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INTRODUCTION

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In this panel we will be examining the not-for-profit sector and corporate philanthropy from the perspectives of tax policy and tax theory. The four papers being presented by this panel address a wide range of issues. Professor Sugin's paper examines the inconsistencies in corporate theory and tax theory that are revealed by the allowance of a tax deduction for corporate philanthropy. Professor Hill's paper discusses the use of exempt organizations as conduits between corporations and political candidates for public office, and the election and tax law issues raised by these conduit relationships. Professor Knauer's paper confronts the policy implications of tax incentives and other forms of governmental intervention used to direct corporate philanthropy and otherwise promote the substitution of the not-for-profit sector for government when it is politically expedient. Our final panelist, Professor Shaviro, will lead us back to first principles by critiquing the models of economic theory that are seen as justifying the tax exemptions enjoyed by the not-for-profit sector.

Panel One presented some very interesting quantitative data concerning corporate philanthropy and offered us an important historical perspective of the issue. With those presentations in mind, our panelists will shift the focus to the tax policy choices that surround corporate philanthropy.

From its earliest days, the federal income tax has supported philanthropic endeavors. Initially, this was seen in the tax relief given to organizations that were religious, philanthropic, or charitable in their nature. The notion of tax relief for religious and charitable organizations is ancient. It precedes our country's income tax by thousands of years. In the ancient world, religious institutions enjoyed exemptions from tax, apparently based upon the idea that their property belonged to the gods.[1] A tax exemption for religious and charitable organizations appeared in the 1894 version of the federal tax law, which was also the first major effort for a permanent income tax.[2] The 1894 income tax did not survive

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1. *See, e.g.*, JAMES J. FISHMAN & STEPHEN SCHWARZ, NONPROFIT ORGANIZATIONS 307 (1995).

2. *See* Tariff Act of 1894, ch. 349, § 32, 28 Stat. 509, 556 (1894).

Constitutional scrutiny,[3] but when the income tax was revived, the concept of a tax exemption for this sort of activity was restored as well. It has been with us ever since.[4]

The idea of a tax deduction for donors who make gifts or contributions to religious and philanthropic institutions was not part of the first U.S. income tax statutes.[5] Indeed, this deduction was proposed but rejected in the 1913 debate.[6] But with the increase in the tax rates in 1917, which accompanied the entry of the United States into World War I, the charitable contribution deduction for individuals became part of the Internal Revenue Code.[7] Given the rather narrow tax base that existed at that time, Congress apparently was swayed by the argument that even taxpayers who were wealthy and usually philanthropic might respond to the sharp rate increases by reducing charitable contributions.[8] Although the tax rate increases of 1917 proved to be temporary, the charitable contribution deduction for individual donors was a permanent change that has remained an important feature of the Code through many tax reforms.

As the speakers in Panel One have told us, we have not actually had a tax deduction for corporate charitable contributions for all that long. The corporate charitable deduction first became part of the Code in 1935 and at that time was limited to five percent of taxable income.[9] Interestingly, this provision did not start out as a part of the New Deal agenda. The successful passage of the provision is attributed to the combined efforts of business and fund-raisers.[10] The provision did not change until the Reagan administration amendments of 1981. At that point, the five percent allowance was doubled to ten percent.[11]

Earlier this morning David Morgan presented a very interesting and important distributional analysis of the corporations and industries that claim a tax deduction for corporate philanthropy. He also provided us with updated estimates of the aggregate numbers involved. In 1993, it is

3. *See* Pollock v. Farmers' Loan and Trust Co., 158 U.S. 601 (1895).

4. *See, e.g.*, FISHMAN & SCHWARZ, *supra* note 1, at 308.

5. *See* Tariff Act of 1894, ch. 349, 28 Stat. 509 (1894).

6. *See* 50 CONG. REC. 1259 (1913).

7. *See* War Revenue Act of 1917, ch. 63, § 1201(2), 40 Stat. 300, 330 (1917).

8. *See* 55 CONG. REC. 6728 (1917).

9. *See* Revenue Act of 1935, ch. 29, § 102, 49 Stat. 1014, 1016 (1935).

10. *See* Nancy J. Knauer, *The Paradox of Corporate Giving: Tax Expenditures, the Nature of the Corporation and the Social Construction of Charity*, 44 DEPAUL L. REV. 1, 19 (1994).

11. *See* Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, § 263; 95 Stat. 172, 264 (amending I.R.C. § 170(b)).

estimated that corporations contributed $5.92 billion to charities.[12] David Morgan told us this morning that in 1995 corporations claimed upwards of $8 billion in charitable deductions. These numbers reflect corporate charitable philanthropy in a narrow sense, encompassing only the contribution of money, goods, or other property by corporations that have current profits. These figures do not include either contributions from corporate private foundations or a broader range of corporate philanthropy in the form of employee released time and other contributions of services. However, $8 billion is a large number even without these other contributions factored in, and it represents a level of economic activity and arguably, a tax subsidy, that deserves serious attention.

The first panel that we heard today gave us a sense of the scope and size of the not-for-profit sector in the United States. It is without question a sizable part of our economy and a large force in our national life. The estimates that Dr. Morgan provided are a useful reference point in thinking about the size and scope of the not-for-profit sector in the United States. As he pointed out, the $8 billion estimate of corporate philanthropy represents a little less than six percent of the total charitable contributions for that year, which his numbers placed at upwards of $140 billion. Estimates of the number of charitable organizations in the United States range from 1.5 million to more than 6 million, depending on whether you count local chapters as separate organizations.[13] Another way to think about the size of the not-for-profit sector is to consider its role in the labor market. In 1990, not-for-profit organizations employed more than ten percent of the work force in the United States.[14] Few other industrial groupings account for this large a slice of the labor market. From many points of view the not-for-profit sector, funded by tax deductible contributions from individuals and corporate philanthropy, is quite visible and quite large.

One of the more interesting things about the not-for-profit sector in the United States has been the dramatic increase in its size over the last thirty years. Our first panel this morning developed this history for us. An obvious question then is: why have we seen this dramatic increase in the number of not-for-profit organizations? Our panelists here and later today will be contributing to our understanding of the issue in the context of the United States. However, it has become increasingly clear that this phenomenon is being seen in many other parts of the world as well. One commentator, Lester Salamon, has called the growth of these not-for-profit

12. *See* FISHMAN & SCHWARZ, *supra* note 1, at 15.

13. *See id.* at 14.

14. *See id.*

and non-governmental organizations a "global associational revolution."[15]

Professor Salamon suggests that this global associational revolution may prove to be as significant for the latter part of the twentieth century as the nation state was in the latter part of the nineteenth century.[16] History will judge the ultimate influence of the not-for-profit organizations, but we can take Professor Salamon's prediction as an indication of the scope and potential of this sector to reshape economies, the role of government, and the body politic itself. All over the world we can see an increase in the numbers of people who form voluntary associations and an increase in the financial resources of these associations.[17]

I believe this growing sector has put an enormous amount of pressure on our traditional ideas about what philanthropy is and what role tax law plays in it. Whether you want to think about the tax benefits conferred upon the not-for-profit sector as an indirect subsidy—a tax expenditure arising from the tax exemptions for organizations and tax deductions for donors—or if you just want to think about the tax benefits in terms of the lost revenue; it's there, it's big, and it's pressing. In this context of growth and change and associational revolutions, it is entirely appropriate to go back and re-examine the tax policies that underlie and support philanthropy and the not-for-profit sector.

15. Lester M. Salamon, *The Rise of the Not-for-Profit Sector*, FOREIGN AFF., July-Aug. 1994, at 109.

16. *See id.*

17. *See id.*