like a communitarian godsend and more like a communitarian nightmare.

As with utilitarian and Rawlsian theories of the deduction, there is a problem here at the level of ethico-political theory as well as the level of fact. Factually, as just suggested, it is unclear whether the deduction really does promote communitarian-friendly organizations. Theoretically, it is unclear whether, even if the deduction does do a better job than alternative policies of actualizing communitarian values, these values should trump the utilitarian concern with efficiency or the social-contractarian concern.
with distributive justice. The tension between organizational pluralism and social welfare is perhaps the most obvious, for the nonprofit marketplace does not weed out laggards like the for-profit marketplace, and the pluralist tent will inevitably embrace groups that are inefficient, extremist, and redundant.165 This tension surfaced dramatically in the Supreme Court’s Bob Jones decision, where Justice Powell, in concurrence, expressed skepticism that many nonprofits provide “a clear ‘public benefit’ as defined by the Court” yet nevertheless expressed his support for their subsidy, because these organizations provide an “indispensable means of limiting the influence of governmental orthodoxy on important areas of community life.”166 That no other Justices joined Powell’s opinion reflects how many deduction (and exemption) supporters are unwilling to sanction the categorical elevation of heterodoxy, or any other specific benefit, over the others.

IV. DEDUCTION THEORY AND INTERNATIONAL CHARITY

Having summarized the literature on the charitable deduction and drawn out its normative premises, I seek in this Part to complexify—and advance—the debate by internationalizing it. To be able to make this move, Section A first provides an overview of internationally-targeted donations: who donates abroad, to which organizations, and why. Applying the analytic taxonomy developed above, Section B evaluates the significance of cross-border giving under each of the leading theories. (I reserve for Part V considerations of whether alternative non-tax policies, such as greater direct government spending on foreign aid, might be more or less attractive than the current water’s edge deduction scheme.) My aim in Section B is to draw out the most significant ways in which the deduction theories illuminate the question of foreign giving and, conversely, to draw out the most significant ways in which this question illuminates the theories.

The subsidy theories pose an added challenge here as compared to Andrews’s and Bittker’s arguments, because in all consequentialist theories of the deduction, a crucial, yet heretofore overlooked threshold question arises over how to define the population of interest. The use of the heading “community benefit” (or “public benefit”) to encapsulate what we are seeking from the subsidy begs not only the question of what are the

165 See Goode, supra note 112, at 160–62 (discussing the tension between pluralism and “waste”). This is the downside of pluralism for the utilitarian, for whom, as I described in supra Part III.C.2, the pluralisms of means and ends stimulated by the deduction are often promoted as major selling points.

benefits—the question to which tax scholars have addressed their attention—but also the question of what is the community (or public) whose members are to be benefited. There are two words in “community benefit.” Incorporating foreign giving into the analysis underscores the normative and empirical problematics lurking in the first.

A. What Do Internationally-Targeted Donations Look Like?

Before applying the theories of the deduction to internationally-targeted donations, it is useful to consider how these donations compare to domestically-targeted donations, the ideal type around which the theories have been constructed. This comparison cannot be made too specific because data are spotty on the distribution and magnitude of internationally-targeted giving, both with regard to contributors and beneficiaries. Only a tiny fraction of foreign charities are registered with the IRS,167 the government does not require domestic charities to report their international activities in any systematic way, and no researchers appear to have compiled macro-statistics on the programs that U.S.-based nonprofits support overseas. Nevertheless, the evidence that exists, supplemented by anecdote and common sense, permits some general observations about the distinctive features of internationally-targeted donations.

As discussed in Part II, the recipients of internationally-targeted donations may be U.S.-based organizations that do charitable work abroad or foreign charities that receive re-transmitted funds from U.S.-based intermediaries. American donors may also give directly to foreign charities, but they tend to avoid this route because of the water’s edge policy, which raises such giving’s relative cost.168 Since World War II, private foundations have proven especially powerfully intermediaries for international altruism.169 One study from the early 1990s found that over 10% of the largest U.S. foundations’ annual giving, amounting to more than $500 million, went either to foreign recipients or to domestic recipients for international purposes.170 A decade later, these figures have increased dramatically: the Foundation Center estimates that in 2005 U.S. foundations, led by the Bill & Melinda Gates Foundation, gave nearly 20%
of their grant dollars, or $3.8 billion, for international purposes.\textsuperscript{171} Public charities took a cosmopolitan turn somewhat later than foundations, starting around 1970. Of the 2078 public charities classified by the IRS in 1998 as “international and foreign affairs” entities (a subsector comprising organizations that focus on international disaster relief, economic development, cultural exchanges, research, and advocacy), 88% were founded in 1970 or later and 62% were founded in 1985 or later.\textsuperscript{172}

The American Association of Fundraising Counsel (AAFRC) introduced its own “international affairs” category for philanthropy recipients in 1987. From that year to 1993 the annual amount of private contributions flowing to these recipients nearly tripled, from $780 million to $2.2 billion, and from 1993 to 2003 the amount nearly tripled again, to $5.3 billion,\textsuperscript{173} making international affairs easily the fastest-growing recipient category over the past two decades.\textsuperscript{174} These figures, striking in their own right, understate the true growth in internationally-targeted contributions, as many of the nonprofits not classified under international affairs likely increased their own foreign expenditures.\textsuperscript{175} International affairs charities garnered only 2.2% of private giving in 2003.\textsuperscript{176} If the nine other types of AAFRC charities (religion; education; health; human services; arts, culture, and humanities; public-society benefit; environment/animals; foundations; and unclassified) had spent just 1% of their 2003 contributions outside of the United States, it would have represented an additional $2 billion in internationally-targeted giving.\textsuperscript{177} One percent is a conservative estimate, given how many of these


\textsuperscript{172} Murray S. Weitzman et al., The New Nonprofit Almanac and Desk Reference 133 tbl.5.4 (2002).

\textsuperscript{173} AAFRC Trust for Philanthropy, Giving USA 2004, at 44 (2004). In 2003 inflation-adjusted dollars, the amounts were $1.3 billion in 1987 and $2.8 billion in 1993. Id.

\textsuperscript{174} AAFRC Trust for Philanthropy, supra note 109, at 25.

\textsuperscript{175} See generally Salamon, supra note 5 (describing U.S. nonprofits’ increasingly international activities in recent years).

\textsuperscript{176} AAFRC Trust for Philanthropy, supra note 173, at 10.

\textsuperscript{177} Calculated from id.
organizations operate foreign programs or support foreign causes; the famously internationalist Red Cross, for example, grossed over $2 billion in 1998 and is classified by the IRS under human services. 178 Raise the estimate to 2%, and the total amount of private internationally-targeted giving in 2003 would have topped $10 billion—and comfortably exceeded USAID’s total budget of $8.2 billion for the following fiscal year. 179 This figure is in line with data collected by the Organization for Economic Cooperation and Development, which estimates that U.S. nongovernmental organizations (NGOs) gave $6.3 billion in 2003 to developing countries and $4.3 billion to middle-income countries, far more than any other country’s NGOs on a total basis and one of the highest rates on a per-capita and per-GDP basis. 180 On the whole, then, Americans appear to give around 2% to 4% of their contributions to foreign recipients (and 2% of their income to charity), and 60% of foreign contributions to developing countries. 181

Compared to the average domestic charity, the organizations that ultimately receive most of Americans’ internationally-targeted donations—U.S.-based international affairs charities and foreign charities supported by U.S.-based intermediaries—share some notable structural differentials. With 62% of its 1998 revenue coming from private contributions and 20% from government grants, the international affairs subsector relies far more heavily on private contributions and somewhat more heavily on government grants than do the other U.S. nonprofit subsectors, and far less heavily on fees for services or payments for goods. 182 One reason for this

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178 Weitzman et al., supra note 172, at 178.
179 Tarnoff & Nowels, supra note 11, at 10 tbl.1. The U.S. government’s total spending on official development assistance, defined by the Organization for Economic Cooperation and Development (OECD) as the sum of grants, technical support, and sub-market-rate loans made to developing countries “with the promotion of economic development and welfare as the main objective,” OECD, DEVELOPMENT CO-OPERATION REPORT 2005, at 260 (2006), was $16.3 billion in 2003. Id. at 172 tbl.8.
180 See Roodman & Standley, supra note 3, at 6 tbl.1, 7 tbl.2 (reporting statistics from the OECD Development Assistance Committee database). Of the twenty-two countries surveyed, only Ireland and Norway had higher per-capita and per-GDP foreign giving rates than the United States. Id. at 7 tbl.2. Private U.S. support for middle-income countries, the authors indicate, goes mainly to Israel. Id. at 5, 21. Another recent study frequently referenced by government officials, Carol C. Adelman et al., Hudson Inst., America’s Total Economic Engagement with the Developing World: Rethinking the Uses and Nature of Foreign Aid (2005), available at http://www.hudson.org/files/publications/Rethinking_Foreign_Aid.pdf, provides much higher estimates of private annual U.S. foreign giving (approximately $19 billion, not counting remittance payments or volunteer time, id. at 2–3), but the Center for Global Development report suggests this may be the result of double counting. Roodman & Standley, supra note 3, at 9–10.
181 See Roodman & Standley, supra note 3, at 5–6, 9–10. The 4% estimate, which I think more realistic, includes contributions to both international affairs charities and to other U.S.-based nonprofits that relay the funds abroad.
182 Weitzman et al., supra note 172, at 170; see also Lester M. Salamon, America’s Nonprofit Sector: A Primer 101 (1992) (discussing U.S.-based international relief and development assistance organizations’ reliance on private giving); Salamon & Flaherty, supra note 39, at 27–28
donation dependence is that international affairs charities, whose mission is
to serve people in other countries, will often lack a natural base of client-
beneficiaries in the United States. The foreign charities supported
(indirectly) by Americans’ internationally-targeted giving are also likely to
rely more on private donations than do most domestic charities—which
rarely, if ever, receive donations from foreign sources—because U.S.-
based intermediaries presumably select recipients in part on the basis of
need. Both international affairs and foreign charities, accordingly, tend to
be donative entrepreneurial183 with little potential to earn income. Foreign
charities may be especially capital-constrained within their national
markets, which helps explain why the majority of funding for developing-
world nonprofits comes from developed-world countries.184

Although some foreign charities are known to operate on a shoestring
budget, the U.S.-based charities that provide services or send funds abroad
in significant quantity may be expected to have higher overheads than
comparable charities that do not have to incur cross-border transaction
costs. The cross-border premium on transaction costs likewise explains
why it is generally more difficult for American donors to monitor
international charitable activity: the activity is farther away, physically if
not culturally, and neither the IRS nor most independent nonprofit
watchdog groups offer evaluations for specific foreign programs or foreign
charities.185 Donors face especially acute information deficits regarding
their contributions, which lowers the scope for oversight and raises the
premium on donee trustworthiness. International charitable activity, as a
result, may be particularly susceptible to what Henry Hansmann has
termed “contract failure,” whereby consumers (in this case, donors) cannot
enforce future performance because of difficulties in measuring the
quantity or quality of the goods and services they paid for.186 Although

183 This terminology comes from Henry Hansmann, who famously categorized nonprofit
organizations along two main axes: donative (receive most of their income in the form of grants or
donations) versus commercial (receive most of their income from fees charged for services); and
mutual (controlled by patrons) versus entrepreneurial (free of patrons’ formal control). Hansmann,
Nonprofit Enterprise, supra note 24, at 840–43. Hansmann and others have since argued that subsidy
theories will tend to work best for donative entrepreneurial. See, e.g., HENRY HANSMANN, THE
OWNERSHIP OF ENTERPRISE 234–35 (1996); Hall & Colombo, Charitable Status, supra note 137, at
389–404; Hall & Colombo, Donative Theory, supra note 137.

184 Shaoguang Wang, Money and Autonomy: Patterns of Civil Society Finance and Their

site.cfm/watchdog.cfm (last visited Aug. 23, 2006) (summarizing and providing links to major
watchdog organizations). Watchdog groups do often rate the performance of international NGOs, as
distinct from foreign charities.

186 See Hansmann, Nonprofit Enterprise, supra note 24, at 843–45.
Hansmann has not explored the transnational implications of his theory, it is telling that his paradigmatic example of a donative-entrepreneurial nonprofit arising to solve a contract failure problem is CARE, an international humanitarian organization.187

Perhaps more apparent to donors than the structural characteristics of organizations receiving international support are the substantive practice areas in which these organizations tend to cluster. While aggregate data do not exist on the foreign charities that receive funding from U.S.-based intermediaries, we do know that a high portion of international nongovernmental organizations (INGOs) work on issues concerning the environment, humanitarian aid and human rights, or economic development.188 These are issues that involve deep transnational externalities and moral resonances, and so are logical candidates for INGO intervention. Among U.S.-based nonprofits that conduct their own programs in foreign countries, an important component is churches that send members abroad for missionary and service work. One study found that approximately one-quarter of Americans’ giving to foreign and international affairs activities in 1995 went through religious organizations.189 With the International Religious Freedom Act of 1998 bolstering State Department protections for missionaries abroad,190 a number of American churches have expanded their international programs in the years since.191 The Mormon Church alone has roughly 60,000 missionaries currently working in foreign countries.192 Thus while Americans’ contributions to religious organizations have declined as a percentage of total giving in the past decade—35.5% of all private giving, measured in dollars, went to religious organizations in 2004,193 down from

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187 Id. at 842, 846–48, 880–81.
189 Weitzman et al., supra note 172, at 72 tbl.3.11 (reporting statistics from prior studies).
193 AAFRC Trust for Philanthropy, supra note 109, at 20.
47.0% in 1997\textsuperscript{194}—churches and their missionaries remain a powerful vehicle, practically and symbolically, for international nonprofit activity.

Along with the organizations that receive internationally-targeted contributions, the individuals who give them may also differ systematically from market norms. The most striking distinction concerns wealth and social status. Whereas the vast majority of Americans give to domestic charities and many give to religious organizations with foreign programs, the subset of donors that gives to secular, internationally-oriented recipients is much narrower. In 1995, 6.1% of households made contributions to international and foreign affairs organizations, the lowest participation rate for any charitable activity area.\textsuperscript{195} Given that wealthier, better educated individuals have consistently polled as being much more committed to internationalism than the rest of America,\textsuperscript{196} a reasonable inference to draw from this donor concentration is that elite groups are especially overrepresented in the funding of these organizations. If true, this would make internationally-targeted donations even more redistributive globally, and their deductibility even more upside-down domestically.\textsuperscript{197}

An interesting question is whether these donations are more altruistic on average than their domestically-targeted counterparts. Because the benefits and beneficiaries of internationally-targeted gifts are located further from the donor’s home community, these donors may be in a weaker position to garner reputational, social, or financial advantages—not to mention impermissible quid pro quos—from their largesse. If one defines a charitable contribution’s altruistic-ness as an inverse function of its capacity to yield extra-psychic personal gain, internationally-targeted contributions should, on balance, measure as more altruistic than domestically-targeted contributions. At least, they should when made by individuals: corporations also make substantial outlays to international charity,\textsuperscript{198} but their motivations never stray far from the bottom line. As the Conference Board reports, the growing emphasis in the corporate

\textsuperscript{194} AAFRC TRUST FOR PHILANTHROPY, GIVING USA 1998, at 23 (1998).
\textsuperscript{195} WEITZMAN ET AL., supra note 172, at 71 fig.3.9, 72 tbl.3.11. These are organizations specifically focused on (secular) international issues; many more domestic nonprofits, and hence their donors, support international causes at some level. See supra notes 175–81 and accompanying text.
\textsuperscript{196} GOLDSMITH & POSNER, supra note 11, at 216.
\textsuperscript{197} See supra note 110 and accompanying text (explaining “upside-down” equity arguments against the deduction).
\textsuperscript{198} See ANNE KLEPPER, CONFERENCE BD., GLOBAL CONTRIBUTIONS OF U.S. CORPORATIONS 7 (1993) (“Over the past [ten] years, companies in the United States have increased their contributions to foreign countries by more than 500 percent.”); SOPHIA A. MUIRHEAD, CONFERENCE BD., THE 2004 CORPORATE CONTRIBUTIONS REPORT: AN ANALYSIS OF THE GIVING PATTERNS OF 232 MAJOR CORPORATIONS IN 2003, at 4 (2003) (indicating that among one hundred survey respondents reporting international charitable contributions, foreign giving in 2003 totaled $1.1 billion).
sphere on “strategic philanthropy,” often led by marketing or public relations divisions, “has led corporations to align their contributions programs more closely with their business missions.”199

What any of this means for donor tax-price elasticities is not clear. Although corporations are likely to be highly attuned and responsive to tax incentives, the strategic value of international philanthropy may in many cases provide sufficient inducement to give. For individual donors, although no studies have tried to estimate elasticities specifically for internationally-targeted giving, many studies have shown that wealthy taxpayers tend to be more price-sensitive and that gifts to religious organizations are uniquely inelastic.200 These findings could be read to imply that secular internationally-targeted giving will be quite tax-price elastic—and to support the Center for Global Development’s estimate that over half of Americans’ foreign giving is attributable to the charitable deduction.201 On the other hand, if these gifts derive more strongly from altruistic motivations, even wealthy donors may not be as responsive to tax rate changes.202 Also potentially cutting against elasticity is the fact that donors to international causes have inferior volunteering alternatives. If one wants to support the local welfare agency, church, or arts organization, it is often possible to volunteer instead of or in addition to donating. For international causes, however, the cost of volunteering is greater, both in terms of time and resources, and cultural and language barriers may limit a volunteer’s effectiveness. For the cosmopolitan-minded samaritan, writing a check may be the only realistic option.

B. Applying—and Rethinking—the Theories

1. Andrews

Internationally-targeted charitable contributions pose little problem for William Andrews’s theory of the deduction—so little problem, in fact, that they illuminate just how limited the theory is. For Andrews and his followers, recall, the charitable deduction is not needed to subsidize anything, nor would a subsidy rationale make any sense; the deduction is

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199 Muirhead, supra note 198, at 11.
200 See sources cited supra note 121.
201 Roodman & Standley, supra note 3, at 22 tbl.9.
202 Another open question is whether internationally-targeted giving is subject to the phenomenon of “privileged groups,” groups that contain one or more members who get enough satisfaction from a good—in this case, foreign giving—to induce them to provide it for the entire membership. See Gergen, supra note 86, at 1411 (explaining the economic theory). Bill Gates may be serving this function right now for certain Americans concerned about global health issues. See supra note 171. Yet at the same time, his foundation’s work may have increased aggregate demand for health-related foreign giving, such that it has become relatively more underprovided. Although privileged groups will generally be less in need of subsidy, these dynamic demand effects and the general idiosyncracy of the phenomenon make it an unreliable guide for policymaking.
needed to instantiate an accurate and internally consistent definition of taxable income.\textsuperscript{203} Charitable contributions are not acts of personal consumption, and are therefore not countable as income, because they do not involve the preclusive appropriation of real economic resources. They involve, instead, the creation of “common goods,” goods “whose enjoyment is not confined to contributors nor apportioned among contributors according to the amounts of their contributions."\textsuperscript{204}

Internationally-targeted contributions fit easily into this framework. If anything, these contributions are less likely than their domestically-targeted analogues to involve private preclusive appropriation, because their donors have diminished capacity for personal gain.\textsuperscript{205} At the same time, internationally-targeted contributions are more likely to divert resources to common goods on account of the geographic disconnect between the donors and the persons meant to be benefited. Andrews refused to draw distinctions regarding which types of charitable contributions have better or worse claims to the deduction. If he had done so, internationally-targeted contributions might well have been his archetype.\textsuperscript{206}

This result is, of course, at odds with the water’s edge policy, which privileges domestic altruism over international altruism, rather than the other way around. Internationalizing the scope of analysis thus scores another point against the tax-base-defining rationale as a descriptive theory of the deduction. As a normative theory, however, the tax-base-defining rationale is neither helped nor hindered by the revelation that internationally-targeted contributions represent its strongest case for deductibility, because, as the thinness of the preclusive-appropriation/common-good inquiry makes plain, the rationale has no

\textsuperscript{203} See supra Part III.A (summarizing Andrews’s tax-base-defining theory of the deduction).

\textsuperscript{204} Andrews, supra note 73, at 346.

\textsuperscript{205} See supra Part IV.A (penultimate paragraph).

\textsuperscript{206} Mark Kelman, in his blistering critique of Andrews, implicitly corroborates this point. Kelman notes that “Andrews never explicitly deals with three conditions that characterize the strongest case for deductibility” under his theory. Kelman, supra note 71, at 835 n.14. “First, the donor must be anonymous with respect to the donees, charitable organizations, and his community in general” so that he cannot “‘purchase’ deference or respect with his donation.” Id. “Second, the donor must not restrict the donee’s use of funds . . . .” Id. “Third, the donor must not receive direct services from the donee.” Id. Each of these conditions is more likely to hold in the case of internationally-targeted donations, on account of the greater physical separation and information asymmetries between the donor and the donee.

Andrews also makes an argument from economic neutrality, see supra note 77 and accompanying text, and here internationally-targeted contributions (of money) may have a weaker claim to the deduction because they are less easily replaced with contributions of time. See supra Part IV.A (discussing, in the closing paragraph, the limits of transnational volunteerism). But the economic neutrality argument is only an addendum to Andrews’s thesis, and a weak one at that, see supra note 86 and accompanying text; the tax-base-defining rationale is, for Andrews and his followers, both necessary and sufficient to justify the deduction.
normative content to speak of. Andrews’s failure to explain with any precision what is preclusive appropriation or a common good—and why the former requires full taxation, the latter full deduction—is not just a failure of definition; it is the failure to make any non-tautological argument at all.

What is left is intuition, the feeling that charity ought to fall outside the taxman’s bailiwick. Do Americans feel this sentiment more or less strongly about internationally-targeted charity? Probably less strongly on the whole, considering that the water’s edge policy has failed to arouse popular opposition. But there is a dangerous circularity here: the water’s edge policy is not only shaped by, but also helps shape taxpayer intuitions about the appropriate objects of charity. And, more basically, arguments that intuition should not merely inform, but should dictate tax policy have not held much appeal since the Enlightenment.207

2. Bittker

Boris Bittker, like Andrews, never applied his theory outside of the domestic context; if he had done so, he too would have had to concede that internationally-targeted donations possess a superior claim to deductibility. For Bittker, the charitable deduction (1) equitably accounts for the loss of welfare suffered by donors, (2) respects how many donations derive from perceived moral obligations, and (3) rewards selfless acts.208 It is both fair and righteous, accordingly, to provide unlimited deductions for all legitimate gifts. There are, however, gradations of welfare loss, moral obligation, and selflessness, and on each of these dimensions internationally-targeted contributions rank “higher” on average than their domestically-targeted kin.

Compared to domestically-targeted contributions, internationally-targeted contributions will tend to generate fewer reputational, social, or tangible benefits for their (individual) donors—these donors can expect to receive less extra-psychic compensation per dollar.209 Moreover, because internationally-targeted gifts do not directly benefit the people or organizations in a donor’s local community, social pressure will generally be lower to make them; in some cases, there may actually be negative social pressure directed at these gifts, as reflected in the mantra, “charity begins at home.”210 In place of social suasion, moral beliefs may play a

207 In the feudal and royal pre-Enlightenment history of tax policy debates, it was not uncommon for arguments from intuition and theology to be taken as decisive. See Simon, supra note 18, at 75.
208 See supra Part III.B (summarizing Bittker’s equitable theory of the deduction).
209 Cf. supra Part IV.A (discussing, in the penultimate paragraph, internationally-targeted donations’ relative degree of altruistic-ness).
210 I think it fair to classify “charity begins at home” as a mantra, with common currency and intonations of profundity, rather than dismiss it as a tired bit of epigrammatic Americana. Typing in the exact phrase in Google on March 15, 2006 yielded 287,000 hits.
bigger role in compelling people to give their money to foreign causes. Taking together these two lines of argument, internationally-targeted donations come out looking more selfless—and therefore, for Bittker, more praiseworthy—because of their higher ratio of other-regarding to self-regarding motive. If one accepts Bittker’s three criteria for deduction-worthiness, internationally-targeted donations seem especially deserving of a tax break, and, even more so than § 170’s percentage limitations, the water’s edge policy seems especially offensive to donor equity.

Yet Bittker never develops his three equitable criteria; he just presents them, without any underlying normative framework or philosophy. If “something can be said for rewarding activities which in a certain sense are selfless,” Bittker never says it. Which brings us back to intuition. Bittker’s argument is structurally sounder than Andrews’s, in that it is transparent in its aims (to promote donor equity) and its evaluative methods (the three criteria). Nevertheless, it too ultimately resolves into an appeal to the reader’s sense of what the Code is supposed to look like. In this case, the intuition Bittker presses is that charitable giving is praiseworthy and ought to be rewarded as such by the tax system. Whether most Americans believe internationally-targeted donations to be more or less praiseworthy is another empirical question beset by circularity and, to the rationalistic tax policymaker, beside the point.

Applying Andrews’s and Bittker’s theories of the deduction to internationally-targeted donations thus reveals quite a lot about these theories’ limits, and usefully highlights how classic principles of tax logic and donor equity can be invoked to support international deductions. Andrews and Bittker are of less help, however, if one wants to devise a systematic tax approach to questions of foreign-versus-domestic charity. For that, the deduction must be conceptualized as a subsidy.

3. Subsidy Theories

The first and perhaps most cited of the major subsidy theories, treasury efficiency, combines two ideas: that the charitable deduction substitutes for direct government expenditures, and that donor tax-price elasticities have an absolute value greater than 1.0. Although counterfactuals are inherently speculative, it seems fair to assume that if deductions for internationally-targeted donations were disallowed, the

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211 Bittker, supra note 70, at 60.
212 See supra Part III.C.1 (explaining treasury efficiency and related concepts).
213 See supra note 54 and accompanying text.
government would be less likely to compensate for the resultant decline in giving than it would be for a comparable decline in domestic giving. This result may be expected, most obviously, because legislators tend to be more responsive to domestic concerns, but also because only a small fraction of Americans give to secular internationally-focused organizations—thus limiting the political necessity of compensation—and because the government is constitutionally barred from directly subsidizing missionary work abroad. Tax-price elasticities for foreign donations, I suggested earlier, may be either higher or lower than for domestic donations; assuming these elasticities are, on average, roughly equal, a further result would be a marked decline in foreign giving per dollar of tax revenue for secular causes, though not much effect on giving for religious causes. Domestic giving per tax dollar, by contrast, would rise if donors substitute American donees for foreign donees, which to some extent is almost sure to happen. There is also the issue of investment efficiency, or the ratio of nonprofit output to total spending. While transaction costs are generally higher for internationally-targeted donations—and artificially inflated by the need for U.S.-based intermediaries under the water’s edge policy—this discrepancy is declining due to the Internet, and foreign charities, being more cash-starved and donation-dependent, may still be able to generate greater output than domestic charities per dollar received.

On the whole, then, the effect of eliminating deductions for internationally-targeted contributions would likely be to bolster the public fisc and domestic giving and, within the United States, to increase treasury efficiency and investment efficiency; but to reduce the amount of foreign giving and, on a global scale, to decrease treasury efficiency and possibly investment efficiency. The effect of expanding deductions for internationally-targeted contributions—most simply, by allowing deductions for direct gifts to foreign charities—would likely be the reverse. Which of these scenarios is preferable? Treasury efficiency theory (and the associated replacement-of-government-burdens and investment efficiency ideas) cannot tell us, in two senses: it supplies no argument as to why the deduction should be linked to the particular ratio of charitable giving to government spending, and it supplies no guidance as to the

214 See supra notes 195–97 and accompanying text.
215 Such substitution would be expected to happen if one assumes that donors allocate foreign giving and domestic giving from a common budget or, at least, from overlapping budgets, and if one assumes that foreign giving is a normal good or, at least, not an inferior good. Both assumptions are reasonable: indeed, the implicit logic (and moral argument) of the “charity begins at home” aphorism is that the more donors contribute to causes far away, the less they will contribute to causes near their home. Of the major types of foreign charity, gifts for missionary efforts should be the least susceptible to tax inducements one way or the other, in light of the highly specialized purposes they serve and the uniquely low tax-price elasticities of religious contributions.
geographic boundaries within which to calculate this ratio. Saving the
government money and stimulating charitable contributions may be good
things, but, as considerations of international altruism render especially
vivid, they are just two of the many possible goals that a subsidy might
serve.

Utilitarian theories of the deduction are more helpful because their
normative premises are more coherent and compelling, but applying these
theories to internationally-targeted donations only redoubles their ethical
and empirical difficulties. Let us first assume a strict isolationist-
utilitarian concerned only with maximizing the aggregate social welfare
(whether defined by reference to happiness, human flourishing, preference
satisfaction, or wealth) of Americans. At first blush, it might seem clear
that allowing deductions for internationally-targeted donations would run
counter to this goal. The most direct threat such deductions pose for
Americans’ welfare is the displacement of domestic charity with foreign
charity: the substitution effect implicitly censured in reminders that
“charity begins at home.” Subsidizing foreign giving will lead to lower
levels of nonprofit output—and hence to lower levels of public good
provision—in American communities, and may also lead to a weakened
nonprofit marketplace if a sizeable contingent of would-be donor-
overseers, often from elite societal groups, starts paying less attention to
domestic charities.

Radically disinterested parties, who experience a decrease in utility
from being forced to subsidize certain causes, may be a particular problem
for international deductions. Some Americans will resent any loss of
domestic charity in favor of foreign charity (the America-first concern);
some will resent the strengthening of transnational actors they see as
ineffectual, illegitimate, or otherwise misconceived (the INGO concern);
some will resent the possible undermining of IRS oversight (the regulatory
concern); some will resent the aggrandizement of elite power with respect
to international affairs—and maybe even see in the subsidy an effective
delegation of foreign policy to these elites (the democratic concern); and
some will resent the encouragement of missionary agendas (the secularist,
or religious neutrality concern). Moreover, if international gifts command
a higher media profile or are otherwise more salient, the deduction’s
opacity may offer a less effective shield against the ire of third parties. For
every util gained by the satisfied international donor, allowing her to
deduct her gift may reduce the subjective and objective welfare of
numerous compatriots.

216 This is Mark Gergen’s label. See supra note 138 and accompanying text.
However, if one takes a broader view of the deduction’s effects—without yet relaxing the assumption that Americans’ welfare is all that matters—there is a plausible case to be made that net social welfare will be greater in a tax system with more generous international deductions. A threshold consideration is that, despite the fears of the charity_begins_at_home crowd, domestic giving will not meaningfully, or at least not proportionately, decline. It is probably too much of a stretch to argue that domestic and foreign giving are complementary goods, but if the two types of giving reflect sufficiently distinct donative calculi, substitution between them may be substantially incomplete. Subjectively, although certain Americans may be especially displeased by the subsidization of foreign contributions, many others may be especially happy to free-ride off this brand of altruism. Some international causes are among the least objectionable and most morally compelling that exist—famine and disaster relief, for example. The low political support in the United States for (direct) governmental foreign aid does not necessarily transfer over to the realm of indirect tax subsidy. Even if it does, Weisbrod’s median voter theory suggests that deductions may have an especially important role to play in augmenting foreign giving to meet inframarginal demand.

Objectively, all Americans stand to benefit from foreign charity that helps abate interspatial negative externalities: the environmental pollutants, infectious diseases, and destructive ideologies that spread increasingly easily beyond borders. These are paradigmatic social harms that the free market cannot be expected to rectify on its own, and that governments may be handicapped from addressing in full because of political and institutional constraints—most notably, the legislator pressure to overweight short-term threats relative to long-term threats, the complexities of multilateral cooperation, and the difficulties of sustaining coordinated responses over changing administrations. By contrast, the benefits of domestic contributions often accrue to highly concentrated groups of clients and supporters; remember that the Code makes no effort to link deductibility to an organization’s ability to generate collective benefits or its need for subsidy. Compared to contributions to the local church or arts organization, contributions to causes such as environmental

217 There is a regrettable hole in the empirical literature concerning this question, reflecting how not only nonprofit tax scholarship but economic research more generally has scant the distinction between domestically- and internationally-targeted charitable giving. I showed in Part IV.A that foreign donors and donees possess a number of distinctive characteristics as compared to their domestic counterparts, and argued that foreign contributions will on average reflect a higher proportion of other-regarding motive. Empirical research into the relative tax-price elasticities of, and the degree of substitution between, foreign and domestic giving could make a large contribution to deduction theory.

Irrespective of what it does to the quantity of domestic giving, however, internationalizing the marketplace of donees may have the effect of increasing, not decreasing, the quality of domestic charities by forcing them to contend with stiffer competition for donor dollars.

218 See supra note 130 and accompanying text.
protection and human rights, two mainstays of INGO activity, are much more diffuse in their benefits. Indeed, contributions to a vast range of international causes, even when they do not involve clear cross-border externalities, have the potential to yield objective benefits for Americans by generating goodwill toward the United States and helping to create more prosperous and stable trading partners. There is a temporal tradeoff implicit in this analysis: the benefits from subsidizing foreign charity (cultivating goodwill, strengthening economic relationships, abating cross-border negative externalities) may not be immediately apparent, but their longer-term implications are profound.

What about the radically disinterested parties? There may be a greater number of them with respect to international deductions because of the concerns enumerated above, but this is not inevitable; domestic nonprofits, after all, have plenty of taxpayer enemies. And because domestic nonprofits and their activities are physically closer, their enemies may dislike them more intensely. Yet even to go down this route of speculation is, for the utilitarian theorist of the deduction, to risk excessive subjectivity, and excessive deference to the views of a minority, in the cost-benefit calculus. Bringing internationally-targeted donations into the analysis thus shines a spotlight on the ethical and empirical limits of the utilitarian argument: allowing deductions for these gifts threatens to magnify the violation of the Pareto ideal at the same time that it offers the potential to increase long-term social welfare, and it is impossible to quantify either with anything close to precision.

219 See supra note 188 and accompanying text.

220 I return to the idea of goodwill in Part V.B. Along with any abatement of interspatial externality threats, stimulation of goodwill and international trade are among the foreign charity benefits with the most clearly positive implications for the U.S. economy. On account of these economic effects and the inefficiencies inherent in much domestic nonprofit activity, deductions for international gifts may hold especially strong appeal for those (few) utilitarians whose preferred yardstick is social wealth, not social welfare. For explorations of social wealth maximization as a moral and policy guide, see RICHARD A. POSNER, THE ECONOMICS OF JUSTICE 48–115 (1981); Richard A. Posner, Wealth Maximization Revisited, 2 NOTRE DAME J.L. ETHICS & PUB. POL’Y 85 (1985).

221 See, e.g., GILBERT M. GAUL & NEILL A. BOROWSKI, FREE RIDE: THE TAX-EXEMPT ECONOMY (1993); ODENDAHLM, supra note 111.

222 Recall that if a utilitarian theorist supports the deduction, then by necessity she is already deep into Kaldor-Hicks terrain and must find net improvements in social welfare sufficiently compelling to override the disinterests of a minority. See supra notes 138–39 and accompanying text.

223 Much of the above (and below) discussion in this Subsection holds equally for corporate contributions. With internationally-targeted gifts, corporations may be especially useful vehicles for economizing on information gathering and administration, and there may be less of a concern that CEOs will manipulate these gifts toward their own pet causes. On the other hand, sending corporate contributions abroad may exacerbate agency and political power concerns.

To be sure, though, more work needs to be done to internationalize our understanding of the corporate charitable deduction. For a thorough review of the literature on corporate philanthropy and tax policy, see Nancy J. Knauer, The Paradox of Corporate Giving: Tax Expenditures, the Nature of the Corporation, and the Social Construction of Charity, 44 DePaul L. Rev. 1 (1994).
So, even if one restricts the community of interest to the United States, a devout isolationist-utilitarian could still come down on either side of the debate over international deductions. There is nothing necessary, however, about this geographic restriction. To the contrary, many utilitarians—including many tax scholars—would find such a restriction to be morally arbitrary, if not grotesque.\footnote{For recent examples of tax scholarship advocating the maximization of world welfare as a policy goal, see Nina J. Crimm, Democratization, Global Grant-Making, and the Internal Revenue Code Lobbying Restrictions, 79 Tul. L. Rev. 587, 666–67 (2005) (advocating global utilitarianism with respect to foundation grantmaking regulation); James R. Hines, Jr., The Case Against Deferral: A Deferential Reconsideration, 52 Nat’l Tax J. 385, 386 (1999) (presenting the common position that capital export neutrality is preferable to capital import neutrality as a tax principle because the former fosters greater world welfare).}

If one takes a \textit{universalist-utilitarian} perspective instead, there is a powerful argument that enhancing deductibility for foreign giving will enhance global welfare. Greater heterogeneity of preferences for public goods will mean that nonprofits have a greater role to play in fulfilling residual demand. Both INGOs and U.S.-based nonprofits that have international missions tend to be donative entrepreneurs with limited commercial potential, to address social problems involving interspatial negative externalities, and to generate diffuse collective benefits subject to freeriding: which is to say, they are the ideal donees under efficient subsidy theories.\footnote{Perhaps the most famous living utilitarian philosopher, Professor Peter Singer, is also perhaps the most famous proponent of strong cosmopolitan duties—more specifically, of the view that “the average American family should donate a large portion of their income [any annual income over $30,000] to organizations like UNICEF and Oxfam.” Peter Singer, \textit{Poverty, Facts, and Political Philosophies: A Debate with Andrew Kuper}, in \textit{GLOBAL RESPONSIBILITIES: WHO MUST DELIVER ON HUMAN RIGHTS?} 173, 173 (Andrew Kuper ed., 2005) (reprising earlier arguments from Peter Singer, \textit{The Singer Solution to World Poverty}, N.Y. Times Sunday Mag., Sept. 5, 1999, at 60, available at LEXIS, News Library, NYT File); see also Peter Singer, \textit{Famine, Affluence, and Morality}, 1 Phil. & Pub. Aff. 229 (1972). Notice that gifts made directly to Singer’s exemplary recipients would not qualify for a deduction: an American donor would have to give through their domestic intermediaries, the U.S. Fund for UNICEF or Oxfam America.}

Foreign charities are a more eclectic lot, but it is plausible that, on average, they would get greater use from any additional donor dollars than the jilted domestic charities would have, both because of relative production costs and, more
contestably, because charitable provision may be subject to declining marginal utility of contributions received. 226

Another contestable yet commonsensical assumption is relevant here: the declining marginal utility of income (and its corollary, the declining marginal utility of non-cash assistance). Interpersonal utility comparisons may be taboo in modern economic theory, but philosophers since Rawls have acknowledged that we inevitably make at least approximate interpersonal comparisons. 227 Perhaps the most unobjectionable comparison is to assume that a starving or severely ill person would be made relatively better-off from an additional unit of money or aid than a healthier, wealthier person would be. Indeed, if we did not hold this assumption, there would be little humanitarian charity. Foreign charities in developing countries—where most internationally-targeted giving ends up 228—are more likely than domestic charities to address material and social deprivation, and much more likely to address severe deprivation. The United States has no shortage of deprived populations, to be sure, but the reallocation of charitable flows under a more generous international deduction system would, on balance, channel aid to needier beneficiaries.

This simple insight has important implications for a universalist-Rawlsian theorist of the charitable deduction. Enhancing deductions for internationally-targeted contributions, as discussed above, is likely to increase both the total and relative amount of foreign giving. If Saul Levmore’s theory that taxpayer empowerment fosters more progressive-minded and generous spending on public goods exports to the transnational context, enhancing these deductions could increase foreign giving further still. 230 In light of global resource disparities, the rise in foreign charity would be massively redistributive and, in light of the strong humanitarian component to much international charity, might have especially powerful welfare effects for the world’s most disadvantaged. 231 Not just a

226 This is contestable primarily because organizations need the capacity to put contributions to use, and foreign charities may on average have lesser ability to process new contributions and integrate them into their programs. However, any such deficit may conversely imply that there is great marginal utility to be gleaned from donations that target capacity- and infrastructure-building, up to some threshold level.

227 See Kelman, supra note 71, at 841 n.32. Such comparisons are a standard theme in the charitable literature. See, e.g., UNITED NATIONS DEVELOPMENT PROGRAMME, HUMAN DEVELOPMENT REPORT 2005, at 53 (2005).

228 See supra notes 180–81 and accompanying text.

229 I am of course using the “Rawlsian” label very loosely in the main text, as a shorthand for a primary commitment to distributive justice. Cf. supra notes 118, 140 and accompanying text (explaining my choice of terms).

230 See supra notes 150–51 and accompanying text.

231 This is not to say that all internationally-targeted contributions will serve needy groups. It is worth noting, however, that even though international environmental protection—the other main INGO practice area along with human rights and economic development—does not generally focus on
universalist-Rawlsian theory, but almost any moderately cosmopolitan theory of social justice—for instance, Martha Nussbaum’s or Amartya Sen’s capabilities approach would applaud. The water’s edge policy could not compare.

Still, it is important to recognize just how far a deviation this would be from a rigorous application of the maximin principle. Gauging the redistributiveness or the welfare effects of a deduction policy is hard enough within the United States. Internationalizing the scope of inquiry compounds the empirical difficulties, and it dramatically complexifies questions of identification and remedy: how does the Rawlsian deduction theorist identify the “worst-off” individuals in the world, and how does she tailor the deduction to address their needs? These goals are so elusive in the international context, their analytic constructs so fraught, that distributive justice starts to lose all coherence as a theory or policy guide for the deduction and is left offering little more than an aspirational ideal.

Enhancing deductions for internationally-targeted contributions poses fewer conceptual problems for the isolationist-Rawlsian, but much sharper worries about the effects on distributive justice. For the isolationist-Rawlsian, concerned only with the well-being of America’s worst-off, the substitution of foreign for domestic giving under an enhanced international deduction scheme would immediately raise flags. Just because domestic giving might decline, however, does not mean that America’s worst-off individuals would be made worse off. The wealthiest taxpayers, who would be the most responsive to changes in deductibility and would have the most money to donate, already allocate the majority of their domestic donations toward non-redistributionary causes. For moral reasons, wealthy and non-wealthy taxpayers may be less inclined to reduce giving to charities that serve the neediest Americans. Religious giving, for instance, is especially price-inelastic. For political as well as moral reasons, the federal and state governments may also intervene, providing a systemic check against at least some of the harms. And America’s least fortunate groups also stand to benefit from the cross-border positive externalities generated by foreign contributions. The isolationist-Rawlsian, material or social deprivation, it may still be quite progressive in the distribution of its benefits if, as seems likely, poorer individuals tend to live under worse environmental conditions.


233 Rawls himself was by no means an isolationist, but he was very sensitive to the difficulties of extending social contract theory to the international level, so sensitive that he famously postponed this move until late in his career. See generally JOHN RAWLS, THE LAW OF PEOPLES (1999); JOHN RAWLS, POLITICAL LIBERALISM (1993).

234 See supra notes 142–44 and accompanying text. If, under a more generous international deductions scheme, the wealthy substituted most of their giving away from self-benefiting nonprofit pursuits, it is possible that America’s poor would be made better off in an intra-U.S. relative sense. This would no doubt be small comfort, however.
therefore, could conceivably be accommodated to increased deductibility for foreign contributions, at least in the long term. That this is even remotely possible speaks volumes about the descriptive failures of “Rawlsian” deduction theory: if § 170 provides only the crudest of utilitarian constraints on deductibility, its link to the maximin principle, or to any redistributive principle, is cruder still.

Finally, we come to communitarian arguments for the deduction. Like the isolationist-utilitarian, the isolationist-communitarian would be quite troubled by any rise in “radical disinterest” following an enhanced international deduction, not so much as a matter of individual welfare but as a threat to social cohesion. And like both the isolationist-utilitarian and the isolationist-Rawlsian, she would be troubled by the donative substitution effect. Reduced levels of domestic giving may cause some local nonprofits to contract or fold, decreasing social pluralism and communal capacity for voluntary association. Increased ratios of foreign to domestic giving may also pose indirect threats, such as the attenuation of donors’ (including corporate donors’) attachments to their home communities and to the donee organizations. Charity would be propelled further away from the thick, social-capital-rich sphere of community relationships and closer toward the bloodless sphere of Internet fundraising, mass mailings, and low-sweat relief of one’s duties to others. “What we require,” Professor Benjamin Barber inveighs, “are healthy, democratic forms of local community and civic patriotism rather than abstract universalism and the thin gruel of contract relations.”

This tension between a cosmopolitan deduction and the communitarian program may be something of a caricature, however. Entirely separate from the domestic-versus-international issue, I noted above, the deduction could be seen to jeopardize communitarian values—fueling extremist and self-interested groups, dividing social classes, cheapening the act of giving, decreasing volunteerism. This corrosive capability would exist even if Americans gave exclusively to domestic organizations. Moreover, there is

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236 The analysis here thus offers a slightly new wrinkle on the relationship between cosmopolitanism and communitarianism, which are often taken as antagonists in modern political theory. For a particularly engaging discussion of recent debates between cosmopolitans and communitarians, see Jeremy Waldron, Minority Cultures and the Cosmopolitan Alternative, 25 U. MICH. J.L. REFORM 751 (1992).
237 See supra Part III.C.4 (penultimate paragraph).
no one-to-one tradeoff between communal virtue and cosmopolitan virtue: foreign giving might deflect money away from local organizations yet nevertheless support values like altruism, solidarity, and responsibility within the local context through virtue spillovers, especially considering how much foreign giving is humanitarian in nature. While there may be no such thing as a universalist-communitarian—who not only supports communitarian goals the world over but also takes the world as a single organic community—plenty of communitarians support a vision of global pluralism and global ethics.238

Domestic organizational pluralism would be the clearest loser from expanding international deductibility, owing to the substitution effect. But pluralism is not, or at least should not be, a categorical good for communitarians and others who tout it in defense of the charitable deduction. Communitarians want social power to be “dispersed and balanced—but not fragmented”; they seek a “congenial” social pluralism.239 Because those self-serving donors and divisive nonprofits that undermine communitarian values have much greater potential to do (domestic) harm when their focus is domestic, it is possible that increased foreign giving would support congenial pluralism even as it reduced overall pluralism in the U.S. nonprofit sector. On yet another level, then, pluralism emerges as an ambiguous value for the deduction critic, and certainly not the dispositive argument in its favor that some have taken it to be.240 Applying communitarian theory to foreign giving reveals how there may be “sociological” pitfalls to elevating such giving’s status through the tax code, in addition to the more evident economic and possibly distributional concerns. But as with utilitarianism and distributive justice, the analysis does not yield clear answers and, if anything, suggests that subsidizing internationally-targeted donations may ultimately prove just as appealing as subsidizing domestically-targeted donations.

There is an even more fundamental ambiguity for the communitarian analysis of international deductions. The isolationist-communitarian, by definition, may not care for communities outside the United States, but what about all the different communities within the United States? Several U.S. states have attempted to ban charitable deductions for gifts to out-of-state donees, only to have courts strike down these laws under the dormant

238 To take one example, the Responsive Community Platform, signed onto by numerous prominent communitarian scholars, contains a section on “The Human Community” which concludes: “Our communitarian concern may begin with ourselves and our families, but it rises inexorably to the long-imagined community of humankind.” The Responsive Community Platform: Rights and Responsibilities, in THE COMMUNITARIAN READER, supra note 161, at 13, 23.
240 See supra notes 156, 165–66 and accompanying text.
Commerce Clause. That these laws were passed in the first place reveals the discontent some feel over the geographic promiscuity with which the deduction allocates its subsidy; not just the federal charitable deduction, but all its state siblings draw no spatial boundaries within the United States. To support the deduction on account of its sociological benefits, therefore, one must already move beyond a localized conception of community, responsibility, or civic virtue. These values, to the extent they are supported at all by the charitable deduction, must remain fuzzy and unrooted—which both undermines the force of the communitarian (or any sociological/secondary-benefit) argument for the deduction, and renders more arbitrary the drawing of a line at the national border.

V. TAX POLICY AT THE WATER’S EDGE

Having critiqued the theories of the charitable deduction and applied them to internationally-targeted contributions, I seek in this Part to synthesize the foregoing discussion and draw out some implications. In Section A, I propose an integrated theory of the deduction that would accommodate the strengths and weaknesses of each of its major justifications. Applying the integrated theory to internationally-targeted contributions underscores just how strong their claim to deductibility is, and suggests that they deserve equal tax treatment to domestically-targeted contributions absent intervening complications. There are intervening complications, however, as Section B explains. Yet, while oversight and foreign policy concerns require some degree of deviation from geographic neutrality, the water’s edge policy is not well tailored to address either concern.

This Part is necessarily succinct in its discussion of the integrated theory and the practical complications raised by foreign giving. Each topic is worthy of sustained independent analysis. The goal here is to help stimulate and frame such analyses, and thereby move our understanding of

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241 See Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564 (1997) (prohibiting states from denying nonprofits a property tax exemption on the grounds that many of their clients are nonresidents); Chapman v. Comm’r of Revenue, 651 N.W.2d 825 (Minn. 2002) (applying Camps Newfound to invalidate a state law conditioning deductibility on the donee’s in-state status). A similar, though less dramatic protectionism can be seen in state statutes that prevent charities from soliciting funds unless they have registered in that state. As of 1999, thirty-eight states and the District of Columbia had such laws. ERIC MERCER, HOW MANY SOLICITING NONPROFIT ORGANIZATIONS HAVE REGISTERED NATIONWIDE? (1999), http://www.paperglyphs.com/aporegulation/documents/soliciting_npos.html.

242 I offer some additional thoughts on how and why we might want to conceptualize certain tax expenditures, including but not limited to the charitable deduction, as forms of foreign aid in David E. Pozen, Comment, Tax Expenditures as Foreign Aid, 116 YALE L.J. 869 (forthcoming 2007) (on file with Connecticut Law Review).
the charitable deduction in productive directions, not to provide definitive answers.

A. Toward an Integrated Theory (and Application) of the Charitable Deduction

Part III’s critical roadmap of the literature demonstrated that existing theories of the charitable deduction are flawed, along three main dimensions: none provides a compelling account of the deduction in anything like its present form; none is explicit, much less thoroughgoing, about its normative premises; and none takes into account the international/domestic distinction in contributions. When that distinction is taken into account, Part IV showed, the theories’ warts emerge with all the more resplendence. In particular, it becomes apparent how much Andrews’s and Bittker’s theories ultimately depend on intuition, and how much the subsidy theories are vulnerable not only to empirical uncertainty, counterevidence, and normative disagreement, but also to the choice of a relevant community within which to gauge the subsidy’s effects. In this sense, internationalizing the scope of inquiry is not just some fanciful thought experiment; it is crucial for understanding how helpful (or, as the case may be, how unhelpful) the theories are for explaining and defending the deduction. If these theories proved descriptively and prescriptively unsatisfying within the traditional analytic framework, they become all the more so when Americans’ internationally-targeted contributions—contributions running over $10 billion per year and rising—are admitted into the debate.

And yet, none of the theories is completely sunk. Andrews’s base-defining-rationale comes out looking worst, but like Bittker’s argument for rewarding donors, it holds appeal at the level of intuition. Most Americans, whether through historic conditioning or Tocquevillian conceptions of U.S. civil society or an innate sense of charity’s place in the Code, believe in the charitable deduction. Deontological notions of tax logic and donor equity help legitimize this belief. This is important to remember because it points up an implicit flaw in the logic of many subsidy arguments: a subsidy is not only justifiable if it creates economic, communal, or even “sociological” benefits sufficiently weighty to counteract its costs; it may also be justifiable for the simple reason that taxpayers want it. Preference satisfaction is a psychic benefit in its own

243 As a purely normative or prescriptive matter, this is not a flaw; the deduction might be deemed unjustifiable in its present form. Yet given that the deduction seems politically safe from radical reform for the foreseeable future, I take these descriptive failings (these failures of “fit”) to be significant drawbacks.

244 See supra notes 179–80 and accompanying text.

245 See supra note 104 and accompanying text.
right. Relative to Andrews’s and Bittker’s accounts, the subsidy theories have more obvious and stronger claims to relevance: few people would reject altogether treasury efficiency, economic efficiency, social welfare maximization, distributive justice, associational pluralism, or robust community life as aspirations for a public policy. And while the charitable deduction does not, at all times and in all ways, support each of these values—an impossible order, because these values will conflict—at some times and in some ways it supports them all. Internationalizing the analysis problematizes but does not fundamentally displace any of these theories. To the contrary, internationalizing the analysis shows how each can contribute to our understanding of the deduction’s costs and benefits.

To make sense of the charitable deduction, then, I propose an integrated theory. By integrated, I mean a theory that incorporates all of the major justificatory rationales explicated above, shears them of any claim to exclusivity, and applies the insights of each to explain the deduction and evaluate its effects. This is by no means a unitary, or monistic, theory that offers a specific winning argument for the deduction or a specific normative frame within which to assess its desirability. Against the idealizing impulse, it is an admission that there can never be such a theory. The charitable deduction is too compromised a policy. Promulgated in the early 20th century out of simplistic replacement-of-government-burdens ideas and vague intuitions about charity, it was undertheorized from the start. As the nonprofit sector has grown (explosively, since the 1970s) and diversified—so that § 170 now includes many donations and donees barely recognizable as charity—theoretical coherence has further unraveled.

246 While it may be the case that no tax policy will submit to a single neat justification, the charitable deduction is notable for the number and diversity of theoretical perspectives claimed on its behalf. Some scholars have applied more than one of these perspectives—most notably, Mark Gergen in his exceptionally thoughtful defense of the deduction, Gergen, supra note 86—but most scholars have not done so, and none has considered the full range of perspectives outlined here. Cass Sunstein has pointed out that “any simple general theory of a large area of the law—free speech, contracts, property—is likely to be too crude to fit with the best understandings of the multiple values that are at stake in the area.” Cass R. Sunstein, Incompletely Theorized Agreements, 108 HARV. L. REV. 1733, 1748 (1995). “For this reason, monistic theories are usually inadequate,” id., and incompletely theorized agreements will often be necessary to mediate “[t]he problem of social pluralism,” id. at 1734. Sunstein’s argument helps explain how so many commentators have been able to support the charitable deduction without coming to agreement on the high-level principles underlying their support. Even though the charitable deduction is not a “large area of the law” on the order of free speech or contracts, its policies affect large areas of human endeavor, and, as Part III’s critical roadmap revealed, the problem of social pluralism very much pervades the debate. By crediting and incorporating the multiple high-level values fostered by the deduction, the integrated theory tries to avoid both monistic and incompletely theorized interpretations.

247 See supra notes 23, 54, 104 and accompanying text.
Fundamentally, the deduction reflects the understanding that certain nonprofit goods and services will tend to go underprovided in the free market, and that we do not want a centralized administrative bureaucracy to compensate entirely for this deficit. Beyond these basic insights, consensus breaks down. Some seek in the charitable deduction to reify a vision of what it means to give, some seek approbation for donors, some seek efficiency of various kinds, some seek distributive justice, some seek liberal or communitarian ideals. Alternative policies (for instance, matching grants, credits, or direct government funding) might better serve certain of these aims, but the deduction’s political resilience and its peculiar immunity from macro-level scrutiny of the kind applied in this Article suggest that no other policy could better broker among the competing values inherent in charitable tax policy. The benefits of the deduction are highly diffuse, its costs relatively small.

Any monistic theory of the deduction—such as one based on treasury efficiency or economic efficiency, the two dominant ideas in the recent literature—will not only fail to explain features of the deduction that are plainly at odds with that theory’s normative premise, but will also slight the other values the deduction works to accommodate. Only an integrated approach can capture the productive tensions embodied within the charitable deduction, and only an integrated approach can enable truly transparent discourse. An integrated, nonideal theory gives us the best chance, descriptively, to make sense of the heterogeneous values the charitable deduction has come to serve, and the best chance, prescriptively, to evaluate reform options in a meaningful way.

It is a thin theory, however; the cost of integration is normative conviction and evaluative ease. The integrated theory I am proposing is, indeed, not a value-based theory at all. Rather than try to foreclose value disagreements, it creates a discursive space for their deliberation. To translate the theory into specific policy solutions, two value judgments need to be layered in: a hierarchy of substantive commitments, and the specification of a relevant community. Among the major theories of the deduction, I suggested above that the most important, because the most normatively coherent and compelling, are those rooted in Kaldor-Hicks efficiency (which especially favors deductions for gifts to organizations providing collective benefits and public goods), redistribution (which especially favors deductions for gifts to organizations providing services to disadvantaged groups), and communitarianism (which especially favors deductions for gifts to organizations that generate social capital and

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248 The charitable deduction itself, of course, could be tweaked any number of ways so as to serve particular values more or less intensively; few supporters of the deduction think it perfect in its current form. While this is not the place to consider specific refinements, the integrated theory provides a uniquely robust tool for understanding and evaluating any refinement’s expected impacts.
invigorate civil society). How one prioritizes among (and within) these values, along with intuition and treasury efficiency, will depend on one’s background goals for tax policy, charity, and society more generally. There is no “right” hierarchy. The integrated theory is therefore amenable to numerous permutations reflecting divergent views of the good. But it should no longer be possible for a deduction theorist to isolate one of the views to the neglect of the others.

The choice of community is, for the subsidy theorist, also a value-based choice without a “right” answer. In the previous Part, I showed how adopting the isolationist stance (in which domestic effects are all that matters) versus the universalist stance (in which no geographic distinctions are drawn) influences the analysis for the utilitarian, distributive, and communitarian critic of the deduction. Yet while the isolationist-versus-universalist distinction offers a useful tool for illustrating how the choice of community may be relevant, it is a false dichotomy. For any tax expenditure, most Americans will fall in between these two poles, caring primarily about the national impact of the subsidy but also to some extent about its international impact. Charity occupies a special place in this geographic calculus because it bears so basically on the questions of what we owe other people and how to trade off more local obligations for more distant ones—on questions of cosmopolitan duty. Although many would reject Diogenes the Cynic’s call to be a pure cosmopolitan, a “citizen of the world,” even the most devout advocates of patriotism and particularism generally acknowledge that personal responsibilities do not fall away at the neighborhood, city, state, or national border, that just being human binds us morally and functionally to the plight of all persons, at least to a baseline level.250 A slew of practical and “plausibility” constraints, however, limits the ability of individuals to effectuate cosmopolitan duties: everything from informational deficits, to travel expenses, to intuition and habit, to cultural disjunctures, to collective action problems makes it more

249 See Martha C. Nussbaum, Patriotism and Cosmopolitanism, in FOR LOVE OF COUNTRY, supra note 235, at 2, 6.
250 There has been a great outpouring of scholarship on cosmopolitan ethics in recent years. For accessible synopses of the debates, see the essays collected in FOR LOVE OF COUNTRY, supra note 235; GLOBAL ETHICS AND CIVIL SOCIETY (John Eade & Darren O’Byrne eds., 2005); and GLOBAL RESPONSIBILITIES, supra note 224, as well as KWAME ANTHONY APPIAH, COSMOPOLITANISM: ETHICS IN A WORLD OF STRANGERS (2006). David Held provides a particularly succinct summary of cosmopolitan theory in David Held, Globalization, Corporate Practice, and Cosmopolitan Social Standards, in GLOBAL RESPONSIBILITIES, supra note 224, at 186, 189–94. The extent to which humans owe moral duties to non-human animals is another lively debate—also prominently featuring Martha Nussbaum, e.g., NUSSBAUM, supra note 232, at ch. 6, and Peter Singer, e.g., PETER SINGER, ANIMAL LIBERATION (1975)—that complexifies the task of defining a relevant community and degrees of relevance within that community for purposes of the charitable deduction. I thank Henry Hansmann for suggesting this point.
costly and more difficult to do good by someone in a faraway country than to do good by one’s neighbor.251

The significance of this insight for the charitable deduction is that it augments the moral claim of a transnational perspective. For many Americans, giving to an internationally-active NGO is the only realistic way, and certainly the most cost-effective way, to realize their responsibilities to people the world over, without so compromising their fiscal and temporal budgets as to undermine their local responsibilities. Pushing the government to give more foreign aid may go toward the same end (and, if successful, might even be a more effective substitute), but it is a far less direct and intimate means; it is not charity. To be a humane global actor, much less a citizen of the world, it will often be NGO contributions or nothing. This is not a policy argument for displacing government aid with private aid, which at some point would yield undesirable consequences.252 It is, rather, a realistic argument that NGOs will often provide the most powerful vehicle for Americans to fulfill basic duties to foreigners while preserving agency and ownership, which links § 170 indelibly to issues of global ethics. Thus, while there is no “right” community for assessing the effects of the charitable deduction, I am suggesting that there is a wrong community—and it is the United States alone.253

251 These plausibility limitations have led to an “institutionalist turn” in cosmopolitan ethics, wherein duties “are best viewed as attaching to domestic institutions (e.g., national governments) and, derivatively, to international institutions” rather than to individuals. Jack Goldsmith, Liberal Democracy and Cosmopolitan Duty, 55 STAN. L. REV. 1667, 1670 (2003). As substate but often transnational actors influenced by but autonomous of donors, NGOs, like the state-subsidized charitable deductions that support them, occupy a middle space between individualist and institutionalist modes of fulfilling interpersonal duties.

252 Apart from any political impacts, undesirable practical consequences might flow the fact that NGOs are not democratically elected or accountable, from their relative inability to produce large-scale growth or redistribution, or from the bureaucratization that inevitably follows revenue gains. Consequentialist arguments such as these against subsidizing foreign contributions can be evaluated under the utilitarian, distributive, or communitarian frameworks. These arguments have some force and provide an important check on Peter Singer-like arguments that Americans should give all non-essential income to Oxfam. See supra note 224. Nevertheless, most contributions to foreign charities will do far more good than harm for the donee country, cf. supra notes 225–26 and accompanying text, and for purposes of specifying a community of interest, such consequentialist considerations are not relevant.

253 Within this framework, one could still reach very different conclusions on international deductibility depending on how strongly one prioritizes Americans’ welfare and in what ways. The moral argument for subsidizing private contributions to the Vienna Opera, for example, may be far weaker than the argument for subsidizing contributions to famine relief. And the practical benefits from subsidizing contributions to the Vienna Opera may be far smaller than the benefits from subsidizing contributions to an INGO devoted to eradicating global terrorism. One might be tempted, therefore, to employ a national norm and allow deductions only for a certain class of internationally-targeted gifts—say, those gifts that are sufficiently morally compelling or sufficiently likely to advance U.S. interests.

Sensible though this may sound, I would reject such a move. As a practical matter, it would be extremely difficult to separate out the deserving from the undeserving gifts. Such line-drawing would politicize deduction policy, distort the marketplace of foreign charity, and require new forms of
If the integrated theory’s thinness may be taken as a general limitation, it proves a virtue for evaluating the deduction-worthiness of foreign gifts, for no matter how one prioritizes the component theories or defines the community of interest, most of these gifts end up appearing quite worthy. The base-defining and donor-equity rationales, recall, press strongly in favor of deductibility for internationally-targeted contributions—more strongly, indeed, than for domestically-targeted contributions because the former are less likely to involve private preclusive appropriation or to reflect self-interested motive. But the more remarkable takeaway from Part IV is that even for the isolationist utilitarian, distributive, or communitarian theorist of the deduction, internationally-targeted contributions hold a respectable claim to deductibility when their implications are considered in full. For each theorist’s universalist doppelgänger, this claim is all the more compelling.

Although foreign giving exacts some domestic costs, it supports relatively efficient, donative organizations; it creates positive externalities that increase social welfare both psychically and tangibly, over a long time horizon; it is highly redistributive globally without likely ill effects for America’s worst-off individuals; and it has greater potential to increase social capital and civic virtue than to decrease them. Among foreign gifts, the most morally compelling will tend to be those made to charities operating in developing countries, while the most instrumentally valuable for Americans’ welfare will tend to be those made to organizations focused on combating cross-border negative externalities. And indeed, the vast majority of Americans’ internationally-targeted contributions are allocated precisely to these two classes of recipients. To the critic who falls in between the isolationist and universalist poles, and hence to most Americans, foreign giving ought to appear richly deserving of deductibility. The empirical inquiries underlying the domestic-versus-

governmental monitoring; it would go a long way toward eroding the autonomy of the global philanthropic sector. Moreover, the benefits to the public fisc (and to instrumental rationality more generally) may be small, for the great bulk of Americans’ internationally-targeted contributions already flow to organizations that operate in developing countries and/or focus on combating negative interspatial externalities. See AARFC TRUST FOR PHILANTHROPY, supra note 173, at 44; see also supra notes 180–81, 188 and accompanying text. And even if it were to receive substantial U.S. donor support, would the Vienna Opera be such an inadvisable target of subsidy? Apart from a basic set of public charity and private foundation qualifications, the charitable deduction has been constructed so that the government is scrupulously neutral among donors’ choices: the tax expenditure is purely a function of donativeness. To reject certain types of foreign gifts as undesirable would undermine this commitment to neutrality and the decentralization it allows. There would be something a little inconsistent, a little coercive, and, to my mind, a little ugly about a system that allowed deductions for gifts to the Metropolitan Opera but not to the Vienna Opera.

254 See supra note 253.
international comparisons may be too speculative to yield precise answers, but this basic outcome emerges clear enough.

Under almost any hierarchy of policy goals or specification of community, then, the integrated theory affirms the claim that foreign gifts have to the deduction. As a matter of tax theory, broadly construed, it is hard to identify a principled basis on which to restrict deductions geographically. The integrated theory points instead to an equivalency ideal, whereby internationally-targeted contributions are granted the same tax treatment as domestically-targeted contributions, except to the extent justified by reasonable extrinsic considerations.

B. Complications

The most meaningful way in which the United States violates the equivalency ideal is through the water’s edge policy, which raises the relative cost and complexity of foreign giving. The violation is not so dramatic, however: although it denies deductions for gifts made directly to foreign charities, the water’s edge policy allows full deductions for gifts made to U.S.-based intermediaries that send or use the funds abroad. Other countries deviate much more seriously from the equivalency ideal. Brazil, Russia, and Thailand, for example, allow no deductions unless all donated funds are used by the donee within the home country. Countries like Italy, Poland, and South Africa, on the other hand, place no geographic restrictions on the deduction. One reason for these disparities must lie in the fact that international giving raises two complications outside the purview of traditional tax theory. The most obvious complication concerns cross-border oversight. The subtler, yet perhaps more interesting complication concerns foreign policy. Both make it more difficult to say whether the water’s edge policy is responsive to the equivalency ideal, and whether it adds or subtracts value.

Oversight considerations have long been the central defense for the water’s edge policy. Oversight considerations have long been the central defense for the water’s edge policy. The basic concern is that with foreign gifts the IRS will have a harder time ensuring that the donor and donee have met the terms of § 170—ensuring that the donee is organized and operated

255 Jane Peebles suggests an unprincipled basis for the water’s edge policy and the “arcane” rules that attend it: they create a lot of work for lawyers and accountants. E-mail from Jane Peebles, Partner, Bingham McCutchen LLP, to David Pozen (May 16, 2006, 4:45 PM) (on file with Connecticut Law Review). This reality may help explain why, despite widespread disapproval in the nonprofit tax law community, the water’s edge policy has not been the subject of any substantial reformist efforts.

256 See supra Part II.B (explaining the water’s edge policy). Apart from the water’s edge policy, the equivalency ideal also supports the minimization of charitable-giving tax differentials along the other, less dramatic dimensions adumbrated in Part II. Harvey Dale provides a sensible list of reforms to this end in Dale, supra note 39, at 696.

257 See supra note 67.

258 See supra note 67.

259 See supra note 66 and accompanying text.
exclusively for charitable purposes, that no part of its net earnings inure to the benefit of any private shareholder or individual, and so forth—because of resource and informational constraints as well as possible jurisdictional obstacles. These regulatory difficulties lead Professor Peter Wiedenbeck to ask rhetorically: “How will the IRS assure that [§ 170’s] conditions are satisfied in the case of a contribution to an organization located outside the United States?”

For Wiedenbeck and others, the only answer is to require these contributions to flow through a U.S.-based intermediary, creating both an administrative and jurisdictional hook.

This is a reasonable solution, but it is not the only solution, and it is certainly not the most narrowly tailored solution. Although in theory the intermediary system facilitates accountability, in practice both state and federal oversight is minimal. More important, as critics of the water’s edge policy have argued, there are ways the IRS could retain oversight capacity without denying deductions for gifts made directly to foreign charities (or to some subset thereof). The most straightforward alternative would be to require foreign organizations seeking tax-deductible U.S. gifts to register with the IRS and submit to its jurisdiction, just as we do currently for organizations seeking recognition of their exempt status under § 501(c)(3). Many organizations would never register because of the filing fees, ignorance, or a desire to avoid IRS scrutiny; for those unregistered donees, the water’s edge regime could remain in place.

Other schemes would allow for greater flexibility. The United States could most fully realize the equivalency ideal by rescinding all geographic restrictions on deductibility—if this sounds radical, recall that unlike the income tax, the gift and estate taxes have never been subject to such restrictions—and then devoting additional resources to monitoring. It could expand on its bilateral treaties with Canada, Israel, and Mexico by dropping the local-source-income limitation (or failing that, dropping the percentage limits) and granting waivers to donees located in all countries whose regulators it trusts. It could lead efforts to harmonize nations’ nonprofit laws and create an international body to enforce them.

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260 Wiedenbeck, supra note 43, at 103.
262 See supra notes 56, 62 and accompanying text (describing Harvey Dale’s and Kimberly Blanchard’s proposals to this effect). Dale also recommends relaxing the filing requirements for foreign charities. Dale, supra note 39, at 690, 696.
263 See supra note 41 and accompanying text.
264 See sources cited supra note 40 (explaining these treaties).
265 Darryll Jones and Penina Kessler Lieber advocate for such efforts. Jones, supra note 48, at 140; Lieber, supra note 63, at 740–42.
rely on independent watchdog groups to identify problem donees. It could allow donors to unregistered foreign charities to make an affirmative case for deductibility. Or it could employ any combination of the above. These schemes all have distinct costs and benefits and countless permutations, and this is not the place to explore their practicalities. The point here is that oversight concerns could be allayed through any number of mechanisms, in place of or alongside the water’s edge policy, that would lower the cost of foreign giving, erode the often unnecessary layer of U.S. middlemen, and better preserve an ethic of equivalency.

Beyond basic oversight to ensure that charitable contributions meet the terms of § 170 and do not, for example, constitute an impermissible quid pro quo, a more crucial area of oversight concerns gifts to terrorist organizations pretending to be charitable entities. This has been a topic of intense interest since September 11, 2001, and the subsequent revelation that terrorist organizations, at home and abroad, had been using charitable fronts for their operations, providing not only legal cover but also, perversely, state subsidy for their operations.266 The threat posed by these organizations is so great and so salient that even the best-known opponent of the water’s edge policy, Harvey Dale, recently conceded that it makes reform unlikely.267 Yet here too, the water’s edge policy is an awkward fit for the policy goal. While it is vital that we root out donations that abet terrorism, requiring foreign charities seeking deductible status to register with the IRS or an international agency could generate more information on global flows of terrorist financing, at the same time that it reduces the impediments to legitimate flows of charity. Requiring a U.S.-based intermediary, by contrast, does little to separate out legitimate from illegitimate giving and may better enable U.S. individuals to coordinate support for terrorists abroad.268

Everyone can agree that the charitable deduction should never be allowed to support terrorist entities, that the rules of § 170 should apply to

266 For a summary of these revelations and the attendant legal developments, see Andrew J. Brauer, Terrorist Financing Through the U.S. Nonprofit Sector: Towards a More Effective Balancing of Crucial Global Priorities (May 2005) (unpublished manuscript, on file with Connecticut Law Review).
267 Dale, supra note 66, at 5.
268 Separate from the role of U.S.-based intermediary organizations as tools of IRS oversight, preserving a legal mandate for these organizations could perhaps be argued on other grounds. For instance, a utilitarian theorist of the deduction could argue that the intermediaries improve the quality of foreign recipients by exporting institutional know-how as well as donor funds. A communitarian might argue that they preserve a local element to foreign giving, enrich discourse surrounding international causes, and augment the value-inculcating potential of transnational charity. These arguments have some theoretical appeal, but here again, the water’s edge policy is awkwardly crafted to serve the goals. The reality of “friends of” organizations, which exist only to pass through Americans’ contributions to foreign donees, see supra note 46 and accompanying text, belies both the utilitarian and communitarian vision. A policy that encouraged, rather than mandated, more substantial forms of intermediaries would serve utilitarian and communitarian goals more directly and less expensively than the current policy.
foreign gifts as well as domestic gifts, and that foreign deductibility can be reasonably circumscribed by these needs; the oversight difficulties lie in the balancing of the equivalency ideal with regulatory exigency. Substantively, however, the more difficult issues arise when Americans’ foreign charity decisions conflict with the government’s foreign policy goals without violating any laws. A good example of this involves contributions to foreign NGOs that perform, provide counseling on, or lobby for abortion. Under the Bush Administration’s highly controversial “global gag rule,” official U.S. policy is to deny government aid to any such organization.269 Representative losers from this rule include the International Planned Parenthood Federation affiliates, mostly in Africa, which had to forfeit all government funding on account of their abortion-related activities.270

Except not quite: American donors can still receive deductions for gifts made to the Planned Parenthood Federation of America—and thereby enlist all other U.S. taxpayers in their subsidy—which can then transmit those funds to Planned Parenthood Associations overseas. Allowing these deductions collides with the government’s stated goal by making it an indirect sponsor. Other conflicts with policy goals will be less direct, but just as real. For example, some INGOs may operate programs inimical to government objectives in unfriendly states like Burma and Cuba, and many environmental INGOs oppose the Administration’s refusal to ratify the Kyoto Protocol on climate change.271 The charitable deduction might be seen in these instances as a subversive agent of foreign policy—covertly thwarting the will of the electorate, undemocratically transforming individual donors into foreign policymakers, undermining national interests. These accusations would be available with or without the requirement of U.S.-based intermediaries. To enable the government to exercise greater control over internationally-targeted contributions, an exclusive program of matching grants such as Ireland’s272 might seem more attractive.


272 See supra note 67.
This idea of the charitable deduction as the privatization of foreign policy is provocative and potentially generative, but it by no means follows that the proper response is to exercise tighter gatekeeping over eligible foreign donees. Although domestic charities may be prohibited from engaging in substantial lobbying or other political activities, many of them routinely advocate positions at odds with those of the current regime (including the global gag rule and the failure to ratify the Kyoto Protocol), and we think this a good thing: “Active engagement in public affairs has long been touted as a vital and noble function of the third sector.”

Creating a government-supported space for dissent in foreign policy, an Executive-dominated area not generally amenable to minority views, can be seen as democratic in the participatory sense, if not in the republican sense. It is a mechanism for what Professor Heather Gerken has termed “dissenting by deciding,” whereby decentralized decisionmaking processes allow minority groups to set policies that bind the majority. There are concerns of countermajoritarianism and inefficiency with dissenting by deciding, but there may be offsetting benefits, including an expanded marketplace of ideas, deeper potential for transformative reform, and Professor Steven Shiffrin’s idea that the “institutional promotion of dissent is necessary to combat injustice.”

Disallowing the charitable deduction for donations used to support Planned Parenthood Associations abroad would, furthermore, create severe investigative and civil liberties problems. Individual donations to the Planned Parenthood Federation of America would need to be tracked and sorted, and the programming of all recipient charities, foreign and domestic, would need to be mined for potential conflict with government policies that may shift over time. Any such scheme would unravel the deduction’s opacity and, potentially, the delicate social compromises it has facilitated. The NGO community would be in an uproar; charitable

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273 In a short companion piece to this Article, I suggest how it might be fruitful to explore the foreign policy role of the charitable deduction and other nonprofit tax privileges through the lens of tax expenditure analysis. Pozen, supra note 242.

274 See Simon, Dale & Chisolm, supra note 3, at 53–66 (reviewing the major regulations affecting § 501(c)(3) status).

275 Id. at 53.


277 Id. at 1805 (quoting STEVEN H. SHIFFLIN, DISSENT, INJUSTICE, AND THE MEANINGS OF AMERICA 91 (1999)). One feature that differentiates the charitable deduction from typical modes of dissenting by deciding is that those individuals best able to avail themselves of this route, namely wealthy itemizing taxpayers, will tend to be empowered political and economic actors, not traditional minorities. Even wealthy taxpayers, however, are typically disempowered actors in matters of foreign policy, and almost 30% of taxpayers now claim the charitable deduction. See supra note 109.

278 See supra Part III.C.2 (discussing the benefits of having the deduction’s subsidy be “hidden”).
giving would likely decline. Politicizing international deductions would be a very costly means to promote foreign policy consistency.

While I have seen no other commentators identify the charitable deduction as an instrument for state-sponsored foreign policy dissent, many commentators since 9/11 have voiced the complaint that the United States receives insufficient credit for its foreign aid spending. For example, in a report widely cited by Administration officials, Carol Adelman and colleagues argue that official statistics understate Americans’ generosity to the developing world because the statistics exclude private transfers. Adelman and colleagues do not take up the charitable deduction, but they might have: although the deduction’s opacity hides its less attractive elements from the American public, it also hides its generosity from the global community. As a result, there may be a tradeoff between the deduction’s ability to broker domestic compromise and its ability to generate international goodwill toward the United States or, at least, toward the U.S. government. Official foreign aid is more visible, better able to exploit economies of scale, and may carry greater expressive force. Replacing the implicit subsidy of foreign giving—now worth perhaps one to two billion dollars per year—with explicit government aid might therefore stimulate an increase in goodwill, in addition to mitigating oversight burdens and other foreign policy concerns.

On the other hand, increasing government aid at the expense of the charitable deduction may dampen goodwill on a number of fronts.

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280 Professor Evelyn Brody has made a similar point in the domestic context. Brody, supra note 105, at 753 (“The public fails to equate the tax expenditure to revenue that flows into the federal fisc and is then reallocated [via the deduction] to the charities of the taxpayers’ choice. In short, the government does not get credit for this financial support, and charities often assert that they receive no public funds.”). Matching grants and tax credits, two oft-proposed alternatives to the deduction, would be more easily recognizable as subsidies, though still more opaque than direct government spending.

281 I have seen no attempts to calculate the size of this subsidy, but if we take Fishman and Schwarz’s estimate that the charitable deduction saved U.S. federal income taxpayers $40.6 billion in 2003, FISHMAN & SCHWARZ, supra note 23, at 689, along with the fact that approximately 2% to 4% of Americans’ giving now goes to foreign causes, see supra note 181 and accompanying text, simple multiplication suggests that deductions for these gifts generated between $812 million and $1.62 billion in savings. The real figure should be at the upper end of this range, and very possibly higher, given that 4% is a more realistic figure than 2%, aggregate giving levels have been rising, the estate and gift taxes and state income taxes also subsidize foreign contributions, and higher-bracket taxpayers seem more likely to support international causes.
Individual and corporate giving are likely to fall substantially; displeased American donors may convey their anger to groups abroad; foreign recipients may be more skeptical of government aid than private aid; and a more centralized process for distributing charity will tend to reduce the diversity of recipients and exacerbate the democratic-process pathology of systematically underweighting long-term risks. More basically, however, the tension between the charitable deduction and direct aid may be artificial. One to two billion dollars is not a vast amount in the scheme of the foreign affairs budget, which in recent years has included over $16 billion annually for official development assistance. If the charitable deduction is failing to generate goodwill commensurate with its economic cost, the failure could be seen as one of marketing. By clarifying to the international community that the charitable deduction not only subsidizes foreign charity, but also does so in a resolutely apolitical way, the U.S. government has a chance to bolster the deduction’s utility as an instrument of soft power and stimulate greater overall goodwill. In the current political clime, opacity may not be worth it.

VI. CONCLUSION
For better and worse, tax deductions for internationally-targeted donations are already raising oversight concerns, already delegating foreign policy to individual donors, already transforming civil society across the world. A notoriously problematic policy, the charitable deduction only becomes more problematic in the international context. Yet it also becomes a more powerful vehicle for generating collective benefits—for enhancing social welfare, distributive justice, and communitarian values not just globally, but also domestically.

This Article has tried to situate the charitable deduction in a broader critical and spatial context, and to show how it has provided a vital, underexplored link between U.S. tax policy and the “global associational revolution.” The analysis suggests that any deduction policy should aim to effectuate an ideal of geographic neutrality. Replacing or supplementing the water’s edge policy with a less restrictive alternative would better comport with tax theory, across a wide range of normative

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282 See supra notes 200–01 and accompanying text (noting the Center for Global Development’s estimate that over half of Americans’ internationally-targeted giving is attributable to the charitable deduction).
283 See supra Part IV.B.3 (discussing the utilitarian benefits of international deductions).
285 See supra notes 5–10 and accompanying text.
commitments, and better capitalize on the deduction’s virtues. It would also be an act of political symbolism. Against the widespread belief that the U.S. government is stingy with international aid, dismantling the water’s edge policy would demonstrate our commitment to foreign charity. It would send the message that—conditionally, consistent with our national security and national interest, yet wholeheartedly—America supports the revolution.