THE YALE LAW JOURNAL

COMMENT

Tax Expenditures as Foreign Aid

Few issues in global politics are as contentious as foreign aid—how much rich countries should give, in what ways, to whom. For years, it has been a commonplace that U.S. policies are stingy. The Organization for Economic Cooperation and Development (OECD) routinely ranks the United States far behind its industrialized peers in official development assistance (ODA), measured as a percentage of gross national income (GNI).[1] An endless parade of critics has implored the government to do more; some suggest that the Bush Administration's support for the Monterrey Consensus, which sets a goal of increasing assistance to 0.7% of GNI, commits it to do more.[2] Against these allegations of miserliness, executive officials and certain sympathetic scholars have begun to argue that the published statistics are misleading because they fail to account for individual and corporate philanthropy. What the OECD misses, this argument runs, is the exceptional extent of Americans' private generosity.[3]

1. *See, e.g.*, RICHARD MANNING, ORG. FOR ECON. COOPERATION & DEV., DEVELOPMENT CO-OPERATION REPORT 2005, at 16 tbl.1.1 (2006) (ranking the United States second to last in 2004 and last in 2006, with an ODA/GNI ratio less than half the European Union average). In 2004 the United States gave $19.7 billion, or 0.17% of GNI. *Id.*

2. *See, e.g.*, JEFFREY D. SACHS, THE END OF POVERTY: ECONOMIC POSSIBILITIES FOR OUR TIME 329, 337-40 (2005) (asserting that questions about solving global poverty are "particularly American questions these days" and urging the U.S. government to fulfill its Monterrey Consensus pledge); UNITED NATIONS DEV. PROGRAMME, HUMAN DEVELOPMENT REPORT 2005, at 86 (2005) (describing the Monterrey Consensus and the United States' explicit refusal to "see the 0.7% target as an operational budget commitment").

3. Perhaps the most influential work in this vein has been that of Carol Adelman and her colleagues at the Hudson Institute. *See, e.g.*, CAROL C. ADELMAN ET AL., HUDSON INST., AMERICA'S TOTAL ECONOMIC ENGAGEMENT WITH THE DEVELOPING WORLD: RETHINKING THE USES AND NATURE OF FOREIGN AID (2005), *available at* http://www.hudson.org/files/publications/Rethinking_Foreign_Aid.pdf; *see also* U.S. AGENCY FOR INT'L DEV., FOREIGN AID IN THE NATIONAL INTEREST: PROMOTING FREEDOM, SECURITY, AND

What both sides of the debate have missed, this Comment proposes, is not the role of the private sector in generating foreign aid but the role of tax expenditures in subsidizing it. Tax expenditures are deviations from the normal tax structure "designed to favor a particular industry, activity, or class of persons."[4] They take the form of deductions, exemptions, exclusions, deferrals, credits, or preferential rates. Economically, these "expenditures" may be seen as equivalent to direct government outlays: if U.S. taxpayers saved $70 billion last year from, say, the mortgage interest deduction, the government therefore gave a $70 billion (implicit) subsidy to homeownership. Stanley Surrey pioneered the theory of tax expenditures in the late 1960s, and the concept is now widely credited. Since 1974, Congress has required the annual publication of a tax expenditure budget.[5]

Although not immediately evident from the budget data, in recent years a growing amount of expenditure has gone toward foreign aid. The reason lies in America's tax treatment of nonprofit organizations. Whenever U.S. charities and foundations spend money overseas—as they have increasingly been doing—some portion of this spending can be attributed to the support they receive from numerous state and federal tax privileges. Unlike traditional ODA, these tax expenditure funds are privately organized and distributed, yet unlike voluntary transfers they are paid for by the public fisc. This is not private aid; it is *privatized* aid.

The basic, descriptive goal of this Comment is to show, in Parts I and II, how nonprofit tax policies have shaped the content of American aid. The broader goal is to begin to connect this insight, in Part III, with the literatures on tax expenditures and international development—and, in so doing, to illuminate some attractive and unattractive features of using tax expenditures in the foreign aid context.

I. HIDDEN SOURCES OF AID

No other tax system is as generous to its nonprofit organizations as that of the United States;[6] U.S. nonprofit law is, in large measure, a coordinated

OPPORTUNITY ch. 6, at 129 (2002) (echoing Adelman's arguments that ODA fails to capture "the full measure of foreign aid").

4. STANLEY S. SURREY & PAUL R. MCDANIEL, TAX EXPENDITURES 3 (1985).

5. Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, § 601(a), 88 Stat. 297, 323 (codified as amended at 31 U.S.C. § 1105(a)(16) (2000)).

6. *See* John Simon et al., *The Federal Tax Treatment of Charitable Organizations*, *in* THE NONPROFIT SECTOR: A RESEARCH HANDBOOK 267, 267 (Walter W. Powell & Richard Steinberg eds., 2d ed. 2006).

regime of tax privileges. Many nonprofits are exempt from income, property, sales, and franchise taxes at all levels of government. Contributions to charities may be deductible under state and federal income, gift, and estate taxes. Section 501(c)(3) nonprofits are allowed to issue tax-exempt bonds.[7]

Not everyone agrees that these tax privileges constitute tax expenditures. The Joint Committee on Taxation (JCT) and the Office of Management and Budget (OMB), for example, include the charitable contributions deduction but not the income tax exemption in their annual tax expenditure compilations.[8] Because of the special nature of charitable giving and nonprofit enterprise, one might view the forgone revenue from these provisions as a necessary concession to measurement difficulties, donor equity, or the conceptual integrity of the tax base. Among tax scholars, however, the mainstream position is to view both the deduction and the exemptions as tax expenditures—as government subsidies justifiable, if at all, on consequentialist grounds.[9] The Supreme Court seems to concur.[10]

If one acknowledges the nonprofit tax preferences (or some subset thereof) to be tax expenditures, it follows that the government acts as an indirect fiscal sponsor of the beneficiary organizations, in all that they do. When the organizations expend funds on grants, technical support, or submarket-rate loans in foreign countries "with the promotion of economic development and welfare as the main objective,"[11] it is hard to see why, analytically, the tax expenditure portion of these funds—the portion effectively paid for by the government—should not count as official aid.

---

7. Nonprofit organizations also receive many lesser tax privileges. For a thorough discussion of their tax treatment, see JAMES J. FISHMAN & STEPHEN SCHWARZ, NONPROFIT ORGANIZATIONS: CASES AND MATERIALS pts. 3-4 (3d ed. 2006); and Bazil Facchina et al., *Privileges and Exemptions Enjoyed by Nonprofit Organizations*, 28 U.S.F. L. REV. 85 (1993).

8. *See, e.g.*, STAFF OF JOINT COMM. ON TAXATION, 109TH CONG., ESTIMATES OF FEDERAL TAX EXPENDITURES FOR FISCAL YEARS 2006-2010, at 7-8 (Comm. Print 2006); OFFICE OF MGMT. & BUDGET, ANALYTICAL PERSPECTIVES: BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2007, at 287-90 tbl.19-1 (2006).

9. *See* Evelyn Brody, *Charities in Tax Reform: Threats to Subsidies Overt and Covert*, 66 TENN. L. REV. 687, 691 n.5 (1999).

10. *See* Bob Jones Univ. v. United States, 461 U.S. 574, 591 (1983) ("When the Government grants exemptions or allows deductions all taxpayers are affected; the very fact of the exemption or deduction for the donor means that other taxpayers can be said to be indirect and vicarious 'donors.'"); Regan v. Taxation with Representation of Wash., 461 U.S. 540, 544 (1983) ("Both tax exemptions and tax deductibility are a form of subsidy that is administered through the tax system.").

11. MANNING, *supra* note 1, at 260. This is the OECD's definition of "official aid," which must be "undertaken by the official sector." *Id.* "Official development assistance" must satisfy the further criterion that it goes to developing countries. *Id.*

With the charitable deduction, the foreign aid subsidy occurs anytime individuals or corporations make contributions to a U.S.-based nonprofit that runs or supports appropriate programs outside the country. Federal income tax deductions are not available for gifts made directly to foreign recipients, but the rules allow full deductibility for gifts made through an American intermediary.[12] With the various entity-level exemptions, the foreign aid subsidy can occur whenever a U.S.-based organization sends abroad money it would have otherwise lost to taxes. Other tax expenditures (arguably) made by the U.S. government, such as tax sparing provisions in treaties with developing countries, might also be classified as "hidden" foreign aid. I focus only on the nonprofit sector expenditures because measures aimed at incentivizing foreign investment have a weaker conceptual claim to being aid and a weaker empirical claim, I suspect, to having fostered global development.[13]

As the U.S. nonprofit sector has grown larger and more international, it stands to reason that tax expenditures on foreign aid have swelled correspondingly. Of the 2078 public charities classified by the IRS in 1998 as "international and foreign affairs" entities, 88% were founded in 1970 or later and 62% were founded in 1985 or later.[14] Internationally focused charities and foundations currently make up about 2% of the nonprofit sector, in numerical and revenue terms, and this figure is expected to rise.[15] Many of the domestically focused organizations, moreover, have expanding overseas roles.[16] These trends reflect a distinctive feature of tax expenditures as compared to direct expenditures: once the triggering tax preference is established, the expenditure becomes a function of exogenous factors and can grow or shrink dramatically without any government action. Indeed, the recent growth in

12. I.R.C. § 170(c)(2)(A) (2000). Under the gift and estate taxes, these geographic restrictions do not apply. *Id.* §§ 2055, 2522 (amended 2006).

13. *See* Allison D. Christians, *Tax Treaties for Investment and Aid to Sub-Saharan Africa*, 71 BROOK. L. REV. 639, 692-95 (2005) (discussing the theory and evidence that tax sparing is not effective at promoting investment in less developed countries).

14. MURRAY S. WEITZMAN ET AL., THE NEW NONPROFIT ALMANAC AND DESK REFERENCE 133 tbl.5.4 (2002).

15. JANELLE A. KERLIN & SUPAPORN THANASOMBAT, URBAN INST., THE INTERNATIONAL CHARITABLE NONPROFIT SUBSECTOR: SCOPE, SIZE, AND REVENUE 1, 6 (2006), *available at* http://www.urban.org/UploadedPDF/311360_nonprofit_subsector.pdf.

16. *See* David E. Pozen, *Remapping the Charitable Deduction*, 39 CONN. L. REV. 531, 568-70 (2006) (describing the growing international role of U.S. charities, foundations, and donors and providing further statistics).

America's tax expenditure aid cuts in the opposite direction of its post-Marshall Plan secular decline in official aid.[17]

II. ESTIMATING THE EXPENSE

So how much does the United States "spend" in tax expenditures on foreign aid? There are numerous, perhaps insuperable, obstacles to divining a reliable figure. First, there is the aforementioned debate about which nonprofit tax preferences (if any) should count as tax expenditures. Second, many states do not produce tax expenditure estimates, and when they do, their methodologies often differ.[18] Third, many nonprofits benefit indirectly from a wide range of tax expenditures beyond the charitable deduction, debt-financing exclusion, and standard exemptions; colleges and universities, for instance, likely capture the value of tuition credits.[19]

Fourth, as the OMB ritually points out in its *Analytical Perspectives* reports, the overall revenue impact of tax expenditures cannot be determined through simple addition.[20] Because tax expenditure policies generate behavioral incentives and complex interdependencies, changes to one policy may have first- and second-order consequences for other tax expenditures and for the public fisc more generally. Were the charitable deduction to be eliminated, to take just one example, the resultant decline in private contributions would make the exclusion of interest income more valuable if organizations responded by issuing more bonds, and it would put pressure on the government to compensate for the shortfall.[21]

Finally, not all of U.S. nonprofits' cross-border activity can reasonably claim to be foreign aid. Some organizations support religious or cultural causes, or causes in other wealthy countries, that would not satisfy most

---

17. *See* CURT TARNOFF & LARRY NOWELS, CONG. RESEARCH SERV., FOREIGN AID: AN INTRODUCTORY OVERVIEW OF U.S. PROGRAMS AND POLICY 15 figs.7 & 8 (2004) (charting the decline in official aid in real dollars and as a percentage of GDP).

18. *See* Christopher Howard, *Tax Expenditures*, *in* THE TOOLS OF GOVERNMENT: A GUIDE TO THE NEW GOVERNANCE 410, 420 (Lester M. Salamon ed., 2002).

19. *See* Brody, *supra* note 9, at 695. Many nonprofits, of course, also benefit substantially from direct government expenditures and nontax legal policies.

20. *See, e.g.*, OFFICE OF MGMT. & BUDGET, *supra* note 8, at 286. This has not stopped many tax experts from adding and subtracting them. *See* Howard, *supra* note 18, at 418.

21. The standard deduction also raises measurement problems. At present, only itemizing taxpayers can claim the charitable deduction. If the standard deduction were set at a lower rate, though, more taxpayers who donate would choose to itemize, which implies that some portion of the standard deduction acts as a tax expenditure in support of these marginal taxpayers' gifts. *See* Brody, *supra* note 9, at 695 n.18.

people's understanding of "aid." Separating out the tax expenditure allocated to these activities from the expenditure allocated to true foreign aid activities would require difficult definitional choices, extensive recordkeeping, and fine-grained quantitative analysis.

Bracketing all of these caveats, casual empiricism can give us a rough sense of the expenditure's magnitude. The most significant foreign aid tax expenditure is occasioned by the charitable deduction. The OMB estimates that the total revenue loss attributable to the federal income tax deduction will exceed $240 billion over the next five years, or roughly $48 billion per year.[22] The annual revenue loss from the federal gift and estate tax deductions, according to the OMB, had been running at roughly $5 billion before recent reforms.[23] Not counting any of the state deductions, these figures suggest a total tax expenditure of $53 billion per year on the charitable deduction. If we estimate, conservatively, that 2% of U.S. donations head overseas—and make no adjustment for the possibility that higher-bracket taxpayers are more likely to support international causes—it would mean that around $1.06 billion of these funds is currently allocated to cross-border charity. Raise the estimate to a more realistic 4%,[24] and the figure would be $2.12 billion. Apart from whatever incentive effects they might have, federal deduction expenditures would thus account for one-fifth of U.S. nonprofits' total giving to lower- and middle-income countries,[25] in an amount equal to 13% of America's ODA ($16.3 billion) in 2003.[26] Given that up to 60% of U.S. nonprofits' cross-border spending has been going to developing countries,[27] approximately $1.27 billion

22. OFFICE OF MGMT. & BUDGET, *supra* note 8, at 296 tbl.19-3.

23. OFFICE OF MGMT. & BUDGET, ANALYTICAL PERSPECTIVES: BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2002, at 93 tbl.5-6 (2001). This figure is shakier than the income tax deduction figure both because it does not incorporate post-2001 policy changes and because transfer tax deductions have a somewhat weaker case for being tax expenditures.

24. *See* Pozen, *supra* note 16, at 569-70 (reporting recent findings that 2.2% of Americans' giving goes to international affairs charities and suggesting that roughly 2% more heads overseas through other types of nonprofits).

25. *See* David Roodman & Scott Standley, *Tax Policies To Promote Private Charitable Giving in DAC Countries* 6 tbl.1 (Ctr. for Global Dev., Working Paper No. 82, 2006), *available at* http://www.cgdev.org/files/6303_file_WP_82.pdf (reporting OECD Development Assistance Committee statistics that U.S. nongovernmental organizations gave $6.3 billion to developing countries and $4.3 billion to middle-income countries in 2003).

26. MANNING, *supra* note 1, at 172 tbl.8. This $16.3 billion figure is up from $10.6 billion in 2000. *Id.*

27. *See supra* note 25.

of that $2.12 billion could be a candidate for "development assistance" classification.[28]

The other major tax expenditures are tougher to quantify and flow mainly to hospitals and universities, two types of nonprofits unlikely to dispense much foreign charity (though some hospitals run international programs, and certain university policies, such as scholarships for international students and drug development for global diseases, might be so characterized).[29] For the exclusion of interest income, the JCT and the OMB do not keep statistics beyond those for hospitals and educational facilities.[30] Enterprising tax scholars recently estimated the annual state and federal aggregate expenditure on the income tax exemption and the property tax exemption at $10.1 billion and $8 to $13 billion, respectively.[31] If even 1% of the lower bound of this sum ($18.1 billion) had gone toward international development, it would represent an additional $181 million in aid spending. The real figure could easily be double this.

The calculations just proffered are crude, and much more work must be done to derive satisfactory estimates of, first, the total tax expenditure allocated to the nonprofit sector and, second, the portion thereof allocated to foreign causes deserving of the "aid" label. But the cocktail-napkin math suggests that annual tax expenditures on foreign aid, as delivered through private nonprofits, are currently running somewhere in the range of $1 to $2.5 billion, of which as much as $1.5 billion might reasonably be deemed ODA.

III. NEXT STEPS

If one accepts the argument above, then government spending on foreign aid is somewhat larger, and substantially different in character, than most commentators seem to have realized.[32] What to make of this insight is a

28. *See supra* note 11 and accompanying text (explaining the OECD's definition of ODA).

29. The charitable deduction expenditure is not skewed in this way. If contributions to education and health were excluded, the OMB's projection of the annual revenue loss on the federal income tax deduction, *see supra* note 22 and accompanying text, would come to approximately $40 billion. OFFICE OF MGMT. & BUDGET, *supra* note 8, at 296 tbl.19-3.

30. *See, e.g.*, STAFF OF JOINT COMM. ON TAXATION, *supra* note 8, at 30-42 tbl.1; OFFICE OF MGMT. & BUDGET, *supra* note 8, at 287-90 tbl.19-1.

31. *See* Evelyn Brody & Joseph J. Cordes, *Tax Treatment of Nonprofit Organizations: A Two-Edged Sword?*, *in* NONPROFITS AND GOVERNMENT: COLLABORATION AND CONFLICT 141, 149, 150 & tbl.4.5 (Elizabeth T. Boris & C. Eugene Steuerle eds., 2d ed. 2006).

32. I have been unable to find any prior discussion of these tax expenditures' relationship to foreign aid. The closest I have seen appears in Roodman & Standley, *supra* note 25, in which

question large enough for a book, so here I will just try to sketch a few implications.

A. Making It Count

Perhaps the most obvious takeaway from the prior analysis is that the OECD and the U.S. government should start to classify tax expenditures on foreign aid *as* foreign aid, collect data thereon, and adjust their statistics accordingly. Estimating these tax expenditures will not be easy, as explained in Part II, and comparing them across countries will only increase the difficulties. Yet tax expenditure scholars have been developing templates for comparative analysis since at least 1985,[33] and the OECD has the competence and credibility to formulate a reasonably reliable, if not entirely valid, methodology. As long as the OECD methodology is transparent, it should greatly advance public understanding of this form of aid.

Classifying anything other than direct government spending as aid might be seen to start us down a slippery definitional slope: if tax expenditures on foreign charity should be added to the official figures, should tax expenditures (and U.S. subsidies more broadly) on agriculture—expenditures known to have devastating effects on developing-world farmers—be *subtracted* from the figures?[34] Although I believe that agricultural subsidies profoundly undermine the United States' good works in international development, I would resist such a move, so as to preserve conceptual clarity. Development-degrading tax expenditures can be tallied on a separate list, as can purely private contributions, and scrutinized just as intensively.

---

the authors identify the charitable deduction as a "de facto aid policy," *id.* at 35, and thoughtfully explore its incentive effects on private cross-border giving. David Roodman and Scott Standley do not, however, identify this "aid" as a tax expenditure, try to quantify its revenue cost, address possible implications of conceptualizing the deduction as aid, or consider the other nonprofit tax privileges.

33. *See* INTERNATIONAL ASPECTS OF TAX EXPENDITURES: A COMPARATIVE STUDY (Paul R. McDaniel & Stanley S. Surrey eds., 1985). Another useful template is offered by the Center for Global Development's remarkable Commitment to Development Index. The Index's aid component—on which the United States ranked third to last in 2006—includes both controls for aid quality and measures of private giving attributable to tax incentives. *See* Ctr. for Global Dev., Commitment to Development Index 2006: Aid (2006), http://www.cgdev.org/section/initiatives/_active/cdi/_components/aid/.

34. Pushing this idea a little further, would counting foreign charity tax expenditures as ODA strengthen the case for counting agricultural tax expenditures as illegal farm subsidies under World Trade Organization rules? The U.S. government would presumably be even more averse to drawing this inference. I am grateful to John Colombo for suggesting this point.

One could also raise a pragmatic argument for excluding tax expenditures from the official aid figures. For those who want the U.S. government to give much more, there is a risk that any upward revaluation of its largesse will make Americans feel more confident in their generosity and thus lead to complacency. (In stark contrast to the United States, Sweden, the darling of the international development community, provides zero tax subsidies for foreign charity.[35]) Militating against this argument, however, are both the demands of intellectual honesty and the equally plausible prospect that, by stimulating increased attention to foreign aid, a public conversation on tax expenditures will help Americans see just how ungenerous their policies really are.[36] Adding $1.5 billion to annual ODA would still leave the United States far below its peers in proportional terms. Specifically, it would have increased 2006 spending from 0.19% to 0.20% of GNI—less than half the European Union's unadjusted average and possibly insufficient to move the United States out of last place in the OECD rankings.[37] In a foreign aid debate so focused on perceptions of generosity, it is damaging that the U.S. government does not receive full credit for its spending. But full credit would not mean high marks.

B. Conceptualizing the Costs and Benefits

Beyond simply acknowledging and keeping track of tax expenditures on foreign aid, how might we begin to evaluate them as tools of legal and public policy? One useful framework is offered by tax expenditure theory. From its inception, this literature has had a clear prescriptive aim: to convert most tax expenditures into direct expenditures or repeal them altogether.[38] Following Surrey, critics have flagged a host of concerns. Tax expenditures increase tax complexity and compliance burdens (administrative concerns); they are more opaque and esoteric than direct expenditures and so relatively more immunized from public debate or scrutiny (visibility concerns); they are more likely than direct expenditures to have regressive first-order effects (equity concerns); their uses may evolve in unexpected ways (predictability concerns); and they

---

35. Roodman & Standley, *supra* note 25, at 15.

36. Note in this regard that recent studies have found Americans, on average, to believe that foreign aid accounts for 20% of the federal budget, around thirty times the actual figure. Jeffrey D. Sachs, *The Development Challenge*, FOREIGN AFF., Mar.-Apr. 2005, at 78, 80.

37. *See* MANNING, *supra* note 1, at 16 tbl.1.1.

38. *See* Daniel N. Shaviro, *Rethinking Tax Expenditures and Fiscal Language*, 57 TAX L. REV. 187, 187 (2004).

may stimulate unproductive activity or reward behavior that would have occurred anyway (efficiency concerns).[39]

At first glance, tax expenditures on foreign aid appear to exaggerate each of these defects. Most obviously, their transnational character raises special problems of oversight and transparency. Given that wealthier Americans have consistently polled as being more committed to internationalism, the nonprofit tax privileges may also be more regressive when cross-border giving is concerned.[40] With foreign aid, there is an especially acute tension between the value of fostering "pluralism, volunteerism, and compassion"[41] through preferential treatment of the nonprofit sector, and the potential to save money and pursue a unitary policy vision through centralized planning and administration. Tax expenditures are much less likely than direct expenditures, one assumes, to be allocated to foreign governments or public international institutions such as the World Bank—bodies that are uniquely equipped to implement large-scale projects and reforms. Whereas traditional ODA will inevitably reflect the government's political and strategic goals,[42] a decentralized patchwork of tax expenditures may serve very different objectives—missionary agendas, for instance—and even contrary objectives.[43] These features of tax expenditures on foreign aid raise problems not only of administration, visibility, vertical equity, targeting, and efficacy, but also, one could argue, of democratic legitimacy. They conjure up the old notion, dating back to the World War II era, of the nonprofit sector as a locus of liberal internationalism, disconnected from, if not downright opposed to, the U.S. national interest.[44]

Yet at the same time, tax expenditures on foreign aid possess some distinctive virtues not captured by standard tax expenditure analysis. These expenditures help develop both the U.S. nonprofit sector and global civil society. They diversify aid spending and increase the total amount of aid. (There is little reason to think that they crowd out explicit government giving when their uses are so unpredictable and no relevant officials appear to have

39. *See, e.g.*, SURREY & MCDANIEL, *supra* note 4, chs. 3-4.

40. *See* Pozen, *supra* note 16, at 573.

41. U.S. AGENCY FOR INT'L DEV., *supra* note 3, at 141 (discussing the advantages of private organizations in financing foreign charity).

42. For empirical verification of this point, see Alberto Alesina & David Dollar, *Who Gives Foreign Aid to Whom and Why?*, 5 J. ECON. GROWTH 33 (2000).

43. *See* Pozen, *supra* note 16, at 597-99 (describing and defending deductibility for gifts to organizations that violate executive branch policies such as the "global gag rule").

44. *See* Peter Dobkin Hall, *A Historical Overview of the Private Nonprofit Sector*, *in* THE NONPROFIT SECTOR: A RESEARCH HANDBOOK 3, 19 (Walter W. Powell ed., 1987).

noted them.) They serve an educative function by connecting more Americans, via the beneficiary nonprofits, to issues and events around the world. They empower certain minority views in foreign policymaking and invigorate the "market" in development strategies. They cordon off one segment of the aid budget from the vicissitudes of constituent politics and thereby help correct for possible governmental failures, such as a tendency to underserve populations or causes that lack a domestic lobby and to underweight long-term threats. Although the public bodies typically bypassed by tax expenditure aid may have greater scope and authority to foster development, nongovernmental recipients may nevertheless be more effective because of their relative freedom from political and bureaucratic constraints and, often, corruption.

The list could go on and on. Developing a normative appraisal of these tax expenditures is by no means straightforward; there is clear merit to having both centralized aid and decentralized aid, and striking the optimal balance between them will never be an exact science. Yet given America's comparatively paltry levels of ODA and the well-known limitations—intuitionistic, psychological, biological, practical—on individuals' capacity to show moral regard for distant strangers,[45] I submit that tax expenditures serve a valuable function in institutionalizing and expanding our commitment to foreign charity.[46] Sweden no doubt has a more targeted, consistent, and efficient aid

45. *See* Jack Goldsmith, *Liberal Democracy and Cosmopolitan Duty*, 55 STAN. L. REV. 1667, 1670-75 (2003) (summarizing the philosophical literature on "plausibility constraints" that make cosmopolitan moral duties too demanding for individuals and more appropriately assigned to institutions).

46. To see just how subtle America's tax expenditures on foreign aid are, an interesting comparison might be drawn with the globally redistributive taxes that cosmopolitan political theorists have recently been advocating. Many of these theorists have endorsed Thomas Pogge's proposal for a "global resources tax," a 1% consumption tax on all natural resources the proceeds of which would be "used toward the emancipation of the present and future global poor." Thomas W. Pogge, *An Egalitarian Law of Peoples*, 23 PHIL. & PUB. AFF. 195, 201 (1994); *see also* THOMAS W. POGGE, WORLD POVERTY AND HUMAN RIGHTS: COSMOPOLITAN RESPONSIBILITIES AND REFORMS ch. 8 (2002) (expanding on this idea, now dubbed a "Global Resources Dividend"). In the same vein, numerous academics and development organizations have endorsed some version of a redistributive "Tobin tax," an excise tax on cross-border currency transactions the proceeds of which would likewise be devoted to the world's poor. *See* Ctr. for Envtl. Econ. Dev., Tobin Tax Initiative, http://www.ceedweb.org/iirp/ (last visited Dec. 11, 2006). Global taxes such as these would in many senses be the inverse of our tax expenditures on foreign aid: they would be highly visible, administered by a central international body, purposefully and unabashedly redistributive, subject to ceaseless intergovernmental politicking, and coordinated to the last decimal point with other countries. Both functionally and symbolically, tax expenditures have much less capacity than global taxes to effectuate development ideals. Politically and programmatically, however, tax expenditures are nowhere near as demanding or as disruptive of the existing economic order.

program, but in a society as large and heterogeneous (and skeptical of big government) as the United States, a more pluralistic, mixed-funding approach may be appropriate. And regardless, transitioning to a unified aid budget would be extremely costly. There is no way to decouple the tax expenditures on nonprofits' foreign activities from the tax expenditures on their domestic activities without upending the current system of tax preferences and severely compromising the autonomy of the nonprofit sector.

C. Keeping Perspective

Readers unconvinced by this cursory defense of tax expenditures on foreign aid need not be too alarmed. If these expenditures are politically safe from radical retrenchment, they are constrained from radical expansion for a more basic, structural reason: they are not scalable like regular expenditures. Although further internationalization of the nonprofit sector should keep driving up the subsidies, by design they will never be more than fractional supplements to private charity. Nonprofit organizations cannot realistically benefit any more from exemptions because they already pay nothing, in most jurisdictions, in mission-related income, property, sales, or franchise taxes. The charitable deduction might be extended to nonitemizers and to direct cross-border gifts,[47] but if individual and corporate donors were to receive significantly more generous tax breaks—on top of what are already the most generous such policies in the world—it could undermine the deduction's popular support, if not the tax base itself. And it would be a political nonstarter, not to mention a communitarian nightmare, to provide stronger incentives for foreign giving than for domestic giving.

For those who seek a Jeffrey Sachs-style foreign aid revolution in which the United States delivers on its Monterrey Consensus pledge,[48] it would therefore be a mistake to see tax expenditures as a possible panacea. Tax expenditures are destined to be a limited, though important, vehicle for addressing the world's most urgent problems.

DAVID E. POZEN

47. *See* Pozen, *supra* note 16, at 595-96 (recommending possible reforms to facilitate international deductibility).

48. *See supra* note 2 and accompanying text.

THE YALE LAW JOURNAL

MARCH 2007 VOLUME 116, NUMBER 5