An Economic and Constitutional Case for Repeal of the I.R.C. Section 170 Deduction for Charitable Contributions to Religious Organizations

E. C. Lashbrooke Jr.
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I. INTRODUCTION

The charitable contribution deduction for contributions made to religious, educational and other charitable organizations was enacted in 1917 and, hence, has a history nearly as long as the income tax. Section 170 of the Internal Revenue Code, within limits, allows a deduction for charitable contributions. A charitable contribution is a contribution or gift to or for the use of:

1. A State, a possession of the United States, or any political subdivision thereof, or the United States or District of Columbia provided the contribution or gift is made exclusively for public purposes
2. A corporation, trust, or community chest, fund, or foundation: (A) created or organized in the United States or in any possession thereof, or under the law of the United States, any State, the District of Columbia, or any possession of the United States; (B) organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals; (C) no part of the net earnings of which inures to the benefit of any private shareholder or individual; and (D) which is not disqualified for tax exemption under section 501(c)(3) by reason of attempting to influence legislation, and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office
3. A post or organization of war veterans, or an auxiliary unit or society of, or trust of foundation for, any such post or organization: (A) organized in the United States or any of its possessions, and (B) no part of the net earnings of which inures to the benefit of any private shareholder or individual
4. In the case of a contribution or gift by an individual, a domestic fraternal society, order, or association, operating under the lodge system, but only if such contribution or gift is to be used exclusively for religious, charitable,


scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals.

5. A cemetery company owned and operated exclusively for the benefit of its members, or any corporation chartered solely for burial purposes as a cemetery corporation and not permitted by its charter to engage in any business not necessarily incident to that purpose, if such company or corporation is not operated for profit and no part of the net earnings of such company or corporation inures to the benefit of any private shareholder or individual.²

Other tax exempt organizations do not qualify to receive deductible charitable contributions. A contribution or gift to an individual regardless of how needy or charitable the purpose, is not deductible. A contribution to a foreign charitable organization is not deductible; however, United States-based charitable organizations may use charitable contributions abroad except for contributions by corporations to a trust, chest, fund, or foundation which must be used within the United States or its possessions. However, a domestic charitable organization may not act as a mere conduit for transferring contributions to a foreign organization.³

Limitations are imposed on the amount deductible by individuals based on the type of property which is contributed, the use to which the contributed property is put by the donee, and the kind of charitable organization receiving the contribution.⁴ Corporations are limited to a maximum deduction equal to ten percent of taxable income computed without regard for charitable deductions, most special deductions for corporations (sections 241-47, 249, 250), section 172 net operating carrybacks, or section 1212(a)(1) capital loss carrybacks.⁵

The growing importance of the charitable contribution deduction can be seen by comparing amounts deducted over a period of years. In 1970, the aggregate amount deducted was $12.9 billion.⁶ In 1980, the aggregate amount deducted doubled to $25.8 billion.⁷ In the five years between 1980 and 1985, the amount deducted has almost doubled again to $50.0 billion.⁸

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⁵. Id. § 170(b)(2).
Charitable giving in 1970 amounted to $21.0 billion. This amount more than doubled to $49 billion in 1980. As did the amount of charitable contributions deducted in 1985, charitable giving nearly doubled again over its 1980 figure to $79.8 billion. First reports of charitable giving in 1987 indicate that a record amount of $93.7 billion was donated. Nearly one half ($37.7 billion in 1985) of all charitable giving goes to religious organizations, while educational organizations, hospitals, health organizations, and social welfare organizations combined account for approximately thirty-eight percent ($31 billion in 1985) of the total. Charitable giving consistently amounts to approximately two percent of gross national product.

The magnitude of the deduction for charitable contributions to religious organizations alone makes it worthwhile examining in terms of effectiveness and necessity of purpose. This article examines the charitable contribution deduction for contributions made to religious organizations as a tax expenditure item. The four part analysis examines the rationale for and goal of the deduction, the effectiveness in accomplishing the goal, the desired level of government involvement, if any, and the constitutional issues involved.

II. TAX EXPENDITURE ANALYSIS

The Internal Revenue Code is in fact two documents. The primary function of the code is to describe the normative tax attributes of the revenue system. The remainder of the code consists of tax expenditure items for the benefit of, and tax penalties imposed on, special activities or groups.

Normative tax items deal with the structure of the tax, the establishment of the tax base (what is income), the tax accounting period, accounting concepts applicable to the accounting period,

10. Id.
11. Id. at 6.
14. Id. at 41.
15. "[T]ax expenditures are those] revenue losses attributable to provisions of the Federal tax laws which allow a special exclusion, exemption, or deduction from gross income or which provide a special credit, a preferential rate of tax, or a deferral of tax liability . . . ." Congressional Budget Act of 1974, Pub. L. No. 93-344, 88 Stat. 297, § 3(a)(3).
attention to the revenue provisions. All other items are tax expenditures or penalties and constitute a deviation from the normative tax system.

A tax expenditure item is designed to provide indirect government assistance through the tax system to a particular group or activity, to provide an incentive for economic reallocation of resources, or to penalize certain activity. In effect, a tax expenditure item is a congressional fiscal policy disguised as a tax policy. One must be careful not to confuse tax reform with indirect budget spending. Discussion of tax expenditure items does not fall within the rhetoric of tax reform, but instead should be characterized in appropriations language because tax reform properly only deals with normative tax items. What is being discussed here is congressional fiscal policy, not tax policy or reform.

It was not until 1968 that the Treasury Department compiled the first tax expenditure budget. The Congressional Budget Act of 1974 made the tax expenditure concept an integral part of the congressional budget process. In addition to the requirement that a tax expenditure must be included in the congressional budget, the President is also required to include tax expenditures in the annual budget submitted to Congress. But even under this statutory mandate, the tax expenditure lists are remarkably deficient when it comes to accounting for charitable contributions and tax-exempt organizations. Charitable contributions are only accounted for under education, social services, and health. The greatest omission though is the absence of any tax expenditure item relating to tax-exempt organizations. Tax expenditure lists have never included any item related to non-profit, tax-exempt organizations or charitable contributions to religious organizations; moreover, no explanation has ever been given for the omission. One might speculate that the reason for the omission is that in terms of magnitude the loss of income is very high and so remains hidden from

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16. See Congressional Budget Office, Five Year Budget Projections, Supplement on Tax Expenditures 1 (1977);
[A] tax expenditure is analogous to an entitlement program on the spending side of the budget; the amount expended is not subject to any legislated limit but is dependent solely upon taxpayer response to the particular provision. In this respect, tax expenditures closely resemble spending programs that have no ceiling.

Id.


There are some commentators who argue that this omission from the tax expenditure list is proper. Professor William Andrews, for example, argues that charitable contributions should not be considered consumption. If they are not consumption, then the amount of the charitable contribution is not part of the normative tax base, and, therefore, the charitable contribution deduction is not a tax expenditure item. Andrews admits that his concept of an ideal personal income tax base differs from the Simons definition of income. Andrews has changed the meaning of consumption from the Schanz-Haig-Simons definition of net of expenditure over costs incurred in the earning or production of income to a "standard of living" concept. Andrews' argument is simply that the donor's standard of living is unaffected by a charitable contribution, and hence, there is no consumption which inures to the benefit of the donor.

There is no congressional support for this position. If Congress wanted to exclude charitable contributions from the normative tax base, it could have excluded it from income or treated it as an "above the line" deduction under section 62 so that all taxpayers benefit, not just itemizers. Deductions for charitable contributions to religious organizations should be included in the list of tax expenditure items. To the extent that charitable contributions to religious organizations represent consumption for the donors in the


20. Using a Schanz-Haig-Simons definition of income, modified to fit the tax code, income is the algebraic sum of the market value of rights exercised in consumption plus the change in the value of the store of property rights between the beginning and end of the period in question. Under this definition, income is the sum of the net change in wealth from the beginning of the period to the end of the period plus consumption during that period. For tax purposes, this economic definition of income must be modified so that it may be used in the normative tax provisions. Consumption means the net of expenditures over costs incurred in the earning or production of income. Also excluded from the definition are certain items of income that have not been historically treated as income in the United States. The Treasury Department has cited only two such items: unrealized appreciation in asset values during a person's lifetime and imputed income from homes or other durable consumer assets. See Office of Management and Budget, Special Analysis G: Tax Expenditures, Special Analysis, Budget of the United States Government 1984 at G-2-G-3.


22. Id. at 315.


24. Id. at 314.
Simons sense of consumption, and to the extent that they are untaxed as a result of the deduction, those amounts are excluded from the normative tax base, thereby resulting in tax expenditure items.

Just because an item appears as a tax expenditure does not mean that it is necessarily bad. What it does mean is that each tax expenditure item should be treated as if it were a direct appropriation item. This is so for numerous reasons. First, whether recognized by Congress or not, a tax expenditure item has the highest priority of any spending item. Because the revenue is simply never collected, it always has first priority over any budgeted item for which the revenue must be collected and then appropriated. Second, there is a lack of control over the distribution of the tax expenditure item. It is left in the hands of the private sector without effective government control. Third, tax expenditure items virtually escape any deficit reduction attempt because of the mindset that deficit reduction applies only to direct appropriation items. Fourth, there is a filter effect where first order recipients of a tax expenditure item extract a high price for providing the service; that is, there is in effect a private sector middleman in almost every tax expenditure item. Fifth, the Internal Revenue Service is involved in businesses other than revenue collection and administration. For example, in the charitable contribution area, the Internal Revenue Service is engaged in activities dealing with the regulation of charitable deductions and in writing regulations that determine who is entitled to a charitable deduction and to what extent. This type of activity unnecessarily burdens the Service with items outside of the revenue area and in areas in which the Service does not have the requisite expertise. Sixth, tax expenditure items that should be administered by other administrative agencies (for example HUD or HEW) are dealt with by the Internal Revenue Service and are treated in tax committees in Congress rather than the substantive committees that are properly assigned that particular subject area.

26. Id. at 33-34.
27. Id. at 48-54.
28. Id. at 83.
29. Id. at 70.
30. Id. at 70, 106.
31. Id.
tees are writing housing regulations, regulating charity, and are involved in religion.

Tax assistance through the tax expenditure items is legally equivalent to direct assistance. Therefore, tax expenditure items must be individually examined to determine whether or not: (1) the goal is compatible with congressional intent, i.e., what social service is desired or intended?; (2) the tax expenditure item or preference group accomplishes the goal?; (3) if the goal is desirable and the preference group can attain that goal, which is preferable: a direct expenditure with government supervision or an indirect tax expenditure with little or no government oversight?; and (4) the tax expenditure preference item or exemption would be constitutional if it were a direct expenditure?

A. Is the Goal Compatible with Congressional Intent?

To answer this question, we must determine what social service Congress desired or intended by granting a deduction for charitable contributions to religious organizations. The House of Representatives in its report\(^{32}\) in 1938 articulated the rationale for the charitable contribution deduction:

The exemption from taxation on money or property devoted to charitable and other purposes is based on the theory that the Government is compensated for the loss of revenue by its relief from financial burden which would otherwise have to be met by appropriations from public funds, and by the benefits resulting from the promotion of the general welfare.\(^{33}\)

This rationale does not support privatization whereby the government transfers a government function to the private sector which can provide the service or product more efficiently than the government. Nor are costs shifted from the public treasury to the private sector. What is involved is a decision to subsidize religious organizations through a tax expenditure in lieu of a direct appropriation for social welfare services.

From what financial burden is the government relieved by granting a deduction for charitable contributions to religious organizations? Direct appropriations for religious purposes raise constitutional questions, so the government financial burden relieved should be limited to secular activities.\(^{34}\) But leaving the constitutional questions aside for the moment, what social services do reli-

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33. Id. at 19.
34. See infra text accompanying notes 111-22.
igious organizations provide that Congress should subsidize?

It is assumed without elaboration that religious organizations provide social welfare services to the community. The Supreme Court tells us that section 170 "simply makes plain what common sense and history tell us: . . . [that] Congress sought to provide tax benefits to charitable organizations, to encourage the development of private institutions that serve a useful public purpose . . . ."

Chief Justice Burger in discussing the tax exemption in *Walz v. Tax Commission of the City of New York* said:

[I]t [is] unnecessary to justify the tax exemption on the social welfare services or 'good works' that some churches perform for parishioners and others — family counselling, aid to the elderly and the infirm, and to children. . . . To give emphasis to so variable an aspect of the work of religious bodies would introduce an element of governmental evaluation and standards as to the worth of particular social welfare programs, thus producing a kind of continuing day-to-day relationship which the policy of neutrality seeks to minimize. Hence, the use of a social welfare yardstick . . . could conceivably give rise to confrontations that could escalate to constitutional dimensions.

This statement is particularly illuminating considering that Chief Justice Burger in *Bob Jones University v. United States* stated that sections 170 and 501(c)(3) must be construed together. If so, the relief from financial burdens for social welfare programs element of the congressional rationale would not apply to deductions for charitable contributions made to religious organizations, and we must look only to the promotion of the general welfare. But it is not so easy to dismiss the congressional intent. It may not be necessary to examine each church individually, as Chief Justice Burger feared, but rather to examine them as a class which Congress has decided does provide social services otherwise compensable out of the public treasury.

The congressional intent in enacting the charitable deduction was to subsidize social services which could be appropriated from the public treasury. The government cannot operate a church.

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35. *E.g.*, Justice Brennan, concurring in *Walz v. Tax Comm'n of New York*, 397 U.S. 664, 687 (1970), said categorically that religious organizations provide nonreligious services to the community that would otherwise have to be met by general taxation. He did not elaborate.


38. *Id.* at 674.


40. *Id.* at 587 n.11.

41. *See supra* note 32.
Worship cannot be supported by direct appropriation. Nevertheless, part of every dollar donated to religious organizations goes to support worship or other religious activities. Section 170 does not distinguish between contributions to religious organizations which support worship and those that support social services. All are deductible. Congress, through section 170, subsidizes religion. The goal far exceeds the congressional intent.

Family counseling, aid to the elderly and infirm, et cetera, can be and are done by other charitable organizations without religious entanglement. If the goal is simply to provide social services instead of subsidizing religion, as between equally efficient conveyers, Congress should be neutral. But religious organizations are less efficient on a cost/benefit analysis than other charitable organizations because a large portion of every dollar donated to religious organizations is devoted to worship. This defeats the efficiency rationale for shifting the social welfare burden to the private sector to cut government overhead and costs, and makes the goal incompatible with congressional intent.\textsuperscript{2}

The second part of the congressional rationale for the charitable deduction is that the activities of the charitable organization promote the general welfare.\textsuperscript{4} One often hears the argument that religion is the buffer between human nature and the state. Without a belief in an ultimate reward in an afterlife for the sufferings and deprivations in this life, the poor, homeless and disenfranchised would rise up and bring down the government and their oppressors. Of course, history teaches us a different lesson. Organized religion did not save Louis XVI and the French aristocracy anymore than it did Czar Nicholas II and the Russian boyars, primarily because organized religion was entwined with the state.

Nevertheless, our Declaration of Independence, constitution and governmental institutions are predicated on the existence of a Supreme Being. Mr. Justice Douglas in \textit{Zorach v. Clauson}\textsuperscript{44} said: "When the state encourages religious instruction . . . it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs."\textsuperscript{45} Mr. Justice Brennan in \textit{Walz} said:

\begin{quote}
[R]eligious organizations . . . uniquely contribute to the pluralism of Amer-
\end{quote}

\textsuperscript{42} See infra text accompanying notes 104-08.
\textsuperscript{43} See supra note 32.
\textsuperscript{44} 343 U.S. 306 (1952).
\textsuperscript{45} \textit{Id.} at 313-14.
ican society by their religious activities. . . . During their ordinary operations, most churches engage in activities of a secular nature that benefit the community; and all churches by their existence contribute to the diversity of association, viewpoint, and enterprise so highly valued by all of us. . . . Viewed in this light, there is no nonreligious substitute for religion as an element in our societal mosaic . . . .

From another viewpoint, religion is one of the atavistic elements of today's cohesive social entities. The social code underwritten by religious values is elevated to a higher level than the individual's life, making possible group loyalty and individual sacrifice for the group's sake. This group loyalty contributed to the cohesiveness of the nascent nation-state. But in a pluralistic society, the sense of social unity and purpose has a dark side. The concept of social unity and purpose breeds an isolationism and contempt for those who are not a part of the group. One sect is pitted against another and all against the nonbelievers. Intolerance rips the fabric of a pluralistic society.

American society is more complex and stressful today than when the charitable contribution deduction was written into the Internal Revenue Code. Complexity is the result of being affiliated with a multitude of groups and organizations each with its own allegiances and competing demands. The bonds of loyalty to family, church, state, employer and land are strained. None can command an unswerving loyalty from the individual anymore. In today's society, religion plays a lesser role than in times past. Stress results from the more detailed, technical government regulation of all parts of life, work, and play. Increased government regulation of life results in more and more government entanglement with religion and religious values. But when government and religion get tangled the worst is brought out. James Madison did not think the goal compatible with government intent to subsidize religious activities when he wrote:

47. See Wilson, Religion, Rational Society, and the Modern Concept of Peace, 3 INT'L J. ON WORLD PEACE 67, 72 (1986).
48. Id.
49. Id.
50. Id. at 72-73.
51. A Gallup poll taken in 1985 revealed that only 55% of the population viewed religion as important in their lives. Between 1947 and 1985, the number of Protestants fell 17%, while the number of Jews fell 60%. The number of Catholics increased 40%, but they represented only 20% of the population in 1947. See 1985 GIVING REPORT, supra note 9, at 51.
[E]xperience witnesseth that ecclesiastical establishments, instead of maintaining the purity and efficacy of Religion, have had a contrary operation. During almost fifteen centuries, has the legal establishment of Christianity been on trial. What have been its fruits? More or less in all places, pride and indolence in the Clergy; ignorance and servility in the laity, in both, superstition, bigotry and persecution. Enquire of the Teachers of Christianity for the ages in which it appeared in its greatest lustre; those of every sect, point to the ages prior to its incorporation with Civil policy. Propose a restoration to this primitive state in which its Teachers depended on the voluntary rewards of their flocks; many of them predict its downfall. On which side ought their testimony to have greatest weight, when for or when against their interest.  

Reasonable men might differ as to whether or not the goal is compatible with congressional intent, but on which side ought their testimony have greatest weight?

B. Does It Accomplish the Goal?

1. Equitably

The principal lesson to be derived from the tax expenditure analysis is that deductions (or exclusions) in the individual income tax are inferior devices for implementing objectives extraneous to those of the tax itself. It will not generally make sense to distribute government funds according to the graduated rates in the personal income tax unless the purpose of the distribution is intrinsically related to the distribution of tax burdens that those rates are designed to effect.

Tax expenditure analysis shows that the section 170 deduction primarily benefits high income taxpayers. If the object is to fund charitable contributions out of the pockets of the rich at a lesser cost to them than to middle and low income taxpayers, then the policy is a success. The charitable contribution deduction has an upside-down effect in that taxpayers most able to afford to make charitable contributions reap the benefit of the deduction by incurring a lower price of contributing. The least able to afford to make the contributions bear a higher cost. For example, a high income, itemizing taxpayer has a cost per dollar of charitable contributions of 1-MR, where MR is the taxpayer's marginal rate, while a low


53. Andrews, supra note 19, at 311.

54. In 1984, taxpayers with annual incomes of more that $50,000 (less than five percent of all taxpayers) accounted for 54.9% of all charitable contributions. See Tax Expenditures, supra note 25, at 72.
income, nonitemizing taxpayer has a cost per dollar of charitable contribution of one dollar. While it is true that the lower rate schedule in effect after the passage of the Tax Reform Act of 1986\textsuperscript{55} reduces the upside-down effect to some extent, it makes more taxpayers nonitemizers because of increased personal exemptions and standard deductions, thereby increasing their cost of giving. Yet, repeal of the charitable contribution would result only in a seven percent reduction in contributions made to religious organizations\textsuperscript{56} because nearly three-fourths of contributions to religious organizations come from low income taxpayers.\textsuperscript{57} Accordingly, high income taxpayers reap a tax windfall virtually unrelated to the congressional purpose of shifting the cost of public welfare programs supported by religious organizations to private individuals or promoting the general welfare. The section 170 deduction for charitable contributions to religious organizations simply does not provide the incentive to give to religious organizations. That incentive lies in the individual's moral and religious values as a matter of conscience.

2. Economically

Economic studies show that charitable contributions, in general, are increased substantially by the section 170 deduction.\textsuperscript{58} Moreover, to use the best case scenario, the efficiency of the section 170 deduction is greater that 100 percent so that the amount received by charitable organizations exceeds the amount of revenue lost by the government.\textsuperscript{59}

It is generally agreed that the amount of charitable contributions in the aggregate is quite sensitive to the tax treatment. Estimates

\textsuperscript{56} See Feldstein, The Income Tax and Charitable Contributions: Part II — The Impact on Religious, Educational and Other Organizations, 28 Nat'l Tax J. 209, 221, 224 (1975) [hereinafter Feldstein Part II].
\textsuperscript{57} See infra text accompanying notes 67-69.
\textsuperscript{59} Feldstein Part I, supra note 58, at 82. Contra Taussig, Economic Aspects of the Personal Income Tax Treatment of Charitable Contributions, 20 Nat'l Tax J. 1 (1967). Taussig found the efficiency to be very low. He reported that charities only received five cents on the dollar for every dollar of revenue lost by the government. Taussig himself warns the reader about shortcomings and biases in his work.
of reductions in charitable giving resulting from the repeal of section 170 are between twenty-five and fifty percent of total individual giving.\textsuperscript{60} The issue here is not charitable giving in the aggregate, but rather charitable giving to religious organizations. It is the effect of repeal of section 170 on the distribution of charitable contributions that concerns us as an indication of what the result of selective repeal would be.

For those itemizers who take advantage of the charitable contribution deduction, the price elasticity is -1, which means that the amount of the total charitable contribution deduction remains constant with respect to the deductibility of the contribution.\textsuperscript{61} What happens is that charitable contributions are redistributed away from educational and cultural organizations because the sensitivity of charitable giving to changes in the tax treatment varies depending on the type of donee.\textsuperscript{62} The tax expenditure budget for 1977 showed that more than seventy-three percent of charitable contributions came from the top 1.4 percent of the taxpayer population by income.\textsuperscript{63} Loss of deductibility of charitable contributions to educational institutions and hospitals would result in a precipitous drop in charitable contributions to these organizations. Total repeal of section 170 would affect educational institutions and hospitals (up to a sixty-five percent reduction) far more than religious organizations (seven percent reduction).\textsuperscript{64} It is expected that the lower rate schedule of the Tax Reform Act of 1986\textsuperscript{65} will result in a lesser amount of charitable contributions to educational and cultural organizations because it raises the price of the charitable contribution to high income taxpayers.\textsuperscript{66}

Contributions to religious organizations are primarily made by

\textsuperscript{60} Feldstein Part I, supra note 58, at 97; Feldstein and Clotfelter, Tax Incentives and Charitable Contributions in the United States, 5 J. of Pub. Economics 1, 24 (1976).

\textsuperscript{61} Feldstein Part II, supra note 56, at 209-10.

\textsuperscript{62} Id. at 224.

\textsuperscript{63} See Tax Expenditures, supra note 25, at 71.

\textsuperscript{64} Feldstein Part II, supra note 56, at 209, 221, 224.

\textsuperscript{65} The prior rates ranged from 11\% to 50\% with as many as 15 brackets. The current structure has two rate brackets at 15\% and 28\%; however, some taxpayers may have a marginal rate of 33\% as a result of the two five percent surcharges. See I.R.C. \S\ 1 (1986).

\textsuperscript{66} The cost of charitable giving is equal to 1-MR, where MR is the taxpayer's marginal tax rate, i.e., the taxpayer may either have 1-MR cash in hand or donate one dollar to charity. The highest marginal tax rate in 1988 is 28\%, down from 50\% in 1986; therefore, the cost of a charitable contribution has risen from fifty cents on the dollar (1-.50) to seventy-two cents on the dollar (1-.28). This increase in the cost of charitable contributions is expected to have a substantial negative impact on charitable giving.
low income taxpayers. Studies show that the section 170 deduction for charitable contributions to religious organizations does not substantially affect the behavior of the majority of donors. In 1962, approximately fifty-six million out of the sixty-two million taxpayers who filed returns had annual incomes of less than $10,000. Of this group, only thirty-eight percent itemized but accounted for seventy-four percent of all charitable contributions to religious organizations. The important statistic is that their marginal rates were very low, making the cost of giving high. Consequently, the repeal of section 170 with respect to contributions to religious organizations would have little effect since the difference in the cost of giving would be small. Such donors will give to their respective churches or religious organizations notwithstanding the deductibility of their contribution. In addition, substantial amounts of charitable contributions to religious organizations come from nonitemizing taxpayers who, since the termination of the direct charitable deduction on December 31, 1986, do not benefit from section 170.

Clearly, the rationale that the deduction for charitable contributions to religious organizations relieves the government of any financial burden which would have to be met otherwise by appropriations, if constitutional, is false. In fact, the contributions are made in any event, and the government forgoes a significant amount of income, the amount of which is admittedly significant but not readily ascertainable because of the lack of data.

3. Philosophically

The economic argument used for individuals is not valid for corporations. The economic literature shows that the corporate tax has a price and net-income effect on corporate giving. Corporate

67. In 1962, 82% of gifts to religious organizations came from taxpayers having annual incomes of less than $15,000, while 74% came from taxpayers with annual incomes of less than $10,000. Feldstein Part II, supra note 56, at 214. Fifty-six percent of the people having annual incomes of less than $10,000 give a high priority to giving to religious organizations. See 1985 GIVING REPORT, supra note 9, at 53.
68. Feldstein Part II, supra note 56, at 224.
69. Id.
70. See supra note 66.
71. Id.
73. See TAX EXPENDITURES, supra note 25, at 220; Feldstein Part II, supra note 56, at 210. If one-half of aggregate charitable contributions deducted in 1985 went to religious organizations, as do nearly 50% of all charitable contributions, the treasury lost tax revenues on approximately $25 billion.
74. See C. CLOTFELTER, supra note 58, at 275.
Charitable contributions are proportional to after tax income. Moreover, corporations do not have a standard deduction; hence, every dollar of charitable contributions is deductible up to the statutory limit so that the problem of equity between individual taxpayers who itemize and those who do not does not arise in the corporate context. But there are compelling reasons why corporations should not be permitted to take a charitable contribution deduction for contributions to religious organizations.

There are fundamental differences between individuals and corporations. Corporations are creatures of the state, created for profit with authority to operate only within the parameters set forth in state law so that corporate decision-making is thereby limited. Individuals are endowed with freedom of choice and "owe their existence to a higher sovereign [than the state]." Professor Jeffrey Nesteruk has analyzed and compared the decision-making process of individuals and corporations by examining the corporate analogues of individual reason and desire in the corporate context. He equates desire with profit seeking shareholders, and reason with corporate management charged with making the daily corporate decisions, and concludes that the corporate decision-making process distorts the dynamics of individual moral choice.

75. Id.
77. Professor Nesteruk describes the roles of desire and reason in individuals as follows:
All individuals experience tensions, at least at times, between what they want to do and what they ought to do. This tension may be expressed as a conflict between reason and desire. Desire is the motivational, wanting aspect of the psyche, while reason is the evaluating aspect, the setter of standards. To do what is right entails using reason to evaluate either conflicting desires or conflicts between desires and some standard of proper behavior. For while each desire has as its aim some end—it can only want such an end—not evaluate its worthiness. The evaluation of competing ends is reason's role.

78. Id. at 691.
79. The distortion is caused by the separation of ownership and control in the modern corporation which results in the lack of an intimate and interactive relationship between the two corporate analogues of reason and desire—management and shareholders—whereas in a natural person reason and desire are united and reason's evaluation of the ends of desire is an act of self-determination. Professor Nesteruk describes two distortions—the distortion of displaced reason and the distortion of unrestrained desire. The distortion of displaced reason is the result of the corporate analogue of reason—management—usurping the function of desire by not having to respond to the multiple personal ends of the individual shareholders who do not meaningfully participate in modern corporate decision-making. The second distortion—the distortion of unrestrained desire—also is caused by the separation of control
This conclusion leads him to the further conclusion, of importance here, that corporations are not moral agents.\textsuperscript{80}

A moral agent is an entity capable of making a moral choice based on a concept of right and wrong. This issue is important because the value of the first amendment religious freedoms as well as other individual rights and freedoms is premised on the concept of moral agency.\textsuperscript{81} To have a religious belief presumes the ability to embrace moral choice. Corporations, being mere creatures of the state, must operate within the parameters of state corporation law and are, therefore, incapable of making decisions based on moral considerations. They are constrained by the framework of the profit motive.

The landmark case in this area is \textit{Dodge v. Ford Motor Company}.\textsuperscript{82} The issue in the case was whether or not a corporation organized for profit could divert its profits from the shareholders to society-at-large. The court drew a distinction between incidental humanitarian expenditure of corporate funds for the benefit of employees and a general purpose plan to benefit mankind.\textsuperscript{83} The court was clear when it stated:

\begin{quote}
A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end. The discretion of directors is to be exercised in the choice of means to attain that end and does not extend to a change in the end itself, to the reduction of profits or to the nondistribution of profits among stockholders in order to devote them to other purposes. . . . [I]t is not within the lawful powers of a board of directors to shape and conduct the affairs of a corporation for the merely incidental benefit of shareholders and for the primary purpose of benefiting others, . . . .\textsuperscript{84}
\end{quote}

from ownership in the modern corporation. The shareholder desire for profit is a controlling end for management which only may choose among means to that end rather than among competing ends. The dynamic of the moral agent is then reversed because desire determines the legitimacy of reason's actions rather than reason evaluating desire. \textit{Id.} at 696-99.

\textsuperscript{80} \textit{Id.} at 701.

\textsuperscript{81} James Madison wrote in his \textit{Memorial and Remonstrance Against Religious Assessments}:

Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature an unalienable right. It is unalienable; because the opinions of men, depending only on the evidence contemplated by their own minds, cannot follow the dictates of other men.

\textit{2 Writings of James Madison} 183 (G. Hunt ed. 1901), as reproduced in the Appendix to the dissenting opinion of Rutledge, J., in \textit{Everson v. Board of Educ.}, 330 U.S. 1, 63 (1947).

\textsuperscript{82} 204 Mich. 459, 170 N.W. 668 (1919).

\textsuperscript{83} \textit{Id.} at 506-507, 170 N.W. at 684.

\textsuperscript{84} \textit{Id.} at 507, 170 N.W. at 684.
This statement is in effect a reflection of the underlying moral agency issue. Corporations are restricted to deciding the means to the end but not what the end is to be, for that is decided by the state.

More recent cases tend toward a social responsibility theory for corporations. Nonetheless, the profit motive remains the driving force behind corporate existence, and social responsibility is constrained by reasonableness. The reasonableness test, however, should be applied within the framework of moral agency because what is reasonable is a value judgment. Corporations should be prohibited from making decisions involving individual freedom of conscience because they do not have an "intellect" or "mind" and are, therefore, incapable of exercising individual freedom of conscience. It would be unreasonable to expect or allow a corporation to make a decision which ordinarily involves the exercise of individual freedom of conscience.

Making a charitable contribution to a religious organization is an exercise of the individual freedom of conscience. Giving to a religious organization is predicated on a belief in certain religious tenets and dogma and their propagation. Corporations not being moral agents cannot make value judgments, have religious beliefs, or worship. To allow corporations to make charitable contributions to religious organizations undermines the concept of individual conscience which is at the base of religious belief. Economic studies of corporate charitable giving confirm this.

The economic literature shows that the corporate tax has a price and net-income effect on corporate giving. Corporate charitable contributions are proportional to after-tax income, and corporations tend to make charitable contributions when doing so has a positive effect on after-tax profits. In a study of corporate contributions during the period 1936-1961, Professor Orace Johnson established that only in years of high marginal tax rates on excess

86. "[T]he test to be applied in passing on the validity of a gift such as the one here at issue is that of reasonableness..." Id. at 405.
87. Chief Justice Rehnquist in his dissent in Pacific Gas & Elec. v. Public Util. Comm'n of California, 475 U.S. 1, 33 (1986) makes this point by saying: "To ascribe to such artificial entities an 'intellect' or 'mind' for freedom of conscience purposes is to confuse metaphor with reality." Id.
88. See C. CLOTFELTER, supra note 58, at 275.
89. Id.
90. Id.
profits has corporate giving approached the five\textsuperscript{91} percent statutory limit,\textsuperscript{92} and that corporate giving dropped precipitously in the years for which the excess profits tax was removed.\textsuperscript{93} Corporate giving is bottom line oriented. Moreover, the amount of corporate giving seems to be related to the competitive position of the firm in the industry.

In Adam Smith's ideal world of pure competition, no corporate giving would be tolerated since to make a charitable contribution is to raise the cost of goods and price oneself out of the market. Monopolists, at the other extreme, have no incentive to make charitable contributions if they are profit maximizers. The only corporations with an incentive to make charitable contributions are the so-called "rival" firms. The rival firms are corporations that are oligopolistic,\textsuperscript{94} imperfectly or monopolistically competitive,\textsuperscript{95} which seek a comparative advantage over each other by such means as contributions, public relations, advertising, and innovative marketing and management.\textsuperscript{96} Professor Johnson has established that these predictions are true.\textsuperscript{97} Corporate charitable giving, consistent with corporate status, is motivated by profits.

The profit motive is diametrically opposed to the values underlying first amendment religious freedom and the charitable contribution deduction for contributions made to religious organizations. At a minimum, so much of I.R.C. section 170 which allows corporations to take deductions for charitable contributions to religious organizations should be repealed.

C. Direct or Indirect Expenditure?

In 1917, Congress decided to opt for the indirect expenditure of government funds for charitable purposes through the predecessor of section 170.\textsuperscript{98} It is highly unlikely that this decision was a con-

\textsuperscript{91} The corporate limit is currently 10%. See I.R.C. § 170(b)(2) (1986).
\textsuperscript{92} See Johnson, Corporate Philanthropy: An Analysis of Corporate Contributions, 39 J. Bus. 489, 492 (1966) [hereinafter Johnson].
\textsuperscript{93} Id.
\textsuperscript{94} An oligopoly is a market where there are only a few competing producers so each producer must take into account what each other producer does. See B.T. Allen, Managerial Economics 117 (1988) [hereinafter Managerial Economics].
\textsuperscript{95} Monopolistic competition is the result of having many sellers of only slightly differentiated products but not enough sellers to make the market purely competitive. See Managerial Economics, supra note 94, at 116-17.
\textsuperscript{96} Johnson, supra note 92, at 497.
\textsuperscript{97} Id. at 496-98.
\textsuperscript{98} See supra note 1.
Charitable Deductions

1989

scions one involving even rudimentary tax expenditure analysis. Rather, Congress was simply carrying on the American tradition of private philanthropy for the public good. Historically, religious and other charitable organizations devoted a great deal of their resources to relief of the poor and infirm and to education. Congress continued the tradition with an indirect tax subsidy, through what is now section 170, to encourage private donations to charitable organizations.

One of the basic problems with the section 170 deduction is distribution. High income taxpayer sensitivity to the cost of giving (1-MR) causes shifts in giving patterns,\(^9^9\) causing problems in delivering services where needed or desired most. Educational institutions which have a high national priority are among the most affected.\(^\text{100}\) The exception to this pattern is giving to religious organizations, which is resistant to changes in the cost of giving.\(^\text{101}\) The distribution problem, which could be solved by government regulation of gift allocation or more simply by changing the indirect tax subsidy to a direct spending program, does not pertain to the issue of partial repeal of section 170 because of the price inelasticity of giving to religious organizations.

During the great depression it became painfully obvious that the private sector could not cope with the volume of people forced onto the welfare rolls. At that point, Congress opted for direct expenditures in social welfare services, most notably the social security system.\(^\text{102}\) Today the private and public welfare systems exist side by side, and both systems involve government revenues. Costs of private social welfare programs provided by charitable organizations are not shifted from the treasury to the private sector. The choice here is not one of privatization whereby a government function, performed at zero or below full-cost prices, is transferred to the private sector at prices which reflect the true cost of production.\(^\text{103}\) The choice between direct and indirect expenditure does not alter the source of funds which is still the public treasury.

There are two efficiency issues to be explored. The first is the efficiency of the section 170 deduction. The cost/benefit question involved is whether or not charitable organizations receive more

\(^{99}\) See supra text accompanying notes 62-66.

\(^{100}\) Id.

\(^{101}\) See supra text accompanying notes 67-72.


\(^{103}\) ENTREPRENEURSHIP AND THE PRIVATIZING OF GOVERNMENT 4 (C. Kent, ed. 1987) [hereinafter ENTREPRENEURSHIP].
money as a result of the section 170 deduction than the government loses in revenue. It has generally been thought that the section 170 deduction is inefficient, but recent economic studies show that it may be more efficient than previously thought. The price elasticity clustering about -1.1 means that more than 100 percent of the amount forgone by the treasury is donated to charitable organizations. The efficiency of the cost/benefit of the deduction pales, however, when compared with the inefficiency of charitable organizations, particularly religious institutions. Every tax expenditure item has a middleman involved who delivers the intended government benefit to the ultimate consumer or beneficiary. In the case of the charitable contributions deduction, the middleman is the charitable organization which incurs administrative and overhead costs of its own. Charitable organizations, generally, are less efficient than for-profit enterprises because market pressures do not force them to be efficient. There is no institutional profit incentive nor a personal profit incentive since none of the net earnings may inure to the benefit of any individual. In religious organizations, the situation is exacerbated since contributions attributable to worship and public charity are not differentiated; therefore, a portion of every dollar contributed to religious organizations goes to support worship, thereby reducing the amount available for charitable purposes. Since a direct subsidy of worship is unconstitutional, an equivalent direct spending program would have to be limited to charitable activities not involving religion, but that would involve the excessive entanglement that Chief Justice Burger worried about in Walz. Such a program, without more, would be more efficient than charities operated by religious institutions.

But there is no need for a direct spending program to replace the indirect tax subsidy to religious organizations because the level of giving to religious organizations would remain nearly constant

104. See supra note 60.
105. Id.
106. Inefficiency in nonprofit areas is largely attributed to attenuated or lack of ownership rights by participants. "Where ownership rights are attenuated, the managers of the unowned assets have little incentive to monitor the use of those assets. The cost of monitoring may be heavy in terms of time and personal relations, particularly if it yields no visible rewards." ENTREPRENEURSHIP, supra note 103, at 38.
108. See infra text accompanying notes 111-122.
109. See supra text accompanying note 38.
without the section 170 deduction. There is no need to choose between direct or indirect expenditure. Neither is necessary. Congress can extract itself from religious entanglement and save money without doing harm to religious organizations or the ultimate consumers of the charitable works by repealing the section 170 deduction for charitable contributions to religious organizations.

D. Constitutionality

The first amendment contains two provisions with respect to religion. Congress may neither establish a religion, nor may it prohibit the free exercise of religious beliefs.  

1. Establishment Clause

The establishment clause is concerned with "sponsorship, financial support, and active involvement of the sovereign in religious activity." The first amendment was written in response to old-world practices and persecutions that were transplanted in the new-world. Particularly onerous was the practice of taxing to maintain and support established religions. This is consistent with colonial dislike for any tax whether it be on tea, stamps, or whatever. Virtually every colony imposed a tax for the support of a church, and punishment was often meted out for failure to pay taxes and tithes to support the established religion.

The reaction against established religion resulted in the "conviction that individual religious liberty could be achieved best under a government which was stripped of all power to tax, to support, or otherwise to assist any or all religions." James Madison's famous MEMORIAL AND REMONSTRANCE was written to protest the proposed renewal of Virginia's tax for the support of the established church. Madison wrote: "[T]o compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical; . . . ." The Supreme Court has

110. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." U.S. CONST. amend. I.
113. Id. at 10 n.8.
114. Id. at 9.
115. Id. at 11.
116. 2 WRITINGS OF JAMES MADISON 183 (G. Hunt ed. 1901).
117. Id.
accepted Madison's ideas and objectives as being the driving force behind the first amendment's religion clauses.  

Mr. Justice Black in *Everson* stated that: "The 'establishment of religion' clause of the First Amendment means at least this: . . . No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion."  

The difficulty is distinguishing between tax legislation which provides funds for the public welfare and that which supports religion. The Supreme Court seems unwilling to draw such distinctions. As long as the section 170 deduction for charitable contributions to religious organizations is a part of the general statutory scheme allowing the deduction for contributions to all eligible charitable organizations, the court is not inclined to question its constitutionality.

Social services provided by religious organizations are so entwined with their religious function that it is impossible to differentiate. The primary functions of religious organizations are to tend to the spiritual well-being of the members (pastoral) and to convert or recruit new members (propagation). For example, educational activities fall into both categories. The religious organization seeks to instruct its own members in its religious tenants and to recruit others through education. Virtually every social welfare function carried on by religious organizations falls into one, the other, or both categories. This is not surprising since that is their mission; for it to be otherwise would be surprising. This then is the major difference between religious organizations and the other nonprofit organizations.

Social welfare programs operated by nonreligious organizations clearly could be subsidized since they lack religious entanglement. The inability to divorce the religious aspect from the social welfare program provided by religious organizations renders them ineligible for government aid. Mr. Justice Rutledge speaking of education in *Everson* said: "Commingling the religious with the secular teaching does not divest the whole of its religious permeation and emphasis or make them of minor part, if proportion were material. Indeed on any other view, the constitutional prohibition always could be brought to naught by adding a modicum of the secu-

119. *Id.* at 16.
lar."\textsuperscript{120} That is precisely the issue here. Commingling social welfare programs with religion does not make direct aid or subsidy to religion constitutional.

"[T]he effect of the religious freedom Amendment to our Constitution was to take every form of propagation of religion out of the realm of things which could directly or indirectly be made public business and thereby be supported in whole or in part at taxpayers' expense."\textsuperscript{121} There is no question but that direct appropriations to religious organizations to carry-on social welfare work are unconstitutional.\textsuperscript{122} The controversy today swirls around indirect aid to religious organizations—for example, state payments reimbursing parents for children's transportation costs to parochial schools\textsuperscript{123} and free textbooks for parochial school children.\textsuperscript{124} The Supreme Court justifies these "indirect" expenditures on the grounds that they are incidental and do not benefit the religious organization directly, but rather as in \textit{Everson}, benefit parochial school parents by reimbursing transportation costs. Chief Justice Burger, writing for the majority in \textit{Walz}, attempted to draw this distinction. The chief justice said: "Obviously a direct money subsidy would be a relationship pregnant with involvement and, as with most governmental grant programs, could encompass sustained and detailed administrative relationships for enforcement of statutory or administrative standards, . . . ."\textsuperscript{125} Whereas, in the next paragraph, he said: "The grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state."\textsuperscript{126} Obviously, the majority did not consider uncollected revenue equivalent to a direct grant.

The majority in \textit{Walz} completely misunderstood or deliberately misconstrued the tax expenditure concept when it drew a distinction between a direct money subsidy and a tax exemption. For the Court to equate the two, as the legislative and executive branches do under the tax expenditure budget,\textsuperscript{127} is to render the opinion untenable. The majority seemed more concerned with "sustained

\textsuperscript{120} Id. at 47.
\textsuperscript{121} Id. at 27 (emphasis added).
\textsuperscript{123} \textit{See Everson v. Board of Educ.}, 330 U.S. 1 (1947).
\textsuperscript{125} 397 U.S. at 675.
\textsuperscript{126} Id.
\textsuperscript{127} \textit{See supra} text accompanying notes 17-18.
and detailed administrative relationships” than with result. Their treatment is concerned with government involvement with religion rather than sponsorship or financial aid. Justice Brennan concurring in *Walz* admitted that “[g]eneral subsidies of religious activities would, of course, constitute impermissible state involvement with religion.”128 Nonetheless, he insisted on the difference between a direct transfer of public monies which he believed would be unconstitutional and a tax exemption which he believed to be permissible.129 This is form over substance. “The prohibition against establishment of religion cannot be circumvented by a subsidy, bonus or reimbursement of expense to individuals . . . .”130 A tax exemption or deduction is equivalent to a direct grant.

Justice Douglas in his dissent in *Walz* clearly equates a tax exemption with a subsidy.131 Both an exemption and deduction are tax expenditures.132 The form of the subsidy is irrelevant. If a subsidy to religious organizations to support religious activities is unconstitutional, then a tax exemption or deduction having the same effect is also unconstitutional. If a charitable contribution to a religious organization results in a deduction, then to the extent that the contribution supports worship or other religious activities the result is government sponsorship of religion and violation of the establishment clause.

2. *Free Exercise Clause*

The establishment clause was designed to keep separate religion and government, while the free exercise clause was designed to keep government out of individual choice. The free exercise clause prohibits the government from interfering with the beliefs of any religious individual or group. James Madison protested government interference with religious beliefs as much as established religion.133 It is a violation of the free exercise clause to tax a person

128. 397 U.S. at 690 (Brennan, J., concurring).
129. Id. at 690-91.
131. “[O]ne of the best ways to ‘establish’ one or more religions is to subsidize them, which a tax exemption does.” 397 U.S. at 701 (Douglas, J., dissenting).
132. See supra note 15.
133. See 1 *WRITINGS OF JAMES MADISON* 21 (G. Hunt ed. 1901).

This vexes me the worst of anything whatever. There are at this time in the adjacent country not less than five or six well-meaning men in close jail for publishing their religious sentiments, which in the main are very orthodox. I have neither patience to hear, talk, or think of anything relative to this matter; . . . .
for the support of a religious sect in which he disbelieves. Religion is a matter of individual conscience, and the government is prohibited from interfering by dictating which religion a person must support by a tax levy. The same is true of a tax subsidy. Taxpayers are compelled to support religious ideas and convictions in which they might disbelieve through the section 170 deduction.

Denying the section 170 deduction for charitable contributions made to religious organizations would not interfere with the belief of any religious individual or group. First, the deduction does not directly affect the religious organization. The deduction only inures to the benefit of itemizing taxpayers, not the religious organization. Whatever contribution the religious organization receives is tax exempt under section 501(c)(3) whether received from a taxpayer who itemizes or not. The status of the taxpayer as an itemizer or nonitemizer is irrelevant to the religious organization. Moreover, there is no indirect benefit to religious organizations since economic studies show that the existence of the section 170 deduction for charitable contributions to religious organizations has little effect on such contributions. Individual freedom of choice is preserved. Those who wish to support their religion will continue to do so. Those who do not so wish are not indirectly forced to contribute by way of government subsidy.

There is no excessive entanglement problem with respect to repeal of the section 170 deduction. The excessive entanglement problem is caused by trying to separate the social welfare functions of religious organizations from the religious function. As Chief Justice Burger stated in Walz: "[A] direct money subsidy would be a relationship pregnant with involvement, . . . ." A subsidy by way of a tax deduction can be no less pregnant.

The elusive, sought-after concept of constitutional neutrality between the establishment and free exercise clauses can be obtained by repeal of the section 170 deduction for charitable contributions to religious organizations.

### III. Conclusion

In enacting the section 170 deduction for charitable contribu-

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134. See supra text accompanying notes 67-72.
135. 397 U.S. at 675.
136. "We sponsor an attitude on the part of the government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma." Zorach v. Clauson, 343 U.S. 306, 313 (1952).
tions, Congress chose an indirect tax subsidy instead of a direct spending program for certain social welfare services. A tax expenditure analysis of the deduction for charitable contributions to religious organizations shows that the goals of shifting the burden of providing social welfare programs from the government to the private sector and, as a result, promoting the general welfare are not accomplished by the section 170 deduction for charitable contributions to religious organizations.

The section 170 deduction for charitable contributions to religious organizations is neither necessary nor desirable. Economic studies show that repeal of section 170 for charitable contributions to religious organizations would not materially alter the giving levels to religious organizations because the cost of giving for most donors to religious organizations remains high whether they itemize or not. Individual giving to religious organizations appears to be more a matter of conscience than tax savings. The section 170 deduction is inequitable because it favors high income, itemizing taxpayers over nonitemizing taxpayers who actually contribute the bulk of charitable contributions to religious organizations. The section 170 deduction for charitable contributions to religious organizations is in effect a tax subsidy for high income taxpayers.

Philosophically, corporations should not be allowed to deduct charitable contributions to religious organizations because they are not moral agents and, hence, cannot embrace a religious belief. Charitable giving by corporations is inconsistent with the spirit of the first amendment and distorts free exercise.

Because of the inexorable entwining of religion and social services provided by religious organizations, the tax subsidy raises serious constitutional questions no less than a direct spending program supporting religion. Congress can extract itself from religious entanglement and save money without doing harm to religious organizations or the ultimate consumers of the charitable works by repealing the section 170 deduction for charitable contributions to religious organizations.