

University of Chicago Law School

Chicago Unbound

Journal Articles

Faculty Scholarship

2009

Corporate Philanthropy and the Market for Altruism

M. Todd Henderson

Anup Malani

Follow this and additional works at: https://chicagounbound.uchicago.edu/journal_articles



Part of the [Law Commons](#)

Recommended Citation

M. Todd Henderson & Anup Malani, "Corporate Philanthropy and the Market for Altruism," 109 Columbia Law Review 571 (2009).

This Article is brought to you for free and open access by the Faculty Scholarship at Chicago Unbound. It has been accepted for inclusion in Journal Articles by an authorized administrator of Chicago Unbound. For more information, please contact unbound@law.uchicago.edu.

ESSAY

CORPORATE PHILANTHROPY AND THE MARKET FOR ALTRUISM

M. Todd Henderson*

Anup Malani**

Academics and businesspeople have long debated the merits of corporate philanthropy. It is our contention that this debate is too narrowly focused on the role of corporations. There is a robust market for philanthropic works—which we call the market for altruism—in which nonprofit organizations, the government, and for-profit corporations compete to do good works. In this Essay, we describe this market and the role corporations play in satisfying the demand for altruism. We conclude that corporations should only engage in philanthropy when they have a comparative advantage over nonprofits and the government. Moreover, the government must avoid discriminating—particularly when setting tax policy—between nonprofits and corporations that do good deeds.

INTRODUCTION

Should corporations be permitted to engage in philanthropy, and, if so, should they choose to do so? These questions have spawned a decades-long debate among academics and corporate executives. Milton Friedman fired the first salvo in 1972 with a *New York Times Magazine* article in which he asserted that corporations should only make money, distribute it to shareholders, and let them decide how to spend it.¹ Bill Gates joined the fray in 2007 in his commencement address at Harvard University, when he argued that corporate philanthropy (that is, doing things other than making the most money possible) is necessary to help

* Assistant Professor of Law, University of Chicago Law School.

** Professor of Law and Aaron Director Research Scholar, University of Chicago Law School; University Scholar, Resources for the Future. We thank Ilya Beylin, William Birdthistle, Steve Clymer, Saul Levmore, Tom Miles, Eric Posner, James Spindler, Michael Vandenberg, David Weisbach, and participants in the Philanthropy Seminar at the Harris School of Public Policy Studies at the University of Chicago for their comments. Professor Malani thanks the Milton and Miriam Handler Foundation for financial support. We are grateful to Ruben Rodrigues for his research assistance.

1. Milton Friedman, The Social Responsibility of Business Is to Increase Its Profits, *N.Y. Times Mag.*, Sept. 13, 1970, at 32, 33 [hereinafter Friedman, Social Responsibility] (arguing that “in his capacity as a corporate executive, the manager is the agent of the individuals who own the corporation,” and that his “responsibility is to conduct the business in accordance with their desires, which generally will be to make as much money as possible while conforming to the basic rules of the society”).

those whom markets cannot help.² (For the record, courts side with Mr. Gates, though for less lofty reasons.³)

To answer the question whether corporations should engage in philanthropy, we must first understand why they do it.⁴ On this topic scholars have taken two sides. The first side argues that corporate philanthropy is an example of managerial graft: Executives spend corporate profits on their pet charities rather than returning that money to shareholders.⁵ Another side—led by Michael Porter of Harvard Business School—claims that philanthropy does not siphon profits, it begets them. The reason offered is that philanthropy buys goodwill from consumers, employees, and regulators.⁶

Both sides in this debate miss the forest for the trees. To understand why *corporations* engage in philanthropy and to know whether they should, one must return to first principles and explain why *anyone* engages in philanthropy.⁷ The answer is altruism: People feel good when others' lives are improved.⁸ Whether an individual donates money to help a poor child in Africa or volunteers to mentor a troubled teen, the reason for the charitable action is the happiness (or, to an economist, the

2. Bill Gates, Speech at the 2007 Harvard University Commencement (June 6, 2007), available at <http://www.gatesfoundation.org/speeches-commentary/pages/bill-gates-2007-harvard-commencement.aspx> (on file with the *Columbia Law Review*). While this is a good reason for philanthropy, it is not a good reason for *corporate* philanthropy. Cf. *infra* Part I.B (discussing duty-based corporate social responsibility).

3. The picture is actually more complex. As discussed below, state statutes specifically authorize corporate philanthropy and courts generally take a hands-off approach, but there are cases that purport to command a norm of shareholder wealth maximization. See, e.g., *Dodge v. Ford Motor Co.*, 170 N.W. 668, 684 (Mich. 1919) ("A business corporation is organized and carried on primarily for the profit of the stockholders."). *Dodge*, however, does not create a substantive standard that is enforceable in court, but rather an aspirational goal for corporate directors. The business judgment rule, which applies to philanthropic decisions just like any other corporate decision, insulates firms from judicial review of decisions that allegedly do not maximize shareholder value.

4. The "corporate social responsibility" (CSR) movement takes a different tack. Instead of offering a descriptive theory of why corporations engage in philanthropy to answer the normative question whether they should do so, they answer the normative question and use it to explain why one observes corporations engaging in philanthropy. Under the CSR view, corporations have a moral duty to do good for others, even if it comes at the expense of the bottom line, and we see corporations engaging in philanthropy because of this moral duty. We address this view *infra* Part I.B.

5. See *infra* notes 34–38 and accompanying text.

6. See *infra* notes 26–33 and accompanying text.

7. After all, the current debate just begs the question why managers engage in altruism or why consumers, employers, and regulators offer goodwill in exchange for it.

8. Altruism is well documented, but explanations for its origins are debated. Compare H.A. Simon, A Mechanism for Social Selection and Successful Altruism, 250 *Science* 1665, 1665 (1990) (arguing that human tendency to accept social influence accounts for development of altruism through natural selection), with R.L. Trivers, The Evolution of Reciprocal Altruism, 46 *Q. Rev. Bio.* 35, 35 (1971) ("[U]nder certain conditions natural selection favors [certain] altruistic behaviors because in the long run they benefit the organism performing them."). This debate is beyond the scope of this Essay. We take it as noncontroversial that some individuals are altruistic.

utility) that the individual draws from knowing someone has been helped along.⁹ With total charitable activity (including money, in kind, and volunteer donations; purchase of goods bundling philanthropic donations; and some taxes) totaling nearly one trillion dollars in the United States last year, the demand for altruism is obvious.¹⁰

Knowing that individuals demand altruism or charitable utility, we then must ask how individuals satisfy this demand. At a basic level, altruism is like anything in the economy that individuals demand; they can produce it themselves or use an intermediary to deliver it.¹¹ Putting self-production to the side for now,¹² the typical individual satisfies the demand by donating time or money to nonprofit organizations. One can, for example, volunteer at a soup kitchen or donate money to the Red Cross. A second approach is to pay taxes so that the government can help the downtrodden with programs like Medicaid and public housing.¹³

For-profit corporations can also deliver altruism to individuals, and their role in doing so has increased dramatically in the past few years.¹⁴ The conventional, narrow definition of corporate philanthropy is cash donations by corporations to nonprofit organizations, which then use the cash to help others. Under this definition, firms are acting as aggregators and second-order intermediaries between individuals (that is, shareholders) and nonprofit charities. As discussed below, this is the smallest and least interesting component of how we define “corporate philanthropy.” We use a broader definition that includes any corporate activity that helps others without regard to the bottom line—what we call “corporate social action.” Corporations do not merely channel funds to nonprofits, but do many things to help others at the expense of corporate profits.¹⁵

9. There are actually two separate altruistic motivations that we define and unpack a bit more below. Economists call the two possible motives “pure altruism” and “warm glow.” Pure altruism is a desire that other people’s lives be improved, whether or not one contributes to that improvement. Warm glow is a desire actually to contribute to that improvement. Economists call the combination of these preferences “impure altruism.” For simplicity we will call them “altruism.” See *infra* notes 52–53 and accompanying text.

10. See Appendix A for specific estimates of charitable contributions.

11. Food is an obvious example. Individuals can grow their own, but most rely on specialization to deliver food at lower prices and with less effort than self-production would require. The same arguments can be applied to altruism.

12. There are no good estimates of the amount of good individuals do for others without using an intermediary, so our discussion of the market for altruism ignores self-production in the same way that measures of the size of the economy and competition within it ignore individual self-production of goods and services.

13. Although taxes are mandatory, individuals can engage in various levels of compliance and tax avoidance, and can, of course, politically support higher or lower tax burdens.

14. See Appendix A for a discussion and rough sizing of the relative market share of the various altruism intermediaries.

15. Our definition even includes payment of corporate taxes that support good works by the government to the extent that those payments are voluntary. The voluntary component of payments is that part which the corporation could have avoided or successfully (in expectation) evaded but did not.

Firms now produce “green goods,” voluntarily reduce environmental emissions, and directly help provide medicines to the uninsured.¹⁶ To see why these activities are charity, consider corporate commitments to reduce carbon dioxide emissions, which we estimate to cost firms tens of billions of dollars per year.¹⁷ Since there is currently no law or regulation requiring these reductions, there is no significant difference between a firm donating \$100 to an environmental charity and a firm spending \$100 to voluntarily reduce carbon dioxide emissions; both reduce the firm’s profit by \$100 with the goal of improving social welfare.¹⁸ We outline these works of corporate social action and their scope in Appendix A, showing that they form a very large portion of total corporate donations. To ignore these activities is to ignore the full scope of corporations’ charitable work.

Although there should be nothing troubling about firms delivering a new product, corporate delivery of altruism is controversial because of how corporations “sell” altruism. We can see this by comparing the sale of altruism with the sale of regular products, like toothpaste or iPods. Ordinarily, corporations obtain financing from shareholders and use it to purchase labor from employees, who in turn manufacture products that are sold to consumers. At the end of the day, consumers obtain a product in return for their payment, employees receive a wage for their labor, and shareholders get back a financial return on their investment. The production of altruism adds a layer of complexity to this process. When the corporation engages in philanthropy, it may satisfy the altruism demand of shareholders, employees, and consumers alike; every corporate stakeholder may feel good knowing that the firm is helping others. All three parties also pay: Consumers may pay more for the corporation’s

16. See, e.g., Mike Boyer, *Cinergy to Reduce Airborne Emissions*, *Cin. Enquirer*, Sept. 10, 2003, at 1A (reporting company’s planned reduction of emissions by five percent over seven years); Press Release, AstraZeneca, *AstraZeneca to Provide Free Medicines to Facilities that Serve the Uninsured in West Virginia* (Jan. 23, 2008), available at <http://www.astrazeneca-us.com/about-astrazeneca-us/newsroom/corporate/2041753?itemId=2041753> (on file with the *Columbia Law Review*) (announcing provision of free medications to health centers in West Virginia).

17. There are no existing estimates of the total amount or dollar cost of voluntary compliance, so we base our estimate on the opinions of environmental law experts, including Jonathan Adler and Michael Vandenbergh. Telephone Interview with Jonathan Adler, Professor of Law, Case Western Reserve Univ. (Jan. 10, 2008); Telephone Interview with Michael Vandenbergh, Professor of Law, Vanderbilt Univ. (Jan. 10, 2008).

18. This may not be literally true, in that there are numerous benefits to managers, shareholders, customers, employees, and other individuals that must be added up on both sides to determine the true social value of these actions. For example, reducing carbon dioxide emissions may preempt more costly regulatory intervention, and thus reduce the firm’s ongoing expenses, while donations to charity may be more conspicuous and generate goodwill for the firm, which also may reduce future costs or increase future revenues. If such overcompliance is intended merely to forestall government regulation, then it is more like government social work outsourced to corporations. If, however, it is overcompliance to engender the goodwill of private stakeholders, then it differs little from donations to a nonprofit or direct social action.

products, employees may take a lower wage to work for the corporation, and shareholders may accept a lower return on their investment. It is precisely this contortion of the usual producer-consumer relationship that makes corporate philanthropy controversial.

If nonprofits and the government already help others, and corporate giving is so contentious, why do people seek altruism from corporations? The answer is that corporations are sometimes better at delivering philanthropy than their competitors in the nonprofit and public sectors. An advantage that corporations have over nonprofits is that their ordinary profitmaking activities sometimes give corporations an edge at helping the less fortunate. For example, Starbucks's procurement of coffee beans puts it in a great position to identify and encourage productive small farmers in the developing world. Starbucks can offer its coffee consumers the ability to help these farmers by purchasing fair trade coffee. Economists call this "economies of scope," and it is something corporations likely have that most nonprofits do not.

An advantage corporations have over the government is that different corporations can offer different types of altruism to different people. Those who care about the environment can deal with Patagonia, which has pledged about one percent of profits to environmental causes,¹⁹ while those who are concerned about poverty in developing countries can engage with Google, which has made a similar pledge to that cause.²⁰ The government, in contrast, is limited by the political compromises of the entire electorate.

Whatever the reasons behind the rise of corporate philanthropy, its presence highlights the fact that people "purchase" altruism like they do other goods. Unlike automobiles, accounting services, or cell phones, however, three types of organizations—nonprofits, the government, and for-profit corporations—provide individuals opportunities to buy altruism. Each competes on price and quality to sell altruism to consumers, just as corporations compete when selling other goods. We call this dynamic the "market for altruism," since there is competition to satisfy the

19. Patagonia, through its "1% for the Planet" campaign, joins a group of businesses that have pledged one percent of sales to help environmental causes. See Patagonia, 1% for the Planet, at http://www.patagonia.com/euro/en_GB_GB-/patagonia.go?assetid=1960 (last visited Jan. 14, 2009) (on file with the *Columbia Law Review*) (noting Patagonia alone has "awarded over 30 million dollars" to environmental groups through this program).

20. Google donates one percent of its profits to Google.org, a "hybrid philanthropy" that administers grants and engages in socially responsible business endeavors, as well as manages the nonprofit Google Foundation. See Google.org, Inform and Empower to Improve Public Services, at <http://www.google.org/inform.html> (last visited Nov. 3, 2008) (on file with the *Columbia Law Review*); Google.org, Our Structure, at <http://www.google.org/about.html> (last visited Jan. 22, 2009) (on file with the *Columbia Law Review*).

demand for altruism just as there is competition to satisfy the demand for all other goods and services in the economy.²¹

This recharacterization and framework helps us answer the two questions that drive the debate over corporate philanthropy: Should firms choose to engage in philanthropy? And should they be allowed to? First, a corporation should only engage in philanthropy when it is efficient for it to do so, that is, when it has a comparative advantage over other corporations and, importantly, nonprofit organizations and the government.²² When a corporation is acting merely as a pass-through—simply donating corporate profits to nonprofit organizations—it must explain why it should not step out of the way and let shareholders make these donations directly.²³

Second, the government should not prohibit or discourage corporate philanthropy in general, since firms are important and often efficient providers of altruism. We show below that for-profit firms help complete the market for altruism by offering individuals who would not otherwise be able to satisfy their altruistic preferences an opportunity to do so. For a well-functioning market, however, the government must do more than this—it must be careful not to discriminate without good reason among various providers of altruism. One source of discrimination is government favoritism toward itself. Unlike in most markets,²⁴ the government is a competitor in the market for altruism, and because it can compel individuals to purchase altruism from it through taxes, it may favor itself at the expense of charities or altruistic firms. This potential for crowding out of efficient providers of altruism is real and should be resisted, but it is not the most serious concern.

The more serious concern arises because the government writes the rules for philanthropy, largely through tax benefits for certain types of giving, and it may discriminate in an inefficient manner here too. For example, a taxpayer who itemizes her deductions can deduct a charitable contribution to a nonprofit from her taxable income, but she cannot deduct the charitable portion of a purchase from a for-profit corporation.²⁵ This discrimination is just as bad for competition—and consumers—as if

21. We discuss some elements of this market competition in detail *infra* Parts II and III. It is important to note here that this “market” is not exactly like the market for automobiles or accounting services. We explore these differences *infra* Part IV.A.

22. See *infra* Part IV.B (discussing comparative advantages of corporate charity).

23. The current tax regime often favors corporate giving over direct donations by shareholders, see *infra* Part V.B.2, but this regime may itself be inefficient.

24. Nonprofits and the government compete in the market for education and also indirectly compete with firms in the markets for housing, credit, and transportation; all three types of actors occasionally compete in the market for health care and health insurance. In nearly all other product markets, for-profit firms are the only market participants.

25. See 26 U.S.C. § 170(a)–(c) (2006) (allowing deduction of “any charitable contribution” to groups “organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes”).

the government favored General Motors over Ford in the market for cars. If the tax rules are not tailored to reflect the relative merits of the different delivery mechanisms or providers, consumers will tend not to choose the product that is best for them, but rather the product that is favored by the government. The recipients of altruism may also be hurt, since they may receive less or lower quality aid than they would if the tax rules were nondiscriminatory.

Our bottom line is simple: Companies exist to deliver value to employees, customers, and investors, and firms are providing these stakeholders increasing opportunities to satisfy their demand for altruism as a component of this value. Asking why firms produce altruism is like asking why Toyota produces the Camry or Apple produces the iPod Nano. The answer is that they do so because there is consumer demand for it and the company is able to produce it at competitive cost. Government, which is both a competitor and rulemaker in this market for altruism, is acting inefficiently along several dimensions; reforms are needed to level the playing field in the market so that altruism is delivered efficiently to individuals demanding it and benefits are delivered efficiently to recipients of charity. To make our argument, the rest of this Essay proceeds as follows: Part I reviews the existing debate over the merits of corporate philanthropy, asking why corporations engage in philanthropy and whether they should. Part II presents the foundation of our theory of corporate philanthropy. It describes why people demand charitable works and how corporations provide them. Part III considers the roles of nonprofits and the government as the traditional suppliers of altruism. Part IV then examines how corporations supply altruism, showing how for-profit firms may have a comparative advantage over nonprofits and the government at delivering altruism in certain circumstances. With the importance of corporate philanthropy in the market for altruism established, Part V shows how government discrimination in the market for altruism—in favor of itself and of certain types of giving—is inefficient and needs to be reformed to ensure altruism is delivered in an efficient manner.

I. THE EXISTING DEBATE

The bulk of the academic literature on corporate philanthropy tackles the question of why corporations engage in philanthropy. One's answer to this question is a good predictor of one's answer to the question that occupies public discourse: Should corporations engage in philanthropy? We review the sides in this debate to set the stage for our theory of philanthropy.

A. *Why Do Corporations Engage in Philanthropy?*

Prominent scholars such as Michael Porter argue that philanthropy helps a firm's bottom line and can be a source of competitive advan-

tage.²⁶ Numerous studies claim to support the link between giving and profit.²⁷ The mechanisms by which this link operates include generating good feelings among customers, suppliers, or employees;²⁸ attracting high quality employees;²⁹ or decreasing the risk of government or activist action.³⁰ Whether the source of the goodwill and increased profits is the advertising benefits of doing good³¹ or something else is beside the point. All that matters is that the firm is actually doing some public good and that the act of doing this helps not only strangers to the firm but also its shareholders.³² Even Milton Friedman, who famously claimed that the

26. Michael E. Porter & Mark R. Kramer, *The Competitive Advantage of Corporate Philanthropy*, Harv. Bus. Rev., Dec. 2002, at 57, 59 [hereinafter Porter & Kramer, *Competitive Advantage*] (“[S]ocial and economic goals are not inherently conflicting but integrally connected . . .”).

27. See Madhu Khanna & Lisa A. Damon, *EPA’s Voluntary 33/50 Program: Impact on Toxic Releases and Economic Performance of Firms*, 37 J. Envtl. Econ. & Mgmt. 1, 21, 24 (1999) (“[W]hile the immediate impact of participation in [a voluntary pollution reduction] program on profits is negative relative to the profits of nonparticipants, in the long run participating companies are expected to be more profitable . . .”); see also Seema Arora & Shubhashis Gangopadhyay, *Toward a Theoretical Model of Voluntary Overcompliance*, 28 J. Econ. Behav. & Org. 289, 291 (1995) (discussing how consumer preference and response to firm reputation have resulted in firms’ willingness to overcomply with EPA regulations); Lance Moir & Richard J. Taffler, *Does Corporate Philanthropy Exist?: Business Giving to the Arts in the U.K.*, 54 J. Bus. Ethics 149, 154–57 (2004) (analyzing gifts to the arts by sixty firms, and finding they were internally justified almost entirely by profit maximization).

28. See, e.g., Khanna & Damon, *supra* note 27, at 21 (“[I]nvestors expect the costs of . . . improving environmental performance to be offset in the future by . . . increased consumer goodwill . . .”); Moir & Taffler, *supra* note 27, at 150 (describing common view among scholars that corporate giving is primarily promotional).

29. Daniel W. Greening & Daniel B. Turban, *Corporate Social Performance as a Competitive Advantage in Attracting a Quality Workforce*, 39 Bus. & Soc’y 254, 276 (2000) (finding firms with reputations for corporate social performance may develop competitive advantage in attracting employees); see also Jeanne M. Logsdon et al., *Corporate Philanthropy: Strategic Responses to the Firm’s Stakeholders*, 19 Nonprofit & Voluntary Sector Q. 93, 104 (1990) (same).

30. See David P. Baron, *Private Politics, Corporate Social Responsibility, and Integrated Strategy*, 10 J. Econ. & Mgmt. Strategy 7, 44 (2001) (suggesting giving reduces risks of activist action); Thomas P. Lyon & John W. Maxwell, *Corporate Social Responsibility and the Environment: A Theoretical Perspective*, 2 Rev. Envtl. Econ. & Pol’y 240, 245 (2008) (“One important reason that industry invests in CSR is to preempt advocacy groups from organizing to enter the political arena and press for regulation . . .”).

31. See Peter Navarro, *Why Do Corporations Give to Charity?*, 61 J. Bus. 65, 89–90 (1988) (concluding that corporate contributions represent form of advertising, as firms that spend more on advertising also tend to give more to charity).

32. Indeed, Einer Elhauge has suggested that shareholders may draw nonfinancial utility from corporate social actions even if they lower corporate profits. See Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. Rev. 733, 783–96 (2005) (“To at least some extent, shareholders value nonfinancial aspects of corporate activities, such as whether those activities further the shareholders’ social and moral views. Thus, maximizing shareholder welfare is not the same thing as maximizing profits.”); see also Joshua Graff Zivin & Arthur Small, *A Modigliani-Miller Theory of Altruistic Corporate Social Responsibility*, Topics in Econ. Anal. & Pol., 2005 art. 10, at 1, 12–15, at <http://>

"only . . . responsibility of business [is] to use its resources and engage in activities designed to increase its profits," acknowledged that corporate philanthropy may be justified when it is necessary to maximize long-run profits.³³

Other scholars argue that philanthropy is simply managerial graft, no different from a CEO using a fancy corporate jet for personal purposes.³⁴ Managers are spending other people's money, and, because monitoring by shareholders is imperfect, managers will do so in ways that maximize their own utility rather than that of the shareholders. Numerous studies claim to support this view.³⁵ The agency costs account is supported by the facts that the law does not require firms to disclose to shareholders corporate charitable gifts and that many firms do not do so.³⁶

www.bepress.com/bejeap/topics/vol5/iss1/art10 (on file with the *Columbia Law Review*) (arguing that firms acting in socially responsible ways are providing utility, what they call an "ethical premium," to investors in those firms).

33. Friedman, Social Responsibility, *supra* note 1, at 124, 126.

34. See, e.g., Faith Stevelman Kahn, Pandora's Box: Managerial Discretion and the Problem of Corporate Philanthropy, 44 UCLA L. Rev. 579, 586 (1997) (arguing that lack of regulation and disclosure requirements have "meant that corporate senior executives have had a blank check to make corporate charitable contributions independent of both business objectives and shareholder preferences"); see also Jayne W. Barnard, Corporate Philanthropy, Executives' Pet Charities and the Agency Problem, 41 N.Y.L. Sch. L. Rev. 1147, 1160-64 (1997) (disregarding any profit or tax motives, and imputing much of donation to personal (largely selfish) motives of CEOs); James R. Boatsman & Sanjay Gupta, Taxes and Corporate Charity: Empirical Evidence from Micro-Level Panel Data, 49 Nat'l Tax J. 193, 200-02 (1996) (discussing data on corporate philanthropy consistent with managers' utility maximization rather than profit maximization); Jill E. Fisch, Questioning Philanthropy from a Corporate Governance Perspective, 41 N.Y.L. Sch. L. Rev. 1091, 1097 (1997) (concluding that corporate giving is motivated by management self-interest because studies fail to find link between giving and profitability); Bill Shaw & Frederick R. Post, A Moral Basis for Corporate Philanthropy, 12 J. Bus. Ethics 745, 747-48 (1993) (concluding that empirical evidence suggests corporate giving is primarily motivated by citizenship interests).

35. See William O. Brown, Jr. et al., Corporate Philanthropic Practices, 12 J. Corp. Fin. 855, 856 (2006) (concluding that "agency cost considerations play a prominent role in explaining corporate giving"); see also Lisa Atkinson & Joseph Galaskiewicz, Stock Ownership and Company Contributions to Charity, 33 Admin. Sci. Q. 82, 97-98 (1988) (finding that among sampled firms, companies with higher percentage of ownership by CEO or with large blockholder give less to charity); Bruce Seifert et al., Having, Giving, and Getting: Slack Resources, Corporate Philanthropy, and Firm Financial Performance, 43 Bus. & Soc'y 135, 147 (2004) (finding that generous firms have much higher free cash flow at discretion of managers).

36. For example, the New York Stock Exchange lists charitable organizations as relevant in determining the independence of directors. See NYSE, Inc., Listed Company Manual § 303A.02(a) cmt. (2008), at <http://www.nyse.com/Frameset.html?nyseref=&displayPage=/lcm/1078416930885.html> (on file with the *Columbia Law Review*) (stating that charitable relationships can be "material" and thus render a director not independent). The Manual requires firms to adopt governance guidelines including, inter alia, consideration of payments made to charities affiliated with directors. *Id.* § 303A.09 cmt. (stating that concerns regarding director independence "may be raised when the listed company makes substantial charitable contributions to organizations in which a director is affiliated").

Proponents of this view call into question the causal connection between donations and profits relied on by the opposing camp.³⁷ They argue that profits, or the expectation of profits, may allow corporations to be more generous—thus explaining the observed correlation between corporate success and philanthropy.³⁸

The empirical research is not conclusive, but suggests that corporate philanthropy reflects a blend of motives. Even studies finding evidence consistent with profit-maximizing motives also find that companies with lower agency costs—greater monitoring by creditors, more independent boards, less free cash available to managers—gave less to charity than other firms.³⁹ We think these studies fairly capture reality: Both positive theories are more or less true and will be present at various levels in most cases.⁴⁰ Just as a CEO's decision about the use of a corporate jet may be motivated by both personal and shareholder concerns, it would be surprising if decisions about doing good for others were not mostly based on mixed motives.

In light of the inevitable mixed motives and the inability of courts to distinguish *ex post* between “good” and “bad” philanthropic decisions made by firms, the law takes a very agnostic view. This was not always the case. Prior to about 1960, donations to charity were often considered beyond the power of firms.⁴¹ But how is a court to determine whether a donation to Princeton University, a commitment to pay higher wages to autoworkers, or a decision not to install lights at Wrigley Field is a profit-maximizing decision or a charitable one?⁴² After all, a firm's decision to limit pollution to a greater extent than that required by law is as much charity as a gift to the opera, and if courts are in the business of making

37. See Fisch, *supra* note 34, at 1097 (“The possibility that corporate giving is motivated by management self-interest rather than profit maximization is . . . supported by studies that fail to find a conclusive link between charitable giving and profitability.”).

38. See Seifert et al., *supra* note 35, at 147 (finding positive correlation between corporate philanthropy and cash flow).

39. See Brown et al., *supra* note 35, at 875 (stating that agency-cost and profit-maximization theories are not mutually exclusive). Other evidence, like larger relative giving by firms in regulated industries, conceivably cuts both ways: Regulated firms may be giving to build goodwill with regulators (and thereby reduce regulation and increase profits) or may simply face less competition and therefore have greater managerial discretion over cash flows. See *id.* at 872.

40. See Navarro, *supra* note 31, at 67 (arguing that profit-maximization and agency-cost explanations are not mutually exclusive).

41. See Kahn, *supra* note 34, at 594 (describing transition from judicial prohibition of corporate philanthropy in early twentieth century to enactment of open-ended enabling laws validating corporate philanthropy after mid-century).

42. See *Shlensky v. Wrigley*, 237 N.E.2d 776, 781 (Ill. App. Ct. 1968) (holding decision not to install lights at Wrigley Field to benefit baseball and local neighborhood was permissible exercise of business judgment); *Dodge v. Ford Motor Co.*, 170 N.W. 668, 684 (Mich. 1919) (holding increase in wages for workers—Ford's famous five-dollar day—was not impermissible charitable donation); *A.P. Smith Mfg. Co. v. Barlow*, 98 A.2d 581, 590 (N.J. 1953) (holding gift from plumbing supply company to Princeton reasonable and calculated to benefit shareholders).

these distinctions, regulatory laws become not only minimums but maximums. In this way, the law's permissive attitude toward corporations doing good (in all forms) is an inevitable result of the business judgment rule: Courts avoid second guessing business decisions in an attempt to minimize the sum of decision costs and error costs, and the decision to act charitably, whether it is by donating money or not acting badly, is a quintessential business decision.⁴³

B. *Should Corporations Engage in Philanthropy?*

It should not be surprising that scholars who believe that corporate philanthropy helps the bottom line support it and scholars who believe corporate philanthropy is an example of managerial graft oppose it. The common goal in both camps is the promotion of shareholder interests.

There is, however, a third (and for our purposes largely irrelevant) camp in the debate. Comprising mainly progressive academics, this camp champions the cause of "corporate social responsibility" (CSR). Their argument is founded on either a moral claim (firms have an abstract moral duty to do good)⁴⁴ or a historical one (firms are licensed by the state, and therefore must serve it).⁴⁵ Whatever the case, they assert that managers have an obligation to focus on more than profits, the more being some unspecified amalgamation of the interests of employees, communities, governments, and other "stakeholders."⁴⁶ Although undoubtedly opposed to managerial graft, the proponents of corporate social responsibility may simply view it as a cost that is exceeded by the benefits of corporate philanthropy. They do not care about the impact on corporate profits.

The opposing view, summarized by Milton Friedman, claims that the CSR movement conflates business and politics in ways that obscure rather

43. Today, nearly all state corporation statutes specifically authorize corporate altruism. For example, Delaware gives boards the power to "[m]ake donations for the public welfare or for charitable, scientific or educational purposes." Del. Code Ann. tit. 8, § 122(9) (2006). This protects specific donations; corporate activities that improve social welfare, like overcompliance with environmental laws, are protected under the business judgment rule.

44. See, e.g., David P. Baron, *The Positive Theory of Moral Management, Social Pressure, and Corporate Social Performance* 5 (Stanford Univ. Graduate Sch. of Bus., Research Paper No. 1940, 2006), available at <http://ssrn.com/abstract=913808> (on file with the *Columbia Law Review*) (describing "moral duty" as one theoretical base for CSR claims).

45. See, e.g., Douglas J. Den Uyl, *The New Crusaders* 8–9 (1985) (describing four schools of CSR, including the "concession theory," which suggests that "corporations are creations of the state" and therefore must serve its interests or those of society at large).

46. See, e.g., John M. Conley & Cynthia A. Williams, *Engage, Embed, and Embellish: Theory Versus Practice in the Corporate Social Responsibility Movement*, 31 J. Corp. L. 1, 2 (2005) (discussing CSR proponents' arguments that corporate managers should consider "a variety of 'stakeholder' constituencies, including employees, residents of communities affected by their activities, governments, and organizations advocating for various social and environmental interests," as well as their shareholders).

than illuminate the relevant issues. Friedman criticizes CSR on the ground that business knows nothing of politics or social policy:

If businessmen do have a social responsibility other than making maximum profits for stockholders, how are they to know what it is? Can self-selected private individuals decide what the social interest is? Can they decide how great a burden they are justified in placing on themselves or their stockholders to serve that social interest? Is it tolerable that these public functions of taxation, expenditure, and control be exercised by the people who happen at the moment to be in charge of particular enterprises, chosen for those posts by strictly private groups?⁴⁷

Friedman's criticism is basically that one needs an underlying political theory to make sense of the call for, in the abstract, greater corporate contribution to the public good.⁴⁸ Managers installed by shareholders to make money for shareholders are poorly positioned to know what the public good is or how best to deliver it.

While we agree with the critics of the corporate social responsibility movement that firms should give shareholders and customers only what they want, we believe that this demand increasingly is for corporate social action designed to make the world a better place. In other words, while Friedman believes that shareholder utility is only based on profits, we believe it is the sum of financial returns and the good feeling that comes with knowing investments are doing good for others.⁴⁹ The practical implications of our view may not be very different from what the corporate social responsibility movement desires, but will be more focused on maximizing the efficiency of altruism delivery as opposed to imposing it on every firm. We will therefore focus our attention on whether philanthropy promotes corporate rather than social interest. Since this boils down to why corporations engage in philanthropy, we now offer our own answer to this question.

II. THE DEMAND FOR ALTRUISM

Existing explanations for why corporations engage in philanthropy all stop short of answering the bedrock question. Proponents of corporate philanthropy argue that it engenders goodwill from shareholders, employees, consumers or regulators; in doing so philanthropy lowers the corporation's costs or raises the price it can charge.⁵⁰ But this just raises a further question: Why does philanthropy engender the goodwill of

47. Milton Friedman, *Capitalism and Freedom* 133–34 (1962) [hereinafter *Friedman, Capitalism*].

48. See David L. Engel, *An Approach to Corporate Social Responsibility*, 32 *Stan. L. Rev.* 1, 1–2 (1979) (“[T]he topic of corporate social responsibility cannot be debated except against the background of a general political theory.”).

49. Evidence that shareholders care about utility, not just money, is provided by the rise of socially responsible investing, which we describe *infra* Part I.A.1 of Appendix A.

50. See *supra* notes 26–30 and accompanying text.

these other parties? Opponents of corporate philanthropy make the same error. They assert that philanthropy is an example of managers wasting shareholder money on their pet charities.⁵¹ But why do managers spend it on charity rather than, say, a bigger office or more lavish corporate parties?

It is our contention that to understand why *corporations* engage in philanthropy, we need a theory for why *anyone*—from shareholders to consumers to regulators—engages in philanthropy. Our answer starts with the premise that at least some people feel better when others are helped.⁵² This pleasure may derive from being the giver or from knowing that someone received a gift. In economic terms, utility derived from giving is called “warm glow,” and the utility derived when someone’s welfare is improved is called “pure altruism.”⁵³ Philanthropy exists because individuals have preferences for altruism. Philanthropic organizations are simply third parties that offer individuals the opportunity to satisfy these preferences in an efficient manner (relative to self-production).

We show below that firm stakeholders (employees, customers, and investors) get utility from firm actions designed to help others at the expense of wages, product value, or profits. For example, employees may accept lower wages and investors may accept lower returns in exchange for altruistic utility; customers may pay more for the same product if it is bundled with altruism.⁵⁴ Whether this utility is warm glow or pure altruism is impossible to know and is largely irrelevant. Some stakeholders will accept these tradeoffs because it makes them feel good that others are helped, some will do so because they like being associated with a firm that does good, and some will do so for a mix of these reasons. Whatever the case, the firm is simply delivering altruism to these individuals, just as if

51. See *supra* notes 34–38 and accompanying text.

52. We recognize this is a complex question; much ink has been spilled debating whether individuals are inherently selfish or altruistic, and, if the latter, what the evolutionary reason is for this. See *supra* note 8. We don’t weigh in on this debate, but rather simply look at the amount of charitable contributions and activities in the market—about one trillion dollars last year—as evidence of some individual preferences for altruism.

53. See James Andreoni, *Giving with Impure Altruism: Applications to Charities and Ricardian Equivalence*, 97 J. Pol. Econ. 1447, 1448–49, 1455 (1989) (defining “warm glow” and “pure altruism” as the two motives that animate charitable giving). Together these two types are called “impure altruism,” since the warm glow component is considered a selfish motive. For simplicity, we refer to the combination simply as “altruism.” Our usage is slightly at odds with Andreoni’s. He uses “altruism” as a synonym for “pure altruism” whereas we use “altruism” as a synonym for “impure altruism.” *Id.* at 1455; see also *supra* note 9 (describing use of these terms in this Essay). Because this Essay is largely unconcerned with disaggregating the various motives behind philanthropy, we prefer our usage for its brevity.

54. We document evidence for these tradeoffs in Appendix A.

they got only money from the firm, and then made donations on their own.⁵⁵

Under this view, all that existing proponents of corporate philanthropy are saying is that corporations satisfy the altruistic demands of shareholders, employees, consumers, and regulators when they engage in philanthropy.⁵⁶ Likewise, opponents merely assert that managers use corporate assets to satisfy their own demand for altruism.⁵⁷ Opponents would surely argue that our recharacterization does not fully capture their claim, which is that managers should not be allowed to use corporate assets for any purpose that does not increase profits, including altruism. We will address this point when we describe how corporations produce altruism.⁵⁸ The lesson of this section is that our simple claim about the demand for altruism captures both sides of the debate over corporate philanthropy.

There is the residual question of which side is correct: Does corporate philanthropy serve shareholders, employees, and consumers, or does it serve top managers? Our answer is "all of the above." Some corporations—Occidental Petroleum⁵⁹ comes to mind—may favor managers

55. In an important work, Joshua Zivin and Arthur Small develop a model in which corporate philanthropy can offset (either in whole or in part) private donations shareholders would make to nonprofit charities. Zivin and Small argue that investors in socially responsible firms "view the securities of these firms as a bundle that delivers both financial and social characteristics." Zivin & Small, *supra* note 32, at 12. The authors' model shows how corporate altruism may be a perfect substitute for the private donations to charity it displaces, in which case share prices of altruistic and nonaltruistic firms should be the same, *ceteris paribus*. See *id.* at 3. It also demonstrates how share prices might be affected if this substitution effect is imperfect. Zivin and Small speculate about the impact of government and taxes on this tradeoff. We extend their work by considering more fully the market for altruism. Specifically, we identify more comprehensively all of the suppliers in the market, their relative strengths and weaknesses, the role of the government in setting the rules for the market, the sizes of the various inputs and outputs of the market, and the inefficiencies created by the tax code in the delivery of altruism. Finally, we suggest reforms to the tax code to rationalize tax treatment of altruism.

56. Some proponents of duty-based CSR might argue that corporations ought to engage in philanthropy or other good works regardless of demand, because of an independent moral duty. See *supra* notes 44–46 and accompanying text (describing theories of CSR). But this moral duty must be based on a demand from someone for something, otherwise it makes no sense. In this case, the demand animating the moral duty may come from citizens who are impacted by, but do not necessarily interact voluntarily with, the corporation in question.

57. Cynics will argue that managers are not truly altruistic. Rather they engage in corporate philanthropy only to bolster their own image in the community. But, again, this just begs the question why such philanthropy helps the reputation of managers. The answer is that other members of the community value philanthropy and exchange their respect for philanthropy engineered by managers.

58. See *infra* Part IV.

59. Armand Hammer, the head of Occidental Petroleum, had the board donate one-third of the firm's profits in one year to build a museum to house his personal art collection. See *Kahn v. Sullivan*, 594 A.2d 48, 50–51 (Del. 1991) (affirming lower court's approval of settlement with shareholder plaintiffs).

over other stakeholders. But others—such as Toyota with its hybrid cars and Target with its charitable contributions—probably favor consumers or employees over others. We do not believe all corporations are the same. Different corporations serve different consumer groups, even in the case of altruism. Nor do we believe that all corporations behave optimally. Some may be too generous to managers' pet charities and others may be overinvested in green consumer products.

The only claims we resist are unconditional claims that corporations should always engage in philanthropy or always abstain from it. Just as with ordinary products, a better approach is a case by case analysis of when a corporation should enter a specific altruistic market and when it should remain on the sidelines. A key step in this analysis is identifying its potential competitors.⁶⁰ This is the topic to which we now turn.

III. THE SUPPLY OF ALTRUISM

Altruism is like anything else that individuals desire: Demand for altruism generates production by suppliers in a market. Viewed in this way, a nonprofit charity soliciting donations to help victims of a hurricane is selling "altruism," that is, satisfying some combination of donors' desires to be involved in helping the victims and to have the victims be helped. The same is true when the government collects taxes to pay for social programs and when a for-profit firm takes actions that sacrifice profits in the public interest. In all these cases, individuals demand something—in this case utility from giving and doing good—and suppliers provide it for them.

There are of course important differences between the three producers of altruism. The first major group of producers, nonprofit organizations, is—as the name suggests—prohibited from distributing profits to stakeholders. Nonprofits are also limited in the activities in which they can engage. In return for these restrictions, they are exempt from corporate income taxes.⁶¹

Because the activities nonprofits are permitted to do (those with "religious, charitable, scientific, testing for public safety, literary, or educational purposes"⁶²) overlap with much of the demand for altruism, nonprofits are thought to be the primary producer of altruism. Indeed, the conventional notion of corporate philanthropy—donations by corporations to nonprofits—implicitly accepts the market dominance of nonprofit organizations.

60. See Michael E. Porter, *How Competitive Forces Shape Strategy*, Harv. Bus. Rev., Mar.-Apr. 1979, at 137, 137 [hereinafter Porter, *Competitive Forces*] (identifying "five forces" shaping competition in market that are relevant to any strategic calculation).

61. 26 U.S.C. § 501(c)(3) (2006). Consumers who purchase altruism from nonprofit organizations through donations of cash or assets are also given certain tax breaks, but we shall address that topic *infra* Part V.B.

62. 26 U.S.C. § 501(c)(3).

The second major producer of altruism is the government. It is unusual to find the government participating as a producer in any market, especially in America, where the public believes strongly in the primacy of private enterprise. The reason for government participation in the market for altruism is that pure altruism—one of the two drivers of demand for altruism—is a public good⁶³ and is therefore undersupplied in private markets.⁶⁴ Government actions that substitute for charitable endeavors can help solve the free riding problem because of the mandatory nature of charitable giving to the government (that is, taxes).

The free riding problem can be understood by recalling that “pure altruism” is one individual’s concern about the welfare of another. The purely altruistic individual experiences joy whenever his preferred beneficiary receives money, even if that money did not come from the pure altruist. All that matters is that the beneficiary’s welfare is improved. Ironically, this state of affairs leads to rational free riding by the pure altruist. If anyone’s contribution to the beneficiary confers joy upon the pure altruist, it is entirely rational for the pure altruist to wait for others to help the beneficiary and save his income for personal consumption. Since all rational pure altruists will behave this way, the beneficiary will lack for care and no pure altruist will be satisfied.⁶⁵

The usual solution to the free riding problem is to make contributions to public goods mandatory. The government does this by imposing taxes and using the proceeds to produce public goods. This can explain a substantial portion of government production of altruism. If the government did not provide medical care to the indigent through Medicaid, it is very unlikely that the private sector would completely fill the gap. Even if one cared about the health of the poor, why donate money to the cause when someone else’s contribution provides the same altruistic satis-

63. A public good is one that is nonrivalrous (one person’s consumption does not preclude another’s) and nonexcludable (one person cannot stop another from consuming the product). See Paul A. Samuelson, *The Pure Theory of Public Expenditure*, 36 *Rev. Econ. & Stat.* 387, 387 (1954) (defining public goods or “collective consumption goods”).

64. See Richard Cornes & Todd Sandler, *The Theory of Externalities, Public Goods and Club Goods* 10 (2d ed. 1996) (“Governments allocate resources for those goods and services for which the private sector fails to assign sufficient resources.”). Implicit in this argument is the claim that, while certain activities can satisfy both warm glow and purely altruistic preferences, they do not always do so. There may be some activities which are driven largely by warm glow and others that mainly satisfy purely altruistic preferences. Examples of the former are the construction of a fancy university building, which gives the donor warm glow but only marginally benefits students, or a personal act of kindness that is not revealed to—and thus cannot confer purely altruistic benefit upon—others. In contrast, an example of an activity that primarily satisfies purely altruistic preferences is an anonymous donation to pay for an especially sick child’s surgery. The limited cost of the surgery caps the number of people who can donate and obtain warm glow, while press coverage of the surgery permits the entire population to draw purely altruistic benefits from the child’s care.

65. This is an obvious overstatement, but it is likely true on the margin, meaning there will be some rational free riding and thus less altruism than is optimal.

faction as one's own? The government appreciates this and funds Medicaid via (mandatory) tax revenues.

Although government spending largely targets pure altruism activities that are prone to free riding, the government still competes to some extent with the nonprofit sector. For example, Arthur Brooks's research on private charity finds that, after controlling for income, education, age, religion, gender, marital status, race, and political views, those in favor of government action to improve social welfare are ten percentage points less likely to give to private charities than those who do not favor a government role. He concludes that "[p]eople who favor government income redistribution are significantly less likely to [give to charity] than those who do not."⁶⁶ This is not a recent phenomenon. Jonathan Gruber's research suggests that half of the nearly thirty percentage point drop in gifts to private charity during the Great Depression was the result of government extensions in serving the needy.⁶⁷ Economists call this "crowd out" since mandatory contributions reduce (or crowd out) voluntary contributions from other sources. There is less evidence of the government's ability to crowd out corporate philanthropy, but we offer some evidence below in support of this phenomenon too. Interestingly, crowd out in this market is a two-way street. Because the government grants tax breaks for donations to nonprofits and, in some cases, corporate philanthropy, patronage of these two sectors decreases taxes paid to the government. The result is a form of reverse crowd out.⁶⁸

The third competitor in the market for altruism is the for-profit corporation. In the next Part, we describe how corporations produce altruism and explore the comparative advantage they have over their nonprofit and government competitors.

66. Arthur C. Brooks, *Who Really Cares? The Surprising Truth About Compassionate Conservatism* 55–57 (2006) [hereinafter Brooks, *Who Really Cares?*]; see also Jerald Schiff, *Does Government Spending Crowd Out Charitable Contributions?*, 38 *Nat'l Tax J.* 535, 540–41 (1985) (finding that "aggregate [charitable] contributions fall as local governments increase spending").

67. Jonathan Gruber & Daniel M. Hungerman, *Faith-Based Charity and Crowd Out During the Great Depression* 18 (Nat'l Bureau of Econ. Research, Working Paper No. 1132, 2005), available at <http://www.nber.org/papers/W11332> (on file with the *Columbia Law Review*) ("[E]ach dollar of government spending crowded out 1.15 cents of church benevolence.").

68. There is an international component of this story too. While European and Asian governments contributed more in absolute dollars (and much more on a per-GNP basis) than the American government to aid the victims of the 2004 tsunami (for example, Germany gave \$674 million and Japan gave \$500 million compared with only \$350 million from the United States), private contributions by Americans made up for the difference: "Americans . . . donated more than \$1.5 billion in cash and gifts." Brooks, *Who Really Cares?*, supra note 66, at 117. Extrapolating back to the homefront, this suggests a view of welfare that is the sum of public and private efforts, with the United States relying more heavily on the latter than the former.

IV. THE CORPORATE SUPPLY OF ALTRUISM

Corporate philanthropy has a rocky history. One of the most famous corporate law cases of all time involved a dispute about the alleged eleemosynary motives of Henry Ford in increasing wages to the famous five dollar day.⁶⁹ Ford's plan was not really charity, but was motivated by purely business interests, namely to reduce chronic turnover in his factories.⁷⁰ Nevertheless, the Michigan courts interjected themselves to some degree, and established an aspirational, and essentially unenforceable, standard of shareholder wealth maximization for corporate boards to follow.⁷¹ Modern courts and legislatures are more permissive, allowing or specifically authorizing corporate donations to charity.⁷² But the cases, statutes, and academic criticism focus largely on corporate donations to charities, as opposed to the good works that firms do themselves. This latter type of philanthropy has grown dramatically over the past few decades, and a reconsideration of the manner in which it is delivered and why is both timely and important to getting the rules right. It is to these issues that we now turn.

A. *How Corporations Produce Altruism*

In Economics 101, students learn how corporations provide goods like toothpaste for consumers. Corporations use financial capital from shareholders and labor from employees to manufacture toothpaste and then sell that toothpaste for a price to consumers. The price that the consumer pays reimburses the shareholders for their capital and the employees for their labor. Shareholders and employees exchange capital and labor, respectively, for money. The consumer exchanges money for toothpaste. At the end of the day, only the consumer is left with a con-

69. See *Dodge v. Ford Motor Co.*, 170 N.W. 668, 684 (Mich. 1919) (establishing norm of shareholder wealth maximization as duty of corporate boards).

70. See M. Todd Henderson, *The Story of Dodge v. Ford Motor Company: Everything Old Is New Again*, in *Corporate Law Stories* (Mark Ramseyer ed., forthcoming 2009) (manuscript at 51, on file with the *Columbia Law Review*) [hereinafter Henderson, *The Story of Dodge*] ("The Five-Dollar Day was a response to business pressures and was brilliant competitive strategy."). The link between corporate charity for workers and the bottom line was also a key feature of company towns, which were ubiquitous for the five decades after the Civil War. See M. Todd Henderson, *The Nanny Corporation and the Market for Paternalism* 13–18 (Jan. 5, 2009) (unpublished manuscript, on file with the *Columbia Law Review*) [hereinafter Henderson, *Nanny Corporation*] (describing profit motives behind creation of company towns).

71. See Henderson, *The Story of Dodge*, *supra* note 70, at 66 (noting that "courts generally will not enforce a strict shareholder wealth maximization [norm] on all firm decisionmaking").

72. See, e.g., Del. Code Ann. tit. 8, § 122(9) (2006) (giving firms specific powers to "[m]ake donations for the public welfare or for charitable, scientific or educational purposes . . ."); *A.P. Smith Mfg. Co. v. Barlow*, 98 A.2d 581, 586 (N.J. 1953) (using business judgment rule to decline judicial inquiry into propriety of gift to Princeton University).

sumable good, which in this case satisfies a demand for clean teeth and minty fresh breath.

How corporations satisfy the demand for altruism is dramatically different. Shareholders may still provide investment capital, the employee may still provide labor, and the consumer may still provide purchase money, but the corporation's good works may provide a consumable good for all three stakeholders. When Microsoft gives free computers to schools, all the stakeholders may be happier: Workers and investors may benefit from participating in a firm that does good works, and consumers may be willing to pay a higher price for Microsoft products knowing of Microsoft's good work.⁷³

Just as consumers are charged for toothpaste, stakeholders must pay for altruism. Shareholders may be asked to accept a lower return on their capital, employees may be asked to accept a lower wage per hour, and consumers (just as they did before) pay a purchase price, but in this case one that exceeds what they would otherwise pay. Since shareholders and employees are paying for (and receiving) some of the altruism the corporation produces, the consumer does not pay for (and receive) all the altruism the corporation produces.⁷⁴

The lesson is that, in the case of philanthropy, the lines between who does the producing and who does the consuming may be blurred. This blurring is controversial simply because it is nontraditional. Some people think that corporations harm shareholders when they engage in philanthropy, but they ignore that shareholders may also benefit from that philanthropy. The shareholders provide capital and get back both a financial return and altruistic consumption. If the shareholders do not value the altruism, they can invest in another corporation that only offers a financial return. Not surprisingly, we observe this segmentation of the market: Some investors choose socially responsible investment funds, which usually earn a lower return and thus embed a charitable contribution in the investment, while others may go simply for the monetary return.⁷⁵

The following graphic illustrates the various players in the market for altruism and our estimates of the relative sizes of the mechanisms

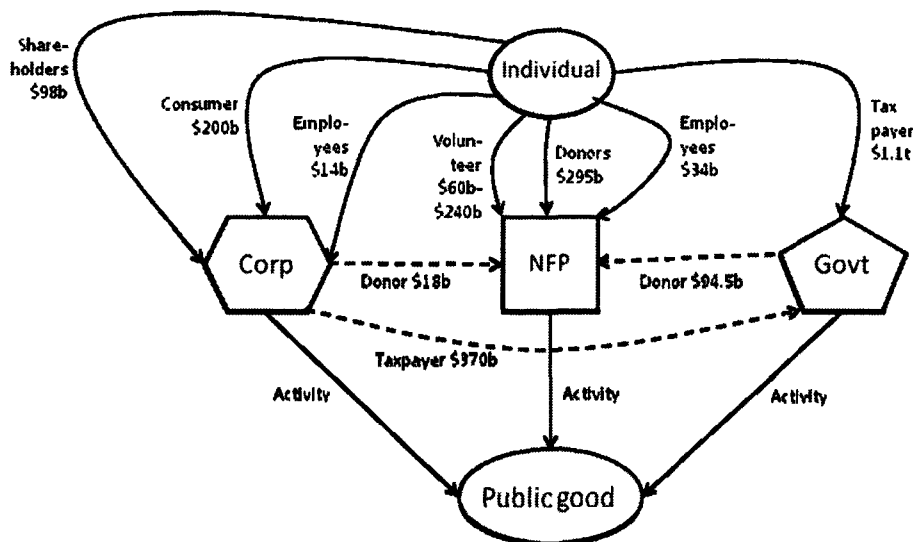
73. We discuss the willingness to trade cash (either in labor or investment income) for charitable utility *infra* Appendix A Parts I.A.2 and I.A.3.

74. An interesting implication is that when a corporation produces altruism, it is behaving like a producer cooperative, albeit with specialized workers. There is a large body of economics literature that documents how cooperatives behave differently—and perhaps less efficiently—than shareholder-owned firms producing widgets. See, e.g., Philip K. Porter & Gerald W. Scully, *Economic Efficiency in Cooperatives*, 30 *J.L. & Econ.* 489, 491 (1987) (listing hypotheses for comparative inefficiency of cooperatives). What is less clear is whether corporations are more or less efficient than nonprofits or the government at producing altruistic goods.

75. See *infra* Appendix A Part I.A.1 for a discussion of the socially responsible investing phenomenon.

through which altruism is demanded and delivered. We derive the numbers referenced in Appendix A.

FIGURE 1: THE MARKET FOR ALTRUISM



B. *The Comparative Advantage of Corporations*

We have already explained why governments and nonprofits participate in altruistic markets. What is less clear is why corporations do. Why don't they—as Milton Friedman once suggested—focus on turning profits off widgets?⁷⁶ The reason is that corporations may have a comparative advantage over both nonprofits and the government in producing certain altruistic goods, and therefore in satisfying the altruistic utility demand of corporate stakeholders. Below, we consider several of the most important competitive advantages corporations are likely to have in the market for altruism: using economies of scope to lower costs of delivering public goods, bundling charitable and regular goods to reduce free riding, using diversification to tailor public good delivery to market demand, reducing agency costs through competitive pressures, and providing positive network externalities in warm glow.

1. *Economies of Scope.* — One competitive advantage held by for-profit corporations is that they may be more efficient at producing certain altruistic goods because of economies of scope between the private goods they typically produce and the altruistic good.⁷⁷ An obvious example is that

76. See *supra* note 1 and accompanying text.

77. One can say that there are economies of scope between the production of two goods if the producer can lower its costs of producing one of the goods by also producing the other good. For example, goods A and B may each cost \$1 to produce separately, but cost \$0.75 each to produce together.

Starbucks may be better at providing income support to coffee farmers in developing countries than nonprofits or governments that simply donate cash to the same farmers. Starbucks pays fair trade prices (often more than double competitive prices) to farmers who produce coffee rather than simply transferring money to them.⁷⁸ This encourages farmers to work in order to receive welfare; unconditional welfare might discourage work and encourage dependency.⁷⁹ What's more, Starbucks already has a distribution channel to farmers in place, meaning it can deliver social action at less cost than a provider that must make an investment in a redundant distribution network. Nonprofits do not have such low-cost access to these farmers, nor does the government.⁸⁰

Another example of economies of scope is the monitoring of working conditions in factories in developing countries by clothing and footwear manufacturers. After negative press coverage exposed Nike's use of factories with unsafe conditions and employment of children, consumers demanded better working conditions for workers in developing countries.⁸¹ The government or nonprofits could have been used to satisfy this altruistic demand, but the most efficient mechanism for delivering this public good was through a for-profit corporation. Nike created an internal department to monitor the health, safety, and environmental conditions in over 700 of its factories in fifty countries.⁸² Nike is clearly

78. See Starbucks Coffee, Starbucks, Fair Trade, and Coffee Social Responsibility, available at <http://www.starbucks.com/aboutus/starbucksandfairtrade.pdf> (last updated Mar. 7, 2006) (on file with the *Columbia Law Review*) (noting that Starbucks paid premium between 83% and 118% above prevailing market prices for coffee in 2003).

79. See, e.g., Lawrence M. Mead, *Beyond Entitlement* 69 (1986) ("There is a good reason to think that disadvantaged workers are unlikely to labor regularly unless they are required to as a condition of support by society.").

80. To be clear, we do not claim that nonprofits do not obtain economies of scope. They may start with donating money to coffee farmers in developing countries and decide that it would be easier to generate demand for donations if they also ran a coffee shop or to find farmers if they also bought coffee from them. A real world example of such a move is that a nonprofit seeking to train poor or disabled individuals for jobs may actually start a fast food franchise to improve the productivity of its job training program. See, e.g., Colleen DeBaise, *Profits on the Side: Take a Charity; Add a Franchise Outlet; The Result; More Money for the Mission*, Wall St. J., June 25, 2007, at R3 (discussing "social franchising" as a way for nonprofit groups to supplement their income). Rather, our claim is that nonprofits produce private goods less commonly than corporations produce altruistic goods.

81. See Leo Hickman & Simon Chilvers, *Can Fashion Play Fair?*, Guardian (London), July 25, 2008, at Features 18 ("It is almost exactly a decade ago . . . that the sports fashion retailer Nike, the first major company to face sweatshop allegations, finally reacted to the ire of protestors around the world and announced a series of changes in its working practices.").

82. See Dara O'Rourke, *Outsourcing Regulation: Analyzing Nongovernmental Systems of Labor Standards and Monitoring*, 31 Pol'y Stud. J. 1, 7, 10 (2003) (describing development and breadth of Nike's internal compliance division). Another example is Ikea, which monitors the use of child labor by suppliers of its rugs from India. See Ikea, *Ikea's Position on Child Labour 2* (2003), available at http://www.ikea.com/ms/en_US/about_ikea_new/about/read_our_materials/ikea_position_child_labour.pdf (on file with

the most efficient party to design, implement, and monitor higher standards for these roughly 650,000 workers,⁸³ since it would be highly costly for a nonprofit to put in place systems and monitors at all of these locations.⁸⁴

The production of hybrid cars by automobile companies is yet another example of economies of scope. Consumers are increasingly demanding a solution to the problem of climate change, and automakers are meeting this altruistic demand.⁸⁵ Hybrid cars can be thought of as simply a bundle of a fuel efficient car and a donation to pay for research and development expenses on hybrid engines or to help the environment. We know this because hybrids are more costly than equally fuel efficient gas-only cars.⁸⁶ The best explanation for this additional payment⁸⁷—as opposed to a simple donation of the difference in price to an environmental charity—is that consumers are contributing to a public

the *Columbia Law Review*) (describing monitoring of suppliers by Ikea staff and outside auditors).

83. O'Rourke, *supra* note 82, at 7 (noting that in 2003 Nike's supplier network comprised some 900 factories employing over 650,000 workers).

84. Michael Vandenberg's important work on private provision of public goods is instructive here. See generally Michael P. Vandenberg, *The Private Life of Public Law*, 105 *Colum. L. Rev.* 2029, 2037–39 (2005) (discussing new focus on private role in provision of public goods).

85. The need for action by for-profit firms arises in part because of the lack of a political solution to the problem. This is related to the problem of diversification discussed *infra* Part IV.B.3. The point is simply that political consensus may be difficult to reach on certain issues, and firms can meet this demand more efficiently. See Henderson, *Nanny Corporation*, *supra* note 70, at 42.

86. The premium for hybrid versions of most vehicles is several thousand dollars. Which Hybrids Save You Money?, *Consumer Rep.*, Oct. 2008, at 40, 41 (noting several Lexus, Toyota, and Honda hybrid vehicles costing between \$4,000 and \$8,000 more than their gasoline equivalents). If these vehicles cost the same or less than gasoline versions, state subsidies for hybrids would be unnecessary.

87. One might argue that consumers pay a premium in order to signal certain personal attributes, such as a commitment to the environment, through their purchases. One can achieve this same benefit through other means, however, such as notorious donations to charities, displaying bumper stickers of support, simply telling people about one's commitment, and so on. A large purchase may be a means of making this commitment to the environment more credible, but it seems unlikely, given the alternative mechanisms available and the likely size of the benefits, that this explanation can account for the difference in price individuals are willing to pay for hybrid vehicles. Even if the purpose of paying the premium is to signal certain personal attributes to a third party, the premium still represents a demand for altruism. One reason that the third party values receiving the signal from purchase of a hybrid may be that the third party has an altruistic preference to contribute to a public good. Even if the third party does not have such a preference but is using the hybrid purchase as, for example, a costly screening device as suggested in Michael Spence, *Job Market Signaling*, 87 *Q.J. Econ.* 355, 364 & n.6 (1973), the premium still reflects demand for a transfer. In short, our analysis requires only that there is some demand for an altruistic public good. It does not matter that the demand is driven by costly signaling any more than it matters that the altruistic preferences are driven by, for example, religious ideology or a childhood experience.

good, namely research on hybrids.⁸⁸ Clearly, car manufacturers are in a better position than nonprofits or the government to research hybrid engines, if for no other reason than the fact that they need to merge those engines with the rest of the cars they produce.⁸⁹

Other examples are readily available, but we should not overstate the case. Corporate social action is not a perfect substitute for other types of charitable or governmental good works, but rather is complementary and sometimes only moderately so. Corporate philanthropy by some firms will work well at some times for some causes. At other times or by other firms it will not work well and may be a sign of managerial graft. Competition in product, labor, and capital markets should help sort these successes and failures in a fairly efficient manner.

2. *Bundling to Reduce Free Riding.* — A second advantage that for-profit corporations have is that they may be better than nonprofits—though not the government⁹⁰—at reducing free riding in the production of pure altruism.⁹¹ The reason is that corporations bundle private goods

88. It is true that the federal government provides tax breaks to promote sales of hybrids. However, these breaks do not fully offset the additional cost of hybrids. For a list of tax breaks, see U.S. Dep't of Energy, *New Energy Tax Credits for Hybrids*, at http://www.fueleconomy.gov/feg/tax_hybrid.shtml (last updated Jan. 9, 2009) (on file with the *Columbia Law Review*). Moreover, the tax breaks have expired for many cars, see *id.*, but demand has not. Compare *id.* (indicating decreasing tax credits for Toyota Prius from 2006 through 2007), with Press Release, Toyota, *Worldwide Prius Sales Top 1 Million Mark* (May 15, 2008), available at <http://www.toyota.co.jp/en/news/08/0515.html> (on file with the *Columbia Law Review*) (indicating increased sales from 2006 to 2007).

89. This advantage comports well with an account of strategic corporate philanthropy offered by Michael Porter and Mark Kramer. See Porter & Kramer, *Competitive Advantage*, *supra* note 26, at 68 (“[T]he more closely a company’s philanthropy is linked to its competitive context, the greater the company’s contribution to society will be. Other areas, where the company neither creates added value nor derives benefit, should appropriately be left—as Friedman asserts—to individual donors following their own charitable impulses.”).

90. Recall that the government solves free riding with mandatory contributions to altruistic public goods. See *supra* notes 65–66 and accompanying text.

91. Zivin and Small claim that free riding is not an issue in the market for altruism because of the presence of warm glow:

The investor who sheds his holdings in an enlightened firm may still enjoy the public benefits of the firm’s social activism, but will no longer enjoy the positive feeling that comes through a perceived personal connection to the endeavor. It is this private benefit, we claim, that underlies incentives to devote private resources to charitable and altruistic causes

Zivin & Small, *supra* note 32, at 14. The presence of warm glow is certainly a helpful condition, but it is not sufficient to overcome the free riding problem. Warm glow provides incentives for some individuals to donate, but not pure altruists. Assuming the mix of desire for pure altruism and warm glow is heterogeneous across individuals, the presence of warm glow will reduce free riding, but not eliminate it. And, on the margin, there will be less philanthropy than would be socially optimal. The solution we offer arising from corporate bundling is a superior explanation for the corporate advantage because it accounts for this heterogeneity and the marginal donors.

with altruistic public goods.⁹² Because of economies of scope between the two goods, their combination changes the relative prices of the public and private goods in ways that lead to a greater production of public goods than if the two goods were offered separately. Bundling will either (1) lower the relative price of the public good and make it more attractive for direct purchase, or (2) make the private good more attractive and, because of the bundling, more of the public good will indirectly be purchased.

To see this, consider two of the corporate bundles we discussed above: Starbucks's fair trade coffee bundles regular coffee with a transfer to farmers in developing countries; Toyota's hybrids bundle a regular car with a contribution to the environment in the form of lower carbon dioxide emissions or research on fuel efficient engines. The companies offer these bundles because each increases the sum value of the two separate items above their value if sold separately. Consumers could purchase each component (coffee and monetary transfer to farmers; car and contribution to the environment) separately, but instead they buy them together because there are economies of scope between bundled components.⁹³ This implies that, for the same amount of money, consumers can buy more of each component than they could if the components were not bundled. This in turn implies that the bundle changes the relative prices of the two components.

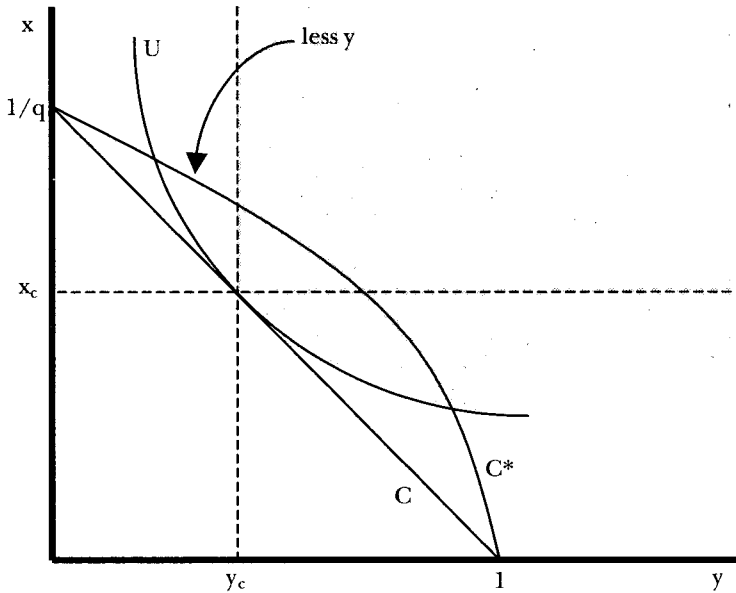
This change in prices or amounts is illustrated in Figure 2. Unbundled goods can be purchased at an exchange rate of q parts private good

92. Another reason that corporations may be able to reduce free riding is, ironically, managerial graft. The main argument against corporate donations is that they are given by managers serving their own preferences (or reputation) rather than those of shareholders. But even purely altruistic shareholders have an incentive to free ride. So when a manager ignores shareholders' preferences, he also ignores the incentive to free ride. Thus managerial graft may, fortuitously, reduce free riding. There are two limits to this reasoning that keep us from including it in the main text. First, it requires managers to be motivated by warm glow (or reputation) while shareholders are motivated by pure altruism. Otherwise managers too would simply free ride on others' production of pure altruism. But why would managers have different preferences, especially since they too are shareholders in other companies? This disconnect is partly bridged by the fact that managers are spending shareholders' money and even pure altruists would buy a free public good. Yet all models of managerial wage under asymmetric information find that graft to some extent trades off with wage—that is, that more opportunity for graft is a form of compensation that reduces wages. See, e.g., M. Todd Henderson & James Spindler, *Corporate Heroin: A Defense of Perks, Executive Loans, and Conspicuous Consumption*, 93 *Geo. L.J.* 1835, 1864 (2005) (describing perks as substitutes for cash in executive compensation). Therefore, managers' donations are not entirely free. Second, managers' preferences among charities might not match those of shareholders. For example, managers may like the local opera while shareholders like helping soup kitchens.

93. This point is different from the first comparative advantage we have highlighted. The first was that corporations, because of economies of scope, may be able to produce the altruistic public good more efficiently, whether the demand for that good is driven by warm glow or pure altruism. See *supra* Part IV.B.1. The current point is that this joint efficiency helps reduce free riding when consumers are driven by pure altruism.

(x) for one part altruistic public good (y). Assuming the consumer's income M is one, this relative price yields a linear budget constraint labeled C . So the consumer can buy $1/q$ units of the unbundled private good or one unit of the unbundled public good or some combination along C . We have drawn the consumer's indifference curve U so that she chooses combination x_c and y_c .

FIGURE 2: EFFECT OF BUNDLING ON PURCHASE OF ALTRUISTIC PUBLIC GOOD



For bundling to be attractive, the budget constraint must expand to some C^* that lies to the right of C .⁹⁴ Any combination of private and public goods that is on C^* and to the right of the consumer's original indifference curve U will improve the consumer's utility. The consumer will abandon her original choice (x_c, y_c) only for one of these combinations. If the consumer's indifference curves are such that they touch C^* to the right of y_c , that is, in the shaded portion of Figure 2, the consumer will purchase more public good. If the consumer chooses a point on C^* where the slope of C^* is flatter than C , then the consumer's choice is driven by a lower relative price of the public good; that is, the consumer is substituting purchase of the public good for purchase of the private good. If the consumer chooses a point on C^* where the slope of C^* is steeper than C , then the consumer is buying more of the private good, but getting more of the public good simply because they are bundled.

94. We have arbitrarily drawn such a C^* . In contrast to our smooth and continuous depiction, C^* may be a single point or piecewise linear. This will not affect our conclusion.

Either way more altruism is produced through bundling than could be produced by buying altruism alone.⁹⁵

The main lesson to take away from Figure 2 is that bundling—due to economies of scope—increases the purely altruistic consumer's expenditure on the altruistic public good because it either reduces the relative price of that good or increases consumption of the private good, which fortuitously is bundled with the altruistic public good. Either way, the result is less free riding on other consumers' contributions to that public good.⁹⁶

3. *Diversification.* — A third advantage that corporations have over the government, if not nonprofits, is that they are able to narrowly tailor altruism delivery to the specific idiosyncratic preferences of individuals in ways that the government cannot. The government is limited by the political compromises of the entire electorate, meaning contributions to the public good will be made only in cases of broad political consensus or to serve particularly powerful political interest groups. In contrast, different firms, just like different nonprofits, can offer individual employees, customers, and investors the opportunity to purchase different kinds of altruism. Environmentally conscious individuals can choose to work for, invest in, or buy from firms committed to sacrificing profits to help the environment, while those interested in delivering medicines to the developing world or improving schools in local communities can engage with firms that make those commitments. Dozens of for-profit firms have made public commitments to each of these causes,⁹⁷ and there are nearly as many social causes as there are firms. An individual can satisfy almost any altruistic preference through for-profit firms because of the large

95. The astute reader will ask: Might not the consumer land in the region above U on C^* but to the left of y_C , a segment we have labeled “less y ”? Although this would decrease the altruistic efficiency of bundling, it is very unlikely to happen because of the nature of public goods. Matthew Kotchen's work on “green markets” shows that an important feature of free riding is that the larger an economy is, the more free riding on public goods there will be. Matthew J. Kotchen, *Green Markets and Private Provision of Public Goods*, 114 J. Pol. Econ. 816, 826–27 (2006) (finding that availability of green good in a larger economy will tend to crowd out direct donations to improve environmental quality). In other words, there will be less y purchased by each individual. In the extreme, y_C will fall to zero, and thus bundling that raises the budget constraint to C^* can only increase the consumer's expenditure on the altruistic public good y . But this is a rather technical point that does nothing more than preserve the main argument from all but the most improbable circumstances.

96. For a related bundling benefit for shareholders, see Henry N. Butler & Fred S. McChesney, *Why They Give at the Office: Shareholder Welfare and Corporate Philanthropy in the Contractual Theory of the Firm*, 84 Cornell L. Rev. 1195, 1203–04 (1999) (“Shareholders would prefer to give at the office precisely because giving through the firm forces all others who will also benefit from giving at the office too.”).

97. See, e.g., *supra* notes 19–20 (discussing the commitments of Patagonia and Google); see also *Corporate Philanthropy's Biggest Givers*, BusinessWeek Online, at http://bwnt.businessweek.com/interactive_reports/philanthropy_corporate/ (last visited Jan. 15, 2009) (on file with the *Columbia Law Review*) (tracking philanthropic giving by companies in S&P 500 and providing a key for “favored causes”).

number of firms, and because, as they do with consumer products and services, firms compete by offering differentiated types of altruism opportunities.

This last point is worth emphasizing. Just as in normal product markets where firms try to offer differentiated products in the hope of getting market share and thus profits, so too do firms offer differentiated altruism opportunities so as to maximize the value the firm can deliver to its stakeholders. If every firm donated to or did work to improve the environment, other charitable causes would suffer, and the benefits (be they goodwill, warm glow for managers, or altruism utility for customers, shareholders, and employees) from a firm choosing another cause would increase. This is analogous to the concept of supply and demand curves in normal product markets.

This responsiveness to the demand signals from the market is important not only in what is offered but also in what is not offered. Political programs, like Medicare or farm subsidies, are notoriously sticky—once a political consensus on a particular public good is achieved, it is difficult to do away with the program.⁹⁸ Firms, which face constant competition, are likely to be agile in offering stakeholders the particular altruism outlets that they demand at a particular time. Philanthropy that increases stakeholder utility will be offered, and that which does not will soon disappear.

A final observation on this point is that we should expect firms to deliver altruism in areas or at times when they have some comparative advantage over other firms. As noted above, Starbucks clearly has the distribution channels to help poor farmers in coffee growing countries, while Toyota naturally is connected with the environment.⁹⁹ It is possible that the employees of the outdoor clothing firm Patagonia would get utility from the firm doing good for persecuted Christians in the Sudan, but it is much more likely that their utility is linked more closely with the environment. Here, then, is a cautionary tale for corporate watchdogs: Corporate philanthropy is more suspect where firm efforts to help others are not correlated with an obvious comparative advantage or the logical preferences of firm stakeholders.¹⁰⁰

This discussion is focused mostly on how firms are advantaged vis-à-vis the government, but firms may also have an important role compared

98. See Herbert Kaufman, *Are Government Organizations Immortal?* 34 (1976) (finding only fifteen percent of government organizations present in 1923 had been eliminated by 1973). Even studies claiming government programs are not immortal show remarkable stickiness that dramatically exceeds the survivability of firms or programs in the private sector. For example, a recent study concludes that “over 80 percent of programs survive for at least 30 years.” Christopher R. Berry et al., *Matters of Life and Death: The Durability of Discretionary Programs 1970–2004*, at 11 (Harris Sch. of Pub. Policy Studies, Working Paper No. 0701, 2006), available at <http://ideas.repec.org/p/har/wpaper/0701.html> (on file with the *Columbia Law Review*).

99. See *infra* notes 162, 166, and accompanying text.

100. Cf. *supra* note 89.

with nonprofits. Although there are many nonprofits and thus a diverse array of altruism opportunities, nonprofits offer only opportunities for donations (of cash or in kind) and volunteering. Firms help complete the market for altruism by offering individuals who have altruistic preferences other ways of satisfying them. For example, the transaction costs¹⁰¹ for some individuals of volunteering or writing a check to a charity that helps Ethiopian farmers may exceed the benefits. But these individuals may be willing to add one dollar to each cup of coffee to support these same farmers. Although, ignoring taxes, rational individuals would be indifferent between donating \$200 via a check to a nonprofit and buying 200 cups of fair trade coffee, behavioral heuristics may make the former unappealing or less likely for some individuals.¹⁰² The evidence discussed in Part V below about the tax treatment of the purchase of products bundled with charitable contributions supports this—the individual paying a \$200 premium for fair trade coffee over the course of a year cannot take a tax deduction for this contribution to charity, but may be able to do so if she gave a cash donation for a charity to achieve the same end. Since the purchase of a product-charity bundle is likely inefficient for the individual from a monetary standpoint, there must be other reasons that explain the choices of individuals.¹⁰³ And it is in satisfying the altruism of these subrational individuals that firms provide an important component of the market for altruism.¹⁰⁴

4. *Agency Costs.* — A fourth, but more contestable, advantage that for-profit corporations have over nonprofit organizations and the government is that they may be able to reduce agency costs that are an inevitable part of giving through an intermediary. Individuals who donate to non-

101. We mean this in the Coasian sense—transaction costs include any monetary, psychic, or other cost that individuals experience when deciding on a course of action. One of these costs in this context might be some notion of commodification and the belief that a donation is in some sense a bribe or payoff, while paying a bit more for a product is not. We do not know what is in the minds of individuals making these choices, but we observe behavior that is inconsistent with purely rational behavior. A full consideration of the reasons is beyond the scope of this Essay.

102. Individuals may, for example, engage in various types of “mental accounting” that suggest money is nonfungible and therefore skew purchase choices based on budgetary constraints. For example, an individual might allocate a certain amount at the beginning of the year to give to charity, and then make payments to it at the end of the year, while separately choosing to buy fair trade coffee and not debit these purchases from the charity budget. For a full treatment of mental accounting heuristics, see generally Richard H. Thaler, *Mental Accounting Matters*, 12 *J. Behav. Decision Making* 183 (1999).

103. Under certain circumstances, buying a product-charity bundle may be efficient. Buying green goods not only increases philanthropic activity the consumer demands, but in some cases also decreases activities that are detrimental to those demands. For example, buying a cup of fair trade coffee not only makes an implicit donation to coffee farmers, but also takes money away from companies that might exploit the same farmers. Depending on the magnitudes of the increase and decrease, as well as the size of the tax advantage from direct giving, it may be efficient for consumers to purchase green goods.

104. The same argument applies equally to working for or investing in firms committed to doing good.

profit charities suffer an agency problem: How do they ensure the charity is using donations to efficiently transfer value to beneficiaries? Perhaps charities are spending too much on administrative expenses or are not providing the right sort of value to beneficiaries, for example, sending poor African kids computers instead of food or medicine.¹⁰⁵ Corporations may be able to help. By aggregating a number of different shareholders' and consumers' donations, they have greater leverage over charity managers. They can use this leverage to demand disclosure of activities and accountability. A useful analogy is to institutional investors, who are thought to discipline a corporation's managers on behalf of their own investors and, indirectly, on behalf of the individual shareholders of the corporation as well.¹⁰⁶

Indeed, corporations may be better at directly providing the charitable products that stakeholders demand than nonprofits are at serving their donors because corporations are more regulated and scrutinized than nonprofits. Unlike for-profit firms, nonprofits are not subjected to intense scrutiny by investors, regulators, plaintiffs' lawyers, academics, and activists in terms of governance and accountability. In addition, federal securities laws and the Sarbanes-Oxley Act, which require an enormous amount of transparency and impose strict liability and large penalties for noncompliance, do not apply to nonprofits.¹⁰⁷ The result of less legal and market oversight is plain. There is widespread criticism of the accountability of nonprofits to donors,¹⁰⁸ and nonprofits are widely regarded as much less well-governed and subject to much less oversight than the average public company.¹⁰⁹ There are some third party organi-

105. See Eric Posner, *The Strange Case of One Laptop per Child*, University of Chicago Law School Faculty Blog, Jan. 7, 2008, at <http://uchicagolaw.typepad.com/faculty/2008/01/the-strange-cas.html> (on file with the *Columbia Law Review*) (describing controversy over charity founded to provide laptop computers to children in developing world).

106. See, e.g., Roberta Romano, *Public Pension Fund Activism in Corporate Governance Reconsidered*, in *Institutional Investors and Corporate Governance* 105, 105 (Theodor Baums et al. eds., 1994) (noting that commentators concerned about corporate performance have "call[ed] for more active monitoring by institutional investors" and public pension funds in particular).

107. See Dana Brakman Reiser, *Enron.org: Why Sarbanes-Oxley Will Not Ensure Comprehensive Nonprofit Accountability*, 38 U.C. Davis L. Rev. 205, 244 (2004) ("Sarbanes-Oxley does not, by its terms, address the nonprofit sector."); cf. Bill Birchard, *Nonprofits by the Numbers*, CFO Mag., July 2005, at 50, 52 ("Although most Sarbox rules apply only to publicly held for-profit firms . . . [n]onprofit directors drawn from the corporate world are now asking why the law's reforms shouldn't apply to nonprofits as well.").

108. See, e.g., Ron Nixon, *Bottom Line for (Red)*, N.Y. Times, Feb. 6, 2008, at C1 (noting that detractors "criticize a lack of transparency at the company and its partners over how much they make from Red products" and that one publication reported "Red companies had collectively spent as much as \$100 million in advertising and raised only \$18 million").

109. See, e.g., Janet Greenlee et al., *An Investigation of Fraud in Nonprofit Organizations: Occurrences and Deterrents*, 36 Nonprofit & Voluntary Sector Q. 676, 679

zations that provide information for donors about nonprofit governance and conduct,¹¹⁰ but these pale in comparison with the investors, analysts, watchdogs, and government agencies monitoring every move made by large, for-profit firms. All else being equal, an individual might believe a for-profit firm is a better monitor—that is, has lower agency costs—in a giving transaction.¹¹¹

Given well known examples of fraud by corporate managers, we freely admit that our claim about agency costs is debatable. At best, corporations merely replace agency problems between a donor and a nonprofit (or between taxpayers and politicians) with agency problems between a shareholder-donor and the corporation's managers. In a well-governed corporation, the corporation may have a leg up on direct contributions to a nonprofit or taxes paid to the government. But in other cases, a donor should take her chances with the nonprofit and the taxpayer should prefer the government. What's more, the nonprofit and the government offer the altruist a backstop—the nonprofit cannot legally distribute profits to its managers and politicians cannot legally skim off tax revenues—that limits the amount of misfeasance in which they can engage.¹¹² Our point is only that the well-governed for-profit corporation may, in some cases, be more responsive to stakeholders' altruistic desires than nonprofits are to donors and the government is to taxpayers.

5. *Network Effects*. — A final corporate delivery benefit is the ability of firms to use their greater size to more efficiently produce network effects in warm glow. What do we mean by "network effects"? Simply that warm glow rises in direct proportion to either the number of other contributors

(2007) ("Prior literature has conjectured that fraud may be easier to perpetrate in a nonprofit organization [than in a business organization, due to] an atmosphere of trust, the difficulty in verifying certain revenue streams, weaker internal controls, lack of business and financial expertise, and reliance on volunteer boards . . .").

110. See, e.g., William P. Barrett, *Genuinely Needy*, *Forbes*, Dec. 8, 2003, at 246, 246 (describing annual survey of 200 large charities); American Institute of Philanthropy, at www.charitywatch.org (last visited Nov. 7, 2008) (grading performance of approximately 500 American charities over various categories); Charity Navigator, at www.charitynavigator.org (last visited Nov. 7, 2008) (rating financial health of over 5,000 charities).

111. A different type of agency cost arises with government providers of altruism. Individuals' ability to monitor what is done with their contributions is likely higher in the case of for-profit or nonprofit entities than in the case of government production of altruism. Taxpayers can less directly trace tax dollars to philanthropic ends than they can trace their own purchases of goods, ownership of stocks, or donations to charities. In other words, individuals likely get more warm glow and pure altruism spending \$200 on fair trade coffee than giving the government the same \$200 in taxes, since the latter is used for a variety of purposes, some of which may even be inimical to the philanthropic ends desired by the individual.

112. The lines here are obviously blurry: Taxpayer-funded junkets look similar to corporate managers' private use of the company's jet. The point is simply that the lines are a bit less blurry for government and nonprofit employees, since there are direct rules or laws on point, while the market constraints are higher for corporate managers. Insofar as one relies on the former, preferring nonprofits or the government makes more sense, and vice versa.

or the amount donated to a particular social cause.¹¹³ In economics, this is known as a “network externality.”¹¹⁴ A classic example of a network externality is e-mail—the more people that use e-mail, the more potential value the service has to any individual user. Moreover, the addition of any new user provides a benefit (that is, a positive externality) to existing users. We argue the same effect exists in the market for altruism. An individual’s one dollar donation to a project to which another person also donates one dollar gives more than one dollar of warm glow to each giver. And, as with e-mail, the addition of another one dollar by someone else after the original donation may provide some warm glow (as well as pure altruism) to the original donors. This is because a small donation alone can do very limited good, but when an individual’s one dollar is added to many other donations, the amount of pure public good the one dollar can do, and therefore the amount of warm glow it can deliver, is higher.¹¹⁵

There are two implications of network effects in warm glow. The first is that warm glow may be even more effective at offsetting free riding than previously thought. When there are economies of scale in the production of a good, this encourages higher levels of production of that good.¹¹⁶ The economies of scale we highlight in the production of warm glow mean there will be incentives to produce more of it. Because a by-product of the delivery of warm glow is the production of pure altruism, a second implication is that there is an increasingly large net benefit from agglomeration in the production of warm glow and thus altruism generally. Agglomeration is possible in all three sectors (for-profit, nonprofit,

113. Our suggestion that warm glow production generates network effects is supported by some empirical evidence. Studies examining the effect of matching contributions on giving by donors show donors give more to charity when told their donation will be matched by their employer or some other donor. See, e.g., John A. List & Daniel Rondeau, *Matching and Challenge Gifts to Charity: Evidence from Laboratory and Natural Field Experiments 4* (Nat’l Bureau of Econ. Research, Working Paper No. W13728, 2008), available at http://www.nber.org/papers/w13728.pdf?new_window=1 (on file with the *Columbia Law Review*) (“We observe that a challenge gift attracted 23% more donors and increased total dollar contributions 18% when compared to the identical campaign in which no announcement of leadership gift was made.”). If a donor did not obtain some warm glow from the matching contribution, it should have no effect on the donor’s contribution. In fact, if the donor had purely altruistic preferences, the matching contribution might actually lower her own donation, because she can free ride on the public benefits it provides.

114. See Michael Katz & Carl Shapiro, *Network Externalities, Competition and Compatibility*, 75 *Am. Econ. Rev.* 424, 424 (1985) (“There are many products for which the utility that a user derives from consumption of the good increases with the number of other agents consuming the good.”).

115. This positive externality in warm glow may justify subsidies to encourage delivery in this aggregated way.

116. See, e.g., Campbell R. McConnell & Stanley L. Brue, *Economics* 404–08 (16th ed. 2005) (showing how economies of scale decrease a firm’s average total costs, and therefore lead to increased production by the firm relative to higher cost firms).

and government), but corporations may have advantages in performing this function.

Specifically, corporations may be better able to take advantage of scale than nonprofit firms because they are generally larger than nonprofits. For-profit firms (through their managers) have strong incentives to increase efficiency, while nonprofit managers cannot share in the income from increased efficiency. These incentives also provide powerful reasons for firms to merge (and thus get bigger); nonprofit firms rarely, if ever, merge. Another reason for for-profit firms to be bigger is that nonprofit entrepreneurs may be driven to directly control the good works of the organization—just another form of warm glow—but this desire for control also may discourage mergers.

Ostensibly the U.S. government, which is bigger than any one corporation, has likewise an advantage over any for-profit firm at capitalizing on network externalities in warm glow. Another feature of warm glow, however, limits the efficiencies of government provision of altruism. James Andreoni, who popularized the idea of warm glow, has demonstrated that warm glow declines with the number of beneficiaries that share a contribution.¹¹⁷ More precisely, the warm glow most people derive from a contribution to a fund that benefits N persons is greater than the warm glow from that contribution when the fund benefits $N+1$ persons. Because contributions to the government (i.e., taxes) are shared by all beneficiaries of government public good programs, this diminishes the network efficiencies of warm glow. In contrast, a corporation can target its social action toward a smaller group of beneficiaries, thereby capturing the signal amplification of warm glow in giving without reducing it by dispersing the impact across too many recipients. In other words, there are increasing returns to a larger fund but negative returns to a larger number of beneficiaries. The government has a larger fund than any corporation (and all corporations in the aggregate),¹¹⁸ but it cannot limit the number of beneficiaries. Thus in many cases a corpora-

117. James Andreoni, *Giving Gifts to Groups: How Altruism Depends on the Number of Recipients*, 91 J. Pub. Econ. 1731, 1748 (2007) (“[A]s groups [of altruism recipients] grow, altruism of the givers is congested and the value of the gift to the giver does not grow proportionately with the social value of the public good.”).

118. The federal budget in 2009 is about \$3.1 trillion. Office of Mgmt. and Budget, *Budget of the United States Government, Fiscal Year 2009*, at 139 tbl.S-1 (2008), available at <http://www.whitehouse.gov/omb/budget/fy2009/budget.html> (on file with the *Columbia Law Review*). The amount firms have to devote to public goods is much less. The Wilshire 5000 index, which estimates the value of all publicly traded firms, was about \$10 trillion on December 31, 2008. Wilshire, *The Dow Jones Wilshire 5000 Composite Index, Fundamental Characteristics*, at <http://www.wilshire.com/Indexes/Broad/Wilshire5000/Characteristics.html> (last visited Jan. 17, 2009) (on file with the *Columbia Law Review*). To estimate the amount available to all firms, one would need to convert this figure to earnings, then multiply by one or two percent, which is the average for most firms engaging in philanthropy, see *infra* note 192 and accompanying text. This number will be significantly less than the amount available to the government.

tion—especially a large one—may have a comparative advantage over the government at delivering warm glow.¹¹⁹

* * *

In this Part, we have suggested several potential advantages that for-profit firms may have over their competitors (that is, nonprofit charities and the government) in the market for altruism. We have shown that firms may be able to use their existing acquisition and sales networks to deliver public goods at lower cost than nonprofits or the government; that firms may be able to bundle regular and philanthropic goods in ways that lower the relative price of altruism; that firms may be able to offer more narrowly tailored opportunities for buying altruism; that firms may be able to monitor the actual delivery of public goods better than their competitors; and that firms can take advantage of their size and diversity of stakeholders to increase network effects from giving. This is not to say that these advantages will obtain for every cause or case. Rather, the advantages present in any given situation will depend on the particular characteristics of the firm, the donor, and the donee. Our aim here is simply to point out that firms are important players in the market for altruism. In the next Part, we consider the implications of this conclusion for the normative question of whether firms should engage in corporate philanthropy and how the government should regulate the market for altruism.

V. THE MERITS OF CORPORATE PHILANTHROPY

Having proposed a new framework for understanding corporate philanthropy and its relationship to the nonprofit sector and government programs, it is time to return to the basic questions that motivate this Essay: Should corporations engage in philanthropy and, if so, how should the government regulate this activity?

119. Individuals also get less warm glow from paying taxes than from buying philanthropic goods, thus giving nonprofits an additional advantage over the government. Tax time is not widely considered a good time of the year, and there is a vast amount of resources devoted by individuals and firms to minimize taxes and by the government to stop tax evasion. See, e.g., Econ. Policy Inst., *Bridging the Tax Gap*, at vii (Max B. Sawicky ed., 2005) (citing government estimates that up to \$350 billion in taxes is not paid voluntarily, and about \$50 billion is recovered through enforcement). Many states also offer the option for taxpayers to voluntarily pay additional taxes; few, if any, choose to pay. Case in point is the Virginia plan called the “Tax Me More Fund,” which was designed to allow citizens of the Commonwealth to voluntarily pay more taxes to close a \$1.4 billion budget shortfall. From its inception in 2002 until February 2008, the Fund collected about \$10,000. See Seth McLaughlin, “Tax Me More Fund” Raises Little Revenue, *Wash. Times*, Feb. 15, 2008, at B1. In 2006, Virginia taxpayers collectively paid an extra \$19.36. See id.

A. Should Corporations Engage in Philanthropy?

Business schools teach their students—the future leaders of for-profit corporations—that companies should only enter a market if they have an edge over their competitors.¹²⁰ Otherwise they will sacrifice their bottom line and perhaps fail. Given that there is a market for altruism like there is for other products, the same lesson applies to the production of altruism.

To wit: Corporations should only engage in philanthropy if they have a cost or quality advantage over other competitors in that market. This includes other corporations *and* nonprofits and the government. Of course, it is a little complicated to determine how competitive the government is. After all, contributions to government production are mandatory, so people (and corporations) do not have much choice over whether to purchase government altruism.¹²¹ So the more nuanced version of our claim is that a corporation should engage in a particular philanthropic activity only if demand for that activity is not already satisfied by the government and if the corporation is better able to perform that activity than other corporations and nonprofits.

Although the debate over the merits of corporate philanthropy does not tackle social work by nonprofits or the government, our framework has normative implications for these actors as well. A nonprofit should only engage in a specific philanthropic activity if it is not crowded out by the government and it has a comparative advantage over other nonprofits and for-profit corporations. The government should only engage in a specific altruistic activity if that activity is subject to free riding and is therefore likely to be undersupplied by corporations and nonprofits.¹²² Of course, this is a necessary but not sufficient condition for government action. If the government's cost of addressing the undersupply is greater than consumer surplus from that additional supply, then the government should remain on the sidelines.

120. Cf. Porter, *Competitive Forces*, *supra* note 60, at 145 ("The key to growth—even survival—is to stake out a position that is less vulnerable to attack from head-to-head opponents . . .").

121. This "crowd out" of private altruism by government altruism is offset to some extent by a "reverse crowd out" effect since some—but not all—philanthropic activities are tax-deductible and thus reduce government revenues. Moreover, corporations—unlike § 501(c)(3) nonprofits—can engage in unrestricted lobbying of the government to stop engaging in altruistic activities that compete with corporate philanthropy.

122. This is just a variant of the typical economist's claim that the proper, narrow role of government is to provide public goods. See, e.g., Friedman, *Capitalism*, *supra* note 47, at 22–36 (defining role of government as limited to establishing and maintaining conditions for a free market, enforcing the rule of law, and dealing with neighborhood effects, all of which are public goods).

B. *How Should the Government Regulate Corporate Philanthropy?*

The market for altruism is distinguished by competition across three sectors of the economy. Since one of the sectors is the government, there is the risk not only that the government will regulate the market for altruism to favor itself, but that it will not treat each of its competitors equally. The main area of concern is regulation through tax policy. The following examples illustrate our point.

1. *Donations Versus Purchases.* — If a person wants to “buy” altruism via donation to a nonprofit and she itemizes her deductions, her donation may be deductible from her taxable income.¹²³ This means that she effectively gets a price discount on altruism equal to her marginal income tax rate. If the same person wants to “buy” altruism by purchasing a “green good” from a for-profit corporation, her purchase is not tax deductible and thus she receives no price discount.¹²⁴ This discrepancy implies that, even if green goods provide a more efficient form of altruism than traditional nonprofit activity, consumers may still donate to the nonprofit.

2. *Donations Versus Ownership.* — Another option is to “buy” altruism by owning shares in a corporation that sacrifices some shareholder profits to engage in philanthropy. The altruistic shareholder would draw two benefits by pursuing this option. First, the corporation would be permitted to deduct the philanthropic expenses as either contributions to a nonprofit charity or a business expense, thus lowering its corporate income tax bill. Second, the person would lose some corporate profit, which would reduce her capital gains tax bill when she sold her appreciated stock. The net effect is that altruism purchased via share ownership affords a price discount that includes the corporate income tax rate and the capital gains rate. Thus the discount from donating cash to a nonprofit is the personal income tax rate while the discount from owning shares in a for-profit is a combination of the corporate income tax rate and the capital gains rate.¹²⁵ Typically the latter combination is greater

123. Alternatively, she can donate an appreciated asset and deduct not only the full value of the asset from her taxable income, but also avoid paying capital gains tax on the appreciation. Internal Revenue Serv., Publication 526: Charitable Contributions 11 (2007), available at <http://www.irs.gov/pub/irs-pdf/p526.pdf> (on file with the *Columbia Law Review*) (“When figuring your deduction for a gift of capital gain property, you generally can use the fair market value of the gift.”). To see the capital gains benefit, imagine the person sold the stock and donated cash instead of the stock. She would have to pay capital gains tax on the appreciation.

124. It should be noted that the costs from self-production of altruism, for example, giving change to a homeless person, cannot be deducted from taxable income and thus are also not privileged with a discount. See 26 U.S.C. § 170 (2006) (allowing a deduction of “any charitable contribution” to charities authorized by the Secretary of the Treasury, and not including the purchase of green goods or donations of this kind).

125. If, instead of allowing its stock to appreciate, the philanthropic corporation distributed profits via dividends, the sacrifice of corporate profits to engage in philanthropy would lower the dividends rather than share price. Since dividends are taxed

than the personal income tax rate, so tax policy favors corporate philanthropy over donations to a nonprofit.¹²⁶

These examples are just the tip of the iceberg. Table 1 summarizes the disparate tax treatment of altruistic purchases from the different sectors.¹²⁷ It highlights not just disparate treatment across sectors but also disparate treatment of different methods of purchasing altruism *within a sector* and disparate treatment *across people* for a given purchase of altruism. For example, itemizers get to deduct cash donations to nonprofits but (usually less wealthy) non-itemizers do not.¹²⁸ Thus, itemizers get a discount, but non-itemizers do not. Another example is that volunteers who are paid an hourly wage likely get a discount equal to their personal income tax rate, while volunteers who are salaried do not. The reason is that the reduction in work hours due to volunteering lowers the income—and thus the tax bill—of hourly workers, but not salaried workers.

TABLE 1: TAX TREATMENT OF ALTRUISM PURCHASED IN NONPROFIT AND FOR-PROFIT SECTORS

Sector	Method of purchase	Discount for typical consumer
Nonprofit	Donating cash	t_p if itemizer (0 otherwise)
	Donating appreciated stock	t_p plus a rebate equal to appreciation times t_{cg}
	Donating time	0 (t_p if volunteering reduces hours worked and earnings)
	Working	t_p
For-profit	Owning shares	$t_c(1 - t_{cg}) + t_{cg}$
	Buying green product	0
	Working	t_p

Notes: t_p is the personal income tax rate, t_{cg} is the capital gains tax rate, and t_c is the corporate income tax rate.

as ordinary income, see *id.* § 61(a), the second benefit would be to reduce the altruistic shareholder's personal income tax bill rather than her capital gains tax bill. The net effect of altruism purchased via share ownership would be a price discount that is a mix of the corporate income tax rate and the personal income tax rate. Since the personal income tax rate is higher than the capital gains rate for higher income individuals, tax policy favors corporate philanthropy over direct donations to a nonprofit even when the corporation issues dividends.

126. Of course, the conclusion may be reversed if the person donates appreciated stock. See *supra* note 123. It may be reversed back if the corporation distributes all of its profits via dividends. See *supra* note 125.

127. The specific rates are derived *infra* Appendix B.

128. 26 U.S.C. § 63(b) ("In the case of an individual who does not elect to itemize his deductions for the taxable year, for purposes of this subtitle, the term 'taxable income' means adjusted gross income, minus—(1) the standard deduction, and (2) the deduction for personal exemptions provided in section 151.").

Before one can address any of these forms of discrimination, one must decide how much one wants to subsidize altruism. For example, if the right subsidy is the personal income tax rate (t_p), then we should try to increase the discount for buying green goods by making those purchases tax deductible and perhaps decrease the discount for owning shares by eliminating the corporate income tax (t_c).¹²⁹ Alternatively, if the right subsidy is zero, then the appropriate strategy is to eliminate any tax deductions for contributions of cash or stock to a nonprofit.¹³⁰ We do not take a position on which level of subsidy is appropriate—that is outside the scope of this Essay. Our particular claim is that whatever the level of subsidy, the government should provide it as uniformly as possible across (and within) sectors and people.

There are two caveats to our contention that the government should eliminate tax discrimination between producers of altruism. The first is that eliminating tax discrimination is costly.¹³¹ For instance, giving a tax break for the altruistic component of a green good requires that the government estimate the value of the altruistic component of that good. That is, the government must determine, for example, how much more Starbucks pays farmers for fair trade coffee than for regular coffee or how much of the additional cost of a hybrid car is attributable to its ability to lower greenhouse gases. Perhaps the government could rely on corpora-

129. For this to be administrable and not skew incentives to engage in corporate philanthropy, one would have to eliminate the corporate income tax for all corporations regardless of whether they engage in philanthropy. See *infra* note 131 for a discussion of side effects from this intervention.

130. Despite its intent, the proposal would leave two broad classes of altruistic purchases with tax breaks. One is any contribution of time, via volunteering, working at a nonprofit, or doing pro bono work for a for-profit firm. To the extent this contribution lowers the individual's earnings, it will reduce her labor income and thereby offer a tax break proportional to her personal income tax rate. The other class is altruism produced by social activities paid for by shareholders (not including donations by firms to charity, which would no longer be deductible to the corporation). Firm expenditures on these activities are deductible as an ordinary business expense (even without a specific charitable deduction), and reduce either the capital gains or dividends of shareholders. This means the general business expense deduction, which is not going away, offers a blended tax break based on the corporate income tax rate and either the capital gains rate or the personal gains rate, depending on whether the expense reduces capital gains or dividends, respectively. Both of these holes in the solution would be nearly impossible to fix.

131. A related point is that eliminating discrimination sometimes has collateral consequences. For example, addressing the disparate treatment of owning shares in a philanthropic corporation and donating cash to a nonprofit requires abolishing the corporate income tax. If there are benefits to that tax outside the market for altruism, then eliminating this form of discrimination will have as an unintended consequence the loss of those benefits. Therefore, we must add the following condition to our argument against tax discrimination in the market for altruism: If the cost of eliminating a tax break is greater than the inefficiency from the tax discrimination, we should leave the discrimination in place.

We do not count lost revenue as a cost of eliminating discrimination because that is more appropriately a cost assigned to the level of subsidy for altruism. If the proper subsidy were no tax break, eliminating discrimination could actually increase revenue.

tions to self-report these costs. But because even philanthropic corporations care about profits, they would have an incentive to exaggerate the "green" portion of green goods. After all, doing so would lower the effective price of those goods to consumers and increase philanthropic corporations' profits. Of course, the government already relies on self-reporting of costs and expenses for most of its tax collection. Instead of checking each return, it checks a handful and punishes violators with heavy fines.¹³² It could do the same with respect to self-reporting of the costs from green goods.

The second caveat to our position against discriminatory tax treatment of altruistic producers is that some discrimination cannot be eliminated. For example, so long as there is a capital gains tax or personal income tax, one cannot eliminate some benefit to purchasing altruism by owning stock in a philanthropic corporation. Whenever that corporation sacrifices shareholder profits to engage in philanthropy, the shareholder will receive either lower gains or lower dividends, which will lower her tax bill.¹³³ Of course, the inability to eliminate *all* discrimination is not a persuasive argument against trying to eliminate *any* discrimination. Otherwise perfection will become the enemy of progress.

General statements about the evils of discrimination are fine, but specific suggestions are more helpful. So what would we recommend? Assuming that the optimal price discount for altruism is the personal income tax rate, we have three proposals.¹³⁴

132. The government also requires accounting firms to sign off on corporate income tax returns and holds those accounting firms liable if the corporate returns are inaccurate. See 26 U.S.C. § 6694 (establishing penalties for understatement of tax liability by tax return preparer). This incentivizes accounting firms to police corporations. The same could be done with green goods.

133. Cf. *supra* note 130 (describing link between reduced personal income and reduced taxes).

134. It should be noted that some components of the plans below have previously been proposed by scholars and policy advocates. See, e.g., Daniel Halperin, *A Charitable Contribution of Appreciated Property and the Realization of Built-In Gains*, 56 *Tax L. Rev.* 1, 3–4 (2002) (finding no persuasive argument for permitting deduction of fair market value of appreciated stock); Joseph Cordes et al., *Extending the Charitable Deduction to Nonitemizers: Policy Issues and Options 3* (Urban Inst., Charting Civil Society Series No. 7, 2000), available at <http://www.urban.org/url.cfm?ID=310338> (on file with the *Columbia Law Review*) (arguing for above-the-line deduction for all charitable contributions); see also Staff of J. Comm. on Taxation, 109th Cong., *Options to Improve Tax Compliance and Reform Tax Expenditures* 293–95 (Comm. Print 2005), available at <http://www.house.gov/jct/s-2-05.pdf> (on file with the *Columbia Law Review*) (describing reform rules for charitable deductions). There are other, more normative proposals, that we do not consider. See, e.g., Andrew Chamberlain & Mark Sussman, *Charities and Public Goods: The Case for Reforming the Federal Income Tax Deduction for Charitable Gifts*, Special Report (Tax Found., Washington, D.C.), Nov. 23, 2005, at 1, 4–8, available at <http://www.taxfoundation.org/files/sr137.pdf> (on file with the *Columbia Law Review*) (advocating denial of deduction for donations to charities that do not in fact contribute to the public good). The full set of reforms we suggest, however, has not been proposed before. The reason is that previous scholarship has not grasped the breadth of the market

First, the government should allow all consumers to deduct the charitable component of the green goods they purchase. This proposal is controversial because, like volunteer hours,¹³⁵ the altruistic component of green products is difficult to measure. Consumers of green goods have a tax incentive to exaggerate the altruistic component of their purchases. Producers of green goods also have an incentive to exaggerate the altruistic component because, combined with the charitable deduction, exaggerating the altruistic component lowers the price of even the nongreen component of these products at the expense of government revenues and thereby makes the producer more competitive.

To solve this problem, one might place the burden of valuing the altruistic component of green products on producers. For example, producers might be required to apply to the IRS for the right to offer their consumers a "green receipt" which would indicate the value of the consumer's contribution via the green product. The producer's application

for altruism or seen the full range of inequalities, and thus has not sought to pursue true tax neutrality.

135. To be perfectly nondiscriminatory, the government would have to allow deductions for donations of time, just as it does for donations of money. This is controversial, however, because it is very difficult to verify either the actual number of hours donated or the value of those hours. Individuals have an incentive to exaggerate the amount of donated time and charities have no incentive to correct overestimates. Moreover, it is difficult to value the hours. If a corporate lawyer builds houses for Habitat for Humanity, the value of his contribution is at most the cost to Habitat of hiring a paid worker to do the equivalent work. Indeed, it might be less since the lawyer is probably not as skilled at building houses as the carpenter. The problem, as with measuring the number of hours volunteered, is that the lawyer has an incentive to exaggerate either the tasks performed or the quality of the tasks performed and Habitat has little reason to correct the lawyer. What is more, the government may not have a good estimate of the value of a carpenter's time.

If one is undeterred by the risk of fraud, which after all exists already in much self-reporting of in kind donations, one can imagine a solution where the government would rely on self-reports of volunteer hours and tasks so long as they are validated by nonprofit or employer receipts (for volunteer and pro bono work, respectively). The potential for abuse per donation is no worse than that for donations of other illiquid assets such as cars (though the amount of abuse would rise because the number of deductible donations would rise). To deal with the problem of valuing the time donated, the government could simply create, say, ten or fifteen preset categories of jobs—for example, server, carpenter/electrician, administrative, professional services—with each category's wages fixed at the median wage for that category in the nonprofit charity's local Metropolitan Statistical Area. These figures can easily be derived from the Census Bureau's annual Current Population Survey. See Bureau of Labor Statistics, U.S. Dep't of Labor, Labor Force Statistics from the Current Population Survey, Household Data Annual Averages (2007), available at <http://www.bls.gov/cps/tables.htm#weekearn> (on file with the *Columbia Law Review*) (providing median weekly earnings of full-time and salary workers by occupation). The donor would have to get a receipt from a nonprofit stating both the number of hours worked and the task performed. To adjust for the probably lower quality of work by volunteers, the IRS could discount the value of the time donation by a reasonable amount, say twenty-five percent, before allowing a deduction from taxable income. Note, however, the deductible amount would still benefit from the multiplier discussed above to account for the higher tax break currently given to shareholders.

would have to include an example of a product comparable to the nonaltruistic component of its green product and document the average difference between the market price of the green product and the comparable product.¹³⁶ The difference in price would be the value of the green receipt. The consumer who purchases a green product would be allowed to deduct the green receipt from her taxable income. For example, if Starbucks wanted to offer a green receipt for its organic shade-grown coffee from Mexico (\$13.45 per pound),¹³⁷ it could offer its own Guatemala coffee (\$10.65 per pound)¹³⁸ or a competitor's Mexican coffee (~\$12.00 per pound)¹³⁹ as a nonaltruistic comparable product. The average difference in price is \$2.13. This is the value of the green receipt the IRS would authorize Starbucks to give to consumers of its Mexican coffee.¹⁴⁰ This application process is not without cost, but given the rapid growth in green product markets, omitting green products from any neutrality proposal would leave too large a hole in that proposal.¹⁴¹ Moreover, this is the approach that already regulates the nonprofit sector: Estimating the value of the altruistic component for the government and providing con-

136. Ideally, the producer would have to offer at least one example of a comparable product it did not make. While such a product is less likely to mimic the nonaltruistic components of the green product from that producer, allowing a producer to rely solely on its own comparable product would allow it to manipulate the green receipt by underpricing the nongreen comparable product it made so as to inflate the apparent value of the altruistic component of the green product.

137. StarbucksStore.com, Organic Shade Grown Mexico by Starbucks Coffee, at <http://www.starbucksstore.com/products/shprodde.asp?sku=313018> (last visited Jan. 17, 2009) (on file with the *Columbia Law Review*).

138. StarbucksStore.com, Guatemala Antigua Coffee by Starbucks Coffee, at <http://www.starbucksstore.com/products/shprodde.asp?sku=312871> (last visited Jan. 17, 2009) (on file with the *Columbia Law Review*).

139. See, e.g., Tessa's Organic Coffee, at <http://www.freshorganiccoffee.com/selection.html> (last visited Nov. 8, 2008) (on file with the *Columbia Law Review*).

140. As noted above, the premium may include other elements—such as signaling—that would make the real donation amount less than this difference. See *supra* note 87. The lack of universal standards in many contexts also makes it difficult to discern what proportion of the premium is genuinely philanthropic. For example, while Starbucks claims to pay above-market prices for most or all of its coffee, most of it is not fair trade certified. See Starbucks Coffee, *supra* note 78 (stating that the “Fair Trade system . . . currently produces about two percent of the world’s coffee supply” and that “[t]he majority of the . . . coffee Starbucks purchases is grown by farmers outside the system, many of whom are small-holders”). It is consequently impossible to determine exactly how much “greener” Starbucks’s shade-grown Mexican coffee is than its Guatemalan or its competitors’ Mexican coffees. But these difficulties arise in all charitable giving, so the most efficient approach is probably to ignore them. The IRS could (and should) make these judgments based on the applications, available data, and its experience.

141. An approach that is less costly to corporations—but more costly to the IRS—is to let producers designate products as green and also to designate the amount of altruism contained in any green product, but to subject these assessments to *ex post* review by the IRS or another government agency. If the penalties for overclaiming along either dimension are set appropriately, this could give producers the same incentives as the *ex ante* approval process outlined above, while reducing government overhead costs.

sumers with a separate receipt for that component is, after all, exactly what nonprofits currently do for donors of non-cash assets.¹⁴²

Second, the government should allow all consumers to deduct donations of cash or assets to nonprofit organizations. These deductions should not be restricted to itemizers. In other words, all contributions to nonprofit charities should be privileged with an above-the-line deduction. There is no sensible efficiency or fairness reason why non-itemizers should not receive the same tax incentives for buying altruism as itemizers, especially since lower-income individuals are large contributors to charity.¹⁴³ Allowing this above-the-line deduction would reduce one bias of the current treatment of philanthropy.

Third, the government should tax donations of stock and other appreciated assets the same as donations of cash to nonprofits. There are two ways to accomplish this: do not exempt appreciation of donated stock from capital gains taxes, or only permit donors a charitable deduction from labor income equal to their basis in the donated stock.¹⁴⁴ Again, this reform would be designed simply to level the current playing field across various methods of giving. Without an efficiency justification for preferring donations of stock over cash, these rules distort private choices in ways that may be socially undesirable.

CONCLUSION

Individuals have preferences for altruism, and they can turn to three providers in what we call the “market for altruism” to satisfy these preferences. Nonprofit charities and the government are the typical intermediaries that help individuals satisfy these preferences, whether individuals are seeking pure altruism, warm glow, or some mix of both. For-profit corporations have historically provided cash donations to charities, but their role is increasingly to do good works themselves. This new and bigger role has been criticized and praised, but neither backers nor skeptics have properly framed the debate. Corporations are not increasingly acting charitably simply because it increases profits (conventionally seen

142. See generally Internal Revenue Serv., Publication 561: Determining the Value of Donated Property (2007), available at <http://www.irs.gov/pub/irs-pdf/p561.pdf> (on file with the *Columbia Law Review*) (describing valuation and required supporting documentation for donations).

143. See Brooks, *Who Really Cares?*, *supra* note 66, at 80–81 (finding that “poor people contribute more of their household incomes than rich people,” and both groups contribute more than middle class); Arthur C. Brooks, *A Nation of Givers*, *The American*, Mar.–Apr. 2008, at 40, 43 (finding that “low-income working families . . . are the most generous group in America, giving away about 4.5 percent of their income on average,” compared with “about 2.5 percent among the middle class, and 3 percent among high-income families”).

144. Halperin, *supra* note 134, at 1–2 (describing current donation regime and assessing taxation of gains from appreciated property when donated). This reform works by encouraging donors to sell stock and donate the proceeds, after paying capital gains taxes, as cash. *Id.*

as good) or because managers are acting selfishly (undoubtedly bad), but also, and perhaps primarily, because their stakeholders—investors, employees, and customers—are demanding that they do.

Yet the market for altruism we describe is not like other markets. For one, the government is both a producer and a rule setter in this market, which means there may be crowding out of private production and unfair competition across sectors depending on tax and other regulatory policies. The market also suffers the classic problem of free riding on public goods, which for-profit firms may be uniquely positioned to solve through bundling of altruistic goods with nonaltruistic goods. We show how firms may also have other comparative advantages that allow them, in some cases, to more efficiently deliver altruistic goods than either nonprofit charities or the government. In other cases, these competitors may be better suited for this job.

With no clear theoretical basis for choosing the most efficient competitor for delivering altruism, we should expect neutral tax treatment so as not to bias altruism-purchasing decisions based on taxes. We show not only that the tax law is not neutral among competitors, but that the current tax laws are incoherent. Certain mechanisms for giving within a sector are favored over other mechanisms without any clear efficiency justification for the distinction. For example, donations of appreciated stock or ownership of shares in philanthropic corporations are the most tax-favored, while separate rules exist for donations of money and time to nonprofits, pro bono work, and, most importantly, products bundled with charity and sold by for-profit firms. Seeing no justification for this, we offer several reform proposals with an eye toward leveling the competitive playing field and setting the right incentives for the production of altruism in all sectors of the economy.

APPENDIX A

In order to understand the magnitude of the market for altruism and the manner in which the various sectors (the government, nonprofits, and for-profits) compete through different delivery mechanisms (donations, investments, labor, and purchases), we provide an examination of the inputs and outputs of this market.

I. INPUTS

A. *For-Profit Sector*

There are three primary stakeholders in any firm: investors, employees, and customers. Individuals, whether they are contributing capital, helping turn the capital into goods and services, or buying goods and services from firms, may be willing to “pay” firms to do good on their behalf. This intermediary role for the firm is analogous to that served by nonprofit charities, which solicit donations from individuals to do good on their behalf. We consider the inputs provided by each of these constituencies in turn. As we show, a rough estimate of the total inputs to corporate social action is several hundred billion dollars.

1. *Investors.* — There is some evidence that shareholders are willing to forgo profits by investing in firms that are committed to acting in a socially responsible fashion. An entire industry, known as “socially responsible investing” (SRI), has developed to identify and invest in firms acting in socially and environmentally responsible ways.¹⁴⁵ There are several hundred mutual funds and other institutional investors focusing entirely on this type of investing.¹⁴⁶ The major stock exchanges also have special indices, such as the FTSE 4Good Index and the Dow Jones Sustainability Index, which track the performance of these firms.¹⁴⁷

145. SRI primarily involves applying ethical screens to personal and institutional investments to ensure that funds are directed toward sustainable activities and away from unsustainable ones. Funds can use “negative” screens, meaning they prohibit investment in companies or funds involved in specific activities, such as tobacco production or nuclear power. “Positive” screens, a more recent SRI tool, encourage investments in companies that generate economic activity consistent with sustainability, such as solar power or microfinance. Soc. Inv. Forum, 2005 Report on Socially Responsible Investing Trends in the United States: 10 Year Review 4–5 (2006), available at <http://www.socialinvest.org/pdf/research/Trends/2005%20Trends%20Report.pdf> (on file with the *Columbia Law Review*) (describing SRI history and strategies).

146. See Soc. Inv. Forum, Socially Responsible Investing Facts, at <http://www.socialinvest.org/resources/sriguide/srifacts.cfm> (last visited Nov. 8, 2008) (on file with the *Columbia Law Review*) [hereinafter Soc. Inv. Forum, Investing Facts] (providing overview of SRI).

147. See, e.g., Dow Jones Sustainability Indexes, at <http://www.sustainability-indexes.com/> (last visited Jan. 16, 2009) (“Dow Jones Sustainability Indexes are the first global indexes tracking the financial performance of the leading sustainability-driven companies worldwide.”); FTSE, FTSE4Good Index Series, at http://www.ftse.com/Indices/FTSE4Good_Index_Series/index.jsp (last visited Jan. 16, 2009) (on file with the *Columbia Law Review*) (stating that index “has been designed to measure the performance

The amount of investment in firms committed to relatively more social welfare than the average firm is staggering. In 2005, over \$2.7 trillion was invested in socially responsible investment funds, which is about ten percent of total assets under management in the United States.¹⁴⁸ Because the filtering process screens out potentially profitable investments, investors in these funds necessarily forsake potential profits. These opportunity costs are in effect a charitable contribution by the investors to social welfare. In a recent analysis, Christopher Geczy, Robert Stambauh, and David Levin found investments in socially screened funds underperform alternative investments in unscreened funds by 360 basis points.¹⁴⁹ In other words, investors in these funds contribute about \$98 billion per year (\$2.7 trillion times 3.6%) to social welfare by limiting their investments to funds committed to doing good (or not doing bad).

If we are correct that shareholders get utility (in the form of altruism) from investing in firms that do social good, then this \$98 billion figure surely underestimates the total amount of this form of giving. This estimate includes only a small and very specific subset of investments in public firms, and thereby excludes other types of investments and investments in small or private firms. In addition, socially responsible investing is growing dramatically, rising over 300% over the past decade.¹⁵⁰ If recent history is a gauge, this is true even in times when overall investment in equity markets declines. For example, according to the market research firm Lipper, in the first quarter of 2003, investors added nearly \$200 billion to socially responsible mutual funds, while regular mutual

of companies that meet globally recognized corporate responsibility standards, and to facilitate investment in those companies”).

148. See Soc. Inv. Forum, *Investing Facts*, supra note 146. Of this, about \$180 billion is in socially responsible mutual funds, while the remainder is in individually managed accounts of individuals or institutions. See *id.*

149. See Christopher Geczy et al., *Investing in Socially Responsible Mutual Funds 3* (Oct. 2005) (unpublished manuscript, on file with the *Columbia Law Review*), available at <http://ssrn.com/abstract=416380> (“[T]he SRI constraint imposes substantially higher diversification costs—at least 30 basis points per month.”). This finding is consistent with the views of industry experts. A study by the consultancy Mercer finds that over eighty percent of investors reported the belief that SRI would “reduce returns or increase risk” as “very important” or “somewhat important” in their decision not to engage in SRI. Mercer Inv. Consulting, *Perspectives on Responsible Investment 6 ex.7* (2006), available at <http://www.mercer.com/usrisurvey> (on file with the *Columbia Law Review*). But see Zivin & Small, supra note 32, at 10–15 (arguing that if donation through investment fully offsets private donations that would have otherwise been made, share prices will not be affected by corporate social responsibility). The situation imagined by Zivin and Small is, as they acknowledge, a “somewhat implausible[] corner solution,” since substitution is likely to be imperfect. *Id.* at 13. In reality, then, share prices likely are sensitive to firm policy, and Zivin and Small’s model is largely consistent with the empirical findings of Geczy et al., supra.

150. Gary Gardner, *Socially Responsible Investing Grows Rapidly*, Vital Signs Online (Worldwatch Inst., Wash., D.C.), Nov. 8, 2007, at <http://www.worldwatch.org/node/5481> (on file with the *Columbia Law Review*) (noting socially responsible investment funds “grew more than threefold between 1995 and 2005”).

funds experienced a net decrease of over \$13 billion.¹⁵¹ Over one-half of Fortune 500 firms provide social responsibility reports, and hardly a week goes by without some company announcing what it is doing for the world's environment. Adding this all together, we estimate that shareholders "contribute" at least \$100 billion per year in forgone capital appreciation by investing in socially responsible firms.

2. *Employees.* — Just as investors can forgo equity returns for altruism, so too can a firm's workers contribute to social good by accepting a lower wage from a firm committed to social action. If the market clearing wage for a store manager is \$100, but an environmentally conscious one agrees to work for a firm like Patagonia for, say, \$80, then the \$20 difference is equivalent to a donation to charity. In other words, all else being equal, the individual store manager would be indifferent between working for Sears and donating some portion of her salary to an environmental charity, and working for Patagonia.

The empirical evidence supports the claim that employees are willing to give up financial compensation in return for working for a firm committed to social action. David Montgomery and Catherine Ramus surveyed about 300 MBAs and used conjoint analysis to estimate their willingness to forgo financial benefits for a variety of firm characteristics.¹⁵² They found employees were willing to give up about eight percent of their expected total compensation to work for firms committed to environmental sustainability and caring for stakeholders.¹⁵³ This amounts to an implicit donation of nearly \$10,000 per employee per year.¹⁵⁴

A reasonable analogy can be made to volunteering. When an individual volunteers, he shows a willingness to forgo financial benefits equal to the difference between the wage he could otherwise earn and zero. These forgone dollars are the individual's donation to charity. As discussed below, individuals forgo about \$150 billion in wages by donating

151. Thomas Clarke & Marie de la Rama, *The Impact of Socially Responsible Investment upon Corporate Social Responsibility*, in *Perspectives on Corporate Social Responsibility* 161, 163 (David Crother & Lez Rayman-Bacchus eds., 2004).

152. See David B. Montgomery & Catherine A. Ramus, *Corporate Social Responsibility Reputation Effects on MBA Job Choice* 10–11 (Stanford Graduate Sch. of Bus., Research Paper No. 1805, 2003), available at <http://ssrn.com/abstract=412124> (on file with the *Columbia Law Review*) (describing seventeen job choice attributes measured).

153. *Id.* at 7.

154. See *id.* (finding MBAs willing to give up \$5,500 to work for firms committed to environmental sustainability and \$3,700 to work for firms committed to other stakeholders, based on expected compensation packages of \$115,000). A 2004 survey of 800 MBAs in North America found that ninety-seven percent would be willing to give up an average of fourteen percent of expected pay to work for socially responsible firms. See Inst. for Global Ethics, *Survey of MBA Students Finds Strong Desire for Ethical Employers*, Ethics Newline, Aug. 2, 2004, available at <http://www.globalethics.org/newline/2004/08/02> (on file with the *Columbia Law Review*).

time to nonprofit charities.¹⁵⁵ Since this figure is calculated using a very low wage—about \$19 per hour¹⁵⁶—and most volunteers are very high wage earners,¹⁵⁷ this estimate likely undervalues the amount of income forgone by volunteers. It is not unreasonable to suggest that employees at firms donate a comparable amount of labor to firms by accepting wages below those of the market clearing price to work at firms committed to doing good. If a significant number of employees have the same willingness to pay as those in the MBA survey, then this implicit donation could be quite large. For example, if only one percent of employees in the United States took a wage discount as large as that suggested by Montgomery and Ramus's research, the total donation to charity from this behavior would be about \$14 billion.¹⁵⁸

3. *Customers.* — One need only look at the grocery store shelves or visit a local coffee shop to see the manner in which customers donate through firms for the purpose of social action. Firms increasingly offer “green” products for sale at a premium price. These are ordinary items that are manufactured, distributed, used, or disposed of in ways that are more socially sensitive than the regular version of the same product.¹⁵⁹ Fair trade coffee, biodegradable household cleaners, and hybrid cars are

155. See *infra* notes 170–173 and accompanying text (estimating total value of volunteer time as between \$60 billion and \$240 billion).

156. See Indep. Sector, Value of Volunteer Time, at http://independentsector.org/programs/research/volunteer_time.html (last visited Jan. 17, 2009) (on file with the *Columbia Law Review*) [hereinafter Value of Volunteer Time] (listing dollar value of volunteer hours 1980–2007).

157. According to the Bureau of Labor Statistics, about forty-five percent of volunteers have a college degree, master's degree, doctorate, or other advanced degree, while nearly eighty percent have some college experience. See News Release, Bureau of Labor Statistics, U.S. Dep't of Labor, Volunteering in the United States, 2008, at 2 tbl.A (Jan. 23, 2009) available at <http://www.bls.gov/news.release/pdf/volun.pdf> (on file with the *Columbia Law Review*) [hereinafter Bureau of Labor Statistics, Volunteering] (indicating 45.7% of volunteers have bachelor's degree or higher and 34.2% have some college or associate degree).

158. There are over 140 million individuals in the U.S. workforce. See News Release, Bureau of Labor Statistics, U.S. Dep't of Labor, The Employment Situation: December 2008, at 2 tbl.A (Jan. 9, 2009), available at <http://www.bls.gov/news.release/pdf/empstat.pdf> (on file with the *Columbia Law Review*) (indicating 144,046,000 workers employed in fourth quarter of 2008). Multiplying this number by one percent and by the wage discount of \$10,000 yields the estimated size of this contribution. This estimate is probably conservative. According to the Census Bureau's American Community Survey, about ten percent of the workforce has a graduate or professional degree. See U.S. Census Bureau, 2004 American Community Survey: Selected Social Characteristics (2004), available at http://factfinder.census.gov/servlet/ADPTable?_bm=y&-state=adp&-qr_name=ACS_2004_EST_G00_DP2&-ds_name=ACS_2004_EST_G00_-redoLog=true&-caller=geoselect&-geo_id=01000US&-format=&-lang=en (on file with the *Columbia Law Review*) (estimating 18,381,134 people with graduate or professional degree). This suggests that more than one percent of the American workforce may be willing to take a wage cut in line with that found in the MBA survey.

159. In our usage, a “green” product may help social causes other than the environment.

examples. According to one independent market analyst group, about ten percent of all new product introductions are green products.¹⁶⁰ Another survey finds that about thirty percent of consumers consider a firm's "sense of social responsibility" as a key factor in purchasing decisions.¹⁶¹

These products are nothing more than a bundle of two separate goods—a regular good and a donation to charity or to improve social welfare. To see this, consider fair trade coffee. Starbucks pays coffee farmers significantly more than the going rate for coffee beans and charges a premium price.¹⁶² The premium is just a "donation" to help the farmers, administered through Starbucks instead of a nonprofit charity.

The U.S. market for fair trade products was roughly \$391 million in 2005 and is growing dramatically—estimates suggest that it will exceed \$15 billion by 2012.¹⁶³ This is just a fraction of the overall value of goods and services provided by firms that bundle some sort of social welfare improvement with a regular product. Some of these products explicitly bundle donations. Examples include the (RED) campaign in which various firms committed to donate a portion of sales to treat AIDS in Africa.¹⁶⁴ Other products implicitly bundle a donation. Examples include "green" household products and paper products made from recycled materials. One estimate puts the value of all goods and services embedding a commitment to sustainability at around \$200 billion.¹⁶⁵

There are innumerable examples of recently introduced and widely popular products embedding social action. The Toyota Prius is a prominent example. The Prius is marketed as being good for the environment because of reduced fuel consumption over a given distance (as are all

160. Kotchen, *supra* note 95, at 817 (citing 1999 study by Marketing Intelligence Service).

161. See Dale Kurschner, 5 Ways Ethical Business Creates Fatter Profits, *Bus. Ethics*, Mar.–Apr. 1996, at 20, 21 (citing 1995 study by Cone Communications and Roper Starch Worldwide).

162. See *supra* notes 78, 137–140 and accompanying text.

163. Memorandum from Michael J. Hiscox, Harvard Univ., to the Conference on Europe and the Mgmt. of Globalization at Princeton Univ., Fair Trade as an Approach to Managing Globalization 7 (Feb. 23, 2007), available at http://www.princeton.edu/~smeunier/Hiscox_Fair%20Trade%20and%20Globalization.pdf (on file with the *Columbia Law Review*).

164. The (RED) campaign has contributed over \$59 million to combat disease in Africa. See Nixon, *supra* note 108. The lack of transparency about how the funds are raised, how much is spent on advertising, and so on has raised concerns about the campaign. See *id.*

165. See *Lifestyles of Health and Sustainability (LOHAS)*, LOHAS Background, at <http://www.lohas.com/about.html> (last visited Jan. 17, 2009) (on file with the *Columbia Law Review*) (describing "estimated marketplace for goods and services focused on health, the environment, and sustainable living"). Some of the goods and services included in this estimate, for example dietary supplements, see *id.*, may not meet our definition of "green." Certainly a large portion do, however.

hybrids, for that matter). Toyota has sold some 500,000 Prius vehicles in the United States over the past few years, each at a premium of about \$4,000 to \$7,000 over a comparably equipped vehicle.¹⁶⁶ Some part of this premium is the equivalent of a donation to an environmental charity. Admittedly there is also a purely private consumption part: the expected cost savings in terms of fuel. If we assume about half of the premium is environmentally motivated (a conservative assessment perhaps, given the way these cars are marketed), Prius owners alone have donated the equivalent of about \$1.5 billion to environmental sustainability.

B. *Nonprofit Sector*

The inputs to nonprofit charities are more familiar than the inputs to corporate social action. Individuals hoping to do good and feel good about doing it can opt to donate cash or time to nonprofit charities committed to doing good. There are therefore three inputs to the nonprofit sector—donations, volunteering, and working—and they amount to nearly \$500 billion per year.

1. *Donations.* — Total cash contributions to nonprofits were about \$295 billion in 2006.¹⁶⁷ About seventy-five percent of this amount comprised direct donations by individuals, with the remainder coming from bequests and donations by corporations and foundations.¹⁶⁸ Total contributions increased roughly sixty-five percent between 1996 and 2006.¹⁶⁹ As we discuss *supra* Part V.B, cash donations to charities are tax-privileged, since they can be deducted from total taxable income.

2. *Volunteering.* — The estimates of volunteer time vary. According to one study, about 60 million Americans volunteered for nonprofit charities in the period from September 2007 to September 2008.¹⁷⁰ The average volunteer donated about 50 hours,¹⁷¹ meaning a total of over 3 billion hours of free labor was provided to nonprofit charities. Each of these hours was unpaid, meaning the difference between the wage rate for the task performed and zero (the amount paid for the work) was a donation to social good. According to the nonprofit trade group

166. Jerry Garrett, *Pick of the Litter: Which Hybrids Are Hot? Which Are Not?*, San Diego Union-Trib., May 20, 2006, at L2 (describing how Toyota is considering adding Prius premium to other hybrids); Press Release, Toyota, *supra* note 88 (indicating 591,600 vehicles sold in North America).

167. Press Release, Giving USA Found., U.S. Charitable Giving Reaches \$295.02 Billion in 2006, at 1 (June 25, 2007), available at http://www.givingusa.org/press_releases/gusa/20070625.pdf (on file with the *Columbia Law Review*).

168. This breaks down as about \$23 billion in bequests, \$13 billion in corporate donations, and \$37 billion in donations from foundations (individual and corporate). *Id.* at 2.

169. PowerPoint: The Annual Report on Philanthropy for the Year 2006 (Giving USA Found. 2007), available at <https://www.givinginstitute.org/secure/> [hereinafter Giving USA 2007] (on file with the *Columbia Law Review*).

170. Bureau of Labor Statistics, *Volunteering*, *supra* note 157, at 1.

171. *Id.* at 3 (indicating median of fifty-two volunteer hours per person).

Independent Sector, the estimated average value of this time (and thus donation) is about \$19 per hour.¹⁷² The total value of this input is therefore over \$60 billion. Another estimate puts the number of volunteer hours at over 15 billion, implying a donation of almost \$240 billion.¹⁷³ Splitting the difference between these figures, we estimate the value of volunteer hours last year to be \$150 billion.

3. *Working.* — Just as individuals may work at a discount for for-profit firms committed to doing good, employees of nonprofits may demand less in wages because they work for nonprofit charities. We are not aware of any attempts to quantify the size of this donation to social good. To estimate it, we would want to know the difference between what nonprofit employees earn and what individuals are paid to perform similar tasks for employers not committed to doing good. If we assume the average employee of a nonprofit is doing about what the average employee of a for-profit is doing, we can then estimate the wage discount by comparing the difference between the total percent of the labor force employed by nonprofits and the total percent of wages paid to nonprofit employees. According to one source, about 7.2% of all employees in the economy worked at nonprofit charities, while they earned only 6.6% of all wages.¹⁷⁴ If this amount represents a wage discount, as opposed to lower human capital of these employees,¹⁷⁵ it amounts to an additional \$34 billion contribution by nonprofit employees.¹⁷⁶

172. Value of Volunteer Time, *supra* note 156.

173. Indep. Sector, Giving and Volunteering in the United States: Key Findings (2001), available at <http://www.independentsector.org/PDFs/GV01keyfind.pdf> (on file with the *Columbia Law Review*) (reporting 15.5 billion hours or about 9 million full-time equivalents in 2001 survey).

174. Lester M. Salamon & S. Wojciech Sokolowski, Employment in America's Charities: A Profile, 26 Nonprofit Emp. Bull. 1, 3 (2006), available at <http://www.jhu.edu/ccss/research/pdf/Employment%20in%20Americas%20Charities.pdf> (on file with the *Columbia Law Review*).

175. The nonprofit literature reveals mixed results on the question whether the lower wages were the result of a wage discount or lower human capital. See, e.g., Femida Handy & Eliakim Katz, The Wage Differential Between Nonprofit Institutions and Corporations: Getting More by Paying Less?, 26 J. Comp. Econ. 246, 259 (1998) (finding that lower wages are "adopted by nonprofits to generate positive self-selection among [their] managerial staff"); Anne E. Preston, The Nonprofit Worker in a For-Profit World, 7 J. Lab. Econ. 438, 447 (1989) (controlling for human capital and other work variables, finding a negative wage differential of twenty percent). There is some evidence suggesting nonprofit employees earn higher wages than for-profit counterparts in some fields. See Salamon & Sokolowski, *supra* note 174, at 10 (finding for-profits pay about seven percent more on average, but that they pay less in medical and educational fields). As Salamon and Sokolowski point out, there are potentially confounding variables, and simply not enough data to reach a definitive conclusion. See *id.* There may be explanations for the wage difference in these fields having to do with the particular characteristics of nonprofits in industries like healthcare.

176. This is derived by multiplying the average wages—about \$39,000 in 2007, see Soc. Sec. Admin., Wage Statistics for 2007, at <http://www.ssa.gov/cgi-bin/netcomp.cgi?year=2007> (last visited Jan. 23, 2009) (on file with the *Columbia Law Review*) (indicating average U.S. wage for 2007 of \$38,760.95)—by the labor force in the U.S.—146 million in

C. Government Sector

The government receives “contributions” in the form of taxes from individuals to improve social welfare by investing in public goods. These contributions are not entirely voluntary, since paying taxes is mandatory and subject to financial and criminal penalties. In 2006, the federal government collected about \$2.4 trillion in taxes,¹⁷⁷ which is consistent with a historical trend of about nineteen percent of gross domestic product.¹⁷⁸ In addition, state and local governments collected about \$1.2 trillion in taxes.¹⁷⁹ Not all of these taxes are paid by individuals, and not all of those paid by individuals are dedicated to providing social welfare in the sense of delivering altruism to individuals.

Social insurance (that is, Social Security, Medicare, etc.) might be viewed as government sale of insurance to consumers, and could thus be considered a private good of sorts. State and local taxes are also more likely to pay for private goods, since these receipts are more likely to go to things like fixing local potholes and maintaining local courts that enforce contracts. So, roughly, if we take out social insurance and state and local taxes, the government collects about \$1.6 trillion in taxes.¹⁸⁰ Not all of these tax revenues are used to produce public goods or deliver altruism, be it warm glow or pure altruism. For example, the United States Post Office is certainly not a public good, while the money spent to defend the country and to clean up the environment certainly are. The best we can do is treat this figure of \$1.6 trillion as an upper bound on the amount the government collects to do charitable social good.

Working for the government may also be a contribution to the public good, just as working for a firm or a nonprofit can be. The government at all levels employed about 19 million people in 2006, or about thirteen percent of all workers in the United States.¹⁸¹ Most of these gov-

2007, see News Release, Bureau of Labor Statistics, U.S. Dep’t of Labor, The Employment Situation: December 2007, at 2 tbl.A (Jan. 4, 2008), available at http://www.bls.gov/news.release/archives/empst_01042008.pdf (on file with the *Columbia Law Review*)—by the wage differential of 0.6%, which equals about \$34 billion.

177. Tax Policy Ctr., Historical Federal Receipt and Outlay Summary 1940–2013 (2008), at <http://www.taxpolicycenter.org/taxfacts/displayafact.cfm?Docid=200> (on file with the *Columbia Law Review*).

178. The U.S. GDP was about \$13 trillion in 2006. Bureau of Econ. Analysis, National Economic Accounts: Current-Dollar and “Real” GDP, at <http://www.bea.gov/national/index.htm#gdp> (last updated Sept. 26, 2008) (on file with the *Columbia Law Review*).

179. U.S. Census Bureau, Table 1: National Totals of State and Local Tax Revenue, by Type of Tax, at <http://www.census.gov/govs/www/qtax.html> (last modified Sept. 26, 2008) (on file with the *Columbia Law Review*) (listing national totals of state and local government revenue by quarter).

180. Internal Revenue Serv., Data Book 2007, at 3 tbl.1 (Mar. 2008), available at <http://www.irs.gov/pub/irs-soi/07databk.pdf> (on file with the *Columbia Law Review*) (indicating approximately \$2.4 trillion in 2007 net tax collections and \$840 billion in employment taxes).

181. Data360, Number of Government Employees, at http://www.data360.org/dsg.aspx?Data_Set_Group_Id=228 (last visited Jan. 17, 2009) (on file with the *Columbia Law*

ernment workers were employed at the state and local levels (eighty-seven percent of the total).¹⁸² These workers are somewhat less likely to be involved in creating pure public goods. The wage discount question is complicated with government workers. Some government workers undoubtedly take a wage discount to work for the government, but the tradeoffs may be for more leisure, better benefits, more responsibility, more job security, and so on.¹⁸³ In addition, it is not at all clear that the overall government wages are in fact less over a range of jobs. Comparing the national average wage and the government wages for eleven randomly chosen job classifications, the government salaries are on average four percent higher.¹⁸⁴ This is certainly not conclusive evidence, but this, coupled with the arguably greater benefits that come with government jobs, suggests that the altruism contribution component of government employment is small or nonexistent.

II. OUTPUTS

Nonprofit charities act directly to do social good, whether it is through feeding the poor in soup kitchens or buying land to set aside from development. We can measure outputs by looking at inputs, since contributions are typically earmarked in a general sense—for example, donations to one's church are expected to be used for "religious" purposes. The largest component of nonprofit activity by dollar volume of charitable contributions is religious activity (36%), which likely includes a variety of social services.¹⁸⁵ Education (15%), human services (10%), and health (9%) are the next-largest activities of nonprofit charities.¹⁸⁶ The government does direct social activities too, but it also acts as an intermediary and issues grants to nonprofits (about \$95 billion in

Review); see also U.S. Census Bureau, Federal Government Civilian Employment by Function: December 2006 (2006), at <http://ftp2.census.gov/govs/apes/06fedfun.pdf> (on file with the *Columbia Law Review*) (indicating 2,720,688 federal employees in December 2006); U.S. Census Bureau, 2006 Public Employment Data: State and Local Governments (2006), at <http://ftp2.census.gov/govs/apes/06stlus.txt> (on file with the *Columbia Law Review*) (indicating 16,135,699 full-time equivalent employees).

182. See Dennis Cauchon, Public Jobs See Pay Gains; Government Benefits Outpace Private Sector, *USA Today*, Feb. 1, 2008, at 1A (noting there are about three million federal workers and twenty million state and local government workers).

183. For a comparison of the benefits, see Laura Morsch, Government Salaries vs. Private Sector Salaries, *CNN.com*, Oct. 11, 2006, at <http://www.cnn.com/2006/US/Careers/10/11/cb.government/index.html> (on file with the *Columbia Law Review*) (describing benefits of government employment over private sector employment).

184. See *id.* (noting average wages for attorney, financial manager, economist, microbiologist, architect, accountant, librarian, human resources manager, nurse, tax specialist, and medical technician).

185. Urban Inst., *The Nonprofit Sector in Brief: Facts and Figures from the Nonprofit Almanac 2007*, at 5 tbl.4 (2007), available at http://www.urban.org/UploadedPDF/311373_nonprofit_sector.pdf (on file with the *Columbia Law Review*).

186. *Id.*

2006)¹⁸⁷ to help them do good. Judging from the magnitude of inputs, then, the total amount of altruism-generating activity from nonprofits and government likely exceeds \$2 trillion.¹⁸⁸

The traditional accounts of corporate philanthropy focus on corporate donations to activities by nonprofit charities (about \$18 billion in 2006).¹⁸⁹ The largest component is about \$13 billion in direct gifts from firms to nonprofit charities.¹⁹⁰ The deductibility of direct gifts is capped at ten percent of taxable income,¹⁹¹ and the average firm has given between one and two percent of pretax profits over the past two decades.¹⁹² Some firms, like Patagonia and Whole Foods, have pledged up to ten percent of profits to charity, but these are rare acts of generosity.¹⁹³

The rest of corporate giving is about \$4 billion in grants from corporate foundations.¹⁹⁴ Five of the biggest ten foundations were established by operating companies, most of which are pharmaceutical companies.¹⁹⁵ Firms also donate billions of dollars to charities and other nonprofits in the form of employee matching grants.¹⁹⁶ In absolute terms, firm direct

187. *Id.* at 3–4, tbl.3, fig.2 (noting that total revenue of reporting charities was \$1.05 trillion in 2004 and 9% of this revenue came from government grants).

188. See *id.* (reporting total revenue of reporting charities of \$1.05 trillion); *supra* note 180 and accompanying text (estimating taxes serving public goods to be under \$1.6 trillion).

189. Direct corporate giving to charities was about \$13 billion, see Press Release, Giving USA Found., *supra* note 167, at 2, and corporate giving through foundations was about \$4 billion, see Found. Ctr., *Foundation Growth and Giving Estimates, 2007 Edition 4* (2007), available at <http://foundationcenter.org/gainknowledge/research/pdf/fgge07.pdf> (on file with the *Columbia Law Review*).

190. Press Release, Giving USA Found., *supra* note 167, at 2.

191. See 26 U.S.C. § 170(b)(2) (2006) (“In the case of a corporation . . . [t]he total deductions under subsection (a) for any taxable year . . . shall not exceed 10 percent of the taxpayer’s taxable income.”). Legislation proposed in 2003 would have raised this to twenty percent gradually over the next several years. See Indep. Sector, *Charitable Giving Act of 2003* (H.R. 7), at <http://www.independentsector.org/programs/gr/hr7.html> (last updated Dec. 9, 2004) (on file with the *Columbia Law Review*) (explaining proposed increases in cap on corporate charitable deductions).

192. See Giving USA 2007, *supra* note 169.

193. See Patagonia, *Environmental Grants Program: Growing the Grassroots*, at <http://www.patagonia.com/usa/patagonia.go?assetid=2927> (last visited Jan. 17, 2009) (on file with the *Columbia Law Review*) (pledging “at least 1% of sales or 10% of pre-tax profits—whichever is more”); Whole Foods Mkt., *Community Giving*, at <http://www.wholefoodsmarket.com/values/giving.php> (last visited Jan. 17, 2009) (on file with the *Columbia Law Review*) (“Overall, our community giving well exceeds 5% of our total net profits each year.”).

194. See Found. Ctr., *supra* note 189, at 4 (“Estimated giving by corporate foundations grew 6 percent in 2006 to a record \$4.2 billion.”).

195. See *id.* at 6 (listing top twenty-five corporate foundations).

196. While we know of no data on the extent of employee matching programs, nearly every major company has a very generous matching program. See, e.g., Gen. Elec. Found., *GE Foundation Matching Gifts Program 2*, at http://www.ge.com/files_foundation/pdf/ge_foundation_matching_gifts_overview.pdf (last visited Jan. 17, 2009) (on file with the *Columbia Law Review*) (matching up to \$50,000 per employee per year).

giving has increased threefold since 1970, but as a proportion of profits has remained steady at about 1.5%.¹⁹⁷

Focusing only on corporate donations, however, dramatically underestimates the amount of good works, and therefore altruism, firms deliver. To see this, consider the most obvious firm activity creating public goods: overcompliance with environmental laws. Countless high-profile companies have committed to lower emissions of carbon dioxide at the cost of several billion dollars,¹⁹⁸ and experts estimate these costs are at least \$30 billion and rising dramatically.¹⁹⁹ These costs are charitable contributions, since they are voluntary expenditures intended to improve social welfare in ways not obviously linked with shareholder value. After all, every dollar spent on reducing greenhouse gas emissions is intended to improve the global environment instead of earning the most possible money for shareholders. A number of other corporate activities, including overcompliance with health, safety, and product regulatory rules, also fall within this category.²⁰⁰

197. See Giving USA 2007, *supra* note 169.

198. See, e.g., John Carey & Sarah R. Shapiro, Global Warming, *Bus. Week*, Aug. 16, 2004, at 60 (describing DuPont's sixty-five percent reduction in emissions since 1990, and plan to cut by additional two-thirds); Michelle Conlin, From Plunderer to Protector, *Bus. Week*, Jul. 19, 2004, at 60 (describing documentary on commercial carpet tile manufacturer Interface's plan to phase out ozone-depleting chemicals); Roger Cowe, Improving Quality of Life and Profits, *Fin. Times*, Aug. 13, 2002, at 12 (noting Proctor & Gamble's commitment to reduce carbon emissions by two-thirds); Marc Gunther, Tree Huggers, Soy Lovers, and Profits, *Fortune*, June 23, 2003, at 98 (noting that FedEx converted its entire fleet to hybrid vehicles and UPS converted 1,800 vehicles to alternative fuels); A. Revkin, U.S. Is Pressuring Industries to Cut Greenhouse Gases, *N.Y. Times*, Jan. 20, 2003, at A1 (describing Motorola's pursuit of "voluntary caps and trading schemes in which companies that aggressively cut their emissions acquire pollution credits they can sell to other companies" and Alcoa's plan to cut emissions by twenty-five percent); Gen. Elec. Energy, GE Joins Group Urging Mandatory CO₂ Reduction, at http://www.gepower.com/corporate/ecomagination_home/ge_position_uscap.htm (last visited Jan. 17, 2009) (on file with the *Columbia Law Review*) (describing General Electric's commitment to reduction of greenhouse emissions).

199. Telephone interview with Jonathan Adler, *supra* note 17; Telephone interview with Michael Vandenberg, *supra* note 17.

200. See, e.g., Vandenberg, *supra* note 84, at 2034 (showing that private contracts are frequently replacing or supplementing traditional government oversight on environmental and other regulatory compliance issues).

APPENDIX B

The following discussion derives the tax rates reported in Table 1.

I. THE NONPROFIT SECTOR

The dominant method of purchasing altruism from charities is to donate cash or other real assets.²⁰¹ If a taxpayer already itemizes deductions, she can deduct her donation from her taxable income. This deduction (called an “above-the-line” deduction) amounts to a discount on the price of altruism equal to her personal income tax rate. If the taxpayer does not itemize her deductions, however, the donation (called a below-the-line deduction) will not actually reduce her taxable income and the donation is not at all subsidized.²⁰² Since only about thirty-five percent of taxpayers itemize their deductions,²⁰³ most donors do not actually enjoy any tax break for their donations. Itemizers are, however, responsible for a disproportionate share of donations, because they have higher incomes and thus likely demand more altruism,²⁰⁴ and because higher income earners pay a higher average tax rate and thus enjoy a larger price discount on donations.

A second method of contributing to nonprofit charities is to donate one’s time, also known as volunteering. The tax treatment of volunteering depends on what an individual would have done had she not volunteered her time. For hourly workers who could choose to work extra hours and earn additional wages, volunteering reduces taxable income by the amount of the forgone wages. In that case, volunteering essentially offers the taxpayer an above-the-line deduction—that is, a discount on the price of altruism equal to the volunteer’s personal income tax rate. For salaried workers or those who would choose leisure instead of volun-

201. We exclude volunteering and appreciated securities. These receive separate tax treatment and are discussed below.

202. Donations are taxed differently if they are made at the time of an individual’s death. Roughly ten percent of contributions to charity are bequests. Cong. Budget Office, *The Estate Tax and Charitable Giving* 1–2 (2004). Like the treatment of donations (other than stock or time) during an individual’s lifetime, donations at death are deductible from the taxable estate. Because the estate tax schedule differs from the personal income tax schedule (for example, the estate tax schedule currently maxes out with a forty-five percent tax bracket, see Internal Revenue Serv., *Instructions for Form 706*, at 4 tbl.A (2008), available at <http://www.irs.gov/pub/irs-pdf/i706.pdf> (on file with the *Columbia Law Review*), while the personal income tax schedule maxes out with a thirty-five percent tax bracket), donations at death afford a different price discount.

203. See Internal Revenue Serv., *SOI Tax Stats—Individual Income Tax Returns Publication 1304 (Complete Report)* tbls.1.2 & 2.1 (tax year 2005), available at <http://www.irs.gov/taxstats/indtaxstats/article/0,,id=134951,00.html> (on file with the *Columbia Law Review*) (reporting that 47,755,427 of 134,372,678 filers itemized deductions).

204. Itemizers account for 80.5% of all income tax revenue raised in 2005. See *id.* (reporting that itemizers paid \$753 billion of the total \$935 billion in income tax paid). Altruism is likely a “normal good,” that is, one for which demand increases as incomes rise.

teering, no income is forgone by volunteering, and therefore there is no favorable tax treatment or discount on the price of altruism.

A third method of purchasing altruism from the nonprofit sector is to donate appreciated stock or other investment property. A taxpayer who donates, for example, stock that has increased in value since its purchase does not have to pay any capital gains tax on the appreciation and can deduct the full value of the stock from her income taxes as if it were a cash donation.²⁰⁵ This donation is more favorable than the donation of cash, regardless of whether or not a taxpayer itemizes deductions. If the taxpayer does not itemize deductions, then the appreciated stock donation reduces capital gains taxes. If the taxpayer does itemize deductions, then the appreciated stock donations afford both the deduction of a cash donation plus the capital gains tax break.

The final method of contributing to nonprofits is to work as a paid employee of a nonprofit. Working can be thought of as a donation if the nonprofit pays a lower-than-market wage for equivalent services. The size of the donation is the difference between the market wage and the nonprofit wage. Because this forgone income lowers taxable income by the same amount, it generates a tax break equal to an above-the-line deduction in the amount of the forgone income. The result is, again, a price discount on altruism equal to the earner's personal income tax rate.

II. THE FOR-PROFIT SECTOR

The tax treatment of altruism purchased from for-profit firms is much more complex. One way for the taxpayer to obtain altruism through firms is to own shares in a company that either donates to nonprofits or directly engages in social action. Either way, the purchase of altruism is deductible to the company as a charitable donation²⁰⁶ or as a business expense.²⁰⁷ This gives the company a discount on the price of altruism equal to its corporate income tax rate.²⁰⁸ Whether or not the company pays firm-level income taxes,²⁰⁹ the company's social action

205. See *supra* note 123. If the stock had not risen in value since the taxpayer purchased it, there would be no capital gains tax to begin with and the stock donation would be treated just like an equivalent cash donation.

206. Corporate donations have the additional benefit that they can be depreciated immediately. These donations, however, are capped at ten percent of net income. See 26 U.S.C. § 170(b)(2) (2006). Few corporations hit this threshold, since the average donation is about 1.1% of corporate profits. See *Giving USA 2007*, *supra* note 169.

207. See 26 U.S.C. § 162 (establishing deduction for business expenses).

208. See, e.g., Linda Sugin, *Theories of the Corporation and the Tax Treatment of Corporate Philanthropy*, 41 N.Y.L. Sch. L. Rev. 835, 856–57 (1997) (noting that tax code may privilege corporate giving over shareholder giving, and that this may bias donations in favor of managers' preferences).

209. If the company is taxed at the firm level, this discount is equal to the corporate tax rate, which is nominally thirty-five percent for the largest companies. If the company is able to opt out of Subchapter C, then its income is not taxed at the firm level and it enjoys no discount on the price of altruism. Compare 26 U.S.C. § 11 (defining tax rate on C

reduces its net income and thus the shareholder's investment earnings. If corporate income is distributed as dividends, the shareholder will see a reduction in her taxable income. Thus corporate social action affords the shareholder a further tax break equal to an above-the-line deduction. If the investment earnings were accrued as capital gains, the shareholder would see a reduction in her taxes in proportion to the capital gains tax rate rather than the personal income tax rate. Because the capital gains rate is smaller than the labor rate for most investors,²¹⁰ accruing investment returns as capital gains affords a smaller discount for altruism than distributing those returns as dividends.

With so many moving parts (firm-level taxation, distribution of investment earnings), it is hard to describe succinctly the tax treatment of purchasing altruism through shareholding and corporate social action. Because the investment income most readily available to taxpayers involves companies that pay corporate income taxes²¹¹ and because most shareholders accrue investment earning via capital gains, we shall use these features to simplify our characterization of the tax treatment of shareholder altruism. In this baseline case, buying altruism from a firm triggers two levels of discount, first by the corporate tax rate and then by the capital gains rate. Because the discounts are sequentially applied, the full discount is roughly $t_c(1-t_{cg}) + t_{cg}$ where t_c is the effective corporate income tax rate and t_{cg} is the capital gains tax rate. By contrast, a cash donation to a nonprofit yields a discount of t_p equal to the effective personal income tax rate. If investment earnings were distributed as dividends, which are taxed at the personal income tax rate, it is clear the tax treatment of shareholder altruism would be more favorable than the tax treatment of individual donations to nonprofits. But since most investment gains are accrued as capital gains, it is possible that individuals with high personal incomes (for whom $t_p > t_c(1-t_{cg}) + t_{cg}$) might find donations to nonprofits less costly than donations via stock.

A second way for individuals to obtain altruism from for-profit companies is to purchase green goods. Although this is a rapidly growing portion of total purchases of altruism,²¹² it is highly disfavored by the tax code relative to other forms of giving. Individuals buying green goods,

corporations), with *id.* § 1361 (defining subchapter S corporations not subject to normal corporate taxes).

210. The capital gains tax rate is scheduled to rise in 2011 to ten percent from the current rate of zero for taxpayers in the fifteen percent personal income tax bracket, and to rise to twenty percent for taxpayers in higher-income brackets. See Jobs and Growth Tax Relief and Reconciliation Act of 2003, Pub. L. No. 108-27, §§ 301, 303, 117 Stat. 752, 758, 764 (temporarily reducing capital gains tax rates); Tax Increase Prevention and Reconciliation Act of 2005, Pub. L. No. 109-222, § 102, 120 Stat. 345, 346 (2006) (to be codified at 26 U.S.C. § 1) (postponing amendment to capital gains section of tax code until 2011).

211. Any company with publicly traded shares is taxed according to subchapter C, that is, pays corporate income taxes. See 26 U.S.C. § 11.

212. See *supra* notes 160–161 and accompanying text.

such as fair trade coffee, do so with after-tax income, and therefore get no tax benefit under current tax rules. Consider two ways in which an individual can help poor coffee farmers: (1) buy regular coffee and make a cash donation to a nonprofit charity that gives aid to the farmers, or (2) buy fair trade coffee that bundles a donation with the purchase of regular coffee. All else being equal, the first way is more efficient for the individual because the cash donation can be deducted from income, while the donation part of a fair trade bundle cannot. If an individual chooses option (1), this leaves the individual able to donate more to charity or consume more other goods or leisure per dollar earned than the individual buying green goods.²¹³

The final way that individuals can purchase altruism through a for-profit outlet is to work at a company that does good deeds. Altruism purchased in this manner typically generates an above-the-line deduction regardless of whether the employee is an itemizer. For instance, if the company has a program that matches employees' donations to a nonprofit charity, a profit-maximizing company lowers the wage it offers by the amount of the donation it makes on the employee's behalf.²¹⁴ This reduction in wage lowers the employee's taxable income. Alternatively, if the company has a program that pays employees to do volunteer work, also called *pro bono* work, the profit-maximizing company presumably lowers the wage it pays on nonvolunteer hours to account for the lost productivity during the volunteer hours. Again the result is a reduction in the employee's wage. In this regard, altruism purchased through employment at a for-profit company is treated as volunteer work that reduces the hours worked by an individual paid on an hourly basis.²¹⁵

213. Certain green goods, such as hybrid cars, are the target of government subsidies, but this treatment is the exception rather than the rule.

214. The company is indifferent between donating a matching amount or paying the employee more. Either way the expense is deductible, assuming the ten percent cap on corporate charitable donations does not bind.

215. There are two caveats to this description of the tax treatment of altruistic employees. First, if the company's shareholders do not dock the altruistic employee's wage by their matching donation or paid volunteer hours, they in effect decide to pay for altruism themselves. In that case it is the shareholder that is paying for part of the employee's purchase and it is the shareholder that receives a tax break. Second, it is difficult for a company to adjust the wage of each individual employee based upon the employee's participation in a work-sponsored charitable program. In general it can only adjust the wages of all employees based on the participation of the average employee. This generates a sort of moral hazard where each individual employee has an incentive to donate or volunteer more than average because there is no cost in terms of lost wage. Indeed, there is a subsidy equal to the after-tax wage rate. To limit this moral hazard, companies have to cap the number amount of matching donations or the amount of *pro bono* work they permit.

