1998

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INTRODUCTION

We are familiar with two kinds of taxes: those that raise revenue and those that aim to induce behavior of one kind or another.¹ But the tax system also can be used to gauge preferences in a way that substitutes for, or even improves upon, a function normally performed by the ballot box or by privately organized surveys. An example of this "taxes as ballots" idea is the annual American inquiry in the form of a checkoff on tax returns, permitting individual taxpayers to earmark a small amount of their tax payment for the...
cause of publicly financed presidential campaigns. This example might seem to have little to do with taxation because respondents incur no additional costs as a result of their choices. On the other hand, as explored in Part I, there are features of this inquiry on the tax return that bear little resemblance to a conventional ballot but have much in common with the structure of taxation. At the same time, there is a plausible case to be made that this poll has advantages over alternative means of assessing citizen opinion as to the wisdom and magnitude of public campaign financing.

A second, perhaps less trivial, and certainly very different example of balloting associated with the tax system derives from a re-examination of the role and purpose of the charitable deduction and the tax-exempt status of a variety of organizations. It is generally recognized that the deduction stimulates charitable contributions, but it may be useful to set this familiar view aside. Nearly lost in the substantial literature on these features of the tax system is the idea that some tax-exempt recipient organizations do work that the government might otherwise do itself or pay agents to perform. Part II of this Article focuses on the charitable deduction as an illustration of the idea that the tax system can be understood as allowing dispersed donors to determine which agents, projects, or causes the government will finance. The tax deduction essentially casts the government as a financing partner, with taxpayer-donors serving as intermediaries or agents who choose the providers of, or indeed the very existence of, certain services. In an important sense, private contributions are matched by the government through the charitable deduction.

The “votes” cast through deductible contributions generate a measure of preferences that is in some ways superior and in other ways inferior to other polling devices. Suffrage is restricted. Indeed, even fewer citizens participate in making deductible contributions than in the campaign finance scheme, so that decisionmaking diverges yet more dramatically from the one-person-one-vote baseline.

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2 A number of states have checkoff systems for the public financing of political campaigns that do cost the respondents directly. The design of these checkoffs is taken up in Part I.C.

3 By “recipient” I refer only to the fact that these are organizations on the receiving end of tax-deductible contributions. The fact that they may also receive direct government grants or contracts plays a small part in the discussion below.

4 The partnership metaphor reminds us that these agents are also principals. In this case, their individual contributions instruct the agent, or government, how much to spend (at least in tax expenditure terms).

5 The deduction might also be seen as affecting the behavior of the providers of such things as social services and education. Providers necessarily find themselves competing not only for the attention of bureaucrats, because there are some direct government grants available, but also for the attention of private donors (who come bearing indirect government grants).
that is so familiar. Nevertheless, I hope to show that it is likely that this system of taxes as ballots, through the deductibility of private contributions, measures and aggregates citizens' preferences more satisfactorily than the one-taxpayer–one-vote campaign finance checkoff scheme. A more important claim is that this balloting through the tax system also may be superior to conventional voting. Indeed, the charitable deduction is probably the most useful example of what I mean by taxes as ballots. I begin, however, with the checkoff scheme because it usefully illustrates collective choice problems that inform the comparison between conventional and tax-driven ballots—as well as legislative voting. After examining the campaign finance checkoff in Part I and the charitable deduction in Part II, in Part III I explore the tension between, or perhaps the complementary character of, extracting information about preferences and encouraging private giving. I inspect matching-grant programs and donor-designation options that have emerged in the philanthropic and private sectors, where they also may be used to gauge preferences and to induce private contributions. The striking comparison to private matching schemes solidifies the description of balloting through the tax system.

Finally, Part IV goes beyond the charitable deduction and campaign finance examples to return to the social choice questions that are at the core of the taxes as ballots idea. The question is whether the legislature might not also delegate other matters to popular decisionmaking of a particular sort through tax deductions or similar devices.

I. SIMPLE CHECKOFFS AS PROPORTIONAL VOTING

A. Checkoff Mechanics for Financing Presidential Campaigns

The familiar individual return, Form 1040, asks taxpayers whether they would like to allocate $3 of federal funds to the Presidential Election Campaign Fund.6 As if to emphasize the taxes as ballots theme and the desire to approach the one-person–one-vote norm, married taxpayers filing joint returns are offered the opportunity to respond independently and to allocate (or not) $3 each.7 Somewhat surprisingly, and in contrast to the Internal Revenue Service instructions for such things as charitable deductions,8 the

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6 This allocation was authorized by the Presidential Election Campaign Fund Act of 1966, Title III § 302(a), Pub L No 89-809, 80 Stat 1587, codified at 26 USC § 6096 (1994).
8 See id at A-3. One difference may be that other opportunities reflected on the return must have been taken by the taxpayer during the tax year and prior to completing the form.
instructions to Form 1040 appear to encourage positive responses by puffing that “[t]he fund reduces candidates’ dependence on large contributions from individuals and groups and places candidates on an equal financial footing in the general election.”

For every positive response, a special account at the Treasury is enriched by $3 and, upon certification by the Federal Election Commission, the contents of the account are dispensed to presidential candidates by matching the first $250 received during presidential primaries (subject to a ceiling, which was $15.4 million in 1996), to political parties to fund national conventions ($12.4 million to each of the two major parties in 1996), and to candidates in the general presidential election who agree not to accept private contributions ($61.8 million each to Clinton and Dole in 1996). Candidates can receive these funds even as they benefit from “soft money” given to political parties by individuals, corporations, and interest groups. In 1980, 28.7 percent of taxpayers allocated money through this checkoff; by 1994, the positive response had dropped to 13 percent. In 1993, these steadily dwin-

9 Id at 11.
12 26 USC §§ 9004-06 (1994).
14 Sullivan, 73 Tax Notes at 287. The revenues generated by most state checkoff schemes also have been falling. See Checkoff Contributions Continue to Decline, Tax Administrators News 17 (Mar 1997). This parallel state experience suggests that the key to understanding checkoff schemes is unlikely to be the manner in which the questions put to taxpayers are framed.

The decline in affirmative responses, the positioning of the checkoff question at the beginning of Form 1040, anecdotal evidence of taxpayers' explanations for their responses, and the fact that many citizens give charitable contributions of as little as $3 all contribute to my inclination to think of these responses as made by rational actors. Some readers will have a contrary reaction, and will insist that $3 is too small an amount to take seriously, if only because one could not possibly think that a $3 reallocation among federal projects could make any real difference. This skeptical approach to rationality and cooperation is, of course, the basis of puzzles involving the fact that millions of people vote, that voter turnout is often higher where the cost of voting is higher rather than lower, that millions of people contribute to charities, applaud at concerts, pick up litter, and so forth. I would ask the skeptic to explain also why the government pursues remedies that at the margin seem irrational. If a government auditor discovers that taxpayer X has understated her income by $1,000, why bother to collect the taxes and penalties due? The marginal $1,000 or more could hardly make much of a difference with respect to the government's overall effectiveness, and one more or one less piece of enforcement could hardly affect overall deterrence. And if the government is "permitted" to think of many such cases as part of one deterrence strategy, then why can we not think of many taxpayers and donors as constituting one rational team? In short, there is anecdotal evidence that people take their checkoff and charitable giving strategies seriously (as they do their inclinations to boycott products or vendors). There is also a sense in which we can com-
dling responses and funds prompted Congress to raise the checkoff amount from $1 to $3.\footnote{See Omnibus Budget Reconciliation Act of 1993 § 13441, Pub L No 103-66, 107 Stat 312, codified at 26 USC § 6096 (1994).}

B. The Checkoff as a Form of Democratic Decisionmaking

1. Political participation.

Putting aside the question of why Congress might wish to delegate (or return) to the people the decision as to the funding level of the campaign financing program, a useful place to begin is with a comparison of the checkoff and more traditional forms of democracy or preference revelation as implemented through voting booths on election days. An obvious focal point of such a comparison is the difference in political participation under the two schemes. On the one hand, voters who do not file returns are denied input in the checkoff scheme, although presumably it would be fairly easy to encourage nonfilers to submit very simple returns in order to participate in this decision.\footnote{Present federal rules do not respect the preferences of those taxpayers who have a tax liability of less than $3. If there is a liability at the time the return is filed, or if a tax liability has already been satisfied through withholding, the response is counted. See 26 USC § 6096(a) (1994). In no event does an affirmative response increase the amount due from the responding taxpayer. Some state checkoff programs follow the federal pattern, but others do ask for direct contributions or for subtractions from refunds due taxpayers. See Part I.C.} Inasmuch as this simple checkoff asks for no direct payment from each "voter,"\footnote{See note 2 and accompanying text.} there is not much to the claim that only citizens who must file returns can be counted on to take the checkoff decision seriously. Still, voters who need not file tax returns would surely be more likely to register their preferences on election day than through this "tax day," or "checkoff day," option.\footnote{The tax return might be more attractive if it offered the opportunity to allocate a large sum of money rather than $1 or $3.} On the other hand, because the turnout rate is far greater, the overall level of political participation may well be higher on tax day than on election day.
day. To be sure, turnout for general elections might increase if voters everywhere could easily cast their ballots over a several-month period as they now can file their returns. Alternatively, we could use tax returns as the medium through which to record conventional votes that presently are entered on election day. I think it is fair to say that election day is appealing because of conventional views regarding political participation, but the checkoff day alternative is not necessarily inferior. The taste for broad suffrage is probably not a reason to reject taxes as ballots, although it may suggest some tinkering with the details of the campaign checkoff scheme.

2. Checkoffs versus referenda and legislation.

a) The collective choice and public goods problems. The substantive character of the checkoff is, I think, more interesting than either its operational details or the level of political participation it can generate. The characteristics of a checkoff are perhaps easiest to explore by comparing a tax checkoff to a more conventional exercise in direct democracy, a referendum. However, the comparison does not help to answer the question of why we use the checkoff where we do, if only because our constitutional structure does not make room for federal plebiscites. One function

19 There are some states that now permit voting over several weeks, but the impact on turnout is modest at best. See Sam Attlesey, State Leaders Trying to Get Out the Voters, Dallas Morning News 1A (Feb 17, 1997) (reporting that overall turnout in Texas has not increased despite the state's switch from one election day to a seventeen-day election period); Lilliard E. Richardson, Jr. and Grant W. Neeley, Implementation of Early Voting, 69 Spectrum: J State Govt 16, 21 (1996) (examining Tennessee's experience with a two-week early voting period and finding a positive effect on turnout). For a compilation of six states' rules regarding voting periods and a comparison of ordinary absentee voting with early voting, see Margaret Rosenfield, Early Voting (FEC Natl Clearinghouse on Election Admin 1994).

20 I ignore the question of whether respondents are likely to take an issue more seriously if polled at the time of a general election or through their tax returns. Note also that tax return information is delivered less anonymously for many taxpayers, because spouses or professional preparers are likely to have access to responses, but it is unclear whether such a modest departure from anonymity would affect many responses even if the checkoff approach were expanded to numerous matters.

21 I use the term "referendum" because it pertains to a question the legislature has "referred" to the voters for their decision. In contrast, an "initiative" is a voter-initiated question put to the electorate. The checkoff is thus a referendum. "Plebiscites" form the larger set of which referenda and initiatives are subsets. A referendum often indicates a constitutional decision or other matter of great moment, while a plebiscite may refer to any matter decided by public expression. Unfortunately, this distinction is violated by referring to checkoffs as a kind of referendum.

22 The comparison between checkoffs and referenda is sufficiently interesting that I try to ignore the fact that our federal Constitution does not provide for either referenda or initiatives. For some discussion and references regarding the absence of a federal mechanism for direct expression or legislation, see Clayton P. Gillette, Plebiscites, Participation, and Collective Action in Local Government Law, 86 Mich L Rev 930, 931 & nn 5-6 (1988) (noting that "meaningful participation cannot occur in the national polity"). Of course, candidates might try to pre-
of the comparison therefore may be to explore the ability of the checkoff device to serve as a substitute for the absent and unavailable national referendum.

A conventional referendum is limited almost necessarily to a few questions with room only for affirmative or negative responses. It would be easy to use a referendum to ask whether the electorate supported publicly financed campaigns, but difficult to ask the electorate for its preferences as to either the conditions necessary for a candidate to qualify for public support or, more basically, the amount of public support that should be available. A checkoff, on the other hand, seems reasonably well-suited to determining a level of funding. For example, the checkoff for the Presidential Election Campaign Fund provides respondents neither the opportunity to reject the idea of public campaign funding altogether nor the chance to approve or disapprove of some specific level of funding. Instead each respondent is asked to add (or not) $3 to a total. Voters can see that no agenda-setter is forcing them to an up or down vote on some strategically set total expenditure; control of the expenditure is in their combined hands. Put this way, the checkoff resembles a variety of private fundraising schemes and seems like a reasonable tool of social choice, especially where alternatives to it obviously are flawed.

There is, however, potential for a serious collective action problem associated with the checkoff that is absent from the alternative

commit to voters by promising that, if elected, they will do everything in their power to accomplish some specified substantive policy. See Saul Levmore, Precommitment Politics, 82 Va L Rev 567, 575-79 (1996).

I think it is unlikely, however, that the checkoff scheme emerged precisely because of the unavailability of the more conventional referendum. As we will see, virtually all states with income taxes make greater use of checkoff schemes than does the federal government, even though the referendum alternative is available in about half the states. See David B. Magleby, Direct Legislation in the American States, in David Butler and Austin Ranney, eds, Referendums around the World: The Growing Use of Direct Democracy 218, 224-29, 254-57 (American Enterprise 1994) (surveying the use of referenda in twenty-seven states and analyzing their pros and cons). Also, I argue that the taxes as ballots idea is reflected in the charitable deduction, and this deduction is available under state income tax laws, even in states that allow referenda.

I assume that the $3 figure is not coercive in the sense that it seems unlikely that many respondents would wish to reallocate an amount greater than zero but less than $3. A respondent who yearns for the old $1 checkoff can answer affirmatively once every three years.

The referendum alternative seems flawed because an agenda-setter would have the power to set an amount, which voters could only approve or reject. This is a special case of Riker's well-known point that referenda probably empower overachieving interest groups. See William H. Riker, Comment on Baker, "Direct Democracy and Discrimination: A Public Choice Perspective," 67 Chi Kent L Rev 791, 793 (1991) (explaining that the ability to set the agenda gives a substantial advantage to the first interest group to act). And legislative decisionmaking may seem especially untrustworthy when it comes to using public funds for campaigns. But see note 112.
decisionmaking mechanisms. A participant in a checkoff does not know how others are responding, but in order to know how to respond himself, he needs to know or be able to estimate the aggregate responses of others. Without this information about other responses, the individual has no idea whether an affirmative response of his own will support his own preferences or will perversely exacerbate the aggregate overshooting of his preferred level of funding. A population of many individuals, all participating under such conditions, would only accidentally produce a result worth defending on social choice grounds. To the extent that response rates, expenditures from the campaign fund, and the rules of the game remain relatively constant, there is no collective action problem, because individuals can compare past results with the end result they most prefer and then act accordingly. But it is plausible (and interesting to imagine) that, with respect to the present checkoff scheme, uncertainty as to the response levels may be created by the declining number of affirmative responses, the uncertain number of primary candidates who will make claims on the fund, the absence of ongoing reporting of response rates, and especially the congressional decision to increase the checkoff amount. This uncertainty may be sufficient to leave many individuals in a position where they do not know whether the overall level of funding they prefer calls for an affirmative or negative response to the checkoff. Only those respondents who wish either for greater public financing than provided under the status quo or for zero (or nominal) public financing can proceed with complete confidence.

The unexpected number of primary candidates was cited by the Federal Election Commission as a factor in the temporary shortfall in the Presidential Election Campaign Fund in 1996. See Federal Election Commission, *Annual Report at 7* (cited in note 13). Taxpayer-respondents might similarly have been uncertain about how to respond, especially if their own preferences for public funding were a function of the number of candidates and the need for more information about these candidates.

As noted earlier, the increase to a $3 checkoff in 1993 would have made predictions yet more difficult. The collective action problem is of course greatest the first time it is encountered. I may want some public money to go to the campaign financing cause, but if I knew that other respondents would cause a half-billion dollars to be allocated without my nod, I would surely withhold "my" $3 in a checkoff scheme. And if I knew there would be but ten affirmative responses in the entire country, I would also decline because, when I add my $3, the fund would have but $33 and would accomplish nothing. I would most like to add $3 to the fund if it were in some intermediate range, but this kind of preference gathering requires some information; in the extreme case, adequate information requires multiple questions and contingent responses, as found in a decision-tree format. Substantial complexities soon overwhelm the objective. Moreover, as students of comparable single-transferable voting systems will recognize, perverse outcomes may arise. See William H. Riker, *Liberalism Against Populism: A Confrontation Between the Theory of Democracy and the Theory of Social Choice* 48-51 (Freeman 1982).

The former group's confidence is based only on the perception that most observers of a declining response rate do not expect an increase in that rate.
On the other hand, it is arguable not only that most individuals find their checkoff decisions unaffected by the uncertainties they perceive, but also that the scheme as a whole can generate a reasonably democratic outcome. Imagine, for example, that 55 percent of the voters support an expenditure of $200 million and that 45 percent prefer zero, but that a $200 million budget will in fact be generated by a 20 percent affirmative response rate. The 45 percent will surely decline to add "their" $3 to the pool. The question, however, is whether it is too fanciful to imagine that about 35 percent of taxpayers respond negatively, not because they do not support the expenditure, but because they correctly surmise that their own positive responses would lead to overshooting.

I will refer to the view that stresses the uncertainty about others' responses and the interaction between one's response strategy and these other responses as reflecting the collective action problem of checkoffs. If it is present, it is a simple coordination problem, but one that is not solved easily through a typical exercise in direct de-

Note that the collective action problem examined in the text has a counterpart in conventional voting to the extent that voters aim to communicate enthusiasm or caution through the size of the winning margin. See also text accompanying note 74 (explaining that a candidate obtains public funding by polling more than a fixed number of votes and that a collective action problem arises because each voter is unsure whether his vote is needed to reach this number). There is probably less of a collective action problem in these elections because uncertainty is reduced through the publication of pre-election survey results. In contrast, private surveys are not conducted regarding (and news organizations show little interest in) the number of taxpayers inclined to respond affirmatively to the checkoff question on their upcoming tax returns.

The example in the text raises the normative question of how to set the dollar amount of the checkoff. If the checkoff (or any referendum) could tolerate multiple questions in the manner of a decision tree, see text accompanying notes 30-31, then there would be a more complicated question of how to set up the multistage inquiry. One possible strategy is to aim for an amount likely to induce a 50 percent affirmative response rate. There might, after all, be a kind of aesthetic appeal to the principle of the median voter's preferences. My intuition is that there is a tradeoff between the advantages of higher and lower amounts. If each respondent were, for example, offered the opportunity to reallocate $1,000, then many respondents might take the checkoff process quite seriously. On the other hand, high amounts raise the likelihood of a tyranny of the minority. Thus, with the $3 amount and a 13 percent affirmative response rate, see text accompanying note 14, it is plausible that a majority of voters and taxpayers approve of the process and approximate budget allocation determined by the checkoff. See text accompanying notes 42-43. But with, say, a $1 million checkoff amount and approval by one thousand respondents, it would be quite plausible that the other 99.9 percent of the respondents preferred a budget below the $1 billion amount reallocated by this thousand-person minority. The increase from $1 to $3 in the face of declining enthusiasm, if it is that, see notes 14-15 and accompanying text, probably suggests that the checkoff amount we experience has more to do with the legislature's preferences than with some scientific notion of the correct solution to this problem of setting the amount. But it is at least interesting to imagine that the increase to $3 was meant to encourage serious thought; an increase to $100 might have been more defensible on these grounds, although the lower approval rate that that amount would have generated (perhaps less than 1 percent) might have raised the fear of tyranny by a minority.
mocracy. If such a collective action problem is absent, then, as we will see, the checkoff procedure is more like the taxes as ballots scheme reflected in the tax deduction for charitable contributions.

I have already alluded to the notion that a concern about collective action arising from a decisionmaker's need for information often can be remedied at the cost of complexity. In this case, taxpayers could be polled as to whether they would like to add $3 even if the amount otherwise raised exceeds the previous year's (or some other) total. These respondents might be informed of the amount raised in previous years, so that each taxpayer could then record the amount he would like to see budgeted in the present year, with his response generating a $3 addition to the campaign fund if the amount "otherwise" raised falls below his preferred budget. Inasmuch as we shy away from comparable complexity in general elections, where voters might similarly wish to make their votes for Senator X contingent upon a particular result in other elections held that day, I will assume that this sort of decision-tree thinking may motivate legislative logrolls but is beyond the scope of direct democracy. However, the less complex the polling, and the less room there is for contingent responses, the more likely that a coordination problem will exist among respondents who are combining to set budgets.

Even if the coordination problem just described seems plausible, the uncertainty at its roots may seem dwarfed by the public goods problem in which it can be regarded as embedded. If a taxpayer is willing to pay $3 when he enjoys but a tiny fraction (perhaps one two-hundred millionth) of the benefit from public financing of campaigns, then there is something to be said for the claim that this good is vastly underprovided and that a typical affirmative response supports the public provision of a huge multiple of that privately contributed amount. But this conventional argument regarding "nonrival" goods is misplaced here, at least with respect to the federal system. Taxpayers are not asked to contribute directly from

29 See notes 26-27 and accompanying text. Perhaps we have stumbled on an interesting explanation for the emergence of representative democracies and the move away from town meetings and the like.

30 A taxpayer who preferred the "group's" view on the matter could respond over a period of years in proportion to the group's response rate. But this technical point makes the taxpayer's marginal decision so insignificant compared to the cost of decisionmaking as to seem silly.

31 Thus, there are arguments for single-transferable voting and cumulative voting schemes in a variety of settings, but their complexity helps to account for the fact that these schemes have not been widely adopted. See note 26.

32 In any case, individual behavior regarding nonrival goods is not entirely predictable. Laboratory experiments undertaken to explore tendencies toward free-rider behavior have exhibited mixed results. One such study suggests a relatively balanced mix between free-riding and public-spirited behavior, contradicting the view that free-riding inevitably leads to zero
their own pockets but rather are asked whether they would prefer that $3 be allocated to the public campaign fund instead of another unspecified federal program. In this other program, the single citizen is again likely to receive but a tiny fraction of the good provided to all. It is possible that a single taxpayer is a decent judge of whether he prefers the "average" public use of $3 or its particular allocation to this campaign financing program. Put slightly differently, the tax return's question is not posed as one of private sacrifice; the question is how the allocation decision generated through the checkoff scheme compares to that offered through legislative decisionmaking, bureaucratic determination, or even a referendum.

Further evidence that the coordination problem emphasized in this Part is more important than the more general public goods problem is presented by extending the discussion to situations where affirmatively responding individuals do bear a modest cost, as is the case with many state checkoffs. If there are 100,000 visitors to a museum, and 2,000 of them voluntarily contribute $100 each, we should not conclude that each donor is expressing a preference for the museum's budget to be (governmentally subsidized up to the level of) $10 million. Instead, the typical donor may appreciate the benefits of cooperation. Each would give nothing if she knew she were the only donor; each $100 gift is part of a cooperative effort among 2,000 persons who may well think that the museum's budget should be about the amount raised ($200,000).

Similarly, the or a trivial amount of public goods. On the other hand, more cynical expectations appear to be borne out as laboratory researchers produce in their subjects a growing awareness of the potential for free-riding. See Harvey S. Rosen, Public Finance 71 (Irwin 4th ed 1995).

25 See note 2.

24 The argument would be that to the extent that each donor is a representative visitor, then the donor enjoys 1/100,000 of the return from what she gives. If the average gift is $100, our best estimate of the total value of the museum in that period is $100 * 100,000 = $10,000,000. Note that the large number of donors simply confirms a view that the average donor is not idiosyncratic but rather represents the likely benefit obtained by each of (or the average of) the 100,000 visitors. The example could thus be written with 2,000 diverse donors whose median gift is $100.

26 I hesitate to use the word "cooperative" because it is the redistributive motive that the museum might wish to stress. A generous visitor might think that if the average cost of each visit is $20, then this museum is a socially useful institution that she is happy to support. She gives an extra $80, we might imagine, in order to subsidize the visits of four other persons who cannot afford cultural ventures. An alternative view of the $100 contribution is that the donor wishes to help the museum improve its collection; she and the museum's management may aspire to make the average cost of a visit $40, and she gives more than that amount "on behalf" of future visitors who cannot yet grasp the increased private benefit they will receive. Of course, this example puts to the side the rationality of any individual's believing that she affects the aggregate quality or character of the museum. See note 14.

Imagine now that the state responds to the $200,000 raised in private money by suggesting that it reduce the public subsidy to this museum. A typical (and often sensible) reaction to this proposed reduction is that it will discourage future donors; it takes the public goods argument about nonrival goods and turns it on its head in an unattractive and destructive
checkoff scheme can be seen as an opportunity for cooperation in generating a public campaign fund. In both settings, however, erratic fundraising histories can make each willing cooperator uncertain about how to respond in order to generate the total budget preferred by that player.

It may be unnecessary to add that many taxpayers pay little attention to their checkoff responses either because $3 is a small amount, because their own net cost is close to zero, or simply because they cynically believe that the number of affirmative responses makes no difference inasmuch as Congress would find a different method of producing the same budget for presidential campaigns. Nevertheless, I am inclined to find the scheme, and the responses to it, interesting. It can be taken as an opportunity to think about collective action problems and proportional voting (as discussed presently) in a world in which the strategy embodied in the checkoff scheme is extended to other matters and to much larger budgetary allocations.

b) The temptation of proportional voting. Perhaps the most interesting attribute of the checkoff scheme is that, because each positive response adds the specified amount to the public allocation, the checkoff produces a policy result—in this case an appropriation—that is proportional to the electorate's enthusiasm.6

A somewhat analogous election day procedure would provide that each vote (or more realistically each percentage point of the vote) for candidate A entitled A, if victorious, to hold office for some unit of time. A winner with 60 percent of the popular vote might earn a term that was one or two years longer than a winner with 50 percent of the vote.7

fashion. But the state's response to this outrage might be that it wanted the museum to be a modest $20 experience, and that donors are simply increasing the quality of the museum when in fact this is a museum that would do more social good by not aspiring to be more luxurious and better equipped.

In the case of state universities, for example, this may be close to the position of many state governments; tuition and service levels continue to rise, fueled in part by private funds, and it is not unreasonable for the state to prefer that there be no continuing rise in the share of gross national product attributable to elite education. University administrators might respond to this claim by arguing that private donors are especially interested in the redistributive (rather than quality-increasing) potential of their gifts. But the spirit of these redistributive gifts remains cooperative in the sense that each donor is part of the effort to create a scholarship fund (or a fund capable of providing a museum even for those who cannot pay). Each donor would likely cease to contribute if she knew that she would be the sole donor or that her gift would lead to a reduction in public support.

6 Proportional decisionmaking of the kind sketched in the text enjoys no special link to campaign finance questions. The more general topic is introduced and explored in Saul Levmore, Three Kinds of Proportional Democracy (work in progress).

7 A more complex system could give equivalent bonuses to winners with substantial plu-
The proportionality feature of the appropriation-by-checkoff is one thing that makes this device as much a part of the world of taxes as it is a part of the world of ballots. Tax credits and deductions regularly yield results that are proportional to the level of taxpayer response, while ballots nearly always involve up or down votes on issues or candidates.\textsuperscript{38}

In short, it is tempting to think of the checkoff scheme as emerging where it does because of the occasional attraction of proportional voting. I have not, however, specified the nature of the attraction or the identity of the necessary admirers. Indeed, one problem with this explanation of the tax checkoff scheme is that some further explanation will be required as to why other political decisions also are not delegated to popular, proportional decisionmaking.\textsuperscript{39} Another problem is that any potential advantage of proportionality, or of linking expenditures to the level of political support, may be offset by its coercive, antimajoritarian possibilities.\textsuperscript{40} The checkoff tool might increase the level of coercion associated with all decisionmaking that is less than unanimous. It might also impose greater "external costs" than conventional all-or-nothing voting.\textsuperscript{41}
Modifying the earlier example, if 20 percent of taxpayers respond affirmatively and cause a public expenditure of $200 million dollars, it is plausible that a majority of respondents (not to mention citizens more generally) prefer no public expenditure of this kind and now find themselves paying for a minority’s program. Affirmative respondents are not, after all, paying these sums out of their own funds, for they are simply asked whether they would like to see three more dollars of public funds allocated to the Presidential Election Campaign Fund. The personal cost is thus the fraction of a cent of value that might be enjoyed by some alternative public use of these dollars. A conventional referendum or congressional vote might well have yielded a zero expenditure, and it is easy to imagine that an ideal referendum or legislative decision reflecting the preferences of the median voter (in an all-or-nothing fashion), and perhaps even taking intensity of preferences into account, would yield a zero expenditure.

A third problem with the proportionality explanation is the need for a plausible evolutionary story and the difficulty of identifying a relevant set of admirers of proportional voting. It is difficult to see why a majority coalition in the legislature would institute a tool of proportional decisionmaking when it could simply vote conventionally for the expenditure level it desires. Indeed, this per-
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Perspective illuminates the complementary question of why proportional decisionmaking is the exception rather than the rule. The disinclination to employ superficially attractive proportional decisionmaking may be explained by the fact that the attraction is indeed superficial; a majority of voters (or representatives with the authority to vote on a matter) can always get their way if they hold an all-or-nothing vote, so we should not expect members of a potential majority (which is by definition most voters) to give up their authority and turn to proportional decisionmaking.

The puzzle that remains is why the checkoff idea is found palatable in its limited domain. Without expanding the discussion to proportional decisionmaking more generally, a reasonable answer seems to be that elected representatives might find the subject of publicly financed presidential campaigns a good one to delegate away, both because the results matter little to these players and because they fear voter "dissatisfaction" with any budgetary allocation emanating from the legislature. A cynical embellishment to this conjecture is that the novelty of the checkoff scheme makes its problems least obvious to voters, so that (at least for the present) it is attractive to legislators who can claim to have allowed the people to decide and obtain what they want. Over time, when this mechanism is revealed as generating something that is inconsistent with the preferences of a majority of voters, the elected delegators will need to move to another solution (or avoidance) mechanism. Alternatively, similar decisionmaking mechanisms might be proposed for other budgetary questions, and then either the collective action problems of checkoff schemes will be revealed, or elected representatives will master the art of explaining why their constituents are good at deciding some things but not others.

A more general response is that taxpayers may simply like the public campaign financing idea regardless of who wins.

By "dissatisfaction," I do not mean to suggest that the checkoff scheme yields a superior result in terms associated with Pareto or Condorcet (or, through the empty core idea, with both). However, it is certainly possible that a legislature that chose to delegate the question of the funding level for publicly financed campaigns might well avoid the referendum mechanism (were it somehow constitutionally available) because it would lead to dissatisfaction. See Levmore, 75 Va L Rev at 991-96 (cited in note 42) (explaining the relationship of cycling preferences, Condorcet winners, and instability arising from "dissatisfaction" when a majority coalition sees that it could have defeated the prevailing coalition if procedural rules had been different). The checkoff might uniquely avoid dissatisfaction, if only because it randomizes or delegates the agenda-setting function.

Note that the legislators' own dissatisfaction might be evident only if the budget set by the checkoff pertained to their own campaigns rather than to those of the presidential candidates.

An analytically tidy—but almost surely incorrect—move to make at this point would be to suggest that the public financing of presidential campaigns is among the least likely questions to generate an unambiguous majoritarian position. It is therefore noteworthy that proportional decisionmaking is introduced precisely where this source of dissatisfaction with other
3. Checkoffs as political expression.

I have suggested thus far that the checkoff scheme is an interesting but flawed social choice mechanism, and I have ignored the less complicated view that the checkoff option may aim to facilitate political expression rather than collective choice regarding an expenditure. Respondents who like the idea of public financing can send that message by affirmatively responding to the checkoff question; the symbolic dollar amount for individual reallocation is somewhat beside the point.45

The expressionist view would hardly explain the preference for a checkoff rather than a referendum of some kind. Yet, as I will discuss in Part I.C, many states employ the checkoff device even though they, unlike the federal government, have the ready option of a referendum.46 It is also difficult to see how an expressionist view will explain why a full credit is used for funding publicly financed election campaigns while a deduction is used for funding charitable giving. The deduction would seem to disenfranchise unnecessarily (or stifle the expressive potential of) nonitemizing taxpayers.

C. Costly Checkoffs

Colorado instituted a checkoff on its state income tax return for the benefit of wildlife programs in 1977, five years after the federal campaign financing scheme began. By 1996, every state with an income tax had some form of checkoff:47 State checkoff programs fund forms of majority decisionmaking is most obvious to the legislature. In fact, however, majority decisionmaking may be more problematic in situations where cyclical or multiple-peaked preferences are likely. One such situation, the decision regarding the appropriate level of foreign aid appropriations, is discussed in Part IV. Most voters who prefer $X to be allocated to the cause of publicly financed election campaigns will be increasingly displeased with the distance from $X. Such single-peaked preferences yield coherent majority decisionmaking. Levmore, 75 Va L Rev at 987 & n 47 (cited in note 42). In contrast it is likely that line-by-line allocations in a foreign aid bill affect sentiments as to its overall size. Furthermore, voters who prefer that SX be appropriated might well think that $0 is better than $.5X or that $.5X is better than $.75X because of the indivisibilities associated with some foreign aid programs. In any event, inasmuch as my aim here is to explore the idea of taxes as ballots and not to defend or even explain the nearly unique presence of the presidential checkoff scheme, there is no need to exhaust these questions.

There is however the question of how to set the overall budget. If respondents are perceived as enthusiastic, Congress can appropriate additional (or even matching) public funds. The expressionist view is problematic when extended to the more general topic of taxes as ballots because it suggests the cynical approach that all balloting can be understood as serving an expressive rather than a more direct social choice function. The first paradox of voting, namely why people vote at all, might simply be resolved with the idea that voters are like graffitists and authors of letters to newspaper editors; it does not seem mysterious that some people participate while others decline such opportunities to be heard.

See note 22.

campaign financing, but they also embrace numerous nonpolitical causes, including education, medical research, Olympic sports, military memorials, and especially wildlife programs. Unlike the federal checkoff, all of the nonpolitical state checkoffs—and some of those designated for political campaign financing—ask the taxpayer not to reallocate public funds but to contribute out of the refund check the taxpayer would otherwise receive. The offer made to taxpayers in these state tax returns is thus little more than a state-sponsored fundraising campaign; in some cases, the state even charges for its administrative efforts.

State checkoff schemes are sometimes used to fund politically sensitive causes, such as AIDS research, aid for the homeless, or arts funding. These examples suggest the point raised in Part I.B.2.b, that legislative delegation, or outsourcing to a populist mechanism that creates no absolute winners and losers, might be explained by representatives’ desire to avoid decisionmaking that will lead to inevitable voter dissatisfaction.

In those systems where the state is little more than an intermediary, transferring funds from the pockets of affirmative respondents to a variety of causes, the potential collective action problem that makes the federal plan for funding presidential campaigns especially interesting is more remote. Admittedly, taxpayers who file

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48 See id. One of the interesting things about the state programs is the way they have imitated one another. A checkoff for non-game wildlife is omnipresent, even though this is not a cause that does particularly well in the legislative process itself. Another interesting feature is the nondeductibility of the amounts contributed through these state programs (even though they involve a net cost to the responding taxpayer). Nondeductibility may have seemed natural when checkoffs involved political campaign funds, since direct contributions to candidates and parties are also nondeductible, but it is notable that there developed no move to encourage other checkoffs with the usual incentive of the tax deduction. Itemizers and serious contributors can be expected to contribute directly and to let the checkoff opportunities pass by. On the other hand, we might expect federal checkoffs for new causes to mimic the state programs, appealing to small, nonitemizing contributors. Causes such as space exploration and arts programs come to mind, if the checkoffs could be marketed as supplementing direct allocations by Congress and by itemizing donors.

49 Indeed, it is possible that many taxpayers are misled by the federal model into thinking that the state checkoff similarly involves no net cost to the individual. On the other hand, the rate of affirmative responses is fairly low and generally declining. The highest rate of affirmative participation in a nonpolitical checkoff scheme is the 4.13 percent rate generated by Minnesota’s non-game wildlife program, but half elicit less than 1 percent participation. The highest rate for a state political checkoff (at no net cost to the taxpayer) is Hawaii’s 26.4 percent, but most fall well below the federal response rate of 13 percent. Id at 21.

50 Some states deduct an amount for reasonable administrative costs before forwarding contributions to the designated causes. See State Tax Rev 10 (CCH May 19, 1997) (describing Pennsylvania’s approach to this problem).

state returns might wish they could divine the behavior of fellow respondents, because an individual's inclination to contribute to a fund might rise or fall depending on the amount of money otherwise contained in, or raised by, this fund. On the other hand, if these causes enjoy other sources of funding, then by the time taxpayers file their state returns, sufficient information may be available to allow many respondents to assess whether their own preferences regarding the level of support for a given cause call for a further contribution. 52

II. BALLOTTING THROUGH THE CHARITABLE DEDUCTION

A. The Charitable Deduction as a Social Choice Mechanism

Readers familiar with the vast literature on the charitable deduction, and on the associated exemption from income tax available to organizations that are on the receiving end of contributions, 53 may have encountered hints of the idea that the tax system can be seen as allowing taxpayers individually to allocate federal money to worthy causes. 54 The taxes as ballots idea has its origin in these earlier

52 Other taxpayers who favor that cause will prefer to make direct charitable contributions, not only because of the available tax deduction, but also because one can choose to make a charitable gift early in the year when it might send a useful signal to other potential donors, or later in the year, if the donor's own decisionmaking would be improved by the availability of additional information regarding the charity's fundraising (including revenues from the state's tax-return-as-fundraiser option). The role of information about other gift-giving is explored more fully in Part III.B.

53 See 26 USC §§ 170, 501 (1994) (Section 170 allows taxpayers to deduct charitable contributions up to 50 percent of the taxpayer's contribution base for the year; Section 501 exempts corporations and organizations devoted exclusively to charitable purposes from taxation.).

54 This literature focuses on the tax deduction as promoting a kind of pluralism, although there are occasional suggestions that this pluralism is greater than that which would be produced through legislative decisionmaking. The public choice perspective—that a deduction may aggregate preferences in a way that is superior to conventional voting or referenda—is entirely absent. Much of the work linking the deduction to pluralism goes on to argue that an explicit matching-grant (or credit) scheme, perhaps progressive in structure, would improve the pluralistic character of the system because nonitemizers would be given a voice, because low-bracket taxpayers would be as empowered as high-bracket taxpayers, because donors whose contributions were modest in absolute terms but quite impressive in relative, or wealth-corrected, terms could gain influence as well, and because private giving in the aggregate would be encouraged by empowering modest donors. Notable works include Boris I. Bittker, Charitable Contributions: Tax Deductions or Matching Grants?, 28 Tax L Rev 37 (1972) (defending the equity of deductions, criticizing matching-grant proposals as constitutionally and politically unworkable as well as overly intrusive, and suggesting reforms in the deduction-based system); Charles T. Clotfelter, Federal Tax Policy and Charitable Giving (Chicago 1985) (presenting econometric evidence, including empirical data and computer simulations, bearing on tax policy toward charitable contributions); Martin Feldstein, A Contribution to the Theory of Tax Expenditures: The Case of Charitable Giving, in Henry J. Aaron and Michael J. Boskin, eds, The Economics of Taxation 99, 105 n 13 (Brookings 1980) (citing econometric studies that indicate, contra Vickrey and others, that the price elasticity of charitable contributions is
suggestions. The charitable deduction makes the government a partner in every gift-giving venture; a taxpayer in the (hypothetical but arithmetically convenient) 50 percent bracket, for instance, can be seen as joining forces with the government to give equal amounts to the cause chosen by the taxpayer (with characteristics or minimum qualifications set by the government). Hence each individual taxpayer’s choice, deduction, or “ballot,” not only reflects a private contribution but also triggers a matching government contribution in the form of a reimbursement of part of the taxpayer-donor’s gift. The government may of course choose to increase its support with direct grants beyond the amounts generated by the matching scheme.

An obvious objection to the use of the charitable deduction as a social choice mechanism to determine government spending is that many citizens effectively are disenfranchised because they need not file returns or do not benefit from itemizing their deductions. Another familiar objection in slightly new clothing is that because higher bracket taxpayers are given more reason to “vote,” and wealthier taxpayers can afford more votes, there is distasteful deviation from the one-person–one-vote ideal. It is as if the charitable de-

I will ignore the various incentives associated with the (somewhat constrained) ability to contribute appreciated property and obtain a deduction for the full value of the property without recognizing gain on the previously untaxed appreciation. See 26 USC § 170(b), (e).
duction institutes something of a poll tax, because one can only "vote," and thus influence the allocation of these government matching funds, by paying some "fee." These objections may be overcome for some by the substantial "voter turnout" that is induced by the tax deduction scheme, and by the fact that the government may need all the help it can get in monitoring and choosing among hospitals, schools, social welfare agencies, and the like. Another argument in favor of the deduction approach as compared to the alternative of direct government grants is that it may induce citizens not only to choose for themselves where to apply personal and government funds, but also to develop a sense of commitment to the chosen charities. Thus, they become involved individually as volunteers in ways that they would not if their tax money were simply allocated to the charities by the legislature or by government bureaucrats. It is also plausible that citizens tolerate greater redistribution or spending on public goods when they take the lead in identifying the objects of government (and personal) munificence than they would if the government simply collected taxes and spent money directly on similar causes. It may be that a majority of voters or legislators supports increased redistribution, and that this majority chooses the tax deduction scheme as a superior mechanism for achieving that long-term goal. The redistribution strategy can even be thought of as a precommitment device by a majority that knows that when left to its private devices it is not so mean-spirited after all.

It is not terribly puzzling, I think, that even as the legislature (arguably) delegates funding decisions in this manner, it also

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66 Admittedly, the assertion that such an altruistic spirit may govern here is not unproblematic. Empathic behavior, because of its facially nonegoistic character, poses difficulties of explanation for evolutionary biologists, economists, psychologists, and philosophers alike; the literature is accordingly vast. The debate, however, as to whether the underlying motivation for such behavior is actually altruistic or egoistic at its root does not controvert the existence of the empathic responses themselves. See C. Daniel Batson, Jim Fultz, and Patricia A. Schoenrade, *Adults' Emotional Reactions to the Distress of Others*, in Nancy Eisenberg and Janet Strayer, eds, *Empathy and Its Development* 163, 164-65, 180-81 (Cambridge 1987) (describing empathic reactions and noting that "[whether the motivation to help associated with empathy is altruistic or simply a different form of egoistic motivation is not at present clear"). A recent interdisciplinary overview of the problem is Kristen Renwick Monroe, *The Heart of Altruism: Perceptions of a Common Humanity* (Princeton 1996). The psychological literature and its various proposed models are canvassed by David A. Schroeder, et al, *The Psychology of Helping and Altruism: Problems and Puzzles* (McGraw-Hill 1985). See also Amartya K. Sen, *Rational Fools: A Critique of the Behavioral Foundations of Economic Theory*, 6 Phil & Pub Affairs 317, 329 (1977) (arguing that commitment "drives a wedge between personal choice and personal welfare, and much of traditional economic theory relies on the identity of the two").

57 Some readers might identify the principal actor to be the voters, while others will prefer to think of the government as an independent entity, barely responsible to anyone. The argument can be adapted accordingly. In any event, the "legislature" is best taken as referring to Congress, inasmuch as state legislatures have administrative reasons for piggybacking on the federal tax system and its decisions as to what ought to be deductible. It is possible, I suppose,
makes direct allocations to an overlapping set of recipients. For example, direct support of a university's programs alongside matching grants in the form of deductions on the tax returns of private donors to the same university can be understood in a variety of ways. The government may buy or encourage some activities and services, such as particular kinds of research, either because the university is an efficient provider, because interest group pressures or legislators' tastes generate such expenditures, or because the government chooses to follow the lead of private donors and to do more than match those donations through deductions. It is also possible that with regard to the wisdom of certain contributions there is reason to have great faith in the information and expertise available to centralized decisionmakers. Finally, and perhaps most practically, the tax deduction scheme leaves decisionmaking largely in the hands of a set of taxpayers, and the government may wish to encourage particular programs that these (otherwise trusted and encouraged) decisionmakers would be unlikely to identify on their own. For example, direct government grants to universities are rarely unrestricted.

If one becomes caught up in the spirit of the taxes as ballots idea, a variety of subsidies and tax deductions begin to fit the description of delegations from the legislature to the "voters." For example, the interest deduction available to investors and homeowners, not to mention the income tax itself, with its taxing of profits and deductions for losses, establishes the government as a kind of partner that allows private actors to decide on the location and details of investments. Other governments, in contrast, are more inclined to make investment decisions centrally after collecting the necessary funds through higher tax rates, much as other governments offer no charitable deduction in their income tax systems but engage in more centrally organized social welfare programs.55 Although one can find examples of the taxes as ballots idea everywhere, many of these examples have sensible conventional explana-

that a state constitution with stronger language regarding separation of church and state than the federal Constitution could lead a state court to insist that deductions taken on the federal return for contributions to religious organizations be added back to income on that state's income tax returns.

55 For some other examples of centralization versus delegation, or partially funded privatization, if it can be called that, see Part IV. To expand the point in the text, one might argue that it is no accident that the same tax system that offers the charitable deduction also offers a child care credit and contemplates tuition tax credits and, elsewhere in the regulatory system, school voucher programs.

Note that although I use the term delegation here, because deductible contributions often go to organizations that Congress also subsidizes directly, there is less delegation in the charitable deduction context than in the checkoff and (perhaps) home construction (interest rate) examples. It is therefore possible that the delegation is cosmetic—with Congress increasing its direct outlay if private (matched) giving falls short of expectations.
tions that make the taxes as ballots understanding less central. I therefore do not broaden the scope of the present Article in this manner.

Public-choice minded readers with a pessimistic bent may be inclined to think of Congress as delegating allocational decisionmaking whenever this outsourcing benefits its members by increasing rent-seeking activity. It is arguable, for example, that the charitable deduction is palatable to Congress both because most of the beneficiary organizations, unlike profit-oriented firms that often seek government favors through lavish expenditures, would be frugal supplicants, and because legislators would have more to lose from favoring some organizations or causes over others than they would gain from such favoritism. The optimistic alternative is that the charitable deduction can be viewed as a precommitment by Congress to refrain from exercising power (and encouraging rent-seeking) where it might have. The problem with the optimistic version is that it fails to explain why and where Congress gives up opportunities; many deductions could be withdrawn and many spending programs could be delegated through deductions. But the claim associated with the pessimistic view, that Senators and Representatives would be worse off from the perspective of their own selfish interests if Congress were more directly involved in funding social welfare and religious organizations and the like, while Congress is somehow better off using direct grants in other industries, is not entirely convincing, because where there are strong sentiments there are normally opportunities for extracting political contributions. In any event, my aim in this Article is merely to explore the possibility of taxes as ballots, not to insist on a single correct view of the checkoff and the deductions that I have placed under investigation. I return to the question of congressional self-interest in Part IV.

B. Balloting and the Checkoff Alternative to the Deduction

1. Advantages of the deduction.

But why deductions rather than credits—and, in particular, why the deduction approach to charities and the checkoff scheme for

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59 The interest deduction, for example, is necessary to avoid marring income measurement and efficiency of inputs. See Michael S. Knoll, Taxing Prometheus: How the Corporate Interest Deduction Discourages Innovation and Risk-Taking, 38 Vill L Rev 1461, 1510 n 190 (1993) (demonstrating how the personal deduction for interest paid on business debts ensures an accurate measure of taxable income). The income tax itself, aside from serving as a vehicle for delegation of decisionmaking, is of course justified primarily as a means of raising revenue that compares favorably with alternative strategies.

60 See Gordon Tullock, The Economics of Special Privilege and Rent Seeking 81 (Kluwer 1989).
financing campaigns? The choice between deductions and credits is available to lawmakers in every corner of the tax code, and there is no reason to think that the taxes as ballots idea needs to provide a master key to understanding this recurring question. Nevertheless, the relative capacities of deductions and credits to facilitate collective choice are useful to compare. The most straightforward comparison is between a deduction and a full, or 100 percent, credit, as was more or less encountered in the checkoff system described in Part I.A. The immediate question, therefore, is what are the relative advantages of the two proportional decisionmaking schemes that we have examined?

I have suggested already that the campaign financing checkoff is a seriously flawed balloting procedure, both because respondents are not really offered the opportunity to express their views as to the aggregate level of government spending and because the aggregation of responses is unlikely to reflect much more than a collage of private guesswork. I also have suggested that these imperfections may not much trouble the legislators who have put this system in place. The checkoff scheme may be explained best as delegation sinking to the level of abdication.

In contrast, as a matter of gathering information about majoritarian or other preferences, the charitable deduction may be a relatively clever tool, and a comparison with the full credit quality of the campaign checkoff scheme may provide the means to appreciate the deduction. Imagine a system that encouraged charitable giving and helped the government allocate funds to and among charities by offering taxpayers a full credit for all qualified gifts or for gifts up to some amount per taxpayer. This sort of costless vote to direct government funds to a particular qualified recipient would run the risk of potential recipients buying these votes. Much as politicians

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61 The checkoff option is different from a tax credit in that it does not reduce a taxpayer's liability. A full credit would allow respondents with a positive tax liability to influence the allocation of public funds in a personally beneficial way, while the checkoff scheme allows filers to do so in a costless but nonbeneficial manner.

62 Of course, an unsatisfactory answer might lead us to conclude that it is misleading to try to understand the two schemes as balloting endeavors. Note that although I refer to the credit and deduction schemes as proportional, because they are not all-or-nothing in the manner of so many majoritarian legislative decisions, there is no guarantee that they will yield results that are actually any more "proportional" with respect to voters' preferences than would legislative or other compromises.

63 Under this system, the taxpayer would donate to a charity, and then at the end of the tax year, receive full credit for this gift. See note 67.

64 We can imagine either a virtually limitless credit, just as most taxpayers can now take deductions for all their charitable gifts, or a limited credit. Thus, every taxpayer might be in a position to allocate $500, because tax law would provide a full credit for that amount, and further contributions to qualified recipients would yield a deduction or lesser credit—or even a progressive credit or matching grant. See note 54. In any event, charities might compete for
sometimes seek to buy votes from registered voters, charities might buy the tax-credited transfers from “donors.” Charities would be in a significantly better position than are politicians to contract in this manner, even assuming comparable reputational and criminal deterrents. Politicians are hampered by the secret ballot, but charities could be certain that colluding donors had done their part. A donor might fail to file for the credit either because of neglect or because he had already exhausted the available credit, but neither of these possibilities is of concern to the charity. In sum, one problem with costless votes in the form of full credits for charitable donations is that charities might compete too vigorously for these funds. This competition would greatly reduce the likelihood of either extracting the first $500 from each taxpayer, and some charities might pay for this allocation.

65 One recent scandal involved the sale of votes in a local election at prices ranging from $20 to $60 each. See Bill Osinski, Dodge County: A Legacy of Lawlessness; Seedy Side of Politics, Atlanta J & Const 4B (July 6, 1997) (describing a Democratic primary for county commission that became “a bargain-basement sellout of the democratic process”). I will not dwell on the question of how it could be nearly irrational to vote but also rational to pay so much for votes; in this particular case of corruption, up to one-third of the votes were said to have been influenced by monetary inducements. Id. In theory, if vote buying is socially bad, then it ought to be the case that in a fully functioning market citizens would value their votes more than corrupt politicians do, and the majority would pay outlaw citizens not to sell their votes to selfish politicians. After all, corrupt policies should be inferior to socially responsive actions (or inaction). But the market for votes, or their tax-credited contributions, would not necessarily favor the most worthwhile charities, because the very nature of these charities is to redistribute wealth or undertake projects that involve public goods or other market failures.

66 In contrast, the current campaign financing checkoff runs an especially low risk of encouraging bribes, both because the actual responses are difficult to verify, and because no single candidate or even political party gains more than $1.50 per respondent. In effect, the transaction costs of bribery regarding this checkoff are prohibitive.

67 These possibilities would of course be quite important to the charity if the system were structured so that the Treasury paid money to the charity only after the taxpayer “checked-off” that charity on her tax return. However, a charitable contribution credit would be unlikely to have such a structure, because this sort of exercise in direct democracy would have two significant disadvantages: it would require charities to wait until year’s end for funds, and it would generate significant administrative costs for the government, since funds would be distributed to a large number of charities, unlike the small number of recipients of campaign finance funding. Consequently, it is a fairly safe assumption that a charitable credit system would have respondents contribute to charities directly, and then file for the credit. Under such a system, the charities that had bribed taxpayers would have their money in hand, so they would have no reason to care whether any taxpayer actually filed the credit, although any charity would of course fear detection of their bribe.

68 If the system were structured as a checkoff or a write-in in which the government made payment to the charity only after the taxpayer claimed the credit on the charity’s behalf, this problem would be lessened somewhat. A charity would hesitate to pay $300 for the taxpayer’s promise to write in that charity’s name as the recipient of a government grant of $500. The promise might ask to see a copy of the tax return, but originals could always be altered after copying, and the very process of receiving another’s return raises the prospect of criminal prosecution—assuming that such bargaining or payment by a charity is criminalized. (I can imagine a free-market mood swing in which reputational interests alone were allowed to control this matter, but the problem is that the allocational feature of the credit would likely be eviscerated as charities compete for these government funds.)
information about respondents’ true preferences or encouraging individual involvement in (or monitoring of) charitable works.

A second, and perhaps less interesting, argument is that voters might take their votes more seriously when required to pay for them. Respondents might well think more carefully about allocating government funds (in the form of the matching function played by the charitable deduction) when there is a personal net cost than when there is not (as would be the case with a full credit, a checkoff among candidate charities, or a more conventional referendum). We might, for example, think of law school graduates who are solicited for contributions by the colleges and law schools they attended. It is quite plausible that in responding with money, these voters contemplate the relative qualities and efficiencies of these institutions more carefully than they would if simply asked by the government to vote or advise on the allocation of public funds for higher education.

A further advantage of the charitable deduction returns us to the collective action problem that may be associated with aggregating preferences in order to determine an expenditure level. The charitable deduction scheme permits a kind of ongoing vote. If a donor’s decision as to how to allocate his own funds, and therefore the government’s as well, depends on other contributors’ decisions, then this uncertain donor can receive information regarding charities’ receipts as the year progresses. In fact, the conventional explanations for the spurt of charitable giving in December, that taxpayers earn deductions most efficiently with this timing or that they are poor planners but take the expiration of the tax year as a reminder to give and earn deductions, may miss the fact that (for the same deduction value) waiting until year’s end provides the opportunity for more informed decisionmaking. Correspondingly, some charities appeal to a certain subset of donors by stressing their dire needs

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Note that the problem described in the text may yield a Condorcet winner with conventional voting because preferences can be single-peaked. The problem, as described in Part I.B.2.a, arises because some voters prefer an intermediate expenditure rather than always more or always less money spent.

One conventional argument is that the artificial nature of the tax reporting year allows donors to enjoy their money all year, part with it at the last minute, and then receive a deduction as if the gift were given in the “middle” of the year. The argument has some flaws, but rings true to the Haig-Simons-minded reader or to one who simply insists that taxpayers have more control over deductible expenditures that do not produce matching income for some recipients than they do over the timing of income.

On the other hand, as an empirical matter, many charities remind us of the opportunity to give at year’s end, but most do not provide last minute updates about their receipts from other contributors or other sources. And if there is as much uncertainty about what a charity will raise as there is regarding the yield from the campaign checkoff scheme, then the collective action problem is identical, unless the donor-taxpayer can adjust better in the charity case because contributions in subsequent years are not limited to $3.
as the year goes on, while others appeal to a different subset by advertising their successes and encouraging potential donors to board the bandwagon toward “excellence” or “making a real difference.”

2. Information gathering prior to contributing or other balloting.

This distinction between the charitable deduction and more conventional ballots—or even less conventional checkoffs—need not be as stark as I have implied. We could imitate the ongoing nature of the deduction by turning election day into election month and reporting votes received on a daily or weekly basis.\(^2\) And we could have more checkoffs (or full tax credits) and report those results as returns are filed. Some voters and filers would respond early in order to encourage others to do the same (“See, our cause is not a loser.”), while others would wait in order to vote with fuller information. Some readers may recognize an obscure analogy to the source of single-transferable-vote decisionmaking, in which school children lined up behind candidates, deciding whether to run to the front and form a new line or to hang back and move among established lines in order to maximize the value of one’s vote.\(^3\) But given our institutional norms and the costs of altering them, we normally compare institutions as they are presently constituted. I think it is therefore fair to say that where we think that voters prefer, or perform better with, more information regarding the marginal worth of their votes than is available through preelection surveys and the like, ongoing deductions may be superior to conventional balloting.

The preceding claim about taxes as drawn-out ballots able to capture the value of developing information may be overly optimistic. Consider, for example, one of the best examples of a collective action problem that might have been solved with a switch from conventional election day voting to a drawn-out process with ongoing disclosure. In the 1980 presidential election some voters were said to have “wasted” their votes on John Anderson, even though it was clear that only Jimmy Carter and Ronald Reagan had a chance to win, because they liked the idea of enabling Anderson to poll the 5 percent required in order to collect funds from the Federal Election Commission. Even if we count this 5 percent as not wasted, Anderson polled about 7 percent so that 2 percent of the votes (or two-sevenths of each vote cast by 7 percent of the voters) might be re-

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\(^2\) Note that the modern experiments with extended voting periods do not provide for reporting of vote totals before the last election day. See Rosenfield, *Early Voting* at 37-38 (cited in note 19), citing Arizona, Colorado, Iowa, and Texas rules.

\(^3\) For some discussion and sources, see Levmore, 75 Va L Rev at 1037 n 171 (cited in note 42).
garded as wasted. An ongoing tally of the votes could have reduced the problem because citizens who were most eager to fund Anderson, or most supportive of the financing principle, or most indifferent between the other two candidates, could have voted early in order to free other voters to cast marginally useful ballots.\textsuperscript{74}

But even this example works in favor of unconventional balloting only with heroic assumptions. If, as seems likely, most voters who wished for Anderson to receive funding had a definite opinion as between the other candidates and had no reason to prefer their fellow Anderson supporters over other voters, then there would be no rush to liberate the 2 percent. Only a complicated ballot of the transferable vote variety could do the job, and even that could be seriously flawed.\textsuperscript{75} Moreover, it may be unreasonable to regard 2 percent waste as much of an indictment. This small margin of "error" might be taken to illustrate the fact that pre-election day surveys provide enough information to make ongoing disclosure (with conventional balloting or tax deduction schemes) unnecessary. If charities did not try to stimulate giving with interim reports, it may well be that they would still generate annual totals very close to the amounts they receive at present. Having said this, I will now set it aside, returning to my analytically defensible intuition that one advantage of balloting through charitable donations (as precursors to later deductions) is a reduction in the collective choice problem associated with appropriating funds through either a conventional popular ballot or a checkoff device. This form of balloting through the tax system is likely to be a superior collective choice procedure.

There is no need to dwell on the possibility of capitalizing the Presidential Election Campaign Fund by asking citizens throughout the year for contributions that can later be taken as full credits (of up to $3) on the annual tax return.\textsuperscript{76} This strategy is superficially appealing because not only does it mimic current law, but also it would improve upon it as a collective choice mechanism by offering the possibility of earlier creditable contributions that could be disclosed to the public in a way that informs those whose decisions depend on the total amount likely to be raised. However, the transaction costs do not seem worth the candle.

\textsuperscript{74} The Anderson supporters might be thought of as attaching greater value to the preferences of their fellow Anderson supporters, in choosing between the two major party candidates, than to the preferences of other voters. For a discussion of the Anderson race, see Warren Weaver, Jr., \textit{Anderson Says He Feels No Bitterness and that He Might Consider 1984 Run}, \textit{NY Times} A27 (Nov 6, 1980).

\textsuperscript{75} See Levmore, 75 Va L Rev at 1036-38 nn 171-74 (cited in note 42).

\textsuperscript{76} A credit system could offer a checkoff response on the annual tax return as a means of enabling respondents to link their contributions and credits in instantaneous last-minute fashion.
C. Rethinking the Charitable Deduction: Balloting, Partial Credits, and Floors

1. Alternatives to the charitable deduction.

Students of tax policy are familiar with the choice between deductions and equivalent partial credits; in most cases, a less-than-full credit can be offered as a perfect substitute for a tax deduction. Thus, a taxpayer who itemizes deductions and who is subject to a marginal tax rate of 50 percent is indifferent between the present charitable deduction and a 50 percent credit. The substitution can be perfected through decisions about the refundability of credits, the need to itemize in order to enjoy deductions, and so forth. For the system as a whole, the most important difference arises from the fact that while deductions are worth more to those in higher brackets, the terms of credits are invariant across brackets. Roughly speaking, deductions seem superior when they are offered in order to perfect the measurement of income. But if instead the aim is to encourage or reward some behavior, then a credit might seem preferable because it is hard to defend systematically greater rewards to those with higher incomes, which is what a deduction would offer. Thus, extraordinary medical expenses are deducted rather than credited because the system is measuring income by attempting to ascertain one's ability to pay taxes after medical expenses have been paid, rather than encouraging taxpayers to incur medical expenses.77

On the other hand, the encouragement-measurement distinction fails to predict the deductibility of mortgage interest and property taxes attributable to homeowners.78 In these examples, there is a deduction rather than a partial credit even though the point seems to be to encourage home ownership, not to measure income accurately. Indeed, as every student of tax law quickly learns, these

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77 See 26 USC § 213 (1994). For the classic debate, compare William D. Andrews, Personal Deductions in an Ideal Income Tax, 86 Harv L Rev 309, 330-37 (1972) (emphasizing that taxes should be a function of well-being and that a deduction for medical expenses, which are an intermediate good used to restore good health, is thus consistent with the idea of attempting to apportion tax burdens according to aggregate personal consumption and accumulation of goods and services), with Mark G. Kelman, Personal Deductions Revisited: Why They Fit Poorly in an "Ideal" Income Tax and Why They Fit Worse in a Far from Ideal World, 31 Stan L Rev 831, 865-68 (1979) (observing that personal medical expenditures are likely to reflect differences in personal consumption patterns). More recent work has drawn attention to baseline and moral hazard problems, which might on their own drive the case for or against deductions or credits. See Thomas D. Griffith, Theories of Personal Deductions in the Income Tax, 40 Hastings L J 343, 385-94 (1989) (presenting a Rawlsian analysis of distributive-justice implications of deductions); Louis Kaplow, The Income Tax as Insurance: The Casualty Loss and Medical Expense Deductions and the Exclusion of Medical Insurance Premiums, 79 Cal L Rev 1485, 1495-99, 1504-05 (1991) (presenting an analysis of deductions as implicit insurance systems, and discussing the moral hazard problems they create).

78 See 26 USC § 163(h) (1994).
homeowners' deductions do not fare well in the normatively minded tax policy literature.\textsuperscript{79} The deduction for charitable giving occupies something of a middle ground. On one hand, it surely represents an attempt to encourage contributions, so that a credit would be defensible.\textsuperscript{80} On the other hand, there is an argument that a deduction is more appropriate, because the system may seek to measure income after the payment of charitable contributions (and even medical expenses\textsuperscript{81}) and not before. However, the availability of the deduction for contributions to religious organizations—including payments for church pews and dues—is a bit difficult to rationalize. Indeed, one explanation for the use of a charitable deduction rather than a partial credit may be that it is politic to deploy the tax policy tool consistent with income measurement rather than that which is normally associated with explicit subsidies and encouragement in order to support the legal claim that there is no constitutional difficulty with extending favorable tax treatment to these religion-oriented contributions.\textsuperscript{82}

\textsuperscript{79} See, for example, Marvin A. Chirelstein, \textit{Federal Income Taxation: A Law Student's Guide to the Leading Cases and Concepts} 174-79 (Foundation 8th ed 1997). As already noted, there is some room here for an aggressive application of the taxes as ballots idea, because homeowners play a role in allocating construction and urban planning resources that might otherwise have been centrally collected and disbursed. See text accompanying note 58.

\textsuperscript{80} I will not try to argue that the wealthy need greater incentives. Moreover, my discussion is anything but exhaustive, avoiding the large and sometimes subtle literature that has emerged on justifiable deductions and credits.

\textsuperscript{81} See note 77 and accompanying text.

\textsuperscript{82} An alternative explanation is that money given to churches that is used to help the poor ought to be deductible (or credited), and that a system that distinguished between these monies and those going to church building and support would require auditing and an uncomfortable level of government intrusion. More generally, one might ask what the taxes as ballots idea contributes to the question of which organizations ought to enjoy tax-exempt status, and especially the gains from generating tax deductions for donors. Again, personal religious decisions do not fare well under this view unless we rely on our disinclination to audit and separate the religious and social welfare functions of religious organizations. Similarly, there is ample room to wonder about the continued deductibility of contributions for which the donor receives a benefit, such as a church pew. The taxes as ballots view does not support deductibility in such instances, but the future of Internal Revenue Service (“IRS”) rulings and other law in this area may be to continue to allow some such deductions in order to avoid any government intrusions into the financing patterns of mainstream religions. Thus far, courts have endorsed the IRS’s refusal to allow deductions for parochial and other private school tuition on the ground that such giving involves a quid pro quo rather than the “contribution or gift” required under 26 USC § 170(c). See \textit{Foley v Commissioner}, 844 F2d 94, 96 (2d Cir 1988), vacated on other grounds, 490 US 1103 (1989), citing \textit{Winters v Commissioner}, 468 F2d 778, 781 (2d Cir 1972). On the other hand, the IRS has declined to encompass benefits of a traditionally religious character under the quid pro quo label, reasoning that their primary motivation is presumed to be charitable, notwithstanding that sometimes a tangible benefit is involved and indeed is contingent on the contribution being made. Thus, not only do donations for the saying of a Mass for a specific person or for an individual’s playing a specific role in a synagogue remain deductible, but this latitude also extends to payments for pew rents, building fund assessments, and periodic dues. See Rev Rul 78-366, 1978-2 Cum Bull 241 (masses); Rev Rul 70-47, 1970-1 Cum Bull 49 (pew rents, building fund assessments, and periodic dues). But see
In any event, the taxes as ballots perspective can be seen as roughly consistent with either the encouragement or the measurement view, but perhaps also as suggestive of a novel strategy. We might now think of taxpayers as agents employed to decide where government funds should go; these agents must pay for their choices, or votes, in order to take their decisions more seriously.\(^3\) It is arguable that the deduction approach is appropriate because we should tax only earnings that the taxpayer can enjoy, deducting those that are "spent" doing the government's work. Alternatively, it might be said that there is no reason to pay high-income agents more than low-bracket agents, in which case a partial credit seems superior.

A more subtle argument is that we should imagine what the world would be like without the charitable deduction and with the government making many more and many larger direct grants. Tax collections would need to rise to finance these grants; it seems reasonable to imagine increased rates with progressivity comparable to that which we presently find with a charitable deduction in place. If so, high-income citizens would pay more than their proportional share of the new taxes. Thus, the argument continues, it hardly makes sense to give high-income filers in the present world greater rewards. They are, after all, the ones who would pay more in the alternative system. If, however, any earner contributes more than his progressively required share, then it might be fair to give a greater reward. This approach suggests a partial credit, or a partial credit up to some ceiling, so that all filers have equal votes, but then perhaps a greater credit or deduction for filers whose charitable contributions exceed a specified percentage of their income. There may therefore be an argument for the charitable deduction to resemble

\(^3\) To the extent that the fear is that free votes would lead to corruption on the part of charities, partial credits will probably do—although deductions are perhaps more palatable.
other deductions that are available only when expenses of the particular kind exceed 2 percent of the taxpayer's income.  

2. Eliminating the advantages of wealth.

The preceding Part suggested that there are arguments for the charitable deduction as opposed to a system of credits, and that there is an argument for limiting the deduction to contributions that are generous for a given taxpayer's income. I suggested a deduction above some floor, or perhaps I should say "landing," with a partial credit below that landing.

Consider, by way of illustration, a 50 percent partial credit on the first $2,000 donated by a taxpayer, with further contributions to qualified organizations yielding a full deduction to the extent that they exceed 3 percent of the taxpayer's adjusted gross income. Taxpayer A donates $3,000 with an adjusted gross income of $100,000. B gives the same amount but earns $30,000. C earns $100,000 and donates $10,000. Each of these taxpayers receives the full $1,000 credit. The deductions are $0 for A, $100 for B, and $5,000 for C.

A 2 percent floor for charitable deductions was proposed by the Treasury Department in 1969 and again in 1984 but was successfully opposed in Congress by recipient organizations. See Joseph A. Pechman, Federal Tax Policy 98 (Brookings 5th ed 1987). See also Louis Kaplow, The Standard Deduction and Floors in the Income Tax, 50 Tax L Rev 1, 5-12 (1994) (arguing that standard deductions and floors can be used interchangeably without necessarily affecting revenues or the overall distribution of income). I use 3 percent in the illustration that follows in the text in order to emphasize that there is nothing magical about the familiar 2 percent base. Note also that current law accomplishes something of the same with its phase-out of deductions, including the charitable deduction, under 26 USC § 68.

One argument about, and implicitly against, partial credits has been that nonitemizers tend to be lower income earners and these earners give disproportionately to their churches. A likely effect of a credit rather than a deduction will therefore be a redistribution of gifts toward churches. See Peter J. Wiedenbeck, Charitable Contributions: A Policy Perspective, 50 Mo L Rev 85, 101 (1985) (predicting the effect of a credit on the distribution of contributions).

If any of these taxpayers had made qualifying contributions of $1,600, for example, then the available credit would be only $800.

The first $2,000 given by each taxpayer generates the maximum available credit. Taxpayer A gave an additional $1,000, but inasmuch as 3 percent of his adjusted gross income ("AGI") is $3,000, no deduction is available. B calculates 3 percent of his AGI to be $900, and
My aim, however, is not to provide an exhaustive analysis of deductions versus credits, or even of that choice with respect to charitable giving. The important point is that the taxes as ballots perspective offers both positive and normative insights. It can help to explain or rationalize the system we have, but it can also be used to design a system that, among other things, makes some judgment about minimizing or even eliminating the ubiquitous advantages of wealth. High-income “voters” can be paid or be made to pay more than, less than, or the same as their low-income fellow citizens for their roles as partners in choosing the beneficiaries of government funds.

III. BALLOTING (AND SOME ENCOURAGING) IN THE PRIVATE SECTOR

A. Collective Action and Allocation Without Government Involvement

1. An overview of umbrella charities.

Many of the themes discussed thus far have close counterparts in other arrangements where there are joint ventures in the interest of allocation and solicitation of funds, but where tax law is almost beside the point and where neither joint venturer is the government. These analogies are interesting in themselves and offer relevant insights into the issues discussed in this Article.

Consider the fundraising and allocation strategies adopted by regional United Way organizations or other umbrella entities that offer donors and constituent organizations economies of scale in fundraising and perhaps in monitoring and allocating funds as well. A rough, greatly overgeneralized, history runs as follows. In various parts of the country, in the late nineteenth century, social entrepreneurs had the idea of capitalizing on the available economies of scale in fundraising and in monitoring recipients of funds by presenting a unified front to potential contributors. Potential donors would no longer be besieged by multiple requests and fundraising events, and individual charities would be freed from the task of fundraising. Moreover, large employers, disinclined to permit multiple solicitations of their employees, could be encouraged to partici-
be thought of as engaging in joint ventures through these umbrella entities. Constituent organizations were sometimes required to pledge to refrain from fundraising (either generally or only during particular months of the year) in order to avoid the obvious collective action problem among these organizations in the face of the temptation to enjoy the umbrella’s fruits while also exploiting the suddenly spacious fundraising field.

One obvious problem with such an arrangement is how to allocate funds from an umbrella back to the constituent entities. Formulas relying on preventure budgets could not survive in the long run as new charities appeared. The dominant arrangement seems to have been that the umbrella organization, armed with much advice and responsive to a diverse board of directors drawn in large part from its own constituents, would determine the annual grant to each constituent. Constituents could, of course, threaten to defect, so there is some reason to think that large constituent organizations were treated favorably. But in the absence of obvious baselines, and with serious gains from cooperation, some semblance of stability seems to have emerged. The major slippage has been with that part of the arrangement banning concurrent fundraising. Modern agreements display great variety as to the permissibility of constituent fundraising; it is not unusual for a large local charity, such as a hospital, to receive grants from the United Way even as it raises funds directly throughout the entire year. There are, however, likely to be some constraints on solicitation strategies. The hospital may agree that during the annual United Way campaign it will not solicit beyond its list of previous donors. This rule can be thought of as an attempt to appease donors by limiting the number of solicitations.

Larger constituents would seem to be able to make more convincing threats of defection, because they are more likely to enjoy some economy of scale in fundraising on their own. On the other hand, groups of smaller organizations might threaten to form their own umbrellas, and larger constituents would presumably make threats from a position, or earlier bargain, that already reflected the differences in ability to go it alone. Indeed, the American Red Cross, the American Cancer Society, and umbrella groups representing hospitals proved to be regular defectors from the ambitions represented by the United Way (and predecessor) organizations. See id at 40, 89, 110, 113, 117 (detailing repeated examples of opposition of the American Red Cross to federation approach); id at 187 (reporting American Cancer Society’s prohibition on local units’ participation in community umbrellas). The Canadian Red Cross seems to have presented a similar problem in that country. See id at 81-82.
they receive, or as an attempt to reduce the ability of constituents to threaten defection.

Over time, constituents can see that they gain by excluding some new constituents from the umbrella and at the same time encouraging their loyal donors to send them funds directly and to cut back on gifts to the umbrella entity. Constituents occasionally do signal their own respectability by advertising their association with a well-known umbrella, but it is rare to find a constituent trying to advertise "its" umbrella's positive qualities the way a law school might try to impress donors with facts about the larger university of which it is a part. In any event, this sort of uncooperative behavior between constituents and umbrellas (less permanently tied to one another than a given law school and its university) eventually generated an innovation; many umbrella organizations now give donors a choice between earmarking their contributions to specific constituents or leaving them unrestricted for the umbrella to allocate in its wisdom.\(^9\) In principle, there could emerge umbrellas that receive nothing but restricted donations, because their comparative advantage could lie entirely in the fundraising department and not at all in the allocation among constituents, where internal politics could lead to costly rent-seeking. In practice, such an umbrella would be unable to attract new constituent organizations because donors are likely to allocate gifts only to constituents that have explained their function. This "explaining" is often the process of fundraising itself.\(^2\)

2. United Ways and alternative mechanisms for fund allocation.

We come finally to the allocation problem that is most like that which I have associated with the charitable deduction and the tax checkoff. To the extent that donors send in unrestricted funds to an umbrella, how should we expect these funds to be allocated to the constituent organizations? In particular, allocations might depend on the restricted or earmarked character of the funds that have been received by this umbrella fundraiser. There are four possibilities. The first is for the umbrella to set out a formula in advance, based

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\(^9\) See Nancy K. Austin, *Back from the Brink*, Working Woman 47, 50 (Jan 1997) (describing the implementation of a "donor choice" program, through which donors may earmark how their donations will be used); Renate Robey, *United Way on Way Back Charity Sheds Scandal's Effects*, Denver Post B-01 (Nov 12, 1997) (discussing United Way's policy of allowing donors to earmark contributions).

\(^2\) We can, however, imagine a limited ballot distributed by the umbrella in which each constituent described itself and asked for gifts. Elections for directors sometimes involve such brochures and ballots. The overwhelming majority of voters know nothing about the candidates other than what is contained in this mailing. Umbrella organizations might also invite new constituents to continue their separate fundraising for a limited period.
on the needs and defection capacities of the constituents, and perhaps based on the social good and reputational interest of the umbrella as well; dollars allocated by donors then go toward satisfying their intended beneficiary’s predetermined allocation. Thus, although they may be deceived in this regard, donors who restrict or allocate their gifts make no real allocation decision, except possibly in situations where the constituent entity they identify receives designated funds in excess of the amount the umbrella had planned to allocate to it. A similar situation may occur within any given charity’s budget and fundraising calculations—donors often wish to affect project decisions, while managers regard themselves as better informed. Even when managers are eager to promise donors that their gifts will be applied at the margin to a particular project, and thus be restricted in a meaningful way, it is difficult both to draft such a promise and to prove that it has been kept.

Two other strategies for coordinating designated and unrestricted private contributions are fairly obvious, as is their evolutionary origin. Umbrella organizations face defections from constituents and from donors who find that they are unable to engage in true designation under the first approach. As might have been predicted, some umbrellas therefore switch to the mixed system of the second approach, in which a portion of each designated gift goes toward satisfying the predetermined allocation for the designated constituent, while the remainder truly increases the designated constituent’s share.

Under the third strategy, the umbrella is simply an intermediary with respect to designated gifts, but it allocates undesignated, unrestricted contributions according to its predetermined formula. There is of course the possibility that this professed strategy will unravel because next year’s “predetermined” allocations inevitably might be determined with some reference to which constituents seemed underfunded in previous years. But this unraveling may also be controlled by the threat of defections and by the fact that large donors and constituents, who are the most likely to favor enforceable designation, are well represented in the decisionmaking apparatus of the umbrella.

Each of the above strategies can be found in actual practice, as can a fourth, which is the most interesting in analytic terms. The umbrella might offer itself as a fundraiser and allocative intermediary such that undesignated funds are distributed according to the relative amounts received by each constituent in designated funds channeled through the intermediary. Imagine that a regional United Way adopting this strategy collects equal amounts of designated and undesignated funds. If 10 percent of the designated funds are as-
signed by donors to the local hospital, then the hospital will also receive 10 percent of the undesignated funds available for allocation by this United Way chapter. Designating donors will have leveraged their contributions. Thus, the hospital will suddenly be enthusiastic about encouraging its loyal supporters to give money indirectly through the United Way rather than directly, where there is no one-to-one match. We can think of this strategy as employing contributions as ballots, just as the earlier discussion emphasized the role of taxes as ballots.\textsuperscript{93} In this setting, however, the contributions provide greater leverage than the charitable tax deduction alone. A contribution of $1,000 to the United Way designated for the local hospital by an itemizing taxpayer-donor in the 50 percent tax bracket costs the private donor $500, elicits $500 from the government in the form of the tax revenue lost by way of the deduction, and earns another $1,000 from other private donors who gave undesignated funds to this United Way organization.\textsuperscript{94} The hospital receives $2,000, the designating donor finds her net cost leveraged or multiplied by four, and the United Way enjoys the bureaucratic emoluments associated with processing $2,000.

I revisit the potential collective action problem only briefly, in order to point to some new wrinkles. Donors to our United Way face less uncertainty than in the campaign finance checkoff system, because they can await information about the receipts of both the local hospital and the United Way. On the other hand, the United Way is unlikely to share or at least to publicize information regarding either the division between designated and undesignated funds or the allocation of designated funds by other donors.\textsuperscript{95} A donor who wants to designate the hospital as a recipient only if its receipts so far are within a given range, and who would otherwise allocate his contribution elsewhere or even refrain from giving, might suffer from the collective action problem associated with this information deficiency.

\textsuperscript{93} Nondesignating donors might also be seen as employing the designators as better informed decisionmakers or monitors. But this optimistic analogy to the charitable deduction analysis would be more fitting if the umbrella advertised its choice among allocative mechanisms. In practice, there is some secrecy as to the marginal impact of designation. See note 95 and accompanying text.

\textsuperscript{94} The example continues with the assumption that one-half of this United Way's receipts are undesignated. The undesignated contributions also generate tax deductions and, hence, government "contributions."

\textsuperscript{95} There are at least two explanations for the apparent secrecy. First, the umbrella organization negotiates with constituents one at a time over their ability to continue to raise funds on their own. Asymmetric information of this kind often benefits the central, repeat player. Second, the United Way would like to attract contributions from all possible donors, and it may be able to leave all those who prefer different sharing arrangements with the impression that the arrangement they prefer is indeed the one in effect.
My intuition is that this collective action problem is sufficiently
great as to make the designations-as-ballots system more remark-
able than ideal or even stable. It is perfectly rational to give to a
United Way campaign that follows this leveraging or balloting strat-
ogy, because one might be of the view either that other donors are
more expert at assessing the relative needs and efficiency of con-
stituents, or that it is a good thing to encourage other donors to give
to charity by extending the levers offered by the United Way. But
the flaws in the collective choice mechanism, arising mostly out of
the inability of individual donors to know their marginal positions,
make allocation decisions difficult to privatize. I suspect that dis-
satisfaction with results will lead to continuing experimentation and
even cycling. Moreover, while it is true that the fourth strategy’s
leverage effect might attract more designating donors than it would
repel with its collective action problem, the strategy itself seems un-
stable because constituents will start investing more in advertising
themselves in order to attract more of these (potent) designated con-
tributions. In short, the analogy between umbrellas’ allocations and
governmental funding by the charitable deduction is interesting, but
it is by no means clear that either sector has much to learn from the
other.

B. Matching Grants

There are two familiar kinds of matching-gift programs: those
where the initiator identifies the target beneficiary and then seeks
to encourage other gift-giving to that beneficiary, and those where
the initiator allows other, targeted donors to leverage their alloca-
tive decisions about which charities to

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Thus, one year some local charity will receive zero and the dissatisfaction will lead to
a switch to some funds under the control of bureaucrats rather than designators. But then
defections will generate some movement back to the umbrella-as-intermediary model.

The first kind of matching program normally involves a large donor with great attach-
ment to the charity in question, while the second kind often involves an employer or someone
else with a link to the decisionmaker. Put differently, we are not surprised if X, who is a friend
of Y, proposes a wager or makes a gift in honor of an occasion to “the charity of Y’s choice,” but
we would be surprised if a philanthropic individual with no such preexisting link to a target
audience sought to increase the audience’s contributions by offering to match their gifts to the
charities that they select.
that target group. If there is any matching-as-balloting in this offer, it is that some large match-offering donors, such as foundations, can be seen as looking for “votes” of confidence on the part of the target group. If the charity can demonstrate that indeed thousands of small voters will sacrifice for this charity, then the large donor is duly impressed. This view is supported by the oft-heard claim that foundations pay attention to universities’ alumni percentage participation in annual giving or other campaigns.98

Most matching programs, however, are initiated not by outsiders but rather by loyal, seasoned insider-donors. They should probably be understood as seeking to overcome smaller donors’ sense that no small gift makes much of a difference. It is as if we experimented with voter turnout by promising voters in one county in a state election that their votes would be multiplied by two while voters in the other counties would have but one vote each. It is, I suppose, somewhat plausible that this target group would show higher turnout rates.99 Another explanation for these matching programs is that the loyal match-offering donor gives the dean an excuse to solicit the target group aggressively, with the claim that there is a special reason to approach each potential donor at the present time, inasmuch as this unique, time-sensitive matching opportunity is available.100

If these matching programs really aim to encourage giving by others, then a puzzle is that they rarely if ever focus on marginal behavior. A match initiator could offer to match contributions above the level obtained in the preceding year or above the level contributed by individual donors in preceding years. Similarly, the match

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98 See Doug Stutler and Dave Calvario, In Alumni Support, Satisfaction Matters; Student Satisfaction Motivates Alumni Donors, Fund Raising Management 12 (Nov 1996). Other explanations of why fundraisers pay so much attention to their own organizations’ participation percentages include the possibility that participation at any level is a good predictor of future participation—when donors may have more wealth at their disposal. United Way campaigns, for example, report cumulative receipts as well as comparisons with previous years’ totals, but not the percentage participation of the local population—presumably because the report could discourage other donors. Particular employers do, however, often worry about the percentage participation of their own workforce in a United Way campaign. In short, there appears to be a tipping point such that reports of substantial participation (by employees or alumni of an organization) are thought to encourage further participation as nondonors begin to see themselves as free riders rather than suckers.

Note that the matching-as-ballots possibility described in the text suggests that we should find matching offers of this kind for programs rather than for bricks and mortar.

99 If we could hold enough other variables constant, it would be interesting to test the proposition in the text by assessing whether voter turnout in elections where there is a departure from the one-person—one-vote baseline supports the claim that turnout is higher where the marginal vote is more “valuable.”

100 Thus, we never find a donor offering $10,000 as a 1:100 challenge match if the dean can raise $1 million from foundations! Note also that in practice many match initiators are loyal insiders who may be expected to contribute their specified amounts even if the target group is unable to meet the terms of the match.
could be three-for-one for amounts raised above $X and up to $Y, rather than the common dollar-for-dollar up to $Y. An odd solution to this puzzle is that the point may be to encourage not the apparent target group, but rather the loyal large donor who initiates the matching grant.

Another hint that the matches-as-encouragements idea should not be taken too seriously is that there is a collective action problem in responding to the matching offer that would suggest (counterfactually) that last minute responses might be common. Imagine, for example that the match initiator offers to match all gifts up to $2 million, so long as at least $1 million is raised. A donor who is motivated by the matching offer must worry either that less than $1 million will be raised or that more than $2 million will be raised; in either case his gift effectively is not matched. Fundraisers do not report delayed responses following a matching offer, although it is possible that most donors respond quickly (perhaps even to encourage the few marginal decisionmakers to see that the $1 million trigger will be reached), but some donors do indeed wait for the necessary information and then respond if they are matched on the margin. Put differently, the charitable deduction is in a sense superior to most matching programs. Most match initiators have set limits on the amounts they will contribute and therefore create more of a collective action problem for match responders who might like to know the marginal impact of their gifts. As a matching donor with unlimited funds, the government avoids creating this particular collective action problem.

The second kind of matching program bears more resemblance to the balloting generated by the charitable deduction. The most common example is an employer who matches individual employee contributions. Whether or not there are limits on the amounts that will be matched or on the types of charities that can benefit from these programs, there is obviously a significant allocative task performed by the individual employee. The employees (or a corporate board, perhaps) could have decided to vote on the question of where to contribute the amount budgeted by the employer for charitable giving, but voting is instead done in a proportional manner such that every vote counts. From a public choice and democratic theory perspective, it is interesting that this method is once again likely to avoid the problem of a disappointed minority. It is also likely to reduce a kind of rent-seeking.\textsuperscript{101} The same advantages could be en-

\textsuperscript{101}The equivalent of rent-seeking in the workplace would be energy expended on convincing fellow employees to "vote" for or against certain causes. Employees might also lobby to have certain causes excluded or favored in the matching process.
joyed in other settings, but we do not expect a majority, poised to get its way entirely, to delegate decisionmaking to the individual level where the majority will get less of its way. In this context, however, management may care more about the principle of charitable giving or about public relations than about the precise identities of the charities it supports. Management is likely to concentrate on reducing workplace dissatisfaction and campaigning rather than preferring some charities to the exclusion of others.

IV. MORE BALLOTTING THROUGH TAXES

The examples of direct democracy through proportional voting that we have seen in both the campaign finance checkoff and the charitable deduction raise the question of whether we might engage in more direct democracy of this sort. There are really several questions lurking here, because this species of direct democracy can take a variety of forms, from fairly explicit balloting, as illustrated by the campaign finance checkoff, to deductions and credits that are simply open to interpretation as instances of balloting, delegation, or "privatization." One possibility is to expect legislatures to maximize their own power and ability to generate rent-seeking behavior. Following this approach, we might expect our representatives in Congress to avoid extending the checkoff scheme to their fundraising and to avoid delegation where organized interest groups currently invest heavily to influence legislation.

But this simplistic, nearly univariable approach generates conflicting implications in many contexts. Powerful senators and representatives might be expected to prefer less delegation and more legislatively fashioned tax and spending packages, since they will have a large say in any such legislative product. Meanwhile, other legislators who do not have enough power to influence legislative spending decisions substantially might prefer deductions, which would at least allow them to boast to their constituents that they provided tax reductions. Interest groups can be expected to form in favor of both delegation and centralization, with their relative strength depending on the industry in question. One tentative generalization is that de-

102 The distinctive characteristic of these taxes as ballots examples, as well as the private sector matching programs discussed in Part III, is the nature of the delegation to the “voters.” The taxpayer-voters are asked not to vote something up or down (as is the usual case with exercises in direct democracy), but rather to make allocations or determine a budget by voting in a way that makes every vote count.

103 See note 110.

104 Unless, perhaps, soft money is as good as hard money from the perspective of legislators.

105 Of course, an unambiguous reduction in the tax burden would suggest the cessation of a spending program with no substitution of (revenue-reducing) deductions.
centralized power within a legislature can be expected to lead to a substitution of tax deductions (and the delegation of "spending" that that approach entails) for spending programs. A contemporary example illustrating such a substitution is the apparent reduction in government support for universities followed by some kind of deduction or credit for tuition payments. \(^\text{106}\) A very similar example, further reflecting the American taste for private choice over government involvement, is the tax credit for child-care expenses. \(^\text{107}\) This credit allows some consumers to allocate federal funds to suppliers, many of whom would not survive if the federal government itself established and operated child-care centers. Despite these examples of delegation, there are many contexts (particularly where deductions or credits are unworkable or simply unattractive) where we should not expect legislatures readily to give up their decisionmaking and patronage potential. Thus, it would be startling to find direct democracy of any kind with respect to the question of where to build new military bases, when to offer exemptions from antitrust law, or the extent to which patent and copyright monopolies ought to be extended.

If we allow for the possibility that legislative decisionmaking can be public-regarding rather than strictly self-serving, then delegation to the voters or donors makes sense when there is some desire to encourage private action (such as volunteering for the charities to which one contributes) or where the people have more information than their legislators. This last point may help to explain the tax deduction for charitable contributions and even the proportional-voting character of the ballot represented by that tool. Voters across the country are unlikely to be well informed about my local hospital or your university, so a conventional exercise in direct democracy would not delegate decisionmaking to better informed parties. How-

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\(^{106}\) Readers inclined to object to politicians' pandering to the upper-middle class by proposing tuition tax credits for college might rethink their objections if these credits are viewed as a substitute for direct grants to universities. The substitution argument is imperfect, however. Students and their parents can allocate federal funds to diverse colleges, voting with their matriculation and credits, but by and large the allocations to a large number of colleges will be invariant because these schools will fill up their entering classes regardless of how satisfied customers are in the short term. Only struggling schools will feel the impact of the preferences exhibited by these voters. This is, perhaps, the major difference between a modest tuition credit system and a large-scale voucher system of the kind presently debated and of the sort introduced for veterans of the Second World War. This early example of a voucher system is noted in Gerard M. Brannon and James Strnad, Alternative Approaches to Encouraging Philanthropic Activities, in Commission on Private Philanthropy and Public Needs, 4 Research Papers 2361, 2383 (US Dept of the Treasury 1977). A more complicated system could make better use of the direct democracy notion, but I will leave for another day the larger question of getting the most out of vouchers and tax credits in this context.

\(^{107}\) See 26 USC § 21 (1994).
ever, alumni of your university and citizens of my local community might be fairly well informed about their respective organizations. Some large contributors will be especially well informed, as members of governing boards, or simply because they investigate before "investing." 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.

Apart from noting that various existing deductions and credits can be viewed as instances of taxes as ballots, it may be useful to specify other public decisions regarding which we might expect or even suggest the growth of the taxes as ballots idea—but where there is not yet any hint of a deduction, credit, checkoff, or other balloting tool. Characteristics that would make a particular decision well-suited for the taxes as ballot mechanism include the likelihood that significant interest groups preferred or did not object to delegation by the legislature to more popular decisionmaking, the possibility that legislators might avoid creating dissatisfied minorities by delegating away some decisionmaking, and (ideally) the potential for capitalizing on the knowledge and experiences of voters.

Consider first the possibility of using the taxes as ballots idea with respect to foreign aid appropriations. Voters could be asked to allocate up to \( \$X \) among a list of countries. The checkoff could amount to a full credit, or to something slightly less than that. Congress could borrow from some of the umbrella fundraisers' practices by appropriating a portion of the foreign aid budget legislatively and then allowing individuals to allocate the balance of the foreign aid budget or to decide the size of this budget beyond that legislatively announced amount.\(^{108}\) On the one hand, the foreign aid context might seem to be a particularly poor location for the expansion of the taxes as ballots strategy, inasmuch as Congress will have access to more rather than less information than will voters regarding national security interests and the effectiveness of past expenditures abroad. Moreover, voters are ill-positioned to monitor the recipients of foreign aid. On the other hand, these appropriations have become quite unpopular in Congress, because voters are perceived as rebelling against representatives who support them. In addition, foreign aid appropriations may be an appropriate issue for direct decision-making if the legislature is susceptible to cycling preferences regarding this issue.\(^{109}\)

\(^{108}\) The United Way model suggests that Congress might wish to hide its formula or the size of its minimum budget, see note 95 and accompanying text, but this sort of secrecy in the foreign aid context seems unwise and politically unlikely.

\(^{109}\) See note 96 and accompanying text. There are almost surely such cyclical preferences
There is something to be said for this delegation to relatively ignorant decisionmakers from both a positive and normative perspective. Voters may be badly informed, but they are also relatively difficult to influence. Indeed, one source of their objections to congressional foreign aid appropriations may be news of intense rent-seeking by foreign interests. These interests could be expected to have some influence over voters as well, but it seems plausible that direct democracy in this context (and in many others) would reduce the rent-seeking associated with political decisionmaking. If we exercise some caution in designing the scheme—for example by refraining from offering full credits where these credits might easily be bought—interest groups will normally find it difficult to make socially undesirable offers to the voters. Thus, if taxpayers are offered the opportunity to appropriate up to $5 each to one of several countries eligible for foreign aid, interested parties will have a difficult time investing in efficient advertising (or other forms of rent-seeking) in order to influence these millions of small designators.

One path to this intuition is to think of how little commercial advertising we find for products that cost no more than $5 or $10 and that any given consumer only purchases once. I suppose it is possible that the new hurdles faced by interest groups would lead to more rather than less rent-seeking, but my intuition is that as the profitability of a given rent-seeking investment falls, there will be significantly less of that activity. If rent-seeking behavior regarding for-

in the case of foreign aid appropriations. As a normative matter, there is therefore a case to be made for proportional popular decisionmaking in this setting (allowing a new collective action problem to dominate in order to have nearly random results rather than tyrant-determined results). However, as a positive matter it is noteworthy that the checkoff first emerged where cycling preferences were most improbable, see notes 43-44 and accompanying text, so that its use should perhaps not be expected in this setting.


It would be even more difficult to bribe these voter-taxpayers. And note that the analysis does not change much in the absence of a per-taxpayer ceiling. A similar point about the difficulty of corrupting many small decisions was made in the context of the $3 campaign checkoff scheme. See note 65.
eign expenditures is in fact reduced by the use of taxes as ballots, then a similar advantage might accompany the use of this mechanism in other contexts (even where citizens are less well informed than their representatives). Thus one can imagine direct democratic decisionmaking regarding a choice among defense suppliers, locations for military bases, crop subsidy programs, allocations among the branches of the armed services, or subsidies to various industries. In all these examples there appears to be a great deal of rent-seeking associated with legislative allocations, and therefore the possibility of gaining by delegating to the uninformed.  

CONCLUSION

Congress does not appear eager to reclaim for itself the decisionmaking authority that it has delegated away through the charitable deduction. This may be because the charitable deduction is politically popular, or it may reflect a recognition that the deduction is a very useful social choice mechanism at least as compared to the seriously flawed alternatives we can imagine. But it may also be that this interesting example of "taxes as ballots" is unusual, and that there are few other areas where comparable political and decisionmaking realities suggest new applications of the decisionmaking mechanisms discussed here. A positive argument could be made in

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122 There is, however, the danger that interest groups will thrive even with direct democratic decisionmaking, perhaps because they will control the framing of questions (such as the list of countries among which taxpayers must allocate funds) or, in the case of a conventional exercise in direct democracy, the framing of referenda. Compare Riker, 67 Chi Kent L Rev at 793 (cited in note 24) (arguing that referenda are subject to manipulation by the agenda-setter), with Gillette, 86 Mich L Rev at 978-82 (cited in note 22) (suggesting that legislatures are likely to be easier to capture than is the electorate as a whole).

Although my focus in the text is on the potential for taxes as ballots where there has of yet been no move toward delegation, I noted earlier the need for further exploration of instances where some delegation is already found, as it is in the education arena, albeit not necessarily through the tax system. See note 106. School vouchers, or other ballots regarding education expenditures, may capitalize on the expertise of parents, but note that in this context the good in question is largely private rather than nonrival in character. Those who use school vouchers are not only providing information as to the relative quality of schools but also are selfishly consuming educational services. Indeed, to the extent that their contributions to these schools often exceed normal tuition levels, charitable deductions—and thus matching government funds—are already available even where there is no explicit voucher program.

Finally, it is also possible that it is the proportional, rather than the decentralized, character of the taxes as ballots idea that best supports the claim that this form of decisionmaking will generate less rent-seeking than comparable legislative decisions. This argument is supported by the literature on discontinuities or "cliffs," which suggests that a party might invest more where there are all-or-nothing payoffs than where payoffs are smoother, as they are with proportional voting. This possibility may explain the fact that much more is spent on campaigns in winner-take-all contests as opposed to proportional, parliamentary elections. But I will leave for another day the link between proportional voting (or proportional appropriations) and rent-seeking.
this regard, although I have avoided making it here, that our legal system may in fact choose the best available mechanism for many diverse decisions.

An obvious piece of unfinished business is to examine other tax deductions and to explore the ways in which these deductions facilitate allocative or other decisions that otherwise might have been made legislatively or even through more conventional exercises in direct democracy. I have hinted at my interest in education subsidies and local and state taxes in this regard, but there are other less obvious (or perhaps weaker) examples as well, including the medical deduction. I leave these tasks for another day.

\[\text{1998} \text{ HeinOnline -- 65 U. Chi. L. Rev. 431 1998}\]

See note 112. I do not intend to abandon the perspective of linking delegation to preference aggregation. Thus, as I noted, the interest deductions make the government a kind of partner in business and in housing construction and so forth, see text accompanying note 58. But most other deductions are best understood as a means of measuring income or of providing a subsidy rather than as a method of aggregating preferences.