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Daniel Hemel

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Since December 2017, four states—Connecticut, New Jersey, New York, and Oregon—have enacted laws granting state tax credits for charitable contributions that go toward public education or public health.[1] A primary purpose of these laws is to allow individuals to claim federal charitable contribution deductions for payments that simultaneously serve to reduce those individuals' state tax liabilities and to support programs that state governments would otherwise fund. The strategy adopted by these states—if effective—would mitigate the impact of the $10,000 cap on individual state and local tax deductions imposed by the December 2017 tax law. The U.S. Treasury Department and the Internal Revenue Service ("IRS") have proposed, but not yet finalized, regulations aimed at shutting down that strategy.[2] The proposed regulations would require individual taxpayers to reduce the amount of any charitable contribution deduction by the value of state and local tax benefits received for their contribution, with a "*de minimis*" rule ignoring state tax benefits worth less than 15% of the donation.

The ongoing debate regarding state charitable credit programs and the proposed Treasury regulations raise a number of interesting legal questions. Some of these questions are not new: more than thirty states had enacted similar programs prior to December 2017, leading taxpayers to ask whether they could claim federal charitable contribution deductions for donations to those programs notwithstanding the substantial state tax benefits that they received in return. In an advisory released in 2011 addressing four Missouri tax credits, the IRS concluded that donations to these state programs are generally deductible for federal purposes as charitable contributions rather than as state and local tax payments.[3] Several authors (myself included) have argued that the IRS's 2011 position is consistent with decades of case law addressing the federal

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1. *See* Liz Farmer, *3 Ways Blue States Could Still Get Around Tax Reform*, GOVERNING (Sept. 6, 2018), http://www.governing.com/topics/finance/gov-blue-states-get-around-tax-reform.html.
2. Prop. Treas. Reg. § 1.170A-1, 83 Fed. Reg. 43,563 (Aug. 27, 2018).
3. IRS CCA 201105010 (Feb. 4, 2011).

income tax treatment of state charitable credits.[4] The agency's attempt to reverse that position via regulation will almost certainly be challenged in federal court by states and individual taxpayers who are negatively affected by the rule.

We could easily occupy the time allotted for this afternoon's panel with a discussion of those likely lawsuits and their chances of success. Yet I fear that if we do so, we may be too early and too late. "Too early" in the sense that the outcome of any legal challenges is likely to hinge upon the contents of the final regulations, which still may be several months away. "Too late" in the sense that our discussion will be outdated before the ink on this symposium issue is dry. As the Supreme Court held in *SEC v. Chenery*, one of the most important administrative law decisions of the 20th century: "The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based."[5] Thus, Treasury and the IRS can defend their regulation only on the basis of the rationales that they give during the rulemaking process—and not on the basis of justifications conjured *post hoc*. The record of the rulemaking process supplies the closed universe of justifications upon which Treasury and the IRS can rely. That closed universe is still, for now, open, and it remains to be seen whether Treasury and the IRS will adequately explain the reasoning that leads them to the regulations that they ultimately adopt.

Rather than trying to predict the outcome of a still-nascent legal dispute, or to shadow-box against arguments that Treasury and the IRS have yet to make, I would like to focus instead on a separate, though related, question—a question that is implicated by the charitable credit debate but that will linger long after any litigation is resolved. That question is: Why should federal tax law allow more favorable treatment to charitable contributions than to state and local tax payments? If not for this differential treatment, there would be no federal tax benefit from replacing state and local tax payments with charitable contributions. Why should charitable contributions be deductible on individual income tax returns up to a sky-high limit of 60% of adjusted gross income, while state and local

4. *See, e.g.,* Joseph Bankman et al., *State Responses to Federal Tax Reform: Charitable Credits*, 159 TAX NOTES 641 (2018).
5. 318 U.S. 80, 87 (1943).

tax deductions are limited to $10,000 per year? What are the essential differences between non-governmental charities and sub-national governments, or between contributions and tax payments, that justify this lack of parity?[6]

Now, one might say that I am "too late" coming to this question too: Congress, after all, decided in December 2017 to allow donors to deduct up to 60 percent of cash contributions to public charities while at the same time capping the state and local tax ("SALT") deduction for individuals at $10,000. Treasury and the IRS, moreover, must implement that decision irrespective of its merits. The agencies would be acting *ultra vires* if they said that they disagreed with Congress's policy decision and would therefore allow taxpayers to work around it. And so I should be clear: What I am proposing here is not bureaucratic resistance. The SALT deduction will not be salvaged by the "deep state" or by the author of an anonymous op-ed.[7]

And yet, the ultimate fate of the SALT deduction was not decided by the December 2017 tax law. For one thing, the $10,000 cap expires on its own terms on January 1, 2026. Even before then, the cap is certain to be a topic of political contention and potentially of congressional reevaluation. Especially if Republicans lose control of Congress, the cap might not live out its natural life. Lawmakers will again decide—and tax scholars will continue to debate—whether charities and states should be placed on equal footing in the Internal Revenue Code.

It is thus neither too early nor too late to debate whether charitable contributions and state and local tax payments should be treated similarly for federal income tax purposes. In my view, there is little justification for allowing a virtually unlimited charitable contribution deduction while capping the deduction for SALT. The argument proceeds in three parts. First, I seek to show that charities and state and local governments do remarkably similar things. Second, I will explore the principal

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6. For an excellent discussion of the federalism implications of the charitable contribution deduction well before the December 2017 SALT rollback, see Brian Galle, *The Role of Charity in a Federal System*, 53 WM. & MARY L. REV. 778 (2012).

7. *Cf.* Anonymous, *I Am Part of the Resistance Inside the Trump Administration*, N.Y. TIMES (Sept. 5, 2018), https://www.nytimes.com/2018/09/05/opinion/trump-white-house-anonymous-resistance.htm
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justifications for the charitable contribution deduction and argue that they apply with similar or greater force to SALT. Finally, I will consider the implications of this analysis for tax policy and politics.

I. WHAT DO CHARITIES AND STATE AND LOCAL GOVERNMENTS DO?

Close your eyes and focus on the first charity that springs to mind. Perhaps it's your church, synagogue, mosque, or another religious congregation to which you belong. Perhaps it's a conservation organization such as the Nature Conservancy or the Sierra Club, or an animal welfare organization such as the ASPCA or the Humane Society. Perhaps it's a public radio station or an art museum or a symphony. Perhaps it's a human rights organization such as Amnesty International.

If it's any of those, then the charity that you are thinking about is, in at least one important way, unrepresentative of the charitable sector overall. The charitable sector overall is overwhelmingly dominated by three functional categories: Education, health, and social services. Together, education, health, and social services charities (including K-12 schools and universities, hospitals, homeless shelters, and food banks) account for 89% of public charity revenues and expenses.[8] It is only a slight exaggeration to say that everything else (arts groups, environmental and animal welfare organizations, religious congregations, etc.) amounts to a rounding error.

For state and local governments, the statistics are similar. The same three categories—education, health, and social services (or alternatively, public welfare)—accounted for 62% percent of state and local government spending as of 2015.[9] It would be more than a slight exaggeration to describe the remaining 38% percent of the pie as a "rounding error." State

8. BRICE S. MCKEEVER, URBAN INST., THE NONPROFIT SECTOR IN BRIEF 2015: PUBLIC CHARITIES, GIVING, AND VOLUNTEERING 6 (2015), https://www.urban.org/sites/default/files/publication/72536/2000497-The-Nonprofit-Sector-in-Brief-2015-Public-Charities-Giving-and-Volunteering.pdf (statistics from 2013).

9. *State and Local Expenditures*, URBAN INST., https://www.urban.org/policy-centers/cross-center-initiatives/state-local-finance-initiative/projects/state-and-local-backgrounders/state-and-local-expenditures (last visited Sept. 16, 2018) (fiscal year 2015 data).

and local government expenditures on police and corrections (6% of the total) and on highways and roads (also 6%) are nontrivial in both absolute and percentage terms.[10] But the point remains that state and local governments are primarily in the business of providing education, health, and social services, and public charities are primarily engaged in the same.

The overlap in activities between charities and state and local governments gives rise to the question: Why should the federal tax system robustly support spending on education, health, and social services through the charitable sector but not through state and local governments? The question becomes all the more of a puzzle once one considers the principal justifications for allowing a charitable contribution deduction at all. These arguments can be grouped into four categories: (1) measurement-of-income, (2) positive externalities, (3) institutional pluralism, and (4) local knowledge. While these arguments play out somewhat differently in the charitable contribution and SALT contexts, the case for a deduction is—if anything—stronger in the latter context than in the former.

II. JUSTIFYING DEDUCTIBILITY

A. Measurement-of-Income

Stepping back from the charities-versus-state-and-local-governments debate for a moment, perhaps the preliminary question we should ask is why we ought to allow income tax deductions at all. A familiar answer is that federal tax law aspires to allocate tax burdens on the basis of ability to pay, that income—i.e. consumption plus savings—provides a proxy for ability to pay, but that certain deductions can improve the proxy measure. Perhaps a more precise way to say something similar is that the marginal utility of income declines with income—an extra dollar of consumption plus savings matters less to Jeff Bezos than to a minimum-wage worker—and so taxing the rich more than the poor causes less pain. Taxable income will always be a crude proxy for the pain associated with paying an extra

10. *Id.*

dollar of taxes, but as such a proxy, it arguably offers in practical administrability what it lacks in perfect accuracy.

Two types of deductions fit relatively easily within the measurement-of-income framework. The first are deductions reflecting misfortunes that befall certain individuals, such as personal casualty losses and extraordinary medical expenditures. Imagine, for example, that Person A earns $100, Person B earns $90, and Person C earns $100 but—unlike A and B—also pays $10 in unreimbursed medical expenses arising from open heart surgery. Most of us would agree that Person C is no better off than Person B; both have $90 available for nonmedical consumption and savings. One way to put this point is to say that Person C's ability to pay is no greater than Person B's; another is to say that Person C's marginal utility of income is no less than Person B's. So if we seek to allocate tax burdens on the basis of ability to pay or marginal utility of income, it would seem that Person C should pay less in taxes than Person A and no more than Person B. Allowing Person C a deduction for medical expenses would achieve this objective.

A second type of deduction that is relatively uncontroversial among tax scholars encompasses deductions that represent expenses of earning income. For example, almost everyone agrees that the sole proprietor of a small business should be allowed to claim a deduction for ordinary and necessary business expenses. This deduction, taken above the line, reflects the intuition that a shopkeeper whose gross receipts total $1,000, and whose cost of goods totals $900, is not materially better off than a worker whose salary is $100. The cost of goods sold is an expense that the shopkeeper must incur in order to earn the income that she does.

The charitable contribution deduction is difficult to fit within either category: It neither reflects a misfortune that befalls certain individuals, nor compensates for the cost of earning income. One way to illustrate the point is to bring back our three hypothetical individuals: A, B, and C. Person A again earns $100; Person B again earns $90; and Person C again earns $100, but this time—instead of bearing a $10 medical expense—she gives $10 to charity. (Assume that A and B donate nothing.) Almost everyone will agree that Person A (who earns $100) is better off than Person B (who earns $90) and that Person A should therefore pay more in federal taxes. What also seems clear is that Person C can be no worse off than Person A, because Person C had the option of being in the same position as Person A but chose to give $10 to charity nonetheless. In ability-to-pay terms, Person C has the same ability to pay as Person A, notwithstanding C's charitable contribution, because Person C had the option to wear Person A's shoes.

The case for the SALT deduction on measurement-of-income grounds fares somewhat better. Let's say that Person X earns $100 in a state without an income tax, Person Y earns $95 in a state without an income tax, and Person Z earns $100 in Massachusetts, where the income tax rate is approximately 5%.[11] Person Z might argue that she had little choice but to live in Massachusetts (e.g., because she has an ailing parent living in Boston who cannot relocate); a state income tax deduction therefore reflects a misfortune that has befallen her. Alternatively, Person Z might argue that her $5 in Massachusetts state income taxes represents a cost of earning income (e.g., because her training is in the life sciences and so the most remunerative income-earning opportunities available to her are inside Greater Boston's Route 128 biotechnology corridor).

Of course, there are powerful counterarguments with which our hypothetical Massachusetts taxpayer claiming a measurement-of-income basis for the SALT deduction must contend. For example, Person Z, who earns $100 and pays $5 in Massachusetts state income taxes, has the same-after-tax income as Person Y, who earns $95 in New Hampshire (a mostly income-tax-free state),[12] but arguably the Bay Stater is still getting some bang for her five bucks. Massachusetts consistently ranks first in the country in the quality of its K-12 public schools[13] and is at or near the top

11. *See Personal Income Tax for Residents*, MASS. DEP'T OF REVENUE, https://www.mass.gov/guide s/personal-income-tax-for-residents (last visited Dec. 9, 2018) (noting that Massachusetts imposes a 5.1% tax on most types of income).

12. *See Taxpayer Assistance - Overview of New Hampshire Taxes*, N.H. DEP'T OF REVENUE ADMIN., https://www.revenue.nh.gov/assistance/tax-overview.htm (last visited Dec. 9, 2018) (noting that New Hampshire does not have a tax on labor income but imposes a 5% tax on interest and dividend income).

13. *See, e.g.*, *Education Rankings: Measuring How Well States Are Educating Their Students*, U.S. NEWS & WORLD REP., https://www.usnews.com/news/best-states/rankings/education (last visited October 18, 2018); Samuel Stebbins & Thomas C. Frolich, *Geographic Disparity: States with the Best (and Worst) Schools*, USA TODAY (Feb. 8, 2018), https://www.usatoday.com/story/money/economy/20

for health care access.[14] High taxes are arguably the price the state and local governments charge for the services that they provide.

If state and local taxes are simply the price of goods and services that state and local governments provide, then there may be no more reason to allow a deduction for state and local taxes than for other personal expenditures. But it is difficult to argue that the value of goods and services provided to an individual by state and local governments increases linearly with the tax that an individual pays. Does New England Patriots quarterback Tom Brady, who earns roughly $22 million a year in salary[15] plus endorsement deals and likely pays somewhere on the order of $1.1 million in Massachusetts state income taxes, really receive state-provided goods and services that are 1,000 times the value of the goods and services delivered to a minimum-wage worker in Massachusetts who earns roughly $22,000 a year and pays on the order of $1,100 in state income taxes? It is hard to see how. Maybe higher income Massachusetts residents can send their children to higher quality public schools, receive more robust police and fire protection, and are more likely to have their streets plowed first after a snowy Nor'easter. But it strains credulity to believe that the benefits to Tom Brady are 1,000 times more. If we focus purely on the market value of goods and services that Massachusetts provides to Tom Brady, it is difficult to argue that the five-time Super Bowl winner is getting a good deal.

Perhaps a sensible approach, at least from a measurement-of-income perspective, would be to allow individuals to claim a federal income tax deduction for state and local taxes paid above a threshold amount, with the threshold approximating the value of goods and services that individuals receive from their states and localities. That is more or less what we did before December 2017. To simplify the analysis, assume that a single filer

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18/02/08/geographic-disparity-states-best-and-worst-schools/1079181001.

14. *See, e.g.*, *Best State for Health Care Access*, U.S. NEWS & WORLD REP. (2018), https://www.usn
ews.com/news/best-states/rankings/health-care/healthcare-access (ranking Massachusetts first); Nick Wallace, *The Best States for Healthcare Access*, SMARTASSET (Aug. 10, 2018), https://smartasset.com/l
ife-insurance/best-states-for-healthcare-access.

15. *See* Ryan Wilson, *Patriots To Reportedly Add $5 Million in Incentives to Tom Brady's Contract*, CBS SPORTS (Aug. 9, 2018), https://www.cbssports.com/nfl/news/patriots-to-reportedly-add-5-million-in-incentives-to-tom-bradys-contract.

in 2017 made no charitable contributions or mortgage interest payments and had no other itemized deductions aside from SALT. With a 2017 standard deduction of $6,350 for single filers, it was only the 6,351st dollar of deductible state and local taxes that brought a federal tax benefit.[16] The measurement-of-income argument in favor of such a system is that state and local taxes represent payments for services only up to a point, after which they constitute a reduction in consumption plus savings.

There is much more to be said about the measurement-of-income justification for the state and local tax deduction. I have explored these arguments at greater length elsewhere.[17] The important point for now is that there is much less to be said for the charitable contribution deduction than for the SALT deduction if measurement-of-income is our focus. To construct an argument for keeping the charitable contribution deduction while capping the SALT deduction, we will have to look elsewhere.

B. Promoting Positive Externalities

A more common—and I think sounder—justification for the charitable contribution deduction focuses on the positive externalities that donors to charities generate. Individuals internalize some of the benefits of charitable giving in the form of warm glow, and they also may benefit from the activities of the organizations that they support. For example, I might donate to a local hospital and then go there as a patient one day, or I might give to the private school that my child attends, or I might donate my car to NPR and reap some of the benefits when I listen to "All Things Considered." But some of the benefits redound to other patients at the hospital and other families with children who attend the same school or other afternoon commuters who listen to NPR. A basic premise of welfare economics—often attributed to the early 20th century Cambridge professor Arthur Cecil Pigou—is that government should subsidize activities that produce positive externalities and tax activities that generate negative externalities, with the rate of the subsidy or tax equaling the

16. *See generally* Louis Kaplow, *The Standard Deduction and Floors in the Income Tax*, 50 TAX L. REV. 1, 1 (1994) (demonstrating the interchangeability of the standard deduction and floors).
17. *See* Daniel Hemel, *The Death and Life of the State and Local Tax Deduction*, 72 TAX L. REV. (forthcoming 2019).

marginal external benefit or cost.[18] The charitable contribution deduction might be defensible as a "Pigouvian subsidy" for the positive externalities that donors to charities confer upon others.

The Pigouvian case for the charitable contribution deduction is, in my view, a reasonably strong one—though as I discuss elsewhere—it might better fit with a flat-rate credit rather than a deduction whose value depends upon a taxpayer's marginal rate.[19] The key point for present purposes is that a very similar argument applies to the state and local tax deduction. After all, what state and local governments actually do with their money is very similar to what charities do. If charitable contributions to education, health, and social services organizations generate positive externalities that justify Pigouvian subsidies, why would the same not be true for state and local taxes?

One possible response is that while charities and state and local governments both provide education, health, and social services, charities do proportionately more of those activities. Recall above that while 89% of public charity revenues and expenses go toward those three functional categories, only 62% of state and local government spending does. Interestingly though, if we focus on charitable contributions rather than charitable activities more broadly, the inequality reverses. At most, a little under half of all charitable *contributions* go toward education, health, and social services, versus more than three-fifths of state and local taxes. The reason why is that education, health, and social services organizations are more dependent than other charities (and in particular, religious congregations) upon fees and government grants.[20] So if the goal is to subsidize education, health, and social services rather than, say, religion, the SALT deduction is likely a more effective tool than the deduction for charitable contributions.

A second possible response is that charitable contributions are voluntary, while state and local taxes are not. Pigouvian subsidies are generally necessary in order to bring the production of positive

18. *See, e.g.*, LOUIS KAPLOW, THE THEORY OF TAXATION AND PUBLIC ECONOMICS 28-29 (2011).

19. *See* Daniel Hemel, Equity, Efficiency, and Charity (unpublished manuscript) (on file with author).

20. MCKEEVER, *supra* note 8, at 10. The figure is 48% if we assume, conservatively, that contributions to private foundations ultimately flow to these three function categories and exclude the portion categorized as "Gifts to individuals/unallocated/other."

externalities up to a socially optimal level, but perhaps we do not need such subsidies when we have an alternative mechanism: coercive force. That is, we might be concerned that Tom Brady will contribute less than the socially optimal amount to charity in the absence of a subsidy, but we need not be as concerned that he will underpay his state and local taxes. If he does, we can seize his property or throw him in jail.

Characterizing charitable contributions as voluntary and state and local taxes as mandatory gets us only so far. For one thing, it is the voluntary character of charitable contributions and the mandatory nature of state and local taxes that justifies a deduction for the latter but not the former on measurement-of-income grounds. For another, state and local taxes are more voluntary than they may seem initially. After all, Tom Brady can switch teams and switch states (as many European soccer stars apparently do in response to taxes),[21] and if Massachusetts raises tax rates too high, the Patriots might relocate to another New England state. Individuals, moreover, can influence their state and local tax liabilities not only by voting with their feet, but also by voting. A Pigouvian subsidy for state and local taxes likely leads voters to accept higher rates.[22] And finally, at least in a few cases, charitable contributions might not feel so voluntary either. For example, members of religions that require tithing do not necessarily consider charitable giving to be a product of free will. The state can send you to jail; only a religion can send you to hell.

In sum, while charitable contributions arguably give rise to positive externalities that merit Pigouvian subsidies, state and local tax payments do too. Some of these externalities accrue to other residents of the same state. Some spill across state lines. Californians certainly are not the only ones who have benefitted from the discovery of Vitamins E and K at state-funded University of California, Berkeley.[23] Illinoisans are not the only

21. Henrik Kleven, et al., *Migration of Superstars: Evidence from the European Football Market*, 103 AM. ECON. REV. 1892 (2013). For similar evidence that state tax rates affect the location decisions of National Basketball Association free agents, see Nolan Kopkin, *Tax Avoidance: How Income Tax Rates Affect the Labor Migration Decisions of NBA Free Agents*, 13 J. SPORTS ECON. 571 (2012).
22. *See, e.g.*, Douglas Holtz-Eakin & Harvey Rosen, *Federal Deductibility and Local Property Taxes*, 27 J. URBAN ECON. 269 (1990); Gilbert E. Metcalf, *Assessing the Federal Deduction for State and Local Tax Payments*, 64 NAT'L TAX J. 565 (2011).
23. *See History & Discoveries*, UNIV. OF CAL., BERKELEY, https://www.berkeley.edu/about/history-discoveries (last visited Sept. 17, 2018).

users of web browsers and touch screens (products of the University of Illinois Urbana-Champaign); Minnesotans are not the only users of pacemakers.[24] Beyond the university research context, state and local government spending (and lack thereof) spills over in all sorts of ways. An estimated 1,000 homeless individuals from other cities—many of whom hail from outside California—come to San Francisco each year, attracted in part by the city's robust social services.[25] In this respect, San Francisco taxpayers are alleviating the burden of homelessness that jurisdictions elsewhere would otherwise bear.

C. Fostering Institutional Pluralism

A third argument for the charitable contribution deduction focuses on institutional pluralism. As Alexis de Tocqueville observed nearly two centuries ago, "associations" (i.e., non-profit organizations) serve as a safeguard of liberty and a source of national strength.[26] They operate as checks on the national government, as incubators of social capital, and as mechanisms for groups that do not command a majority at the national level to pursue shared goals and vindicate collective values.

I explore these justifications for government support of the non-profit sector in greater depth elsewhere.[27] The key point for present purposes is that these justifications apply similarly to states and localities. The idea of states and localities as checks on the national government is even more deeply rooted in American political thought than the notion of the non-profit sector as a limit on federal overreach. Local school boards, town meetings, and city councils—no less than non-profit institutions—are sites in which Americans "acquire the practice of associating with each other"

24. *See 100 Important Innovations That Came From University Research*, ONLINE UNIVERSITIES.COM (Aug. 17, 2012), https://www.onlineuniversities.com/blog/2012/08/100-important-innovations-that-came-from-university-research.
25. *See* Molly Turner, *Homelessness in the Bay Area*, SPUR (Oct. 23, 2017), https://www.spur.org/pu
blications/urbanist-article/2017-10-23/homelessness-bay-area.
26. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 183-85 (Harvey C. Mansfield & Delba Winthrop eds., 2000) (1835).
27. *See* DANIEL HEMEL, *Tangled Up in Tax: The Nonprofit Sector and the Federal Tax System*, *in* THE NONPROFIT SECTOR: A RESEARCH HANDBOOK (3d ed., Patricia Bromley & Walter Powell eds., forthcoming 2019).

without which, according to Tocqueville, "civilization itself would be in peril."[28] State and especially local governments are, moreover, important elements of what Heather Gerken has called "second-order diversity" (i.e., the quality of a polity that allows numerical minorities to occupy majority status in certain contexts). Perhaps even more so than non-profit institutions, state and local political forums where minorities are majorities can endow marginalized groups with the "dignity to decide," encourage broader political participation, and foster norms of reciprocity and respect.[29]

Here again, the decision to provide more robust support through the federal tax system for charities than for states and localities is something of a puzzle. The pluralism values nurtured by nonprofit organizations are, in many ways, overlapping with the values that federalism seeks to cultivate. There are, at least in my view, strong arguments for the federal government to subsidize sectors of society that serve as alternatives to national power. What is harder to understand is why the non-profit sector, but not state and local governments, would be the target of that aid.

D. Leveraging Local Knowledge

A final argument for federal subsidies to the non-profit sector through the charitable contribution deduction involves the delegation of decision-making to individuals with informational advantages *vis-à-vis* Congress. Saul Levmore puts the point crisply:

> Voters across the country are unlikely to be well informed about my local hospital or your university . . . . However, alumni of your university and citizens of my local community might be fairly well informed about their respective organizations. . . . Matching grants through a tax deduction in such instances may be expected to delegate decisions to the well informed, and the proportional character of the deduction for most filers permits intensity of preferences (or knowledge) to be recorded.[30]

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28. *See* TOCQUEVILLE, *supra* note 26.
29. *See* Heather K. Gerken, *Second-Order Diversity*, 118 HARV. L. REV. 1099, 1142-52 (2005).
30. Saul Levmore, *Taxes as Ballots*, 65 U. CHI. L. REV. 387, 427-28 (1998).

The idea behind Levmore's "taxes as ballots" framing is that the charitable contribution deduction operates as a federal subsidy for public goods and services that Congress allows well-informed individuals to allocate. The application of this argument to the state and local tax deduction is straightforward. We might think of the state and local tax deduction as allocating funds to communities for their members to divvy up among worthy local causes, with the proviso that the more members are willing to pay out of their own pockets, the more Congress is willing to pitch in. What distinguishes the charitable contribution deduction from the state and local tax deduction is that while both are examples of "taxes as ballots," the state and local tax deduction is also an example of "ballots as ballots:" in allocating the federal subsidy, citizens generally must operate through democratic processes that tend to be more participatory and transparent than, for example, the funding decisions of a private foundation. If we justify the charitable contribution deduction on the ground that it supports the allocative decisions of smaller communities, it is difficult to see why we would cap a parallel deduction that seems to advance those same objectives more directly.

To be sure, the state and local tax deduction is not the only channel through which the federal government supports states and localities: other fiscal mechanisms such as block grants do the same. What distinguishes the state and local tax deduction from block grants is that the federal government plays a less directive role in the former case than in the latter: block grants tend to be conditional on specific programmatic requirements, [31] while the state and local tax deduction is not. Again, if allocative freedom is a value we seek to vindicate, the state and local tax deduction is a likelier candidate than the charitable contribution write-off.

III. ALL POLITICS IS STATE AND LOCAL

31. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-1016, GRANTS TO STATE AND LOCAL GOVERNMENTS: AN OVERVIEW OF FEDERAL FUNDING LEVELS AND SELECTED CHALLENGES 39 (Sept. 2012), https://www.gao.gov/assets/650/648792.pdf (noting that federal grants to state and local governments "are typically subject to a wide range of substantive and other requirements under the particular program statutes as well as implementing agency regulations and other guidance that applies to them," and "are also governed by many additional cross-cutting requirements that are common to most federal assistance programs").

Comparing the charitable contribution deduction to the state and local tax deduction sheds light on Congress's decision, as part of the December 2017 tax law, to raise the cap on the former while lowering it on the latter. The decision is difficult to justify on policy grounds, especially considering the substantial similarities in the activities in which charities and state and local governments actually engage. The incongruity in the December 2017 tax law's treatment of these two categories has led many to posit that the disparity was motivated by partisanship more than policy.[32] The fact that the households hit hardest by the December 2017 tax law are concentrated in Democratic-leaning states lends further support to the partisanship hypothesis.[33]

There is, however, a significant wrinkle in partisan accounts of the December 2017 tax law's cap on the SALT deduction. President Trump and the congressional Republican leaders are not the only national politicians who have proposed a tax reform plan that preserves the charitable contribution deduction while rolling back SALT. Indeed, 2016 Democratic presidential nominee Hillary Clinton's tax plan would have capped the value of the SALT deduction at twenty-eight cents on the dollar while leaving the charitable contribution deduction uncapped.[34] In an alternate universe in which Hillary Clinton, not Donald Trump, had won the Electoral College vote in 2016 and passed a tax reform plan in her first year in office that followed her campaign proposal, I could have repurposed my remarks here as a critique of the Clinton tax law.

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32. *See, e.g.*, Paula Dwyer, *Trump's War Against Blue States*, BLOOMBERG BUSINESSWEEK (Aug. 21, 2018), https://www.bloomberg.com/news/articles/2018-08-21/trump-s-war-against-blue-states; Jacob S. Hacker & Paul Pierson, *Robbing Blue States To Pay Red*, N.Y. TIMES (Nov. 13, 2017), https://
www.nytimes.com/2017/11/13/opinion/tax-plan-states-gop.html.

33. *See* FRANK SAMMARTINO, ET AL., TAX POLICY CTR., THE EFFECT OF THE TCJA INDIVIDUAL INCOME TAX PROVISIONS ACROSS INCOME GROUPS AND ACROSS THE STATES 6 (2018), https://www.ta
xpolicycenter.org/sites/default/files/publication/154006/the_effect_of_the_tcja_individual_income_tax_provisions_across_income_groups_and_across_the_states.pdf (noting that the states in which more than eight percent of households will experience a tax increase as a result of the December 2017 law are California, Connecticut, Maryland, New Jersey, and New York, along with the District of Columbia). All of these jurisdictions voted overwhelmingly for Hillary Clinton in 2016.

34. *See* Kyle Pomerleau, *Details and Analysis of Hillary Clinton's Tax Proposals*, TAX FOUND. (Oct. 12, 2016), https://taxfoundation.org/details-and-analysis-hillary-clinton-s-tax-proposals-october-2016.

None of this is to deny that the December 2017 tax law was imbued with partisan intentions. I mention the Clinton tax plan to illustrate a separate point: the similarities between the charitable contribution deduction and the SALT deduction were not widely appreciated before blue states put the IRS to the test and asked, in effect, why can't we classify our taxpayers' payments for public goods and services as charitable contributions?[35] The yet-to-be-finalized Treasury regulations regarding state charitable credit programs may provide a legal answer to this question. We are still waiting for a persuasive answer that rings in a normative register.

This, in my view, may turn out to be the lasting achievement of the states that have adopted charitable credit programs in the last several months. Whether these programs survive the final Treasury regulations and whether those regulations survive in court are, in some respects, ancillary issues because the final Treasury regulations are not the final word on SALT. What the states have done is to focus our attention on the fact that even while contributions to private schools, private universities, and religiously-affiliated charities remain deductible, payments that go toward supporting public schools, public universities, and public hospitals are treated less favorably by federal tax law—a disparity that, if anything, seems to get it backwards. These states know that the SALT deduction's future will be determined in the court of public opinion rather than in an agency process or court of law. By illustrating—dramatically—the arbitrariness of the current disparity in treatment, these states have made for themselves a powerful opening argument.

35. *See* Galle, *supra* note 6, at 782 (taking the SALT deduction for granted and positing: "if the goal is to subsidize production of public goods by actors other than the federal government, why should we grant a deduction for contributions to charity when there is already a deduction for taxes paid to state and local governments?").