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### The Charitable Continuum

Eric Kades

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# The Charitable Continuum

*Eric Kades\**

*There are powerful fairness and efficiency arguments for making charitable donations to soup kitchens 100% deductible. These arguments have no purchase for donations to fund opulent church organs, yet these too are 100% deductible under the current tax code. This stark dichotomy is only the tip of the iceberg. Looking at a wider sampling of charitable gifts reveals a charitable continuum. Based on sliding scales for efficiency, multiple theories of fairness, pluralism, institutional competence and social welfare dictate that charitable deductions should in most cases be fractions between zero and one. Moreover, the Central Limit Theorem strongly suggests that combining this welter of largely independent criteria with the wide variety of charitable gifts results in a classic bell-shaped normal curve of optimal deductions, with a peak at some central value and quickly decaying to zero at the extremes of 0% and 100%. Given that those are the only two options under the current tax code, the current charitable deduction regime inevitably makes large errors in most cases. Actually calculating a precise optimal percentage for each type of charitable donation is of course impractical. This Article suggests, however, that we can do much better than the systematically erroneous current charitable deduction. Granting a 100% deduction only for donations to the desperately poor, along with 50%, 25%, and 0% for gifts yielding progressively fewer efficiency, fairness, pluralism, and institutional competence benefits, promises to deliver a socially more desirable charitable deduction.*

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## INTRODUCTION

*There are no degrees of charitableness. Exactly the same privileges and immunities are accorded in the creating of the great foundations, whose purposes are sometimes stated to be to distribute the income for the benefit of mankind, as are accorded to a bequest to maintain a hospital for ailing Siamese cats.<sup>1</sup>*

*The line between what is charitable and what is not is sometimes a difficult one to draw, for the difference may be one of degree and the line may be drawn differently at different times and in different places.<sup>2</sup>*

One day, through no fault of my own, I attended church at a congregation that my family typically drives 30 minutes to avoid. This ostentatiously wealthy congregation sports a beautiful, capacious, new building and lovely landscaping. What caught my eye, however, were the enormous pair of beautiful pipe organs that dominate the front and back of the chapel. A little research reveals that the larger organ is 32 feet tall; both are constructed of thick, solid white oak, poplar, and Honduran mahogany; together the two have no less than 3,600 pipes; and that it took over 10,000 man-hours to make the pair.<sup>3</sup> Research did not reveal the price of this particular super-deluxe pipe organ, but the best information that I could find suggests that a new custom-made instrument of this size and quality probably costs millions.<sup>4</sup> I then had the arguably uncharitable thought that, despite devoting my charitable donations (religious and otherwise) to much humbler causes, I nonetheless had paid for a portion (admittedly, a very small portion) of these opulent organs. I confess that this bothered me sufficiently to motivate me to write this Article.<sup>5</sup>

The reason that I involuntarily contributed to the purchase of the opulent organs is the charitable tax deduction (hereinafter the “CD”), a feature of America’s Internal Revenue Code that dates back to the founding era of the

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1 LEWIS M. SIMES, PUBLIC POLICY AND THE DEAD HAND: FIVE LECTURES DELIVERED AT THE UNIVERSITY OF MICHIGAN FEBRUARY 7, 8, 9, 14, AND 15, 1955, at 118 (1955).

2 RESTATEMENT (THIRD) OF TRUSTS § 28 cmt. (AM. LAW INST. 2003).

3 PIPE ORGAN, SAINT BEDE CATHOLIC CHURCH, <https://www.bedeva.org/103> (last visited Nov. 14, 2020).

4 *How Much Can a Pipe Organ Cost, Built to Order?*, QUORA, <https://www.quora.com/How-much-can-a-pipe-organ-cost-built-to-order> (last visited Nov. 14, 2020).

5 Church organs have similarly inspired earlier scholars; see Mark P. Gergen, *The Case for a Charitable Contributions Deduction*, 74 VA. L. REV. 1393, 1440 (1988).

federal income tax.<sup>6</sup> The CD grants an income tax deduction for contributions to suitable nonprofits “organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes . . . or for the prevention of cruelty to children or animals.”<sup>7</sup> This provision has long been construed to permit deduction of all donations to churches, as they are nonprofits “organized and operated exclusively for religious . . . purposes.”<sup>8</sup>

If someone in the top federal income tax bracket for 2019, 37%,<sup>9</sup> donates \$1,000 to a church that happens to be buying opulent organs, their federal tax bill falls by \$370. There is nothing unique about deductible donations to religious entities. All CDs, whether religious, charitable, scientific, educational, or literary, are examples of “tax expenditures”—provisions of the IRC that implicitly spend federal dollars via deductions, credits, and similar tax-reducing mechanisms.<sup>10</sup> Congress must slash spending on some program that presumably many Americans favor, raise tax rates on everyone to make up for this tax revenue decrement, or borrow more and kick the funding shortfall down the road.

Under the tax code, donations are either charitable and hence 100% deductible<sup>11</sup> or non-charitable and hence not deductible at all. This ironclad doctrine of both tax and trust law is what Simes captured in the first introductory quote above. The general rule is that donations to qualified organizations *for any purpose* are deductible.<sup>12</sup> Thus, donations to fund a church’s super-deluxe pipe organ garner the same tax deduction as donations to feed starving orphans.

This seems wrong at multiple levels, from the everyday meaning of the word “charitable” up to social policy rationales—why on earth should all Americans subsidize fancy church organs? The lawyerly reaction might well be to recraft the rules so that “true charity” like the soup kitchen remains deductible but donations for luxuries like the pipe organ are not. The problem,

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6 26 U.S.C. § 170 (2011). We will also make frequent reference to the parallel provision granting donee nonprofit entities exemption from the payment of federal income taxes; 26 U.S.C. § 501 (2011).

7 26 U.S.C. § 170(c)(2)(B) (2011).

8 *Id.* For a case not too far from opulent organs, see *Matter of MacFarland*, 95 N.Y.S.2d 258 (Sur. Ct. 1950) (holding that a trust funding weekly flower supply for church qualified as charitable under state law).

9 26 U.S.C. § 1 (2011).

10 See STANLEY S. SURREY & PAUL R. MCDANIEL, *TAX EXPENDITURES* (1985).

11 For purposes of this summary, I ignore some important caveats to this statement, e.g., that a taxpayer must itemize to benefit from the charitable deduction, or that the dollar value of a deduction depends on a taxpayer’s marginal tax rate.

12 Most commonly, charitable donations are made to tax-exempt § 501(c)(3) organizations; 26 U.S.C. § 501(c)(3) (2011).

however, is much deeper. Instead of the organ, think of a donation to subsidize the Sunday school tuition bills of poor congregants. This certainly seems more like charity than the organ though less like charity than feeding the waifs. Or what of a donation to fund 50% of the operating costs of the church so that all congregants, whether poor, middle-class, or wealthy, can pay lower annual dues or put less in the collection basket each week? There is still some element of charity in this gift, though less than the preceding example.

Generalizing on this series of examples, the lesson is that there is a charitable *continuum*: instead of *all or nothing*, we should think of *more or less* charitable. Once again, however, the problem is deeper than suggested by the previous paragraph. There are in fact *multiple* charitable continua. The examples offered up so far sound in fairness or equity and revolve around gifts by those with means to help those without—essentially redistribution. Fairness, however, comes in many flavors: utilitarianism, Rawls's maximin principle, natural rights theory, and naked national wealth maximization, just to name some of the more prominent candidates.<sup>13</sup> These frameworks diverge in their estimation of the social value of particular charitable gifts. More to the point of this Article, however, is that each and every one of them will value such gifts along its own continuum. In a pluralist democracy, all of these theories of fairness (and likely others) should receive some positive weight in the social calculus. Thus, fairness alone gives rise to multiple continua that must be combined into a single charitable continuum.

And fairness in its various incarnations is not anywhere near the end of this story; indeed, over the last 40-odd years fairness has not even been the beginning of the story for tax scholars. Although it seems alien to the word "charitable," the dominant normative model of the deduction for decades has been *efficiency*. The essential insight is that bystanders A, B, and C feel better simply observing donor D help suffering S. In a word, we as a species are widely and deeply empathetic. If you are thinking that A, B, and C are free-riding on D's generosity, then you have intuited the efficiency justification for the charitable deduction. They are free riders. This shows that *charity is a public good*, just like the police and the courts. Markets will provide an insufficient level of it given the positive externalities it generates for the likes of A, B, and C. A subsidy, e.g., the charitable deduction, is then in order. Efficiency is yet another continuum: some donations will yield larger positive external benefits, some smaller. It is not all-or-nothing, but rather ranges from 0 to 100%.

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13 For an overview of these and other theories of fairness, see STANFORD ENCYCLOPEDIA OF PHILOSOPHY, *Justice*, <https://stanford.io/35vbpRx> (last visited Nov. 14, 2020).

Although efficiency and fairness might seem to cover the field, that is economics-centered thinking. Political scientists have suggested two more continua as relevant to optimizing the charitable deduction. First, there is pluralism.<sup>14</sup> The charitable deduction allows minority interest groups to indirectly obtain some public support for goods or services that the majority disfavors. Second, there is institutional competence: sometimes the private sector is simply better at providing particular public goods than the government.<sup>15</sup> Some have argued, for example, that private charitable efforts to alleviate poverty are more effective than public programs.<sup>16</sup>

When all is said and done, Parts I and II of this Article identify no fewer than nine continua that are relevant to calculating the socially most desirable schedule for charitable deductions. Part III then explores some special and surprising issues that arise in applying a charitable continuum to science and religion. Part IV provides a framework for dealing with institutions with multiple charitable and non-charitable purposes.

Part V then highlights why the current all-or-nothing system imposes high error costs based on statistical fundamentals suggesting that the distribution of optimal charitable deductions has a peak at some relatively middling value with quickly diminishing tails towards the extremes of 0% and 100% deductibility. Given that most of the distribution's weight is in the center and relatively little at the tails, the error costs of the current all-or-nothing charitable deduction are large: many deductions should be, e.g., in a range like 33%-67%, yet in procrustean fashion the current regime forces all deductions to either 0% or 100%.

Despite these high error costs, trying to calculate a precise percentage deduction for each and every charitable deduction is simply infeasible—i.e., prohibitively expensive. The perfect, however, need not be the enemy of the good. Part VI proposes a relatively simple, practical set of rules to reduce the cost of suboptimal charitable deductions at reasonable cost.

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14 *Infra* § I.C.

15 *Infra* § I.D.

16 *See, e.g.*, David M. Schizer, *Subsidizing Charitable Contributions: Incentives, Information, and the Private Pursuit of Public Goals*, 62 *TAX L. REV.* 221, 224 (2009); Saul Levmore, *Taxes as Ballots*, 65 *U. CHI. L. REV.* 387, 405 (1998).

## I. THE MULTIPLICITY OF POLICY JUSTIFICATIONS FOR THE CHARITABLE DEDUCTION

Before discussing the multiple policy rationales for the CD, a few words on the legal definitions and sources are necessary. The Internal Revenue Code (“IRC”) sections establishing the CD and the exemption for nonprofits use almost exactly the same list of qualifying activities: religious, charitable, scientific, literary, educational, and the prevention of cruelty to children or animals.<sup>17</sup>

This language, however, is not as plain as it might seem. Although the word “charitable” appears as one element of a list, that same word is, confusingly, also used to refer to the entire list of altruistic purposes. Thus we must be mindful that “charitable” frequently is used in this broader sense. In addition, although there are differences, there is a large overlap between the IRC definitions and the common-law definition of “charitable” in the broader sense. The most widely used definition of charity from the law of trusts is: “[c]haritable trust purposes include: (a) the relief of poverty; (b) the advancement of knowledge or education; (c) the advancement of religion; (d) the promotion of health; (e) governmental or municipal purposes; and (f) other purposes that are beneficial to the community.”<sup>18</sup> In the first use of a charitable tax exemption in 1894, “Congress apparently patterned the exemption in the original income tax after the [English common law]. IRS regulations published in 1959 state that charitable is to be understood according to its ‘generally accepted legal sense ... as developed by judicial decisions.’”<sup>19</sup> Thus, like the IRS, this Article draws on examples and policy reasoning from the law of charitable trusts. This branch of private, largely judge-made law has a long and rich history stretching back to medieval England.<sup>20</sup> As with all trusts, the essential legal effect of a trust is to split the grantor’s ownership of property into legal title held by a trustee and equitable (or beneficial) title vested in some group of beneficiaries. In the case of charitable trusts, the beneficiaries must be a relatively large group without any personal ties to the grantor.<sup>21</sup>

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17 26 U.S.C. § 170(c)(2) (deduction) (2011), 26 U.S.C. §501(c)(3) (exemption) (2011).

18 RESTATEMENT (THIRD) OF TRUSTS § 28 (AM. LAW INST. 2003). The language in the analogous § 368 from the Restatements First and Second of Trusts is almost exactly the same, and this language can be traced at least as far back as the English Statute of Charitable Uses (1601).

19 JOHN D. COLOMBO & MARK A. HALL, THE CHARITABLE TAX EXEMPTION 33 (1995).

20 See AMY MORRIS HESS, GEORGE GLEASON BOGERT & GEORGE TAYLOR BOGERT, BOGERT’S TRUSTS AND TRUSTEES §§ 321-22, 361-63 (June 2020 update).

21 *Id.* at § 1.

For such a modest feature of the tax code, the CD has a remarkable number of policy justifications. In what surely will come as a surprise to those not versed in the literature, the traditional definition of charity,<sup>22</sup> “generous actions or donations to aid the poor, ill, or helpless,” is not at the top of the list and doesn’t even make some scholars’ lists!<sup>23</sup> In what may be an even greater surprise, efficiency has become the leading explanation for the CD based on pioneering economic scholarship from the 1970s.<sup>24</sup>

### A. Efficiency Justifications (a Bigger Pie)

We start with perhaps the most prominent academic argument for the CD: it can ameliorate knotty collective action problems. The story begins with public goods—those goods/services that are both non-rivalrous (one person’s use of the good does not prevent others from also using it) and non-exclusive (it is impossible or prohibitively expensive to exclude anyone from using the good). The classic example of a public good is national defense: my enjoyment of the peace and safety maintained by national military forces does not diminish others’ enjoyment of the same benefits (non-rivalry), and it impossible to limit national defense to any subgroup of the population (non-exclusive). The following table situates public goods in a wider context, providing a standard taxonomy for four different types of goods.

**Table 1**

	<b>Excludable</b>	<b>Non-excludable</b>
<b>Rivalrous</b>	<b>Private goods</b> Food, housing, computers, airplane seats	<b>Commons (&amp; tragedy of)</b> Clean air, fish, satellite orbits
<b>Non-rivalrous</b>	<b>Club goods</b> Private golf clubs, private schools, copyrighted materials	<b>Public goods</b> National defense, streetlights, economic data, fireworks, charity

22 *Charity*, DICTIONARY.COM, <https://www.dictionary.com/browse/charity> (last visited Nov. 14, 2020).

23 *See, e.g.*, Schizer, *supra* note 16, at 224. To be fair, although Schizer omits fairness/equity concerns from his main list of rationales for the CD, he later observes that “we should determine which approach is more efficient *and more equitable*.” *Id.* at 227 (emphasis added).

24 *See infra* text accompanying notes 26-27 & 47-49.



This Article does not involve either private goods or commons. We will find the *club goods* category useful—goods that are non-rivalrous but excludable have an important role to play in thinking about the CD.

In the main, however, the CD implicates *public goods*. The well-known problem with such goods is that we cannot rely on private action to supply them (hence the label *public!*). The essential difficulty is free-riding. Imagine trying to fund the armed forces with voluntary contributions. Most citizens attach significant value to national defense services but also realize that their \$2,054.71<sup>25</sup> contribution makes almost no difference to the quality of those services and so, if given the option, might decide not to pay. This is individually rational. Of course others think the same way, and the end result might well be no money for national defense, which seems socially irrational. To avoid this collective action problem, the government imposes compulsory taxes to fund the military—and a host of other public goods. In theory the state could provide all public goods. Governments, however, are imperfect and may fail to deliver all of the public goods that the populace desires. In particular, an elected government will have a tendency to fund only those public goods supported by the “median voter,” the single or small group of marginal voters in any majority voting bloc. This leaves untapped demand for various charitable causes commanding possibly significant though less than majority support.<sup>26</sup>

Charity, whether funded publicly because of widespread support or subsidized via the CD because the group of beneficiaries and other supporters does not comprise a majority, is not one of the more frequently referenced examples of a public good, but it easily qualifies.<sup>27</sup> Here we are thinking not of the direct services that a soup kitchen provides to the poor, but rather the indirect benefit, rooted in the fundamental human emotion of empathy that

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25 This is the per capita military budget for the U.S. in 2019: expenditures of \$676 billion divided by a population of about 329 million. Military Budget of the United States, Congressional Budget Office, *The Federal Budget in 2019: An Infographic*, <https://www.cbo.gov/publication/56324> (last visited Nov. 14, 2020); U.S. AND THE WORLD POPULATION CLOCK, UNITED STATES CENSUS BUREAU, <https://www.census.gov/popclock/> (last visited Nov. 14, 2020).

26 Burton A. Weisbrod, *Toward a Theory of the Voluntary Nonprofit Sector in a Three-sector Economy*, in ALTRUISM, MORALITY, AND ECONOMIC THEORY 171 (Edmund S. Phelps ed. 1975).

27 The seminal work on charity as a public good remains. Harold M. Hochman & James D. Rodgers, *The Optimal Tax Treatment of Charitable Contributions*, 30 NAT. TAX J. 1 (1977).

most people feel when they see suffering alleviated.<sup>28</sup> Here is how a preeminent scholar of charitable giving puts it:

[C]haritable giving, motivated out of altruism, creates a public good out of charity. Even if, for instance, the recipients of the charitable services are individuals and are given private goods, such as income transfers, day care, or housing, the fact that others feel altruistically toward these individuals means that the private consumption of these charity recipients becomes a public good.<sup>29</sup>

This is a matter of *positive* economics, accepted by economists across the ideological spectrum. No less a conservative/libertarian than Milton Friedman concurred.<sup>30</sup>

To frame the idea in practical terms, if X gives money to feed starving children, X's enjoyment of the fruits of her charity in no way inhibits non-contributor Y from seeing and enjoying the reduction in the children's suffering (non-rivalrous) and X cannot prevent Y from partaking of this empathetic pleasure (non-excludable). To use a slightly different vocabulary for the same idea, X's charity confers a positive external (abbreviated "PosEx" hereinafter) benefit on Y.<sup>31</sup> For historical, institutional, or political reasons, the government may fail to meet the full public demand for charity.

As with any public good (or PosEx), however, the specter of free-riding tends to inhibit private charity. The CD is almost perfectly suited to solving this problem. It reduces the cost of charitable contributions to those most willing to make voluntary contributions—presumably those who most value aiding the poor—and funds the discount by imposing incremental tax burdens on non-donors who experience PosEx from others' generosity. Hochman and

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28 For an introduction to the burgeoning science of empathy, see SIMON BARON-COHEN, *THE SCIENCE OF EVIL: ON EMPATHY AND THE ORIGINS OF CRUELTY* (2011); Antti Kauppinen, *Empathy and Moral Judgment*, in *THE ROUTLEDGE HANDBOOK OF THE PHILOSOPHY OF EMPATHY* 215, 215-26 (Heidi Maibom ed. 2017); SUSAN M. LANZONI, *EMPATHY: A HISTORY* (2018).

29 James Andreoni, *Philanthropy*, Ch. 18 in *2 HANDBOOK OF THE ECONOMICS OF GIVING, ALTRUISM AND RECIPROCITY* 1201, 1212 (Serge-Christophe Kolm & Jean Mercier Ythier eds., 2006).

30 MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* 191 (1962). Friedman's libertarian followers never explain why their minimalist state must provide some public goods (police; courts) but not charity.

31 Some prominent scholars think that "the concept of an externality is the basic one," and that public goods are simply one manifestation of externalities. RICHARD CORNES & TODD SANDLER, *THE THEORY OF EXTERNALITIES, PUBLIC GOODS AND CLUB GOODS* 7 (2d ed. 1996).

Rogers argue that the deduction approximates the *optimal* subsidy: it induces additional contributions from donors that result in delivery of the socially most desired level of charity.<sup>32</sup> If non-donors are honest, they would (begrudgingly) admit that the satisfaction from alleviating suffering fully compensates them for their bigger tax bills.

Innovative scholarship over the last few decades has significantly buttressed this 'traditional' case for subsidizing charitable giving. Indeed, the innovations are necessary to explain the prevalence of charity by assumedly rational agents. If only empathy motivated donors, then in large populations most rational donors (all but the most wealthy and generous) would have vanishingly small incentives to give at all because their gifts, being a tiny share of total charity, provide only the minutest marginal improvement in the condition of charities' beneficiaries.<sup>33</sup> The leading explanation for the pervasive charity witnessed in the U.S. for as far back as we have data is "warm glow," the notion that donors derive value/satisfaction/utility from the very act of giving—they experience a warm glow from the very act of penning a check or dropping a Jackson in a donation box.<sup>34</sup> This warm glow is in addition to the salve to their empathy provided by the actual benefit to the beleaguered object of their charity.

Why does warm-glow giving strengthen the efficiency case for the CD? The key insight is that people get a warm glow from *voluntary giving* and not from the government compelling them to pay more taxes. Thus, to the extent that we fund charity with giving rather than via taxing and redistributing, donors derive additional utility. Presumably the recipients' gains depend only on the size of the gift and so they do not care whether the money was given voluntarily or not, and the PosEx to other potential donors similarly depends on alleviation of hardship and not at all on the source of funds. Thus the CD increases the benefits of charity without cost.

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32 Hochman & Rogers, *supra* note 27, at 8-10 (arguing that a tax subsidy can approximate an efficient *Lindahl* solution to the problem of providing optimal levels of public goods). Hochman and Rodgers argue that a tax *credit* rather than a deduction will produce outcomes closer to the Lindahl solution under standard economic assumptions. Other scholarship has countered and argued that a deduction is the better policy too. Jeff Strnad, *The Charitable Contribution Deduction: A Politico-Economic Analysis*, in *THE ECONOMICS OF NONPROFIT INSTITUTIONS: STUDIES IN STRUCTURE AND POLICY* 265 (Susan Rose-Ackerman ed., 1986). This wrinkle does not affect the basic structure of the efficiency argument for the charitable deduction.

33 James Andreoni, *Impure Altruism and Donations to Public Goods: A Theory of Warm-Glow Giving*, 100 *ECON. J.* 464 (1990).

34 *Id.* See also Gergen, *supra* note 5, at 1407-10.

Exactly what constitutes PosEx varies with time and place. Given the universality of human empathy, aid to orphans and others suffering through no fault of their own has been viewed as charity since time immemorial. Treasury regulations of recent provenance illustrate how a society can expand the list of purposes that qualify for preferential treatment. Gifts designed to “lessen neighborhood tension; ... eliminate prejudice and discrimination; ... defend human and civil rights secured by law; or ... combat community deterioration ...” all now qualify.<sup>35</sup> These newfangled charitable causes have clear roots in the Civil Rights Movement of the 1960s. Indeed, in the late 1800s and early 1900s most Americans were prejudiced and believed in racial discrimination; in such a society, there would be a negative, not positive, external effect from gifts supporting racial equality. Today, however, a sea-change in social attitudes, as reflected in the quoted regulations, tells us that gifts to further these ends generate significant PosEx.

## B. Fairness/Equity Justifications

To those unexposed to this literature, the efficiency justification for the CD likely comes as a surprise. Indeed, in lay language an *efficiency* justification for *charity* sounds like a contradiction in terms. Even more surprising may be the extent to which the efficiency rationale has eclipsed traditional notions of charity (redistribution; fairness; equity). “[C]urrent tax scholarship on the charitable tax subsidies generally either ignores or explicitly disavows normative distributive justice concerns.”<sup>36</sup> The efficiency justification undoubtedly brings powerful insights to bear, e.g., it is a much better justification for the longstanding deduction for contributions to science and the arts, which generate PosEx bearing no resemblance to aiding the destitute.

All that said, the very word “charitable” powerfully suggests that at least some elements of the targeted phenomenon should involve redistribution, fairness, equity, and related concepts orthogonal to efficiency. As one scholar sums it up, “avoidance of distributive justice concerns ignores the very purpose of charity: voluntary redistribution. After all, it’s called the charitable deduction, not the public goods deduction.”<sup>37</sup> Others have made much the same point.<sup>38</sup> Indeed, this more common conception of charity is so deeply

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35 26 C.F.R. § 1.503(c)(3)-1(d) (2001).

36 Miranda Perry Fleischer, *Theorizing the Charitable Tax Subsidies: The Role of Distributive Justice*, 87 WASH. U.L. REV. 505, 507-08 (2010).

37 *Id.* at 508.

38 See, e.g., John K. McNulty, *Public Policy and Private Charity: A Tax Policy Perspective*, 3 VA. TAX REV. 229, 247-48 (1984) (“at an elemental level

rooted that efficiency advocates routinely slip into various admissions that fairness matters.<sup>39</sup> The direct benefits flowing to beneficiaries are what most people think of as the value of charitable giving. The fairness gains from charitable giving are rooted in the twin notions of the declining marginal utility of money<sup>40</sup> and some concave social welfare function.<sup>41</sup> Together these concepts embody the notion that, all else equal, redistributing from the wealthy to the poor improves overall welfare.

In a series of articles, Miranda Perry Fleischer has made a powerful case that there is a strong theoretical basis for the traditional redistributionary justification for charity. Her overarching point is that *all* modern schools of political philosophy, from libertarianism to utilitarianism to Rawlsian maximin redistribution, justify subsidizing donations to the needy based on distributional concerns (in contrast to efficiency concerns). For example, under standard utilitarianism “the types of groups we can most comfortably identify as increasing utility via income redistribution are donative organizations that provide basic needs to the poor.”<sup>42</sup> More importantly, she stresses the fact that although the many stripes of utilitarianism diverge in important ways, “donative organizations that help the poor likely enhance welfare under all of the common [utilitarian theories] of justice.”<sup>43</sup> She makes a similar point about the many varieties of libertarianism: “[a]lmost all [versions of libertarianism] would subsidize aid to the very poorest members of society.”<sup>44</sup> Perry Fleischer makes a compelling case that the fact that such a wide variety

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redistribution seems to be what philanthropy is.”); John Simon, Harvey Dale & Laura Chisolm, *The Federal Tax Treatment of Charitable Organizations*, in *THE NONPROFIT SECTOR: A RESEARCH HANDBOOK* 267 (Walter W. Powell & Richard Steinberg eds., 2d ed. 2006) (arguing that tax preferences for charity are designed “[t]o bring about . . . a degree of fairness or redistribution of resources and opportunities. . .”).

39 *Id.* at 542-43.

40 POSNER, *infra* note 62, at 285 (explaining the common assumption that the marginal increase in utility from an increase in income varies inversely with income).

41 A social welfare function maps the set of individual welfare levels to cardinal measures of overall societal wellbeing; concave versions reflect a general societal desire for a more equal income distribution. See ANDREU MAS-COLELL, MICHAEL D. WHINSTON, & JERRY R. GREEN, *MICROECONOMIC THEORY* 825-31 (1995).

42 Miranda Perry Fleischer, *Charitable Giving and Utilitarianism: Problems and Priorities*, 89 *IND. L.J.* 1485, 1490 (2014).

43 *Id.* at 1491.

44 Miranda Perry Fleischer, *Libertarianism and the Charitable Tax Subsidies*, 56 *B.C. L. REV.* 1345, 1415 (2015).

of social justice theories support the traditional redistributionary justification for subsidizing charity means that “there is something special about groups that help the poor and disadvantaged.”<sup>45</sup>

Of course, there is no necessary contradiction between the efficiency and fairness justifications for the CD. In a theme expanded on at the end of this Part, tax law frequently has “multiple masters,” and there is no *a priori* reason that the CD cannot serve both of these (and additional) ends. Even when efficiency and fairness do come into conflict, it is not standard to choose one to the total exclusion of the other. Both tax policy and economics more generally are permeated with sophisticated tradeoffs between efficiency and fairness.<sup>46</sup>

### C. Pluralism as a Justification

Efficiency and fairness do not exhaust the policies relevant to the CD. This section briefly sketches the pluralism values served by the deduction. The core idea is due to Weisbrod.<sup>47</sup> Thinking in the framework of the efficiency justification, Weisbrod noted that even relatively large groups can be in the minority, and in the absence of some special measures their preferences for goods that generate PosEx among themselves will go unsatisfied under simple majority rule. Gergen summarized the difficulty, and the way that the CD can solve it, as follows:

[The charitable deduction] enables smaller groups to act collectively without having to secure direct government expenditures for the good through the political process. If there is a high preference minority and a relatively indifferent majority, a tax subsidy for private funding of the good may be the only way to fund the good at the level the minority desires. Left to its own devices without a tax subsidy, the minority may not be able to overcome its freerider problems to provide the appropriate amount of the good.<sup>48</sup>

Weisbrod labeled this phenomenon a “government market failure, analogous to the conditions causing private market failures.”<sup>49</sup>

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45 *Id.* at 1347.

46 AMARTYA SEN, COLLECTIVE CHOICE AND SOCIAL WELFARE (expanded ed. 2017); for the classic discussion of balancing efficiency and equity, see ARTHUR M. OKUN, EQUALITY AND EFFICIENCY: THE BIG TRADEOFF (1975).

47 Burton A. Weisbrod, *Toward a Theory of the Voluntary Nonprofit Sector in a Three-Sector Economy*, in THE ECONOMICS OF NONPROFIT INSTITUTIONS: STUDIES IN STRUCTURE AND POLICY 21 (Susan Rose-Ackerman ed., 1986).

48 Gergen, *supra* note 5, at 1399.

49 Weisbrod, *supra* note 47, at 22.

Without invoking this justification explicitly, courts have long seemed to recognize the value of conferring charitable status on causes that lack majority support. In *Jackson v. Phillips*, for example, a 19<sup>th</sup>-century court held that trusts established “to create a public sentiment that will put an end to negro slavery” and “for the benefit of fugitive slaves that may escape from the slave-holding states” qualified as charitable.<sup>50</sup> Courts continue to make such rulings, finding that trusts to promote agnosticism<sup>51</sup> and socialism,<sup>52</sup> can qualify as charitable. These are clearly minority positions: only 4% of Americans identify as agnostic,<sup>53</sup> and only about 40% support any form of socialism.<sup>54</sup>

These holdings are not anomalous, but are in keeping with the Restatement 3<sup>rd</sup> of Trust. Comments on the section defining charitable trusts expressly embrace “[c]ontroversial ideas and unpopular causes,” declaring that “the mere fact that a majority of the people or of the members of a court believe that the particular purpose of the settlor is unwise or not well adapted to its social objective does not prevent the trust from being charitable.”<sup>55</sup>

So far we have treated pluralism as a subspecies of efficiency, to extend the freerider-solving CD to minority interests. There are, however, other varieties of pluralism employed to justify the deduction. Hopkins, for example, has argued that tax breaks for nonprofits are “a bulwark against over-domination by government and a hallmark of a free society; they help nourish the voluntary sector of this nation and preserve individual initiative and reflect the pluralistic philosophy that has been the guiding spirit of democratic America.”<sup>56</sup> Although subject to more than one interpretation, Hopkins’ point seems to be that nurturing nonprofits is one facet of a general pluralistic policy to counterbalance majorities’ definitional power in a democracy. Under this view, it joins an

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50 *Jackson v. Phillips*, 96 Mass. (14 Allen) 539 (1867). Admittedly, both of these causes may have enjoyed majority support in Civil War-era Massachusetts. In tension with these expansive holdings, the *Jackson* court refused to recognize a trust to promote women’s suffrage on the grounds that efforts to change laws could not qualify as charitable.

51 *Estate of Connolly*, 48 Cal. App. 3d 129, 121 Cal. Rptr. 325 (1975).

52 *Estate of Breeden*, 208 Cal. App. 3d 981, 256 Cal. Rptr. 813 (1989).

53 *America’s Changing Religious Landscape*, PEW RESEARCH CENTER ON RELIGION & PUBLIC LIFE (May 12, 2015), <https://www.pewforum.org/2015/05/12/americas-changing-religious-landscape/>.

54 Mohamed Younis, *Four in 10 Americans Embrace Some Form of Socialism*, GALLUP ORGANIZATION (May 20, 2019), <https://news.gallup.com/poll/257639/four-americans-embrace-form-socialism.aspx>.

55 RESTATEMENT (THIRD) OF TRUSTS § 28 cmt. (AM. LAW INST. 2003).

56 BRUCE R. HOPKINS, *THE LAW OF TAX-EXEMPT ORGANIZATIONS* 62 (6th ed. 1992).

arsenal including the Bill of Rights, the Equal Protection Clause, and judicial review in providing some checks on majoritarian overreaching.

#### D. Institutional Competence as a Justification

Institutional competence, our final justification for the CD, is unlike the three discussed above. Efficiency, fairness, and pluralism each are ultimate ends. In contrast, institutional competence is a *means* to achieve these ends. In some contexts the government is the better agent to solve collective action problems, enhance fairness, and promote pluralism. In other contexts, however, the private sector is better, and in such situations the CD is a useful tool to augment private giving. The key issue here is identifying contexts in which private actors outperform the state in funding activities that generate PosEx, fairness, and pluralism.

Levmore opines that donors are more energetic and active than government officials in monitoring and even in participating in charitable projects.<sup>57</sup> He also notes that by giving money, donors signal other potential donors about the merits of a charity, e.g., its efficiency, or the amount of redistribution it actually achieves.<sup>58</sup> Schizer expands on this theme.

Donors have the incentive to assess whether their gifts are having a positive impact. When the donor is capable of making a large contribution, moreover, she is likely to have influence with the nonprofit manager. By passively subsidizing such gifts, the government piggybacks on the positive externalities associated with this monitoring.<sup>59</sup>

Levmore and Schizer's analysis of the institutional advantages of private provision may have some real bite in the case of classic charity, aid to the poor. Despite some relatively large-scale efforts, e.g., President Johnson's "War on Poverty," the U.S. government has had only mixed success providing assistance to the poor.<sup>60</sup> In addition to better monitoring and oversight, the private sector might well be more creative and dynamic. Of course the government can engage in simple progressive tax policies that materially assist poor Americans—but only those who have some income and thus might pay some taxes.

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57 Levmore, *supra* note 16, at 405.

58 *Id.*

59 Schizer, *supra* note 16, at 256.

60 See also Martha J. Bailey & Sheldon Danziger, *Legacies of the War on Poverty*, in LEGACIES OF THE WAR ON POVERTY 1, 10-13 (Martha J. Bailey & Sheldon Danziger eds., 2013).



### E. It's Like the Socratic Method: There is No Single Right Answer

Too often when faced with a multiplicity of explanations for a phenomenon, the mind gets lured into a quixotic search for the “one true cause.” This mindset has some sway in CD scholarship, especially from efficiency advocates.<sup>61</sup> This is misguided—and puzzling, coming as it does from economic logic. Though deeply devoted to efficiency, economics generally does not banish fairness from the stage. Economists regularly leaven maximizing aggregate income (efficiency)<sup>62</sup> with some sort of social welfare function that calls for sacrificing some efficiency in order to achieve greater equality.<sup>63</sup>

Nowhere is the dual importance of efficiency and fairness more prominent than in the tax code, which in both theory and practice constantly faces tradeoffs between the two.<sup>64</sup> In addition, tax policy is intensely political and the desire for pluralism also fits naturally into such issues. This Article therefore takes as axiomatic the need to take account of all four of the policy concerns raised in the preceding sections when designing a socially optimal CD.

Complicating matters considerably, each of the four criteria (efficiency, fairness, pluralism, and institutional competence) manifests not simply as binary yes/no, all-or-nothing outcomes, but rather along continua. Thus, in designing the CD we are not assessing four yes/no answers, but rather integrating four real numbers. Part II outlines the structure of each of these continua.

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61 Perry Fleischer, a leading advocate of including fairness considerations in structuring the charitable deduction, is careful to avoid one-size-fits-all thinking. “[D]istributive justice should play *some* role in our assessment of charitable giving policy” but should not “push aside considerations of efficiency and pluralism . . .”. Miranda Perry Fleischer, *Equality of Opportunity and the Charitable Tax Subsidies*, 91 B.U. L. REV. 601, 605 (2011).

62 Maximizing income is a nutshell of the Kaldor-Hicks definition of efficiency, as it is equivalent to requiring that all policies yield gains to the winners large enough to more than offset losses to the losers. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 13-14 (7th ed. 2007).

63 OKUN, *supra* note 46.

64 The most pervasive example of the efficiency/fairness tradeoff in the U.S. income tax is the progressive rate structure. A famous result from optimal tax theory is that the individual or household with the highest income should face a marginal tax rate of zero. James Mirrlees, *An Exploration in the Theory of Optimal Income Taxation*, 38 REV. ECON. STUD. 135 (1971). Tax credits and deductions that are phased out with increasing income also reflect this tension (e.g. the Earned Income Tax Credit, 26 U.S.C. § 32; the Child Care Credit, 26 U.S.C. § 24).

## II. THE MANY CHARITABLE CONTINUA

The greater share of this Part shows that each policy reason for the deduction introduced in Part I, *on its own*, gives rise to a continuous answer as opposed to an all-or-nothing choice. Graded measurement of the benefits of different charitable gifts is critical because, like just about everything else, they are not free. When the tax code grants deductions (or other preferences, like credits or exemptions), it is implicitly spending other taxpayers' money.<sup>65</sup> Deductions aren't free. Like any good shopper, the government should get the most bang per buck spent. If the benefit is PosEx, the deduction should be scaled to the size of the PosEx created by the gift. If the benefit is fairness, the deduction should be scaled to the amount of redistribution achieved. So too for pluralism, and in a less direct way for institutional advantage. To sum up: the percentages along the various continua we consider in this Part are *prices*. The idea is to use these prices to equate the CD with the social value produced by varying charitable donations.

### A. Efficiency is a Continuum

In the context of efficiency, Weisbrod's seminal article in passing flagged this proportionality principle, noting that "the magnitude of the subsidy ought to depend (from the standpoint of allocative efficiency) on the severity of the free-rider problem — that is, on the quantity of external benefits that would be generated by individuals' private decisions to purchase (or supply) the good."<sup>66</sup> The question that this section asks (and answers, in the negative) is, does it make sense, as a matter of policy, to classify charitable gifts into binary, yes/no categories based on PosEx *given that these PosEx are continuous quantities*? Their extent depends entirely on the population's tastes and preferences. At one extreme, traditional, dictionary-defined charity, such as feeding and housing the destitute, has large PosEx due to the breadth and depth of human empathy.

At the other extreme we have "charities" like the National Mustard Museum in Middleton, Wisconsin, with "more than 6,090 mustards from all 50 states and more than 70 countries (and counting)."<sup>67</sup> Or, if you prefer, the National

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65 This is the tax expenditure concept discussed *supra* text accompanying note 10.

66 Weisbrod, *supra* note 47, at 36. Strnad later made much the same point. Jeff Strnad, *The Charitable Deduction: A Politico-Economic Analysis*, in *THE ECONOMICS OF NONPROFIT INSTITUTIONS* 279 (Susan Rose-Ackerman ed., 1986).

67 *The Museum*, MUSTARD MUSEUM, <https://mustardmuseum.com/the-mustard-museum/35TeWt3> (last visited Nov. 22, 2020). The Mustard Museum example

Museum of Roller Skating in Lincoln, Nebraska, which “maintains the largest collection of roller skating artifacts and textual materials in the world. The Museum displays many one-of-a-kind artifacts for visitors to see.”<sup>68</sup> Both qualify as untaxed nonprofit entities and so donations are deductible.<sup>69</sup> Thus, under existing law someone donating, say, \$10,000 to a local food bank receives no greater deduction than someone donating the same amount to the National Mustard Museum or the National Museum of Roller Skating.

Does that make any sense under a theory driven by PosEx? Almost certainly not. Sure, mustard and roller skating have their fans (and some might find they make a great pair—what’s better than a pretzel<sup>70</sup> with mustard during a break from roller-skating?), but fewer people care about these subjects than about helping the poor, and for most who care at all the depth of their feelings are almost certainly weaker than their empathy-based desires to help the less fortunate. One reaction, in keeping with the current CD, would be to grant *no* deduction for donations to the mustard museum. That might be pretty close to the true PosEx of such obscure causes.

In general, however, the PosEx generated by the great variety of charitable causes will fall along a continuum. At one extreme, those generating the greatest PosEx might well justify a deduction greater than 100% of the gift; there is no *a priori* reason to set an upper bound on deductions at 100%. A very clever gift utilizing some clever mechanisms might reduce malnutrition dramatically and justify a 200%, 300%, or even greater deduction. In the interests of expositional clarity, the remainder of this Article does not explore this possibility further and assumes that the top of the charitable continuum is 100%.

At the other extreme we have our mustard museum with a social value (PosEx) within a rounding error of zero. But there are all sorts of intermediate cases. The remainder of this section presents a series of actual cases and hypotheticals demonstrating that donations for classic aid to the poor, education, and scientific discovery all can deliver anywhere from lots of PosEx to none.

Consider the provision of housing. At one extreme, providing warm shelter to the homeless in the dead of winter scores high on the empathy meter and thus promises copious PosEx. A charity to subsidize posh beach retreats for

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is taken from Perry Fleischer, *supra* note 42, at 1493.

68 THE NATIONAL MUSEUM OF ROLLER SKATING, <http://www.rollerskatingmuseum.org> (last visited Nov. 22, 2020).

69 *Id.*; *The Store*, MUSTARD MUSEUM, <https://store.mustardmuseum.com/category/s?keyword=donation> (last visited Nov. 22, 2020).

70 Unfortunately, the Pretzel Museum closed. *The Pretzel Museum*, US HISTORY, <http://www.ushistory.org/tour/pretzel-museum.htm> (last visited Nov. 22, 2020).

Wall Street executives who earn millions but at least 10% less than their peers? Not so much. As an intermediate case, consider Habitat for Humanity, which builds low-cost homes for the relatively poor but not the homeless (to qualify, beneficiaries must have some sort of tenancy).<sup>71</sup> No deduction seems far too stingy, but a 100% deduction may be too generous. Here are some additional real-world examples of charitable gifts to provide housing that fall somewhere between the extreme ends of the continuum: a gift to provide homes for working girls at moderate cost;<sup>72</sup> homes for low-income farmers;<sup>73</sup> and, my favorite, a gift to fund a home “for refined, educated, Protestant gentlewomen, whose means are small, and whose home is made unhappy, by having to live with relatives, who think them in the way.”<sup>74</sup> This last example doesn’t rise to the level of freezing in the winter cold, but there is reason to think that enough empathy exists for women forced by circumstances to live with callous relatives to justify a partial CD.

As another set of examples of empathy-based PosEx, consider “charitable dollars flowing to schools: most go to private schools with generally wealthier students or to support public schools in well-off areas, thus increasing the head-start of these students over poorer students.”<sup>75</sup> Funding merit-based scholarships for graduating students at an elite private high school where most of the students come from affluent households provides little if any positive external benefits; this is not where most people target their empathy. In contrast, promising to pay college tuition for every member of a sixth-grade class graduating from a grade school filled with poor children might generate enough PosEx among free riders to justify a deduction of over

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71 “Habitat for Humanity is a nonprofit organization that helps families build and improve places to call home.” HABITAT FOR HUMANITY, <https://www.habitat.org/#:~:text=We%20build%20strength%2C%20stability%20and,in%20strong%20and%20stable%20communities>. (last visited Jan. 21, 2021). The group does not help the most destitute members of society, as it requires that those moving into the homes that it builds have the “ability to repay a mortgage through an affordable payment plan.” *FAQ*, HABITAT FOR HUMANITY, <https://www.habitat.org/about/faq> (last visited Nov. 22, 2020).

72 *Thornton v. Franklin Square House*, 200 Mass. 465, 86 N.E. 909 (1909).

73 *Clevenger v. Rio Farms Inc.*, 204 S.W.2d 40 (Tex. Civ. App. 1947).

74 *In re MacDowell’s Will*, 217 N.Y. 454, 112 N.E. 177 (1916).

75 Perry Fleischer, *supra* note 36, at 549, citing Rob Reich, *Philanthropy and Its Uneasy Relation to Equality*, in *TAKING PHILANTHROPY SERIOUSLY: BEYOND NOBLE INTENTIONS TO RESPONSIBLE GIVING* 27, 27-49 (William Damon & Susan Verducci eds., 2007).

100%.<sup>76</sup> In between these two poles, we can imagine a sequence of more and more empathy-invoking scholarship programs based on the neediness of the student beneficiaries.

Education provides PosEx in another way: spreading knowledge of productive activities not only increases the productivity of the student, but also provides “bleed out” to the rest of society.<sup>77</sup> The idea is that students/workers generally cannot capture *all* of the increase in their output due to education, so that their employers—and their employers’ customers (in competitive markets)—also reap some of the benefits. Relatedly, knowledge is one of the classic public goods and hence is underproduced without some form of public provisions or subsidy. This has obvious implications for scientific research; we discuss some of these immediately below and others in Section III.A below.

As a nice example of the sort of educational and scientific PosEx that justify a deduction, a federal court granted a tax exemption to a nonprofit devoted to the science and art of ceramics based on its finding that the entity operated exclusively for “scientific or educational purposes.”<sup>78</sup> Ceramics add value in uses ranging from dinner dishes to high-tech devices<sup>79</sup> to art.<sup>80</sup> Disseminating knowledge of advances and educating firms and workers about best techniques and new scientific findings likely confers significant PosEx on a very large number of consumers in a variety of markets, justifying a tax deduction. Still, the public, via the legislature, might well conclude that subsidies have more bang for the buck in others areas, e.g., educating medical professionals and conducting basic research to reduce infant mortality. Given this observation, was giving a 100% deduction for ceramics the socially optimal outcome? Perhaps it was when the choice was all or nothing, but (again) why so limit tax policy? A partial deduction for ceramics better suits the efficiency purpose of the CD.

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76 Enid Nemy & Joseph Berger, *Eugene Lang, Investor Who Made College Dreams a Reality, Dies at 98*, N.Y. TIMES (Apr. 8, 2017), <https://www.nytimes.com/2017/04/08/nyregion/eugene-lang-dead-harlem-college.html> (behind paywall) (the donor, Lang, not only funded college for the students but also gave generously of his time to counsel the students as they navigated their way towards higher education).

77 POSNER, *supra* note 62, at 153.

78 *Commissioner. v. Orton*, 173 F.2d 483 (6th Cir. 1949).

79 *See, e.g., Uses for Advanced Ceramics*, SCIENCE LEARNING HUB (Apr. 27, 2010), <https://www.sciencelearn.org.nz/resources/1775-uses-for-advanced-ceramics>.

80 *See History and Types of Fine Art Ceramics & Pottery, Earthenware, Stoneware, Porcelain*, ART ENCYCLOPEDIA, <http://www.visual-arts-cork.com/ceramics.htm> (last visited Apr. 18, 2020).

So research and education on infant mortality sits at or near the 100% pole of the continuum and ceramics somewhere in the middle. It is not hard to find examples of knowledge dissemination that fall at or near the 0% pole. A nonprofit that encourages people to get out into nature and teaches courses on survival, navigation, nutrition, and rock climbing might produce a smidgen of PosEx but doesn't warrant anything approaching a 100% deduction.<sup>81</sup> And what of teaching historical etiquette practices at renaissance fairs? Although it is hard to imagine this activity producing much PosEx, *The Order of the Azure Rose* has garnered a federal tax exemption and hence donations for this frivolous pursuit are every bit as deductible (100%) as aid to reduce infant mortality.<sup>82</sup>

As a final, quaint case, consider the work of The Critter Connection, which rescues abandoned guinea pigs and places them in loving homes.<sup>83</sup> This organization is exempt from federal income tax and so donations to it are 100% deductible.<sup>84</sup> Human compassion is not limited to the welfare of other humans, and the significant empathy that many people feel for cats and dogs might well justify full deductibility for gifts to assist these animals when in dire need. Almost half of all U.S. households own dogs, about a third own cats, and owners routinely spend hundreds of dollars a year on these pets, including expensive veterinarian visits.<sup>85</sup> In contrast, only 5% of households own "small animals" like guinea pigs and owners spend much less on these pets. To the extent that efficiency gains are our objective, gifts to The Critter Connection should be only fractionally deductible, and that fraction likely should be pretty small.

What do all of the middling cases cited above prove? Well, if the only alternatives are "all" or "nothing," these are exceedingly difficult choices. Maybe we should grant the (full) deduction, but maybe not. The fundamental insight

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81 *Hurricane Island Outward Bound v. Vinalhaven*, 372 A.2d 1043 (Me. 1977).

82 *About The Order*, THE ORDER OF THE AZURE ROSE, <https://order-of-the-azure-rose.webs.com/> (last visited Nov. 22, 2020) (stating that The Order is a § 501(c)(3) organization).

83 THE CRITTER CONNECTION, <http://www.ctguineapigrescue.org/> (last visited Nov. 22, 2020).

84 *Donations*, THE CRITTER CONNECTION, <http://www.ctguineapigrescue.org/donations> (last visited Apr. 28, 2020).

85 As of 2017, 60.2 million households had at least one dog and 47.1 million had at least one cat. *Facts + Statistics: Pet statistics*, INS. INFO. INST., <https://www.iii.org/fact-statistic/facts-statistics-pet-statistics> (last visited Nov. 22, 2020); *see Id.* for expenditures on cats and dogs; *Number of households in the U.S. from 1960 to 2018 (in millions)*, STATISTA, <https://www.statista.com/statistics/183635/number-of-households-in-the-us> (Nov 28, 2019).

of this Article is that we don't need to put ourselves in the position of having to make these sorts of difficult all-or-nothing decisions. The 'intermediate' examples given do not generate as much PosEx as a charity for the seriously mentally ill living on the streets, but they would seem to generate some—more than instances truly devoid of PosEx, such as an intra-family Christmas gift.

## B. Fairness/Equity is a Continuum

Perhaps the most surprising aspect of the efficiency justification for the CD is that it is *indirect*, focusing on *third parties* to charitable gifts: the free riders garnering benefits from donors' generosity. Shifting to fairness redirects our attention to the "interior" of gift transactions with a focus on the needs of *recipients*.

Despite this fundamentally different focus, for our purposes there is a deep parallel between the fairness continuum and the efficiency continuum limned in the prior section. The efficiency continuum arises from the continuously varying level of PosEx that arise from different charitable gifts. The fairness continuum arises from the infinite gradations of material deprivation, from absolute destitution (homeless, freezing, and starving to death) to less complete poverty (living in a slum with inadequate heating, and frequently hungry) to the problems of the lower middle class (small house needing repairs, no health insurance, no funds for college).

The current all-or-nothing CD is always trying to fit these continuous pegs into discrete, 0/1 holes. In attempting to define the extent of need required to qualify as charitable, the Restatement uses phrases like "persons who have an income that does not afford the reasonable comforts of life that most others enjoy," and "not poverty stricken but merely have less than ordinary opportunities for recreation, enjoyment, or economic advancement."<sup>86</sup>

But the poor fit of such all-or-nothing lines is patent (as it was for efficiency). If, say, the level of income "that does not afford the reasonable comforts of life that most others enjoy" is set at \$10,000, then under the current CD donors receive a 100% deduction for providing food or housing assistance to someone with an income of \$9,999.99 but no deduction for someone making \$10,000.01. Yet the marginal utility of assistance to these two is almost exactly the same, telling us that deductions for gifts to two such individuals should be almost exactly the same. The tax code is replete with mechanisms that recognize continua and treat them appropriately.<sup>87</sup> Fairness demands 100%

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86 RESTATEMENT (THIRD) OF TRUSTS § 28 cmt. (AM. LAW INST. 2003).

87 A marginal income tax rate structure means that average tax rate varies continuously with income. To take one more example, any benefit that phases out with higher

deductions for aid to the most destitute, no deductions for gifts to those with income above some moderate level, and continuously declining percentage deductions between these two poles.

The most common cases in which courts and administrators have struggled to draw the line between charity for the needy and “mere largesse” for the more fortunate involve basic, necessary goods like housing and health.<sup>88</sup> This makes some sense, as providing decent housing and at least minimal healthcare has high marginal utility to the poor and so such gifts can substantially improve overall wellbeing under almost any social welfare function.

Perry Fleischer has identified a group of cases that seem to classify gifts for housing as charitable only if recipients’ income falls below some threshold.<sup>89</sup> One denied charitable status for gifts to a nonprofit that provided grants and education to further home ownership because it did not provide sufficient evidence that it served “low and moderate income buyers.”<sup>90</sup> Another held that housing assistance for middle class beneficiaries does not qualify as charitable.<sup>91</sup> As argued immediately above, this search for some magic threshold below which housing assistance is charitable makes no sense under any theory of fairness and the social value of redistribution.

We observe a similar arbitrariness for gifts to hospitals and other healthcare providers. In the U.S., Hospitals and other healthcare providers must meet a multifactor “community benefit test” to qualify as charities.<sup>92</sup> One factor under this standard is taking emergency room patients regardless of ability to pay. Although one can understand the motivation for this factor, it doesn’t serve redistribution particularly well, as use of emergency rooms is highly correlated with community of residence and Americans are highly segregated by income. Other factors have nothing to do with redistribution (e.g., board of directors drawn from the community; use surpluses to improve medical services). Unsurprisingly, given this unfocused standard, at least one court

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incomes (the Earned Income Tax Credit or the Child Tax Credit, cited *supra* note 64) instantiates a continuum of benefits from largest for the poorest to non-existent for the wealthiest.

88 I did not find any cases discussing another basic necessity, food. I conjecture that this is due to the fact that only the most destitute people receive food aid; in contrast, charity for housing and healthcare seems to target those who may be poor but are not desperately impoverished.

89 Perry Fleischer, *supra* note 36, at 556.

90 *Partners In Charity, Inc. v. Comm’r*, 141 T.C. 151 (T.C. 2013).

91 I.R.S P.L.R 200331005 (May 9, 2003).

92 Rev. Rul. 69-545, 1969-2 C.B. 117.



decided that this standard does not require hospitals to provide *any* specified level of care to low-income patients.<sup>93</sup>

This makes no sense. The correct fairness standard seems obvious. If a hospital is 100% charitable (provides services only to poor patients unable to pay), donations should be 100% deductible. If only 65% of patients are indigent, then donations should be only 65% deductible, and so on, down to no deductions for donations to hospitals that provide treatment only to patients who can pay their own way. Such a graded deduction precisely matches the marginal utility of health services to those with varying means to purchase healthcare.

As we move away from basic necessities, the case for fractional deductions becomes even stronger. In what must be one of the more eccentric charities ever established, silent film actor Conrad Cantzen established a trust “for the purpose of supplying footwear to present and future members of [the actors’ union] and to all needy actors of the theatrical profession, . . . who cant [sic] buy shoes.”<sup>94</sup> Limiting beneficiaries to “needy actors . . . who can’t buy shoes” is consistent with the redistributive goals of fairness, but shiny new shoes are not exactly shelter or emergency medical attention. This peculiar trust thus seems like a prime candidate for some partial deductibility and thus a poster child for replacing the current all-or-nothing regime with a continuum.

There is another, even more important issue here that increases the factors relevant to calculating the optimal charitable deduction: the number and variety of commonly discussed fairness standards. Although there are multiple efficiency standards, most scholarship applies some flavor of Kaldor-Hicks wealth maximization as the only practical alternative. For fairness, however, there are many feasible competing theories and no consensus. Liberals might apply straight utilitarianism (as this section’s use of a social welfare function implies), Rawls’s minimax alternative,<sup>95</sup> or even left-libertarianism.<sup>96</sup> On the right, conservatives might advocate simple libertarianism,<sup>97</sup> natural rights

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93 *McCoy v. E. Tex. Med. Ctr. Reg’l Healthcare Sys.*, 388 F. Supp. 2d 760 (E.D. Tex. 2005).

94 *Guar. Trust Co. v. N.Y. Cmty. Trust*, 141 N.J. Eq. 238, 56 A.2d 907 (N.J. Ch. 1948) *aff’d*, 142 N.J. Eq. 726, 61 A.2d 239 (N.J. 1948). This “N.Y. City actor’s shoe trust” is still alive and well, it appears. CONRAD CANTZEN SHOE FUND, <https://actorsfund.org/services-and-programs/conrad-cantzen-shoe-fund> (last visited Apr. 28, 2020).

95 JOHN RAWLS, *A THEORY OF JUSTICE* (1971).

96 *See, e.g.*, Kevin Carson, *What is Left-Libertarianism?*, CENTER FOR A STATELESS SOCIETY (June 15, 2014), <http://c4ss.org/content/28216>.

97 ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974).

theories,<sup>98</sup> or opt for simple wealth-maximization stripped of any notion of attaching social value to redistribution. In a pluralist, democratic society, no single theory of fair distribution commands a majority. Instead, public policy in the end should assign some weight to each theory based on the number of adherents and the intensity of their preferences. Numerous, divergent theories of fairness significantly buttress the case for a charitable continuum, as explained further in Part V.<sup>99</sup>

### C. Pluralism is a Continuum

There is not much diversity in the approaches to relieving starvation or homelessness *directly*: you give penniless, hungry and homeless people food and shelter. Indirectly, at some remove from immediate need, however, there is a wide range of opinions on the best long-term strategies for alleviating poverty. Universal basic income advocates suggest cash grants guaranteeing everyone an income above the poverty line.<sup>100</sup> Beginning in the 1990s, the U.S. has shifted from welfare grants to “workfare” that requires aid recipients to look for jobs and take them when available.<sup>101</sup> Pure libertarians view any form of aid to the poor as socially undesirable.<sup>102</sup>

If we value pluralism—the idea that society should enjoy a multiplicity of views and engage in some experimentation to find the best ones—then we should foster propagation of policy alternatives. This suggests a CD to groups that advocate, educate, and persuade. Such an approach dovetails

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98 RICHARD A. EPSTEIN, *TAKINGS* (1985).

99 This Article elides over a potentially important fairness issue in charity: the wealth of the donor relative to the wealth of the donee. Gifts from one wealthy person to another wealthy person do not generate the same PosEx as donations to the poor. Perry Fleischer alluded to this issue, suggesting the possibility of using a “sliding scale” to calculate deductions based on the income of the donor relative to the recipient. See Perry Fleischer, *supra* note 42, at 1510.

100 See, e.g., Steve Schiffres, *Why inequality is troubling the world's top economists*, *MACLEAN'S* (August 29, 2017), <https://www.macleans.ca/economy/inequality-troubling-the-worlds-top-economists/> (quoting comments by Nobel Prize winners Peter Diamond and Sir Christopher Pissarides in favor of universal basic income); *ARGUING FOR BASIC INCOME: ETHICAL FOUNDATIONS FOR A RADICAL REFORM*, (Philippe Van Parijs ed., 1992).

101 *From Welfare to Workfare*, *THE ECONOMIST* (July 27, 2006), <https://econ.st/3fqTP4y>.

102 Matt Zwolinski, *Libertarianism and the Poor*, *LIBERTARIANISM* (April 25, 2014), <https://www.libertarianism.org/columns/libertarianism-poor> (“The libertarian case against the welfare state is really just the result of the consistent application of moral common sense.”)

nicely with Weisbrod's observation that the greater the heterogeneity of voter preferences, the larger the unmet demand for public goods for various ideological subpopulations.<sup>103</sup> There is widespread agreement on funding basic police services and so there is no problem getting voters to support candidates who will tax and spend for, e.g., courts and police. The same cannot be said of poverty relief. Advocacy, education, and persuasion have attributes of public goods (benefits are non-rivalrous; it's hard to exclude non-contributors) and so there is an *efficiency* case for using the charitable deduction to encourage wide-ranging advocacy, education, and persuasion.<sup>104</sup>

In order to treat pluralism as a goal (and a continuum) separate and apart from the efficiency goal discussed in Sections I.A and III.A, however, we must identify some distinct policy goal. The core benefit of pluralism, apart from any efficiency concerns, is the classic First Amendment idea of the value of a 'free marketplace of ideas.'<sup>105</sup> This may seem a strange basis for making policy about the CD, but it turns out that this notion has firm roots in the law of charitable trusts. Comments from the Restatement expressly invoke this Free Speech principle:

The role of the court in deciding whether a purpose is charitable is not to attempt to decide which of conflicting views of the social or community interest is more beneficial or appropriate but to decide whether the trust purpose or the view to be promoted is sufficiently useful or reasonable to be of such benefit or interest to the community, including through a marketplace of ideas, as to justify the perpetual existence and other privileges of a charitable trust.<sup>106</sup>

The Restatement comments stress that unpopularity of the views and purposes of a nonprofit trust should in no way affect the determination that it does or does not qualify as charitable.<sup>107</sup>

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103 Weisbrod, *supra* note 26, at 31.

104 See Schizer, *supra* note 16, at 243, 245-48 (noting how the deduction enables minority groups to "pursue their preferences," but going on to highlight that the deduction will disproportionately subsidize *wealthy* minorities. Schizer dubs this "the representation tradeoff.")

105 This phrase originated with Justice Holmes' dissent in *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("the ultimate good desired is better reached by free trade in ideas — that the best test of truth is the power of the thought to get itself accepted in the competition of the market.")

106 RESTATEMENT (THIRD) OF TRUSTS § 28 cmt. (AM. LAW INST. 2003).

107 *Id.* "A trust for the dissemination of beliefs or doctrines may be charitable although the views are out of harmony with those of a majority of the public."

This marketplace of ideas justification for the charitable deduction may sound like a flavor of efficiency, but there are fundamental differences. The efficiency continuum discussed in Section II.A above justified a tax subsidy in order to deliver a good that a substantial portion (even if not a majority) wanted. The efficiency gain was direct. Here, in contrast, we are talking about the dissemination of ideas that may have few if any supporters. At least in the short term, it is hard to paint this as an efficiency gain. If we take a longer-term perspective, however, subsidizing a rich diversity of views (our working definition of pluralism) might be justified based on a widespread belief that, overall, society eventually benefits from permitting *and even encouraging* the airing of a wide range of perspectives. Paraphrasing Holmes' famous language from *Adams*, a robust marketplace of ideas eventually yields large social benefits.

Although the First Amendment does not permit censorship of stupid ideas, the law of charitable trust does. "A trust . . . for the dissemination of beliefs or doctrines that are irrational or apparently so foolish as to be of no significant interest to members of the community is not a charitable trust . . ." <sup>108</sup> Although stated as a condition to receive the trust law benefits of charitable status (e.g., perpetual existence), this same logic applies to granting the CD. Some causes, though protected by the First Amendment, clearly have no value and never will, and so should not be subsidized in any form. Some examples: The Flat Earth Society,<sup>109</sup> Holocaust denial, global warming denial, and racism.

Those are all easy cases. The Restatement comments are disarmingly honest about the difficulty of drawing the line between unpopular views that nonetheless are not totally irrational and those like believing that the Earth is flat that are palpably falsifiable.

Various types of trusts have posed difficult questions regarding what is of benefit to the community. . . . The line drawing in such cases, however, is neither easy nor consistent from time to time or place to

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108 *Id.*

109 Yes, such a society does indeed exist. THE FLAT EARTH WIKI, [https://wiki.tfes.org/The\\_Flat\\_Earth\\_Wiki](https://wiki.tfes.org/The_Flat_Earth_Wiki) (last visited May 2, 2020). Yes, they really do seem to believe that the Earth is flat. And yes, donations to this society are deductible. *Flat Earth Society of Covenant People Church*, CHARITYNAVIGATOR.ORG, <https://www.charitynavigator.org/index.cfm?bay=search.profile&ein=237154049> (last visited May 2, 2020). *But see* RESTATEMENT (THIRD) OF TRUSTS § 28 cmt. (AM. LAW INST. 2003). For a fascinating and somewhat amusing overview of this organization, see Alan Burdick, *Looking for Life on Flat Earth*, THE NEW YORKER (May 30, 2018), <https://www.newyorker.com/science/elements/looking-for-life-on-a-flat-earth>.

place, although an effort must be made to do so if charitable trusts and purposes are to justify the right of perpetual existence and other special privileges attached to charitable trusts. On which side of the line, for example, does spiritualism fall?<sup>110</sup>

The example of “spiritualism” at the end of this quote is a nice one: should we grant a charitable deduction for scientific research, advocacy, and “education” on ghosts and other spirits? Who ya gonna call? *Ghost Busters!*?<sup>111</sup>

Moving on to less fringe beliefs, courts have struggled deciding when to grant the CD to advocates of controversial ideas. For example, one court permitted a CD for gifts to a group advocating for the “right to work” (i.e., the right to work at a unionized employer without joining the union) based on its conclusion that this was advancing a “human and civil right secured by law,”<sup>112</sup> while another court denied the CD to a “watchdog” organization engaged in fighting corruption and governmental abuses of power based on its determination that these activities did not protect fundamental human and civil rights.<sup>113</sup> These two courts seem to agree that efforts to protect human and civil rights merit a (100%) charitable deduction, but those terms are hardly self-defining.

By this point readers likely anticipate what is coming: an argument that pluralism is a continuum. It is, however, an unusual one. The most popular and the most ridiculous causes both should receive a zero weight for pluralism. Though the reasons differ, in both cases it is about maintaining a robust market of (non-stupid) ideas. Popular causes, like feeding the poor, are so well-established that there is no need to subsidize them in the service of plurality. Idiomatic ideas, e.g., that the Earth is flat, deserve no subsidy as they are demonstrably false. Causes that might garner full pluralism credit will tend to be creative, new (and so not yet disproven) ideas that are unpopular but have some potential. For example, “cold fusion” research initially might have merited a deduction on pluralism grounds until accumulating evidence demonstrated that it almost assuredly is impossible.<sup>114</sup> In the political realm, advocacy of Stalinist-style communism might have deserved significant

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110 RESTATEMENT (THIRD) OF TRUSTS § 28 cmt. (AM. LAW INST. 2003).

111 This is an allusion to *Ghostbusters*, the theme song to the *comedy* movie of the same name. *Ghostbusters (song)*, WIKIPEDIA.ORG, [https://en.wikipedia.org/wiki/Ghostbusters\\_\(song\)](https://en.wikipedia.org/wiki/Ghostbusters_(song)) (last visited May 2, 2020).

112 National Right to Work Legal Defense and Education Foundation, Inc., 487 F. Supp. 801 (E.D.N.C. 1979).

113 U.S. v. Judicial Watch, Inc., 266 F. Supp. 2d 1 (D.D.C. 2002).

114 For a detailed summary of the cold fusion misadventure of the 1990s, see Understanding Science team, *Cold fusion: A Case Study for Scientific Behavior*,

pluralism credit before the experience of Stalin (and Mao, and Castro) proved that standard versions of communism are economic, political, and social disasters. Racial equality efforts certainly deserved full pluralism credit into the 1970s; since then, however, the movement's very success means a large fraction of Americans have rejected racism and the cause may merit only partial CD pluralism credit.<sup>115</sup>

#### **D. Institutional Competence is a Continuum**

Pluralism is a justification for subsidizing funding that almost assuredly must come from the private sector. In a democracy the government by definition bends in the direction of majoritarian preferences. Thus, in the language of -Section I.D, private actors have much higher institutional competence to serve the goal of pluralism. Contrast this with police and courts. For multiple reasons it does not make much sense to fund such services with voluntary donations from the public. These are core public services that the government should fund with taxation. In the context of the CD, we should be sensitive to whether or not we think that taxpayers are better able to provide a given variety of either efficiency or fairness.

Following the by-now (too?) familiar pattern, we can start to see a continuum arising. For goods and services that private donors have a comparative advantage providing, the CD should be higher to incentivize giving. In addition to gifts serving the goal of pluralism, the discussion in Section I.D suggested that the private sector may be superior in providing direct services to the poor (e.g., soup kitchens; shelters for the homeless). On the other hand, for those services like the police and the military, for which private support makes little sense, institutional competence weighs in favor of a relatively small CD.

Another, completely distinct institutional factor that should count in determining a percent CD for a given charity is its overhead ratio—the fraction of a charitable organization's income in a given year used for internal expenses (e.g., salaries and benefits; offices; fundraising). A “charity” that is merely a front for diverting gifts targeted at some needy population into the pockets of self-serving administrators is no charity at all and cannot achieve any efficiency, fairness, or pluralism gains. Those who donate to nonprofits

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UNDERSTANDING SCIENCE HOW SCIENCE *REALLY* WORKS, [https://undsci.berkeley.edu/article/cold\\_fusion\\_01](https://undsci.berkeley.edu/article/cold_fusion_01) (last visited May 2, 2020).

115 For comprehensive polling data on race relations going back to the 1950s, see Gallup, *Race Relations*, <https://news.gallup.com/poll/1687/race-relations.aspx> (last visited Oct. 20, 2020).

with very low overhead ratios should receive higher percent CDs than those donating to high overhead groups.<sup>116</sup>

Likely to the relief of most readers, we are finally done examining the numerous continua that should enter into determining the optimal CD. We postpone explaining how we might process this welter of continua until Part V below, however, in order to address issues that will inform those general discussions. First we reach some decidedly unconventional conclusions about deductions for religious and scientific charity (Part III). Next, Part IV discusses how policymakers should deal with the fact that many if not most charitable donations are made to organizations with a complex mix of purposes and activities.

### III. PROBLEMS WITH CHARITABLE DEDUCTIONS FOR RELIGION AND SCIENCE

#### A. Scientific Research Donations: The Downside of Pluralism

Efficiency must serve as the main justification for subsidizing gifts to scientific endeavors. Technological progress is the primary means by which we build better and novel capital goods and so is the engine of economic growth.<sup>117</sup> To at least some extent, most citizens benefit from a more productive economy; said another way, donations to science can generate large PosEx, the heart of the efficiency justification for the CD.<sup>118</sup> Cutting-edge research generates novel perspectives that most experts might initially reject, suggesting that at least some scientific research also yields pluralism benefits. Scientific research seems unlikely to work much redistribution, suggesting that it merits a lower deduction than charity for the penniless.

There are, however, weighty “market structure” objections to funding scientific research with piecemeal, uncoordinated private donations. First,

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116 This idea is due to Schizer, *supra* note 23, at 265.

117 That simply accumulating *more* of the “same old” capital cannot sustain long-term growth, due to the diminishing marginal productivity of capital is perhaps the most important insight of the seminal article on modern growth theory. Robert M. Solow, *A Contribution to the Theory of Economic Growth*, 70 Q.J. ECON. 65 (1956).

118 The PosEx generated by science reach people not through empathy (like aid to the poor) but rather through new goods and lower prices. For policy purposes this distinction in the “channel” through which donations create PosEx is irrelevant; subsidies are efficient regardless of the chain of causation producing any particular PosEx.

as Schizer has noted, there may be “economies of scale, so that the quality of the program is enhanced by . . . size.”<sup>119</sup> In layman’s terms, this means that one \$100 million program to cure a particular type of cancer might yield better results than 100 separate \$1 million dollar programs. Second and relatedly, scientific research may be a “best shot” public good, for which the effective supply—what really makes a difference in solving a scientific problem—is not the sum of all expenditures but rather the single largest expenditure. “An example of ‘best shot’ is research and development: The level of tomorrow’s technology is defined by the advances made by today’s most successful research laboratories.”<sup>120</sup> Admittedly, in some cases, perhaps many, the production function for scientific discovery may not have this “best shot” feature. Diversifying research efforts may yield important risk-reduction benefits; this would seem to be the case for having multiple teams, even within nations, pursuing Covid-19 vaccines based on disparate strategies.<sup>121</sup>

The government also has institutional advantages in funding scientific research. With organized bodies employing top scholars across the nation (e.g., the National Science Foundation; the Centers for Disease Control; the National Institutes of Health), the state is in a better position to size up the benefits of solving problems and the expected costs of finding a solution. With this data, the government can figure out where research dollars have their highest yield. Private donations may be guided less by such efficiency calculations and more by personal experience, leading to large *deductible* donations for causes of relatively low value.<sup>122</sup> Citing another cause of suboptimal funding,

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119 Schizer, *supra* note 23, at 245.

120 See Cornes & Sandler, *supra* note 31, at 55, 185 (“‘Best shot’ public goods are those for which the total available to all is defined as equal to the largest individual contribution.”)

121 For a summary of the 66 different Coronavirus vaccines under development, see Jonathan Corum, Sui-Lee Wee & Carl Zimmer, *Coronavirus Vaccine Tracker*, N.Y. Times (Oct. 30, 2020, 3:22 PM), <https://www.nytimes.com/interactive/2020/science/coronavirus-vaccine-tracker.html>.

122 See, e.g., John Ross, *Philanthropists Leave ANU Millions to Battle Rare Disease*, TIMES HIGHER EDUCATION SUPPLEMENT (July 30, 2019), <https://www.timeshighereducation.com/news/philanthropists-leave-anu-millions-battle-rare-disease> (reporting an Australian \$10 million donation to search for treatments for dermatomyositis, a disease affecting only 1 in 100,000 people; the donors were a couple, one of whom had the condition); *Heritable Change: A \$1,000,000 Private Gift Supports Research, Next Generation Leadership in MPS*, UNC HEALTH AND UNC SCH. OF MED., <http://news.unchealthcare.org/uncchildrens/news/2017/may/heritable> (last visited May 2, 2020) (gift for condition affecting 1 in every 25,000 children).



Gergen observes that “[i]n medicine ... people support well-publicized causes without regard to the relative needs of other causes or the likelihood that research in any particular field will pay off.”<sup>123</sup> In addition, publicly funded expert bodies are less likely to fund “junk science” that seduces some private non-expert donors.<sup>124</sup> It is hard to get paid for applying such policy expertise in the market, meaning that the services provided by the N.S.F., the C.D.C., and other federal expert bodies constitute a public good that markets will under-supply.

Relatedly, given the very large fraction of grants from wealthy donors, private funding may bias research, especially medical research, towards conditions that disproportionately affect the wealthy. One speculative example: we may well be spending too much on Alzheimer’s Disease, which matters much more to the longer-living rich than the poor, and simultaneously be underfunding research and programs to reduce America’s shockingly high infant mortality rate, which disproportionately affects poor families.<sup>125</sup>

All this is not to say that private donations to science are valueless. As with any of the efficiency-justified examples discussed *supra* Section III.A, charitable gifts to science generally will have some PosEx. As these PosEx will

123 Gergen, *supra* note 5, at 1410.

124 For examples of junk science that has qualified for tax-exempt status, and hence deductible donations, see the INSITUTE OF NOETIC SCIENCE, <https://noetic.org/> (last visited May 2, 2020) (“Our Hypothesis: Everything is interconnected. By embodying an awareness of this interconnection, we can tap into information and energy not limited by space and time, and profoundly amplify transformation, innovation, and well-being.”). According to the front page of its website, it is a § 501(c)(3) nonprofit organization. An affirmatively harmful tax-exempt body of pseudo-scientific misinformation comes from the anti-vaccine movement. See, e.g., *Donations, Funding & How to Support NVIC*, THE NATIONAL VACCINE INFORMATION CENTER, <https://www.nvic.org/about/nvic-funding-sources-and-usage.aspx> (last visited May 2, 2020); LEARN THE RISK, <https://www.learntherisk.org> (last visited May 2, 2020).

125 See, e.g., Katherine Ellen Foley, *Bill Gates Just Donated \$50 Million to Look for Out-of-the-Box Alzheimer’s Cures*, QUARTZ (Nov. 13, 2017) <https://qz.com/1127809/bill-gates-and-alzheimers-he-donated-50-million-of-his-own-money-to-the-dementia-discovery-fund>. I was unable to find any large grants to help reduce infant mortality. Infant mortality in the U.S. for 2017 is estimated at 5.8 deaths per 1,000 live births, better than Chile (6.6), not as good as Greece (4.6), and far worse than almost all other developed nations (e.g., U.K. 4.3; Netherlands 3.6, Spain 3.3, Sweden 2.6, Japan 2.0). Central Intelligence Agency, *Country Comparison, Infant Mortality*, THE WORLD FACTBOOK, <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2091rank.html> (last visited May 2, 2020).

vary significantly, we will have a continuum of public benefit from charitable gifts to science. In addition, private funding may also solve collective action problems among minority groups (definitionally unable to muster sufficient political power to obtain public funding), enabling them to efficiently fund research on problems of little or no concern to the governing coalition. Thus all the observations made in Section II.A about efficiency continua, along with the points made about pluralism in Section II.C, apply to science charity.

Although not a Euclidean proof, taken together the points laid out in this section make a strong case that government is the institution best qualified to fund scientific research. This conclusion has important implications for the practical recommendations made by this Article in Part VI below.

## **B. Religious Donations: A Deduction in Search of a Theory**

Religion in many respects is the opposite of science, and this contrast extends to CD policy. One way to nutshell the finding of the previous section is that pluralism may be a negative in the scientific domain. This section, in high contrast, argues that pluralism is the only conceivable grounds on which to justify a deduction for core religious services. In the end, and somewhat paradoxically given the general divergence between science and religion, we end up with a similar policy conclusion: tax law should disfavor charitable gifts for religion just as it should disfavor donations for science.<sup>126</sup>

With so many theoretical justifications from which to choose (Part I *supra*), it might seem virtually impossible that any particular variety of deduction textually authorized under §§ 170(c)(2) and 501(c)(3) could not find at least one to warrant its existence. Yet that is precisely the case for “core” religious charity. Referring back to this Article’s Introduction, there are no efficiency,

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126 This theoretical result is in tension with the fact that donations to religious organizations comprise the single largest category of charitable donations in the United States—about 29% of all donations in 2019. David P. King, *The State of Giving: What We Know and What We Don’t*, June 23, 2020, University of Indiana Lilly Family School of Philanthropy, Insights Newsletter, June 2020, <https://philanthropy.iupui.edu/news-events/insights-newsletter/2020-issues/june-2020-issue-2.html>. This Article’s theoretical challenge to policy justifications for deductibility of donations to religious organizations directly challenges advocates of the religious deduction to counter with some policy basis for continuing this common but seemingly unjustified tax preference. Mere popularity of special tax treatment is no substitute for a sound policy rationale; it may simply indicate suboptimal decision-making under democracy, or the result of an organized special interest group that lobbies Congress effectively.

fairness, or pluralistic grounds on which to justify imposing any part of the cost of a church organ on the taxpaying public.

An organ is part of the “core” activities of a congregation: religious services. Other core expenses include the salary of the officiant; the costs of maintaining and heating/cooling the building; and the cost of prayer books and religion school materials. Outside of these costs, religious congregations may engage in various outreach programs, e.g., running a soup kitchen for the poor. For most of this section we address only the funding of core expenditures, but will address charitable outreach programs at the end.

Tax preferences for religion date back at least to the Old Testament.<sup>127</sup> Per the language of §§ 170 and 501 of the Tax Code, current American law continues this tradition. Whether framed as a general contribution or as payment for the use of a particular pew, all donations to religious organizations are fully deductible.<sup>128</sup> The justifications for this tax benefit are mysterious/mystical:

religious observances generally are not regarded as yielding private benefits when attending the observances. The primary beneficiaries are viewed as being the general public and members of the faith. Thus, payments for saying masses, pew rents, tithes, and other payments involving fixed donations for similar religious services, are fully deductible contributions.<sup>129</sup>

The argument appears to be that those attending religious services confer PosEx on the entire population. As to the causal mechanism running from prayers to public benefits, not a hint is on offer.

As previous scholarship has noted, without any credible story of PosEx, core religious services are simply a club good.<sup>130</sup> Recall from Table 1, *supra*, that club goods are those exhibiting non-rivalrous consumption but for which exclusion is possible. Unlike public goods, there is no efficiency argument for subsidizing private provision of club goods. Markets work perfectly well for country clubs, swimming clubs, and should work just as well for churches. Groups of individuals have all the leeway necessary to choose congregations

127 Perry Fleischer, *supra* note 36, at 511-12.

128 Rev. Rul. 70-47, 1970-1 C.B. 49. (“Pew rents, building fund assessments, and periodic dues paid to a church . . . are all methods of making contributions to the church.”)

129 BNA Daily Report for Executives, *IRS Official Explains New Examination–Education Program on Charitable Contributions to Tax–Exempt Organizations*, SPECIAL REPORT NO. 186, J–1, J–3 (Sept. 26, 1988).

130 Perry Fleischer, *supra* note 36, at 523-24. (“Under this view, for example, churches would not merit a subsidy because the club-like nature of the group minimizes free-riding.”); *see also* Gergen, *supra* note 5, at 1396.

of their preferred size and type. Without any freeriding problems or PosEx, there is simply no efficiency justification for a charitable deduction in favor of core religious services.

There is also no fairness justification. Religious donations do not in any way redistribute resources to those in need. Indeed, congregations tend to be segregated by income (based largely on the increasing geographic segregation by income in the U.S.<sup>131</sup>) and there is little subsidization of poor by rich within individual congregations.

Pluralism might justify a religious deduction, though it would call for a radically different tax break. To serve pluralism, the deduction would be smaller (possibly 0%) for the largest churches and, moreover, the IRS would have to end its longstanding cynicism about new, non-traditional churches<sup>132</sup> as they best serve pluralism.

There is a strong case to provide the deduction for religious efforts to assist the needy. All of the efficiency and fairness arguments made above for subsidizing such “classic” charity apply regardless of the nature of the entity delivering the assistance. Sound policy, which rejects the CD for core religious expenditures, should grant it for ministries helping the indigent. Under this approach, we have instantiated another continuum: the percent deduction for religious congregations should equal that portion of their annual budget devoted to helping the poor.

#### **IV. THE UNAVOIDABLE PHENOMENON OF MIXED-PURPOSE CHARITABLE INSTITUTIONS**

Churches, then, are frequently mixed-purpose institutions: part club delivering core religious services for congregants, and part charity delivering aid to the needy. This Part addresses a more difficult phenomenon: entities that have multiple charitable purposes. Perhaps the best examples are colleges and universities, as they engage in education, assistance to the poor (need-based financial aid), and scientific research. Given that the optimal CDs for these distinct purposes differ under this Article’s thesis, what deduction should donors to colleges, universities, and other mixed-purpose nonprofits receive?

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131 Kendra Bischoff & Sean Riordan, *Residential Segregation by Income, 1979-2009*, in *DIVERSITY & DISPARITIES: AMERICA ENTERS A NEW CENTURY* 208 (John Logan ed., 2014).

132 Edward McGlynn Gaffney, Jr., *Governmental Definition of Religion: The Rise and Fall of the IRS Regulations on an Integrated Auxiliary of a Church*, 25 *VAL. U.L. REV.* 203 (1991).

For unrestricted gifts not targeted to one particular charitable purpose, the obvious answer is a weighted average of the institution's individual CD levels. To illustrate via example, assume that under a version of the charitable continuum advocated by this Article, aid to needy students is 100% deductible, gifts to fund general educational purposes are 75% deductible, and donations for scientific research are 25% deductible. Further, say that the university has an annual budget of \$100 million and spends it as follows:

- \$16 million to need-based scholarships,
- \$48 million to general educational expenditures,
- \$12 million to scientific research, and
- \$24 million to other, non-charitable expenditures.<sup>133</sup>

This is a total annual budget of \$100 million, with 16% devoted to need-based scholarships, 48% to education, 12% to science, and 24% to nondeductible purposes. It is simplest for the law to assume that each unrestricted dollar donated is spread evenly across the school's budget and hence the deductibility percentage is the weighted average:

$$(16\%) * (100\%) + (48\%) * (75\%) + (12\%) * (25\%) + (24\%) * (0\%) = 55\%$$

Thus a taxpayer making an unrestricted donation of \$100 could deduct \$55 on her federal tax return.

Donations for designated purposes ("restricted" gifts) might seem simpler, e.g., donations to fund scholarships for needy admittees would seem entitled to 100% deductions. Unfortunately, things are not that facile. Dealing with restricted gifts is actually *more* complicated because of institutions' ability to "slosh" money between charitable and non-charitable purposes. Consider a \$10 million dollar gift for need-based college scholarships. If the college would prefer to use the money for a new athletic stadium, and is currently using at least \$10 million in funds from other sources *that are not restricted* (e.g., unrestricted gifts or tuition revenue) to fund scholarships, it can simply use the new gift as a *substitute* for these unrestricted dollars, and shift the unrestricted funds to the stadium budget. As most colleges and universities have copious unrestricted income (tuition; unrestricted annual giving; income from unrestricted endowment gifts), this is a serious problem: dollars formally donated for charitable purpose X, entitling the donor to a 100% deduction, are in substance being used for purpose Y, entitled to no deduction at all.

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133 In theory a university could devote no resources to non-deductible purposes. In practice, however, this seems unlikely. Merit-based scholarships, excessive salaries to top administrators and star faculty members, and athletic programs are all examples of outlays that might not qualify as charity under the tax code.

Trying to police this behavior is a nightmare. University budgets are quite complicated, and each one is different. Many schools receive large numbers of restricted gifts and sometimes the restrictions permit more than one charitable use. All of this complexity suggests the need for a simple solution, and perhaps the simplest solution is to treat restricted gifts as unrestricted—which in large part they are given schools' ability to shift unrestricted funds between uses. This would mean, e.g., that even restricted gifts to the school in the numerical example above would entitle donors to a 55% deduction, no more for need-based scholarships and no less for gifts to build that new stadium.

Although this Part has used universities to illustrate the problem, we can apply the same framework to other mixed-purpose institutions, such as museums that frequently have a similar basket of purposes (educating visitors; charging low or no fees to poorer patrons; sponsoring research).

## V. THE PROBLEM WITH AN ALL-OR-NOTHING STANDARD FOR THE CHARITABLE DEDUCTION

### A. The Generic Costs of Mapping a Continuous Quantity to a Binary (0/1) Outcome

The difference between all of the theoretically optimal continua discussed so far and the binary CD of the current tax code is not merely academic. There are huge costs to squishing distributions with considerable weight in the middle to binary 0-or-1 outcomes. This is simply an application of decision theory, the primary tool for evaluating choices in the face of uncertainty.<sup>134</sup> The basic idea is to minimize the expected (average) cost of the mistakes that are inevitable when decision makers lack exact information.

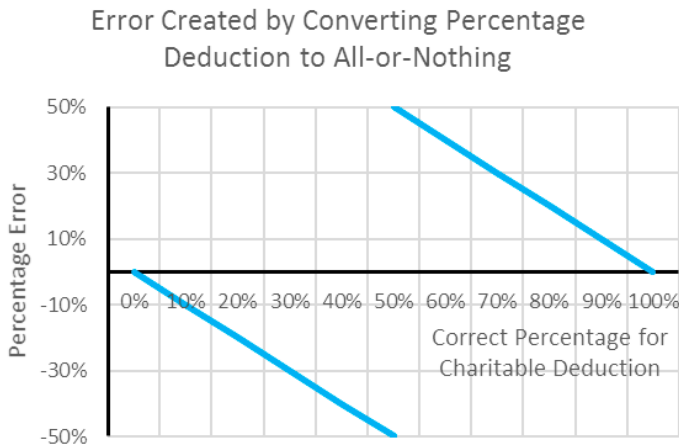
In the context of the CD, the issue is relatively simple. Given that all of the policy justifications in Parts I and II suggest that the deduction should fall along a continuum, the only reason to scrunch it down to a binary choice between zero and 100% is simplification. This means that the costs of calculating, even roughly, the correct deduction percentage for different charitable contributions are relatively high and that the error costs of opting instead for all-or-nothing determinations is relatively low. With the assistance of some simple graphs this section provides a framework for thinking about these error costs. Abandoning the continuum of deductions for the current binary regime is costly. In dollar terms, these mistakes matter: for fiscal year 2020 the CD cost the federal treasury

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134 The classic treatment is LEONARD SAVAGE, *THE FOUNDATIONS OF STATISTICS* (1954); for a modern treatment, see JAMES O. BERGER, *STATISTICAL DECISION THEORY AND BAYESIAN ANALYSIS* (1993).

about \$44.4 billion in foregone revenue.<sup>135</sup> If it is being over-granted, we have material waste in a tax expenditure; conversely, if it is being under-granted, we are under-subsidizing the four benefits of the CD laid out in Parts I and II.

We start with a simple graph illustrating the error made in the process of converting a given deduction on the continuum to either no deduction (0%) or a full deduction (100%).<sup>136</sup> We assume that the law and the tax authorities “convert” percentages perfectly: all deductions that should be less than 50% are set at 0%; all deductions greater than 50% are set to 100%.



**Figure 1**

Some examples to explain this graph:

- if the correct deduction percentage is 50%, the current all-or-nothing regime guarantees a  $\pm 50\%$  error in granting either a zero (+50% error) or a full deduction (-50% error);<sup>137</sup>
- if the correct deduction is 25%, the error from granting no deduction is -25%; and
- if the correct deduction is 90%, the error from granting a full deduction is 10%.

<sup>135</sup> Congressional Research Service, *The Charitable Deduction for Individuals*, CONGRESS.GOV (July 13, 2020), <https://crsreports.congress.gov/product/pdf/IF/IF11022>.

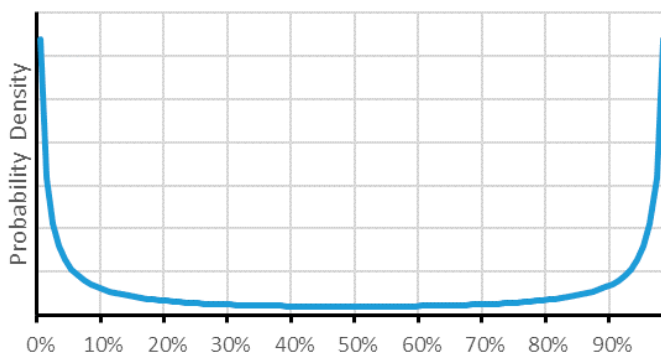
<sup>136</sup> As mentioned above, there is no *a priori* reason that particularly beneficial deductions should not garner a deduction rate greater than 100%.

<sup>137</sup> Deductions that are precisely 50% can be decided by a coin toss; the percent error will be the same 50% either way.

The only cases in which the all-or-nothing gets it right is if the correct deduction is indeed 0% or 100%. This figure is only a first step. In order to determine the magnitude of mistakes made by the all-or-nothing deduction system we need to know the distribution of deductions along the 0-100% continuum. If most actual deductions are close to either zero or 100%, this figure tells us that the costs of going from the continuous percentages to 0/100 are small. As we deviate more and more from this case, error costs grow.

If, for example, accounting for all four of our policy considerations causes optimal deductions to cluster close to 0% and 100% in the 'barbell' shape of the following figure, then the costs of the binary 0%/100% will be relatively low.

"Bar-bell" Distribution: Low Costs to  
Making Binary Choice



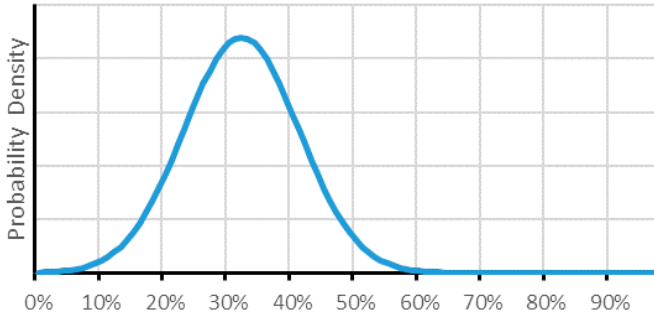
**Figure 2**

With this distribution, there are few cases in the middle to inflict large error costs.

A sort of opposite to this 'barbell' distribution is a distribution with most probability mass concentrated in the middle and tailing off towards zero at the low (0%) and high (100%) ends. The most common example of such a single-peaked, centered distribution is the normal (or Gaussian) distribution. The following figure gives an example of the normal distribution centered at 33%.



Normal Distribution: High Costs to  
Making Binary Choice  
(average correct deduction = 33%)



**Figure 3**

This illustrative example is centered at 33% instead of 50% to highlight the fact that there is no particular reason to think that the average proper CD is 50%. There is, of course, nothing special about 33% either; the choice of the average without data is arbitrary. The center of the distribution is entirely an empirical matter depending on the interplay of our four rationales for the deduction with the causes chosen by donors.

The important thing about distributions with this “normal” shape is that in most cases they imply high error costs.<sup>138</sup> For the example above, assuming that the law and judges accurately gauge the correct percentage for a CD (based on the four policy justifications), the average error will be a bit more than 33%.<sup>139</sup> This matters. The prospect of making significant errors in most cases translates to high costs in forcing the continuum of deductions into either 0% or 100%. The mathematical theory presented in this Part suggests that the true distribution of proper percentage deductibility for charitable

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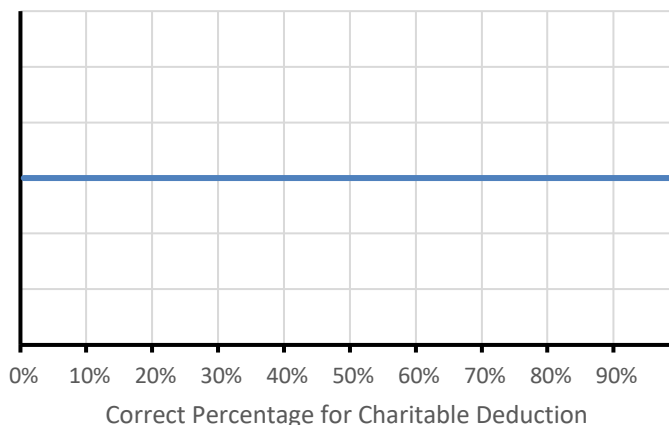
138 If the peak is near 0% or 100%, then the error cost will be low. In order to maintain the normal shape when the curve is so close to an upper (100%) or lower (0%) bound, the variance (spread) of the distribution would have to be very low.

139 If judges always granted no deduction for this distribution, the average error would be exactly 33%. For the small percentage of deductions that should be above 50%, however, the judges would give full deductions, generating an average error of a little bit less than 50%. Combining this small set of larger errors with the bulk of the distribution giving 33% errors yields an overall average slightly above 33%.

gifts will tend to look, at least roughly, more like this normal curve than the preceding ‘barbell’ curve.

Finally, consider an intermediate case between the barbell and the normal distribution: the uniform distribution, with no peaks anywhere and instead an equal probability for all percent deductions from 0% to 100%.

### Uniform Distribution



**Figure 4**

For this “flat” distribution, judges making perfect decisions in deciding whether to grant deductions (100%) or not (0%) will make average errors of 25%.<sup>140</sup> This is still significant, though not as great as for the normal curve example above. What is most important about this example is that when we sum multiple *independent* uniform percentages, the resulting distribution starts to look like the normal curve.

### **B. The Central Limit Theorem and the High Structural Cost of the All-or-Nothing Charitable Deduction**

This section applies the famous Central Limit Theorem to make some important inferences about the costs of the current all-or-nothing CD regime as compared to the alternative of a charitable continuum. It tells us that when we sample and sum a larger and larger number of random factors that are independent

<sup>140</sup> For percentages below 50% they will grant a 0% deduction, and for a flat distribution this will average to 25%. Symmetrically, for percentages above 50% they will grant 100% deductions, again yielding an average error of 25%.

of each other, the probability distribution of the sum will look more and more like the bell-shaped normal curve (see Figure 3 *supra*).<sup>141</sup>

We have enumerated nine relevant continua:

**Efficiency** Continua:

- 1) Amount of PosEx provided per free-rider
- 2) Geographic scope/number of free-riders

**Fairness** Continua:

- 3) Libertarianism
- 4) Utilitarianism (via some Social Welfare Function)
- 5) Rawlsian Maxi-min
- 6) Natural Rights (e.g., Epstein)

**Pluralism** Continuum:

- 7) Pluralism

**Institutional** Competence Continua:

- 8) Private provision and monitoring superior for some services
- 9) Overhead expenses percentage

Although it is impossible to test formally, these seem largely independent of each other. With one exception, efficiency sometimes correlates with some fairness standards, but sometimes does not. That one exception is aid to the poor, which scores high both for efficiency (PosEx due to human empathy) and for most common theories of fairness.<sup>142</sup> The different fairness standards sometimes point in the same direction, but other times not. The pluralism and institutional competence continua seems largely independent of efficiency and fairness concerns. Thus the major assumption required to apply the Central Limit Theorem seems largely satisfied.

Although nine quantities is too small to expect their sum to yield a close approximation to a normal curve, it is sufficient to make it highly likely that the distribution of summed benefits from donations has at least a modest hump in the middle and thinnish tails. Indeed, there are versions of the Central

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141 MORRIS H. DEGROOT & MARK SCHERVISH, *PROBABILITY AND STATISTICS* 282-91 (3d ed. 2002). As we are not requiring each element of the sum to have the same distribution, we are using the Liapunov version of the Theorem, *id.* at 286-87. The main technical requirement for applying this theorem is that all of the elements must have finite variance. The CD is always bound below at 0%. If we impose any upper bound on the deduction, e.g., 100%, 200%, or 500%, that is sufficient to guarantee finite variance and thus the applicability of the Liapunov Central Limit Theorem.

142 Recall that this was the finding of Perry Fleischer for all theories of fairness. See *supra* text accompanying notes 42-45.

Limit Theorem that apply to random variables that are dependent but only weakly.<sup>143</sup> That is all that is needed for the argument to proceed. Recall that distributions with significant weight in the middle and thin tails give rise to large error costs when boiled down to all-or-nothing outcomes—cases in the middle (around 50%) get forced to either 0% or 100%, resulting in errors of around 50%. The Central Limit Theorem tells us that summing the nine largely independent factors relevant to calculating the optimal CD results in a humped distribution, which in turn results in high errors under the current all-or-nothing deduction regime.

In some situations society and the law must make binary choices. In a title dispute, either Abel or Baker has title to Blackacre; we do not generally split the property or force them into co-ownership. Either the government has violated a citizen's First Amendment rights or it has not; either the perpetrator committed first-degree murder or did not; there is no such thing as being guilty for 57% of such a crime.

Tax law, however, is a quintessential legal domain in which partial results, as opposed to all-or-nothing classifications, are ubiquitous and easy to implement in terms of either dollars or percentages. There is nothing remotely complex about the progressive marginal tax rates used in the federal income tax and many state income taxes. The tax code is full of exemption levels, benefits that phase out as incomes rise, and other continua.<sup>144</sup> Tax law presumably uses such “middling” rules based on some rough estimates of efficiency and justice, and possibly pluralism and institutional competence as well. There is no reason to treat the CD any differently.

## VI. A PRACTICAL IMPLEMENTATION OF A CHARITABLE CONTINUUM

Many readers may have been thinking for some time that calculating a percent CD for each donation might be a nice idea in theory, but in practice is unworkable. I agree. In tax law, as in many domains, there is a pervasive

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143 See, e.g., Richard C. Bradley, Jr., *Central Limit Theorems under Weak Dependence*, 11 J. MULTIVARIATE ANALYSIS 1 (1981); A.V. Bulinski and A.P. Shashkin, *Rates in the Central Limit Theorem for Weakly Dependent Random Variables*. 122 J. MATH. SCI. 3343 (2004).

144 State tax systems set rates on continua for a number of purposes, some of which have a faint taste of the charitable continuum contemplated in this Article. For example, South Dakota pro-rates its charitable *exemption* when a charitable entity shares space with a for-profit business. See *Sioux Valley Hosp. Ass'n v South Dakota Bd. Of Equalization*, 513 N.W.2d 562 (S.D. 1994).

tradeoff between the costs and benefits of complexity. The current CD opts for maximal simplicity—an all-or-nothing deduction. The previous Part argued that there is a strong theoretical argument that this comes at very high error costs (granting the deduction to donations that don't confer any benefits; denying the deduction to donations that do). Implementing a truly continuous CD, however, takes things to the other extreme: it is rather obviously too complex and therefore too costly to implement.

The perfect, however, should not be the enemy of the good.<sup>145</sup> Although any *feasible* system for calculating fractional deduction rates will not match the theoretical ideal of a continuum, the schema outlined in this Part almost assuredly is better than the current overly simplistic all-or-nothing approach. Drawing on the major currents highlighted by this Article, this Part outlines a “quick and dirty, rough justice” version of a charitable continuum—a simple categorization system that provides only a crude approximate to the “true” CD continuum. The goal is to eliminate a large chunk of the costs of the current all-or-nothing system (Part V) without imposing excessive administrative costs. Although most of the major provisions discussed here would appear in a statute, administrators (i.e., the I.R.S.) and the courts would of course have their respective powers to add all sorts of details to the statutory framework.

An ideal charitable continuum would determine the deductible percentage on a donation by donation basis. Thus, a gift for need-based scholarships to a college might receive a higher deduction than a gift for merit-based scholarships. As discussed at some length in Part IV, however, the existence of fungible funds that entities can shift among uses makes it impossible to ensure that targeted gifts actually hit their target use. Thus, this Part's practical charitable continuum would establish a single CD for each charitable *entity*. Donations to entities like universities serving multiple charitable purposes would receive a deduction equal to an expenditure-weighted average as described in Part IV.

In an ideal implementation, we would choose precise weights for each of the nine factors that enter into calculating CDs. The costs of trying to determine such finely-tuned weights and the inevitable errors in the imperfect results caution against pretending to any such false precision. Instead, this Part's pragmatic approach gives roughly equal and large weights to efficiency and fairness, with the fairness weight divided up roughly equally between the

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145 This is rough translation of Voltaire's aphorism, “Le mieux est l'ennemi du bien,” which translates literally to “The best is the enemy of the good.” VOLTAIRE, *DICTIONNAIRE PHILOSOPHIQUE* (1822). See, *Quotable Quote*, GOODREADS.COM, <https://www.goodreads.com/quotes/215866-le-mieux-est-l-ennemi-du-bien-the-perfect-is-the> (last visited May 2, 2020).

alternative theories of fairness. Pluralism and institutional competence receive less weight, but in certain domains (e.g., science) they have a significant effect on the calculus.

The first category is gifts of necessities to the poor. In theory we would have deductions varying continuously with the need of the recipients but that is infeasible (i.e., it is prohibitively expensive). I propose a four-level approximation, as summarized below.

**Table 2**

<b>Necessities</b>	
<b>Level of Need</b>	<b>Deduction Percentage</b>
Completely Destitute: Homeless, Chronically Hungry	100%
Not Completely Destitute, but Below Poverty Line	90%
Above Poverty Line, but Significant Deprivation	50%
Not Suffering any Significant Deprivation	0%

Three of the four deductions in this table are relatively large because, as emphasized in Parts I and II, gifts to the poor score high on efficiency, fairness, and institutional competence. As the state of the beneficiaries improves, both the efficiency and the fairness benefits decline and thus the recommended deduction falls in lockstep. The first two categories are pretty objective and clearly defined; the “significant deprivation” element of the last is a bit mushier. This is meant to deal with recipients who have a roof over their heads and generally are not hungry, but who might have only minimal access to healthcare, education, or other important goods and services that middle class citizens take for granted.

Obvious candidates for a 100% deduction are gifts to soup kitchens and homeless shelters. What of the tougher cases considered earlier? Consider Habitat for Humanity.<sup>146</sup> Recall that this charity requires recipients of its aid to have existing tenancies. Thus its beneficiaries are not completely destitute, and donors to the group would receive at most a 90% deduction, and possibly only 50%, depending on the evidence that the group submitted in its application for tax-exempt status. As a second housing example, recall the gift “for refined, educated, Protestant gentlewomen, whose means are small, and whose home is made unhappy, by having to live with relatives, who think them in the way.”<sup>147</sup> The problem here is that by its own terms this gift targeted women already receiving significant charity (a roof over their heads, albeit not in a particularly hospitable setting) that certainly keeps them from complete destitution and

146 See *supra* text accompanying note 71.

147 See *supra* text accompanying note 74.

that might well keep them above the poverty line. In that case, the greatest possible deduction would be 50% and easily might be zero.

Combined with the “blended rate” rule of Part IV, these three tiers extend easily to housing aid that targets more than one tier. If Habitat for Humanity provided half of its aid to the truly destitute and half to those below the poverty line, donors would receive a 95% deduction, the average of the deductions for the two groups. Similar logic covers modern additions to the list of necessary goods, healthcare, and traditional education (primary, secondary, college, and graduate degrees). Donors to hospitals providing free or subsidized care to multiple tiers in Table 2 could deduct the weighted average percentage for the facility.

That covers necessities; what of non-necessities? Drawing the line between these two categories of goods/services is not easy—indeed it is almost assuredly a continuum. But to repeat a by-now familiar refrain, trying to legislate the ideal continuum here is prohibitively expensive. This Article views deprivation and poverty as *relative* concepts that will change over time, complicating matters further. For America today, between the easy cases of clear necessity (food, clothing, shelter, healthcare, education) and clear non-necessities (exotic vacations, plastic surgery, champagne) there are some difficult calls (safe places to recreate, affordable transportation, internet access). This gray area consists of goods that we think most families transitioning from poverty to the lower middle class would add to their consumption bundle.

For donations to fund non-necessities, I propose deduction percentages of one-third those suggested above for necessities, as summarized in the following table.

**Table 3**

<b>Non-Necessities</b>	
<b>Level of Need</b>	<b>Deduction Percentage</b>
Completely Destitute: Homeless, Chronically Hungry	33%
Not Completely Destitute, but Below Poverty Line	30%
Above Poverty Line, but Significant Deprivation	17%
Not Suffering any Significant Deprivation	0%

This schedule will result in sharply lower deductions. For the Conrad Cantzen Trust, funding shoes for down-on-their-luck actors,<sup>148</sup> it seems likely that some struggling actors are below the poverty line, but few are completely destitute and many likely are above the poverty line. Thus the weighted average deduction easily could be less than 16%. To the extent that (i) there is significantly less

148 See *supra* text accompanying note 94.

empathy for struggling actors than starving children (efficiency), and (ii) the marginal utility of shoes to struggling actors is much less than utility of food to said children (one flavor of fairness), it is sound social policy to give a drastically reduced deduction. Non-traditional educational charities, e.g., for wilderness training<sup>149</sup> or Renaissance etiquette,<sup>150</sup> would likely qualify even smaller deductions or none at all, as the target audience for such training is simply not poor folks, who unlikely have time for such endeavors.

Outside of redistributionary gifts that generally score some points on the fairness scale, deductions under a charitable continuum generally will not approach 100%. In addition, institutional competence and market structure frequently play a major role in defining the recommended CD. First, recall that the discussion in Section III.A concluded that due to expertise and informational advantages, the government is better equipped to calculate the returns to investments in different scientific research projects. In comparison to the current regime, in which private donations to science, especially medical science, are large, this likely implies a significant expansion in governmental expenditures on research. Imperfections in the political process or in the government's expertise or information, however, might leave room for funding some scientific research via the CD. Despite the imperfections, however, the state's advantages might well suggest that it should offer a relatively low CD for donations to science. Given the paucity of fairness benefits and the moderate efficiency benefits when the government is funding the best projects, a baseline CD of 25% for gifts to scientific endeavors makes sense under the charitable continuum proposed here. Higher rates might make sense for specific endeavors. Disproportionate political influence of the wealthy, for example, might lead to underfunding of projects that mainly assist the poor such as battling infant mortality, justifying a higher deduction, maybe 50% for gifts to ameliorate this embarrassing failing of American healthcare. Racial fault lines likely result in suboptimal research on diseases affecting minority groups,<sup>151</sup> warranting similarly elevated CDs for donations to fund research on such conditions. On the other side of the equation, the CD for junk science should be zero.<sup>152</sup>

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149 See *supra* text accompanying note 81.

150 See *supra* text accompanying note 82.

151 To give one possible candidate, lung scarring (sarcoidosis) is 16 times more likely to kill African-Americans than other Americans—and this despite the fact that African-Americans smoke less. Daniel J. DeNoon, *Why 7 Deadly Diseases Strike Blacks Most*, WEBMD.COM, <https://www.webmd.com/hypertension-high-blood-pressure/features/why-7-deadly-diseases-strike-blacks-most> (last visited May 2, 2020).

152 See *supra* note 124 and accompanying text.



For religion, Section III.B and Part IV have already, essentially, established the optimal CD. Core religious services are a club good in need of no subsidy for either efficiency or fairness. Thus donations for the opulent organ discussed in the Introduction should be zero. Deductions for donations to charitable efforts such as soup kitchens or food drives should be treated under the three-tiered systems for the needy discussed at the beginning of this Part. Part IV then completes the equation by providing donors to churches with a weighted average CD. It might be simpler for churches to divide themselves into a religious entity and a charitable entity. Donations to the former would not be deductible at all; donations to the latter would depend on (i) the nature of the charitable projects the church undertakes, and (ii) the weighted average of the CDs for these projects, per Part IV.

Museums charging *below-market* prices are another candidate for a specially tailored CD. If they charge *market* prices, museums (and similar) attractions are simply private or club goods yielding no efficiency or fairness PosEx and hence meriting no CD. Those charging a price below their costs still do not deliver any efficiency gains (from empathy or anything else), but likely do effectuate at least some redistribution and so enhance fairness. As a group, museum visitors appear to be too affluent to justify any deduction under the three-tiered framework for the poor outlined above.<sup>153</sup> That said, the bulk of their millions of visitors cannot be wealthy. Thus museums almost assuredly transfer value down the income distribution, justifying a partial CD on fairness grounds.

The value of the discount—the amount by which the price of admission falls below the per user cost of the museum—is one factor in setting the CD for donations to museums. The number of beneficiaries obviously is also relevant. Multiplying the amount of the discount by the number of visitors receiving the discount provides a rough dollar metric for the redistribution effectuated by a museum. There is no single “right” way to map this dollar amount to a percentage CD. My approach begins by noting that because museums offer no efficiency benefits, and because they redistribute largely from the wealthy to the middle class instead of the poor, the *maximum* CD for museums should be relatively low, say 25%.

Only donors to those institutions providing the biggest discount to the largest number of visitors would qualify for this maximal deduction. To gauge

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153 See Humanities Indicators, *Art Museum Attendance*, AM. ACAD. ARTS & SCI., <https://www.amacad.org/humanities-indicators/public-life/art-museum-attendance> (last visited May 2, 2020) (“students eligible for the free and reduced-cost lunch program were less likely to have visited [museums] than those whose higher family income rendered them ineligible.”)

discount, I propose using the *percent* discount. In theory the dollar discount makes more sense, but to use a monetary amount would require setting some baseline maximal price, which is difficult to identify. To gauge the number of visitors, we use the fraction of the number of visitors to the museum divided by the number of visitors to the museum with the largest number of visitors in the nation; call this the *visitor fraction*. As of 2018, that would be the Metropolitan Museum of Art in New York (“The Met”), with seven million visitors, tied with the National Air and Space Museum in Washington, D.C., a public museum

If the National Air and Space Museum was private, its donors would qualify for the maximal 25% deduction, as it charges no admission fee and has a visitor fraction of 100% (seven million divided by seven million). The Met is more complicated. As the most-visited museum in America, it has a visitor fraction of 100%, but it is free only to New York state residents and students from New York, New Jersey, and Connecticut.<sup>154</sup> It charges other visitors \$25, with discounts for senior citizens and students from other states. Based on the number of visitors from each of these segments, we could calculate a weighted average price. Finally, we also need to know the annual cost of running the Met to calculate the percentage discount it offers from this price.

This approach, following in the footsteps of Colombo & Hall,<sup>155</sup> has the attractive feature of calibrating the CD for gifts to museums to observed demand. Whatever the bottom-line number, The Met undoubtedly delivers a respectable chunk of fairness value by providing a below-cost museum experience to millions of folks with middling or low incomes. The same cannot be said of the National Mustard Museum or the National Museum of Roller Skating.<sup>156</sup> Their much lower volume of visitors would translate into a CD approaching zero under the scheme outlined here, in line with the minimal fairness benefits generated by an institution with few visitors relative to popular museums like The Met.

This framework for determining the CD for donations to museums, when fully fleshed out, admittedly would be quite detailed—perhaps too “in the weeds” for inclusion in a statutory provision. Thus it might be the sort of issue that the statute would leave to administrative rule-making. In addition to leaving many details for the regulatory rulemaking process, a statute instantiating the vision of the CD outlined in this Part could expressly authorize courts to craft common-law rules fleshing out core principles case by case.

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154 *Admission Tickets*, THE METRO. MUSEUM OF ART, <https://rsecure.metmuseum.org/admissions/tickets> (last visited May 2, 2020).

155 Colombo & Hall, *supra* note 19.

156 *See supra* text accompanying notes 67-68.

The charitable continuum sketched in this Part answers most objections. It is much less complicated than a number of current tax code provisions.<sup>157</sup> Contrary to Schizer's contentions, it would not require charitable organizations to classify themselves—the system is well within the regulatory capacity of the IRS and would not add any complexity to taxpayers' preparation of their annual returns.<sup>158</sup> Part IV elegantly answers concerns about "mixed" institutions that serve diverse charitable and non-charitable purposes.<sup>159</sup>

## CONCLUSION

In a world of limited resources, governments no less than private parties should make all cost-justified efforts to ensure that they are getting the most bang for every buck spent. The CD, though a *tax* expenditure, is an expenditure nonetheless. The primary point of this Article is that not all dollars donated are equally valuable. A gift to buying an opulent organ for a church is of no social value, in terms of efficiency, fairness, or pluralism. Therefore it merits no CD—the proper price that the government should pay for private provision of opulent organs is zero. Gifts to the same church's soup kitchen for starving orphans, however, could not differ more. As they generate substantial efficiency and fairness benefits, the proper price the state should pay for such generosity is significant, and a 100% deduction seems in order. The current all-or-nothing CD fails to recognize that the benefits of the wide variety of donations observed fall along a continuum between these two extremes. Based on the number of relevant factors, the Central Limit Theorem tells us that the bulk of this distribution is somewhere in the middle. A system like the current one, forcing all outcomes to one extreme tail (no deduction) or the other (a 100% deduction), thus produces large errors in most cases. Although not ideal or provably optimal, this Article's proposal would be a vast improvement on the glaringly flawed current CD. Paying for soup kitchens is great—indeed, maybe a 100% deduction is insufficient.<sup>160</sup> At the other end, we need to "just say no" to subsidizing opulent organs, mustard museums, and the host of other objects of "charity" that fail to deliver in terms of efficiency, fairness, or pluralism. Between these two extremes lies our charitable continuum.

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157 For an overview of some of the more complex portions of the Internal Revenue Code, see Farley P. Katz, *The Infernal Revenue Code*, 50 TAX LAW. 617 (1997).

158 Schizer, *supra* note 23, at 251.

159 *Id.*

160 See discussion *supra* pp. 302.