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The Nonprofit Sector's Uncertain Future in a Post-TCJA America

The tax deduction for charitable contributions has existed in the Internal Revenue Code in some form since the early 1900s. While the charitable deduction has been preserved in the U.S. tax code for more than 100 years, the Tax Cuts and Jobs Act (TCJA) of December 2017 threatens charities by removing the tax incentive to donate to charity from all but the wealthiest taxpayers.

Both charities and nonprofits play a vital role in the U.S. economy by providing some goods and services more efficiently than the public or private sectors. In this Note I explore the role of nonprofits in the U.S. economy and how the federal government has used tax incentives to encourage taxpayers to donate to charities. I describe how new changes in TCJA, including doubling the standard deduction, increasing the estate tax exemption, capping the state and local tax deduction, and lowering the income tax rates, remove the tax incentives for most individual taxpayers to donate to charity. I then propose solutions to the problems that TCJA created for charities. I submit that a carefully constructed universal charitable deduction could be a fiscally efficient subsidy. TCJA created an uncertain future for the nonprofit sector. Implementing the proposals in this Note could help preserve the future of the nonprofit sector in the United States by making the tax incentive to give to charity available to all taxpayers.

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I. INTRODUCTION

> *I'm a believer that philanthropy is not a financial decision; you've got the gene to give – it feels good, literally it's the love of humans. I get that. But if it wasn't at least a little tied to a financial decision, then why are all of our charitable funds established at the end of the year?*[1]

The preceding quote introduces an interesting concept: is donating to charity motivated by a universal human desire to assist others, or is it a financial decision? It is most likely some mixture of the two, but this is only one of many issues that charities must grapple with as they try to predict the effects of 2017's Tax Cuts and Jobs Act (TCJA), a tax bill that may reduce donations to charities by up to $24 billion this year.[2] As a result of TCJA, millions of taxpayers will no longer have an incentive to use the charitable deduction, which reduces a taxpayer's taxable income by the amount

1. Bernie Story, president of the Lehigh Valley Community Foundation, a group that provides charitable funds in Pennsylvania, quoted in Carolyn Y. Johnson, *The GOP Plan to Simplify Taxes Could Put Charitable Giving at Risk*, WASH. POST: WONKBLOG (Oct. 11, 2017), https://www.washingtonpost.com/news/wonk/wp/2017/10/11/the-gop-plan-to-simplify-taxes-could-put-charitable-giving-at-risk/?utm_term=.7ea7f6218425.

2. Bryan McQueeney, Opinion, *The GOP Tax Reform Will Devastate Charitable Giving*, L.A. TIMES (Dec. 27, 2017, 4:00 AM), http://www.latimes.com/opinion/op-ed/la-oe-mcqueeney-charitable-giving-under-new-tax-law-20171227-story.html.

they donate to charity.[3] This leaves U.S. charities in a vulnerable position, especially since many of them already operate on tight budgets. The number of taxpayers who can take advantage of this deduction is expected to drop from 37 million to around 16 million this year, as estimated in one study by the Urban-Brookings Tax Policy Center.[4] If donating to charity is indeed (at least in part) a financial decision, as the introductory quote suggests, one can expect donations to charities to decrease for tax year 2018.

This Note provides an overview of how TCJA may discourage taxpayers from donating to charities until TCJA sunsets in 2025. I will begin in Part II by investigating the important role that the nonprofit sector, which includes charities, plays in the U.S. economy. In Part III, I will explore how a past tax reform affected charitable giving in the United States. In Part IV, I will summarize key changes to the tax code, as a result of TCJA, that may decrease charitable donations, including the increase in the standard deduction, the increase in the estate tax exemption, and the $10,000 state and local tax deduction cap. To finish, I will propose changes to the current tax law that could prevent the potential problems associated with TCJA. The first proposal is to extend a charitable deduction to nonitemizers. The second is to extend the ability to deduct charitable donations through April 15 to encourage donating closer to the end of the tax season. My third suggestion is to eliminate the phaseout for the charitable deduction. TCJA removes the incentive to donate to charity from the tax code for all but the wealthy who can continue to take the charitable deduction. Implementing any of these proposals could help preserve the incentive in the tax code to donate to charity for everyone, instead of just the wealthy, as TCJA does now.

3. Under § 67(b)(4) of the Internal Revenue Code, a taxpayer is authorized to take an itemized deduction, which reduces the taxpayer's overall taxable income, for "deductions under section 170 (relating to charitable, etc., contributions and gifts)." 26 U.S.C § 67(b) (2018); *see also* 26 U.S.C. § 170 (2018).

4. Fred Stokeld, *Fewer Taxpayers Expected to Claim Charitable Deduction*, TAX NOTES (Jan. 29, 2018).

II. CHARITIES AND THEIR ROLE IN THE U.S. ECONOMY

While one of the purposes of TCJA was to simplify taxes by reducing the number of itemizers, it created complications and uncertainty for charities. TCJA will likely end itemization for most Americans, who will no longer have to worry about keeping track of charitable donations or home mortgage interest,[5] two popular itemized deductions. While this may be convenient for taxpayers, charities that rely heavily on donations to perform their role may be in danger of losing funding if fewer people give to charity this year and coming years in response to TCJA. This Part explains the important role of the charitable or nonprofit sector in the U.S. economy, demonstrates that the U.S. government recognizes this role and supports the charitable sector through tax incentives, and shows that TCJA has charities worried about the implications of reducing the availability of the charitable deduction. For clarification, the word *charity* in this Note does not refer simply to generosity to the poor. For purposes of this Note, I will be using the terms *charity* and *nonprofit* interchangeably, both referring to any organization to which taxpayers can make deductible donations under § 170 of the Internal Revenue Code.[6]

A. Role of Charities in the U.S. Economy

The charitable sector is a vital part of the U.S. economy and plays a role that supports the public sector in promoting the general good and solving social problems.[7] The nonprofit sector is made up of hospitals, religious groups, associations, schools, research universities, nongovernmental organizations, and some international relief agencies.[8] In the last year, members of the nonprofit sector have provided relief to U.S. citizens in the face of multiple disasters. They stepped up to help people who lost their homes in

5. Johnson, *supra* note 1.

6. 26 U.S.C. § 170.

7. C. Eugene Steuerle & Martin A. Sullivan, *Toward More Simple and Effective Giving: Reforming the Tax Rules for Charitable Contributions and Charitable Organizations*, 12 AM. J. TAX POL'Y 399, 401–02 (1995).

8. Charles T. Clotfelter & Richard L. Schmalbeck, *The Impact of Fundamental Tax Reform on Nonprofit Organizations*, *in* ECONOMIC EFFECTS OF FUNDAMENTAL TAX REFORM 211, 211 (Henry J. Aaron & William G. Gale eds., 1996).

California's wildfires and in the hurricanes and floods that devastated Puerto Rico and the Gulf Coast.[9] They responded to mass shootings in Texas, Florida, and Las Vegas.[10] They worked to meet the needs of hungry children, abused women, the disabled, and the homeless.[11]

B. The Government's Interest in Subsidizing the Charitable Sector

The United States relies on nonprofits significantly more than other countries and provides nonprofits with favorable tax treatment for carrying out important social functions.[12] Congress has passed laws to ensure that organizations are properly classified as tax exempt, but it provides incentives to nonprofits and their donors because they play an important role in the U.S. economy. The nonprofit sector, in turn, has molded itself to conform to the tax code in order to continue to enjoy these tax incentives.[13] The government's interest in subsidizing nonprofits stems from the fact that nonprofits often fill gaps the government cannot fill. For instance, many churches provide public goods that the government would otherwise have to pay for, including counseling, youth programs, and aid to the poor. At a time when discretionary government services are growing scarcer, and the federal government contemplates more budget cuts, the nonprofit sector's role in filling holes in social safety nets has become even more important.[14] Nonprofits not only provide a safety net for the unfortunate, they provide many other public goods, thereby relieving government of the cost of doing so.

The charitable deduction decreases the amount of revenue the government can raise because it reduces the amount of an individual's or household's money the government can tax. Though the federal government loses money by preserving the charitable deduction, this loss is offset by a greater increase in charitable donations, arguably making the deduction a fiscally efficient

9. McQueeney, *supra* note 2.
10. *Id.*
11. *Id.*
12. Clotfelter & Schmalbeck, *supra* note 8.
13. *Id.*
14. Clotfelter & Schmalbeck, *supra* note 8, at 217.

subsidy.[15] Congress clearly has a vested interest in preserving the charitable deduction. Some studies have found that eliminating the deduction altogether could reduce individual charitable donations by amounts as high as 35%, which would cripple charitable organizations and, consequently, put more pressure on the public sector.[16]

C. Leaders of Charitable Organizations Respond to TCJA

Some charities rely more heavily on deductible donations than others, so it is difficult to make general statements about how changes to the tax code will affect charities.[17] However, it is clear that TCJA will decrease the number of taxpayers who itemize. In 2017, itemizers gave approximately $239 billion in charitable donations while nonitemizers contributed an estimated $53 billion.[18] According to a study at Indiana University, more than 80% of itemizers made charitable donations in 2017, compared to only 44% of nonitemizers.[19] Last year 25 million homes itemized, and some studies estimate that number dropping to 7 million for the 2018 tax year.[20] Charities now face an uncertain future because it is difficult to predict how many taxpayers will continue to itemize and how many new nonitemizers will continue to donate without the tax incentives to do so. Those who will itemize for the 2018 tax year will overwhelmingly be wealthier households.[21] Many of the households that will no longer be able to take advantage of the charitable deduction are middle-class households, meaning charities that depend on donations from middle-class donors will likely be those most affected by TCJA.[22]

The United Way is a charity that depends on smaller donations from middle-class families. It receives an average of 7.2 million donations every year, averaging around $154 per donation.[23]

15. Ernest M. Zampelli & Steven T. Yen, *The Impact of Tax Price Changes on Charitable Contributions to the Needy*, 35 CONTEMP. ECON. POL'Y 113, 121 (2017).

16. *Id.* at 113.

17. Clotfelter & Schmalbeck, *supra* note 8, at 213.

18. JOSEPH ROSENBERG ET AL., URBAN INST., THE NEW DEBATE OVER A CHARITABLE DEDUCTION FOR NONITEMIZERS 1, 5 (Oct. 2016), https://www.taxpolicycenter.org/sites/default/files/publication/135446/the-new-ebate-over-a-charitable-deduction-for-nonitemizers.pdf.

19. Johnson, *supra* note 1.

20. *Id.*

21. *Id.*

22. *See* discussion *infra* Part IV.

23. Johnson, *supra* note 1.

Steven Taylor, senior vice president at United Way Worldwide, discussed the difficulties facing charities as a result of TCJA:

> We have spent an enormous amount of time up on the Hill, and we get back the talking point, "Oh, don't worry—we preserve the charitable deduction." That makes it seems [sic] like many lawmakers don't understand, themselves, what the ramifications of this legislation are . . . . A lot of charities are coming to grips with the fact that there may come a point where individual charities would have to start having to come out in actual opposition to the tax reform bill—and no charities want to be put in that position.[24]

Some charities are legitimately concerned about the implications of TCJA. One may wonder if these concerns are warranted or if Americans are more altruistic when it comes to donating to charity. By looking at a previous tax reform that changed incentives for taxpayers to give to charity, one can see that tax incentives motivate charitable giving in the United States and that diminishing such incentives will likely decrease charitable giving.

III. How the 1981 Tax Reform Affected Charitable Donations

Deciding to what extent tax incentives motivate charitable giving in the United States would be an extremely difficult task, but past tax reforms provide insight into the effect changes to the tax code have on taxpayer behavior with respect to charitable donations. The Economic Recovery Tax Act of 1981 (ERTA) has attracted a lot of attention from scholars because it slowly introduced a charitable deduction for nonitemizers between 1982 and 1986.[25] The data about this nonitemizer deduction as it existed in the 1980s allows us to compare the responsiveness of nonitemizer giving to tax incentives and, therefore, determine whether charitable giving is significantly influenced by tax incentives.

24. *Id.*

25. Christopher M. Duquette, *Is Charitable Giving by Nonitemizers Responsive to Tax Incentives? New Evidence*, 52 NAT'L TAX J. 195, 195–96 (1999).

A. Economic Recovery Tax Act of 1981

ERTA slowly phased in a charitable deduction for nonitemizers. During the first two years, nonitemizers could only deduct 25 cents per dollar given to charity for the first $100 of giving, with a maximum deduction of $25.[26] In 1984, the ceiling on deductible giving increased to $300, so nonitemizers could receive a charitable deduction of up to $75.[27] In 1985, the ceiling was removed, and nonitemizers were allowed to deduct half of the amount they gave to charity with no limitation on the total amount of giving.[28] By 1986, nonitemizer giving was completely deductible and identical to the charitable deduction for itemizers. The effect of the ERTA experiment on nonitemizer giving is summarized in the following table.[29]

Table 1

NONITEMIZERS CLAIMING THE DEDUCTION

Year	Number of Nonitemizer Returns	Number of Nonitemizer Givers	Percent of Returns Giving	Dollars Claimed[a] (in Billions)	Average Dollars Claimed per Giver
1982	61,904,623	19,284,231	31.10	$0.43	$22
1983	61,091,018	22,512,944	36.90	$0.51	$23
1984	61,235,616	22,920,542	37.40	$1.17	$51
1985	61,812,103	25,359,085	41.00	$4.72	$186
1986	62,378,162	28,041,097	45.00	$13.28	$474

[a]Dollars claimed refers to the amount deducted on the return, which for 1982–5 would have been a fraction of the dollar value of total giving. In 1986, since nonitemizer giving was 100 percent deductible, dollars claimed and dollars deducted would have been equal.

From this data, it is clear that giving among nonitemizers increased when contribution limits were removed in 1985 and again in 1986. The average dollar amount claimed per nonitemizer increased from $51 to $186 between 1984 and 1985. This number increased again to $474 in 1986, the last year that the charitable deduction was available to nonitemizers.[30] Between 1982 and 1986, taxpayers donated an estimated $31.16 billion to charities.[31]

26. *Id.*
27. *Id.* at 196.
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.* Total of $31.16 billion found by multiplying the dollars claimed each year by the appropriate multiple. From 1982 through 1984, the dollars claimed in billions multiplied by four represents the total amount given to charity, as only 25 cents per dollar could be claimed by the taxpayer. In 1985, the dollars claimed must be multiplied by two to find the

B. ERTA Aftermath

The preceding data on ERTA supports the claim that charitable giving by nonitemizers is responsive to tax incentives. With respect to charities, ERTA's purpose was to introduce a tax deduction for charitable giving to nonitemizers who previously did not have that incentive. The nonitemizer deduction in the bill was enacted to "stimulate giving by all individual taxpayers, including those who do not benefit from itemizing."[32] In that respect, ERTA succeeded and was able to increase charitable giving in the United States during the short period that it was available.

Another important takeaway from ERTA is that the degree of responsiveness to tax incentives with respect to donations for nonitemizers is smaller than it is for itemizers.[33] Nonitemizers generally are less responsive to changes in the price of giving since they have less disposable income than itemizers. But ERTA reduced the after-tax price of charitable contributions for non-itemizers and succeeded in stimulating charitable giving by this tax group.[34] Understanding how nonitemizers respond to incentives in the tax code could assist policymakers in designing charitable contribution deductions that could apply to nonitemizers if the provision were to be revived.[35] Nonitemizers are an important group to consider when studying whether a universal charitable deduction would be effective, since taxpayers who itemize have more of an incentive to give to charity and are more responsive to changes in the price of giving.[36]

If ERTA was so valuable and it stimulated charitable giving, even among nonitemizers, why did Congress let it expire in 1986? It's important to understand that Congress set a 1986 expiration date when ERTA was enacted in 1981 so it could assess ERTA's effectiveness and determine whether the charitable deduction for

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total amount donated to charity. The amount claimed in 1986 represents the total amount given to charity, as charitable donations were fully deductible by that year.

32. Amy E. Dunbar & John Phillips, *The Effect of Tax Policy on Charitable Contributions: The Case of Nonitemizing Taxpayers*, 19 J. AM. TAX'N ASS'N, 1997 Supp., 1, 2 (citation omitted).

33. Duquette, *supra* note 25, at 203.

34. *Id.* at 204.

35. Dunbar & Phillips, *supra* note 32, at 1.

36. *Id.* at 2.

nonitemizers was worth keeping.[37] In 1984, the Treasury released a report concluding that the charitable deduction for nonitemizers should not be extended. In the report, the Treasury reasoned that there was unnecessary complexity in enforcing ERTA and that it stimulated little additional giving.[38] It was also unnecessarily complex for itemizing taxpayers, who had to calculate their taxes twice to determine which deduction would decrease their tax bill the most: once with the traditional charitable deduction and once taking the standard deduction and the new charitable deduction for nonitemizers.[39] Another reason for ERTA's ineffectiveness according to the Treasury was that nonitemizers gave small donations that were not made in response to tax incentives. These donations probably would have been made by nonitemizers even in the absence of ERTA.[40] One proposal in 1986 to keep the non-itemizer deduction with a $100 floor was rejected without explanation, and Congress let ERTA expire in 1987.[41] This is puzzling, as it was clear that lifting the limitation on nonitemizer deductions in 1986 prompted more taxpayers to give and at higher rates than ever before. Many scholars believe that Congress was unwise to allow the expiration of this effective tax subsidy when it did not preserve the charitable deduction for nonitemizers in ERTA.[42] At the very least, ERTA demonstrates that all taxpayers, not just the wealthy who currently enjoy the benefits of the deduction for charitable contributions, respond in some degree to tax incentives to give to charity.

IV. HOW TCJA CHANGED TAX INCENTIVES TO DONATE

It is clear from the previous Part that donating to charity in the United States is, in part, driven by tax incentives. In December of 2017, TCJA introduced three changes that will expire after 2025 and will most likely reduce the total amount of charitable donations in the United States until then. First, the standard deduction was

37. *Id.* at 4.
38. *Id.* at 4–5.
39. ROSENBERG ET AL., *supra* note 18, at 7.
40. Dunbar & Phillips, *supra* note 32, at 5.
41. *Id.*
42. *See id.* at 18.

doubled. Second, the estate tax exemption was increased to $11.2 million. Third, the state and local tax deduction was capped at $10,000.[43] Each of these changes decreases the incentive to donate to charity by reducing the number of people who can take the charitable deduction, removing tax incentives to donate to charity for some estates, and leaving taxpayers in high-tax states with less money to donate to charity.

A. Doubling the Standard Deduction

The new provisions in TCJA will prevent many middle-class families from taking a charitable deduction because these provisions doubled the amount of the standard deduction. A taxpayer can choose between itemizing and taking the standard deduction. If a taxpayer's itemized deductions add up to more than the standard deduction, they will take the itemized deduction because it will subtract more from their taxable income, leaving them with less income that can be taxed. The standard deduction in 2017 for a single taxpayer was $6350, and $12,700 for married taxpayers filing jointly.[44] For the 2018 tax year, TCJA will almost double the standard deduction. A single taxpayer in 2018 can expect a standard deduction of $12,000, and married taxpayers filing jointly can take a standard deduction of $24,000.[45] Now, in order to itemize, a married couple filing jointly must have total itemized deductions of more than $24,000. This means that many taxpayers who previously itemized will have an easier time doing their taxes because they will not have to keep track of home mortgage interest, state and local taxes, medical expenses, and charitable contributions. However, this will cause some middle-income couples who previously itemized to no longer itemize, because their total itemized deductions will no longer exceed the standard deduction. This means they will no longer be able to deduct charitable

43. H.R. 1, 115th Cong. (2017) (enacted).

44. Kelly Phillips Erb, *IRS Announces 2017 Tax Rates, Standard Deductions, Exemption Amounts and More*, FORBES (Oct. 25, 2016, 4:39 PM), https://www.forbes.com/sites/kellyphillipserb/2016/10/25/irs-announces-2017-tax-rates-standard-deductions-exemption-amounts-and-more/#22c1de8c5701.

45. TAX FOUND., PRELIMINARY DETAILS AND ANALYSIS OF THE TAX CUTS AND JOBS ACT (Dec. 2017), https://files.taxfoundation.org/20171220113959/TaxFoundation-SR241-TCJA-3.pdf.

donations from their taxable income.[46] It also bears mentioning that the standard deduction reduces a taxpayer's taxable income for federal tax purposes, not for state taxes. State taxes will not be reduced as a result of the increase in the standard deduction.

Doubling the standard deduction is, therefore, bad news for charities. TCJA will reduce the number of taxpayers who will be able to take the charitable deduction.[47] Those who will continue to itemize are wealthy individuals and families who have itemized deductions greater than $24,000. Taxpayers with an adjusted gross income of at least $100,000, possibly as high as $200,000, may have over $24,000 in itemized deductions, per Internal Revenue Service (IRS) data.[48] This is incongruent with the original purpose of the charitable deduction and only provides a tax incentive for the wealthy to donate to charity. Roger Colinvaux, law professor and former legislation counsel on Congress's nonpartisan Joint Committee on Taxation, had the following to say concerning this issue:

> One of the points of the charitable deduction is to foster altruism, to foster pluralism, to foster civic society . . . . If the deduction ends up being for the top 5 percent of taxpayers who are the wealthiest, I think you're really painting a very elitist picture of what this incentive is for. It's only incentivizing the charitable choices of the richest, and the pluralism of the richest, and the civic groups chosen by the wealthiest.[49]

U.S. tax law should not provide incentives that solely incentivize the wealthy to donate to charities. As the current law stands, it does present an elitist picture of the charitable deduction's purpose, as Professor Colinvaux remarked.

46. McQueeney, *supra* note 2.

47. Zampelli & Yen, *supra* note 15, at 113.

48. I extracted this example from the IRS's tax statistics on individuals for the taxable year of 2016. *See generally SOI Tax Stats–Individual Statistical Tables by Size of Adjusted Gross Income*, IRS, https://www.irs.gov/statistics/soi-tax-stats-individual-statistical-tables-by-size-of-adjusted-gross-income (last visited Oct. 14, 2018). Specifically, I looked to Tables 1.4 and 2.1 for the 2016 taxable year. *Id.*

49. Johnson, *supra* note 1.

B. Increasing the Estate Tax Exemption

The estate tax encourages charitable giving when one passes away by allowing a deduction for charitable bequests that are greater than an exemption floor provided by the tax law and less than the gross amount of the entire estate.[50] Indeed, due to tax incentives, some estates give more than half of their wealth to nonprofits in order to pay less estate tax.[51] Annually, estates give an estimated $20 billion in charitable bequests.[52] This is a significant source of funding for charities and nonprofits.

TCJA increases the estate tax exemption, which will almost certainly reduce the number and amount of charitable bequests.[53] By doubling the estate tax exemption from $5.6 million to $11.2 million, or $22.4 million for couples, TCJA will reduce the number of estates facing an estate tax and for which an estate tax charitable contribution can be beneficial.[54] The number of taxable estates will decrease by approximately two-thirds in 2018, leaving only about 1700 estates that will owe federal tax and thus retain the incentive to give to charity.[55] TCJA also reduces the amount of estate tax these 1700 estates would owe, which will shrink from $20.4 billion to an estimated $13.6 billion.[56] The heirs of a few wealthy decedents will now receive an estimated $7 billion as a result of TCJA.[57] Not only does this reduce the number of people who can benefit by donating to charity at death, it produces the same problem discussed in the previous section; that is, it only incentivizes the extremely wealthy with estates worth more than

50. *See* Harvey P. Dale & Roger Colinvaux, *The Charitable Contributions Deduction: Federal Tax Rules*, 68 TAX L. 331, 358 n.187 (2015).

51. David Joulfaian, *On Estate Tax Repeal and Charitable Bequests*, TAX NOTES 1221, 1223 (June 8, 2009), http://ssrn.com/abstract=1415058.

52. *Id.* at 1221.

53. JON M. BAKIJA & WILLIAM G. GALE, URBAN-BROOKINGS TAX POLICY CTR., EFFECTS OF ESTATE TAX REFORM ON CHARITABLE GIVING (July 2003), https://www.urban.org/research/publication/effects-estate-tax-reform-charitable-giving (Tax Policy Issues and Options Ser. No. 6).

54. *See* TAX FOUND., *supra* note 45.

55. Howard Gleckman, *Only 1,700 Estates Would Owe Estate Tax in 2018 Under the TCJA*, TAX POL'Y CTR., URB. INST. & BROOKINGS INSTITUTION (Dec. 6, 2017), https://www.taxpolicycenter.org/taxvox/only-1700-estates-would-owe-estate-tax-2018-under-tcja.

56. *Id.*

57. *Id.*

$11.2 million to donate to charity. This exemption was $600,000 just twenty years ago, providing the incentive to donate to charity for many more people than TCJA does.[58] Charitable donations from estates, as a result of the estate tax, are an important income source for charities. If the estate tax were repealed, charitable bequests would drop anywhere between an estimated $3.6 billion and $6 billion.[59] As a result of the new law, fewer people will leave money to nonprofits, potentially leaving some charities without an important source of funding.[60]

C. Capping the State and Local Tax Deduction and Lowering Income Tax Rates

TCJA will also cap the state and local tax (SALT) deduction at a maximum of $10,000.[61] "The SALT deduction [in some form] has been part of every version of the [tax code in U.S. history]."[62] The SALT deduction is an oft-debated provision in the tax code, but many agree that despite its weaknesses, it is an efficient subsidy that is worth keeping.[63] It encourages states to spend more on public services and move toward a progressive income tax, reducing overall income inequality.[64] It reduces the cost for localities and states to raise taxes on the wealthy.[65] The new TCJA cap on the SALT deduction makes it more expensive for states and localities to tax the wealthy.[66] It will also reduce the likelihood that taxpayers will have itemized deductions in excess of the standard deduction.

The deduction cap of $10,000 may seem high, but the average SALT deduction in recent years was actually greater than $10,000 in twenty states.[67] It isn't unique for a taxpayer to take a SALT

58. McQueeney, *supra* note 2.
59. *Id.*
60. Johnson, *supra* note 1.
61. TAX FOUND., *supra* note 45.
62. Tracy Gordon, *The Price We Pay for Capping the SALT Deduction*, TAX POL'Y CTR., URB. INST. & BROOKINGS INSTITUTION (Feb. 15, 2018), https://www.taxpolicycenter.org/taxvox/price-we-pay-capping-salt-deduction.
63. *See id.*
64. *Id.*
65. *See id.*
66. *Id.*
67. *Id.*

deduction of more than $10,000, so it is reasonable that this cap will prompt some taxpayers to not itemize and thus not allow them to take advantage of the charitable deduction. Taxpayers in high-tax states such as Oregon, California, Pennsylvania, and New York, who rely heavily on the state and local tax deduction to reduce their taxable income, will be hit hardest by the new cap. Losing this deduction, especially when coupled with the doubling of the standard deduction, will leave itemizers in these states with less money to give to charity.[68]

TCJA also lowered individual income tax rates, which reduces the value of tax deductions, including the deduction for charitable contributions.[69] The income tax subsidy for charitable giving was reduced by approximately one-third, or from $63 billion to an estimated $42 billion, so the higher cost of charitable giving will make it too expensive to give for many taxpayers whose giving was primarily motivated by tax incentives.[70] Now, the average marginal tax benefit for giving to charity will drop from almost 21% to an estimated 15%.[71] This number will drop more significantly for low- and middle-income taxpayers; but for those in the top 1%, it will only fall from about 30% to an estimated 29%.[72] These reductions in marginal tax benefits will even prompt a reduction in the percentage of taxpayers who itemize and earn between $86,000 and $150,000. The percentage of taxpayers who itemize and fall in this income range will drop from 39% to an estimated 15%.[73] As it is now, TCJA does much to reduce incentives to give to charity for middle- and low-income earners while preserving this incentive for the top earners in America.

In the wake of TCJA, high-tax states have rallied to propose new solutions to the cap on the SALT deduction. New York Governor Andrew Cuomo said that limiting the deduction on state and local

68. McQueeney, *supra* note 2.

69. Howard Gleckman, *21 Million Taxpayers Will Stop Taking the Charitable Deduction Under the TCJA*, TAX POL'Y CTR., URB. INST. & BROOKINGS INSTITUTION (Jan. 8, 2018), http://www.taxpolicycenter.org/taxvox/21-million-taxpayers-will-stop-taking-charitable-deduction-under-tcja.

70. *See id.*

71. *Id.*

72. *Id.*

73. *Id.*

taxes was an "act of war."[74] California Senate leader Kevin de Leon said that the cap on the SALT deduction is a "tax scam [that] disproportionately harms California taxpayers."[75] In response, high-tax states are trying to find ways to offset the harm to their taxpayers. One proposal that is gaining traction in Connecticut would impose a new tax on partnerships, LLCs, and other pass-through businesses while giving the owners of such businesses a tax credit to offset this amount.[76] The SALT deduction cap does not apply to businesses, and giving a credit to business owners effectively shifts an estimated $600 million in lost SALT deductions back to Connecticut residents.[77] If the federal government adopted this proposal, it would pay for the removal of adverse effects of TCJA on Connecticut taxpayers. Another proposal in New York would replace the individual state income tax with a business payroll tax that would be fully deductible.[78]

In California, another high-tax state, one popular proposal is to change state and local taxes into charitable gifts to nonprofits that would be organized by the state and fund services such as education.[79] Both of these proposals have gained some support, but some tax experts do not consider them feasible due to the technical problems that would be created upon implementation.[80] The Connecticut plan also has limitations because it would protect owners of pass-through entities without helping workers who receive income in the form of wages and salaries.[81] The proposal would also encourage owners of S corporations, partnerships, and other pass-through entities to move their businesses to Connecticut to take advantage of this potential tax break.[82] This proposal

74. Gordon, *supra* note 62.

75. *Id.*

76. Howard Gleckman, *Could States Fix the SALT Deduction Cap by Taxing Pass-Throughs and Giving Their Owners a Credit?*, TAX POL'Y CTR., URB. INST. & BROOKINGS INSTITUTION (Feb. 27, 2018), http://www.taxpolicycenter.org/taxvox/could-states-fix-salt-deduction-cap-taxing-pass-throughs-and-giving-their-owners-credit.

77. Amy Hamilton, *Connecticut Finds a SALT Workaround that Would Actually Work*, TAX NOTES (Feb. 26, 2018).

78. Gleckman, *supra* note 69.

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

perpetuates one of the main problems with TCJA and the Internal Revenue Code in general—disproportionate tax breaks for the wealthy.[83] Increases in the standard deduction and estate tax exemption, along with the new cap for SALT deductions and income tax rates imposed by TCJA, generally give taxpayers the incentive to take the standard deduction and discourage them from giving to charity for tax purposes.

V. POTENTIAL FIXES TO PROBLEMS INTRODUCED BY TCJA

The new tax legislation from 2018 seems to significantly diminish tax incentives to donate to charity. I will now propose changes to TCJA that would preserve these important incentives. First, I will propose a charitable deduction for nonitemizers, examine the history of the charitable deduction, and explore its benefits. I will then address possible problems such as the administrative costs and enforcement problems associated with implementing a charitable deduction for all taxpayers. In response to these valid concerns, I propose that a charitable deduction with a floor could be an efficient subsidy despite the aforementioned problems. I will also briefly discuss other changes to TCJA that would result in more charitable giving, including extending the deadline for charitable deductions to April 15 and eliminating the phaseout for charitable deductions. If properly designed, changes to TCJA could provide efficient tax subsidies to more taxpayers who would then give more to charity.

A. Charitable Deduction for Nonitemizers

One popular proposal to make the charitable deduction available to more taxpayers is to open up the charitable deduction to both itemizers and nonitemizers and introduce a universal charitable deduction. In the U.S. tax system before TCJA, there was a charitable deduction available to itemizers, a group that represents only 25% of U.S. taxpayers.[84] Proposals for a universal charitable deduction are motivated by desires to increase the amount of charitable donations, to protect the interests of charities, and to

83. *See* Johnson, *supra* note 1.
84. ROSENBERG ET AL., *supra* note 18, at 1.

protect the incentive to donate to charity from being reduced by other reforms.[85] However, extending the charitable deduction to nonitemizers may decrease federal revenue by as much as 3.8%.[86] As a stand-alone policy, this would not be very efficient. Although it would increase charitable donations in light of the 1981 Economic Recovery Tax Act,[87] a charitable deduction for nonitemizers would most likely increase the government's revenue losses at a greater rate.[88] The cost of the IRS enforcing a regime where all charitable donations were deductible, along with the costs of letting taxpayers take the standard deduction and a charitable deduction, would offset the increases in giving that would supposedly result from a universal charitable deduction. If a charitable deduction were introduced with other key features, it could actually increase giving and be a more efficient subsidy. This section explains the history of the charitable deduction to demonstrate its purpose, outlines how a universal charitable deduction would work, and presents potential problems and ways to overcome them, including other key features that would create an economically efficient subsidy. Understanding the history of the charitable deduction is the first step in analyzing the impact of a universal charitable deduction.

1. Brief overview of the charitable deduction

After the ratification of the Sixteenth Amendment, Congress enacted an income tax in the Revenue Act of 1913.[89] Policymakers did not enact a charitable deduction until four years later when the War Revenue Act of 1917 was passed in response to concerns that charitable giving would drop due to a new, higher tax rate.[90] The charitable deduction provided what is economically the same as a matching government grant equal to the contribution amount multiplied by the donor's marginal income tax rate.[91] For example, for a taxpayer with a marginal tax rate of 30%, the government

85. *Id.*
86. Johnson, *supra* note 1.
87. *See* discussion *supra* Part III.
88. *See generally* ROSENBERG ET AL., *supra* note 18.
89. *Id.* at 2.
90. *Id.*
91. Steuerle & Sullivan, *supra* note 7, at 404.

essentially pays for 30% of each dollar that the taxpayer donates to charity, decreasing the after-tax cost of the donation to the taxpayer by the same amount.[92] One motive behind the charitable deduction was to provide an incentive for taxpayers to donate to charitable organizations. This incentive was a necessary one because the charitable sector could sometimes more efficiently solve problems than the government or an individual acting alone.[93]

Another motive behind the introduction of the charitable deduction was to more appropriately define the tax base. By measuring "taxable income as income less charitable giving," the government could more accurately measure the income tax base for purposes of taxation.[94] This justification is an illustration of the ability-to-pay principle and a recognition that income spent on consumption should be taxed differently than income spent on charitable donations, because these expenditures are so different in result.[95] For example, under this theory a taxpayer who had a gross income of $50,000 but gave $10,000 to charity should pay the same amount of tax as a taxpayer who is in all other ways similar but had a gross income of $40,000 and did not donate anything to charity. They both have the ability to split $40,000 between consumption and saving, because the money donated to charity cannot increase their personal wealth either now or in the future. The ability-to-pay theory is also not a universally accepted theory. For example, the Joint Committee on Taxation classifies the charitable contribution as a tax expenditure in its annual list of tax expenditures.[96] The charitable contribution deduction would not be a tax expenditure if it were considered a necessary element in measuring ability to pay.

Some other important nuances to the charitable deduction were introduced later. Now, there are multiple rules about how much of a charitable deduction can be taken, depending on the type of gift and the type of organization that receives it.[97] Contributions to charity under TCJA cannot exceed 60% of a taxpayer's adjusted

92. *Id.*

93. *Id.*

94. ROSENBERG ET AL., *supra* note 18, at 2.

95. Steuerle & Sullivan, *supra* note 7, at 405.

96. *See* JOINT COMM. ON TAXATION, JCX-3-17, ESTIMATES OF FEDERAL TAX EXPENDITURES FOR FISCAL YEARS 2016–2020, at 37 (Jan. 30, 2017).

97. Steuerle & Sullivan, *supra* note 7, at 403.

gross income,[98] but depending on the character of the donation this limit can be as low as 20%.[99] Charitable deductions are also limited to donations given during the previous calendar year, but not limited until taxes are due on April 15 of the current year.[100] When considering the complexity now associated with determining one's eligibility for the charitable deduction, it is understandable that one of the motivations behind TCJA was to create a more simplified system to make taxes easier for unsophisticated parties. Unfortunately, TCJA did this at the expense of charities. The charitable deduction has been included as a vital part of the U.S. tax law for more than a century, and a universal charitable deduction could help charities by making the charitable deduction accessible to more taxpayers.

2. Benefits of a universal charitable deduction

A universal charitable deduction is more important now than ever because charities face the prospect of fewer itemizers in 2018 than in any previous year. In 2017, itemizers gave approximately $239 billion to charities, while nonitemizers gave around $53 billion.[101] In other words, itemizers gave 82% of all the money contributed to charities in 2017. This is due in part to the fact that itemizers are usually wealthier and have more money to donate in the first place. However, wealthier nonitemizers who itemized before TCJA have more access to tax-planning services and, therefore, will likely take advantage of the standard deduction more this year than in past years. Members of this group may curb their charitable giving, donating less to charity if they do not itemize. A universal charitable deduction would prompt higher-income, nonitemizing families, who would take the standard deduction under TCJA, to donate to charity.[102]

The following table shows estimates of how much charitable giving would increase if a charitable deduction were extended to all taxpayers.[103] The total contributions column represents the

98. H.R. 1, 115th Cong. (2017) (enacted).
99. Steuerle & Sullivan, *supra* note 7, at 408.
100. *Id.* at 403.
101. ROSENBERG ET AL., *supra* note 18.
102. *Id.* at 5–6.
103. *Id.* at 6.

amount, in billions, that each income quintile contributed to charity in 2017. The next three columns measure the amount that an income quintile would increase charitable donations in response to a charitable deduction being available to everyone. The first column, with an elasticity of 0.5, measures a modest response to the universal charitable deduction. If the response to the deduction were modest with an elasticity of 0.5, charitable donations would increase by $5 billion. Most of the extra charitable giving comes from the middle-, fourth-, and top-income quintiles, while lower-income families do not donate much more because they have less discretionary income. If the reaction to the universal charitable deduction were more responsive, as measured in the chart by the column where elasticity is 1.0, then there would be an estimated increase in giving as high as $10 billion. Note that in this example, tax units with negative adjusted gross income are excluded from the quintile estimates but are included in the totals in the bottom row, resulting in lower total increases in giving.[104]

Table 2

Expanding the Charitable Deduction to All Taxpayers

Estimated change in charitable giving by expanded cash income percentile, 2017 ($ billions)

Expanded cash income percentile[a]	Total contributions	Elasticity -0.5	Elasticity -0.7	Elasticity -1.0
Lowest quintile	2.7	0.0	0.0	0.0
Second quintile	12.0	0.2	0.2	0.3
Middle quintile	33.4	1.0	1.4	2.0
Fourth quintile	64.5	2.0	2.8	4.0
Top quintile	179.3	1.9	2.7	3.8
Top 1 percent	74.5	0.4	0.5	0.8
Top 0.1 percent	45.1	0.2	0.3	0.5
All	**292.1**	**5.0**	**7.1**	**10.2**

Another benefit of a universal charitable deduction is that it makes marketing by charities more effective because the charitable deduction is available to everyone the advertisement reaches.[105] A universal charitable deduction means that donated money from both itemizers and nonitemizers is subsidized by the government, so the after-tax cost of giving is the same for both groups.

104. *Id.*
105. *Id.*

An additional benefit of a universal charitable deduction is evident in light of 1981's tax legislation that created a second charitable deduction in addition to the charitable deduction available to itemizers.[106] For taxpayers to decide which charitable deduction to take, they had to calculate what their taxes would be if they itemized and then calculate their potential tax liability if they took the standard deduction and the charitable deduction for nonitemizers. This comparison would show which of the two deductions would be more beneficial. This created additional complexity and was one reason why this second charitable deduction was abolished by 1987. A single charitable deduction for itemizers and non-itemizers would preserve the incentive to donate to charity for all taxpayers without increasing the complexity of filing one's taxes.

3. IRS enforcement and administrative cost problems

The last time that a universal charitable deduction was available to taxpayers, a few problems with the proposal became apparent. The first problem was that the IRS would have had a difficult time enforcing a universal charitable deduction. For taxpayers, a universal charitable deduction would mean that everyone would have to keep track of how much they were donating to charity.[107] This would make it much more difficult for the IRS to enforce the tax code. The IRS only audits less than 1% of individual tax returns because it has limited resources.[108] More charitable deductions could potentially mean more tax fraud. Leading up to the 1984 tax reform, the IRS argued against this type of deduction, saying that it created unnecessary complexity, did not stimulate much additional giving, and would require more resources than they had available to enforce.[109] It referred to these issues as "a difficult enforcement problem."[110] Historically, the IRS has not put great effort into investigating whether charitable deductions were legally taken. The IRS also has almost no way to verify some casual donations, such as money contributed to

106. *Id.* at 7.
107. *Id.* at 6.
108. *Id.*
109. *Id.*
110. *Id.*

collection tins at churches and money donated to people knocking on doors for donations.[111]

Nonitemizers in the 1980s who took the charitable deduction generally reported very small amounts of charitable donations on their tax returns.[112] Without assuming that these donations were fraudulent, it is at least reasonable to assume that many of these small amounts would be hard for taxpayers to document if they were audited. The IRS would not have the resources to audit returns that reported very small deductions. As such, the charitable deduction for nonitemizers in the 1980s imposed increased complexity costs on both taxpayers and the IRS, which was ultimately one of the key reasons it was discontinued.[113]

Another issue facing a universal charitable deduction is what has been referred to as the "administrative cost" problem.[114] The administrative cost problem is that a universal charitable deduction could incentivize some itemizers to reduce their taxes without increasing their giving.[115] In this "double-dipping" scenario, nonitemizers would be able to take both the standard and charitable deductions, reaping the benefits of the standard deduction while also receiving the charitable deduction, a provision traditionally preserved for taxpayers who itemize.[116] The following example provides an explanation of this scenario. Suppose that a household must choose between a standard deduction of $6000 or an itemized deduction of $7000, and that $2000 of those itemized deductions are charitable contributions.[117] Under the current tax law, this household would itemize and take deductions worth $7000. However, under a universal charitable deduction this household would take the standard deduction of $6000 plus a charitable deduction of $2000, for total deductions of $8000. This increases deductions for the household by $1000 over the current law. Tax savings by the

111. *Id.*

112. JOSEPH CORDES ET AL., URB. INST., EXTENDING THE CHARITABLE DEDUCTION TO NONITEMIZERS: POLICY ISSUES AND OPTIONS 1 (May 2000), http://webarchive.urban.org/UploadedPDF/310338_cnp_7.pdf (Charting Civil Society Ser. No. 7).

113. *Id.* at 2.

114. *Id.*

115. *Id.*

116. *See* Gordon, *supra* note 62 (citations omitted).

117. CORDES ET AL., *supra* note 112, at 2.

taxpayer are revenue costs to the government, and this household took a higher deduction without increasing the amount of their charitable giving. Thus, the universal charitable deduction can add costs to the government from taxpayers who did not give more to charity, which is a key goal of the universal charitable deduction. A universal charitable deduction would cost an estimated $13 billion annually for the federal government, attributable to enforcement and administrative costs.[118] In the model in the previous section,[119] even by very optimistic projections, the universal charitable deduction would only generate around $10 billion, which on its own would make this proposal inefficient.

4. Adding a floor

Despite the problems with IRS enforcement and the administrative costs associated with a universal charitable deduction, a cleverly designed deduction could address these concerns while increasing charitable giving with little cost in tax revenue. Policymakers generally agree that when the cost of giving falls, people give more.[120] However, some studies disagree as to how much changes in the after-tax cost of charitable donations affect how much people give to charity. A number of studies find that giving is modestly responsive to changes in the after-tax cost of giving, while other studies are more optimistic.[121] One study by the Urban Institute found that it is possible to implement a universal charitable deduction that addresses concerns with IRS enforcement and administrative costs even if the responsiveness of charitable giving to differences in the after-tax cost of giving is low.[122] Such a deduction could reduce pressure on the IRS and decrease the administrative costs of a universal charitable deduction by introducing a minimum amount of charitable contributions above which all contributions would be deductible.[123] Introducing a floor would not be an unprecedented move, as a $100 floor for a universal

118. ROSENBERG ET AL., *supra* note 18, at 2.
119. *See* discussion *supra* Part V.A.2.
120. *See* ROSENBERG ET AL., *supra* note 18, at 3.
121. *Id.*
122. CORDES ET AL., *supra* note 112, at 5–6.
123. *Id.*

charitable deduction was proposed as a response to ERTA in 1985.[124] Other more recent proposals would have allowed nonitemizers to deduct charitable contributions for donations above $1000 for taxpayers filing singly and $2000 for married taxpayers filing jointly.[125] The difficult part of this proposal is to set the floor at an amount where taxpayers will respond to the incentive. If the floor were set at an amount above which people usually wouldn't give without a deduction, this could be a cost-effective strategy. It would also limit the number of charitable contributions that the IRS would have to monitor.[126] The floor could be set at either a percentage of income or a dollar amount, depending on what would be most efficient. A universal charitable deduction with a floor would also simplify taxes for taxpayers who contributed small amounts to charity, conforming to one of the overarching purposes of the current tax law.[127] The results from this study are summarized in the following table and discussed below.[128]

Table 3

Summary of Revenue Effects and Change in Charitable Giving (Dollar Amounts in Millions), 1995 Income Levels

	PRICE SENSITIVITY IN GIVING					
	Low		Moderate		High	
	Revenue Effects	Change in Giving	Revenue Effects	Change in Giving	Revenue Effects	Change in Giving
Tax Policy Options						
1. Deductions for All Contributions by Nonitemizers	($5,570)	$2,271	($6,215)	$5,513	($6,736)	$8,080
2. Deduction with $500/$250 Floor for Nonitemizers Only	($3,886)	$2,166	($4,518)	$5,318	($5,032)	$7,816
3. Deduction with $500/$250 Floor for All Taxpayers	($1,193)	$1,904	($1,826)	$4,848	($2,340)	$7,219
4. Revenue-Neutral Floor	*$650/$325*	$1,681	*$750/$375*	$3,964	*$800/$400*	$5,711

Source: Urban Institute calculations based upon its charitable giving model.

The Urban Institute measured the changes in charitable giving and tax revenue that result from four different ways to extend a

124. Dunbar & Phillips, *supra* note 32, at 5.
125. Duquette, *supra* note 25, at 196.
126. C. Eugene Steuerle, *Charities Have Plenty of Opportunity to Advance Giving Despite Tax Law Losses*, TAX POL'Y CTR., URB. INST. & BROOKINGS INSTITUTION (Feb. 28, 2018), https://www.taxpolicycenter.org/taxvox/charities-have-plenty-opportunity-advance-giving-despite-tax-law-losses.
127. *See* CORDES ET AL., *supra* note 112, at 2.
128. *Id.* at 3.

charitable deduction to nonitemizers.[129] Under the first scenario, the charitable deduction would be available to nonitemizers with the first dollar given.[130] The results from this scenario showed that the concerns with IRS enforcement and administrative cost related to a charitable deduction for nonitemizers are warranted. Extending the charitable deduction to nonitemizers seems to decrease tax revenue more than it would increase charitable giving, even if the amount of charitable giving were moderately responsive to fluctuations in the cost of giving.[131] However, if taxpayers were very responsive to decreases in the cost of giving, this scenario could be efficient, with an estimated increase in total revenue (the change in giving less revenue effects) at over $1 billion.[132]

The second scenario would let nonitemizers deduct charitable contributions, but only at amounts greater than $250 for single filers and $500 for joint filers.[133] The study found that adding a floor had two effects.[134] First, the floor reduced the enforcement cost for the IRS attributable to taxpayers claiming small deductions that are hard to document because the $250 or $500 floor mostly excluded these types of donations.[135] This reduction in administrative costs attributable to the floor still resulted in a total revenue loss, but less of a loss than would occur under the first scenario.[136] Second, adding the floor may have decreased the costs associated with extending the charitable deduction to itemizers, but it does little to increase charitable giving.[137] This represents nonitemizers who were already giving to charity without a tax incentive to do so.[138] In this scenario, the floor does not provide much of a subsidy to giving that would happen in the absence of an incentive.[139]

The third scenario represents the result of a universal charitable deduction with the floor from the second scenario of $500 or $250

129. *Id.*
130. *Id.*
131. *Id.*
132. *Id.*
133. *Id.* at 4.
134. *Id.* at 3.
135. *Id.*
136. *Id.*
137. *Id.* at 4.
138. *Id.*
139. *Id.*

depending on the taxpayer's filing status.[140] The only difference between this scenario and the second scenario is that the floor is extended to all taxpayers and not just nonitemizers.[141] With a 28% tax rate as an example, this floor would cost an itemizer filing a joint return about $150.[142] In this scenario, even if the responsiveness to changes in the cost of giving is minimal, the extra giving exceeds the revenue cost.[143]

The fourth and last scenario in the Urban Institute study set floors at a calculated level that would result in no overall loss in tax revenue.[144] The results from this study clarify that as long as the floor is set at the right level, there is a way to create a charitable deduction for nonitemizers that increases charitable giving and is also revenue neutral.[145] The universal deduction with a universal floor opens up the opportunity to shift a tax subsidy to the margins where giving is actually sensitive to price even with a modest response.[146] This allows taxpayers to receive a subsidy because they are actually giving at levels at which they would not give in the absence of a floor. This scenario would eliminate the need for any taxpayers to keep track of their small contributions and not require the IRS to enforce a tax regime without the necessary resources to do so.[147] Implementing a floor at the right amount would encourage additional giving and reduce administrative costs to the point where a universal charitable deduction makes fiscal sense.

Another possible solution to the previously discussed IRS enforcement and administrative costs is to improve information-reporting systems from charitable organizations. If charities provided electronic or written forms to the IRS and to people from whom they received donations, they could significantly help the IRS in its efforts to enforce the tax law.[148] This proposal would cost the IRS virtually no money and, since many charities must already

140. *Id.* at 3.
141. *Id.* at 4.
142. *Id.*
143. *Id.*
144. *Id.* at 3.
145. *Id.* at 4.
146. *Id.*
147. *Id.*
148. ROSENBERG ET AL., *supra* note 18, at 6–7.

provide taxpayers with official tax documents reflecting any donations over $250,[149] it would not cost charities much either. This would also help reduce noncompliance with the tax law and help the government regain revenue associated with people who misrepresent how much they actually donate to charity.[150]

B. Extend Deducting Power Through April 15

Allowing taxpayers to deduct charitable donations through April 15 instead of December 31 for a given tax year would provide an incentive for taxpayers to donate to charity and cut their tax bill just before their taxes are due.[151] This would be similar to how contributions to individual retirement accounts function, providing the same incentive and hopefully resulting in more money for charitable organizations to work with.[152]

There is precedent for extending the charitable deduction deadline. Both President Barack Obama and President George W. Bush have signed provisions that for a limited time allowed charitable donations toward natural disaster relief to be deducted as late as March for the previous tax year.[153] Making this a permanent part of the tax code would help solve the advertising problems of a temporary measure that allows donations made past the traditional deadline to be deductible.[154] Evidence suggests that people make decisions about charitable giving at the last minute. One survey in particular shows that 22% of online charitable donations are made during the last two days of December.[155] Additionally, if tax software companies and tax preparers could compute taxpayers' tax liability and then show them how extra donations to charity could reduce their taxable income, it would create a powerful incentive for taxpayers to give to charity.[156] Advertising charitable giving before tax time would create the best

149. *Id.* at 7.
150. *Id.*
151. Steuerle, *supra* note 126.
152. Steuerle & Sullivan, *supra* note 7, at 429.
153. C. Eugene Steuerle, *Extending the Charitable Deduction Deadline to Tax Day*, URBAN-BROOKINGS TAX POL'Y CTR., (Mar. 2013), https://www.urban.org/sites/default/files/publication/23416/412769-Extending-the-Charitable-Deduction-Deadline-to-Tax-Day.PDF (Tax Policy and Charities Project Brief No. 3).
154. *Id.*
155. *Id.*
156. *Id.*

window of opportunity for taxpayers to give and allow taxpayers more certainty in how their donations will help them cut their tax bill.

C. Eliminate the Phaseout for Charitable Deductions

The Pease provision is a section in the Internal Revenue Code that limits the amount of itemized deductions by 3 cents per dollar above a certain adjusted gross income threshold ($313,800 for married couples filing jointly and $261,500 for single returns in 2017).[157] This phaseout is capped at 80% of the value of all itemized deductions.[158] Although TCJA suspended the Pease provision through the end of 2025, it is important to consider the implications Pease has on a universal charitable deduction.[159] By adding this provision to the Code, Congress has found a way to cut revenue losses resulting from itemized deductions taken by high-income taxpayers. The rationale for this cut is that top earners in America don't need deductions for home mortgage interest, since these subsidies were designed to help poorer Americans pay less tax.

Although the Pease provision has little to no effect on giving since few taxpayers are subject to the 80% cap, it poses a problem for a universal charitable deduction. A universal charitable deduction would remove charitable contributions from the itemized deductions that are subject to the Pease provision.[160] In some models, eliminating the Pease provision altogether would not have any significant effect on the amount of charitable giving and would mostly benefit high-income taxpayers.[161] If Pease were applied to both itemized deductions and a universal charitable deduction, it would create complex problems similar to those associated with the 1981 charitable deduction for nonitemizers.[162] So, although not necessary, eliminating the phaseout for itemized deductions could actually increase charitable giving because the after-tax cost of

157. Erb, *supra* note 44.
158. 26 U.S.C. § 68(a)(2) (2018).
159. H.R. 1, 115th Cong. (2017) (enacted).
160. ROSENBERG ET AL., *supra* note 18, at 7.
161. *Id.*
162. *Id.*

donating to a charity remains the same and does not decrease with each additional dollar donated.[163]

VI. WHAT CHARITIES CAN DO IN RESPONSE TO TCJA

As charities prepare for the worst in the aftermath of TCJA, they have not yet made a unified effort to speak out against the new tax law.[164] Charities typically are reluctant to get involved in partisan debates, perhaps due to fear of losing vital federal grants.[165] The nonprofit industry is also very diverse and not particularly coordinated.[166] However, TCJA did create an opportunity for charities to come together and help redesign tax subsidies and secure the money they need to do their job.[167] Nonprofit organizations have been known to present Congress with wish lists, but now is an important time for them to present Congress with alternative provisions that could encourage giving without adding too much to the budget deficit.[168] They need to overcome the stereotype that charities are just special interest groups and convince lawmakers from both parties of their vital role in supporting the public sector. However, charities face a difficult task in doing so, as lawmakers are sometimes skeptical of charities because of popular stories about people taking advantage of charitable donations.[169] Others may have become cynical about how committed highly compensated nonprofit executives are to their cause compared to contributors.

To illustrate, in the last year a couple of high-profile charities made headlines due to fraudulent activities by their owners. One prominent charity, Kids Wish Network, raised millions of dollars in the name of dying children and their families. However, it spent less than 3 cents per dollar helping these children.[170] Most of this

163. James P. Angelini & Nancy Chun Feng, *The Effect of Deduction Phaseout on Charitable Giving*, TAX NOTES 631, 636 (Jan. 29, 2018).

164. Johnson, *supra* note 1.

165. *E.g.*, *id.*

166. *Id.*

167. *See* Steuerle, *supra* note 126.

168. *Id.*

169. *Id.*

170. Kris Hundley & Kendall Taggart, *America's 50 Worst Charities Rake in Nearly $1 Billion for Corporate Fundraisers*, TAMPA BAY TIMES (Oct. 2, 2017, 4:10 PM), http://www.

money ended up with the operators of the charity and the companies the charity hired to solicit donations.[171] Kids Wish Network used the fact that its name sounds a lot like a reputable charity, the Make-A-Wish Foundation, to solicit millions of dollars in donations. In the last ten years, the founder of Kids Wish Network received $4.8 million, and in the same period the charity's corporate solicitors received almost $110 million.[172] Another recent case of charity fraud made headlines when four cancer charities took from consumers over $187 million that was not donated to cancer patients.[173] Donors were told that their money would help patients, including women and children suffering from cancer. In reality, most of the money ended up with the employees of the small charities, along with their families and friends.[174] Because these sham charities were fundraising for personal gain at the expense of women and children battling cancer, the Federal Trade Commission, all fifty states, and the District of Columbia filed a joint enforcement action condemning deceptive solicitations by charities.[175]

Abuses of charitable donations by charity operators are not limited to these few egregious cases. Charity fraud is a widespread problem in the United States. The *Tampa Bay Times* composed a list of the fifty worst charities in the United States in 2017.[176] On average, the fifty worst charities in the United States give less than 4% of donations received to their stated cause.[177] This research compiled by the *Tampa Bay Times* has brought under scrutiny 6000 charities that pay for-profit companies to solicit donations for them. The list of sins committed by charity operators is staggering and includes being blatantly dishonest about where charitable

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tampabay.com/news/nation/americas-50-worst-charities-rake-in-nearly-1-billion-for-corporate/2339540.

171. *Id.*

172. *Id.*

173. Press Release, Fed. Trade Comm'n, FTC, All 50 States and D.C. Charge Four Cancer Charities with Bilking over $187 Million from Consumers (May 19, 2015), https://www.ftc.gov/news-events/press-releases/2015/05/ftc-all-50-states-dc-charge-four-cancer-charities-bilking-over.

174. *Id.*

175. *Id.*

176. *See* Hundley & Taggart, *supra* note 170.

177. *Id.*

donations go, taking multiple salaries, secretly paying themselves consulting fees, and using accounting tricks to inflate the value of donated items.[178]

TCJA reveals that fraudulent activity in the charitable sector is a legitimate concern for some lawmakers; the bill provides "a new excise tax on nonprofits that pay their executives $1 million or more."[179] By being more transparent to the federal government and clearly demonstrating what they use their funding for, charities could help build the reputation of the charitable sector in the wake of well-publicized fraudulent activity. Charities need to clearly demonstrate the value the nonprofit sector adds to the country in order to overcome these stereotypes. As charities face budget cuts and struggle to provide services efficiently, now is an ideal time to push the government to commit to the charitable sector. It is also an ideal time for the U.S. government to provide tax benefits for charities and show that it values groups that help others, reinforcing America's reputation as a country that uses the charitable sector to efficiently solve problems.[180]

VII. CONCLUSION

TCJA was an effort to reduce the complexity of the tax law and cut taxes for corporations and individuals. One must remember that TCJA may be similar to ERTA in that some of the changes may only be temporary, but charities and individuals must nevertheless cope with these changes and attempt to influence future change. How the new law will affect taxpayers will be different for each case, as each taxpayer has his or her own unique financial situation. However, charities will likely face financial loss due to the uncertainty produced by TCJA. Tax incentives for donating to charity have been substantially reduced by the new bill, and the charitable deduction will be available to fewer taxpayers than ever. The history of tax reform in the United States shows that charitable giving is motivated in part by tax incentives. The new bill decreases potential revenue for charities by doubling the standard deduction,

178. *Id.*
179. Steuerle, *supra* note 126.
180. *See id.*

increasing the estate tax exemption, and capping the state and local tax deduction at $10,000.

A universal charitable donation floor would preserve the tax incentive to donate to charity and also not put any extra strain on the IRS. Extending deducting power through April 15 and eliminating the phaseout for charitable deductions are two other ways that the government could recommit to a strong and efficient charitable sector. If charities can come together and push for these changes, they could secure their own future and continue to play their important role in supporting the marginalized in the United States. This is a worthy goal, and one can only hope that the federal government will quickly make necessary changes to bolster the charitable sector and remove some of the potentially adverse effects of TCJA.

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