1972

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Charitable Contributions: Tax Deductions or Matching Grants?*

BORIS I. BITTKER **

Introduction

I n this article, I propose to discuss the propriety and vitality of the federal income tax deduction for contributions to private charitable organizations, and to compare the deduction mechanism of existing law with the alternative mode of encouraging philanthropy by direct federal grants to charities in amounts determined by the level of private donations. At first blush, the question of the deduction’s “propriety”—the legitimacy of governmental aid to private philanthropy—has been so frequently debated that one wonders whether anything new remains to be said. As to the deduction’s “vitality,” one might say briefly that even in the darkest legislative days of the private foundation, a few years ago, there was no disposition to abolish the deduction for charities as a whole; and that the changes that were in fact enacted do not really undercut the basic principle of the deduction. Still, the deduction has encountered stormy weather in academic circles in recent years 1 and even though these clouds are not yet

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** Boris I. Bittker is Sterling Professor of Law, Yale University. This article, part of a larger study in preparation, is a revised version of a paper delivered at a 1971 symposium sponsored by the Tax Institute of America, published under the title The Propriety and Vitality of a Federal Income Tax Deduction for Private Philanthropy, Symposium: Tax Inst., Tax Impacts on Philanthropy 145-70 (Princeton, N.J. 1972).


A system of matching grants to aid educational institutions was described in
any larger than a man’s hand, the rain-makers are so eminent that their efforts call for close scrutiny.

There are usually three counts to the indictment brought by critics of the deduction, viz., that a charitable gift is a personal and voluntary expenditure by the taxpayer that should have no impact on his tax liability because the tax should be based on “net” income; that deductions, even assuming they are to be allowed as a device to encourage philanthropy, are ineffective because they do not distinguish between gifts that need an official incentive and those that would be made in any event; and finally that, assuming we can get over these obstacles, deductions vary in value with the taxpayer’s marginal tax rate and hence inure to the benefit of upper income taxpayers in violation of the progressive rate schedule. These objections to the deduction as it exists today have led to proposals to curtail it sharply, or to eliminate it entirely. The abolitionists sometimes suggest that the deduction be replaced by a system of matching grants for charitable contributions.

Before discussing the three basic criticisms of tax deductions that I have briefly summarized—which might be labelled “impropriety,” “inefficiency” and “inequity”—I should like to say a few words about matching grants as a substitute for the deduction of existing law. If a system of matching grants is not feasible or would generate grave side effects, I suspect that there would be little enthusiasm for a repeal of the tax deduction, no matter how strongly these theoreticians are convinced of its impropriety, inefficiency or inequity. Conversely, if matching grants would be the functional equivalent of the deduction as we now know it, producing substantially the same results, one might accept the change with equanimity, even if the theoretical objections to existing law are unconvincing.

After commenting on the matching grant device, and on the criticisms that have led it to be proposed as a substitute for the deduction of existing law, I will set out my own affirmative views on the “propriety and vitality” of the deduction. Each of these subjects—matching grants, the three-count indictment of the deduction and its affirmative defense—deserves more extensive examination than I can give it here; and I ask the reader’s indulgence

McDaniel, Alternatives to Utilization of the Federal Income Tax System to Meet Social Problems, 11 B.C. Ind. & Com. L. Rev. 867, 875-82 (1970), and a more general proposal to substitute matching grants for the income tax deduction of existing law may be found in McDaniel, Federal Matching Grants for Charitable Contributions: A Substitute for the Income Tax Deduction, 27 Tax L. Rev. 377 (1972). (Like my article, McDaniel’s second article is based on a paper delivered at the Tax Institute’s 1971 Symposium.)
if I traverse the ground rather rapidly and totally neglect some of the interesting landmarks.

**Matching Grants**

**The Propriety of Public Support to Private Charity**

At the outset, I should like to call attention to the fact that proposals for matching grants accept the contention, made by proponents of tax deductions for charitable gifts, that it is wise public policy to encourage the creation and growth of philanthropic institutions. Sometimes the premise is that they are doing socially essential work that otherwise would have to be carried on by governmental agencies, but that can be performed with more imagination, diversity, flexibility or economy by private groups. More recently, the idea has gained ground—fed by concern over the citizen's alienation in a bureaucratic society—that independent centers of power with a large measure of private control should be encouraged, even if their functions would not be picked up by governmental agencies in the absence of private support. In keeping with either, or both, of these rationales, proposals for matching grants have at their core the concept of private choice: the grants are to go to institutions designated by private persons in a particular way, i.e., by putting their money on the line. Matching grants thus would be independent of whatever programs might be instituted as part of the government's regular expenditure budget to support education, science, arts and humanities, the poor, et cetera. These budgeted expenditures may embrace some of the same charitable institutions as the proposed system of matching grants, but the latter will go to organizations selected by private choice, manifested by private gifts, without federal screening, designation or approval.

I begin with this point because the critics of tax allowances for charitable contributions often imply, even when they do not explicitly assert, that there is no justification for private control over the use of "governmental" funds. I will return to this strain of thought later; suffice it to say at this point in the discussion that those who wholeheartedly espouse this view, which is by no means irrational despite the counterarguments that persuade me to reject it, should be no more enthusiastic about matching grants than about tax allowances. For this reason, I am not sure whether they support matching grants as a desirable measure of social policy or only as a temporary expedient, to be eliminated as soon as the public can be brought around to the view that "government" funds should be controlled solely by public officials.
Turning now more directly to the substitution of matching grants for the tax deduction of existing law, I foresee a constitutional obstacle, perhaps an insuperable one, to the inclusion of churches and other religious organizations (which in 1962 received more than 60 per cent of itemized charitable contributions) in the grant system. In the most recent relevant Supreme Court decision, to be sure, a divided Court upheld federal grants to church-related colleges and universities for the construction of buildings and other "academic facilities" under the Higher Education Facilities Act of 1963, against a claim that the aid violated the establishment and free exercise clauses of the first amendment.\(^2\) The prevailing opinion, however, stressed several features of the construction grants that could not be embodied in a program of matching grants to churches. Thus, the enabling legislation explicitly forbids any grant for facilities "to be used for sectarian instruction or as a place for religious worship," a restriction whose violation will trigger a recapture of the facility's value, proportionate to the federal contribution to its cost. To the Court, a dedication of the facilities to secular purposes was so essential that a statutory provision permitting the recapture restriction to expire at the end of 20 years was held to be too lax and was excised by the Court on its own motion. Even with this expanded safeguard, the legislation had to face the argument that the secular function of church-related colleges is so entangled with their religious mission that federal aid to the former inevitably advances the latter. The Court responded to this contention—simultaneously distinguishing the case of federal aid to church-related elementary and secondary schools, which was held improper in two companion cases—by saying that "college students are less impressionable and less susceptible to religious indoctrination" than younger students and that the "predominant" mission of the colleges in the case before it, though church-related, was "to provide their students with a secular education."\(^3\)

I am of course familiar with the theory that tax allowances are

\(^2\) Tilton v. Richardson, 403 U.S. 672 (1971).
\(^3\) Id. at 686-87. See Lemon v. Kurtzman, 403 U.S. 602 (1971) (Rhode Island and Pennsylvania statutes aiding parochial schools unconstitutional); see also Walz v. Tax Commission of the City of New York, 397 U.S. 664 (1970) (state property tax exemption for church property unconstitutional); Board of Education v. Allen, 392 U.S. 1923 (1968) (loan of publicly purchased textbooks to parochial school pupils constitutional).
the functional equivalent of direct grants of public funds 4 and that the Supreme Court ought to apply this theory in its church-state decisions by either nullifying tax allowances to churches or validating direct grants to them. 5 But the Supreme Court, after hearing argument to this effect, has obviously decided to grasp neither nettle of the dilemma. This is of course not the first time that a court has surprised, disappointed or infuriated the logician. Thus, unless the sedulously narrow rationale of Tilton v. Richardson is relaxed to the point of nullification, 6 I see no constitutional future in a matching grant program that includes churches and other clearly religious organizations. It is barely possible that some of their social welfare activities could be split off sufficiently to gain a separate constitutional status for matching grants to these functions, but this would entail some excessively nice distinctions. (Do the Salvation Army's soup kitchens relieve secular—or religious—hunger?) Moreover, a federal effort to distinguish between the social welfare and religious functions of churches might reflect, or be perceived as reflecting, an intolerable bias against churches that openly avow their missionary purpose and in favor of those that are more subtle in their statements or activities.

Aside from the constitutional barrier, there would be a formidable political barrier to a system of matching grants that includes the churches. The struggle over public aid to parochial schools has produced some legislation, to be sure, but these results responded to concentrated pressure in communities with parochial schools that were near financial collapse, where it was possible to argue that the right of parents to send their children to religious schools—itself a constitutionally protected right—was jeopardized


6 It is barely possible that the Court might swing around to the view that the "entanglement" of church and state—one of its concerns in Tilton v. Richardson—could be avoided by grants containing no restrictions or rights to scrutinize or demand reports on the use to which the funds were put, so that a no strings attached "direct expenditure" would have the same constitutional status as the "tax expenditure" upheld in Walz v. Tax Commission of the City of New York, 397 U.S. 664 (1970). While not inconceivable, this rationale would mean that the more the state endeavored to prevent its funds from serving religious ends, the more it would approach an unconstitutional "establishment" of religion!
by their obligation to support the public schools as well. There is no such pressure for matching grants to churches; the potential recipients seem satisfied with the tax deduction of existing law, and Congress is not likely to substitute grants for deductions merely to improve the elegance of the Internal Revenue Code. Hard as it would be, then, to enact a system of matching grants that included churches, it would be equally difficult, in my opinion, to enact a system without them. Nor do I foresee as a compromise the enactment of a matching grant system for secular charities and perpetuation of tax deductions for churches. Deadlock, i.e., preservation of the status quo, is the more likely outcome.

**LEVEL OF BENEFITS UNDER A MATCHING GRANT PROGRAM**

A related problem, which would also contribute to a political deadlock, is that a system of matching grants would hardly coincide with tax deductions in the pattern of benefits conferred on charitable institutions. It would be difficult to devise a formula for matching grants that would produce, even in the aggregate, the same amount of revenue that charities now owe to the tax deduction, and it is almost inconceivable that this could be done for particular charities or even categories of charities.\(^7\) If the rich now give to private universities and the poor to churches, for example, and the deduction is repealed, the postrepeal pattern of charitable receipts would depend on whether these groups respond differently to loss of a tax deduction, and on whether their postrepeal gifts

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\(^7\) McDaniel, *Alternatives to Utilization of the Federal Income Tax System to Meet Social Problems*, 11 B.C. IND. & COM. L. REV. 867, 880 (1970), states that any nontax substitute for the deduction of existing law must assure educational institutions of support equal to "that which they can reasonably anticipate from the present expenditure system." Unless this one class of recipients is to be singled out, it would seem that every other class would similarly be entitled to preserve its status quo ante. It is hard to envision a single formula that could do this without giving some groups more than they had before.

Perhaps inefficiency is to be avoided by conforming the matching grants to a redefined Pareto-optimum (viz., every group is to be as well off, and none is to be better off) with a set of formulas, each exquisitely tailored to its own charitable category. The model that comes to mind is percentage depletion, where we give each industry a different percentage, accurately reflecting its economic risks, technological level and political clout. Although I myself do not share the distaste that has been expressed for the appearance of college presidents before congressional committees (Surrey, *Federal Income Tax Reforms: The Varied Approaches Necessary to Replace Tax Expenditures with Direct Governmental Assistance*, 84 HARV. L. REV. 352, 389–90 (1970); Stone, *Federal Tax Support of Charities and Other Exempt Organizations: The Need for a National Policy*, 1968 S. CALIF. INST. 76), those who think that lobbying is undignified might pause to consider whether a matching grant system, whether it uses one formula or several, would pit every charity against every other one, bringing about a donnybrook of quite new turbulence.
will be matched dollar for dollar, or in a more complex fashion related to the size of the donor’s income. If universities, hospitals, museums, community chests, foundations, churches and others will be differentially affected by the change, there will be no united front in favor either of repealing the tax deduction or of substituting a single formula as its replacement. The poker game will also be affected by the fact that some charities are more likely than others to qualify for direct federal aid apart from matching grants and by the possibility that this independent source of assistance will shrink if a system of matching grants is substituted for tax deductions. If an all-powerful computer could devise a formula for matching grants that would restore the prerepeal status for both donors and donees, I would hail it as a modern miracle; but would then go on to suggest that this feat of ingenuity would be reminiscent of the businessman who, fearful of an investigation by the Antitrust Division of the Department of Justice, instructed his secretary to burn his correspondence with his business competitors, but first to make copies for the files.

In his proposal to substitute matching grants for the deduction of existing law, Professor McDaniel refers to a federal “commitment” to contribute to private charity at a level that in fiscal year 1971 amounted to $3.8 billion. A matching grant program built on this commitment might take $3.8 billion as the aggregate amount to be appropriated (adjusted, perhaps, to reflect changes in the purchasing power of the dollar) and allot it to the charitable claimants in proportion to the private gifts they are able to attract. Alternatively, the commitment could be viewed less as a federal promise to appropriate a specific dollar amount, than as a promise to pay out in the aggregate whatever amount would have been lost if the charitable deduction of existing law had been continued in force. Professor McDaniel proposes the more workable plan of converting the commitment into a schedule based on the existing pattern of charitable giving, with no other umbilical cord to the past. The result would be an appropriation each year determined by the aggregate amount of private donations and by the ratio of each gift to the donor’s own total income.

In assessing the impact of a matching grant program—whether Professor McDaniel’s or any of the many other versions that might be offered—charitable organizations and their donors might well focus on the federal commitment that is described by Professor

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McDaniel. If the $3.8 billion of federal revenue that was lost in 1971 by reason of the tax deductions for charitable donations inured solely to the benefit of charitable organizations, the commitment might indeed be regarded as a reliable base for a system of matching grants. But the advocates of matching grants usually endorse a very different economic analysis of the tax deduction of existing law, viz., that its incentive effect is quite weak, because the bulk of charitable donations would be made even if they were not deductible, and that it therefore inures primarily to the benefit of donors rather than donees. The economic study that is most frequently quoted in support of this conclusion suggested that in 1962 the deduction of charitable contributions cost the Treasury about $2.5 billion, but increased charitable giving by only about $57 million over the level that would have prevailed in the absence of a deduction.\(^9\) I will turn shortly to a fuller discussion of this study, and of its limitations; but it is relevant here because of its implications for the federal commitment that is to serve as the foundation of the proposed matching grant systems. If the deduction of existing law is as "inefficient" as advocates of matching grants allege, one would expect them to isolate its "true incentive" effect and use that as the base for computing the "proper" level of federal support for charities. Applying the conclusion of the economic study just mentioned, this approach would produce a federal commitment of aid to charities in the amount of about $85 million in fiscal 1971, rather than $3.8 billion. The remaining $3.7 billion, on this theory, was "wasted" because it went to donors who would have made the same contributions in the absence of a tax incentive. Despite this, Professor McDaniel does not propose to eliminate this amount from the federal commitment. Instead, he assumes that "the federal government is willing to continue paying to private charitable activities the same amount it is presently expending through the deduction mechanism," an assumption based at least in part on the fact that "Congress has now been shown the effects of the deduction as an expenditure mechanism for 1968-1971."\(^{10}\) To observers who are seeking to assess the matching grant alternative, however, the heavy emphasis by its proponents


\(^{10}\) The reference (McDaniel, Federal Matching Grants for Charitable Contributions: A Substitute for the Income Tax Deduction, 27 TAX L. REV. 377, 405 (1972)) is to the "'tax expenditure budget,' described in the articles cited in note 4 supra. Professor McDaniel has more faith than I in the power of the accountant's pen. Is it so clear that publication of these obscure documents operates as a commitment by Congress?
on the "inefficiency" of existing law strongly suggests that McDaniel's assumption may well be jettisoned by those who follow in his footsteps; and that the proper measure of the federal commitment may, in their view, be only a small fraction of $3.8 billion.

INDEPENDENCE AND PRIVACY

Since I see little likelihood that a matching grant system could overcome these constitutional and political obstacles, I may be merely making a virtue of necessity by suggesting that matching grants would in any event be a poor substitute for existing law. My concern is that a system of matching grants would not preserve the large degree of institutional and donor independence that is now respected by the statutory provisions of the Code and by the Service's administration of these provisions.

When a donor takes a tax deduction for a charitable contribution, his privacy is an inextricable part of the more generally protected privacy that is accorded to federal income tax returns. Thus, an attempt to breach it—for example, on the theory that deductions are equivalent to expenditures and that the public is entitled to know who is controlling the destiny of these hypothetical public funds—would be seen as a threat to the privacy of everyone's tax return, whether he makes charitable contributions or not. By contrast, a promise of privacy embodied in a matching grant system, not yet sanctified or steeled by history, would not be protected by a similar umbrella; and might well be swept away by a revival of McCarthyism, aided perhaps by a philosophic claim (already explicit in some proposals to substitute grants for deductions) that secrecy is incompatible with democratic values. It may be that some proponents of matching grants see their vulnerability to disclosure as an advantage, but I do not.

A closely related threat to the independence of donors and donees is the intrusion of official concepts of right and wrong into the administration of a matching grant system. No public program is immune to either open or covert attempts to foster one set of values and discourage another, but the definition of exempt organizations by section 501(c)(3) of the Code and the administration of this definition by the tax authorities have been relatively free of bias. This freedom is fragile, of course, and it would be fatuous to assert that it will last so long as we stick with tax deductions, but will be lost forever if we shift to matching grants. Professor McDaniel points to "the pages of the Code dealing with private foundations" as evidence that tax allowances may entail a good deal of governmental supervision. He is of course correct,
but the text he has chosen stimulates me to preach a different sermon. The lesson I draw from this part of the Tax Reform Act of 1969 is that tax reformers should be more aware that their well-intentioned passion for tidiness and efficiency may be exploited by opponents of the spirit of free inquiry.

Professor McDaniel assures us that "a direct federal grant or loan program can be drafted and operated as simply, and with the same degree of freedom from governmental control as a tax expenditure." 11 I am reminded—not unfairly, I hope—of William Butler Yeats' story about the Irish peasant who was asked if he believed in leprechauns. "Well, I've never seen one," was the reply, "but it stands to reason." The issue, after all, is not the drafting of a verbal formula promising independence, but its effect in real life. Acknowledging that a dogmatic conclusion is not warranted, I must say that I have very little confidence that a system of matching grants could be administered without administrative and congressional investigations, loyalty oaths, informal or implicit warnings against heterodoxy and the other trappings of governmental support that the tax deduction has, so far, been able to escape. It is of course true that some recipients of charitable contributions (e.g., colleges and universities) are heavily dependent on other types of federal assistance and that these may be encumbered by restrictions; but recent experience with federal scholarship programs shows that private institutions, deriving a degree of independence from their endowments and alumni contributions, are better able to resist such threats than institutions that depend entirely on public appropriations. Whatever may be said, therefore, in favor of matching grants as a substitute for tax allowances in such other areas as tax-exempt state and municipal bond interest,12 the device is no panacea.

Criticism of Charitable Deduction

The Charge of "Impropriety"

I should like now to consider whether a tax deduction for charitable contributions is somehow inconsistent with the basic pre-

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12 Thus, Professor Surrey's proposal for federal financial assistance to states and municipalities as compensation for repeal of section 103(a) (exempt bond interest) has much to commend it. See Surrey, Federal Income Tax Reforms: The Varied Approaches Necessary to Replace Tax Expenditures with Direct Governmental Assistance, 84 HARV. L. REV. 352, 371-81 (1970); see also SIMONS, FEDERAL TAX REFORM 34 (1950).
suppositions of income taxation, one of the claims made in support of its repeal. Another way of putting this assertion of "impropriety" is that "horizontal equity" is violated if $A$ and $B$, having the same amount of adjusted gross income, pay different amounts of federal income tax merely because $A$ has made a charitable contribution. (I will discuss later the assertion, growing out of the progressive rate schedule, that "vertical equity" is violated if $X$ and $Y$ give the same amount to charities but get divergent tax benefits merely because $X$ is in a higher adjusted gross income bracket than $Y$.) The assertion of unfairness when $A$'s tax liability is lower than $B$'s solely because $A$ has made a charitable contribution is based on the premise that the taxpayer's income tax liability should be based on the amount available to him for consumption expenditures, taking no account of how he chooses to spend his money, coupled with the premise that a charitable gift is a consumption expenditure. "Tax logic," we are told, requires gifts to charities to be classed with wine, women and song; to permit any of these to be deducted violates the Haig-Simons definition of income.

I have had occasion elsewhere to discuss at length the limited usefulness of this definition, sometimes described as "the comprehensive income tax base," and, tempting as I find any occasion to paraphrase my earlier remarks, I will refrain from doing so here. I will instead content myself with asserting that even the most enthusiastic proponents of a comprehensive income tax base have themselves found a spate of occasions and reasons for departing from their ideal. This should be no surprise: When the proponents of a bleakly dogmatic theory confront life, they almost always get cold feet and withdraw to the comforting warmth of more familiar terrain. As Holmes said, the life of the law has not been logic; it has been experience.

The no-deduction-for-consumption school of thought is no exception to this custom. Proof can be found in the very area that we are discussing. Thus, condemnation of the existing tax law for distinguishing among taxpayers merely because they use their

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money for different forms of consumption is often coupled with advocacy of matching grants by the government to charities that have been selected by the "private choice" of taxpayers. But a matching grant to A's charity, if nothing goes to B's mistress, also distinguishes among taxpayers by reason of their expenditures: A has been given an economic lever that is denied to B, solely because he spends his money differently. To use the economist's terminology, the price to A of enriching his favorite charity by $2 is reduced, by the matching grant, to $1; but if B wants to give $2 to his companion, it will cost him the full $2. Depending on whether the advocate of matching grants is a puritan, an idealist or a utilitarian, his rationale for matching the taxpayer's charitable contributions, but not his expenditures on wine, women and song, will be that charitable gifts are more "worthy," "selfless" or "beneficial to society." The adjective does not matter; what is important is the basic premise of the matching grant approach that some consumption expenditures should be rewarded or encouraged and others not.

Yet, advocates of matching grants persist in telling us that it is a perversion of the Code, but not of the national expenditure budget, to distinguish between one consumption expenditure and another. The burgeoning theory that tax deductions and direct expenditures are functional equivalents leads to some extravagances, but none is more ironic than this idea that social objectives that are tolerable in one system are inconsistent with the other. It may be, of course, that tax deductions are less "efficient" than matching grants would be, but that is a very long way from saying that logic requires the "tax expenditure" system to treat all consumption expenditures the same, while the "direct expenditure" system, simultaneously and perforce, makes distinctions among them.

Returning now to A and B, who have the same amount of adjusted gross income, but choose to spend their money in different ways, I have no difficulty at all with the proposition that society can rationally distinguish between them. It is a matter of judgment, not of logic whether this is done by giving A a tax allowance for his charitable contributions, by matching his gifts with smaller,

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equal or larger amounts of government funds, by erecting a monument to him in the nation’s capitol, or merely by assuming without official action that virtue is its own reward.

**The Charge of “Inefficiency”**

Turning now to the second count in the indictment of tax deductions for charitable contributions, the charge is that they are inefficient because such a large fraction of charitable gifts would be forthcoming in any event that the incremental contributions stimulated by the deduction are too small to justify their cost. Whether the criterion of “efficiency” should be the sole standard, or even a major one, in judging the deductions, is a question to which I will return later in this article; for the moment, I will accept the criterion as proffered by its proponents.

**Empirical Studies**

The major basis for asserting that the deduction is “inefficient” is a 1965 doctoral dissertation by Professor Michael K. Taussig, summarized by him in a 1967 article in the *National Tax Journal*. Noting that the deduction increases the taxpayer’s disposable income and hence his ability to make charitable contributions and other expenditures at the same time that it reduces the net cost to him of charitable gifts, Professor Taussig sought to separate its “income effect” from its “price effect.” The distinction is important, because repeal of the deduction could be coupled with a subsidy to the taxpayer or an offsetting general rate reduction to produce the same “income effect” (i.e., increase in aggregate after-tax income); thus, it is only the deduction’s “price effect” (i.e., the reduction in the “cost” of making a charitable contribution by the amount of tax saved by the deduction) that can be regarded as a genuine incentive. Using a regression analysis of the ad-

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16 Taussig, Charitable Contributions, 1965, 93 (unpublished M.I.T. doctoral dissertation): “The quantity measured will be the difference between what is actually given (as reported on tax returns), and what would be given under the hypothetical situation in which the individual’s tax liability and disposable income gross of contributions were held constant by simultaneously removing the deductibility provisions and paying a lump-sum subsidy [presumably exempt from tax] exactly equal to the tax equivalent (marginal tax rate \times\text{ deductible contributions}) of the individual’s deductible gifts. If this latter requirement seems too unrealistically strict, remember that the equivalent result could be brought about by at the same time removing the deductibility provision and very carefully designing a general tax reduction that brings about the same result as the lump-sum subsidy described above.”
justed gross income, deductible contributions and marginal tax rates shown on the 1962 Treasury Tax File, and cross-checking this analysis with a series of ancillary studies, Professor Taussig concluded that "the incentive effect of the deduction for charitable contributions is, in the aggregate, weak."\(^{17}\)

This conclusion is often quoted or paraphrased, but the commentators who build on it seldom quote the warning which immediately follows this conclusion in Professor Taussig's commendably cautious article: "At this point, there is no need to repeat all the qualifications of this result spread amply throughout the body of the paper."\(^{18}\)

Professor Taussig did, indeed, sprinkle qualifications throughout the body of his article:

\[\ldots\text{Unfortunately, the tax-return data used in this study allow only a poor approximation of the ideal income measure }\ldots\text{. The omission of many items impairs the reliability and usefulness of results} \ldots\text{more sophisticated concepts could not be used in our analysis. (page 5)}\]

\[\ldots\text{Some difficult problems in the reliability of these results need careful discussion} \ldots\text{. (page 6)}\]

\[\ldots\text{The difficulties involved in constructing this variable adequately from the items available on tax returns} \ldots\text{. (page 7)}\]

\(^{17}\) Taussig, *Economic Aspects of the Personal Income Tax Treatment of Charitable Contributions*, 20 Nat'l Tax J. 1, 16-17 (1967). To be more explicit, Taussig found no statistically significant incentive effect in income classes below $100,000 of adjusted gross income (consisting of two classes, viz., $0 to $25,000, and $25,000 to $100,000); only for incomes above $100,000 was an incentive effect reflected by his analysis. In absolute terms, the $2.5 billion of revenue lost by the deduction in 1962 is said by Taussig to have accounted for as little as $57 million of charitable contributions (Taussig, Charitable Contributions, 1965, 185-86 (unpublished M.I.T. doctoral dissertation)); in Taussig, *Economic Aspects of the Personal Income Tax Treatment of Charitable Contributions*, 20 Nat'l Tax J. 1, 17 (1967), the estimate is 2 to 3 per cent of total giving (i.e., $150 to $225 million, of an aggregate $7.52 billion).

\(^{18}\) Taussig, *Economic Aspects of the Personal Income Tax Treatment of Charitable Contributions*, 20 Nat'l Tax J. 1, 17 (1967). Taussig's policy recommendations are quite bland, suggesting a disinclination to put much weight on the study's findings, viz., "the incomplete results cited in this paper do tend to lend some support to recent proposals to place a 3 per cent floor under deductible contributions [;] a more effective policy mix would be a tax credit of from 30 to 35 per cent floor and the present 30 per cent of AGI ceiling." (I do not understand the rationale of the ceiling; the study does not suggest that the most generous givers are unresponsive to an incentive after they reach 30 per cent of AGI.) With these mild proposals compare Taussig, Charitable Contributions, 1965, 198 (unpublished M.I.T. doctoral dissertation), after discussing a 3 per cent floor on a tax credit: "This author would favor the alternative of doing away entirely with the present deduction \ldots\text{. The basic simplicity of outright repeal of the deduction is very appealing. With one simple stroke, the personal income tax could be transformed into a much better tax. Such a step would seem to be an indispensable part of any worthwhile general tax reform.}"
The possibility that the incentive effect [of the deduction] is masked by the more significant variance associated with different tax schedules must be acknowledged. (page 8)

Unfortunately the problem of the proper treatment of capital gains introduces biases that cannot be satisfactorily removed. The estimates of income elasticities in these high income classes are certainly biased. Estimates of the marginal tax rate elasticities may also be biased. (page 8)

It seems a fair, if discouraging, judgment that the findings are suggestive but of weak reliability. Various factors all tend to cast doubt on the validity of the estimates of the incentive effect. (page 9)

Beyond the problems already discussed, any estimate of the total incentive effect drawn from regression analysis results is open to the objection. (page 9, note 13)

Assume, for the following calculations, that all deductions in the personal income tax other than the contributions deduction are "true" expense items and serve the purpose of properly refining the concept of net income. Admittedly, such an assumption does not stand up to close scrutiny. (page 13)

Two points should be clearly recognized before reading too much significance into these results. (page 14)

This assumption is badly out of date. For lack of a better guess the same assumption is reluctantly repeated here.

This assumption is open to criticism, again on the grounds of realism. (pages 15-16, note 16)

The evidence presented in this paper, even if it were not subject to many serious qualifications, is not as good as we might like for policy decisions. (page 19).

Taussig does not attempt to estimate the cumulative effect, in amount or even in direction, of these limitations, but it is hard to see how they could do much to reduce his low estimate of the deduction's efficiency, unless we are to believe that it had no effect whatsoever or that it actually discouraged donors.

The process of pruning and discarding Taussig's reservations when citing his study to support such major policy recommendations as repeal of the tax deduction and its replacement by a system of matching grants is reminiscent of the Pentagon Papers, which illustrated the same tendency to ignore anything that cannot be quantified and then to eliminate any qualitative reservations about the naked numbers as prior studies are summarized and then summaries of the summaries are passed on to the policymakers. The same latitudinarian use of evidence is reflected by the frequent citation of studies by Kahn and Vickrey, as though they
were independent and cumulative buttresses to Taussig's conclusions, though Taussig himself, after describing their studies, concluded that "no useful information presently [as of 1965] exists on the allocation or incentive effect of the contributions deduction." One is tempted to suggest, paraphrasing the title of a recent book, that this mode of analysis is characteristic of those wonderful folks who gave you Viet Nam.

My conviction about the risk of building too heavily on Taussig's study is buttressed by the fact that two subsequent studies traversing the same ground, published in 1968 and 1970 by Professor R.A. Schwartz of New York University, conclude that "corporate giving [to charities] clearly appears to be price elastic" and that the same can be said of contributions by individuals. Professor Schwartz's studies (finding price elasticities "considerably greater" than Taussig's) confirm the conventional view that a taxpayer who can transfer $1 to his favorite charity at a cost to himself of only 50 cents will be much more inclined to make the gift than one who must lay out a full $1 to transfer that amount. There may be weaknesses in Schwartz's methodology or statistical base, but I know of no effort by the critics of the tax deduction to point them out.

Indeed, even those who profess faith in Taussig's conclusions seem simultaneously to accept the conventional view that the deduction has a powerful incentive effect. At any rate, I do not see any other explanation for the fact that they continue to describe the deduction as a vast governmental "subsidy" to charitable institutions in the teeth of Taussig's conclusion in 1962 that the deduction reduced federal revenue by $2.5 billion, but increased charitable contributions by only $57 million. The same dollar of public money, after all, cannot be both a windfall to donors and a subsidy to their donees.

THE CHARGE OF "INEQUITY"

I should now like to discuss the question of "vertical equity," illustrated by X and Y, who give the same amount to charity but

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10 Taussig, Charitable Contributions, 1965, 87 (unpublished M.I.T. doctoral dissertation). See also id. at 59 ("Weak and inconclusive") and at 151 ("Vickrey's conclusion of marked regressivity seems extremely dubious").


get different tax allowances for their gifts because $X$ has more adjusted gross income than $Y$ and hence is subject to a higher marginal tax rate. It is asserted that $X$ is thereby given an “upside-down” subsidy, because his deduction is “worth more” than $Y$’s. In advancing this argument, the deduction’s critics accept the theory that it subsidizes the donors, although, as I have pointed out, they sometimes prefer the theory that the subsidy goes to the donees.

**Equity and Efficiency**

The first point to be made about this disparity between $X$ and $Y$ is that it may be entirely harmonious with, indeed required by, the criterion of efficiency that is usually put forth with equal fervor by those who criticize upside-down subsidies. Suppose, for example, it falls out that low-income taxpayers customarily put a dollar a week in their church’s collection plate and would not be influenced by changes in the tax system to increase or decrease their gifts, but that high-bracket taxpayers are very responsive to tax allowances. On this set of behavioral assumptions or findings, the criterion of “efficiency” would dictate the elimination of tax allowances for low-income taxpayers and the preservation or liberalization of the allowances for high-income taxpayers. To maximize efficiency in this instance, then, we should not narrow the gap between $X$ and $Y$, but broaden it. I need not go this far, however, to make the point I have in mind. It is that “efficiency” and “equity” are separate criteria, which are quite unlikely to coincide in their operational consequences.

Moreover, I find it ironic that not so long ago, some of my colleagues in the income tax business were arguing that tax preferences, including the personal deductions, must be extirpated so that progression in the rate schedule could be moderated, or even replaced by a flat rate.22 Having been denounced as an obstructionist in that campaign, I am now confronted by the assertion that these deductions must be repealed because they keep us from getting, rather than getting rid of, progression. And—unless I am the victim of combat fatigue—the new battle cry seems to come from some of the same soldiers who used to fight under the old banner. A second irony in this new-found passion for progression is that it

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is often coupled with specific proposals for replacing the tax deduction with matching grants for higher education, while little or nothing is said about grants to churches. Since it is quite clear that education is the favorite charity of the rich, while religion is the refuge of the poor, the matching grant concept seems to be lopsided, or even (shall I use the ultimate calumny?) "upsidedown." 23

**Effect on Progression**

However fickle its own advocates may be, however, I should like to grapple directly with the assertion that a deduction for charitable contributions is inconsistent with "society's judgment that [the federal income tax] should be progressive." 24 To begin with, this description of "society's judgment" seems to confuse hopes with reality. ("If wishes were horses, beggars would ride.") The qualifications and exceptions with which the Code is riddled belie the claim that we have made a strong commitment to progression *as such*, or that the differential impact of tax deductions is a shameful betrayal of a national ideal. What Congress has enacted is a progressive structure with deductions; you cannot hold up one as the authentic voice of the people, and condemn the other as a craven surrender to special privilege. (If put to a vote, would naked progression command more support than the charitable deduction?)

A rate schedule that is itself the product of compromise and judgment—born of experience rather than logic—cannot be turned into a standard by which the "logic" of deductions can be judged. With equal if not greater warrant, one might argue that the durable and central features of the Code are its deductions and that progression is secondary and expendable.

I would myself prefer a more progressive rate structure than Congress has seen fit to enact, but I see no inconsistency in simultaneously favoring deductions or other allowances for a variety of specified expenditures, misfortunes, transactions and other events in the life of the taxpayer. Given a need for additional revenue,

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23 Thus, since McDaniel, *Alternatives to Utilization of the Federal Income Tax System to Meet Social Problems*, 11 B.C. Ind. & Com. L. Rev. 867 (1970), was a proposal for matching grants to educational institutions, it would probably have been more regressive than existing law. This would evidently not be true of McDaniel, *Federal Matching Grants for Charitable Contributions: A Substitute for the Income Tax Deduction*, 27 Tax L. Rev. 377, 401, 404 (1972) (Tables I and II), which embraces all charitable donees.

for example, I would much prefer an increase in progression rather than a repeal of the deduction for charitable contributions.

Approaching the problem from a different angle, I know of nothing in 'tax logic' or in the theory of progression that requires the top marginal rate on taxable income to be 70 per cent rather than 80 per cent or 60 per cent, or that requires today's rates to be maintained for the indefinite future. Since there is nothing sacrosanct about the width of any given income bracket, the marginal rate applicable to it or the number of percentage points between one marginal rate and another, I can see no valid objection, in the name of progression, to the modest step of cutting the marginal and effective rates for a selected group of taxpayers (viz., charitable donors) by granting them a deduction for their contributions. This need not entail any narrowing of the gap in effective rates between rich and poor taxpayers, since the loss in revenue from the deduction can be recouped by increasing the rates on the very same gross income classes that enjoy the deduction. To illustrate the point with a simple example, assume a reformed Code with no personal deductions; with only two classes of taxpayers, those with zero to $10,000 of adjusted gross income, and those with over $10,000; and with rates of 14 per cent on taxable income up to $10,000 and 70 per cent on taxable income above $10,000. The introduction into this hypothetical state of affairs of a deduction that would be employed solely by the rich (e.g., for contributions to private foundations) would not necessarily alter the disparity between the effective rate on rich taxpayers and that on poor taxpayers—because the revenue lost by the new deduction could be recovered by increasing the marginal rate on income over $10,000.

**Progression and the Beneficiaries of Charitable Gifts**

As respects the charitable contribution deduction of existing law, there is still another point to be made in refutation of the claim that it is inconsistent with progression, viz., that it may well have the effect of increasing progression, by transferring funds from rich taxpayers to those in more moderate circumstances. Our information about the financial status of those who benefit from charitable contributions is meager, but it supports the tentative hypothesis that gifts by low-income taxpayers go primarily to the churches of which they are themselves members, thus effecting
little redistribution, but that rich taxpayers contribute heavily to private colleges and universities (both directly and through private foundations), whose student bodies, though not poor, are likely to be drawn—increasingly, these days—from families with far less income than their benefactors. Though the amounts donated by upper-bracket taxpayers are smaller, gifts to community chests, the Red Cross, hospitals and similar social welfare agencies probably generate an even greater degree of redistribution. I would add museums, art galleries, symphony orchestras and other cultural institutions to this list; I am familiar with—but do not accept—the assertion that since the public has not seen fit to support them with governmental funds, they must be dismissed as mere playthings of the rich.

Summary

I might summarize my comments on the barrage of recent criticism of the deduction for charitable contributions as follows:

(1) The assertion that a deduction for charitable contributions is inconsistent or incompatible with a proper measure of taxable income is devoid of merit.

(2) We know too little, other than by intuition, about the incentive effect of the deduction to justify its repeal or major overhaul on grounds of inefficiency.

(3) As to "vertical equity," there is no necessary inconsistency between the deduction and a progressive rate structure, and if there were, this criterion might conflict with the criterion of "efficiency."

(4) A system of matching grants would be a poor substitute for the deduction, but the proposal independently faces such serious constitutional and political obstacles that it can in any event be regarded as a dead end.

Case for Charitable Deduction

I have discussed the criticisms of the deduction for charitable contributions at some length because they represent the considered judgment of eminent authorities, which have not previously, to my knowledge, been subjected to detailed examination. As a result, however, I have little time to make an affirmative case for the deduction and will move on very rapidly. In doing so, I will avoid repeating or paraphrasing the conventional arguments in support of the deduction, but will offer for consideration several other
arguments that, in my view, have not received the attention they deserve.25

Charitable Contributions as Business Expenses

First, charitable contributions can often be properly viewed as business expenses, akin to advertising and public relations, which should be deducted from gross income if the taxpayer's net income is to be properly measured. This is certainly true of much, if not most, corporate philanthropy; quite aside from such familiar donees as the local community chest, business corporations are being pressed to support a wide range of charitable institutions and they disregard this pressure at their peril. A business nexus is also often present in the case of contributions by partnerships and proprietorships and even by employees. For example, contributions to the community chest by employees who are solicited at work by fellow employees and supervisors, often released from their regular business activity for the purpose, are sometimes not very different from union dues and subscriptions to trade publications.

The fact that charitable contributions may serve a business purpose is acknowledged, albeit backhandedly, by the history of section 162(b)—enacted in 1938 and enlarged in its coverage in 1954—which forbids charitable contributions to be deducted as business expenses. Until 1936, corporations could deduct gifts to charities only if they qualified as business expenses and there is a small but interesting body of law on the requisites of satisfying this condition. In 1936, corporations were relieved of this condition by an amendment to what is now section 170, allowing contributions to be deducted up to 5 per cent of corporate taxable income. Since section 170 was not explicitly designated as the sole route to a corporate deduction, however, the possibility remained that contributions in excess of the 5 per cent limit could continue to be deducted as business expenses, if they could meet the pre-1936 requirement of a close nexus with the corporation's business activities. To close off this possibility, Congress enacted section 162(b) in 1938, forbidding corporations to deduct "any [charitable] contribution or

25 The remainder of this article is a slightly revised version of comments made at a 1966 conference at Airlie House, sponsored by the American Alumni Council, on Taxation and Education. An unpublished manuscript by my colleague, Professor John Simon, includes a sympathetic but critical examination of my suggestions, together with his own penetrating analysis of the entire range of public policy issues posed by public aid to private philanthropy.
gift” as a business expense. In 1954, to put individuals and corporations on a plane of equality, section 162(b) was expanded to cover all taxpayers.

In short, the very existence of section 162(b) is a reminder of the business context in which some charitable contributions—by individuals and partnerships, as well as corporations—are made. Even today, a business expense deduction is allowable if the transfer to a charitable organization can avoid being characterized as a “contribution or gift” or if the recipient does not qualify under section 170 (e.g., a foreign charity).26

The outside boundaries of the concept of “corporate social responsibility” are still unclear,27 but it is obvious that we have moved a long way since the thirties, when the propriety of corporate charitable contributions of a type and scale that are now routine was the subject of intense debate. It is equally clear, at least to me, that if Congress had not intervened in 1936 and 1938 to restrict the deductibility of corporate contributions under section 162, the judge-made law in this area would have kept pace with changing conceptions of the stake of business in a healthy social environment, with the result that corporate charitable contributions (and, through a “trickle down” or fallout process, some contributions by individuals and partnerships as well) would be routinely recognized as legitimate business expenses. Indeed, businessmen regularly deduct (with no likelihood, in my opinion, of successful challenge by the Service) the expense of special minority training programs, uncompensated services to community organizations and the like—even if their potential contribution to business profits is speculative and distant, and the motivation is identical with that underlying charitable contributions. It is even possible that section 162(b), by denying a tax deduction for contributions serving the same business and social functions, has the effect of pushing businesses down more costly and less efficient routes to these objectives.

Contributions as a Discharge of Moral Obligation

Second, there is another nonvoluntary aspect of charitable giving in our society, stemming from a conviction that charitable

functions have a claim of very high priority on one’s resources. The weight of this claim varies from person to person and also with the kind of organization soliciting the gift. In the extreme case of a member of a religious order, bound by a vow of poverty, it is clear to me that the income he receives from a trust and must pay over to a religious organization under his vow of poverty is properly excluded in calculating his taxable base. In our secular society, few are bound by oaths of poverty, and even the Biblical tithe is more than we contribute on average. Nevertheless, charitable contributions represent a claim of such a high priority that in my view, a case can be made for excluding them in determining the amount of income at the voluntary disposal of the taxpayer in question. I would offer two analogies. To the economist, the amount that one pays in alimony may be a belated payment for pleasure enjoyed long ago, so that it is just a consumption expenditure. Despite this, the husband is allowed to deduct alimony payments. To be sure, the amounts deducted by the husband are taxed to the ex-wife, but the theory of the deduction (which is granted whether the ex-wife’s tax rate is higher or lower, and even if she has offsetting losses or is a nontaxable nonresident alien, et cetera) is the husband’s inability to use the funds as he chooses. Similarly, section 73 of the Code permits parents to exclude their children’s earnings from their gross income, even if the parents are entitled to the earnings under state law. In effect, section 73 subordinates legal rights to the moral obligation many parents feel to earmark their children’s earnings rather than use them as part of the family’s general resources.\footnote{The announced reason for section 73 was the divergence and complexity of state law, previously controlling in determining whether the child or the parent was required to report the income. S. Rep. No. 885, 78th Cong., 2d Sess. 22-23 (1944). But geographical uniformity could have been achieved as readily by requiring the parent to report the income as by imposing this responsibility on the child; either way, some state laws had to be disregarded.}

**Contributions as Substitutes for Unpaid Services to Charity**

A third buttress to the deductibility of charitable contributions can be built on the fact that some charities rely very heavily upon the unpaid services of donors (e.g., the Boy Scouts and the Red Cross). Side by side with taxpayers who can satisfy their charitable impulses by making a contribution of their time (from which they report no imputed income) are others who feel the same charitable impulse, but must discharge their moral obligation by
contributing cash or property. This raises a question of equity as between these two classes of taxpayers, and a similar question of equity between charitable purposes that can be advanced by the unpaid services of their members and those that depend upon gifts of money and property. The problem of nontaxable imputed income may not be susceptible to a generalized solution, but the deduction for charitable contributions provides an equitable solution in this limited area. A related point is that of two charitably minded persons, one may be able to satisfy his impulse by a transfer of inherited or accumulated property: once he has made his gift, whether in trust or outright, the income from that property is thereafter devoted to the charitable purpose and never again shows up in his tax return. The second person must rely upon contributions out of current earnings to discharge his moral obligation. The deduction helps to equalize their circumstances; its repeal would, in my opinion, create an inequitable disparity between them.

**Tax Deductions as Rewards for Praiseworthy Behavior**

Fourth, I would like to offer a defense of the deduction even if it turns out to be "inefficient," failing to operate effectively as an incentive to private philanthropy, viz., something can be said for rewarding activities which in a certain sense are selfless, even if the reward serves no incentive function. I am quite aware of the fact that a contribution to charity may serve some deep-seated need or drive in the donor, just as much as an expenditure on wine, women and song; and I know that the economist does not like to distinguish among the various things on which people choose to spend their money. As previously noted, however, a system of matching grants would be no more "neutral" vis-à-vis the taxpayer’s expenditures than the tax deduction of existing law. And, if we were to ask whether Nobel Prizes elicit contributions to nuclear physics or to literature, no doubt the answer would be that they have no significant "incentive" effect. But I do not think life would be enriched by eliminating them and parceling out a few dollars to every educational institution in the world. What has been quite notable about the Peace Corps is the almost unanimous feeling that it provides a model and holds up an ideal of public service. Does this alone not justify the expenditure? What I am suggesting, to return to the deduction for charitable contributions, is that it need not stand or fall on its efficiency. Moreover, since its incentive effect is still veiled in uncertainty,
the alleged "waste" is at worst speculative and there are favorable offsetting externalities.

Opportunity to Control Use of Exaction

Last, I would argue that the deduction can be viewed as a mechanism for permitting the taxpayer to direct, within modest limits, the social functions to be supported by his tax payments. We have heard much in recent years of alienation, of discontent with bureaucracy and of the citizen's inability to exert influence over governmental activity. It has often been asserted—with good reason, in my opinion—that voluntary nonprofit agencies under private control provide an antidote to the citizen's feeling that he is ineffectual and powerless, at the mercy of big business and big government. It has, therefore, been customary to defend tax exemption for these organizations and deductions for their benefactors as enhancing their ability to function as independent, decentralized centers of power. Of at least equal importance, in my view, is the fact that the deduction gives the taxpayer a chance to divert funds which would otherwise be spent as Washington determines and to allocate them to other socially approved functions. One need not be an anarchist to applaud the modest opportunity this gives the citizen to control the use of funds that will in any event be taken from him.29

What I am suggesting is that the psychological gap between the student who refuses to pay the tax on long distance telephone calls because it was levied to finance the Viet Nam war and his parents who feel they have been deprived of control over their destinies, may not be as broad as we sometimes think. William James sought for a "moral equivalent of war" that could tap the martial virtues of discipline, vigor and self-sacrifice without violence. Perhaps the deduction for charitable contributions serves as a similar escape hatch—as the older generation's substitute for civil disobedience or, pursuing the military analogy, for alternative civilian public service by conscientious objectors to military training. In a less provocative vein, I remind you that Mr. Justice Holmes liked—or at least said that he liked—to pay taxes, because he bought civilization with them. For those who live in another day, and do not want quite as much of today's civi-

29 Another instance is President Kennedy's 1963 proposal for a credit for political contributions to national campaigns (up to $10 per taxpayer, $20 on a joint return) or a deduction (up to $500), an idea that is embodied in a more restricted form in sections 41, 218 and 6096 of current law.
lization as is offered, perhaps the deductibility of charitable contributions provides a constructive alternative.

**Recommendations**

Against this background, I offer the following recommendations for legislative change in the deduction for charitable contributions.

*First, repeal of the percentage limits on the deduction.* I believe in having as much of a good thing as possible and really do not understand—save as a compromise between those who believe in a deduction and those who would repeal it—these limits. If a taxpayer contributes 100 per cent of his income to charities, it is preposterous to suggest his character will suffer if he does not pay "some" amount in taxes.\(^3\) For those who fear that we will be unable to carry on as a nation if everyone adopts the practice of giving all of his income to charities, I suggest there are greater dangers on the fiscal horizon to which they could turn their attention with profit.

*Second, repeal of section 162(b), which now prevents taxpayers from deducting charitable contributions as business expenses.* Given the pressures on business taxpayers to contribute to community chests, local hospitals, educational and cultural institutions and other nonprofit agencies, I see no reason why they should arbitrarily be deprived of the right to establish that their gifts have a business motivation, comparable to advertising and public relations expenses. Rather than prefer conventional advertising over charitable benefactions by allowing only the former to be deducted, my policy preference would be just the reverse; but I am willing to compromise on "neutrality" in applying section 162. This measure would, of course, be unnecessary if my first recommendation (removal of section 170's percentage limits) were adopted. If there is an administrative problem in separating business motivated contributions from nonbusiness ones, it can be dealt with when it proves to be more than a figment of the imagination, by statutory guidelines, administrative rules of thumb, percentage limitations, specification and so on.

\(^3\) In my view, the unlimited charitable deduction of section 170(b)(1)(C), now being phased out by section 170(g), was unjustly criticized. Though this is not the place for a funeral oration, it is at least appropriate to note that it should have received high marks for "efficiency," since in effect the taxpayer had to take a big leap to get over the otherwise nondeductible area that extended from 30 per cent of adjusted gross income to 90 per cent.
Third, enactment of a modest floor, permitting the taxpayer to deduct contributions only if they exceed this amount. I am prepared to believe that a modest amount of charitable contributions would be forthcoming regardless of the deduction, so that a “floor” related to the taxpayer’s income (on the model of the deduction for medical expenses) would contribute to administrative simplicity without significantly impairing the incentive effect of the deduction. (I would exempt contributions that can qualify as business expenses from the floor if section 162(b) is repealed.) Moreover, the reasons leading to my approval of the deduction are more applicable to the taxpayer who goes an extra mile than to the one who stops at the end of the first lap. I would not insist on an above average contribution, however, but would instead fix the floor so as to exclude, say, the least generous 10 or 20 per cent of currently itemizing taxpayers. Setting this floor at 3 per cent, a figure that has been supported by others in the past, is plausible, though the level probably ought to be reconsidered in the light of the revised limits on the standard deduction.

Fourth, reexamination of the deductibility of the fair market value of appreciated capital assets, without recognizing the gain, only in the context of general realization of appreciation by gift and at death. Commenting on the taxpayer’s right to deduct the fair market value of appreciated capital assets, without recognizing the gain, critics usually compare the taxpayer who sells his capital assets with the one who contributes them to a charity. Aside from the fact that this comparison does not in any event lead irresistibly to the usual conclusion that this state of affairs is intolerable, it is deficient in disregarding the taxpayer’s third alternative, viz., an intrafamily transfer of the property by gift or at death without recognizing the gain. While this possibility remains, I see no burning need for a change in the rules governing charitable contributions of such property. Even then, I would give more weight to the practical consequences of a change than to its contribution to “tax purity,” “tax logic” or definitional elegance.