CHARITY FOR ALL: A MODERN CALL FOR A RENEWED COMMITMENT TO CHARITABLE GIVING

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*. Executive Senior Editor, *Southern California Law Review*, Volume 93; J.D. Candidate 2020, University of Southern California Gould School of Law; M.Acc. 2017, University of Arkansas; B.S.B.A. Accounting 2017, University of Arkansas. I could never thank my Mom, Dr. Dorothy Munch, and Dad, Judge John Bloodworth, enough for their unending support and unwavering belief in me. I would also like to thank my note advisor, Professor Edward McCaffery, the entire *Southern California Law Review*, and my support system at school, especially Kelsey Falkenberg.

INTRODUCTION

> *[A] freedom without a commitment to others, a freedom without love or charity or duty or patriotism, is unworthy of our founding ideals, and those who died in their defense.* – Barack Obama[1]

During the 2016 presidential election, President Donald Trump ran on a platform promising to significantly reduce taxes.[2] Less than a year after taking office, President Trump signed the Tax Cuts and Jobs Act ("TCJA"), enacting it into law.[3] On that day, the President touted the legislation as "the largest TAX CUTS and reform in the history of our country."[4] The TCJA notably lowered the corporate tax rate and modestly lowered the individual income tax rates.[5] The estate tax was also severely handicapped.[6] The president claimed, "95% of Americans will pay less or, at worst, the same amount of taxes (mostly far less)."[7] Despite lower taxes for most in the country, the TCJA was not an overwhelming political win—in fact, the Act is generally unpopular with the American public.[8]

1. Barack Obama, *Transcript: President Obama's Convention Speech*, NAT'L PUB. RADIO (Sept. 6, 2012, 10:25 PM), https://www.npr.org/2012/09/06/160713941/transcript-president-obamas-convention-speech [https://perma.cc/KTL8-4GH9].

2. John W. Schoen, *Trump Touts Sweeping, and Costly, Tax-Cut Plan*, CNBC (Aug. 8, 2016, 4:40 PM), https://www.cnbc.com/2016/08/08/trump-touts-sweeping-and-costly-tax-cut-plan.html [https://perma.cc/6Z3L-Z8BU].

3. WILLIAM G. GALE ET AL., TAX POLICY CTR., EFFECTS OF THE TAX CUTS AND JOBS ACT: A PRELIMINARY ANALYSIS 1 (2018), https://www.brookings.edu/wp-content/uploads/2018/06/ES_20180608_tcja_summary_paper_final.pdf [https://perma.cc/W3ZL-GNS7].

4. Donald J. Trump (@realDonaldTrump), TWITTER (Dec. 22, 2017, 12:47 PM), https://twitter.com/realdonaldtrump/status/944308491887316992?lang=en [https://perma.cc/S9F7-6FRK].

5. GALE ET AL., *supra* note 3, at 1.

6. *Id.* at 5.

7. Donald J. Trump (@realDonaldTrump), TWITTER (Dec. 22, 2017, 8:46 AM), https://twitter.com/realdonaldtrump/status/944247868126318593?lang=en [https://perma.cc/JL7X-LXED].

8. *See Trump, Republicans' Tax Reform Law*, REALCLEARPOLITICS, https://www.realclearpolitics.com/epolls/other/trump_republicans_tax_reform_law-6446.html [https://perma.cc/PKB6-KK7Z]. While admittedly there are many possible definitions of "political win," in this Note I am loosely defining it as a legislative act that is well received by the majority of the American public.

Moreover, while lowering taxes was the primary goal of the TCJA, a secondary goal was tax simplification.[9] Tax simplification[10] is a generally accepted tax policy goal,[11] but this simplification came at the expense of itemized deductions.[12] The Act's changes will almost certainly significantly reduce the percentage of taxpayers using itemized deductions in the future.[13] Most importantly, for the purpose of this analysis, the charitable contributions deduction is an itemized deduction that was rendered useless for a large number of taxpayers.[14] With the incentive of the charitable contribution deduction taken away from many, charities' funding, the average contributor, and society in general will all be adversely affected.[15]

This Note will center on the TCJA's unpopularity, the charitable contribution deduction, and the adverse effect the TCJA is projected to have on charitable giving. It will conclude that now is an optimal time to expand the charitable contribution deduction. The expansion of the charitable contribution deduction would likely be popular for many of the same reasons that the TCJA is currently unpopular. The proposed expansion will also address some of the problems with charitable giving created or exacerbated by the TCJA.

Part I of this Note will detail the political climate surrounding the 2016 presidential election and explore the federal tax changes in the TCJA. This Part will then note the historic unpopularity of the TCJA,[16] as well as the popular support for other recent, similar tax cuts.[17] The expressive theory of law will then be applied to taxation to help explain the Act's unpopularity

9. Bernie Becker, *It's Postcard Time*, POLITICO: MORNING TAX (June 21, 2018, 10:00 AM), https://www.politico.com/newsletters/morning-tax/2018/06/21/its-postcard-time-260746 [https://perma.cc/535U-9Q2B] (discussing the possibility that the new tax form would fit on a postcard).

10. The attempt to reduce the size of the tax form may all be an attempt to fulfill his previous promise to let middle and lower-class taxpayers simply write the IRS a letter saying, "I win." Brett LoGiurato, *Donald Trump: Low-Income People Will File a One-Page Form with the IRS That Says, 'I Win'*, BUS. INSIDER (Sept. 28, 2015, 8:33 AM), https://www.businessinsider.com/donald-trumps-tax-plan-i-win-2015-9 [https://perma.cc/8FL9-8U6Z].

11. Victor Fleischer, *A Theory of Taxing Sovereign Wealth*, 84 N.Y.U. L. REV. 440, 498 (2009); Edward J. McCaffery, *The Holy Grail of Tax Simplification*, 1990 WIS. L. REV. 1267, 1302–04 (stating that tax simplification is likely the answer to the proposed "prisoner's dilemma" of tax and should be implemented to the detriment of various personal deductions).

12. GALE ET AL., *supra* note 3, at 3.

13. *Id.* at 17.

14. *See id.* at 21–22; Linda Sugin, *The Social Meaning of the Tax Cuts and Jobs Act*, 128 YALE L.J. FORUM 403, 425 (2018).

15. *See* GALE ET AL., *supra* note 3, at 21–22.

16. *Trump, Republicans' Tax Reform Law*, *supra* note 8.

17. Larry M. Bartels, *Homer Gets a Tax Cut: Inequality and Public Policy in the American Mind*, 3 PERSP. ON POL. 15, 15 (2005).

within the context of the current political climate and provide clues for the political success of future similar tax revisions. Overall, it will ultimately conclude that this tax cut suffers from poor public perception, and similar future tax policy will continue to suffer unless the current popular concern for the well-being of the lower and middle classes is addressed.

Part II will review the impact of the TCJA on charitable contributions. This Part will consider the overall tax effects of the charitable contribution and the contribution's effect on taxpayers in general. It will then identify the deduction's bias in favor of the elite,[18] note the problems that arise because of this bias, and finally show how this bias is exacerbated by the TCJA.[19] The Part will then explore the Act's negative effect on charitable giving and examine the specific types of charities that may or may not be affected by the recent changes. It will then take an in-depth look into the Act's effects on small, local charities, and conclude that these vulnerable public services are the most likely to be harmed by the TCJA's changes.

Part III will argue for an expansion of the charitable contribution deduction that addresses the current sentiment regarding the lower and middle classes, as discussed in Part I. It also addresses the current issues in the charitable sector caused or exacerbated by the TCJA, as outlined in Part II. Common arguments against an expansion of the charitable contribution deduction will also be considered. This Note will finally conclude that the general public will approve of the proposed expansion and, for that reason, an expansion of the charitable contribution deduction would be a clear political victory for the implementing administration.

Overall, I do not assert that expanding the charitable contribution deduction alone will fix all of the problems in the Internal Revenue Code ("I.R.C.") or in tax policy in general. Such a claim would be nearly impossible to make. However, based on the observations made in Part I and II, expanding the deduction would be a meaningful reform that would be positive for the charitable sector and well received by the American public. Further, additional, similarly thought-out reforms could be made in order to form a meaningful and popular tax policy.[20]

This Note will use various tax-policy projections regarding the effects of the TCJA for tax year 2018. These projections cannot account for all

18. Sugin, *supra* note 14, at 424–25.

19. *Id.*

20. *See* Kitty Richards, *An Expressive Theory of Tax*, 27 CORNELL J.L. & PUB. POL'Y 301, 352–54 (2017) (explaining how expressive messages in taxation can be implemented to create an effective and popular tax policy).

outside variables, such as the state of the economy, which is affected by many factors besides taxation. With this in mind, the aspects of this Note that rely on the projections are tax policy specific, and the outside variables that affect the actual tax year 2018 statistics are not themselves within the scope of this Note. Therefore, unless there are significant, long-term, unexpected outcomes to the TCJA that lead to the alteration of tax policy projection methods,[21] the projections can reasonably be used as data for the purposes of this Note.

I. A TRICKLE-DOWN PROBLEM

It is generally thought that a promise to lower taxes is more popular than a promise to raise taxes, and a president and his administration following through on a campaign promise to lower taxes is typically a positive accomplishment in the eyes of the public.[22] Conversely, the President and the administration draw the public's ire when this promise is not kept.[23] However, in the midst of today's unprecedented political landscape,[24] the Trump Administration has received criticism after his promised tax cut was passed.[25] The reason for this criticism is likely due to the current political climate and can be explained through the expressive theory of law. With an understanding of the current political climate, the expressive theory of law can also provide clues for what tax policies will be popular in the future.[26]

A. THE POLITICAL CLIMATE, THE LEGISLATION, AND THE PUBLIC DISAPPROVAL

President Trump pushed the TCJA through the legislature in his first year in office following the 2016 presidential election.[27] The election came

21. The mentioned unexpected responses would spur significant research and analysis. This research could span for years and could lead to competing theories. Therefore, at the time of writing, current tax projection methods and the actual projections they produce should be used.

22. *See generally* Bartels, *supra* note 17 (discussing the positive public perception of the Bush tax cuts).

23. Elizabeth Barber, *George H.W. Bush Honored for Courage with 1990 Tax Hikes*, REUTERS (May 4, 2014, 6:55 PM), https://www.reuters.com/article/us-usa-kennedy-bush/george-h-w-bush-honored-for-courage-with-1990-tax-hikes-idUSBREA4308G20140505 [https://perma.cc/EW6V-5Q84] (noting that President George H.W. Bush may have lost the presidential election for breaking his promise of, "read my lips: no new taxes").

24. *See infra* Section I.A.1.

25. Howard Gleckman, *Why The 2017 Tax Cuts Are an Election-Year Bust*, FORBES (Aug. 29, 2018, 9:33 AM), https://www.forbes.com/sites/howardgleckman/2018/08/29/why-the-2017-tax-cuts-are-an-election-year-bust/#2dc9a9ea2eb3 [https://perma.cc/7SFH-RK2S].

26. *See infra* Section I.B.3.

27. GALE ET AL., *supra* note 3, at 1.

during a tipping point in politics, stemming in part from economic inequality within the United States.[28] The TCJA was a tax cut that significantly reduced the corporate tax rate, slightly reduced the individual tax rates, nearly doubled the standard deduction, and limited many itemized deductions.[29] Though the Act reduced taxes for most, it did not receive majority approval from the American public in the way that the very similar Bush Tax Cuts from the early 2000s did.[30] This disparate reaction to the two similar tax cuts can likely be explained by the unique political climate.

1. The Political Climate Surrounding the TCJA

The 2016 presidential election was a new political frontier in the United States largely brought about by the country's economic landscape.[31] Mechanization and globalization have made life increasingly difficult for the lower and middle class for years.[32] Income inequality has also increasingly plagued the United States over the past few decades, as noted by economist Thomas Piketty:[33]

> The top decile claimed as much as 45–50 percent of national income in the 1910s–1920s before dropping to 30–35 percent by the end of the 1940s. Inequality then stabilized at that level from 1950 to 1970. We subsequently see a rapid rise in inequality in the 1980s, until by 2000 we have returned to a level on the order of 45–50 percent of national income.[34]

Unsurprisingly, in response, the 2016 election saw the rise of two populist candidates: Senator Bernie Sanders, a Democratic Socialist, and Donald

28. *See, e.g.*, John Hudak, *A Reality Check on 2016's Economically Marginalized*, BROOKINGS (Nov. 16, 2016), https://www.brookings.edu/blog/fixgov/2016/11/16/economic-marginalization-reality-check [https://perma.cc/4TRG-73GB]; Kenneth T. Walsh, *Class Wars*, U.S. NEWS (Jan. 8, 2016, 6:00 AM), https://www.usnews.com/news/the-report/articles/2016/01/08/this-election-is-about-class-struggle [https://perma.cc/7TRJ-VV4Y].

29. GALE ET AL., *supra* note 3, at 1.

30. *Trump, Republicans' Tax Reform Law*, *supra* note 8.

31. *See* David Lauter, *Income Inequality Emerges as Key Issue in 2016 Presidential Campaign*, L.A. TIMES (Feb. 5, 2015, 4:00 AM), http://www.latimes.com/nation/la-na-campaign-income-20150205-story.html [https://perma.cc/338J-MPPL].

32. *See, e.g.*, Ryan Abbott & Bret Bogenschneider, *Should Robots Pay Taxes? Tax Policy in the Age of Automation*, 12 HARV. L. & POL'Y REV. 145, 147 (2018) ("[W]ithout oversight, automation will also exacerbate unemployment and economic inequality."); Michael S. Knoll, *Perchance to Dream: The Global Economy and the American Dream*, 66 S. CAL. L. REV. 1599, 1600–05 (1993) (noting that globalization has caused an increase in inequality).

33. *See* THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY 23 (Arthur Goldhammer trans., Harv. Univ. Press 2014); *see also* Edward J. McCaffery, *It's Tax Not Trade (Stupid)*, HUFFINGTON POST (Jul. 19, 2017), https://www.huffingtonpost.com/edward-j-mccaffery/its-tax-not-trade-stupid_b_11018938.html [https://perma.cc/93Z8-KZEJ] (explaining that the rich today benefit from the favorable surrounding wealth from capital while the lower and middle classes face stiff wage taxes).

34. PIKETTY, *supra* note 33, at 23.

Trump, a pro-business Republican.[35]

Simply, the question was not, "do the middle and lower classes need help?" but rather, "how do we help the middle and lower classes?" This political phenomenon had been building for years, and other similar candidates have reached the national stage at various times,[36] but 2016 appears to have been a potential breakthrough for this political movement.[37] It is also likely that these candidates' success signals a tipping point in American politics.[38] As of writing, politicians and the Republican and Democratic parties continue to try to understand this movement for future elections.[39]

2. The Tax Cuts and Jobs Act

President Trump campaigned as a pro-business and pro-middle class candidate,[40] and as a candidate, he promised to "fix" the tax system.[41] Upon taking office in 2017, President Trump and Republicans in Congress set out to fulfill that promise.[42] After a political battle in the legislature,[43] the Tax Cuts and Jobs Act was signed into law on December 22, 2017.[44]

The President fulfilled his pro-business promises in part with the TCJA. The Act significantly reduced the corporate tax rate from 35 percent down to 21 percent,[45] making the corporate tax rate more competitive with those

35. *See* Paul Ingrassia, *Resurgence of Populism in the 2016 Election*, FORDHAM POL. REV. (Jan. 28, 2016), http://fordhampoliticalreview.org/resurgence-of-populism-in-the-2016-election [https://perma.cc/EL35-45JM].

36. *See id.* (stating that there have been similar movements in the past, including Ross Perot in 1992 and Teddy Roosevelt's Bull Moose Party).

37. *See id.*

38. *See id.*

39. *See* Aaron Blake, *A Majority Says the Democratic Party Stands for Nothing—Except the Only Thing That Matters in 2018*, WASH. POST (July 18, 2017, 4:30 AM), https://www.washingtonpost.com/news/the-fix/wp/2017/07/18/a-majority-says-the-democratic-party-stands-for-nothing-except-the-only-thing-that-matters-in-2018/?utm_term=.62a92e9ace14 [https://perma.cc/5Y58-YVTB].

40. *See* Jonathan Cohn, *Trump's Biggest Con May Be the One He Has Played on American Workers*, HUFFINGTON POST (Jan. 20, 2018, 8:00 AM), https://www.huffingtonpost.com/entry/trump-con-american-workers_us_5a622fd5e4b0125fd6365bf4 [https://perma.cc/V677-QJXV].

41. *See* Tim Hains, *Trump: As a Beneficiary of Broken Tax System, I Am the One That Can Truly Fix It*, REALCLEARPOLITICS (Oct. 3, 2016), https://www.realclearpolitics.com/video/2016/10/03/trump_as_a_beneficiary_of_broken_tax_system_i_am_the_one_that_can_truly_fix_it.html [https://perma.cc/2EX8-6S9G].

42. *See* Alan Rappeport & Thomas Kaplan, *Democrats Vow to Fight Republican Tax Provisions that Aid Rich*, N.Y. TIMES (Sept. 12, 2017), https://www.nytimes.com/2017/09/12/us/politics/trump-tax-code-republicans-votes.html [https://perma.cc/56VT-5B9L].

43. *See id.*

44. Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97, 131 Stat. 2054.

45. *Id.* sec. 13001, § 11(b).

in other countries.[46] The Act also created a repatriation holiday for corporate overseas assets,[47] eliminated the corporate alternative minimum tax ("AMT"), created friendly tax credits for previous AMT credits, created a maximum 20 percent tax rate on flow-through business income, and allowed for more favorable corporate depreciations.[48]

Individuals also received a tax cut from the bill as it moderately lowered the 2018 income tax rates, as noted in Table 1 below.

TABLE 1. SINGLE FILER TAX RATES PRE- AND POST-TCJA

2017 Single Filer Rates[a]		*2018 Single Filer Rates*[b]	
Taxable Income	*Tax Rate*	*Taxable Income*	*Tax Rate*
$0 – $9,325	10%	$0 – $9,525	10%
$9,325 – $37,950	15%	$9,526 – $38,700	12%
$37,950 – $91,900	25%	$38,701 – $82,500	22%
$91,900 – $191,650	28%	$82,501 – $157,500	24%
$191,650 – $416,700	33%	$157,501 – $200,000	32%
$416,700 – $418,400	35%	$200,001 – $500,000	35%
$418,400 or more	39.6%	$500,001 or more	37%

Notes: [a]Kyle Pomerleau, *2017 Tax Brackets*, TAX FOUND. (Nov. 10, 2016), https://taxfoundation.org/2017-tax-brackets [https://perma.cc/4AV5-7LHG]. [b]Amir El-Sibaie, *2018 Tax Brackets*, TAX FOUND., https://taxfoundation.org/2018-tax-brackets [https://perma.cc/D5JZ-8CKK].

In addition, the Act increased the exempted amount from the estate tax and removed the "Obamacare" individual mandate penalty.[49] It also increased the childcare tax credit and eliminated the personal exemptions.[50]

In order to simplify the Federal Income Tax, the TCJA nearly doubled the standard deduction from $6,350 for single tax filers in 2017 to $12,000

46. *See* Erica York, *The Benefits of Cutting the Corporate Income Tax Rate*, TAX FOUND. (Aug. 14, 2018), https://taxfoundation.org/benefits-cutting-corporate-income-tax-rate [https://perma.cc/RXU2-6F2R] ("The Tax Cuts and Jobs Act reduced the federal corporate income tax rate from 35 percent, the highest statutory rate in the developed world, to a more globally competitive 21 percent.").

47. GALE ET AL., *supra* note 3, at 7.

48. *Id.* at 4.

49. *Id.*

50. Tax Cuts and Jobs Act sec. 11022, § 24; *id.* sec. 11041, § 151.

for single tax payers in 2018.[51] All things equal, no longer choosing the itemized deduction by itself does not economically harm the taxpayer.[52] For example, in 2017, if a taxpayer had $9,000 in itemized deductions, the taxpayer would choose to itemize rather than accept the alternative $6,350 standard deduction. In 2018, if that same taxpayer again has $9,000 in itemized deductions, the taxpayer will now accept the new $12,000 standard deduction and receive a larger deduction. The Act did economically harm some taxpayers in an attempt to further reduce the number of itemizing taxpayers. The Act capped the home mortgage interest deduction at the first $750,000 as opposed to the previous first $1 million,[53] and capped the state and local tax deduction at $10,000 per tax return.[54] These changes reduce the number of taxpayers using itemized deductions,[55] as there are fewer deductible expenses in 2018 and beyond.[56]

The TCJA's changes simplify the taxpayer's filing because in order to claim the itemized deduction, the taxpayer must fill out more forms such as Form 1040 schedule A, Form 1098, Form 4952, Form 8283, and others.[57] If everything else were unchanged, then the increase in the standard deduction and the reduction of the mentioned itemized deductions would help accomplish the promise of simplifying individual income tax by requiring fewer forms. However, "simplifying" through reducing the number of taxpayers using itemized deductions hinders the government's ability to

51. *See id.* sec. 11021(a), § 63.

52. While raising the standard deduction alone is a benefit for taxpayers, the TCJA also removed personal exemptions. Therefore, it is worth observing this combined effect on large families especially when compared to small families. For more on this discussion, see generally GALE ET AL., *supra* note 3, at 2–3.

53. Tax Cuts and Jobs Act sec. 11042(a), § 164.

54. *Id.*

55. *See* DAVID BIVIN ET AL., IND. UNIV. LILLY FAMILY SCH. OF PHILANTHROPY, THE PHILANTHROPY OUTLOOK: 2018 & 2019, at 8 (2018), http://martsandlundy.com/wp-content/uploads/2018/03/Philanthropy_Outlook_2018_2019_RS.pdf [https://perma.cc/T695-RT63] (explaining that the SALT deductions have historically been a reason why most taxpayers take itemized deductions).

56. These deductions tend to be used by wealthier taxpayers who perhaps are more likely to itemize anyway because of their higher expenditures. Changing these deductions likely does not have the same effect as raising the standard deduction. *See* THE COUNCIL OF ECON. ADVISERS, EVALUATING THE ANTICIPATED EFFECTS OF CHANGES TO THE MORTGAGE INTEREST DEDUCTION 3 (2017), https://www.whitehouse.gov/sites/whitehouse.gov/files/images/Effects%20of%20Changes%20to%20the%20Mortgage%20Interest%20Deduction%20FINAL.pdf [https://perma.cc/5ZMU-4F66] ("[T]he MID is a regressive subsidy that provides more value to higher income tax units.").

57. *See* INTERNAL REVENUE SERV., SCHEDULE A FORM 1040, https://www.irs.gov/pub/irs-pdf/f1040sa.pdf [https://perma.cc/5ATU-PU6L] (showing that the itemized deduction form, 1040A, references six other forms).

implement policy through taxation[58] as traditionally, itemized deductions have been used to encourage and reward certain behaviors.[59]

Prior to the TCJA, itemized deductions were only taken by roughly 26 percent of tax filers.[60] Moreover, the majority of this 26 percent were from the high-income tax brackets.[61] This is understandable, as the wealthy spend more and generate more deductible expenses that overcome the standard deduction's threshold.[62] After the TCJA nearly doubled the standard deduction, it was projected that only roughly 11 percent of filers would itemize.[63] For an early, though similar, version of what would become the TCJA, the White House projected that the small percentage of itemizing taxpayers would be even more disproportionately composed of wealthy filers.[64] Table 2 below shows the projected effect on itemized deduction filers from the earlier version of the TCJA.

58. *See* Samuel A. Donaldson, *The Easy Case Against Tax Simplification*, 22 VA. TAX REV. 645, 654–58 (2003) (explaining how the government uses tax expenditures to incentivize certain behavior and thus implement policy).

59. *Id.* at 737–39. For example, the itemized home mortgage interest deduction encourages home ownership by reducing the total cost of home buying. *Id.* Many similar examples can be given, such as the charitable contribution deduction, which will be discussed *infra* Section II.A.

60. *See* THE COUNCIL OF ECON. ADVISERS, *supra* note 56, at 3.

61. *See id*.

62. *See id*.

63. *See* GALE ET AL., *supra* note 3, at 17.

64. *See id.*; THE COUNCIL OF ECON. ADVISERS, *supra* note 56, at 3.

TABLE 2. CHANGE IN PERCENTAGE OF ITEMIZERS

Income Amount	*Prior to TCJA Itemizers*	*Projected Itemizers Under a Similar but Early Version of the TCJA*
$0 – 10,000	0.1%	0.1%
$10,000 – 20,000	3.8%	0.6%
$20,000 – 30,000	9.5%	1.4%
$30,000 – 40,000	15.6%	2.4%
$40,000 – 50,000	22.4%	3.5%
$50,000 – 75,000	36.0%	7.5%
$75,000 – 100,000	49.8%	11.0%
$100,000 – 200,000	72.7%	19.6%
$200,000 – 500,000	92.2%	47.2%
$500,000 – 1,000,000	91.6%	66.3%
Greater than $1,000,000	86.5%	74.8%
Overall:	26.3%	7.6%

Notes: See THE COUNCIL OF ECON. ADVISERS, *supra* note 56, at 3. This table was produced for a House of Representatives version of the TCJA that was slightly modified before the President signed it into law. Such modifications include changing the limit on the Mortgage Interest Deduction from the proposed $500,000 of mortgage debt to $750,000. These changes will affect the data shown but according to other projections, the numbers should give an indication of the effects of the final version of the TCJA. *See* GALE ET AL., *supra* note 3, at 17 (projecting that the final version of the TCJA will lead to 11 percent of taxpayers using the itemized deductions).

Though very few taxpayers will use the itemized deductions, the TCJA was projected to save the average taxpayer an estimated $1,600 in taxes in 2018.[65] However, not all taxpayers are treated equally by the Act.[66] The wealthiest 1 percent of taxpaying households—those with an income of $733,000 or more—were projected to receive an average tax cut of $50,000,

65. Howard Gleckman, *The TCJA Would Cut Taxes by an Average of $1,600 in 2018, with Most Benefits Going to Those Making $300,000-Plus*, TAX POL'Y CTR. (Dec. 18, 2017), https://www.taxpolicycenter.org/taxvox/tcja-would-cut-taxes-average-1600-2018-most-benefits-going-those-making-300000-plus [https://perma.cc/V3SB-VWD2].

66. *See id.*

roughly 3.4 percent of their after-tax income.[67] Moreover, the top 0.1 percent of taxpaying households—those with income of $3,400,000—were projected to get an average tax cut of $190,000, 2.7 percent of their after-tax income.[68] On the other hand, the middle quintile of taxpaying households were projected to receive a tax cut of $930, which is barely a 1.5 percent change in after-tax income.[69] Most importantly, the corporate tax rate reduction gave corporations a major windfall.[70] Berkshire Hathaway reported that the reduction increased the company's value by $29 billion,[71] and consequently, the stockholders' shares correspondingly increased in value.[72] Accordingly, because of the disproportionate amount of stock owned by the wealthy,[73] the corporate tax cut can be viewed as an indirect government payment to the wealthy.[74]

The Trump Administration recognizes the discrepancy between the tax cut's immediate effect on the rich and poor but views the issue through the lens of "trickle-down" economics. When asked about the aforementioned discrepancy, Senior Trump Economic Advisor Gary Cohn was unapologetic and proposed that while the less fortunate may get a smaller tax cut, they will still greatly benefit from the Act.[75] As he explained, the TCJA "create[s] wage inflation, which means the workers get paid more; the workers have more disposable income, the workers spend more. And we see the whole

67. *Id.*

68. *Id.*

69. TAX POLICY CTR., DISTRIBUTIONAL ANALYSIS OF THE CONFERENCE AGREEMENT FOR THE TAX CUTS AND JOBS ACT 3 (2017), https://www.taxpolicycenter.org/sites/default/files/publication/150816/2001641_distributional_analysis_of_the_conference_agreement_for_the_tax_cuts_and_jobs_act_0.pdf [https://perma.cc/7R27-X9DZ].

70. *See* Warren Buffet, Berkshire Hathaway Inc., 2017 Berkshire Hathaway Stockholder's Letter, 3 (Feb. 24, 2018), http://www.berkshirehathaway.com/letters/2017ltr.pdf [https://perma.cc/H54J-4MTY].

71. *See id.*

72. Berkshire Hathaway Inc., Beneficial Ownership Report (Schedule 13D/A) (July 17, 2018), https://www.sec.gov/Archives/edgar/data/315090/000119312518219854/d467347dsc13da.htm [https://perma.cc/KSY3-K4SL] (showing that Mr. Buffet owns 16.45 percent of the economic interest in Berkshire Hathaway). Mr. Buffet's interest in the corporation, entitled him to roughly $4.77 billion of the $29 billion gained through the TCJA.

73. Edward N. Wolff, *Household Wealth Trends in the United States, 1962 to 2016: Has Middle Class Wealth Recovered?* 19 (Nat'l Bureau Econ. Research, Working Paper No. 24085, 2017), https://www.nber.org/papers/w24085.pdf [https://perma.cc/YD86-AZR5] ("The top 10 percent of families as a group accounted for about 85 to 90 percent of stock shares, bonds, trusts, and business equity . . . .").

74. It can also be argued that everyone has the ability to purchase stock, and therefore, this is not a wealth discriminatory tax cut on its face, though the practical implications are serious.

75. Nicole Goodkind, *Trump Officials Say Trickle-Down Economics Will Work for Tax Plan—Here's Why That's Wrong*, NEWSWEEK (Nov. 9, 2017, 4:57 PM), https://www.newsweek.com/wealthy-tax-cuts-gary-cohn-donald-trump-trickle-down-707226 [https://perma.cc/593Q-Z4G3].

trickle-down through the economy, and that's good for the economy."[76] In an overly simple explanation,[77] the idea of trickle-down economics or supply-side economics[78] is that when more money is given to the public, especially to the upper class, there will be more investment and an overall expansion in the economy.[79] This economic boost provides better jobs and wage increases to the lower and middle classes, which is the "trickle-down" effect.[80]

3. The Taxpayers Disapprove Today, but Approved Yesterday

As mentioned previously, though the average taxpayer will now pay less tax, the TCJA was not the political win that the Republican Party and President Trump envisioned.[81] As of writing, the Act is generally disapproved of by the public according to an aggregation of various polls on the issue.[82] Historically, past tax cuts have never been generally unpopular, though they may not have received resounding support.[83] It is possible that this phenomenon can be partially attributed to the sharp divide in opinion about President Trump[84] that was reflected in 2016 election,[85] the deep

76. *Id.*

77. For the purpose of this Note, it is acceptable to assume that supply-side economics work as proposed. This point would require a separate note or possibly a book.

78. While Mr. Cohn may have embraced the term "trickle-down" in his quote, some economists view trickle-down economics as "just a clever negative sound bite" for what should be called supply-side economics. *Does Trickle-Down Economics Add Up – or Is It a Drop in the Bucket?*, KNOWLEDGE@WHARTON (Dec. 12, 2017), http://knowledge.wharton.upenn.edu/article/trickle-economics-flood-drip [https://perma.cc/LA2A-HBPX].

79. *See id.*

80. *See id.*

81. Kevin Robillard, *Republicans Abandon Tax Cut Message in Pa. Special Election*, POLITICO (Mar. 13, 2018, 8:24 AM), https://www.politico.com/story/2018/03/13/pennsylvania-special-election-preview-tax-republicans-458276 [https://perma.cc/M87H-7G72] (noting that the Republican Party is not highlighting the TCJA in the 2018 midterm elections because it is not popular with the American public).

82. *See Trump, Republicans' Tax Reform Law*, *supra* note 8. It is reasonable to believe that this approval percent may increase as the economic benefits occur. *See* Megan Brenan, *More Still Disapprove Than Approve of 2017 Tax Cuts*, GALLUP (Oct. 10, 2018), https://news.gallup.com/poll/243611/disapprove-approve-2017-tax-cuts.aspx [https://perma.cc/LJ92-6T7F] ("Although many of the changes to the tax code took effect in January 2018, they didn't affect the 2017 taxes filed by Americans in April, which may account for the slim majority not seeing them as having helped their family's finances.").

83. *See* Harry Enten, *The GOP Tax Cuts Are Even More Unpopular Than Past Tax Hikes*, FIVETHIRTYEIGHT (Nov. 29, 2017, 11:15 AM), https://fivethirtyeight.com/features/the-gop-tax-cuts-are-even-more-unpopular-than-past-tax-hikes [https://perma.cc/9JCJ-Q5ZU].

84. *See Partisanship and Political Animosity in 2016*, PEW RES. CTR. (June 22, 2016), http://www.people-press.org/2016/06/22/partisanship-and-political-animosity-in-2016 [https://perma.cc/N9HW-CBSP].

85. FED. ELECTION COMM'N, OFFICIAL 2016 PRESIDENTIAL GENERAL ELECTION RESULTS 6 (2017), https://transition.fec.gov/pubrec/fe2016/2016presgeresults.pdf [https://perma.cc/KUL6-9LQH]

divide between the political parties in general.[86] However, common sense generally dictates that people prefer receiving additional money for the same amount of work. Accordingly, it may not be surprising if economic benefits lead the average American to approve of a tax cut even though it was advocated by a controversial figure or opposing party.

For a recent tax cut comparison, in his first presidential term, President George W. Bush oversaw the Economic Growth and Tax Relief Reconciliation Act of 2001 and the Jobs and Growth Tax Relief Reconciliation Act of 2003 (collectively known as "the Bush Tax Cuts"). Together, the Acts largely provided the same types of individual tax cuts given in the TCJA.[87] The Acts reduced the top four rate brackets by a few percentages, created a new and beneficial bottom bracket, increased the standard deduction, phased out the gift and estate tax, and significantly increased the child tax credit.[88] The Acts did have similar drawbacks to the TCJA, too.[89] The Acts also were projected to disproportionately benefit the wealthy and reduce their tax contribution relative to the lower and middle classes' contributions.[90]

One would expect the polling for the Bush Tax Cuts to be similar to the TCJA because of their similarity. On the contrary, the Bush Tax Cuts received general approval,[91] while the TCJA is generally disapproved of by voters.[92] Interestingly, in 2001, 55 percent of the American public believed that the Economic Growth and Tax Relief Reconciliation Act of 2001 primarily helped the wealthy,[93] while similarly 51 to 55 percent of the American public approved of the first of the Bush Tax Cuts.[94] These two

(showing that President Trump received 46.09 percent of the popular vote while Secretary Clinton received 48.18 percent of the popular vote).

86. *See Partisanship and Political Animosity in 2016*, *supra* note 84.

87. *See* Scott Greenberg, *Looking Back at the Bush Tax Cuts, Fifteen Years Later*, TAX FOUND. (June 7, 2016), https://taxfoundation.org/looking-back-bush-tax-cuts-fifteen-years-later [https://perma.cc/FVB3-UK6S]; *see also* INTERNAL REVENUE SERV., 2003 TAX TABLE (2003), https://www.irs.gov/pub/irs-prior/i1040tt--2003.pdf [https://perma.cc/P7ED-D3JX] (showing tax rates in 2003 after the Bush Tax Cuts); INTERNAL REVENUE SERV., 2000 1040 INSTRUCTIONS, at 71 (2000), https://www.irs.gov/pub/irs-prior/i1040--2000.pdf [https://perma.cc/4DSX-6GUU] (showing tax rates for the year 2000, which was before the Bush Tax Cuts).

88. *See* Greenberg, *supra* note 87.

89. *See* Bartels, *supra* note 17, at 15–16; Gleckman, *supra* note 65.

90. *See* Bartels, *supra* note 17, at 15–16.

91. *Id.* at 15. It is also important to note that the Bush Tax Cuts did not include a reduction of the corporate tax rate. *See* Greenberg, *supra* note 87. One could argue that perhaps this difference plays a role in the differences in opinion between the two tax cuts.

92. *See Trump, Republicans' Tax Reform Law*, *supra* note 8.

93. Bartels, *supra* note 17, at 16.

94. *Id.* at 16 & n.8.

concurrent beliefs create an interesting phenomenon. Perhaps the American people's tolerance for wealth inequality occurs because of the timeless American belief of "picking yourself up by the bootstraps" to join the upper class.[95] Alternatively, taxpayers may simply not understand enough about tax to know the implications or may not care enough about monitoring the government's actions to make sure that the wealthy are not disproportionately favored by tax policy.[96]

4. The Political Climate Boils Over into Taxation

We are left with the question of why the American people have generally rejected the TCJA, while the very similar Bush Tax Cuts were generally accepted. It seems likely that the political phenomenon surrounding the 2016 election has boiled over into tax policy. Based upon the historical example of the Bush Tax Cuts, individually paying less tax is not what the American public takes issue with in regard to the TCJA.[97] As additional proof, a 2017 Harvard Center for American Political Studies Harris Poll showed that 68 percent of Americans believe that taxes were too high and needed to be lowered.[98] Today, the political climate surrounding the 2016 election and the unpopularity of the TCJA shows that it is likely that swing voters, who perhaps previously disliked wealth inequality but still supported the Bush Tax Cuts, have now withdrawn their support for "trickle-down" tax cuts.

Admittedly, the popularity difference between the Bush Tax Cuts (51 to 55 percent approval)[99] and the TCJA (33.5 percent approval as of writing)[100] is not particularly large. This difference can be important, because, in a two-party dominant, plurality election system,[101] a few percentage points can mean the difference between reelection and being voted out of office.[102] Accordingly, it is important to understand when the

95. *See id.* at 18.

96. *See id.*

97. *See id.* at 16.

98. *Harris Poll on Immigration and Tax Reform*, CTR. AM. POL. STUD. (Sept. 22, 2017), https://caps.gov.harvard.edu/news/caps-harris-poll-immigration-and-tax-reform [https://perma.cc/7JQH-6PLM].

99. Bartels, *supra* note 17, at 16 & n.8.

100. *Trump, Republicans' Tax Reform Law*, *supra* note 8 (noting that approval of the TCJA has been as low as 29.5 percent in the past).

101. William H. Riker, *The Two-Party System and Duverger's Law: An Essay on the History of Political Science*, 76 AM. POL. SCI. REV. 753, 754–55 (1982) (discussing Duverger's Law, which states that a plurality voting system leads to two-party political systems that must maintain a majority over the opposing party).

102. *See id.*

majority has shifted its position on a topic.[103] For future tax policy implementations, the legislation must reflect the majority's values, or the implementing administration will realize the consequences in the next election.[104]

B. THE EXPRESSIVE THEORY OF LAW

In order to understand how future legislation can reflect the voters' values, it is best to assess the TCJA according to the expressive theory of law.[105] While the expressive theory of law was not originally used to explain taxation,[106] it has been expanded to this legal subcategory.[107] The theory is applicable to the TCJA and shows why the Act failed to capture the public's approval. Finally, it can also help predict what types of tax legislation will be popular going forward.[108]

1. Background

There are many forms of expressive theories covering topics such as criminal punishment, the Equal Protection Clause, and the Establishment Clause.[109] Two of the theory's main proponents are Elizabeth Anderson and Richard H. Pildes.[110] In their article, *Expressive Theories of Law: A General Restatement*, they lay a general framework for expressive theories as a whole. They assert that, "what makes an action morally right depends on whether it expresses the appropriate valuations of . . . persons."[111] In plain terms, a law is morally right when it expresses an accepted attitude toward a person or cause.

Anderson and Pildes also argue that "members of Congress recognize

103. *See* Stephanie Kodish, *Balancing Representation: Special Representation Mechanisms Addressing the Imbalance of Marginalized Voices in African Legislatures***,** 30 SUFFOLK TRANSNAT'L L. REV. 1, 27 (2006) **(**noting that "[i]t is statistically impossible for a minority candidate to be elected" in a plurality voting system, which shows the importance of being in the majority).

104. *See id.*

105. *See* Richards, *supra* note 20, at 352–54; *see also* Joseph J. Thorndike, *The Best Parts of the TCJA Are Probably Making It Unpopular*, 159 TAX NOTES 1710, 1711 (2018) (providing an early exploration of this proposition).

106. *See* Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1531–56 (2000) (discussing many areas of law in which the expressive theory of law is applied, but failing to mention taxation).

107. Richards, *supra* note 20, at 303.

108. *See id.* at 354–55.

109. *See* Anderson & Pildes, *supra* note 106, at 1504, 1533–51.

110. Alan Strudler, *The Power of Expressive Theories of Law*, 60 MD. L. REV. 492, 494 (2001) ("The dominant expressive theory of law in the legal academy today is due to Elizabeth Anderson and Richard Pildes.").

111. Anderson & Pildes, *supra* note 106, at 1504, 1545–51.

that the official reports of the substantive committees that approve specific pieces of legislation carry the most authoritative weight, after the text of the bill itself, in giving meaning to proposed legislation."[112] With this critique, the authors assert that a government actor is able to give expression to enacted laws.[113] Continuing this line of thought, Kitty Richards expands the expressive theory into the realm of taxation with her appropriately titled article, *An Expressive Theory of Tax*.[114]

In the article, Richards proposes that "values expressed by the tax code are at least as central to the tax policy preferences of citizens, lawmakers, and judges as economic efficiency and the distribution of income."[115] She continues her analysis to show examples of clear government expression in the realm of tax.[116] As a convincing example, Richards notes that the State of Nevada has refused to tax legal brothels in an attempt to avoid legitimizing the distasteful industry even though a revenue stream is lost and the brothels are effectively given a tax advantage.[117] She also notes that sometimes expressive statements can be made through the most minor tax decisions. As an example, she cites a U.K. marriage tax break, which brought on a significant debate among politicians and among the general public.[118] Richards' argument concludes by advocating that tax scholars must understand the message that a tax provision is sending about what our society values to the same extent as "the provision's instrumental effects on behavior, revenue, and the distribution of income."[119]

2. Application

In many ways the creators of the TCJA failed to follow Richards' proposals. Because of the unequal distribution of the Act's benefits outlined earlier, the Act expresses the message that the wealthy deserve more benefits than the struggling middle and lower classes.[120] For this reason, many of the

112. *Id.* at 1523. This particular aspect of the expressive theory of law was developed after Mathew Adler, a Professor at the University of Pennsylvania Law School, contested the validity of the expressive theory on the grounds that the government, or any collective actor, is unable to "express" a single message. Therefore, there is no actual "expression" in the law. *See* Matthew D. Adler, *Expressive Theories of Law: A Skeptical Overview*, 148 U. PA. L. REV. 1363, 1389–90 (2000).

113. Anderson & Pildes, *supra* note 106, at 1545–51.

114. Richards, *supra* note 20, at 301.

115. *Id.* at 303.

116. *Id.* at 311–15.

117. *Id.* at 354.

118. *Id.* at 316 (reporting that Harry Potter author, J.K. Rowling, was entrenched in the center of the nationwide debate on "[a] £150 tax break for married couples with a single major breadwinner").

119. *Id.* at 354.

120. *See supra* Section I.A.

major provisions[121] of the Act express a message that does not reflect the same values expressed in the 2016 election.[122] While it may be true that lawmakers believe in trickle-down economics and that the middle and lower classes will benefit from it in the long run, Richards offers that "if your opponents are arguing about values and virtues and you are tempted to refute them with a spreadsheet, rethink your approach."[123] Taking the extra step to explain to the middle and lower classes that they will proportionally benefit in the long run is a difficult task when opponents of the bill can speak directly to the immediate inequality.[124]

The TCJA's attempt at simplifying the income tax also failed to follow the expressive theory of tax.[125] While not writing specifically on tax, Pildes also writes about the expressive theory in regards to regulations generally.[126] He and his co-author note that "[p]olicy choices do not just bring about certain immediate material consequences; they also will be understood, at times, to be important for what they reflect about various value commitments—about which values take priority over others."[127] With this principle in mind, one must consider how the average American views tax simplification attained by effectively eliminating the itemized deductions for most versus losing tax incentives provided by the itemized deductions, such as the home mortgage interest deduction and charitable contribution deduction.[128]

It is generally understood that most Americans would prefer a simple federal tax as opposed to a complex one.[129] It is also equally known that the American dream historically involves homeownership and the majority of young renters still aspire to own a home.[130] Consequently, the home

121. As previously mentioned, one of the major provisions of the TCJA was the reduction of the estate tax. Interestingly, though the estate tax only taxes the rich, the message that it is a "death tax" tends to make it very unpopular with Americans. *See* Richards *supra*, note 20, at 347–50. However, taking a dead person's wealth from their families when they die still seems to resonate with some people. *See id.* As the populist movement continues, it will be interesting to see if these sentiments change.

122. *See supra* Section I.A.1.

123. Richards, *supra* note 20, at 347.

124. *See, e.g.*, Opinion, *You Know Who the Tax Cuts Helped? Rich People*, N.Y. TIMES, https://www.nytimes.com/interactive/2018/08/12/opinion/editorials/trump-tax-cuts.html [https://perma.cc/G4UG-TNK7].

125. *See* Thorndike, *supra* note 105, at 1711–12.

126. Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 66–69 (1995).

127. *Id.* at 66.

128. *See* Thorndike, *supra* note 105, at 1711–12.

129. *See* McCaffery, *supra* note 11, at 1267–68.

130. *See* FANNIE MAE, FANNIE MAE NATIONAL HOUSING SURVEY: WHAT YOUNGER RENTERS WANT AND THE FINANCIAL CONSTRAINTS THEY SEE 21 (2014), http://www.fanniemae.com/

mortgage interest deduction is still considered one of the most popular tax deductions.[131] The question then becomes one of simplification at the expense of an expressed support of homeownership through the home mortgage interest deduction.[132] This is also a difficult question that is worth exploring considering the importance of swing voters in this political era.[133] What may be more certain is that many of the itemized personal expenditure deductions do express the values held by the American public.[134]

3. Going Forward

In order to create popular tax legislation, the expressive theory of law dictates that it is better to promote or create parts of the tax code that clearly reflect the majority's values.[135] Current Speaker of the House of Representatives, Nancy Pelosi, called the relatively small tax cuts for the middle and lower class "crumbs,"[136] but in the future, "crumbs" paired with popular and clear expressive meaning may have more effect on the opinions of the masses, similar to the marriage tax break referenced in Richards' article.[137] Again, similar to the marriage tax breaks in Richards' article, expressive tax changes do not have to have strong economic effects to captivate a nation and control the public narrative.[138] Since even small shifts in opinion mean so much in the United States political system, parties must utilize the expressive theory of tax and project clearly accepted values when instituting policy in order to stay in line with popular opinion and thus, stay in power in government.

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resources/file/research/housingsurvey/pdf/nhsmay2014presentation.pdf [https://perma.cc/959S-GJLZ] (reporting that most young renters prefer owning).

131. *See, e.g.*, Roberta F. Mann, *The (Not So) Little House on the Prairie: The Hidden Costs of the Home Mortgage Interest Deduction*, 32 ARIZ. ST. L.J. 1347, 1348 (2000) ("The home mortgage interest deduction **i**s America's favorite itemized deduction. Suggest its repeal and expect howls of protest from all quarters." (footnotes omitted)); Diana Olick, *Popular Mortgage Deduction Could Get a Haircut in Tax Reform*, CNBC (Aug. 22, 2017, 6:14 PM), https://www.cnbc.com/2017/08/22/popular-mortgage-deduction-could-get-a-haircut-in-tax-reform.html [https://perma.cc/JU2F-J63W] (calling the mortgage interest deduction the "hands-down favorite of taxpayers"); Eric Reid, *What Is the Mortgage Interest Deduction and How Does it Work?*, THESTREET (Dec. 26, 2018), https://www.thestreet.com/personal-finance/taxes/mortgage-interest-deduction-14816851 [https://perma.cc/RZ8S-5TU9] (calling the mortgage interest deduction "one of the most popular sections in the tax code").

132. I.R.C. § 163(h) (2018).

133. *See supra* Section I.A.4.

134. *See Results of an Original 2015 National Poll*, PHILANTHROPY ROUNDTABLE, https://www.philanthropyroundtable.org/almanac/statistics/national-poll [https://perma.cc/3HZS-KNJB] (reporting a poll showing that Americans support a tax deduction for charitable giving).

135. *See* Richards, *supra* note 20, at 354.

136. Robert Farley, *Pelosi's 'Crumbs' Comment in Context*, FACTCHECK.ORG (Feb. 2, 2018), https://www.factcheck.org/2018/02/pelosis-crumbs-comment-context [https://perma.cc/CGB9-SKKL].

137. *See* Richards, *supra* note 20, at 316–22.

138. *See id.*

II. A CHARITABLE PROBLEM

The TCJA's unpopularity outlined in Part I of the analysis dealt with the Act's perceptual problems, and one of its worst perceptual problems stems from its negative effects on the nonprofit sector, which will be examined in detail in this Part.[139] First, the TCJA altered the tax incentives for charitable giving, and in doing so, exacerbated the elitism already present in the charitable sector. Second, these altered incentives, all other factors equal, will also reduce charitable giving as a whole. Further, certain vulnerable charitable organizations are likely to lose more funding than others.[140]

A. THE CHARITABLE CONTRIBUTION DEDUCTION TODAY AFTER MINOR CHANGES

To understand the effects of the TCJA on charitable giving, one must first understand the current charitable contributions deduction and how the deduction is viewed. Today, as mentioned above, the charitable contribution deduction is an itemized personal deduction under I.R.C. § 170.[141] The contribution must be made to a qualified organization, as defined in I.R.C. § 170(c). After the TCJA, the charitable contribution deduction is limited yearly to 60 percent of a taxpayer's contribution base for cash gifts,[142] up from 50 percent previously.[143] The excess contributions above the contribution limit for any given year may also be carried forward for five years.[144] Charities have come to expect and, in some cases, rely on this government tax incentive when soliciting donors.[145] Charities also remind taxpayers that they can give more to the cause once the tax deduction is considered.[146]

The charitable contribution deduction is sometimes viewed as a

139. *See* GALE ET AL., *supra* note 3, at 21–22.

140. Sugin, *supra* note 14, at 426.

141. This analysis focuses on the charitable contribution deduction for individuals.

142. Contribution base is defined in I.R.C. § 170(b)(1)(H) (2018) as "adjusted gross income (computed without regard to any net operating loss carryback to the taxable year under section 172)." There are also various contribution bases for different types of gifts, however, cash gifts will be the main aspect of this analysis. *See* I.R.C. § 170.

143. *See* Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97, sec. 11023(a), § 170(b)(1), 131 Stat. 2054, 2074–75.

144. I.R.C. § 170(b)(1)(G)(ii).

145. *See Charitable Giving After Tax Reform*, MCGUIREWOODS (May 30, 2018), https://www.mcguirewoods.com/Client-Resources/Alerts/2018/5/Charitable-Giving-After-Tax-Reform.aspx [https://perma.cc/R4KK-TYZ4] (advocating for charities to adjust their pitch to potential donors after the TCJA in order to retain donors).

146. *See id.*

government-matching fund.[147] For example, if a taxpayer gives a $1,000 gift and their marginal rate is 35 percent, then the taxpayer will receive a $350 tax deduction, assuming that their deductible expenses are already above the standard deduction. It can equally be stated that the taxpayer has given a $650 gift and the federal government has agreed to match this gift with a $350 gift of its own, represented by the lost tax revenue from the deduction. Simply stated, the government matches donations at the taxpayer's marginal tax rate.[148] This model reflects the view that charities "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."[149]

B. ELITISM IN CHARITY

One issue with charitable giving is that it creates a sense of elitism, and this elitism is exacerbated through the charitable contribution deduction. Just prior to the TCJA, one study noted, "total household giving is growing but the share of donor households is declining, and the typical (median) amounts donated per donor household are declining (all after adjusting for inflation), then gifts at the higher end (minimally greater than the median) are driving the increases in total household giving."[150] One of the reasons for this discrepancy is that the wealthy are able to give more for a lower effective cost than lower-income taxpayers. The wealthy are also able to receive personal benefits from their tax-deductible philanthropy, and finally, the wealthy receive government tax deductions even though their charitable contributions allow them to shape civil society according to their own preferences. These reasons shall be discussed further throughout this Section. As written above and shown in Table 2, the TCJA's attempt to simplify the federal income tax through nearly doubling the standard deduction reduces the number of taxpayers who will use itemized deductions and disproportionately reduces the number of low-income taxpayers taking

147. *E.g.*, Sugin, *supra* note 14, at 424–25; Todd Izzo, Note, *A Full Spectrum of Light: Rethinking the Charitable Contribution Deduction*, 141 U. PA. L. REV. 2371, 2380–81 (1993).

148. While there is debate about how the charitable contribution deduction should be viewed from a tax theory perspective. *See, e.g.*, Boris I. Bittker, *Charitable Contributions: Tax Deductions or Matching Grants?*, 28 TAX L. REV. 37, 37–39 (1972). This analysis will use the matching fund approach in most explanations.

149. *Id.* at 39.

150. Patrick M. Rooney, *The Growth in Total Household Giving Is Camouflaging a Decline in Giving by Small and Medium Donors: What Can We Do About It?*, NONPROFIT Q. (Aug. 27, 2019), https://nonprofitquarterly.org/2018/11/21/total-household-growth-decline-small-medium-donors [https://perma.cc/W9J9-VEJ9].

itemized deductions.[151] Most importantly for this discussion, those low-income taxpayers who no longer itemize also are no longer rewarded for their charitable contributions, while the wealthy generally still receive this reward.[152]

1. Match the Rich

A practical effect of the current itemized deduction is that the wealthy are able to receive larger deductions for their charitable gifts.[153] Whether viewed from the lens of the matching fund theory or not, the wealthy's higher marginal rates means that charitable contributions are less burdensome, dollar for dollar, for the wealthy through this government incentive because they receive a larger tax reduction for their gifts.[154] In the example given above, in which the taxpayer gives a $1,000 gift at a 35 percent marginal tax rate, now the taxpayer has a 24 percent marginal tax rate instead. This 24 percent rate is for single taxpayers with taxable income between $82,501 and $157,500, while the original 35 percent single taxpayer has taxable income between $200,001 and $500,000.[155] If the 24 percent marginal taxpayer gives the same $1,000 gift to a qualified charity, then this taxpayer will receive a $240 deduction and the gift will effectively cost the taxpayer $760, as opposed to the $650 that it cost the wealthier taxpayer.[156] Accordingly, the regressive nature of this deduction disproportionately favors the wealthy.[157]

Additionally, if a taxpayer is unable to utilize itemized deductions, which is much more likely for the lower-income taxpayers, then the taxpayer will not receive any tax benefit for his or her gift.[158] The TCJA exacerbates this problem, as it is now even less likely that a lower-income taxpayer will be able to use the itemized deductions as shown in Table 2. [159] Therefore, the TCJA appears to recognize the inequality in charitable giving and not only accepts it but also expands it.

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151. Sugin, *supra* note 14, at 424–25.

152. *Id*. at 425–26.

153. *Id.* at 426–27.

154. *See supra* Table 1.

155. *See supra* Table 1.

156. Stated another way, for every $1,000 someone in the 35-percent bracket gives to charity, someone in the 24-percent bracket can only give roughly $855 for the same cost.

157. *See* ALEX BRILL & DERRICK CHOE, AM. ENTER. INST., CHARITABLE GIVING AND THE TAX CUTS AND JOBS ACT 2 (2018), https://www.aei.org/wp-content/uploads/2018/06/Charitable-Giving-and-the-Tax-Cuts-and-Jobs-Act.pdf [https://perma.cc/L6QA-LHF6].

158. Sugin, *supra* note 14, at 425–26.

159. *Id.*

2. Self-Promotion and Tax Benefit

Taxation also promotes elitism in charitable giving by allowing wealthy charitable donors to receive naming rights from the charities for the donors' larger gifts, and, once again, the TCJA exacerbates this inequality.[160] Smaller donors do not receive these rights, and this right is an outlier in tax law.[161] Charitable donors are given a tax deduction for the amounts they give to charity, but those amounts must be a "contribution or gift."[162] A gift is defined in case law as something given with "detached and disinterested generosity."[163] Accordingly, this definition excludes "gifts" in exchange for things of value or quid pro quo giving.[164] A deduction is entirely disallowed if the "gift" is made in exchange for a "substantial benefit in return."[165] On the other hand, if the amount given to a charity is made partially for a good or service and partially as a donation, then the charitable deduction is calculated as the amount paid minus the value of the good or service received.[166] The quid pro quo rules are strict.[167] Even so, donors who receive naming rights for their otherwise "detached and disinterested" gifts to charity are able to take a deduction in the full amount of their gift.[168] This elitist practice is allowed because naming rights are not "significant or substantial" and are legally considered "incidental" to the otherwise charitable gifts.[169]

While the naming rights practice does encourage charitable giving by the extremely wealthy,[170] scholars argue that, "there are valuable benefits associated with naming rights that donors receive in the form of reputation and status enhancement."[171] However, the government ignores these effects to encourage charitable giving by the wealthy. The charitable contribution deduction also ensures that in the hypothetical case of a $1 million

160. *See* Linda Sugin, *Competitive Philanthropy: Charitable Naming Rights, Inequality, and Social Norms*, 79 OHIO ST. L.J. 121, 148 (2018).

161. *Id.*

162. I.R.C. § 170(c) (2018); Treas. Reg. § 1.170A-1(h) (2019).

163. Comm'r v. Duberstein, 363 U.S. 278, 285 (1960) (citation omitted); *see also* Olk v. United States, 536 F.2d 876, 879 (9th Cir. 1976) (holding that giving chips to a casino card dealer is not detached and disinterested as it is a "tribute to the gods of fortune" to be "returned bounteously").

164. *See Olk*, 536 F.2d at 879.

165. United States v. Am. Bar Endowment, 477 U.S. 105, 116 (1986) ("A payment of money generally cannot constitute a charitable contribution if the contributor expects a substantial benefit in return.").

166. *Id*. at 117.

167. Sugin, *supra* note 160, at 149 (noting that under certain circumstances "even purely religious benefits can constitute a disqualifying quid pro quo").

168. Rev. Rul. 67-246, 1967-2 C.B. 104.

169. *See* Sugin, *supra* note 160, at 150.

170. *See id.* at 132.

171. *Id.* at 151.

contribution,[172] which could come with naming rights, there would also be a $370,000[173] gift, resulting from the government matching 37 percent of the gift.

Regardless of one's beliefs about whether these incentives are a proper allocation of tax expenditures by the government, they certainly create inequality. Compare the previous hypothetical $1 million gift with a $100 donation by a low-income taxpayer. As previously mentioned, because, generally, only the wealthier taxpayers take the itemized deductions,[174] this low-income taxpayer likely would not receive any tax benefit for his or her charitable gift.[175] He or she also would not receive naming rights for this smaller donation.[176] By reducing the number of low-income taxpayers who use itemized deductions, the TCJA asserts that not only can the wealthy receive social benefits for their large gifts, but these large gifts are also the only gifts that deserve a tax deduction.[177]

3. Government Sponsored Oligarchy

Finally, the TCJA's exacerbated bias for the elite in charitable giving has effects on the structure of civil society. From 2000 to 2012, the percent of those who have given to charity in a year was greater than the voter turnout for the presidential elections,[178] where voters directly use their rights to shape society. Accordingly, it has been proposed that "philanthropy is an important part of [people's] 'voice' in their efforts to help build a civil society."[179] By limiting the itemized charitable deduction primarily to the wealthy, the government is supporting the wealthy's efforts to shape civil society[180] but is not providing the same support to the lower-income taxpayers' attempts to shape society as noted throughout this Section.[181] This

172. This hypothetical gift was made extremely large in order to represent a gift that could receive naming rights.

173. This is assuming that the taxpayer is in the highest tax bracket and that the taxpayer can use the entire charitable contribution deduction.

174. *See supra* Table 2.

175. BRILL & CHOE, *supra* note 157, at 3.

176. *See* Sugin, *supra* note 160, at 132.

177. *See id.* at 148–54; Sugin, *supra* note 14, at 424–27.

178. Rooney, *supra* note 150.

179. *Id.*

180. *See* Danielle Holly, *Billionaires Focus Their Philanthropy on Education, but Will Children Benefit?*, NONPROFIT Q. (Dec. 11, 2018), https://nonprofitquarterly.org/2018/12/11/billionaires-focus-their-philanthropy-on-education-but-will-children-benefit [https://perma.cc/VS6Z-Q996] (noting that philanthropy is simply "rich men deciding what to do").

181. One must also consider that, for example, when a $1 million gift is given to a public radio station, the donor provides a public service for everyone and likely does not receive $1 million of personal utility from the station. Conversely, when a $50 donation is made by a lower income taxpayer, that

policy seems oligarchical especially when considering that the 0.4 percent of wealthiest families, who had net worth over $10 million, gave 20.5 percent of all charitable contributions.[182] Moreover, in the 2012 tax year, the top quintile of taxpayers received more than 80 percent of all the individual charitable tax deductions, including 38 percent for the top percentile.[183] Once again, because of the TCJA, the wealthy generally receive government support in their efforts to exert disproportionate control over society, while those with lower incomes who have a greater need for government support in order to affect society, are generally not given it.[184]

C. Reduced Donations, Especially for Some

While the TCJA exacerbates the elitism of charitable giving, the Act, overall, does not encourage additional charitable giving.[185] All other factors held equal, the Act is projected to reduce charitable contributions as a whole, which alone is problematic.[186] Perhaps most importantly, due to the changes in the TCJA, it is likely that the middle and lower classes will disproportionately reduce their charitable giving because some are no longer incentivized by the charitable contribution deduction.[187] Because the lower and middle classes tend to support different charitable causes than the wealthy,[188] these charities will be disproportionately harmed by the Act.[189]

1. Overall Reduced Charitable Contributions

As written above and shown in Table 2, the government's attempt to simplify the federal income tax by nearly doubling the standard deduction reduces the number of taxpayers who will use itemized deductions and disproportionately reduces the number of lower and middle-class taxpayers claiming the itemized deductions.[190] Importantly for this discussion, those lower and middle-class taxpayers who no longer itemize also no longer have

taxpayer may in fact receive $50 worth of listening, and this "gift" seems like a personal expenditure, which is generally taxable. Sugin, *supra* note 160, at 133–34.

182. *Id.* at 129.

183. CONG. BUDGET OFFICE, 4308, THE DISTRIBUTION OF MAJOR TAX EXPENDITURES IN THE INDIVIDUAL INCOME TAX SYSTEM 18 (2013), http://cbo.gov/sites/default/files/cbofiles/attachments/TaxExpenditures_One-Column.pdf [https://perma.cc/XW5K-97RQ].

184. *See id.*

185. *But see* Sugin, *supra* note 14, at 427–28 (noting that the ceiling on cash donations was raised from 50 percent to 60 percent allowing for greater deductibility of larger gifts).

186. *See* GALE ET AL., *supra* note 3, at 21–22; Sugin, *supra* note 14, at 425–27.

187. Sugin, *supra* note 14, at 425–27.

188. *Id.* at 424–427; GALE ET AL., *supra* note 3, at 21–22.

189. GALE ET AL., *supra* note 3, at 21–22.

190. Sugin, *supra* note 14, at 424–25.

a financial incentive for their charitable giving.[191] Common sense dictates that when incentives are reduced, contributions will also be reduced.

Further, by doubling the gift and estate tax exemption for taxpayers, there is less incentive to give to charity upon death in order to avoid the estate tax as this money is already shielded from taxation through the larger exemption.[192] In the past, when the estate tax has changed, the reaction to the change has been slower than it is to other types of tax changes because wills and trusts have to be adjusted by estate planners.[193] There is ample evidence that these changes do affect charitable giving as research indicates that donors are motivated to give more while they are alive if there is an estate tax.[194]

Finally, by lowering the tax rates, the TCJA reduces the benefit of charitable giving. Previously, the top individual income tax rate was 39.6 percent, but this rate is now only 37 percent. Following the same logic as the deduction example given *supra* Section II.A, the government now only matches 37 percent of the highest income taxpayers' contributions as opposed to matching 39.6 percent of the contribution. This change slightly reduces taxpayers' incentive to give.[195] The rate change combined with the increase in the standard deduction is projected, all other factors equal, to reduce individual charitable contributions by between $5 billion and $24 billion according to various projections.[196]

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191. BRILL & CHOE, *supra* note 157, at 3.

192. *See* BIVIN ET AL., *supra* note 55, at 9–10; Vada Waters Lindsey, *The Charitable Contribution Deduction: A Historical Review and a Look to the Future*, 81 NEB. L. REV. 1056, 1058–59 (2003).

193. *See* BIVIN ET AL., *supra* note 55, at 9.

194. David Joulfaian, *Estate Taxes and Charitable Bequests by the Wealthy*, 53 NAT'L TAX J. 743, 761 (2000).

195. *See* IND. UNIV. LILLY FAMILY SCH. OF PHILANTHROPY, TAX POLICY AND CHARITABLE GIVING RESULTS 8 (2017), https://scholarworks.iupui.edu/bitstream/handle/1805/12599/tax-policy1705 18.pdf?sequence=1&isAllowed=y pdf?sequence=1&isAllowed=y 9 [https://perma.cc/T7E3-5GJ2].

196. *Id.*; *Council on Foundations Statement on Passage of the Tax Cuts and Jobs Act*, COUNCIL ON FOUND. (Dec. 20, 2017), https://www.cof.org/news/council-foundations-statement-passage-tax-cuts-and-jobs-act [https://perma.cc/B4W6-XJ98]; Joseph Rosenberg & Philip Stallworth, *The House Tax Bill is Not Very Charitable to Nonprofits*, TAX POL'Y CTR. (Nov. 15, 2017), http://www.taxpolicycenter.org/taxvox/house-tax-bill-not-very-charitable-nonprofits [https://perma.cc/9KR6-PGAW]. It is possible that the full effect of the TCJA on charitable giving will not be felt until 2019 because of the general public's lack of tax knowledge. Experts have suggested that donors will give in 2018 unaware that their donations are no longer tax deductible due to the increase in the standard deduction. Once they are aware in 2019, they will reduce their contributions. Renu Zaretsky, *For Charitable Giving, 'Tis the Season… But Will It Still Be, Post-TCJA?*, TAX POL'Y CTR. (Dec. 5, 2018), https://www.taxpolicycenter.org/taxvox/charitable-giving-tis-season-will-it-still-be-post-tcja [https://perma.cc/6DHS-8XLE].

2. Disproportionate Damage

Even though the overall amount of charitable contributions is not projected to significantly decrease due to the TCJA, as the extremely wealthy will still receive a tax benefit from charitable giving and many may also give regardless of tax benefits,[197] the reduction is projected to disproportionally affect certain charities.[198] Because the incentive of the charitable contribution deduction has primarily been taken away from the middle and lower classes, as shown in Table 2, the charities supported by these classes are likely to disproportionately lose contributions as the Act's effects begin.[199]

This disproportionality is important because the wealthy and the rest of the population tend to support different charitable causes.[200] Studies have shown that, "people who earn less money are more likely to donate to charity when presented with a request that emphasizes social connection and community. In contrast, wealthier individuals are more likely to give money when presented with a request that appeals to their sense of independence and self-reliance."[201] Further, when separating donors by income level in 2005, The Center on Philanthropy at Indiana University found that the wealthy disproportionately gave to education (25.2 percent of dollars donated), health organizations (25.3 percent), and the arts (15.4 percent).[202] Similarly, upper-middle-class donors also disproportionately gave to the arts and education.[203] Wealthy and very wealthy donors gave a much smaller proportion of their charitable contributions to organizations that address basic human needs, such as shelter, food, and medical care, for the indigent.

197. *See* GALE ET AL., *supra* note 3, at 21–22. Further, the poor also will not be affected by the changes because they, generally, did not take the itemized deduction before the TCJA. *See id.*

198. *See id.*

199. *See* Sugin, *supra* note 14, at 424–27; Vauhini Vara, *The Wealth Gap in Philanthropy*, NEW YORKER (Oct. 27, 2016), https://www.newyorker.com/business/currency/the-wealth-gap-in-philanthropy [https://perma.cc/42QK-LSYK].

200. *See* Kate Rogers, *Poor, Middle Class and Rich: Who Gives and Who Doesn't?*, FOX BUS. (Apr. 24, 2013), https://www.foxbusiness.com/features/poor-middle-class-and-rich-who-gives-and-who-doesnt [https://perma.cc/CGS4-AV4E].

201. *E.g.*, Daisy Grewal, *Wealthy People Give to Charity for Different Reasons than the Rest of Us*, SCI. AM. (July 25, 2017), https://www.scientificamerican.com/article/wealthy-people-give-to-charity-for-different-reasons-than-the-rest-of-us [https://perma.cc/65VC-5GCN].

202. IND. UNIV. LILLY FAMILY SCH. OF PHILANTHROPY, PATTERNS OF HOUSEHOLD CHARITABLE GIVING BY INCOME GROUP, 2005, at 17 (2007), https://scholarworks.iupui.edu/bitstream/handle/1805/5838/giving_focused_on_meeting_needs_of_the_poor_july_2007.pdf?sequence=1&isAllowed=y [https://perma.cc/Y3VW-4WJQ].

203. *Id.* (showing that education represented 31.9 percent of dollars donated while the arts represented 14.8 percent of dollars donated from those that made $200,000 to $1 million per year).

Conversely, the lower classes[204] tended to disproportionately give to religious organizations and the organizations providing basic human needs.[205]

Connecting the study reporting that the wealthy give for different reasons and the study reporting that the wealthy disproportionately give to education shows that perhaps education speaks to the sense of independence that inspires the wealthy to give,[206] and while education may be a worthy cause, organizations such as food banks that provide basic human needs provide an important service that, unfortunately, is highly demanded.[207] This demand may also increase if similar government welfare programs lose funding to pay for the anticipated costs of the TCJA.[208] Charities serving human needs also tend to be on a more local level, generally cash poor, and sensitive to reduced donations.[209] Therefore, a disproportionate adverse effect on these types of charities and charities in general is an alarming problem that should be addressed.

III. A CHARITABLE SOLUTION

Due to the unprecedented political climate outlined in Part I and the harm to the charitable sector outlined in Part II, there has never been a better time for the expansion of the charitable contribution deduction to non-itemizing taxpayers.[210] An expansion of the charitable contribution

204. Here, the lower classes are defined as taxpayers with less than $200,000 in income. *Id.*

205. *Id.*

206. *See* Grewal, *supra* note 201; *see also* IND. UNIV. LILLY FAMILY SCH. OF PHILANTHROPY, *supra* note 202.

207. *See* Joe Davidson, *On Eve of Feds' Giving Deadline, Charities Fear More Decline in Donations*, WASH. POST (Jan. 11, 2018, 4:41 AM), https://www.washingtonpost.com/news/powerpost/wp/2018/01/11/on-eve-of-feds-giving-deadline-charities-fear-more-decline-in-donations/?utm_term=.facb3b5fdb34 [https://perma.cc/96HZ-7NJH]; Kathryn Vasel, *In Booming Economies, Food Banks Are Busier than Ever*, CNN MONEY (Jan. 12, 2018, 11:39 AM), https://money.cnn.com/2018/01/12/pf/housing-prices-food-bank/index.html [https://perma.cc/LB6T-GNVD].

208. William G. Gale, *Who Will Pay for the Tax Cuts and Jobs Act?*, TAX POL'Y CTR. (Jan. 2, 2018), https://www.taxpolicycenter.org/taxvox/who-will-pay-tax-cuts-and-jobs-act [https://perma.cc/52YK-N5FC] ("Republican leaders in Congress have suggested they will turn to cutting welfare and programs such as Medicare and Medicaid once a tax bill is complete.").

209. *See* Keenan Weller, *The Decline of the Small Giver May Presage Decline of Some Small Nonprofits*, NONPROFIT Q. (Nov. 26, 2018), https://nonprofitquarterly.org/2018/11/26/the-decline-of-the-small-giver-may-presage-decline-of-some-small-nonprofits [https://perma.cc/W2JU-K828] (noting that House of Yahweh, a nonprofit best known for its food banks, is facing declining donations, while its board president emphasizes the organizations "hand-to-mouth" existence).

210. For the purpose of this analysis, the proposed "expansion" is any type of tax deduction or credit that allows non-itemizing taxpayers to reduce their tax burden by reporting charitable contributions. There has been significant discussion in the past about the most effective means for this expansion. There is little consensus, and arguments can be made for various options. *See* JOSEPH ROSENBERG ET AL., URBAN

deduction would be popular as it expresses the majority's values in accordance with the expressive theory of law. An expansion would restore taxpayers' tax incentive to give to charities and thus likely restore charitable giving to at least its pre-TCJA level. In the past, various expansions of the charitable contribution deduction have been proposed to address many of the problems outlined in Part II of this Note. However, two arguments concerning the potential for fraud and the price elasticity of the deduction have traditionally blocked further consideration of an expansion.[211] Today, the mentioned potential benefits of the expansion outweigh the past concerns, and this tax policy should be adopted. The adoption of this tax policy would also provide a clear political victory for an administration.

A. POPULAR, EXPRESSIVE, AND CHARITABLE TODAY

1. Popular and Expressive

The majority in the United States has shifted its stance on wealth inequality in taxation, as shown through the disapproval of the TCJA after the general approval of the similar Bush Tax Cuts in the past.[212] Accordingly, a tax cut for the middle and lower classes rather than the wealthy would likely be popular. Because the charitable contribution deduction is now generally only available to the wealthy,[213] an expansion of the deduction to non-itemizing taxpayers would function as a tax cut for middle and lower-class taxpayers.[214] Charitable giving is also a rewarded form of voluntary wealth shifting from the wealthier to the less fortunate, which also addresses the problem of income inequality.[215] In the most general sense, this

INST., THE NEW DEBATE OVER A CHARITABLE DEDUCTION FOR NONITEMIZERS 2–4 (2016), https://www.taxpolicycenter.org/sites/default/files/publication/135446/the-new-ebate-over-a-charitable-deduction-for-nonitemizers.pdf [https://perma.cc/2SPD-ZF3A]; Ellen P. Aprill, *Churches, Politics, and the Charitable Contribution Deduction*, 42 B.C. L. REV. 843, 850–51 (2001); Lindsey, *supra* note 192, at 1064–65; Izzo, *supra* note 147, at 2390–402; Finally, I do not address the question of whether to place a limit on the "expanded deduction" similar to the 60 percent limit on the current charitable contribution deduction. If my general proposal were adopted then this consideration would need to be addressed.

211. *See* ROSENBERG ET AL., *supra* note 210, at 8; Lindsey, *supra* note 192, at 1064–65; Izzo, *supra* note 147, at 2390–402.

212. *See supra* Section I.A.4.

213. *See supra* Table 2.

214. *See* ROSENBERG ET AL., *supra* note 210, at 3–6 (showing that middle- and lower-class taxpayers do currently give to charity and would be able to receive a benefit from the donation).

215. *See* Jeffery M. Jones, *Most in U.S. Satisfied with Quality of Life, Opportunity*, GALLUP (Jan. 25, 2019), https://news.gallup.com/poll/246236/satisfied-quality-life-opportunity.aspx [https://perma.cc/EEC6-3PTD] (reporting that while happy about many aspects of life in the United States, Americans are generally dissatisfied with wealth distribution); *2018 Midterm Voters: Issues and Political Values*, PEW RES. CTR. (Oct. 4, 2018), http://www.people-press.org/2018/10/04/2018-midterm-voters-issues-and-political-values [https://perma.cc/9AZS-URMH] (reporting that there is a significant divide people's

expansion would express a clear message of concern for the lower and middle-class taxpayers as well as those that benefit from the charities. According to the expressive theory of law, this strong, visible expression would likely be supported by the public.[216]

Further, an expanded charitable contribution deduction would provide government support through tax deductions to the lower and middle classes' efforts to construct society according to their own vision through charitable giving. Expanding the charitable contribution deduction would also remove part of the oligarchical nature of the deduction.[217] As noted above, wealthy, itemizing taxpayers' charitable gifts are partially matched by the government, whereas the less wealthy non-itemizers generally do not receive a matching government donation. Accordingly, government support is currently only given to the wealthy's efforts, but the deduction would create a more level playing field in government spending as all charitable gifts would be partially matched by the government.[218] This level playing field[219] is once again in accordance with the majority's values and additional evidence that the expansion of the deduction would be popular in light of the current political climate.

Finally, growth in the charitable sector can also mean a reduction in the size of government welfare programs as the larger charitable sector would be able to provide more of those services.[220] Those in the minority who do not believe there is a problem with wealth inequality can view the expansion of the deduction as a way to curtail the expansion of the federal government.[221] With this in mind, the deduction expresses values that can appeal to a wide range of Americans and therefore would be a clear political

beliefs about the fairness of the U.S. economic system); *Americans' Views on Income Inequality and Workers' Rights*, N.Y. TIMES (June 3, 2015), https://www.nytimes.com/interactive/2015/06/03/business/income-inequality-workers-rights-international-trade-poll.html [https://perma.cc/2WCM-WVPH] (showing that over 60 percent of Americans are against wealth inequality while less believe that the government should intervene in redistribution).

216. *See* Richards, *supra* note 20, at 354; *Results of an Original 2015 National Poll*, *supra* note 134 (reporting a poll in which the public overwhelmingly supported charitable giving and supported the government assisting charitable giving through a tax benefit).

217. *See* Holly, *supra* note 180.

218. *See id*. When determining what type of expansion should be chosen, lawmakers should consider the regressive nature of a deduction versus the progressive nature of a tax credit.

219. Not all of the elitism in charitable giving can be fixed by an expansion of the charitable contribution deduction. For instance, a donation that receives naming rights will still receive a charitable contribution tax deduction. *See supra* Section II.B.2. However, at least now this type of large gift will not be the only type of gift that receives government support.

220. Barbara K. Bucholtz, *Reflections on the Role of Nonprofit Associations in a Representative Democracy*, 7 CORNELL J.L. & PUB. POL'Y 555, 562–63 (1998).

221. Thorndike, *supra* note 105, at 1711.

victory for the administration in power.

2. Restored and Expanded Incentives

As noted above, the TCJA removed an estimated 15 percent of taxpayers' tax incentive to contribute to charities when the Act reduced the number of itemizing taxpayers. This lost incentive will inevitably lead to fewer contributions in the future.[222] An expansion of the charitable contribution deduction would restore the same tax incentive to the 15 percent of taxpayers and give a new incentive to those who did not previously use the itemized deductions. Therefore, it is safe to assume that charitable donations would, at minimum, be restored to pre-TCJA levels; however it is likely charitable donations would exceed these levels under an expanded deduction regime. Importantly, small, local charities providing human services that are frequently supported by the lower and middle classes would recover the funding that is projected to be lost due to the TCJA. Moreover, more funding would potentially be available for these necessary services as the low-income taxpayers who never previously itemized would now have a tax incentive to give to these charities.[223] These concrete benefits should not be ignored and a future administration would be wise to politically capitalize on this area of need by expanding the charitable contribution deduction to non-itemizing taxpayers.

B. PAST CONCERNS AND CURRENT ANSWERS

While there are many reasons why the charitable contribution deduction should be expanded today, two arguments were traditionally used in the past to argue against proposed expansions of the charitable contribution deduction.[224] First, opponents argued that allowing a charitable contribution deduction for non-itemizers creates the potential for widespread tax fraud.[225] Second, opponents argued that expanding the charitable contribution deduction to non-itemizers would not lead to additional donations, only larger government tax expenditures.[226] However, these arguments should not prevent the expansion of the deduction today as there are concrete benefits that can outweigh the potential problems.

222. *See supra* Section II.C.
223. *See supra* Section II.C.2.
224. *See* ROSENBERG ET AL., *supra* note 210, at 8.
225. *See id.*
226. *See id.*

1. Fraud Potential

If the charitable contribution deduction were expanded to include non-itemizers, more taxpayers would report charitable contributions on their tax returns and there would be a corresponding increased likelihood of fraudulent deductions.[227] Accordingly, the Internal Revenue Service ("IRS") would be tasked with the responsibility of ensuring that these additional reported contributions were valid.[228] The IRS may not be up to this task though, as it has had a series of budget reductions resulting in fewer personnel and resources.[229] Accordingly, a larger workload would place extra strain the IRS's limited resources. However, one must view this argument from the standpoint of fairness. Today, primarily wealthy taxpayers are able to report false charitable contributions on their tax returns and risk an audit by the IRS. Therefore, opponents contend that the primarily wealthy itemizing taxpayers should be allowed to risk cheating on their charitable contribution deduction, but the primarily lower and middle-class non-itemizers should not be trusted with this same opportunity. It seems that the wealthy are either more honest or just more privileged. Once again, this change in the tax code would promote equality between the economic classes in accordance with values expressed through the 2016 election cycle.[230]

Moreover, a written acknowledgment is required for any contribution $250 or greater for a donor to use the charitable contribution deduction.[231] In order to assist with the IRS's effort to prevent fraud, the expansion of the charitable contribution deduction could also include a mandate that all deductible contributions must either be at least $250 or expand the written acknowledgement to all donation amounts.[232] While this policy may receive

227. *See id.*; GALE ET AL., *supra* note 3, at 21–22 (stating that when the incentive is taken away, fewer people report contributions so the inverse is assumedly true).

228. *The Agency, Its Mission and Statutory Authority*, INTERNAL REVENUE SERV., https://www.irs.gov/about-irs/the-agency-its-mission-and-statutory-authority [https://perma.cc/E4MY-ES3B] ("The IRS role is to help the large majority of compliant taxpayers with the tax law, while ensuring that the minority who are unwilling to comply pay their fair share.").

229. *See* Emily Horton, *2018 Funding Bill Falls Short for the IRS*, CTR. ON BUDGET & POL'Y PRIORITIES (Mar. 23, 2018, 10:30 AM), https://www.cbpp.org/blog/2018-funding-bill-falls-short-for-the-irs [https://perma.cc/JBC7-9RMD]; Jeanne Sahadi, *'Miserable' Tax Season Could Be Worst in Years*, CNN MONEY (Jan. 5, 2015, 5:26 AM), https://money.cnn.com/2015/01/05/pf/taxes/tax-filing-irs/index.html [https://perma.cc/D9CH-SR9Q].

230. *See supra* Section I.B.3.

231. Ellen P. Aprill, *Reforming the Charitable Contribution Substantiation Rules*, 14 FLA. TAX REV. 275, 276 (2013) (citing I.R.C. § 170(f)(8)(B)).

232. Developing blockchain technology could also assist in this effort by helping verify the legitimacy of the acknowledgements. *See, e.g.*, *How Blockchain Technology Could Improve the Tax System*, PWC, https://www.pwc.co.uk/issues/futuretax/how-blockchain-technology-could-improve-tax-system.html [https://perma.cc/2KSY-FXVJ].

some opposition from charities,[233] it may still be a viable option for overcoming the issue of fraudulent charitable contribution deductions.[234] Finally, technology continues to aid the effectiveness of audits, and in the coming years, tracking donations may be a simple and inexpensive task for the IRS.[235] Therefore, the mere potential for fraud should not prevent the implementation of a politically popular tax policy with concrete benefits.

2. Price Elasticity

The Economic Recovery Act of 1981 allowed non-itemizing taxpayers to deduct their charitable contributions.[236] Five years later, The Tax Reform Act of 1986 no longer allowed non-itemizing taxpayers to take the charitable contribution deduction because there was little evidence at the time that the deduction encouraged additional giving.[237] Today, this proposition is contested between scholars, and particularly in regards to lower-income donors who specifically benefit from an expansion of the charitable contributions deduction.[238] Unfortunately, the only consensus is that the statistics regarding this issue are difficult to capture and that the answer is not clear.[239]

Regardless of the price elasticity of the deduction, the charitable contribution deduction should be expanded to replace the lost contributions caused by the TCJA as outlined in Part II.[240] This expansion would also allow the charities providing much-needed human services supported by the lower and middle classes to receive funding at least to their pre-TCJA levels all other factors equal.[241] Before the TCJA, proponents of an expansion of the charitable contribution deduction had to argue that an expansion of the deduction would create additional donations in order to be effective. Today,

233. ROSENBERG ET AL., *supra* note 210, at 6–7 (stating that increased compliance could be attained through more verification, but some areas of the charitable sector have opposed the requirement).

234. *Id.*; *see also Substantiating Charitable Contributions*, INTERNAL REVENUE SERV., https://www.irs.gov/charities-non-profits/substantiating-charitable-contributions [https://perma.cc/UA5Q-JCJF] (showing that the acknowledgement requirements are used for substantiating charitable contributions).

235. *See, e.g.*, *How Blockchain Technology Could Improve the Tax System*, *supra* note 232.

236. *See, e.g.*, ROSENBERG ET AL., *supra* note 210, at 6.

237. *Id.* at 3 (explaining price elasticity and debating whether it was a positive or negative number for the purposes of the tax expenditure on the charitable contribution deduction).

238. *See* ROSENBERG ET AL., *supra* note 210, at 6; Harvey P. Dale & Roger Colinvaux, *The Charitable Contributions Deduction: Federal Tax Rules*, 68 TAX LAW. 331, 362–63 (2015).

239. Dale & Colinvaux, *supra* note 238, at 362–63.

240. *See supra* Section II.C.

241. The expanded charitable contribution deduction would allow those who no longer itemize due to the TCJA to deduct their contributions and thus give more money to charity like they did prior to the Act. The taxpayers will have, at worst, the same incentive to give as before the TCJA.

the risk of vulnerable charities losing funding due to the loss of government tax incentives provides a strong justification for the expansion of the previously provided incentive. The unproven issue of price elasticity should not be a dispositive barrier to the expansion of the charitable contribution deduction because of the concrete benefit of protecting the charities that are potentially in danger due to the TCJA's changes. Therefore, this proposal should be viewed beyond the issue of price elasticity and focus on the reduced charitable giving outlined in Part II.

CONCLUSION

The TCJA was not the political victory that the Trump Administration desired. The Act's negative implications also harmed some of the nation's most vulnerable charities and perpetuated the wealth inequality plaguing the nation. However, it did create a true opportunity for a successful implementation of a much-needed expansion of the charitable contribution deduction. A future administration should capitalize on this opportunity or continue to miss an opportunity to do good and be rewarded for it with a political victory.