

**The Current Reexamination of Charitable Giving:
Reforming the Individual Charitable Deduction**

John Sare, Esq.
Patterson Belknap Webb & Tyler LLP*

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I. Brief Background

A. Origins

1. The income tax deduction for gifts to charitable organizations became part of the United States Internal Revenue Code (the “Code”) in 1917, just four years after an income tax was first imposed.¹
2. One goal of the deduction was to maintain individual support of charities at a time when it was feared that tax hikes occasioned by World War I would deplete the coffers of charity and necessitate still higher tax rates to make up the difference. The original charitable deduction was capped at 15% of an individual’s taxable net income.²
3. Since 1917, Congress has continued to create incentives for individual charity, but the rules surrounding the deduction have grown significantly more complex. However, despite its complexity, and despite the fact that only itemizing taxpayers actually enjoy its benefits, the charitable deduction remains quite popular with the general public: as of December of 2012, one poll showed that 69% of voters opposed its elimination.³

B. The Charitable Deduction Today

1. The current iteration of the charitable deduction is found in Section 170 of the Code, and permits an individual who itemizes his deductions to deduct a percentage of his adjusted gross income (“AGI”) for charitable

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¹ Because this presentation addresses only the charitable deduction for individual taxpayers found in the income tax laws, it does not consider, *e.g.*, the estate and gift tax charitable deductions or the charitable deductions available for corporations and trusts.

² *See generally* Joint Committee on Taxation, “Present Law and Background Relating to the Federal Tax Treatment of Charitable Contributions,” (pp. 4-5) (February 2013).

³ *See* Bruce Bartlett, “The Future of the Charitable Deduction,” *The New York Times* (Aug. 20, 2013).

contributions made to certain charitable organizations, provided certain requirements are met and subject to a variety of limitations.

2. Broadly speaking, the calculation of the charitable deduction generally depends on the type of charitable organization to which each contribution is made, the type and fair market value (sometimes basis) of the property donated, and the donor's AGI.

II. Objections to the Charitable Deduction

- A. The charitable deduction under Section 170 has been the focus of heavy criticism in recent years, both from politicians and academics.
- B. Some of the most common objections to the charitable deduction include:
 1. *"It Helps the Wrong People."* The deduction excludes non-itemizing taxpayers. This disproportionately benefits higher-income taxpayers, as wealthier people are more likely to itemize their deductions. They also pay higher marginal tax rates, and therefore they receive a larger benefit per each contributed dollar.⁴
 - a. In 2006, the Congressional Budget Office (the "CBO") reported that although taxpayers with AGI of \$100,000 or more accounted for 11% of tax returns filed, they received 76% of the tax subsidy associated with the deduction.
 - b. Conversely, taxpayers with AGI of less than \$50,000 filed 66% of total tax returns and received 5% of the subsidy.⁵
 2. *"It Costs Too Much."* Some critics simply take the position that the deduction is too expensive.⁶ The cost to the government of subsidizing charitable donations is not insignificant.
 - a. The CBO has estimated that, in 2006, the charitable deduction cost the Federal government \$40.9 billion in lost tax revenue.⁷

⁴ See, e.g., Mina Kimes, "It's Time to Fix the Charitable Deduction," *CNN Money* (Nov. 27, 2012) (available at <http://finance.fortune.cnn.com/2012/11/27/charitable-deduction-reform/>) (last viewed September 26, 2013).

⁵ See Congressional Budget Office, "Options for Changing the Tax Treatment of Charitable Giving" (p. 4) (May 2011) (CBO 2011).

⁶ See, e.g., Jack Shakely, "In a Time of High Deficits, the Charitable Deduction May Be Too Costly to Keep," *The Chronicle of Philanthropy* (Feb. 19, 2012) (available at <http://philanthropy.com/article/Charitable-Deductions-Are-a/130831/>) (last viewed September 26, 2013).

⁷ See CBO 2011, *supra*.

- b. The staff of the Joint Committee on Taxation (the “JCT”) estimates that between 2010 and 2014, the deduction will cost the government approximately \$230 billion in lost revenue.⁸
3. *“It’s Not the Government’s Job.”* The deduction has garnered objections on ideological grounds from all sides. It has been argued that the deduction violates the principle of separation of church and state, because it rewards donations to religious organizations.⁹ Others believe that the revenue loss from the deduction takes money away from necessary government services.¹⁰ Still others think that it is paternalistic of the government to try to manipulate the private sphere of personal charity.¹¹
4. *“It Doesn’t Sufficiently Promote ‘True’ Charity.”* Some have argued that the deduction unduly benefits the “wrong” charities (*i.e.*, charities that do not primarily benefit the poor and distressed).¹² The CBO has found that as a taxpayer’s AGI increases, the chances that he will donate to a religious organization or an organization devoted to helping to meet basic needs decreases significantly.¹³ Conversely, it has been posited that higher-income taxpayers – who receive the bulk of the benefit of the deduction – are more likely to support educational and arts organizations, as opposed to organizations providing food and shelter for those in need.¹⁴
5. *“It Is Inefficient.”* Currently, the highest Federal income tax rate is slightly less than half what it was in 1980. If the charitable deduction were truly functioning as an incentive, then donations by the wealthy presumably would have decreased as tax rates have fallen. Because

⁸ See CBO 2011, *supra*, (p. vii), citing data contained in Joint Committee on Taxation, “Estimates of Federal Tax Expenditures for Fiscal Years 2010-2014” (December 2010).

⁹ See, *e.g.*, Jack Shakely, “It’s Time to Write Off the Charitable-Giving Tax Deduction,” *Los Angeles Times* (Dec. 18, 2011) (available at <http://articles.latimes.com/2011/dec/18/opinion/la-oe-shakely-deduction-20111218>) (last viewed September 26, 2013); Stephen L. Carter, “Ending Charity Tax Break Will Hurt Poor Most,” *Bloomberg* (Nov. 22, 2011) (available at <http://www.bloomberg.com/news/2011-11-23/ending-charity-tax-break-would-hurt-poor-commentary-by-stephen-l-carter.html>) (last viewed September 26, 2013).

¹⁰ See, *e.g.*, Daily Kos Commenter, “Donations to 501(c)(4)s Are Not Tax-Deductible: Good. Why Are Those to 501(c)(3)s?”, *Daily Kos* (May 19, 2013) (available at <http://www.dailykos.com/story/2013/05/19/1210147/-Donations-to-501-c-4-s-are-not-tax-deductible-Good-Why-are-those-to-501-c-3-s#>) (last viewed September 26, 2013).

¹¹ See, *e.g.*, Scott A. Beaulier and Joshua C. Hall, “Collective Consumption Externalities and Charitable Giving,” *New Perspectives on Political Economy* (Vol. 4, No. 1, 2008).

¹² See, *e.g.*, Robert Reich, “A Failure of Philanthropy,” *Stanford Social Innovation Review* (Winter 2005); Kimes, *supra*.

¹³ See CBO 2011, *supra* (p. 6).

¹⁴ See Bartlett, *supra*.

donations have not dropped, one could conclude that “the growth of income is the dominant factor in charitable giving; when people have more money to give, they give more.”¹⁵ If tax considerations are not actually a strong enough driving force behind charitable giving, it may be wasteful for the government to forego so much revenue for the sake of the charitable deduction.¹⁶

III. Proposals to Reform the Deduction

A. Congressional Budget Office Options¹⁷

The CBO has identified three major categories of options for modifying the way the income tax laws treat charitable giving. Each category, in turn, has variations and sub-variations. Altogether, there are eleven options in the CBO report. Table 3 from CBO 2011 ([Attachment A](#)) shows the projected change in total contributions from each of the eleven options described below and the projected effect on the tax subsidy associated with the charitable deduction. Table 4 from CBO 2011 ([Attachment B](#)) shows the sources of the change in the tax subsidy for each of the eleven options. Figure 5 from CBO 2011 ([Attachment C](#)) shows the impact of each option based on five income bands.

The three Attachments to this outline illustrate several notable phenomena.

- The CBO believes seven of the eleven options it has identified would result in a reduction in charitable giving. The only options that are expected to result in an increase in charitable giving are those that involve extending the deduction to non-itemizers or converting the deduction into a credit for non-itemizers, and then only if the credit is a relatively generous 25% of the amount donated.
- Even the options that would increase charitable giving do not do so to any significant extent (never more than 1.3%), and increases of 1% or more result in a disproportionate and large increase in the tax subsidy (more than 17% in one case).
- Decreases in charitable giving, on the other hand, can result in disproportionately large reductions in the tax subsidy; a decline of less than 1% in charitable giving is tied, in one option, to a 32% reduction in the tax subsidy.
- The options that result in the biggest decline in the tax subsidy are, for the most part, those that would have the heaviest impact on the wealthiest taxpayers.

¹⁵ Bartlett, *supra*.

¹⁶ See, e.g., Joseph J. Cordes, “Re-Thinking the Deduction for Charitable Contributions: Evaluating the Effects of Deficit-Reduction Proposals,” *National Tax Journal* (December 2011).

¹⁷ See CBO 2011, *supra* (pp. 11, 14-19).

1. *Set a Floor for Deductible Contributions.*

- a. This option would maintain the current itemized deduction for charitable donations, but would permit deductions only for contributions in excess of a certain “floor” amount. The CBO notes that the floor would remove the subsidy for smaller donations, many of which would probably be made even without the incentive of the deduction, and would preserve the incentive for making larger contributions. It would also require less recordkeeping and decrease the ability of taxpayers to claim deductions for small, fabricated contributions. However, imposing a floor would be expected to reduce contributions at least to some extent.
- b. Variation One: Set a \$500 floor for deductible contributions (\$1,000 for taxpayers filing jointly).
- c. Variation Two: Set a floor for deductible contributions at 2% of AGI.

2. *Permit Non-Itemizers to Use the Deduction.*

- a. This option has been advanced repeatedly in the past several decades. In 2002, then-President George W. Bush suggested this change in his proposed fiscal year 2003 budget, and the CBO investigated this option in 2002 as well.¹⁸
- b. This option is appealing in terms of overall “fairness:” currently, only itemizers can use the deduction, and historically, taxpayers who itemize are wealthier than those who take the standard deduction.
- c. However, the CBO notes that the only group of taxpayers whose after-tax price of giving would decrease, and who might therefore make more contributions, would be current non-itemizers with positive tax liability, and only some of those taxpayers would move into a lower tax bracket because of the deduction. The CBO also notes that this option would be administratively burdensome: it would require amending the form of Form 1040, and would require additional review of over 50 million individual tax returns.

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See Joint Committee on Taxation, “Descriptions of Revenue Proposals Contained in the President’s Fiscal Year 2003 Budget Proposal” (March 2002); Congressional Budget Office, “Effects of Allowing Non-Itemizers to Deduct Charitable Contributions” (December 2002). Under the Bush plan, a deduction for charitable contributions made by a taxpayer who does not itemize would have been phased in between 2002 and 2012, starting with a \$100 deduction (\$200 in the case of a joint return) in 2002, and ending with a maximum deduction of \$500 (\$1,000 in the case of a joint return) in 2012 and thereafter.

Additionally, it would undermine the purpose of the standard deduction (to relieve taxpayers with small deductions from the administrative burden of itemizing), because these new deducting taxpayers would need to substantiate their charitable contributions.

- d. Variation One: Allow an unlimited deduction for all taxpayers.
 - e. Variation Two: Set a \$500 deduction floor for all taxpayers (\$1,000 for joint filers).
 - f. Variation Three: Set a deduction floor for all taxpayers of 2% of AGI.
3. *Replace the Deduction with a Nonrefundable Credit Available to All Taxpayers.*
- a. This option involves a nonrefundable credit of either 15% or 25% of all donations, with several possible variations. The proposal offers two deduction reforms in one: permitting tax subsidies for all taxpayers (not only itemizers) and changing the form of the subsidy from a deduction to a credit.
 - b. As with the last option, this is not the first time a credit in lieu of a deduction has been proposed. In 2010, the Simpson-Bowles Commission proposed replacing the deduction with a nonrefundable credit in the amount of 12% of all donations, available to all taxpayers as long as their donations exceeded 2% of AGI.¹⁹
 - c. Giving a nonrefundable credit would give the same benefit per dollar of giving to all taxpayers who could fully claim it, rather than giving a subsidy rate that goes up in tandem with increases in a taxpayer's tax rate. A credit of 25% favors both lower-income and middle-income taxpayers, because they generally are taxed at rates of less than 25%, whereas a credit of 15% primarily favors lower-income taxpayers.
 - d. For higher-income taxpayers, the subsidies enjoyed under the current deduction regime would decrease, and the credit would also increase the share of total income taxes paid by higher-income taxpayers, which appeals to those seeking a more progressive tax system. Finally, a nonrefundable credit for all taxpayers would benefit low-income and middle-income taxpayers more than a deduction for all taxpayers, because the after-tax price of giving

¹⁹ See Simpson-Bowles Commission, "National Commission on Fiscal Responsibility and Reform: The Moment of Truth" (December 2010).

would be the same for all taxpayers (instead of being lower for wealthier taxpayers).

- e. Variation One: Set a 25% nonrefundable credit for all taxpayers.
 - i. This variation (like variation two described below) comes with three sub-variations: a no-floor credit, a credit with a set dollar floor, and a credit with a floor that is a percentage of AGI.
 - ii. Sub-Variation One: Set a 25% nonrefundable credit with no floor.
 - iii. Sub-Variation Two: Set a 25% nonrefundable credit with a dollar-amount floor of \$500 (\$1,000 for joint filers).
 - iv. Sub-Variation Three: Set a 25% nonrefundable credit with a floor of 2% of AGI.
- f. Variation Two: Set a 15% nonrefundable credit for all taxpayers.
 - i. Sub-Variation One: Set a 15% nonrefundable credit with no floor.
 - ii. Sub-Variation Two: Set a 15% nonrefundable credit with a dollar-amount floor of \$500 (\$1,000 for joint filers).
 - iii. Sub-Variation Three: Set a 15% nonrefundable credit with a floor of 2% of AGI.

B. Legislative and Other Proposals

Congress, the White House, economists, and law professors have been abuzz recently with reform ideas for the charitable deduction beyond those mentioned in the CBO report. This section summarizes some of those ideas, including President Obama's most recent proposal to reform the treatment of itemized deductions.

- 1. *Repeal the Deduction Completely.*
 - a. The bluntest instrument for reform of the charitable deduction is, of course, elimination. The Senate Finance Committee considered this option in its discussion paper published in June 2013.²⁰

²⁰ See Senate Finance Committee, "Tax-Exempt Organizations and Charitable Giving: Tax Reform Options for Discussion" (June 2013).

- b. The Committee cited an article by Daniel Mitchell, a senior fellow at the Cato Institute, which claimed that eliminating the deduction altogether would actually be beneficial for nonprofits, as it would lessen their dependence on donor contributions and thus force them to operate more efficiently by reducing spending on administrative items.²¹
- c. However, thus far, total repeal has not found widespread favor among members of Congress. Evidence has shown that at least to some degree, as the CBO has stated, “taxpayers [do in fact] respond to the after-tax price of giving.”²²

2. *Subject the Deduction to the Limitation on Itemized Deductions – or Don’t.*

- a. This limitation, commonly called the “Pease limitation” after the late Rep. Donald Pease (D-Ohio), reduces most itemized deductions by 3% of the amount by which a taxpayer’s AGI exceeds a particular threshold, up to a maximum reduction of 80% of itemized deductions. The Pease limitation does not apply to certain itemized deductions, including the deductions for medical expenses and investment interest.
- b. The Pease limitation was originally enacted in the Omnibus Budget Reconciliation of 1990. However, the 2001 Tax Act phased out the limitation over a four-year period starting in 2006. It was set to come back into effect as of January 1, 2013, and Congress allowed it to do so.
- c. In 2013, the Pease limitation works as follows:
 - i. For an individual taxpayer, if his AGI is over \$250,000, his itemized deductions are reduced by the lesser of:
 - (1) 3% of the excess of his AGI over \$250,000, or
 - (2) 80% of the amount of itemized deductions she would otherwise be allowed to take for that tax year.
 - ii. For a married couple filing jointly, the AGI limit is \$300,000. For a married person filing separately, the AGI limit is \$150,000. These AGI thresholds will be adjusted upward for inflation.

²¹ See Mitchell, *supra*.

²² CBO 2011 (p. 2).

- iii. For example, consider an individual taxpayer with AGI of \$350,000 who would like to deduct \$50,000 of charitable donations and who is not filing jointly. His AGI is \$100,000 over the cap for individual taxpayers, so his total deductions must be reduced by 3% of \$100,000, or \$3,000. As a result, he may only claim \$47,000 of deductions.
 - d. The limitation has been criticized for disincentivizing charitable donations by high-income taxpayers. Because it affects all itemized deductions, it has also generally come under fire for being punitive toward wealthier Americans.
 - e. In April 2013, Rep. James Sensenbrenner (R-Wis) introduced H.R. 1479, which would carve out the charitable deduction from the Pease limitation. The bill was referred to committee, and at this time, it is still being reviewed.
- 3. *Cap the Deduction at 28% of AGI and Convert to a Flat Tax and a Charitable Contribution Tax Credit for the Wealthiest Taxpayers.*
 - a. This reform was proposed by President Obama in his fiscal year 2014 budget proposal (to take effect in calendar 2014). The proposal has two elements: (i) a cap on the amount of the tax savings that a taxpayer may have on account of charitable gifts and (ii) a new minimum tax on high-income taxpayers of 30% of AGI minus a credit for charitable contributions. Both changes would preserve the so-called Pease limitation as well.²³
 - b. The cap would reduce the *value* of a charitable deduction (and other itemized deductions and exclusions) for taxpayers in the 33%, 35% and 39.6% tax brackets. That is, for a taxpayer in the top bracket, the last dollar deducted currently has an after-tax cost to the taxpayer of about 60 cents (one dollar minus 39.6 cents of tax saved because of the deduction). The cap would limit the value of the deduction to 28 cents, so the last dollar deducted would have an after-tax cost of 72 cents. In effect, taxpayers in the top bracket would see the “cost of giving” (on an after-tax basis) increase by 20% (from 60 cents on the dollar to 72 cents on the dollar).
 - c. OMB explains the rationale as follows: “Increasing the income tax liability of higher-income taxpayers would reduce the deficit, make the income tax system more progressive, and distribute the cost of

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See Office of Management and Budget, “Fiscal Year 2014 Budget of the United States Government” (pp. 134-137) (April 2013) (OMB 2013).

government more fairly among taxpayers of various income levels.”²⁴

- d. One Washington, D.C. “think tank” has commented as follows on the proposal: “Many middle-income people are in the 15 percent tax bracket and therefore save only 15 cents for every dollar of deductions or exclusions. This is an odd way to subsidize activities that Congress favors. If Congress provided such subsidies through direct spending, there would likely be a public outcry over the fact that rich people are subsidized at higher rates than low- and middle-income people. But because these subsidies are provided through the tax code, the fact has largely escaped the public’s attention.”²⁵
 - e. The proposed phase-out of the charitable deduction for high-earning taxpayers appears in the OMB summary under the headline: “Implement the [Warren] Buffett Rule by Imposing a New ‘Fair Share Tax’.” In effect, this proposal is a “flat tax” on some taxpayers, called the Fair Share Tax (“FST”), albeit a flat tax that would preserve a tax credit for charitable giving.
 - f. The FST would be phased in starting at AGIs of \$1 million, and would be fully phased in at AGIs of \$2 million. The FST would be imposed at a rate of 30% of a taxpayer’s AGI, less a tax credit equal to 28% of itemized charitable contributions (though it is not yet entirely clear exactly how payable FST would be calculated). However, because the Pease limitation still applies, the 28% tax credit for itemized deductions would be significantly reduced, as the Pease limitation constricts available itemized deductions.
4. *Offer Federal Matching Grants via a Refundable Tax Credit for Charitable Organizations.*
- a. This option, proposed by the Debt Reduction Task Force at the Bipartisan Policy Center, would allow all taxpayers to claim a 15% credit for charitable contributions, including those taxpayers without income tax liability. The twist in this proposal is that the

²⁴ OMB 2013 (p. 134).

²⁵ Citizens for Tax Justice, “State-by-State Figures on Obama’s Proposal to Limit Tax Expenditures” (April 2013) (available at <http://ctj.org/pdf/28percentlimit.pdf>) (last viewed September 26, 2013).

credit would go directly to the charitable institution, rather than to the taxpayer.²⁶

- b. Charities would be able to apply to the Internal Revenue Service for grants in the form of credits tied to the donations they receive from taxpayers. Thus, for every \$100 that a taxpayer gives to a charity, the charity could receive another \$15 from the Federal government.
- c. Taxpayers could theoretically use this to reduce their contributions and shift some of the donative burden to the government without reducing the total amount donated: if a taxpayer donated \$87 instead of \$100, the \$13 matching grant from the government (representing 15% of \$87) would bring the donation back to \$100.

5. *Cap All Itemized Deductions at \$50,000.*

- a. This option was introduced most recently by Sen. Robert Corker (R-Tenn.) in 2012.²⁷
- b. Sen. Corker claims that this cap, which would apply to all itemizing taxpayers and to all itemized deductions, would increase the Federal government's revenue by approximately \$749 billion. It is unclear what portion of that sum would be attributable to capping charitable deductions.

6. *Focus the Deduction on Contributions to "Traditional" Charities.*

- a. Rob Reich, a professor of political science at Stanford University, proposed in a 2006 article that Congress could structure the charitable deduction to provide the most benefit for donations to organizations that spend at least 75% of their annual budgets on direct services for people living in poverty.²⁸
- b. In the alternative, Prof. Reich suggested dividing Section 501(c)(3) organizations into categories depending on their charitable activities, and providing stronger deduction incentives for the category of organizations devoted to direct relief of the poor.

²⁶ See Bipartisan Policy Center, "Restoring America's Future: Reviving the Economy, Cutting Spending and Debt, and Creating a Simple, Pro-Growth Tax System" (pp. 33-34) (November 2010).

²⁷ See SFC 2013, *supra*, at p. 6.

²⁸ See Reich, *supra*.

- c. The theory of the Reich proposal is that it would help to redirect charitable giving toward organizations that perform more traditional forms of charity.

7. *Change the Year of Allowance of the Deduction.*

- a. Currently, charitable deductions may be taken for the tax year in which they were made (and carried over to future tax years in some cases). However, sometimes the Federal government makes exceptions to this rule (for example, to encourage donations to assist victims of natural disaster, as in the case of the 2010 earthquake in Haiti) and permits taxpayers to claim deductions made in the current year on their prior-year tax returns.
- b. C. Eugene Steuerle, an economist at the Urban Institute, a Washington D.C. “think tank,” has proposed treating charitable contributions the same way that contributions to IRAs are currently treated: the government would allow a taxpayer to claim charitable contribution deductions until the first to occur of April 15 or the date of filing of his return.²⁹ This would allow taxpayers to more easily and accurately determine the tax savings they will receive for a particular tax year.
- c. The proposal would not affect the value of the deduction, but Dr. Steuerle argues that this increased certainty around the tax savings from charitable contributions would create an incentive to give more, especially around the time of filing, when the savings would become more obvious to the taxpayer.

8. *Make the Deduction Unlimited but Require Gain Recognition.*

- a. Some have argued that the nature of the deduction, combined with the AGI percentage limitations on the deduction, is both abusive and counterproductive. The argument is that the limitations are counterproductive because at least to some extent they disincentivize further giving, and the deduction itself is said to be abusive because, in many instances, a taxpayer can take a full deduction for fair market value on appreciated property without recognizing any gain.
- b. Daniel Halperin, a tax professor at Harvard University, has argued that one way to address these issues would be to remove the

²⁹ See C. Eugene Steuerle, “A New April 15: Make It a Day of Giving (Efficiently),” *The Nonprofit Times* (March 1, 2010).

percentage limitations on the deduction and require gain recognition for gifts of appreciated property.³⁰

- c. The deduction was in fact unlimited under a prior iteration of the Internal Revenue Code, but percentage limits were implemented primarily because the deduction was largely being taken for donations of appreciated property.
 - d. Eliminating the percentage limits while requiring recognition of gain on donated property would encourage cash gifts (which would be more immediately useful for donee organizations), encourage increased giving generally, and eliminate the ability of wealthier taxpayers to donate highly appreciated property tax-free. It would also have the added benefit of significantly reducing the complexity of Sections 170(b) and 170(e).
9. *Eliminate the Special Limit for Contributions of Conservation Easements.*
- a. In addition to his proposal above, Prof. Halperin has also suggested removing the specialized deduction rules applicable to “qualified conservation contributions” from Section 170.³¹
 - b. Qualified conservation contributions are deductible donations of interests in or restrictions on real property used for conservation purposes, including conservation easements. The limitation on deductions for these contributions is higher than other property contribution deduction limitations: instead of 30% of AGI, it is generally 50% of AGI. Additionally, if the contribution is made by a qualified farmer or rancher (*i.e.*, a person earning over 50% of his gross income from farming or ranching), the limit is 100% of AGI. Finally, the normal carryover period for unused deductions is 15 years, instead of the normal 5-year period.
 - c. Prof. Halperin argues that these contributions are problematic and should not be especially encouraged, for several reasons. First, the deduction for a contribution of a conservation easement depends on an appraisal, and the rarity of easement sales makes it difficult to use comparability statistics to obtain an accurate value. Second, the donee benefits less from the contribution than the donor does, because the donee has no ability to transfer or end the easement. Finally, the public benefit of easement contributions is in doubt, because oftentimes the extent of easement restrictions is difficult to

³⁰ See Daniel Halperin, “A Charitable Contribution of Appreciated Property,” 56 Tax L. Rev. 1 (2002).

³¹ See Daniel Halperin, “Incentives for Conservation Easements: The Charitable Deduction or a Better Way,” 74 Law and Contemp. Probs. 29 (2011).

ascertain, and donee organizations may not have the will or the ability to enforce the easements.

- d. Instead of applying a favorable deduction limit to these contributions, Prof. Halperin proposes eliminating such limits and requiring that donees be restricted to governmental entities or land trusts that can meet minimum standards to certify the public benefit of the donations. Alternatively, he suggests replacing the deduction for these donations with tax credits to be allocated among certain eligible donees by a government agency with experience in land issues.

10. *Eliminate the Deduction for Non-Cash Gifts Except in Selected Categories Involving “Measurable Benefit to the Donee.”*

- a. Roger Colinvaux, a professor at The Catholic University of America, has proposed to reverse the general rule today and deny the charitable deduction altogether unless a gift is either in the form of cash or in the form of non-cash property that confers an “objectively verifiable” benefit on the donee.³² In the latter case, the deduction would be limited to the donee benefit and would not be the fair market value of the donated property.
- b. Prof. Colinvaux cites “many benefits” of his proposal: increased revenue, improved tax administration, fewer abusive transactions, a simpler and more equitable tax code, and a preference for cash.³³
- c. His article notes that, on average, gifts of property amounted to an average of \$46 billion per year between 2006 and 2010, about a quarter of charitable giving.³⁴ Before taking into account administrative costs and foregone capital gains tax, he estimates that those gifts resulted in revenue losses ranging from \$77 billion to \$92 billion during that period.³⁵
- d. According to data cited in Prof. Colinvaux’s article, corporate stock, mutual funds and other investments constitute the largest component of gifts of property (about 45%, or \$17.78 billion, in 2010). Clothing and other household items represent another large component (more than 30%, or \$12.05 billion, in 2010). He reports that publicly available data do not show the relative amount

³² See Roger Colinvaux, “Charitable Contributions of Property: A Broken System Reimagined,” 50 Harv. J. on Legis. 263 (June 5, 2013).

³³ See Colinvaux, *supra* (p. 329).

³⁴ See Colinvaux, *supra* (pp. 295, 328).

³⁵ See Colinvaux, *supra* (pp. 280-294).

of donations of real property. Art and other collectibles amounted to just over 3% of property gifts in 2010, or \$1.28 billion.³⁶

- e. Prof. Colinvaux finds that for non-cash property, the “best case” for a measurable benefit deduction is the case of publicly traded securities. Even so, “the ability to time contributions at market peaks or based on insider information, and the very fact that property, even highly marketable property, is not the same as cash” argues in favor of a discount from fair market value (i.e., the date-of-gift average exchange value in the market) “by a percentage to take into account some difference between exchange value and actual donee benefit.”³⁷
- f. In the case of nonpublicly traded securities, Prof. Colinvaux suggests the deduction for automobile vehicles may provide a model in that the deduction is based on the sales price of the vehicle. Similarly, the deduction for certain intellectual property is based on the donee’s future stream of income. Prof. Colinvaux stops short of proposing a specific rule for nonpublicly traded securities and notes that the addition of complexity would have to be taken into account to determine if it is actually “worth it” (in a cost-benefit analysis) to allow any deduction at all for this type of property.³⁸
- g. Prof. Colinvaux identifies a category of property that is “of such importance to donee organizations for the success of their mission [that] the measurement concerns might be overcome ... to warrant an incentive.” The “best example” of this category is artwork and other cultural property, he says. Because any exception for art would be “a deliberate subsidy to museums, ... museums must be held accountable for the contributions that are accepted.” He suggests that there be a penalty, to be paid by the museum, for accepting substantially overvalued property; the penalty might be based on the existing valuation misstatement penalties paid by donors. He also proposed the imposition of reporting obligations on the donee “to certify the related use of, and the distinct need for, the property.”

³⁶ See Colinvaux, *supra* (pp. 299-318).

³⁷ See Colinvaux, *supra* (p. 326).

³⁸ See Colinvaux, *supra* (p. 327).

11. *Simplify and Restructure the Deduction*

- a. In two publications prepared for the Urban Institute, Prof. Halperin has recommended a variety of measures to simplify and restructure the charitable deduction.³⁹ These include:
 - i. Harmonizing certain income, gift and estate tax charitable deduction rules.
 - ii. Reducing from three to two the number of AGI limitations imposed on the deductibility of particular categories of gifts, by shifting some categories of gifts subject to the 20% AGI limitation to the 30% AGI limitation (and making some of those gifts – the ones to fraternal societies and cemetery companies – non-deductible altogether) and by creating a unitary 30% AGI limitation for all gifts of property to charity, without regard to whether the donee is a private foundation or a public charity. As to this latter change, Prof. Halperin explains that this is intended to prevent donors of non-cash property from deducting up to 50% of their AGI if they appropriately divide their non-cash donations between public charities and private foundations.

³⁹ See Daniel Halperin, “Legislative Operations for Simplifying and Restructuring the Charitable Deduction” (December 2012) (available at <http://www.urban.org/publications/412726.html>) (last viewed September 26, 2013); Daniel Halperin, “The Charitable Contribution Deduction: Section 170 Reorganized” (March 2013) (available at <http://www.urban.org/publications/412771.html>) (last viewed September 26, 2013).

ATTACHMENT A

Table 3.

Total Donations and Tax Subsidies Under Current Law and Eleven Policy Options, 2006

	Floor for Eligible Donations	Total Contributions (Billions of 2006 dollars)	Change in Total Contributions from Current-Law Level		Tax Subsidy (Billions of 2006 dollars)	Change in Tax Subsidy from Current-Law Level	
			Billions of Dollars	Percent		Billions of Dollars	Percent
Current Law							
Deduction Available Only to Itemizers	No floor	203.0	n.a.	n.a.	40.9	n.a.	n.a.
Options to Change Current Law							
Keep Deduction Available Only to Itemizers but Add Floor							
Option 1	\$500/\$1,000	202.5	-0.5	-0.2	35.4	-5.5	-13.5
Option 2	2 percent of AGI	200.0	-3.0	-1.5	25.2	-15.7	-38.5
Extend Deduction to All Filers							
Option 3	No floor	205.0	2.0	1.0	46.1	5.2	12.8
Option 4	\$500/\$1,000	203.8	0.8	0.4	38.4	-2.5	-6.1
Option 5	2 percent of AGI	201.1	-1.9	-0.9	27.8	-13.1	-32.1
Convert Deduction to 25 Percent Nonrefundable Credit for All Filers							
Option 6	No floor	205.7	2.7	1.3	48.0	7.1	17.4
Option 7	\$500/\$1,000	204.5	1.5	0.7	38.5	-2.4	-5.8
Option 8	2 percent of AGI	202.0	-1.0	-0.5	29.0	-11.9	-29.2
Convert Deduction to 15 Percent Nonrefundable Credit for All Filers							
Option 9	No floor	195.2	-7.8	-3.9	27.6	-13.3	-32.6
Option 10	\$500/\$1,000	194.4	-8.6	-4.2	21.9	-19.0	-46.5
Option 11	2 percent of AGI	193.0	-10.0	-4.9	16.3	-24.6	-60.1

Source: Congressional Budget Office.

Notes: The simulation results are for tax year 2006, and all figures are at 2006 levels.

n.a. = not applicable; \$500/\$1,000 = \$500 for individual filers and \$1,000 for joint filers; AGI = adjusted gross income.

ATTACHMENT B

Table 4.

Sources of Changes in Tax Subsidies Under Eleven Policy Options, 2006

	Floor for Eligible Donations	Source of Change in Tax Subsidy (Billions of dollars)					Total
		Net Change in Giving	Existing Giving by Nonitemizers	Existing Giving by Itemizers			
				Who Switch to Being Nonitemizers	Who Remain Itemizers		
Keep Deduction Available							
Only to Itemizers but Add Floor							
Option 1	\$500/\$1,000	*	0	-0.1	-5.5	-5.5	
Option 2	2 percent of AGI	0.1	0	-0.4	-15.4	-15.7	
Extend Deduction to All Filers							
Option 3	No floor	0.5	3.2	1.6	0	5.2	
Option 4	\$500/\$1,000	0.3	1.3	1.0	-5.0	-2.5	
Option 5	2 percent of AGI	0.3	0.9	0.3	-14.7	-13.1	
Convert Deduction to 25 Percent Nonrefundable Credit for All Filers							
Option 6	No floor	0.8	4.7	2.5	-0.9	7.1	
Option 7	\$500/\$1,000	0.5	1.9	1.7	-6.5	-2.4	
Option 8	2 percent of AGI	0.6	1.5	0.9	-14.9	-11.9	
Convert Deduction to 15 Percent Nonrefundable Credit for All Filers							
Option 9	No floor	-1.2	2.9	-0.3	-14.8	-13.3	
Option 10	\$500/\$1,000	-1.2	1.1	-0.8	-18.2	-19.0	
Option 11	2 percent of AGI	-1.0	0.9	-1.3	-23.2	-24.6	

Source: Congressional Budget Office.

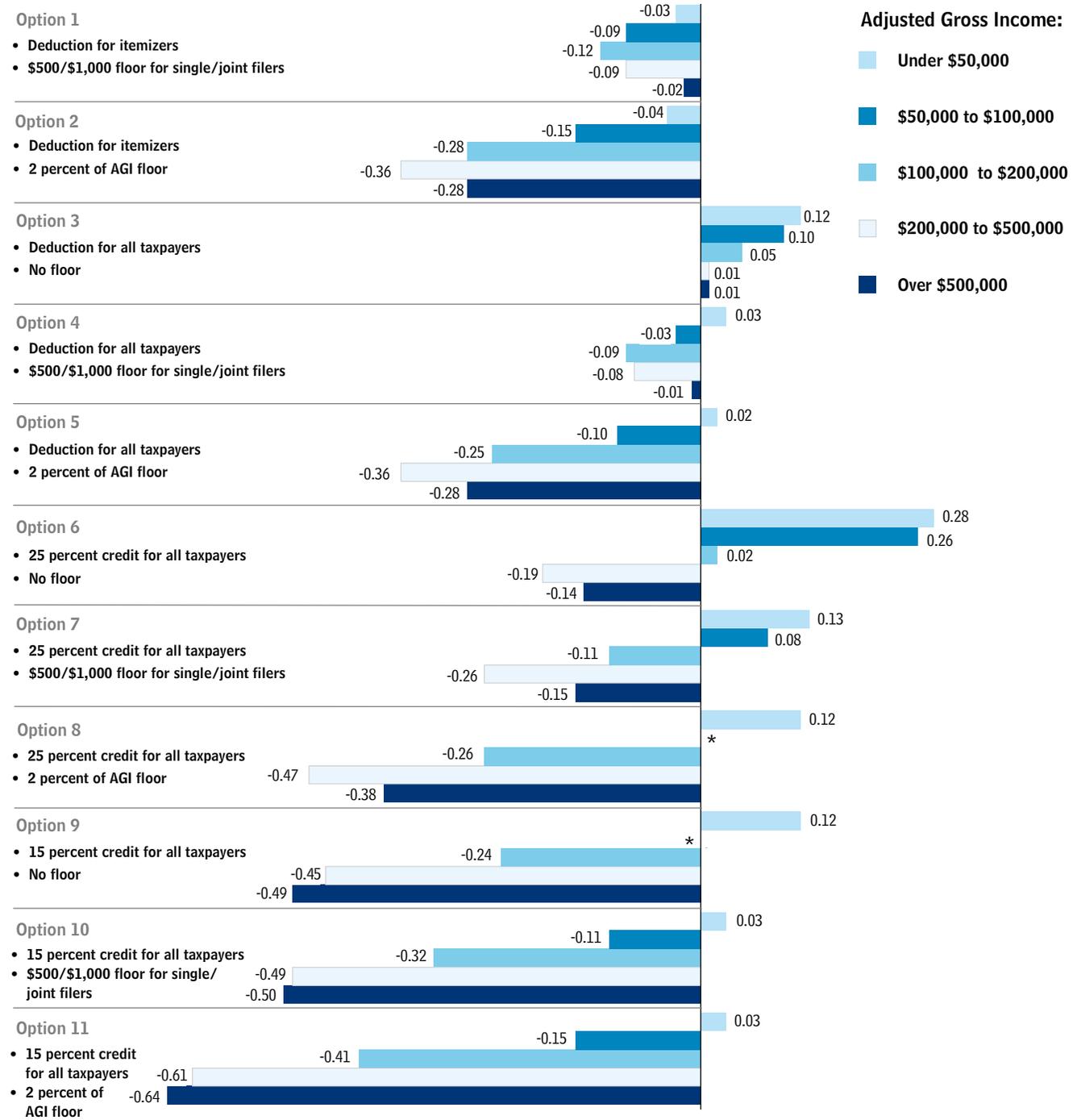
Notes: The simulation results are for tax year 2006, and all figures are at 2006 levels. The total tax subsidy under 2006 law was \$40.9 billion. \$500/\$1,000 = \$500 for individual filers and \$1,000 for joint filers; * = between zero and \$50 million; AGI = adjusted gross income.

ATTACHMENT C

Figure 5.

Changes in Tax Subsidies Under Eleven Policy Options, by Income Group, 2006

(Percentage of adjusted gross income)



Source: Congressional Budget Office.

Notes: The simulation results are for tax year 2006, and all figures are at 2006 levels.

* = between -0.005 percent and 0.005 percent.