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REINVENTING GOVERNMENT: THE PROMISE OF INSTITUTIONAL CHOICE AND GOVERNMENT CREATED CHARITABLE ORGANIZATIONS

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REINVENTING GOVERNMENT: THE PROMISE OF INSTITUTIONAL CHOICE AND GOVERNMENT CREATED CHARITABLE ORGANIZATIONS

NANCY J. KNAUER*

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I. INTRODUCTION

The recent efforts to “reinvent” the federal government focus on ways to decrease spending, enhance efficiency, and attract nontax revenue from the private sector.¹ The recommendations of the National Performance Review, headed by Vice President Al Gore,² include straight-forward measures to eliminate wasteful government spending and minimize the proverbial bureaucratic red tape.³ Its more creative recommendations urge government to consider a variety of alternative vehicles for the delivery of social and economic services, such as government corporations and joint ventures with private sector interests.⁴ These hybrid entities, often

1. The term “reinventing government” was coined by David Osborne and Ted Gaebler. Their 1992 book brought the notion of entrepreneurial government to the general public. See DAVID OSBORNE & TED GAEBLER, *REINVENTING GOVERNMENT: HOW THE ENTREPRENEURIAL SPIRIT IS TRANSFORMING THE PUBLIC SECTOR* (1992). Osborne delivered a speech in 1990 before the Democratic Leadership Council titled “Reinventing Government.” The Clinton administration embraced the term, and it became the hallmark of the National Performance Review. See e.g., AL GORE, *COMMON SENSE GOVERNMENT: WORKS BETTER AND COSTS LESS* (1995) [hereinafter *COMMON SENSE*]; AL GORE, *CREATING A GOVERNMENT THAT WORKS BETTER & COSTS LESS: THE REPORT OF THE NATIONAL PERFORMANCE REVIEW* (1993) [hereinafter *PERFORMANCE REVIEW*]. For a discussion of the movement to reinvent government see *infra* notes 35-45 and accompanying text.

2. The National Performance Review was created by President Clinton on March 3, 1993. Its goal was to “create a government that works better and costs less.” *COMMON SENSE*, *supra* note 1. For a discussion of the National Performance Review see *infra* note 41.

3. For a discussion of the recommendations of the National Performance Review see *infra* note 41.

4. See *PERFORMANCE REVIEW*, *supra* note 1 at 85-86 (stating that, where appropriate, government should “create market dynamics”). After a brief description of government corporations, the second National Performance Review Report concludes: “To get the best value for the taxpayer’s dollar, the federal government needs to use these options more often.” *Id.* at 86.

referred to as public/private partnerships, promise increased efficiency and access to nontax revenue.⁵

This Article focuses on a subset of these private/public partnerships—those that involve relationships between the public sector and charitable organizations,⁶ specifically “government created charitable organizations” (GCCOs).⁷ In several recent high-profile cases, the federal government⁸ elected to use a GCCO to develop and implement certain

5. The term “nontax revenue” differentiates between federal revenue raised through the exercise of the taxing power and all other federal revenue. It also includes revenue from private sources that is used to fund the provision of social services on a federal level, regardless of whether the federal government is directly responsible for the delivery of those services. Nontax revenue can take the form of fees for services, investment capital, and charitable contributions.

6. The terms “charitable organization” and “charities” refer to those organizations classified under § 501(c)(3) of the Internal Revenue Code as exempt from federal income tax on income related to their exempt function and qualified to receive tax-deductible contributions under § 170 of the Internal Revenue Code. I.R.C. §§ 501(c)(3), 170 (1994). These terms do not refer to a larger group of tax-exempt organizations, namely those qualifying for exemption from income tax under other subsections of § 501. With a few minor exceptions, these organizations are not qualified to receive tax-deductible contributions. Moreover, the term does not refer to an even larger group of organizations, namely those organized on a nonprofit basis under relevant state incorporation laws. These organizations may or may not be exempt from federal income tax. For an explanation of the common characteristics of charitable organizations see Nancy J. Knauer, *How Charitable Organizations Influence Federal Tax Policy: “Rent-seeking” Charities or Virtuous Politicians?*, 1996 WIS. L. REV. 971.

7. A GCCO is an autonomous or semiautonomous charitable entity used to develop and/or implement federal social policy and attract nontax revenue, principally in the form of corporate charitable contributions. For a discussion of GCCOs see *infra* text accompanying notes 46-68. A GCCO may be organized formally as a government corporation. For a discussion of government corporations see *infra* text accompanying notes 52-68. This Article does not address the host of constitutional concerns implicated by the creation of government corporations or GCCOs. Existing somewhere between the public and the private sector, the character, powers, and accountability of such entities remain fertile grounds for comment. For a comprehensive treatment of government corporations see A. Michael Froomkin, *Reinventing the Government Corporation*, 1995 U. ILL. L. REV. 543.

8. Although the insights of the Article focus solely on the activities of the federal government, many are equally applicable to state or local government. In fact, many of the examples from Osborne and Gaebler’s blueprint for reinventing government are innovations undertaken on the state or local level. See OSBORNE & GAEBLER, *supra* note 1, at 16-20 (discussing “the emergence of entrepreneurial government”).

social policy initiatives.⁹ George Bush, the "Education President"¹⁰ championed the creation of the New American Schools Development Corporation (NASDC) as the cornerstone of his education policy.¹¹ Designed as an independent charitable organization, the NASDC's proposed budget relied on corporate contributions.¹² This allowed the federal government to claim that it could fund its new educational program without increasing the federal bureaucracy, raising taxes, or cutting other budget items.¹³

To create a government that "works better" (i.e., is more efficient) and "costs less" (i.e., maximizes access to nontax revenue),¹⁴ reinvention literature encourages policy makers to weigh the relative benefits and burdens associated with locating a particular program in the public, charitable, or private sectors.¹⁵ For example, the charitable sector is considered to perform best where "consumer trust" is important, as in the case of medical care and child care.¹⁶ The private sector, on the other

9. It is common practice for the federal government to enter into contractual arrangements with charitable organizations under which the organizations agree to provide certain social services. The federal government also reimburses individuals for services purchased from charitable organizations, such as hospitals. The innovative feature of "reinventing government" is that GCCOs are designed to seek alternative funding sources. "Reinventing government" urges the use of charitable organizations to attract nontax revenue in the form of principally corporate charitable contributions. See *infra* text accompanying notes 48-50 (discussing the use of charitable organizations to provide social services under contract with the federal government).

10. For a discussion of President Bush's self-identification as the "Education President" see *infra* notes 126-29 and accompanying text.

11. See *infra* notes 126-43 and accompanying text (discussing NASDC). The level of government involvement, accountability, and control depends on the GCCO. In a more independent model, such as NASDC, the government involvement is limited to that of catalyst and fundraiser. The highly-structured government corporation, however, offers the "flexibility of [a] private compan[y] while remaining under government supervision and control." COMMON SENSE, *supra* note 1, at 139 (discussing the need to consider the creation of more government corporations).

12. See *infra* notes 134-36 and accompanying text (describing NASDC funding).

13. See *infra* notes 41-44 and accompanying text.

14. See COMMON SENSE, *supra* note 1 (discussing the goal of the National Performance Review).

15. See OSBORNE & GAEBLER, *supra* note 1, at 43-45 (discussing the merits of choosing between the "public sector, private sector, or third sector").

16. See *id.* at 46. This is a restatement of the "contract failure" theory of nonprofit organizations. This theory proposes that where asymmetric information regarding the quality of the service provided exists, consumers feel more comfortable dealing with organizations that will not exploit the information imbalance to maximize profits. See *infra* text accompanying notes 283-300 (explaining the contract failure theory).

hand, is considered superior where innovation is desired.¹⁷ Both offer access to various forms of nontax revenue.¹⁸ However, in the case of the charitable sector, the emphasis is on corporate contributions.¹⁹

The comparative institutional analysis advocated by reinventing government is very promising.²⁰ It recognizes that the institution chosen to deliver the program influences and, to some degree, ultimately determines the success of the program.²¹ Unfortunately, the level of analysis is compromised by an obsession with immediate efficiency gains and access to nontax revenue. This ignores the effect of GCCOs on corporations and the charitable community, and leaves little room for considerations of equity and social justice.²² Thus, the political exigencies of reinventing government threaten to reduce its comparative institutional analysis to nothing more than a short-term cost management tool.

17. See *id.* at 46 (noting that the private sector "tends to be better at performing economic tasks, innovating, replicating successful experiments, adapting to rapid change, abandoning unsuccessful or obsolete activities, and performing complex or technical tasks.").

18. The different types of nontax revenue available indicate that the locus of an activity may be constrained by its ability to attract one form of nontax revenue, but not the other. For example, equity investment is available in the private sector, but not the charitable sector.

19. The interest was perhaps motivated by the billions of dollars corporations contribute each year to charitable organizations. For example, in 1995 U.S. corporations transferred \$7.4 billion to charitable organizations. See AAFRC TRUST FOR PHILANTHROPY, *GIVING USA 1996*, at 88-89 (Ann E. Kaplan ed., 1996) [hereinafter *GIVING USA 1996*]. This does not include the \$10.4 billion that foundations contributed to charity. Some of these foundations are related to for-profit corporations (e.g., the Ford Foundation). *Id.* at 72-73. For a discussion of the difference between corporate giving and corporate foundation giving 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, at 13 n.61 (1994). For a discussion of corporate charitable giving as a potential source of nontax revenue see *infra* text accompanying notes 69-74.

20. However, the level of analysis is necessarily constrained by the absence of a positive theory of the charitable sector, or even agreement as to where the charitable sector ends and the public and private sectors begin. See *infra* text accompanying notes 266-73.

21. This is consistent with a renewed interest in legal scholarship with institutional choice. See NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* (1994); Edward L. Rubin, *The New Legal Process, the Synthesis of Discourse, and the Microanalysis of Institutions*, 109 HARV. L. REV. 1393 (1996) (discussing the need for a new synthesis of legal discourse that takes into account social justice).

22. See Rubin, *supra* note 21, at 1429-33.

The attempt to quantify the effect of GCCOs on corporations and the charitable community underscores how little is known about the composition and actions of the charitable sector. GCCOs represent yet another instance where policy choices are based on largely unexamined assumptions concerning the nature of charitable organizations.²³ For example, significant tax subsidies rest on certain assumptions about the charitable community for which there is very little empirical support: such as charitable organizations deliver social services more efficiently than government, and they "lessen the burdens" of government in a meaningful way.²⁴ Reinventing government uses these same assumptions to determine questions of institutional choice.

Although a comprehensive review of the charitable sector is long overdue, the scope of this article is much more modest. Part II discusses the movement to reinvent government and identifies GCCOs as a recommended form of service delivery.²⁵ Part III places GCCOs within the context of the federal government's interest in corporate contributions as a source of nontax revenue, beginning with the enactment of increased tax incentives for corporate giving during the Reagan administration.²⁶ Part IV examines some of the unintended consequences of the introduction of GCCOs,²⁷ including (i) the increased burden placed on certain corporations to provide funding for social services through nontax, albeit tax-subsidized, dollars;²⁸ (ii) the corresponding opportunity for corporate donors to influence the development and implementation of federal social policy;²⁹ (iii) the introduction of the federal government as a competitor

23. This lack of empirical information continues despite generous and costly tax subsidies for charitable activities and a growing reliance by the federal government on charitable organizations to provide social services.

24. Other related assumptions are that tax subsidies are necessary to encourage individual volunteer and other charitable efforts, and that tax subsidies are a cost-effective way to support such programs. See Knauer, *supra* note 6. Existing economic models of the charitable community are of limited help because they posit the creation of charitable organizations in the absence of tax subsidies. These models are then used to justify the continuation of tax subsidies.

25. See *infra* text accompanying notes 46-68.

26. See *infra* text accompanying notes 69-109 (describing the evolution of the government's interest in corporate contributions as a source of nontax revenue).

27. As with any innovation, the development of GCCOs may yield certain unintended consequences. See EDWARD TENNER, *WHY THINGS BITE BACK: TECHNOLOGY AND THE REVENGE OF UNINTENDED CONSEQUENCES* (1996) (explaining the "revenge effects" of innovations in the scientific field).

28. See *infra* text accompanying notes 191-202.

29. See *infra* text accompanying notes 203-21.

for charitable contributions;³⁰ and (iv) the resulting de facto creation of a preferred class of charitable organizations.³¹ It also offers a public choice analysis of the corporate funding of GCCOs.³² Part V discusses the definitional and descriptive shortcomings of any comparative institutional analysis involving the charitable sector,³³ and revisits the accepted economic models of the charitable organization in light of the emergence of the government as a charitable entrepreneur.³⁴

II. REINVENTING GOVERNMENT AND INSTITUTIONAL CHOICE

A. *Reinventing Government*

The central challenge of reinventing government is to improve the delivery of government services without increasing spending.³⁵ The blueprint for reinventing government is David Osborne and Ted Gaebler's 1992 book, *Reinventing Government: How the Entrepreneurial Spirit Is Transforming the Public Sector*,³⁶ which presents entrepreneurial government as an alternative to the choice between big government or no government.³⁷ An entrepreneurial government tries to reconcile the fact that although it is not politically feasible to raise taxes,³⁸ taxpayers want better (not fewer) government services and continued deficit reduction.³⁹ It does this through the introduction of a series of cost-cutting and performance enhancing reforms, as well as measures to maximize sources

30. See *infra* text accompanying notes 222-34.

31. See *infra* text accompanying notes 235-43.

32. See *infra* text accompanying notes 244-65.

33. See *infra* text accompanying notes 266-73.

34. See *infra* text accompanying notes 274-300.

35. This differs from the New Federalism espoused by the Reagan administration, which looked to the public sector in lieu of government. "Reinventing government," therefore, reflects an ideological view concerning the appropriate role of the federal government in the provision of social services. See *infra* text accompanying notes 35-45.

36. See OSBORNE & GAEBLER, *supra* note 1. The paperback edition bears the following endorsement from President Clinton. "Should be read by every elected official in America. This book gives us the blueprint."

37. See *id.* at xix (defining "entrepreneurial government" as a new model of efficient and effective government).

38. See Daniel Shaviro, *Beyond Public Choice and Public Interest: A Study of the Legislative Process as Illustrated by Tax Legislation in the 1980's*, 139 U. PA. L. REV. 1 (1990).

39. See OSBORNE & GAEBLER, *supra* note 1, at 22 (explaining that taxpayers "do not want less education, fewer roads, less health care, [but] better education, better roads and better health care").

of nontax revenue.⁴⁰ Practiced to some degree by the Bush administration, it was the Clinton administration that embraced the notion of an entrepreneurial government and set out to create a government that "works better on less money."⁴¹

A key component of entrepreneurial government is a willingness to consider alternative forms of service delivery.⁴² When designing (or redesigning) a government program, policy makers consider delivery models other than the traditional model of government-funded public employees.⁴³ They evaluate the relative benefits associated with conducting the program directly, privatizing the service, or constructing

40. *See id.* at 22-24.

41. On March 3, 1993, President Clinton announced the creation of the National Performance Review with the ambitious goal to create a government that "works better on less money." Remarks Announcing the National Performance Review, 1 PUB. PAPERS 233, 235 (Mar. 3, 1993). Initially staffed by 250 career civil servants and a wide variety of consultants, including David Osborne, the first report of the National Performance Review made 384 recommendations for action designed to save \$108 billion. The organization issued this report six months after the organization's creation. The report was titled: CREATING A GOVERNMENT THAT WORKS BETTER AND COSTS LESS.

In an effort to make government more accessible, the National Performance Review maintains an extensive Internet web site. The address of the site is <http://www.npr.gov>. The web site contains all of the reports, related executive orders, and associated news stories. *See A Brief History of the National Performance Review* <http://www.npr.gov/homepage/2366.html>.

After its first report, the National Performance Review downsized to a staff of approximately 50. It has since issued two additional reports. The Clinton administration now refers to the efforts of the National Performance Review as Phase I and Phase II. Phase I focused primarily on improving customer service and eliminating wasteful spending, and introduced such reforms as new procurement procedures, introduction of quality management, and negotiated rulemaking. President Clinton announced Phase II on December 19, 1994, and directed Vice President Gore to focus on regulation reform, government partnerships, and alternative delivery forms. These alternative forms include franchising certain government functions to privately-owned firms, forming partnerships with state and local governments, and the forming government corporations.

42. Osborne and Gaebler describe 36 different alternative delivery formats, four of which relate directly to GCCOs. They are "public/private partnerships," "quasi-public corporations," catalyzing efforts of nongovernmental organizations, and providing seed money to charitable initiatives. OSBORNE & GAEBLER, *supra* note 1, at 31 (listing 36 alternatives).

43. Osborne and Gaebler provide extensive instructions on how to evaluate different forms of service delivery. *See id.* at 31 (listing 36 alternatives to "service delivery by public employees"). With regard to public employees, GCCO employees are not covered by civil service protections.

some form of partnership with the private or charitable sectors.⁴⁴ In addition to different strengths and weaknesses, all three sectors offer a variety of sources of nontax revenue, but only the charitable sector offers the possibility of attracting charitable contributions.⁴⁵

B. Government Created Charitable Organizations (GCCOs)

The public/charity partnerships advocated by "Reinventing Government" offer a twofold benefit; increased efficiency from use of a charitable form,⁴⁶ and access to nontax revenue, principally in the form of corporate contributions.⁴⁷ Standing alone, there is absolutely nothing new about suggesting that the federal government use charitable organizations for the delivery of certain social services.⁴⁸ For some time, the federal government has relied on charitable organizations to provide social services either under government contracts or through various reimbursement schemes, such as Medicare.⁴⁹ Under this contract model

44. See *id.* at 47 (discussing the merits of privatization). Osborne and Gaebler state that this differs from choosing between a government run program and a privately run program. See *id.*

45. All three sectors potentially offer access to fees for services. In recent years the government has instituted user fees. It is curious that the government would turn to the charitable sector as a source of nontax revenue, given that one justification for tax subsidies is that charities are unable to attract funding.

46. The presumed superior efficiency of the charitable form continues despite the lack of empirical support. See *infra* text accompanying notes 266-73.

47. For a description of the level of corporate contributions to charity see *supra* note 19.

48. See generally Lester M. Salamon, *Partners in Public Service: The Scope and Theory of Government-Nonprofit Relations*, in *THE NONPROFIT SECTOR: A RESEARCH HANDBOOK* 99 (Walter W. Powell ed., 1987) (documenting "an extensive pattern of government reliance on private nonprofit groups to carry out public purposes"). Abramson and Salamon term this phenomenon "nonprofit federalism" where government relies on charitable organizations to provide social services. ALAN J. ABRAMSON & LESTER M. SALAMON, *THE NONPROFIT SECTOR AND THE NEW FEDERAL BUDGET* 56-57 (1986).

49. See Salamon, *supra* note 48, at 99. The practice of relying on charitable organizations to deliver federally funded social services became prevalent during the "Great Society" programs of the 1960s. Historian Peter Hall points to this period as the beginning of a time of tremendous growth in the charitable sector. See PETER DOBKIN HALL, *INVENTING THE NONPROFIT SECTOR AND OTHER ESSAYS ON PHILANTHROPY, VOLUNTARISM, AND NONPROFIT ORGANIZATIONS* (1992). Hall explains that "[t]he voluntary sector, rather than constituting an alternative to the welfare state, was largely its creation: between 30 percent and 60 percent of its revenues came from direct or indirect government subsidies." *Id.* at 7.

of a public/charity partnership, the service is federally funded because the federal government pays the charity to provide the service, or it reimburses the individual who purchases the service.⁵⁰ A GCCO, however, is an autonomous or semiautonomous charitable entity used to develop and/or implement federal social policy and attract nontax revenue, principally in the form of corporate charitable contributions.⁵¹ A GCCO is only partially funded by federal spending.

It is important to distinguish a subset of GCCOs, specifically, the government charitable corporations that belong to a larger group of organizations known as government corporations. As a matter of institutional choice, government corporations are not a new phenomenon.⁵² Ever since *McCulloch v. Maryland*,⁵³ the federal government has created government corporations to provide insurance and financial services,⁵⁴ produce electric power,⁵⁵ and run passenger rail service.⁵⁶ Particularly in

50. Although the federal government pays for the services, it benefits from using the pre-existing organization. The government does not have to duplicate the same type of delivery system that is already in place. The goal of "contracting out" is to hold down spending and increase efficiency. Criticisms of the contract model are many: the charitable provider faces mountains of paperwork, the services delivered are not sufficiently monitored, the federal funds impinge on the charity's autonomy and distort its charitable activities. See, e.g., Salamon, *supra* note 48, at 103-06. The contract model early reliance did not directly rely on corporate funding, although contributions to the charities ultimately offset the expenses associated with service delivery such as administrative expenses and other overhead.

51. A GCCO is funded at least in part by private funds. GCCOs typically rely on initial start-up funding from Congress. See, e.g., *infra* text accompanying notes 63-66. In Great Britain, the acronym QUANGO refers to Quasi Autonomous Nongovernmental Organization. Denis P. Doyle, *The Role of Private Sector Management in Public Education*, 76 PHI DELTA KAPPAN 128, 130 (1994) (describing the difference between NASDC and QUANGOs). QUANGOs are more equivalent to government charitable corporations discussed *infra* text accompanying notes 52-66.

52. For a discussion of institutional choice see KOMESAR, *supra* note 21.

53. 17 U.S. (4 Wheat.) 316 (1819) (upholding the creation of the Second Bank of the United States as within the Necessary and Proper clause of the Constitution).

54. Many government corporations provide financial services, such as the Federal Crop Insurance Corporation and the Commodity Credit Corporation. See 15 U.S.C. § 714 (1994). See *infra* text accompanying notes 64-66.

55. The Tennessee Valley Authority is a government corporation. See 16 U.S.C. §§ 831-31d(l) (1994).

56. The National Railroad Passenger Corporation (Amtrak) is a government corporation. Its purpose is to "[p]rovide intercity and commuter rail passenger transportation in the United States." U.S. GENERAL ACCOUNTING OFFICE, GOVERNMENT CORPORATIONS: PROFILES OF EXISTING GOVERNMENT CORPORATIONS 7 (1995) [hereinafter 1995 GAO REPORT].

times of fiscal restraint, when demands for less federal government are strongest, these separate organizations offer an opportunity to conduct certain policy initiatives "off budget."⁵⁷ They further appeal to reinvention advocates because they embody the notion of entrepreneurial government by "gaining the flexibility of private companies while remaining under government supervision and control."⁵⁸

Although reinventing government has sparked renewed interest in government corporations,⁵⁹ the General Accounting Office (GAO) is not even clear as to how many government corporations exist. The problem stems from the lack of a "comprehensive descriptive definition of or criteria" for government corporations.⁶⁰ A 1995 GAO Report found twenty-two self-reported government corporations and five other entities that are generally considered to be government corporations. This differed considerably from a 1988 GAO Report prepared for the House Committee on Government Operations which identified forty-seven government corporations.⁶¹ In the absence of a uniform definition, the GAO defines a government corporation as a "federally chartered entit[y] created to serve a public function of a predominantly business nature."⁶²

57. See Froomkin, *supra* note 7, at 547 (suggesting government corporations "exist as accounting devices to hide the true size of the budget deficit").

58. PERFORMANCE REVIEW, *supra* note 1, at 138-39 (noting the need to reduce the "monopolistic control many government agencies have over their customers" by reinventing some programs as government corporations). The National Performance Review describes the possible control mechanism as follows: "[g]overnment exerts control through a combination of limited operational and management controls, (board member, owner of preferential stock, budget review authority, appropriations, etc.) and regulatory control. NATIONAL PERFORMANCE REVIEW AND OMB, PRIVATIZATION RESOURCE GUIDE AND STATUS REPORT 2 (1995) [hereinafter PRIVATIZATION REPORT].

59. The GAO completed a report in 1995 profiling seven proposed government corporations. U.S. GENERAL ACCOUNTING OFFICE, GOVERNMENT CORPORATIONS - PROFILES OF RECENT PROPOSALS (1995). This report included the proposal by the National Performance Review to privatize part of the Federal Aviation Administration. Only one of the proposals called for the creation of a charitable government corporation. The Presidio Trust would operate and manage the historic Presidio properties in California, currently the site of the Sixth Army Headquarters.

60. 1995 GAO REPORT, *supra* note 56, at 2 (explaining the need for a uniform definition).

61. U.S. GENERAL ACCOUNTING OFFICE, PROFILES ON EXISTING GOVERNMENT CORPORATIONS (1989).

62. 1995 GAO REPORT, *supra* note 56, at 1. This definition is based on the characteristics of a government corporation identified by President Truman in his 1948 budget message. In addition, the Government Corporation Control Act lists wholly owned and mixed ownership government corporations. 31 U.S.C. §§ 9101-10 (1994). The list, however, is not exhaustive. See Froomkin, *supra* note 7, at 549-52.

Typically, government corporations rely on a core amount of federal funding. They then supplement, or in the current lexicon, "leverage," this amount with other forms of nontax revenue, including fees for services, debt, equity capital, and charitable contributions. Many government corporations are organized on a for-profit basis and depend on investment capital⁶³ and some government corporations depend on private giving.⁶⁴ The type of nontax revenue raised is a function of the organization's purpose. For example, organizations that provide economic services, such as financial lending, tend to be organized on a for-profit basis to attract investment capital.⁶⁵ Organizations that provide social or cultural services, such as the Corporation for Public Broadcasting, are organized on a nonprofit basis and are qualified to receive tax-deductible contributions.⁶⁶

Charitable government corporations, such as the Corporation for National Service, exist as the most highly-structured and closely-controlled of the GCCOs.⁶⁷ In the case of the Corporation for National Service,

63. Indeed, the definition used by the GAO includes a requirement that the government function performed by the government corporation is of a "business nature." See 1995 GAO REPORT, *supra* note 56. The distinction between the for-profit and the charitable government corporation can get very complicated. For example, the for-profit Federal National Mortgage Association has a charitable private foundation. See *Fannie Mae Fund Gets \$350-Million*, CHRON. OF PHILANTHROPY, Jan. 11, 1996, at 14.

64. For a discussion of President Clinton's fundraising efforts on behalf of the Corporation for National Service see *infra* note 146. Virtually everyone is familiar with the ubiquitous fund drives of the Corporation for Public Broadcasting.

65. A list of the 22 self-reported government corporations contains numerous organizations offering financial and insurance services. In addition to the ones mentioned above, these organizations include: Community Development Financial Institutions Fund, Export-Import Bank of the United States, Federal Deposit Insurance Corporation, Government National Mortgage Association, National Credit Union Administration Central Liquidity Facility, Overseas Private Investment Corporation, Pension Benefit Guaranty Corporation, and The Financing Corporation (the financing vehicle for the FDIC). See 1995 GAO REPORT, *supra* note 56, at 7-8.

66. The status of the Corporation for Public Broadcasting remains unclear. The GAO considers it a government corporation, but the Corporation for Public Broadcasting self-reports as a "private nonprofit corporation." 1995 GAO REPORT, *supra* note 56, at 21.

67. It is important to remember that a government corporation is only one variation of a GCCO and not the most common. The National Performance Review report on privatization makes this point very clear. It provides the following explanation:

Setting up a government corporation, however, is only one of several privatization-like approaches which can be taken. In fact, some have said that "delegating a government function to a government corporation is not the same as privatizing it." The point to be made here is that the focus of NPR Phase II is to enable the government to more effectively focus on those things which it should and can do, and to put incentives in place to cause these things to

many members of Congress object to it precisely because of its structure. Recent budget debates targeted the Corporation for National Service for termination as an example of wasteful "big government." Some members of Congress used the Points of Light Foundation, a GCCO that is not a government corporation, as an example of how government efforts to encourage volunteerism should be organized.⁶⁸ Accordingly, the perceived advantage of greater government control is actually a distinct disadvantage in certain quarters.

III. RAISING CORPORATE NONTAX REVENUE: THREE MODELS

The contemporary interest in corporate giving as a potential funding source for social services predates the movement to reinvent government.⁶⁹ It began with President Reagan's 1981 Task Force on Private Initiatives,⁷⁰ and it continues today as a major component of President Clinton's Corporation for National Service.⁷¹ The reasons behind the preference for corporate contributions over individual contributions are not clearly articulated,⁷² but it may be the result of very pragmatic concerns. For example, it takes fewer resources to secure several large contributions from corporations than smaller gifts from many individuals.⁷³ Further, the

perform optimally. New and different types of partnerships continue to emerge to meet this challenge, including some that are not easily categorized.

See PRIVATIZATION REPORT, *supra* note 58, at 7-8.

68. The Points of Light Foundation was created pursuant to authorizing legislation. 42 U.S.C. § 12662(b) (1994).

69. Congress enacted the corporate charitable contribution deduction to encourage corporate giving in 1935. Revenue Act of 1935, Pub. L. No. 74-407, 49 Stat. 1014. For a brief discussion of the scope of the deduction see *infra* text accompanying notes 96-110. At that time, the federal government wanted to encourage corporate gifts to private charitable concerns, as opposed to government sponsored charities. See Knauer, *supra* note 19, at 15-19 (discussing the history of the federal government and corporate giving from World War I to the enactment of the deduction in 1935).

70. See *infra* text accompanying notes 80-91.

71. See *infra* text accompanying notes 144-61.

72. This may seem surprising given that contributions from individuals far surpass contributions from corporations both in amount and percentage of taxable income. In 1995, individuals gave approximately \$116.23 billion to charitable organizations, and corporations gave only \$7.4 billion. See GIVING USA 1996, *supra* note 19, at 54-55, 88-89.

73. The Conference Board reports that a "core group" of 233 companies gave a median amount of \$2,863,884. THE CONFERENCE BOARD, CORPORATE CONTRIBUTIONS, 1990, REPORT NO. 989, at 11. Later reports drop the median figure and instead report corporate contributions as a percentage of pretax income. See, e.g., THE CONFERENCE BOARD, CORPORATE CONTRIBUTIONS, 1994, REPORT NO. 1150-95-RR. 12 (reporting that

federal government may have more influence over the donative patterns of corporate taxpayers.⁷⁴

This section examines three different government approaches to attracting nontax corporate funding for the delivery of social services.⁷⁵ The Reagan administration sought to encourage contributions to private charity through tax incentives and urging the importance of corporate social responsibility.⁷⁶ The Bush administration saw a slightly more expanded role for government as a catalyst for certain charitable sector initiatives, such as the Points of Light Foundation⁷⁷ and NASDC.⁷⁸ The Clinton administration further expanded this role and created the ultimate hybrid entity—a charitable government corporation—to run the national service program.⁷⁹ In each case, the goal of attracting corporate contributions remains the same. It is the form and the degree of government control that varies.

companies give a median of 0.9% of pre-tax income to charity). The average total charitable contributions deduction for individual taxpayers with taxable income of \$75,000-99,999 is \$2,315. Jennifer Moore et al., *Small Drop in Gifts Shown in New Tax Study*, CHRON. OF PHILANTHROPY, June 27, 1996, at 35 (citing study by the Research Institute of America showing a slight drop in the average charitable contribution deduction claimed by individual taxpayers from 1993 to 1994). Only individual taxpayers who can "itemize" their deductions (i.e., aggregate of itemized deductions exceed the standard deduction) can claim a charitable contribution deduction.

74. This could be due to two reasons. The U.S. government might just be a particularly unsympathetic donee. In other words, individuals will just not contribute to the U.S. government. Even though this makes practical sense, it does not account for the \$20.7 million the U.S. government received in contributions for fiscal year ended September 30, 1994, mostly from individuals. See Charles A. Jaffe, *\$52 Million Down, Trillions to go as Many Chip in on US Debt*, BOSTON GLOBE, May 4, 1995, at 1 (noting that gifts are processed by the Bureau of Public Debt, Gift to Reduce Public Debt Department G. and contributions over \$5 receive an acknowledgment).

The alternative is that government simply has more leverage in persuading corporations to give. *Id.* (describing the gifts to reduce the national debt from the makers of Eskimo Pies). For a public choice analysis of government officials seeking to extract "rents" from corporate donors see *infra* text accompanying notes 244-65.

75. Each of the initiatives discussed below began with the Executive branch. The impetus for creation could just as easily have come from Congress.

76. See *infra* text accompanying notes 80-109.

77. See *infra* text accompanying notes 111-25.

78. See *infra* text accompanying notes 126-43.

79. See *infra* text accompanying notes 144-61.

A. *The New Federalism and Tax Incentives for Corporate Giving*

The budget policies of the Reagan administration sought to decrease the involvement of the federal government in the provision of social services.⁸⁰ This emerging conservative view of the federal government did not question the need for certain social services. Instead, it shifted the responsibility for the provision of such services to the private charitable sector,⁸¹ including the responsibility for raising the necessary funds from nontax revenue generated by private sector giving and other volunteer efforts.⁸² The reallocation was based on the belief that the charitable sector functions independently of, and more efficiently than, the federal government.⁸³ The federal government enacted tax cuts and tax incentives to increase corporate and individual giving⁸⁴ in order to fill the gap in resources caused by the budget reductions.⁸⁵ These incentives sought to do indirectly what the government would not undertake to do directly.⁸⁶

Leaving aside any questions of the superior efficiency of the charitable sector, the logic was flawed because it did not appreciate the degree to

80. The theory was that tax cuts would spur economic recovery. This in turn would reduce unemployment and thereby make taxpayers more able to contribute to private charity. The resulting increase in contributions would fill the gaps caused by the budget reductions. See HALL, *supra* note 49, at 89.

81. See Knauer, *supra* note 6, at 1062 (discussing the reallocation).

82. This view of the federal government also involved increasing the responsibility of state and local government.

83. See Salamon, *supra* note 48, at 110 (discussing the notion that the contract model was motivated by "concerns about efficiency and economy").

84. Osborne and Gaebler referred to this as the belief that tax cuts would "liberate" the charitable dollar. See OSBORNE & GAEBLER, *supra* note 1, at 45 (noting Reagan's belief that "by cutting public sector spending, we could liberate voluntary efforts from the oppressive arm of the government").

85. The extent to which private giving can fill the gap created by Federal spending cuts has received extensive coverage. See Sanford Cloud, Jr., *The Changing Role of Government and Its Impact on the Nonprofit and Business Sectors*, in THE CORPORATE CONTRIBUTIONS HANDBOOK: DEVOTING PRIVATE MEANS TO PUBLIC NEEDS 50, 55 (James P. Shannon ed., 1991); ABRAMSON & SALAMON, *supra* note 48, at 82-90 (concluding it is unlikely that private giving could make up for the short-fall).

86. A tax incentive represents a policy decision to subsidize certain economic activities through exclusions, deductions, or credits. The subsidy is indirect in the sense that it is administered through the tax code rather than paid directly to the intended beneficiary of the subsidy. Tax expenditure theory characterizes the exclusions, deductions, and credits driven by social and economic policy as the equivalent of direct government expenditures. It measures policy driven adjustments to the tax base as the amount of foregone federal revenue (i.e., the tax that would have been collected in the absence of the adjustment). See Knauer, *supra* note 6, at 1059-62.

which charitable organizations were dependent upon federal revenue in the form of government contracts, reimbursements, and direct grants.⁸⁷ The budget policies reduced spending and at the same time asked the charitable sector to do more.⁸⁸ The significant reduction in receipts from federal sources, however, jeopardized the ability of the sector to maintain its current load, let alone expand its services.⁸⁹

The emphasis on corporate contributions was evident in the nature of the tax incentives enacted to spur charitable giving. Early in his first term, President Reagan formed the Task Force on Private Sector Initiatives to study corporate philanthropy "in the hope of tapping the resources of the private sector to offset the effects of the revenue shortfall that would result from federal spending cuts."⁹⁰ The Task Force's only concrete recommendation was to raise the amount a corporation could claim as a charitable deduction in any given year.⁹¹ Congress seized on the idea of increased tax incentives for corporate giving and enacted a series of tax incentives to encourage contributions from private industry as part of the Economic Recovery Tax Act of 1981 (ERTA).⁹² Congress did not provide

87. Indeed, in the wake of the rhetoric designed to increase private contributions, it is easy to lose sight of the fact that private giving only represents a small percentage of the total revenues of charitable organizations. See ABRAMSON & SALAMON, *supra* note 48, at 19.

88. Further, private giving would not have to provide a dollar for dollar match because private charity could deliver the services in a more efficient manner. President Reagan's first five proposed budgets reduced charitable funding (through programs other than Medicare and Medicaid) by 27% (or \$23 billion) over 1980 spending levels. See ABRAMSON & SALAMON, *supra* note 48, at 68. The budget cuts disproportionately affected community development organizations and social service organization, which experienced a 44% and 40% decrease over 1980 levels, respectively. See *id.* at 27.

89. See ABRAMSON & SALAMON, *supra* note 48, at 90. Today, charitable organizations routinely point to these initial budget reductions as the beginning of financial uncertainty within the sector.

90. Peter Dobkin Hall, *Business Giving and Social Investment in the U.S.*, in PHILANTHROPIC GIVING: STUDIES IN VARIETIES AND GOALS 221, 237 (Richard Magat ed., 1989).

91. *Id.* See *infra* text accompanying notes 94-102 (discussing the ceiling limitations).

The charitable deduction reduces the after-tax cost of the contribution by the donor's top marginal rate of tax. Thus, a taxpayer whose top marginal rate of tax was 40% would save \$40 in taxes that it would otherwise have had to pay without the \$100 deductible charitable contribution. (This assumes that the taxpayer is entitled to deduct the full amount in the year of the gift.) The taxpayer's after-tax cost of the contribution is \$60 (\$100 less the \$40 tax savings).

92. The Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, 95 Stat. 142 (codified as amended in numerous sections of titles 26, 42 and 45 of the United States Code). The legislative history accompanying the ERTA provisions expresses the desire

a comparable increase in tax incentives for individual charitable giving.⁹³

The most widely-touted tax incentive was the increase in the ceiling limitation on the corporate charitable contribution deduction from five percent to ten percent of the corporate taxpayer's "contribution base."⁹⁴ Section 170 of the Internal Revenue Code allows individuals and corporations an income tax deduction for amounts contributed "to or for the use of" qualified charitable organizations.⁹⁵ The amount of the

to increase corporate giving—a policy necessitated by the social spending cuts initiated by the Reagan Administration. For persuasive authority, Congress appealed to a corporation's sense of "social responsibility." Senator Byrd remarked, "I feel that the corporations of our nation have an obligation . . . to the various charities of our country, and I have felt for sometime that the 5 percent limitation was not a particularly reasonable one." *Id.* at 162. 127 CONG. REC. S8353 (daily ed. July 24, 1981). Senator Kennedy voiced similar concerns noting the need to "bring the corporations of this country into the process of meeting the needs of the people of our society." *Id.* at S8352.

93. The 1986 Tax Reform Act did not extend the expiring charitable contribution deduction for nonitemizers. Further, the reduction in tax rates increased the marginal cost of deductible charitable giving. See CHARLES T. CLOTFELTER, *FEDERAL TAX POLICY AND CHARITABLE GIVING* (1985) (explaining the relation between tax rates and the marginal cost of deductible charitable contributions).

94. See I.R.C. § 170(b)(2)(B) (1994).

95. All section references refer to the Internal Revenue Code of 1986, as amended, and the regulations thereunder. Section 170(a) allows the deduction generally for a "charitable contribution." Section 170(c) defines the term and provides, in pertinent part:

Charitable Contribution Defined. For purposes of this section, the term "charitable contribution" means a contribution or gift to or for the use of—

(2) A corporation, trust, or community chest, fund, or foundation—

(A) created or organized in the United States or in any possession thereof, or under the law of the United States, any State, or the District of Columbia, or any possession of the United States;

(B) organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of the activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals;

(C) no part of the net earnings of which inure to the benefit of any private shareholder or individual; and

(D) which is not disqualified from tax exemption under section 501(c)(3) by reason of attempting to influence legislation, and which does not participate in, or intervene in (including the publishing or distributing of statements), and political campaign on behalf of (or in opposition to) any candidate for public office.

I.R.C. § 170(c) (1994).

deduction that can be claimed in any one year is limited by a ceiling.⁹⁶ In the case of a corporate taxpayer, the ceiling is expressed as a percentage of the taxpayer's taxable income calculated without regard to any net operating loss or capital loss carryback.⁹⁷ The corporate taxpayer is entitled to carry forward any unused portion for five years, subject to the same ceiling limitation.⁹⁸ The pre-ERTA percentage amount was five percent,⁹⁹ which ERTA increased to ten percent. This doubled the amount a corporation could claim as a charitable contribution deduction in any given year,¹⁰⁰ subject to the same carryover rules for any unused amounts.¹⁰¹ In the end, the increase represented a case of wishful thinking because virtually no corporation sustained contributions that even approached the old five percent limit.¹⁰²

ERTA also added two tax incentives for certain corporate contributions of inventory and short-term capital gain property¹⁰³ in the case of scientific equipment to certain charitable educational organizations,¹⁰⁴ and corporate gifts to certain charitable organizations for

96. Section 170(b)(1) sets forth the limitation rules applicable to individuals. Section 170(b)(2) sets forth the limitation rules applicable to corporate taxpayers. *See* I.R.C. § 170(b)(1), (2) (1994).

97. *See* I.R.C. § 170(b)(2)(B) (1994).

98. *See* I.R.C. § 170(d)(2)(A) (1994).

99. The ceiling limitation had been five percent ever since the enactment of the corporate charitable deduction in 1935. *See* Knauer, *supra* note 19, at 19 n.93.

100. Implicit in the increase was the assumption that the charitable giving of at least some corporations approached the five percent limitation and that a corporation would not increase its giving beyond the five percent limit in the absence of an immediate tax deduction. This seems to have been wishful thinking on the part of Congress. Accordingly, the change in the ceiling levels affected the giving patterns of very few corporations. This seems to have been the case notwithstanding the directive of Richard Eells, an early proponent of corporate giving, that "companies with a program that will benefit the company while it benefits society should be encouraged to exceed the 5 per cent limit—to the extent of prudence." RICHARD EELLS, *CORPORATION GIVING IN A FREE SOCIETY* 141 (1956).

101. *See* I.R.C. § 170(d)(2)(A) (1994).

102. *Cf.* Susan Gray, *Dayton Hudson Corporation's 5% Philanthropy Tradition Turns 50*, *CHRON. OF PHILANTHROPY*, July 11, 1996, at 17 (reporting that the Dayton Hudson department store chain has donated five percent of its pre-tax income to charity since 1946).

103. *See* Knauer, *supra* note 19, at 33 n.183 (discussing the various contribution reduction and limitation rules).

104. *See* I.R.C. § 170(e)(3)(B) (1994).

use in "the care of the ill, needy or infants."¹⁰⁵ Generally, such pre-ERTA contributions were deductible only to the extent of the taxpayer's basis or cost in the property.¹⁰⁶ To illustrate, assume that a corporate taxpayer manufactures items at a cost of \$50 per item, but sells each one for \$100. Pre-ERTA law restricted the corporate taxpayer's charitable deduction to \$50 (its cost) for each item contributed, regardless of the nature of the property or its intended use.

The ERTA changes permit a corporate taxpayer, but not an individual,¹⁰⁷ to deduct cost plus one-half of the difference between cost and the sales price, provided the amount deducted does not exceed twice cost.¹⁰⁸ Thus, in the previous example the corporation would be entitled to deduct \$75 for each item donated (\$50 cost plus \$25 (one-half cost)).¹⁰⁹

B. *Government as Catalyst*

The Bush administration also concentrated on increasing voluntary contributions in order to hold down federal spending. Its efforts, however, went one step further than the indirect assistance offered by the ERTA tax incentives.¹¹⁰ President Bush saw a role for the federal government as a catalyst for private charitable initiatives. This view led to the formation of two important GCCOs: The Points of Light Foundation and NASDC.

105. See I.R.C. § 170(e)(3)(A) (1994). This new rule was designed to encourage specific types of gifts and to provide corporations with an alternate means of disposing excess inventory. See Knauer, *supra* note 19, at 78-79 (discussing the development of a secondary market in qualifying items where a third party acts as a clearinghouse matching qualified organizations with donors possessing excess inventory).

106. See I.R.C. § 170(e)(2) (1994).

107. The ERTA rules also do not apply to subchapter "S" corporations. See I.R.C. § 170(e)(3)(A) (1994).

108. See I.R.C. § 170(e)(3)(A).

109. To illustrate the "not to exceed twice cost limitation," assume that the item sells for \$100 but only costs the corporation \$20 to make. In such cases, section 170(e)(3) permits deductions not exceeding \$40 (twice cost) even though cost (\$20) plus one-half of the difference between the selling price (\$100) and cost (\$20) equals \$60.

110. Special tax incentives for charitable gifts figured prominently in Bob Dole's presidential campaign platform. His proposal would have given individual taxpayers a tax credit of up to \$500 for contributions to organizations that work to alleviate poverty. Jennifer Moore et al., *The Debate Over Dole's Tax Credit*, CHRON. OF PHILANTHROPY, June 13, 1996, at 9.

1. The Points of Light Foundation

The Points of Light Foundation takes its name from a reference in a speech where Bush likened individual volunteers to "A Thousand Points of Light."¹¹¹ The Foundation is an enabling organization, and its purpose is "to motivat[e] leaders to mobilize others for community service directed at solving the most serious social problems facing society today."¹¹² Like the ERTA tax incentives, it is designed to increase the level of private giving—not to provide any direct social services.

The Foundation is organized and operated as a separate charitable corporation. It is exempt from federal income tax under section 501(c)(3) and qualifies to receive tax-deductible contributions.¹¹³ The Foundation's literature stresses its "independent" character.¹¹⁴ Its *Annual Report* mentions former President Bush, but only at the end of a long list of acknowledgments.¹¹⁵

The choice to create the Foundation as an independent corporation was significant. Its activities could have easily been administered by the White

111. This was President Bush's acceptance speech at the 1988 Republican convention. See Bush's "Points of Light" Volunteerism Burns on With Clinton's Aid, N.Y. TIMES, Apr. 23, 1993, at A22. Each week during his presidency, Bush designated individuals as "Points of Light." The program was coordinated by the White House Office on National Service. The goal was to designate 1,000 "Points of Light" before the end of the administration. Bush continued to name individuals until the last week of his administration and managed to meet that goal with a few to spare. See *Points of Light 1,004 to 1,020*, CHRON. OF PHILANTHROPY, Jan. 26, 1993, at 12.

112. POINTS OF LIGHT FOUNDATION, ANNUAL REPORT 1992, at 3, 5, 13, 15, 17.

113. Although authorized by legislation, the Foundation is not a government corporation. Cf. 1995 GAO REPORT *supra* note 56 (illustrating examples of a government corporation).

114. The Foundation's 1995 ANNUAL REPORT describes the organization as follows:

The Points of Light Foundation is an independent 501(c)(3) organization that works with the support of caring Americans who believe that volunteerism can be a powerful antidote to the social problems that afflict neighborhoods and communities. The Foundation was established in 1990 as an outgrowth of the vision of many distinguished American leaders, among them the members of the Kean Commission, chaired by former New Jersey Governor Thomas Kean, a politically diverse group of prominent Americans from all sectors of society, the bipartisan members of Congress who crafted the Community and National Service Act, and President George Bush.

POINTS OF LIGHT FOUNDATION, 1995 ANNUAL REPORT, WORKING TOGETHER COMMITTED VOLUNTEERS CAN SOLVE PROBLEMS (inside cover).

115. See *id.*

House Office of National Service.¹¹⁶ Instead, the President chose to create (or caused to be created) a new independent organization for which he then secured start-up funding from Congress.¹¹⁷ Many of the activities of the White House Office of National Service reinforced those of the Foundation, most notably the Presidential "Points of Light"¹¹⁸ recognition program where each week the White House designated individuals who volunteered as a "Point of Light." These presidential activities, however, remained separate from those of the Foundation.¹¹⁹

One obvious result of this institutional choice is that the Foundation continues today, whereas the Presidential "Points of Light" recognition program for individuals does not.¹²⁰ A GCCO institutionalized the policy and insulated it from a partisan shift in policy. Thus, unlike many presidential policy initiatives, the Foundation has, at least in form if not substance, an identity or existence separate and distinct from the administration which created and supported it.¹²¹

Notwithstanding the Foundation's close association with President Bush, President Clinton incorporated the Foundation as part of his national

116. In the alternative, the President could have entrusted it to a Cabinet department or designated a representative in each department to be coordinated by the White House.

117. The initial funding was \$10 million. This was reduced to \$5 million for 1993 and subsequent years. OFFICE OF MANAGEMENT AND BUDGET, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 1994, at A-277. President Clinton's 1997 Budget earmarks \$6 million for the Points of Light Foundation. See *infra* note 228 (detailing the proposed budget).

118. For a description of the program see *supra* notes 111-12 and accompanying text.

119. The White House Office of National Service also published a book titled SELECTED PRESIDENTIAL STATEMENTS ON THE POINTS OF LIGHT INITIATIVE. See Michael Kinsley, *Charity Begins With Government*, TIME, Apr. 6, 1992, at 74 (discussing shortcomings in private charity as an answer to all social problems).

120. David Gergen, *Renewing the Call to Service*, U.S. NEWS & WORLD REP., May 20, 1996, at 76 (reporting that "[President] Bush told his successor, Bill Clinton, that he only had one request: the preservation and strengthening of Points of Light"). The Foundation intends to renew the program with some presidential involvement. It will not, however, be a presidential program. Jennifer Moore, *Points of Light Foundation to Revive Daily Awards Program*, CHRON. OF PHILANTHROPY, June 27, 1996, at 15; Jennifer Moore & Grant Williams, *Clinton vs. Dole on Non-Profit Issues*, CHRON. OF PHILANTHROPY, Aug. 8, 1996, at 45.

121. The Foundation made this quite clear when it launched a recruitment drive on behalf of President Clinton's inaugural ceremonies. A Foundation spokesperson noted that many of its board members supported President Clinton. Deborah Baldwin, *The Divorce Is Final*, COMMON CAUSE MAG., Spring 1993, at 5.

service initiative.¹²² President Clinton's 1997 proposed Budget seeks \$6 million in funding for the Foundation, slightly more than approved by Congress for fiscal year 1996.¹²³ The Foundation works closely with the Corporation for National Service.¹²⁴ Although a substantial amount of its revenue comes from nongovernmental sources, the Foundation remains dependent on congressional appropriations. Since 1993, it has received its federal funding in the form of grants from the Corporation for National Service.¹²⁵

2. The New American Schools Development Corporation

Soon after the creation of the Foundation, President Bush applied the same emphasis on private initiative to his education policy. In 1991, the "Education President"¹²⁶ unveiled his comprehensive plan to revitalize the education system in the United States, *America 2000*,¹²⁷ which had as its centerpiece the creation of the New American Schools Development Corporation ("NASDC").¹²⁸ President Bush characterized NASDC as a

122. See *Bush's "Points of Light" Volunteerism Burns On, With Clinton's Aid*, N.Y. TIMES, Apr. 23, 1993, at A22.

123. See *President Seeks Increases in Many Programs That Support Charities*, CHRON. OF PHILANTHROPY, Apr. 4, 1996, at 35.

124. For example, the Points of Light Foundation and the Corporation for National Service organized a presidential summit on volunteerism to take place in February 1997. *Presidential Summit to Spur Volunteerism*, CHRON. OF PHILANTHROPY, July 25, 1996, at 14.

125. Some argue that the Points of Light Foundation is in a more precarious situation with the Corporation for National Service than it was with the Commission. This is because the President of the National Service Corporation is appointed by the President, whereas the National Service Commission was bipartisan commission. In addition, many members of Congress prefer the type of enabling work conducted by the Foundation over that of the "stipended community service" furthered by the National Service Corporation. See *Volunteering Versus Stipended Community Service*, 140 CONG. REC. S10527 (1994) (statement of Sen. Hatch).

126. President Bush referred to himself as the "Education President" while campaigning in 1987. See *School Daze*, WALL ST. J., Apr. 4, 1988, at 16. See also Frank Clifford, *Conservatives Attack Bush, Dole in Lively N.H. Debate*, L.A. TIMES, Jan. 17, 1988, at 1.

127. See Address Before a Joint Session of the Congress on the State of the Union, 1 PUB. PAPERS 129 (Jan. 31, 1990).

128. President Bush announced the creation of the New American Schools Development Corporation at an address on education before invited members of Congress and business leaders. He restated the six goals for American education that he announced during his State of the Union address on January 31, 1990. Address to the Nation on the National Education Strategy, 1 PUB. PAPERS 395 (Apr. 18, 1991) [hereinafter *President*

private sector research and development fund that would, after considerable study, apply its results to establish a new school in each of the 535 congressional districts.¹²⁹

The choice of form won praise from members of Congress and the business community.¹³⁰ As with the Points of Light Foundation, NASDC is organized and operated as an independent corporation. It is exempt from federal income tax under § 501(c)(3) and qualifies to receive tax-deductible contributions.¹³¹ It is not organized as a government corporation.¹³² Unlike the Foundation, NASDC's most recent Annual Report does not mention President Bush.¹³³ In fact, some recent media accounts fail to reference the role of the Bush administration in the

Bush Address on Education]. See also 137 CONG. REC. S60081 (1991) (statements of Sen. Cochran) (referring to New American Schools Development Corporation as the "centerpiece of the education reform strategy").

The following are the six goals of education reform: (i) every child starts school ready to learn; (ii) raise high school graduation rate to 90%; (iii) ensure that students leaving 4th, 8th and 12th grades demonstrate competence in core subjects; (iv) make students first in world in math and science; (v) ensure that all adults are literate and have skills to compete in global economy and exercise duties of citizenship; and (vi) liberate schools from drugs and violence. See *supra* note 127, at 131.

129. The goals of NASDC are now considerably more modest. NASDC's program is organized in three two-year phases to coincide with its anticipated six year life span. Phase 1 lasted from 1992 to 1993 and involved defining concepts and strategy. Phase 2 extended until 1995 and field-tested 147 new school designs. Phase 3 is set to end in 1997, and it concludes with adopting new school designs in at least 30% of the schools in 10 communities throughout the United States. See NEW AMERICAN SCHOOLS DEVELOPMENT CORPORATION, A THOUSAND ACTIONS . . . , ANNUAL REPORT 1994/1995, at 9 [hereinafter ANNUAL REPORT].

130. See 137 CONG. REC. S5451 (1991) (statement of Sen. Seymour) (remarking "It is time for newer and more pragmatic approaches to restructure the way America learns").

131. See I.R.C. § 501(c)(3) (1994).

132. The government has no continuing control over the NASDC. The organization is a "private, nonpartisan, nonprofit corporation." See ANNUAL REPORT, *supra* note 129, at 7.

133. Its earlier Annual Report noted that NASDC had been "endorsed" by President Bush and President Clinton. See NASDC, VISION TO REALITY, ANNUAL REPORT 1993/1994. Only much later in the text does it mention that NASDC was "[c]reated at the behest of President George Bush and strongly endorsed by President Bill Clinton." See ANNUAL REPORT, *supra* note 129, at 4.

creation of NASDC and instead describe it as "a private non-profit group formed by corporate leaders" ¹³⁴

Bush estimated that NASDC would require somewhere between \$150 million and \$200 million in funding over its first five years of operation. ¹³⁵ Consistent with his goal to fund necessary social services with nontax revenue, Bush expected private industry to supply the majority of the required funding. ¹³⁶ Despite enthusiastic endorsements from many industry leaders, the early fundraising efforts were disappointing. ¹³⁷ It was not until the third year of operation that revenue exceeded expenses, and this was the result of a large challenge grant from the Annenberg Foundation—not a corporate donor. ¹³⁸ The uncertainty surrounding the 1992 presidential election and the change in administration made fundraising particularly more difficult. ¹³⁹ Apparently, corporate managers perceived NASDC as a pet project of the Bush administration and were reluctant to provide resources to NASDC without a clear pledge of support from the newly-elected President Clinton. ¹⁴⁰

Clinton specifically endorsed the activities of NASDC five months into his presidency ¹⁴¹ and incorporated much of the America 2000 plan into his Goal 2000 education plan. ¹⁴² The hesitancy on the part of funding sources

134. Mark Skertic, *School Innovations Offer Hope*, CIN. ENQUIRER, Nov. 1, 1995, at B1. See also David T. Kearns, *Business' Role in School Reform*, CORP. BOARD, Nov. 1993, at 2 (quoting the former chairperson of the NASDC as stating that the organization was "created by the business community"); William H. Miller, *Test Beds for School Improvement*, INDUSTRY WK., Jan. 9, 1995, at 11 (referring to NASDC as a "nonprofit, industry-sponsored group").

135. See 137 CONG. REC. S6008 (1991) (testimony of Sen. Cochran) (noting the \$200 million fundraising goal).

136. From a tax-expenditure standpoint, a portion of every corporate dollar represents foregone federal income tax revenue. For a discussion of the after-tax costs of charitable contributions see *supra* note 91.

137. See Miller, *supra* note 134, at 12 (quoting NASDC President John L. Anderson as stating that attracting corporate contributions has been "a little tougher than we anticipated").

138. See ANNUAL REPORT, *supra* note 129, at 33.

139. See Thomas Toch, *A Familiar Refrain for School Reform*, U.S. NEWS & WORLD REP., May 31, 1993, at 70.

140. See *id.*

141. In an award ceremony on the White House lawn for Blue Ribbon Schools, Clinton praised "public-spirited business leaders" and concluded his remarks with a request for more funding for NASDC. See Remarks Honoring Blue Ribbon Schools, 1 PUB. PAPERS 657 (May 14, 1995).

142. Anthony Flint, *U.S. Education Secretary Favors Measured Approach to School Reform*, BOSTON GLOBE, Apr. 18, 1991, at 25.

pending this endorsement suggests that potential donors did not perceive a GCCO, even one that is not organized as a government corporation, to be all that independent.¹⁴³

C. *Entrepreneurial Government and National Service*

Before taking office, president-elect Clinton announced that one of his top five priorities would be to persuade Congress to institute some form of national service.¹⁴⁴ This proposal drew immediate scorn from conservative lawmakers who were opposed to paying young people to "volunteer."¹⁴⁵ It seemed to promise more big government, more bureaucracy, and more entitlements.

The Clinton administration attempted to address this criticism by structuring the Corporation for National Service as the ultimate product of a reinvented government—a public/charity partnership that would seek private funding and work closely with state and local authorities. The purpose statement of the Corporation for National Service (The Corporation) explains that it will act like an "entrepreneurial nonprofit corporation" and will actively seek private contributions.¹⁴⁶ In his message to Congress transmitting the National and Community Service Trust Act of 1993,¹⁴⁷ President Clinton described the Act as designed "to reduce

143. It is interesting then that contributions to the NASDC appear to have stalled waiting for Clinton to give the project a nod. This suggests that the "goodwill" a corporation seeks to "purchase" may involve more than the generic advertising value of a corporate charitable contribution. Prospective donors wanted to make sure that they were funding a government approved endeavor.

144. See Kristin A. Goss & Elizabeth Greene, *National Service: A Boon for Charities?*, CHRON. OF PHILANTHROPY, Dec. 15, 1992, at 1.

145. See 141 CONG. REC. E1890, (1995) (discussing an article by Representative Molinari, titled *Is Americorps Worth Keeping?*, in which she contends that Americorps "volunteers" who are paid salaries, receive medical benefits, and are entitled to educational stipends, are not volunteers at all). See also *Any Volunteers?*, ECONOMIST, Jan. 21, 1995, at 32 (discussing Speaker Gingrich's concern that national service is "coerced voluntarism.").

146. In case there were any doubts about the importance of corporate contributions, President Clinton issued an Executive Notice soliciting contributions of cash, goods and services for the Corporation for National Service. Solicitation and Acceptance of Donations, 59 Fed. Reg. 38,166 (1994).

147. See National and Community Service Trust Act of 1993, Pub. L. No. 103-1, 107 Stat. 785 (1993). [hereinafter Trust Act].

waste and promote an entrepreneurial government culture.”¹⁴⁸ Despite this innovative structure, it continues to be a lightning rod for the objections of primarily Republican lawmakers.¹⁴⁹

The Corporation is a charitable government corporation.¹⁵⁰ Its purpose is to provide young people with a meaningful opportunity for national service and let them earn money toward their college educations. The Corporation manages three different volunteer programs: Americorps, Learn and Serve, and the National Senior Service Corps, often referred to collectively as “Americorps.”¹⁵¹ In the new spirit of “entrepreneurial government,” President Clinton assured Congress that “the Corporation will operate as much like a lean nonprofit corporation as a government agency.”¹⁵²

The White House “Fact Sheet” for the Act clearly articulates the ideal of the public/charity partnership—once again embodied in a GCCO. It states, “[t]he Act is designed to build partnerships—among Federal Government, State governments, and the private sector; and within communities, among the schools, businesses, and civic organizations that seek to fight common problems.”¹⁵³ Because it is a government corporation, the control is not left to business leaders. The members of the Corporation’s Board of Directors are appointed by the President and

148. Message to the Congress Transmitting Proposed Legislation on National Service and Student Loan Reform, 1 PUB. PAPERS 574 (May 5, 1993) (stating that the Acts “reject wasteful bureaucracy—instead reinventing government to unleash the ideas and initiative of the American people.”).

149. See 141 CONG. REC. S975 (1995) (statement of Sen. Grassley). However, many members do support the program. See, e.g., 142 CONG. REC. E128 (1996) (statement of Rep. Vento citing a study quantifying the benefits produced by Americorps volunteers).

150. The Corporation for National Service combined two existing independent agencies, the Commission on National and Community Service and ACTION. See Message to the Congress Transmitting Proposed Legislation on National Service and Student Loan Reform, *supra* note 148, at 575.

151. At the signing on the White House lawn, President Clinton announced that the new National Service Plan would operate under the name “Americorps.” Remarks on Signing the National and Community Service Trust Act of 1993, 2 PUB. PAPERS 1543, 1545 (Sept. 23, 1993). The Corporation for National Service actually encompass three main programs: Americorps, Learn and Serve America, and the National Senior Service Corps. Americorps itself includes two separate programs: Americorps VISTA and Americorps National Civilian Community Corps.

152. Message to the Congress Transmitting Proposed Legislation on National Service and Student Loan Reform, *supra* note 148, at 575.

153. The White House, *National Service Trust Act Fact Sheet* (1993).

confirmed by the Senate.¹⁵⁴ In addition, seven Cabinet secretaries serve as non-voting ex-officio members.¹⁵⁵

The Corporation receives the bulk of its revenue from congressional appropriations,¹⁵⁶ but it is required by law to raise a stated percentage of its revenue from nongovernmental sources.¹⁵⁷ In an attempt to attract contributions, Clinton issued an Executive Notice requesting contributions of cash, services, and goods.¹⁵⁸ This effort notwithstanding, the receipts from the private sector have been disappointing.¹⁵⁹

The debate over the 1996 Federal Budget almost killed Americorps, but an 11th hour compromise, curiously termed a "reinvention," saved the program.¹⁶⁰ The compromise included increased funding for the Points of Light Foundation and a requirement that a larger percentage of Americorps revenue come from the private sector.¹⁶¹

IV. THE LIMITS OF GOVERNMENT CREATED CHARITABLE ORGANIZATIONS

A GCCO results from a determination that a given program will "work better on less money"¹⁶² if its delivery system is located in the charitable sector rather than the public or private sector.¹⁶³ Reinventing

154. See Trust Act, *supra* note 147.

155. See *id.*

156. See OSBORNE & GAEBLER, *supra* note 1, at 31 (discussing the importance of seed money as an alternative delivery form); see also 141 CONG. REC. S18651 (1995) (statement of Sen. Wellstone citing the importance of federal "seed support").

157. See Trust Act, *supra* note 147.

158. See Solicitation and Acceptance of Donations, *supra* note 146.

159. For a compilation of the contributions see Susan B. Garland, *A Social Program CEOs Want to Save*, BUS. WK., June 19, 1995, at 120 (including donations from Nike, BellSouth, American Express, Proctor & Gamble, General Electric, Texaco, Sony, and another government corporation—Fannie Mae).

160. Earlier, President Clinton had vetoed the Rescissions Bill that would have terminated the Corporation for National Service. Message to the House of Representatives Returning Without Approval Legislation for Emergency Supplemental Appropriations and Recissions for Fiscal Year 1995, 1 PUB. PAPERS 828 (June 7, 1995).

161. See 141 CONG. REC. S13329 (testimony of Sen. Grassley).

162. See Remarks Announcing the National Performance Review, *supra* note 41, at 235.

163. Osborne and Gaebler identify the charitable or "third" sector as separate and distinct from either the public or the private sector. See OSBORNE & GAEBLER, *supra* note 1, at 43-44. However, they describe the third sector in a way that is not coextensive with the term charitable sector as used in this Article. Osborne and Gaebler define the third sector as "made up of organizations that are privately owned and controlled, but that

government ascribes certain strengths and weaknesses to each of the three sectors.¹⁶⁴ It does not presume that government will automatically assume responsibility for a desired social or economic program.¹⁶⁵ Neither does it presume that all such matters should be left to the nongovernmental sectors.¹⁶⁶ In this way, reinvention attempts to chart a middle course between the notion of a big federal government associated with New Deal liberalism and that of no federal government associated with the New Federalism of the Reagan revolution.¹⁶⁷

Evaluating alternative forms of service delivery recognizes the importance of institutional choice.¹⁶⁸ Some programs are better suited to the public sector, whereas others are more appropriate for the private or charitable sectors. This begins the process of deciding among what Neil

exist to meet public or social needs, not to accumulate private wealth." *Id.* at 44. It is unclear how their view of "private wealth" fits with the general prohibition against private inurement applicable to charitable organizations.

164. See OSBORNE & GAEBLER, *supra* note 1, at 43 (describing the differences among the three sectors: the private sector, the public sector, and the third sector). Within each sector there continues to be a wide range of possible configurations. Osborne and Gaebler present 36 different alternatives to "standard service delivery by public employees" including the use of seed money, impact fees, and franchising. *Id.* at 31.

165. Phase II of the National Performance Review was titled "Cutting Back to Basics." One of its major goals was to move "the service delivery capability to the most effective provider." PRIVATIZATION REPORT, *supra* note 59, at 1. It listed five basic ways to accomplish this goal, including: service termination, privatization, quasi-government corporations, creation of public/private partnerships, and competition or "outsourcing." *Id.* at 1-2.

166. Osborne and Gaebler state that privatization is not the answer, it is one answer. See OSBORNE & GAEBLER, *supra* note 1, at 45. See generally *id.* at 45-47 (explaining that reinventing government is not "some grand ideology of privatizing government"). The National Performance Review privatization report includes the following quote from the GSA Deputy Administrator, Julia Stasch: "This is not a privatization exercise This is a most cost-effective alternative exercise. It would be irresponsible to do privatization for the sake of privatization. Privatization itself is not the goal. It's only a tool." PRIVATIZATION REPORT, *supra* note 58, at 9.

167. See OSBORNE & GAEBLER, *supra* note 1, at 321-25 (describing the need for a paradigm shift to replace the image of big government formed under the New Deal paradigm).

168. Weisbrod observed an increased interest in charitable organizations in connection with attempts to fashion more efficient enterprises. See BURTON A. WEISBROD, *THE NONPROFIT ECONOMY* 5 (1988) (explaining that "[e]very society makes choices about what forms of institutions it will rely on to achieve its socioeconomic goals" and citing the work of economists Lance E. Davis and Douglas C. North).

Komesar terms “imperfect alternatives.”¹⁶⁹ The analysis requires three elements: a goal, the relevant alternative institutions, and a guiding measure by which to determine the relative merits of the alternative institutions.¹⁷⁰ In the case of reinventing government, goal identification entails the recognition that “there is a definite public need for a service at the federal level,”¹⁷¹ such as encouraging voluntarism,¹⁷² revolutionizing educational policy,¹⁷³ or providing a stipend for charity volunteers.¹⁷⁴ Once the goal is identified,¹⁷⁵ a decision must be made whether to locate the delivery of the service (and its funding) in the public, charitable, or private sector.¹⁷⁶ The measure used to determine the best placement for

169. KOMESAR, *supra* note 21, at 5 (stating “[t]he choice is always a choice among highly imperfect alternatives”).

170. *See id.*

171. PRIVATIZATION REPORT, *supra* note 58, at 2 (explaining the utility of the “quasi-government” corporation). The report emphasizes the business or commercial aspects of government corporations. It explains the type of service provided as follows:

Generally it is a service that can readily be provided by the private sector, but there is no commercial service market able or willing to take on the responsibility. In effect, instead of providing the service directly as a public (in-house) good, the government opts to create a corporation and a market where there is none today.

Id. *See also* 1995 GAO REPORT, *supra* note 56, at 6 (discussing the business or commercial character of government corporations).

172. The Points of Light Foundation is a GCCO. Its charitable purpose is to encourage individual volunteer efforts. *See supra* notes 111-25 and accompanying text (describing the formation of the Points of Light Foundation).

173. NASDC is a GCCO. Its charitable purpose is to revolutionize primary and secondary education in anticipation of the Twenty-First Century. *See supra* text accompanying notes 126-43 (describing the formation of the NASDC).

174. The Corporation for National Service is a GCCO that is also organized as a government corporation. Its charitable purpose is to coordinate the activities of various national service initiatives, including Americorps. *See supra* notes 144-61 and accompanying text (describing the formation of the Corporation for National Service).

175. This article looks at the question of institutional choice after the government reaches a decision that a specific program is desirable. The term government can mean the executive, Congress, voters, or the bureaucracy. Accordingly, this article does not address the many questions that could be raised concerning how the initial decision is reached or whether it represents consensus.

176. The charitable sector is correctly identified as possessing characteristics different from either the public or private sectors and, therefore, warrants separate consideration. The number of alternative institutions will vary depending upon the goal. *See KOMESAR, supra* note 21, at 9 (noting “no magic” about the categories used: the market, the courts, and the legislature).

the program is where it will "work better" (i.e., be most efficient) and "cost less" (i.e., attract nontax revenue).

This type of comparative institutional analysis has been advocated by recent law and economics scholarship¹⁷⁷ and by what has been termed the "new legal process" movement.¹⁷⁸ However, the comparative institutional analysis offered by reinventing government is driven by political and fiscal exigencies, namely the desire to provide social services without increasing federal spending.¹⁷⁹ The resulting emphasis on immediate access to nontax revenue inhibits the ability of this analysis to factor in measures of social justice¹⁸⁰ or "participation"¹⁸¹ that are appropriate to consider in the case of governmental action. On a more basic level, the analysis focuses on short-term gains and does not take into account the potential costs of the effect of GCCOs on corporations and the charitable community.

This section identifies some of these potential costs, including (i) the increased burden placed on certain corporations to provide funding for social services through nontax, albeit tax-subsidized, dollars;¹⁸² (ii) the corresponding invitation for corporate donors to influence the development and implementation of social policy;¹⁸³ (iii) the introduction of the federal government as a competitor for charitable contributions;¹⁸⁴ and (iv) the resulting *de facto* creation of a preferred class of charitable

177. See generally KOMESAR, *supra* note 21.

178. Edward Rubin suggests a synthesis of the law and economics interest in the relative efficiency of various institutional forms with the primacy of institutions in post-critical outsider jurisprudence. See Rubin, *supra* note 21, at 1411 (noting "the possibility of a new synthesis in the discourse of legal scholarship"). He proposes that a "microanalysis" of institutions could find common ground between seemingly disparate law and economics and the different forms of outsider jurisprudence, such as critical race theory, feminist jurisprudence, and lesbian and gay legal theory. See *id.* at 1425 (describing "the new unified methodology" as the "microanalysis" of institutions).

179. See OSBORNE & GAEBLER, *supra* note 1, at 322 (explaining that state and local governments "had little choice: they *had* to grapple with the tax revolt, the sad state of public education, the runaway costs of prisons and Medicaid").

180. See Rubin, *supra* note 21, at 1429 (suggesting that the appropriate measure is a balance between efficiency and social justice).

181. See KOMESAR, *supra* note 21, at 67-81 (describing a model designed to measure a "participation-centered approach" balancing between minoritarian and majoritarian influence).

182. See *infra* text accompanying notes 191-202.

183. See *infra* text accompanying notes 203-21.

184. See *infra* text accompanying notes 224-34.

organizations.¹⁸⁵ It also offers a public choice analysis of corporate support of GCCOs.¹⁸⁶

A. *The Effect on Corporations*

Although a GCCO typically receives start-up or seed money from Congress,¹⁸⁷ it is designed to maximize revenue from nongovernmental sources.¹⁸⁸ This emphasis on nongovernmental funding, combined with continued government control or input, gives the federal government a direct interest in charitable giving.¹⁸⁹ The federal government is transformed into a charitable fundraiser.¹⁹⁰ Instead of exercising its coercive taxing power, it must persuade corporations to contribute to GCCOs. This section asks why corporations fund GCCOs and what they receive in return.

1. The Burden: A Selective Assessment

When the federal government inaugurates a new education program, the bulk of the funding is derived from the individual and corporate income taxes¹⁹¹—an exercise of the state's power to reallocate private

185. *See infra* text accompanying notes 235-43.

186. *See infra* text accompanying notes 244-65.

187. *See supra* text accompanying notes 75-79.

188. *See, e.g., supra* text accompanying notes 75-79.

189. This differs from the ERTA tax incentives which sought to encourage voluntary contributions to fund the activities of a diverse and broadly-defined group of qualified organizations. Arguably, the federal government has always had an indirect interest in charitable giving to the extent that the activities of charitable organizations "lessen the burdens of government." *See* Knauer, *supra* note 6, at 995-99.

190. *See, e.g., Solicitation and Acceptance of Donations, supra* note 146. This portion of the funding is not the result of the exercise of the government's taxing power, but it is aided by certain tax incentives designed to reduce the after-tax cost of charitable giving. For a discussion of tax expenditures see *supra* note 86. For a discussion of the effect of the charitable contribution deduction on the after-tax cost of giving see HALL, *supra* note 47.

191. Income taxes account for approximately 55% of all federal revenue. This is followed closely by payroll taxes that account for almost 40% of total revenue. Payroll taxes, however, are generally earmarked for specific purposes such as the various Social Security insurance funds and hospital insurance for the senior citizens. Accordingly, general spending needs are satisfied principally by income tax receipts.

resources for public applications.¹⁹² Taxpayers theoretically shoulder an equitable share of the cost of the program because income tax liability is calculated by reference to a taxpayer's relative ability to pay measured by the tax base.¹⁹³ This is not the case with NASDC, where corporate donors appear to pay "voluntarily" a disproportionate share of the cost of that social program.¹⁹⁴

Contemporary views of corporate giving describe it as "enlightened self-interest."¹⁹⁵ Under this view, a corporate transfer to charity is more in the nature of a quid pro quo transaction than a gift flowing from "detached and disinterested generosity."¹⁹⁶ In exchange for the contribution payment, the corporation receives advertising value and favorable public relations when it associates its name or products with a

192. Although the income tax system is one of voluntary assessment, there is nothing voluntary about tax liability. Graetz and Schenk describe taxation as "the process by which a government transfers resources (almost always money) from the private to the public sector." MICHAEL J. GRAETZ AND DEBORAH H. SCHENK, *FEDERAL INCOME TAXATION: PRINCIPLES AND POLICIES* 1 (3d ed. 1995).

193. A fundamental feature of the income tax system is that tax liability is a function of a taxpayer's "ability to pay" measured by reference to the taxpayer's taxable income. Thus, similarly situated taxpayers should bear the same burden of taxation. This is difficult to apply to the corporate income tax because the burden of the tax is ultimately borne by individuals (e.g., consumers, shareholders, employees). For a discussion of how the corporate income tax is based on a strong entity theory of the corporation see Linda Sugin, *Theories of the Corporation and the Tax Treatment of Corporate Philanthropy*, 41 N.Y.L. SCH. L. REV. 835 (1997).

194. Of course, reasonable persons could question whether a contribution is truly voluntary when it is prompted by a telephone call from the President or other high-ranking government officials. For a discussion of the voluntary nature of contributions to GCCOs see *infra* text accompanying notes 260-65. The contribution payments are tax-deductible, whereas the campaign contributions are not. See I.R.C. § 160(e) (1986).

195. The term "enlightened self-interest" is widely used by fundraisers and corporate managers to describe how a corporate donor balances philanthropic pursuits with the obligation to maximize shareholder profit and gain. For a discussion of the origin of the term see Knauer, *supra* note 19, at 27 n.149 (explaining that the term first appeared in testimony during the landmark charitable giving case of *A.P. Smith Mfg. Co. v. Barlow*, 98 A.2d 581 (N.J. 1953)).

196. The *Duberstein* standard of "detached and disinterested generosity" defines a gift for federal income tax purposes of the federal income tax. See *Commissioner v. Duberstein*, 363 U.S. 278, 284-85 (1960) (construing the meaning of "gift" for purposes of the exclusion of gifts from gross income). There has been some debate as to whether this standard also applies to the term "gift or contribution" when used in connection with the charitable contribution deduction. See Knauer, *supra* note 19, at 35-41 (comparing the subjective standard of *Duberstein* to the quid pro quo analysis of *Hernandez v. Commissioner*, 490 U.S. 680 (1989)).

charitable cause.¹⁹⁷ This is referred to in the marketing industry as the “halo effect.”¹⁹⁸ Thus, it is not appropriate to ask whether corporations “voluntarily” make detached and disinterested gifts to GCCOs. Most corporate giving does not meet that standard. Instead, the question should be whether corporations voluntarily choose to enter into marketing relationships with GCCOs or whether they are subject to some form of pressure or coercion from government officials.

When a corporation sponsors Breast Cancer Awareness Week, it bears a disproportionate share of the cost of the public good of disseminating educational information regarding early detection and treatment of breast cancer. The public good, however, is provided privately and without the determination of a “definite public need for a service at the federal level.”¹⁹⁹ Indeed, the private provision of certain collective goods which are undersupplied by the government explains a major point of the government failure theory of charitable organization formation.²⁰⁰ With a GCCO, the contribution payment is a direct substitute for tax dollars because it is paying for a service that the government determined should be provided at the federal level.²⁰¹ The contribution payment represents the government’s attempt to fund the service with nontax revenue. If the government also applies some form of pressure on corporations to contribute, then it is using its persuasive/coercive power to reallocate

197. The following section describes the potential benefits attached to contribution payments to GCCOs. See *infra* text accompanying notes 203-21. Commentators routinely categorize corporate giving expenditures by reference to the underlying business or self-interested motivation for the transfer. See, e.g., Knauer, *supra* note 19, at 60-88 (categorizing corporate contributions as advertising, goodwill and public relations, and investment in future markets and future employees); Joseph Galaskiewicz, *Corporate Contributions to Charity: Nothing More Than a Marketing Strategy?* in PHILANTHROPIC GIVING: STUDIES IN VARIETIES AND GOALS 246-52 (Richard Magat ed., 1989) (describing corporate giving as marketing, public relations, enlightened self-interest, tax strategy, and ‘social currency’).

198. The marketing industry refers to the goodwill a corporation can gain by associating its name or products with a charitable organization as the “halo effect.” See Knauer, *supra* note 19, at 57-60 (discussing the nature of the “halo effect”).

199. PRIVATIZATION REPORT, *supra* note 58, at 2. The National Performance Review refers to providing a collective good privately as doing so “in-house.” *Id.*

200. For a discussion of the government failure theory see *infra* text accompanying notes 274-82.

201. See PRIVATIZATION REPORT, *supra* note 58, at 2 (quoting the National Performance Review).

private wealth to public applications on a highly selective basis. This selective assessment violates a basic tenet of tax policy—equity.²⁰²

2. The Benefit: An Invitation to Influence Public Policy

Despite the argument that solicited contributions represent a disproportionate corporate assessment, there has been no outcry from the corporate community regarding GCCOs.²⁰³ To the contrary, business leaders provide enthusiastic support for NASDC and the Corporation for National Service²⁰⁴ and seem to welcome the opportunity to shape social policy.²⁰⁵ During the 1995 budget controversy surrounding continued funding for the Corporation for National Service,²⁰⁶ business leaders lobbied Congress in support of the National Service Program.²⁰⁷ This support was cited again and again by the advocates of national service.²⁰⁸

202. In the alternative, it is possible that corporations contribute to GCCOs because GCCOs simply offer a more attractive "halo effect." See *supra* note 198 and accompanying text.

203. Some corporate representatives, however, have expressed concern that the federal government expects too much from the corporate community. For example, an IBM representative said that it was "totally unrealistic" to expect business to pay the entire bill for national service. Jennifer Moore & Amanda Rocque, *National Service's Uncertain Future*, CHRON. OF PHILANTHROPY, Apr. 20, 1995, at 1, 14 (quoting the president of the IBM International Foundation). IBM contributed \$120,000 to the Corporation for National Service to set up computer networks and repair old ones. *Id.* In fact, the private contributions have not been as high as the government had hoped with regard to any of the public/charity initiatives. For example, the Points of Light Foundation now raises over one-third of its revenue from nongovernment sources, but it still receives 65% of its revenue from the federal government. See 1995 GAO REPORT, *supra* note 56. Thus, it has not achieved its initial goal of financial independence. See *supra* note 117.

204. See 141 CONG. REC. S18639 (daily ed. Dec. 14, 1995) (statement of Sen. Wellstone) (citing support by "businesses such as IBM, General Electric, and American Express").

205. Barbara Benham, *Business Embraces Its New Role in Education*, INVESTOR'S DAILY, Apr. 23, 1991, at 1; William H. Miller, *Bush Bucks It to Business*, INDUSTRY WK., May 20, 1991, at 70.

206. See *supra* text accompanying notes 160-61 (describing the controversy).

207. See Susan B. Garland & Mary Beth Reagan, *A Social Program CEOs Want to Save*, BUS. WK., June 19, 1995, at 120 (citing that the appeal of Americorps is that it "tries to operate like a business."). See also *Plugged Ears in Congress; Business Likes Americorps; So Why Are Pro-business Lawmakers Opposed?*, L.A. TIMES, Dec. 22, 1995, at B8 (noting "participation and support of large corporate donors, including American Express, Anheuser-Bush, General Electric, IBM, Microsoft, and Nike.").

208. See *supra* note 147.

In essence, the business leaders registered their support for the program through their contributions.

Contribution payments to GCCOs have the potential to yield benefits well beyond those associated with corporate giving generally. When the federal government asks private corporations to contribute to the Points of Light Foundation,²⁰⁹ NASDC,²¹⁰ or the National Service Corporation,²¹¹ it lets them choose the social programs they want to fund.²¹² Moreover, the request for funding is an invitation to influence policy.²¹³ President Bush was quite clear on this point when raising funds for NASDC. In his Address on Education, Bush said,

[t]here's a special place in inventing the New American School for the corporate community, for business and labor. And I invite you to work with us not simply to transform our schools but to transform every American adult into a student The corporate community can take the lead by creating a voluntary private system of world class standards for the workplace.²¹⁴

This invitation to help shape social policy extends beyond simple input and, in certain circumstances, can translate into considerable control.²¹⁵ Representatives of large corporate donors often serve on the board of directors or other governing body of a GCCO. Because a GCCO is responsible for the development and implementation of federal policy, a seat on the governing body enables corporate donors to influence social

209. See *supra* text accompanying notes 111-25.

210. See *supra* text accompanying notes 126-43.

211. See *supra* text accompanying notes 144-61.

212. Thus, the "selective or voluntary assessment" is earmarked for specific purposes unlike ordinary tax dollars.

213. For a discussion of the budget dispute concerning Americorps see *supra* text accompanying notes 160-61. The monetary support of corporate donors is seen as corporate endorsement of the project.

214. See *President Bush Address on Education*, *supra* note 128.

215. This is not the case with a GCCO organized as a government corporation where certain members of the Board of Directors or other governing body may serve *ex officio*. See PRIVATIZATION REPORT *supra* note 58 (discussing various forms of continuing government control over government corporations). The fact that the President appoints the head of the Corporation for National Service insures continued control over the management of the organization.

policy directly.²¹⁶ In the case of NASDC, President Bush assembled an impressive array of business leaders, referred to as the "Business Core Group," to coordinate its efforts.²¹⁷ This group included the chairs of IBM, Xerox, R.J. Reynolds, the American Stock Exchange, and Eastman Kodak.²¹⁸

The level of corporate involvement gives rise to two related concerns that reflect the dual nature of GCCOs. First, GCCOs that rely heavily on corporate contributions may become too accountable to corporate interests,²¹⁹ thereby compromising the charitable mission of the GCCO. This is similar to the concern regarding the influence that corporate giving has generally on the charitable mission of the donee organizations.²²⁰ Here, the concern is slightly different because any potential influence relates not to the activities of a single private charity, but to the development and implementation of far-reaching federal social policy. Secondly, the continuing government involvement could scare away certain corporate contributors if potential contributors view a GCCO as too

216. See Garland & Reagan, *supra* note 207, at 120 (quoting the former head of Americorps, Eli J. Segal, referring to the requirement that the nongovernment sources provide at least 25% of the operational costs. "This translates to the kind of business buy-in that other federal programs have not had.").

217. President Bush assembled an impressive array of business leaders: Paul O'Neill (president and CEO of Alcoa, chair of Bush's Education Policy Advisory Council, and chair of NASDC), John F. Akers (chair of IBM), Norman Augustine (Martin-Marietta), David Kearns (chair of Xerox), James Baker (chair and CEO of Arvin Industries), Louis Gerstner (chair of R.J.R. Nabisco), James Herr (chair of Herr Foods) James Jones (chair of American Stock Exchange), James Ketesen (chair of Tenneco), Frank Shrontz (chair of Boeing), and Kay Whittemore (chair of Eastman Kodak). See Benham, *supra* note 205.

218. The Business Core Group addressed four general areas: experimental schools, greater accountability by schools, adult education, and community involvement. In addition, the Business Core Group was asked to develop achievement tests and curriculum standards articulating skills needed by future employees and job-related skill standards for industries. See Miller, *supra* note 205, at 70.

219. See John T. Whiting, *The New American Schools Development Corporation: Did It Create a Climate for Real Reform?*, 74 PHI DELTA KAPPAN 777 (1993) (suggesting that NASDC is too accountable to business and political interests to be an effective source of radical reform).

220. See generally Holly Hall, *Joint Ventures with Business: A Sour Deal?*, CHRON. OF PHILANTHROPY, Apr. 6, 1993, at 21 (explaining the reluctance of certain charitable organizations to associate with corporations linked to unpopular issues such as tobacco or alcohol).

political or the pet project of a specific administration or political party.²²¹

B. Increased Competition Within the Charitable Community

Researchers estimate that there are approximately 600,000 organizations described under Internal Revenue Code § 501(c)(3),²²² all but a handful of which are eligible to receive tax-deductible contributions.²²³ Against this backdrop, the addition of a few GCCOs should not upset the balance. However, these new additions benefit from considerable media attention and have a voracious appetite for fundraising.

The media fanfare associated with the new GCCOs could lead to increased public awareness concerning charitable needs which, in turn, could increase the level of charitable giving. It could also divert charitable dollars from private charitable organizations. The end result could be the de facto creation of a preferred class of government-sponsored charities that offer prospective donors the opportunity to influence social policy, secure favorable public relations, and please government officials.²²⁴

1. The Static and Scarce Charitable Dollar.

Over the last ten years corporate giving has remained relatively constant, with giving estimates for 1995 showing a modest gain over 1994.²²⁵ In a zero sum world of corporate giving, GCCOs with ambitious

221. See, e.g., Editorial, *Same Pool for Experimental Schools?*, N.Y. TIMES, July 18, 1991, at A20 [hereinafter Editorial] (suggesting contributions could be made as a "political calculation").

222. As of 1994, the Internal Revenue Service reported that 599,745 organizations were registered under § 501(c)(3). See *Tax-exempt Organization Registered with the IRS*, CHRON. OF PHILANTHROPY, July 13, 1995, at 44. Some researchers believe the actual number is closer to 750,000. See WILLIAM G. BOWEN ET AL., THE CHARITABLE NONPROFITS: AN ANALYSIS OF INSTITUTIONAL DYNAMICS AND CHARACTERISTICS 4-5 (1994). The reason for the difference is undercounting due to rules that exempt certain small organizations from applying to the IRS for recognition of exemption. Such organizations are not required to file annual information returns. *Id.* at 4.

223. All § 501(c)(3) organizations, with the exception of public safety organizations, qualify to receive tax-deductible contributions under § 170(c)(2). See I.R.C. §§ 501(c)(3), 170(c)(2) (1994).

224. For a discussion of the benefits associated with contributions to GCCOs see *supra* text accompanying notes 203-21.

225. Each year GIVING USA is published by the American Association of Fund-Raising Counsel Trust for Philanthropy. It is widely-cited as the authoritative source on statistics for charitable giving. The report for each calendar year is published the following summer. At the time of publication, many corporate donors have not even filed their income tax returns for the period covered by the report. Accordingly, GIVING USA

fund-raising goals have the potential to divert dollars from other private charities.²²⁶ For example, Bush estimated that NASDC would require between \$150 million and \$200 million in corporate contributions.²²⁷ This estimate appears small in relation to other social welfare spending items in the federal budget,²²⁸ or even the estimated \$7.4 billion in annual corporate contributions.²²⁹ However, the perspective changes considerably when this goal is measured against the \$400 million corporations give to

bases its initial estimate on surveys of major charities, corporations, and foundations. Often, the edition of GIVING USA for the next year has to revise the earlier year's estimates substantially, after taking into account income tax return data. See John Murawski, *A Banner Year for Giving*, CHRON. OF PHILANTHROPY, May 30, 1996, at 30 (explaining the likelihood of revisions). The following are the statistics for corporate giving as reported in GIVING USA 1996 in current dollars and constant dollars. As explained above, the figures for the last several years are subject to revision.

(in billions)					
	Current \$	Constant \$		Current \$	Constant\$
1985	4.63	7.09	1991	5.62	6.44
1986	5.03	7.32	1992	5.92	6.49
1987	5.21	7.31	1993	6.26	6.62
1988	5.34	7.13	1994	6.88	7.08
1989	5.46	6.91	1995	7.40	7.40
1990	5.46	6.57			

GIVING USA 1996, *supra* note 19, at 88.

226. See *supra* notes 209-18 and accompanying text (discussing the concern GCCOs could have on donative patterns).

227. See Rochelle L. Stanfield, *School Business*, 20 NAT'L J., 1862, 1862 (1991) (discussing the role of business leaders in an effort to improve the nation's education system).

228. The following are some examples of proposed spending for social and cultural services for fiscal year ended 1997, compared with estimated spending for 1996.

	<u>1996 spending</u>	<u>1997 proposed</u>
National Endowment for the Arts	\$131,000,000	\$136,000,000
Smithsonian Institution	308,000,000	329,000,000
Homeless Assistance Fund	823,000,000	1,120,000,000
AIDS prevention/treatment	787,000,000	830,000,000
Peace Corps	218,000,000	225,000,000
Foster care and adoption	4,322,000,000	4,445,000,000

See *President Seeks Increases in Many Programs That Support Charities*, CHRON. OF PHILANTHROPY, Apr. 4, 1996, at 35.

229. The estimate for corporate giving in 1995 is \$7.4 billion. Until the IRS releases tax return information, however, this figure is subject to revision. See GIVING USA 1996, *supra* note 19, at 89.

primary and secondary education each year.²³⁰ Over a five year period, NASDC, a start-up corporation, would need to secure up to one-tenth of all corporate giving to primary and secondary education. Thus, the entrance of a GCCO could drastically skew corporate contributions away from local education initiatives such as "adopt a school" programs²³¹ and "redirect corporate dollars that now pay for other education experiments."²³² Not only have many organizations lost federal funding, but now they have gained a formidable competitor for the scarce charitable dollar.²³³

Further, a continued government presence might induce some corporations to forego contributions to education entirely. This way a corporate manager can decline to fund NASDC on the basis that education is outside the corporation's area of philanthropic interest.²³⁴ The alternatives are to risk becoming involved in something that is perceived as too political or to refuse to contribute and possibly alienate the current administration. One solution might be simply to stay out of education.

2. The Emergence of a "Preferred Class" of Charitable Organizations

If GCCOs and private charities are vying for the same corporate dollar, then there are a variety of reasons that GCCOs may have a competitive advantage.²³⁵ A contribution to a GCCO offers media attention, the chance to curry favor with government officials, and, perhaps most importantly, the opportunity to influence federal policy.²³⁶ The combination of these factors may make corporate donors more likely

230. In 1990, U.S. corporations contributed \$400 million in cash and equipment to primary and secondary education. AMERICAN ASSOCIATION OF FUND-RAISING COUNSEL, 1991 GIVING USA: THE ANNUAL REPORT ON PHILANTHROPY FOR THE YEAR 1990, at 90 (1991) [hereinafter 1991 GIVING USA].

231. See generally Stanfield, *supra* note 227 (citing concerns voiced by business representatives and educators).

232. See, e.g., Editorial, *supra* note 221, at A20 (expressing concern that NASDC may redirect corporate dollars away from other experiments).

233. The effect of this competition is magnified because while the federal government is competing with private charities for funding, it is simultaneously reducing its funding of social welfare programs. See Salamon, *supra* note 48.

234. See Stanfield, *supra* note 227, at 65 (citing the concerns of then-President of Columbia University Teachers College that corporate donors might avoid public education as a giving concern if they are going to have their "arm twisted from the White House").

235. See 141 CONG. REC. S.18651 (statement of Sen. Wellstone) (reporting that Americorps raised \$41 million from the private sector in its first year).

236. Further, a corporate manager might be unwilling to just say "no" to a solicitation from the President, member of Congress, or other government official.

to fund the Corporation for National Service over other wholly-private local job training programs.²³⁷ The result could be the de facto creation of a new class of "preferred" or "government-sponsored" charitable organizations.²³⁸

The continuing government involvement with a GCCO²³⁹ insures the GCCO and its contributors that they will have sustained media coverage, at least during the start-up phase. To the extent corporate contributions substitute for advertising and public relations expenditures,²⁴⁰ guaranteed national exposure makes a contribution to a GCCO more attractive than a contribution to a local charity or even an established national charity.²⁴¹ In addition to the generic "halo effect," which accompanies any corporate charitable contribution, a transfer to a GCCO has an added element of patriotism—corporations doing their fair share.²⁴²

The national exposure and access to government officials and policy making are not available in the case of contributions to private charities. In terms of the quid pro quo reasoning, GCCOs simply have more to offer. Thus, a corporate manager who wishes to maximize the impact of the corporation's charitable dollars, and who is not adverse to politics, would choose a GCCO over an ordinary charitable organization.

Given these advantages, GCCOs could easily dominate an area of charitable giving to the detriment of local or even national private initiatives that do not benefit from the same level of media exposure. This

237. See Whiting, *supra* note 219.

238. To some extent, charitable organizations already have government approval in the form of preferred tax status. See JERALD SCHIFF, CHARITABLE GIVING AND GOVERNMENT POLICY: AN ECONOMIC ANALYSIS 5 (1990); Salamon, *supra* note 48, at 102 (reporting that tax deductibility provides an additional \$8.4 billion to all voluntary organizations).

239. This would include activities of the government undertaken to reinforce the prominence of a GCCO, such as the Presidential program recognizing individual "points of light." See *supra* note 111.

240. See Galaskiewicz, *supra* note 197, at 247 (reporting that three studies show a relationship between "advertising and contribution expenditures"); MICHAEL USEEM, THE INNER CIRCLE: LARGE CORPORATIONS AND THE RISE OF BUSINESS POLITICAL ACTIVITY IN THE U.S. AND U.K. 125-26 (1984) (describing the relationship between marketing and charitable giving).

241. A representative of Timberland Company noted this potential: "As the program gets bigger our investment goes further." See Garland and Reagan, *supra* note 207, at 120 (quoting Ken Freitas, vice-president for community enterprise).

242. The notion that corporations have a duty to be "socially responsible" was voiced by many members of Congress during the discussion of the proposed ERTA tax incentives for corporate giving. See Knauer, *supra* note 19, at 28, n.156. (discussing the use of social responsibility rhetoric during the debates over increased tax incentives for corporation charitable contributions).

threatens to undermine a long-standing political justification for charitable organizations, namely that they further pluralism and diversity.²⁴³

C. *A Public Choice or Interest Group Theory Perspective*

It is instructive to view GCCOs through the lens of the public choice or interest group theory of legislation.²⁴⁴ The importance of this analysis is not so much in what it proves. It is offered rather to identify the potential for abuse by individuals operating at the extreme of human behavior.²⁴⁵ The following looks at two models of the legislators who continue to support the funding of GCCOs. The comparative analysis of reinventing government is driven by pragmatic budgetary concerns. However, the laudable goal of protecting the federal fisc also can obscure the potential for self-interested gain.

1. Public Choice Theory

Interest group theory starts with the premise that political actors behave in the same self-interested manner as do economic actors.²⁴⁶ Self-

243. For a discussion of the pluralism justification for favorable policy treatment of charitable organizations see Knauer, *supra* note 6, at 995 (describing the notion that charitable organizations further pluralism and are a distinct part of "national heritage").

244. Public choice theory is "the economic study of nonmarket decision making or simply the application of economics to political science." See DENNIS C. MUELLER, *PUBLIC CHOICE II* 1 (1989).

245. A consistent critique of public choice theory is that it misapprehends the nature of human motivation: rather than steely, self-interested wealth maximizers, individuals act based on a variety of motives, some self-interested and some other-regarding. See Mark Kelman, *On Democracy-Bashing: A Skeptical Look at the Theoretical and "Empirical" Practice of the Public Choice Movement*, 74 VA. L. REV. 199 (1988). The recognition that self-interest cannot be the "sole" motivation for human action is voiced by public choice scholars as well as their critics. See, e.g., Michael E. DeBow and Dwight R. Lee, *Understanding (and Misunderstanding) Public Choice: A Response to Farber and Frickey*, 66 TEX. L. REV. 993, 995-96 (1988) (describing the differences between the "Chicago school" and the "Virginia school" of public choice).

246. See ROBERT E. MCCORMICK AND ROBERT D. TOLLISON, *POLITICIANS, LEGISLATION AND THE ECONOMY: AN INQUIRY INTO THE INTEREST-GROUP THEORY OF GOVERNMENT* 5 (1981) (rejecting the notion that an elected official's behavior in the political arena is public-interested rather than self-interested). See generally WILLIAM A. NISKANEN, JR., *BUREAUCRACY AND REPRESENTATIVE GOVERNMENT* (1971) (applying public choice theory to a bureaucrat's behavior). See generally MUELLER, *supra* note 244, at 348 (discussing the behavior of voters).

interested politicians seek to further their chances of reelection.²⁴⁷ "Rent-seeking" interest groups capitalize on this desire and secure arguably disproportionate economic or political power through protective legislation or regulation.²⁴⁸ Interest groups purchase these rents from reelection-maximizing politicians in exchange for campaign contributions, endorsements, bribes, and lucrative post-government employment opportunities.²⁴⁹

Public choice theory often sees privatization and deregulation as a solution to the "problem" of government sanctioned "rents."²⁵⁰ For example, it has been proposed that the privatization of all government owned lands and mineral rights would solve the problem of government created "rents."²⁵¹ As discussed above, a GCCO does not represent privatization.²⁵² To the contrary, a GCCO envisions a continuing government involvement which can range from ultimate ownership and control to endorsements and fundraising efforts. It is exactly this continued government participation that presents the opportunities for rent-seeking.

2. Rent-seeking Corporations

It is possible to view the ability to influence social policy as a "rent" derived from government in exchange for contributions payments to a GCCO.²⁵³ NASDC provides a provocative example. The corporate

247. See Shaviro, *supra* note 38, at 83 (explaining that although politicians may have goals in addition to reelection, reelection remains the essential ingredient for the continuation of a political career).

248. "Rents" refer to monopoly rents created by lost consumer surplus resulting from government intervention. See MUELLER, *supra* note 244, at 229-30. The monopoly rents should not occur in a competitive market in the absence of government intervention. Thus, the rents are secured through government action (or inaction) in the form of legislation or other regulation.

249. The process of securing these government sanctioned rents is known as "rent-seeking" which can be socially wasteful from a cost-benefit standpoint. See DANIEL A. FARBER AND PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* 35 (1991) (noting that "rent-seeking" is the attempt to generate returns in excess of marginal production costs). For a discussion of the value politicians receive in exchange for rents see Knauer, *supra* note 6, at 1045-49.

250. See MUELLER, *supra* note 244, at 245 (discussing needed reforms suggested by public choice analysis).

251. See *id.* (citing a proposal by Hill and Anderson that the government auction off public lands and mineral rights).

252. See *supra* note 58.

253. See MUELLER, *supra* note 244, at 229-30.

interest in primary and secondary education preceded the establishment of NASDC.²⁵⁴ A former chair of NASDC, also the former CEO of Xerox, explained that the public schools supply business's "most valuable resource"—workers.²⁵⁵ Business evidently finds the current supply lacking in certain fundamental areas because each year U.S. business spends \$25 billion in remedial education and training for employees.²⁵⁶

The failure of the public school system is hardest felt by the high tech and financial industries.²⁵⁷ Such enterprises comprise an interest group with a particularized need to revitalize the public schools in order to educate future workers and consumers. NASDC represents a unique opportunity for this interest group to tailor an educational policy that meets the needs of industry. In exchange for this power, business is willing to pay in the form of contributions. Other interest groups, such as the National Education Association might welcome the opportunity to shape national education policy. However, the opportunity comes with a hefty price tag. In this way, the creation of a GCCO can represent a sale of the power to set national policy to the highest bidder.

If the only visible exchange of value is the contribution payment to the GCCO, it is difficult to see what benefit the reelection-maximizing politician receives from the exchange.²⁵⁸ As explained below, the politician gets to claim credit for the GCCO administered program and is not faced with difficult choices in securing funding for it.²⁵⁹ Thus, the politician benefits, albeit indirectly. Business benefits from this form of exchange because, unlike political campaign contributions, the contribution

254. In 1990, U.S. corporations contributed \$400 million in cash and equipment to improve schools and combat illiteracy. See 1991 GIVING USA, *supra* note 230, at 90.

255. See Kearns, *supra* note 134, at 1 (drawing an analogy between the education system and a corporate supplier that provided outmoded products).

256. See Benham, *supra* note 205 (citing contributions of \$250 million for remedial training).

257. See, e.g., Stanfield, *supra* note 227, at 1863 (describing the remedial employee efforts of Motorola).

258. In addition to ideological appeal and advertising currency, the reallocation presents legislators with a golden management opportunity. If we assume that legislators desire reelection, or, at a minimum, desire not to be pilloried, then legislators avoid potential blame or responsibility. The reallocation offers the legislator the ability to claim credit for encouraging private charitable efforts, but unlike delegation to an administrative agency, the legislator does not remain ultimately responsible for the actions of the charitable community.

Knauer, *supra* note 6, at 1068.

259. For a discussion of the potential benefits see Knauer, *supra* note 6.

payments are tax-deductible, carry advertising value and goodwill, and represent access to policy making.

3. Rent-extracting Politicians

Instead of the interest group extracting rent in the form of influence, it is possible to view the politician as extracting rents from business in the form of contributions to a GCCO.²⁶⁰ This is based on the model of a politician as a rent-extracting actor developed in tax reform scholarship.²⁶¹ The Corporation for National Service provides a possible example of this type of behavior because it is a pet project of the administration in search of funding, rather than a pet project of business in search of access to government policy development.

Politicians could be viewed as rent extractors who pressure corporations to contribute to GCCOs. Although the politicians do not benefit directly, as in the case of campaign contributions, they are able to fund a given project about which they feel strongly from an ideological standpoint.²⁶² They might also be obligated to support the project as a result of agreements with other parties.²⁶³ Finally, they could simply want the benefit of being able to claim credit for the program without having to commit the required funding. In this way, the creation of a GCCO is superior to delegating authority to an administrative body because

260. Typically, legislators are not considered to be rent-seeking actors. Instead, they dispense rents in the form of legislation or other regulation. The interest group theory of legislation views each piece of legislation as a wealth transfer. Legislators broker these wealth transfers by matching the demand for legislation with the supply. The costs of collective action dictate that the demand come from relatively small groups with intense particularized needs. It is then easy for the legislator to place the cost of the desired legislation on diffuse and unorganized constituencies. The fee for the brokerage services is generally campaign contributions. However, in the case of purchasing the opportunity to influence federal policy through a GCCO, the fee is paid in the form of contribution payments. For a discussion of the legislator as broker see MCCORMICK & TOLLISON, *supra* note 246, at 2.

261. See Fred McChesney, *Regulation, Taxes, and Political Extortion*, in REGULATION AND THE REAGAN ERA: POLITICS, BUREAUCRACY, AND THE PUBLIC INTEREST 233-35 (Roger Meiners & Bruce Yandle eds., 1989). For a criticism of this view see Shaviro, *supra* note 38, at 71.

262. For a discussion of the role of ideology in the behavior of legislators see Dwight R. Lee, *Ideology, Politics, and the Power of Public Choice*, 74 VA. L. REV. 191 (1988).

263. Logrolling refers to the practice of vote trading among legislators. It is thought to be necessary to secure support for minority backed legislation. For a discussion of logrolling see MUELLER, *supra* note 244, at 82-87.

Congress does not remain accountable for the success or failure of the program.²⁶⁴

The potential for rent extraction in the case of a GCCO might explain the preoccupation with corporate rather than individual contributions as a primary source of funding. Corporations may be more susceptible to government pressure in the form of veiled threats of regulation or higher taxes.²⁶⁵

V. GOVERNMENT CREATED CHARITABLE ORGANIZATIONS AND TWO ECONOMIC MODELS

Any level of comparative analysis involving the charitable sector is necessarily constrained by our limited understanding of the workings of the charitable sector,²⁶⁶ and lack agreement as to where the sector even ends and the public and private sectors begin.²⁶⁷ The enthusiastic entry of the

264. See Knauer, *supra* note 6, at 1062-72 (discussing the benefits of the reallocation of responsibility for certain social services to the private charitable sector).

265. See Robert D. Tollison, *Public Choice and Legislation*, 74 VA. L. REV. 339, 361 (1988) (noting that McChesney's rent extraction theory helps explain "a range of government gestures in the direction of industry: for example, committee investigations and hearings, political speeches mapping out new legislative proposals, and government commissions to study 'problems'").

266. The types of organizations described by any of the three modes of categorization—nonprofit, third, or charitable—represent an incredibly varied and diverse group that cuts across numerous industry types and derives revenue from a variety of sources. The use of the term "charitable" refers to those organizations that comply with the requirements of § 501(c)(3) and § 170 of the Internal Revenue Code. See I.R.C. §§ 501(c)(3), 170 (1994).

267. The first difficulty arises in trying to demarcate three separate and distinct institutions, particularly when using a term as slippery as "charitable." Reinvention likes to make the distinction between nonprofit and for profit. Osborne and Gaebler refer to the charitable sector as the "third sector" and craft a definition that excludes some nonprofit charitable firms while including for-profit firms—focusing instead on whether the organization exists to "accumulate private wealth." OSBORNE & GAEBLER, *supra* note 1, at 44. Representatives of charitable organizations refer to the sector as the Independent Sector. Peter Dobkin Hall notes that "[t]he starting point for any serious consideration of the place of nonprofits in the American polity is to accept the policy implications of the scholarly recognition of sectoral interpenetration: that the nonprofit sector is a dependent sector, not an independent one." HALL, *supra* note 49, at 106.

Additionally, the charitable sector is related to both government and private industry through overlapping personnel who occupy positions in the various sectors throughout their careers or simultaneously serve on the governing boards of charitable organizations while being employed by the government or private industry. See HALL, *supra* note 49, at 102-03 (summarizing "the intersectoral configuration as a network of patronage and personal relationships"). See also USEEM, *supra* note 240, at 25 (noting that "the

federal government into the charitable sector merits a reexamination of the conventional wisdom regarding the formation of charitable organizations. This section begins a discussion that hopefully others will continue. It looks at the two most widely accepted theories of the formation of charitable organizations: the market or government failure theory²⁶⁸ and the contract failure theory.²⁶⁹

The attributes of the charitable sector identified by the reinventing government literature are based strongly on both theories. For example, charitable organizations are described as the "*preferred mechanism* for providing collective goods."²⁷⁰ They are also recommended when there is a need for "extensive trust on the part of customers or clients."²⁷¹ Because it is driven by political pressures to provide desired social services without increasing federal spending,²⁷² reinventing government does not assess critically whether the charitable sector is indeed as described.²⁷³ The result is a comparative analysis that is based on not only a reductive, but also an idealized, model of the sector. The actual characteristics of the charitable sector are secondary to the belief that GCCOs offer increased efficiency and access to nontax revenue.

A. Market or Government Failure

Under the market failure theory, charitable organizations form to correct for the undersupply of collective or public goods.²⁷⁴ Collective goods are those that are enjoyed by all consumers regardless of who bears

involvement of corporate leadership in the affairs of nonprofit organizations constitutes a seldom acknowledged but highly important part of business's political outreach.")

268. See *infra* text accompanying notes 274-82.

269. See *infra* text accompanying notes 283-300.

270. OSBORNE & GAEBLER, *supra* note 1, at 44 (quoting Lester Salamon).

271. *Id.* at 46. Osborne and Gaebler conclude:

The third sector tends to be best at performing tasks that generate little or no profit, demand compassion and commitment to individuals, require extensive trust on the part of customers or clients, need hands-on, personal attention (such as day care, counseling, and services to the handicapped or ill), and involve the enforcement of moral codes and individual responsibility for behavior.

Id.

272. See *supra* text accompanying notes 35-45.

273. This criticism applies to any comparative institutional analysis using the charitable sector as one of the relevant institutions.

274. See generally BURTON A. WEISBROD, *THE NONPROFIT ECONOMY* (1988); BURTON A. WEISBROD, *THE VOLUNTARY NONPROFIT SECTOR: AN ECONOMIC ANALYSIS* (1977) [hereinafter *VOLUNTARY NONPROFIT*].

the cost of providing the goods.²⁷⁵ The classic examples are a strong national defense and clean air. A rational consumer has no incentive to contribute to the cost of these goods because, once provided, no one can be excluded from enjoying them. This lack of consumer incentive is known as the "free-rider" effect.²⁷⁶

An unregulated market will always undersupply collective goods, and in certain instances the government will intervene and correct for this undersupply.²⁷⁷ Except in the case of interest group capture, the demand on the part of a relatively small group is generally not sufficient to prompt government action. However, an intense demand among a relatively small group of consumers can prompt the formation of a private charitable organization. Thus, in the face of government disinterest, certain highly motivated consumers will overcome free-rider obstacles and organize to insure the private supply of collective goods. Tax subsidies provide a further incentive and help to reduce the cost of collective action.²⁷⁸

The formation of a GCCO starts with the recognition by the government that a specific service should be provided on the federal level. In that regard, true government failure is not present.²⁷⁹ Instead, there is a funding failure. The decision has been made that the program is necessary, but funding is not available for its delivery.

With a GCCO the government acts as a charitable entrepreneur.²⁸⁰ Presumably, it does so in response to consumer demand or interest group capture. In the first instance, there is arguably a broad base of support for the public goods produced by the GCCO, but an unwillingness or inability on the part of the government to fund the provision of the collective goods directly. The existence of this broad base of support gives some credence to the de facto creation of a preferred class of charitable organizations discussed in Part IV.²⁸¹ GCCOs could be viewed as an intermediate group

275. See generally MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* (1965).

276. *Id.* at 16.

277. See VOLUNTARY NONPROFIT, *supra* note 274, at 1 (describing government as a "corrective institution").

278. See Charles T. Clotfelter, *Tax-Induced Distortions in the Voluntary Sector*, 39 CASE W. RES. L. REV. 663, 670 (1988-1989) (discussing charitable tax incentives as "a corrective measure for [a] basic problem in resource allocation," namely, the undersupply of goods with beneficial externalities).

279. See *supra* text accompanying notes 162-81 (describing the circumstances surrounding the creation of a GCCO).

280. The presence of an entrepreneur is one of the factors collective choice scholars have identified as important in overcoming the incentive to free ride. Additional factors include group size, selective incentives, penalties, and political motivations.

281. See *supra* text accompanying notes 235-43.

of organizations with broad public support for their purposes, but insufficient government funding.²⁸²

B. *Contract Failure*

The contract failure theory focuses on why certain firms elect to organize subject to the nondistribution constraint.²⁸³ For purposes of charitable organizations, the nondistribution constraint is expressed as the prohibition against "private inurement"²⁸⁴ and the requirement that the organizational documents provide for the distribution of the assets to other charities upon dissolution.²⁸⁵ Contract failure theory attempts to explain the choice between the nonprofit and for-profit firm. This elemental choice of entity question, however, can be recast as one of institutional choice. The question becomes: Under what circumstances will consumers favor the provision of goods by the charitable sector rather than the private sector or the public sector?²⁸⁶

282. In the alternative, if the creation of a GCCO is the result of interest group capture, then there is no broad based public support—rather there is simply the government endorsement of the interests of a small group. The endorsement itself is lukewarm. Although the government will incur the cost to establish the organization of the GCCO, it will not commit to fund the organization beyond initial seed money or partial funding. It, in effect, lends its name to the endeavor, agrees to help with fundraising, but will not write a sustaining check.

283. See Henry Hansmann, *The Role of Nonprofit Enterprise*, 89 YALE L. J. 835, 845 (1980) (describing the nondistribution constraint as the common attribute of nonprofit organizations); Henry Hansmann, *The Rationale for Exempting Nonprofit Organizations from Corporate Income Taxation*, 91 YALE L.J. 54 (1981) [hereinafter *Rationale Exempting*] (explaining tax exemption as necessary to compensate for the nonprofit's inability to attract investment capital due to the nondistribution constraint).

284. In order to qualify for exemption under § 501(c)(3), "no part of the net earnings" of the organization may "inure to the benefit of any private shareholder or individual." I.R.C. § 501(c)(3) (1994). This means that individuals can receive only reasonable compensation for goods or services. They cannot share in the profits of the organization. See I.R.S. EXEMPT ORGANIZATION HANDBOOK (IRM 7751) § 342.1(1) (stating that "a private shareholder or individual cannot pocket the organization's funds except as reasonable payment for goods or services").

285. This requirement insures that the assets of a charitable organization are imposed with a perpetual charitable trust. Upon dissolution, any assets remaining after the settlement of debts must be transferred to another charitable organization. This way the assets are never returned to a private individual. See Treas. Reg. § 1.501.

286. The introduction of the government as an alternative provider should also give rise to a discussion of why the for-profit sector is preferred over government. See OSBORNE & GAEBLER, *supra* note 1.

Like the market failure explanation, under the contract failure theory, charitable organizations form as a result of consumer demand. However, the demand is not for collective goods themselves, but rather a specific mode of delivery.²⁸⁷ Charitable organizations are prohibited from distributing net earnings. This nondistribution constraint is desired by a consumer where it is difficult for the consumer to assess the quality of the service provided. A common example is a hospital or skilled nursing care facility, although both also exist in a for-profit noncharitable form. The existence of the nondistribution constraint assures the wary consumer that the service provider will not exploit the asymmetric information to maximize its profit.²⁸⁸

Contract failure is most often applied in the case of organizations that provide complex consumer services and, therefore, obtain the bulk of their revenue in the form of fees for services.²⁸⁹ The explanation also applies to donation-based organizations that provide direct services to individuals or groups other than the donor.²⁹⁰ In such case, the donor is thought to "purchase" other-regarding charitable services.²⁹¹ For example, a donor to a homeless advocacy organization has no means, short of costly monitoring, to determine whether his donation has "bought" the appropriate amount of advocacy services for the intended beneficiary group.²⁹² The nondistribution constraint insures that the charitable organization will not exploit the information imbalance.

The nondistribution constraint explains why consumers might prefer a charitable organization to a for-profit organization, but it does not

287. This only applies in the case of charitable organizations providing donation-based collective goods. In the case of charitable organizations providing complex personal services, their formation is not due to the undersupply of collective goods. The concern is the quality of the goods.

288. Hansmann identified "[c]omplex personal services such as day care and residential nursing care" as the type of services the quality of which consumers could not easily evaluate. See *Rationale Exempting*, *supra* note 283, at 69-70. This is why nursing homes routinely advertise their nonprofit status. Until recent scandals, consumers assumed donation-based charities were trustworthy. State solicitation rules are a consumer protection response to charity scandals.

289. See *id.*

290. See *id.* at 69. (noting that it would be very difficult and costly for the donor/consumer to monitor the quality of disaster relief actually provided by the Red Cross (i.e., the donee organization)). Each GCCO discussed in this Article provides collective goods.

291. See Henry Hansmann, *Economic Theories of Nonprofit Organization*, in *THE NONPROFIT SECTOR: A RESEARCH HANDBOOK* 27, 29-30 (Walter W. Powell ed., 1987) (restating the contract failure theory and noting that a donor is "a purchaser of services").

292. See *id.*

explain the preference for charitable organizations over government provided services. Consumer preference for charitable organizations is due to the absence of the goal of profit maximization. Government programs, however, do not threaten to exploit asymmetric information in order to maximize profits. One explanation is that consumers trust charitable organizations over government because government lacks an incentive to provide quality goods. In the case of the private sector, the goal of profit maximization provides the incentive, while in the charitable community, incentive comes from the ideological commitment of those individuals who choose to work in the sector.²⁹³ Both are arguably missing in the case of government provided goods. When government provides collective goods there is still the problem of costly monitoring on the part of the consumer/taxpayer to determine the quality, and perhaps, quantity of the goods provided.²⁹⁴

Compared with government programs, consumers might prefer charitable organizations because the ideological commitment of those working in the sector provides a greater incentive to produce quality goods at the appropriate level. Although an interesting possibility, government employees could share the same level of commitment to the public since they also work without the goal of profit maximization. In fact, William Niskanen's analysis of the budget-maximizing bureaucrat specifically includes charitable organizations, suggesting that the employee of the government agency and the employee of the local soup kitchen may actually belong to the same model.²⁹⁵

A GCCO indicates that in certain instances consumers trust the charitable sector over either the private or public sectors, particularly for the provision of certain collective goods. It is this consumer trust that makes consumers voluntarily contribute to charitable organizations, but not to government programs.²⁹⁶ The notion that taxpayers (i.e., consumers) lack trust in government is one of the central themes of reinventing government.²⁹⁷ Gore's admonition to "put customers first" is an attempt to restore taxpayer confidence in the government delivery of services.²⁹⁸ Calculated use of a GCCO to implement federal policy is an attempt to exploit the consumer trust associated with charitable organizations. This

293. *See id.*

294. There is an argument that monitoring is undertaken by elected representatives on behalf of consumer/taxpayers.

295. *See* NISKANEN, *supra* note 246.

296. *See supra* note 74 (discussing the donors who contribute to the federal government each year).

297. *See* OSBORNE & GAEBLER, *supra* note 1.

298. *See* PERFORMANCE REVIEW, *supra* note 1, at 57.

is particularly troubling since it is exactly this breakdown in consumer confidence that reinvention seeks to remedy.

The fact that consumers might trust charitable organizations over government run programs or private industry is very different from the determination that charitable organizations warrant such trust. Is it the case that the nondistribution constraint makes charitable organizations less likely to exploit an information imbalance? The employees of some charitable organizations, particularly those providing complex personal services, can receive very generous, albeit, "reasonable" compensation packages.²⁹⁹ In addition, the absence of a profit maximization goal could lead to waste and inefficiency. Finally, recent scandals in the charitable community suggest a crisis in monitoring.³⁰⁰ The nondistribution constraint does not serve any utility if it is not enforced.

VI. CONCLUSION

GCCOs represent just one attempt by an entrepreneurial government to provide better services without increasing taxes.³⁰¹ The pragmatic concerns that gave rise to GCCOs have overshadowed the promise of the comparative institutional analysis endorsed by reinventing government. A comparative institutional analysis requires the identification of a goal, the relevant institutions, and the measure by which to judge the relative benefits of the various institutions.³⁰² Currently, the analysis lacks three things: (i) a sufficiently expansive analysis of the costs associated with GCCOs; (ii) a measure of equity to complement that of efficiency; and (iii) a comprehensive understanding of the charitable sector.

Innovation is at the heart of reinventing government. It is important, however, not to advocate innovation for its own sake. GCCOs may offer increased efficiency and access to nontax revenue,³⁰³ but they also carry

299. See Debra E. Blum, et al., *Top Dollar for Charities' Top Leaders*, CHRON. OF PHILANTHROPY, Sept. 19, 1996, at 1 (noting the high salaries of the top charity executives).

300. See, e.g., Kristin A. Goss, *A Crises of Credibility for America's Non-profits*, CHRON. OF PHILANTHROPY, June 15, 1993, at 1.

301. See OSBORNE & GAEBLER, *supra* note 1 at 31 (discussing 36 alternative delivery forms); see also *supra* note 41 (discussing recommendations of the National Performance Review).

302. See *supra* text accompanying notes 35-41.

303. See *supra* text accompanying notes 46-51 (discussing the advantages of GCCOs).

certain potential costs, such as their impact on the charitable community³⁰⁴ and on their corporate donors.³⁰⁵ These potential costs must be considered in order to determine whether GCCOs really work better and cost less than the other institutional alternatives. Accordingly, the comparative institutional analysis must employ an expanded measure of efficiency that is sufficient to include these various externalities.

From a larger standpoint, institutional choice practiced by government should expressly incorporate a measure of equity.³⁰⁶ Without this consideration, GCCOs remain vulnerable to a pervasive criticism of private charity, namely that it reflects the interests, tastes, and needs of those in society with the greatest resources.³⁰⁷ GCCOs form only after a

304. The impact on the charitable community includes increased competition for the charitable dollar and the emergence of a preferred class of charitable organizations. *See supra* text accompanying notes 221-43.

305. The "voluntary" nature of corporate contributions to GCCOs means that certain corporations bear a disproportionate share of the cost of certain social programs. In addition, the fact that representatives of major donors often serve on the governing bodies of GCCOs indicates that corporate donors are presented with an opportunity to influence federal social policy. *See supra* text accompanying notes 186-221 (explaining the selective assessment on certain corporations and the invitation to influence policy).

306. *See* Rubin, *supra* note 21 (describing a measure for the relative benefits of alternate institutions as a combination of efficiency and "social justice"). Concerns over equity are also a constant criticism of the tax expenditure for charitable contributions. *See supra* note 86 (discussing tax expenditure theory). For example, the tax expenditure is only available for individual taxpayers who "itemize" their deductions (i.e., aggregate of allowable itemized deductions, as reduced and limited by applicable floors and ceilings, exceeds the standard deduction). As a result, many taxpayers and all nontaxpayers do not get to participate in the tax expenditure budget for charitable contributions. Moreover, higher income taxpayers are able to direct a greater portion of the tax expenditure budget because the tax savings is a function of the taxpayer's highest marginal rate of tax. *See supra* note 91 (discussing after-tax cost of deductible charitable contribution). This is referred to this as the "upside down" effect of tax expenditures. *See* STANLEY S. SURREY & PAUL R. MCDANIEL, *TAX EXPENDITURES* 72 (1984).

307. Salamon described this limitation of private charity as "philanthropic paternalism." He said that the institution of private charity "vests most of the influence over the definition of community needs in the hands of those in command of the greatest resources." Salamon, *supra* note 48, at 112 (explaining "philanthropic paternalism"). This is a relatively benign picture of the potential influence over charitable ends. The brief public choice analysis provided above illustrates how GCCOs could facilitate rent-seeking behavior on the part of both politicians and corporate donors. *See supra* text accompanying notes 244-65. Of course, the potential for wasteful rent-seeking behavior exists where the service is provided directly by the government. In such case, there is arguably greater opportunity for public oversight. The unique feature of GCCOs is that continued government involvement potentially secures "rents," but the private nature of a GCCO further obscures the rent-seeking behavior.

two part determination that (i) a given service should be provided on the federal level³⁰⁸ and (ii) the delivery of the service would work best and cost less in the charitable sector.³⁰⁹ Thus, GCCOs exercise quasi-government authority or at least discharge a quasi-government function. It is appropriate to include a measure of equity when weighing the relative benefits of the competing sectors, particularly where the "service" involved is the development of federal policy.³¹⁰

In the case of a GCCO, it is not immediately clear whether to impose the measure of equity on the beneficiary level or on the policy level. On the beneficiary level, the requirement imposed by the federal tax code that charitable organizations serve a public rather than a private purpose should insure that GCCOs benefit a sufficiently broad charitable class.³¹¹ This requirement, however, will not insure broad based representation at the policy level. For example, the board of directors of NASDC is comprised exclusively of industry representatives and Walter Annenberg.³¹² More balanced representation on the policy level might include representatives of the intended beneficiary group, community representatives, donors, experts, and government officials.³¹³ If some form of broad based representation is desired, then a government corporation might be preferable because the government can retain the ability to control the composition of the governing body.³¹⁴

Even with an expanded definition of efficiency and the addition of an equity measure, there remains the inherent limitation in any comparative institutional analysis involving the charitable sector, namely lack of information concerning the nature of the sector.³¹⁵ The ability to choose

308. See *supra* note 170 (discussing the decision to provide a given service on the federal level).

309. See *supra* text accompanying notes 161-81 (explaining the process of weighing the relative benefits of the alternate institutions).

310. NASDC is a good example of a GCCO that develops and then implements federal social policy. See *supra* text accompanying notes 126-43 (describing NASDC).

311. See Treas. Reg. § 1.501(c)(3)-1(d)(ii). "[I]t is necessary for an organization to establish that it is not organized or operated for the benefit of private interests such as designated individuals, the creator or his family, shareholders of the organization, or persons controlled, directly or indirectly, by such private interests." *Id.*

312. See Miller, *supra* note 137, at 12; Greg McDonald, *Largest Donation Ever to Public Education*, HOUSTON. CHRON., Dec. 18, 1993, at A20 (discussing that Walter Annenberg, who made his fortune by selling T.V. Guide, donated \$500 million to NASDC).

313. See Whiting, *supra* note 219, at 777; ANNUAL REPORT, *supra* note 129.

314. See *supra* text accompanying notes 52-67 (describing government corporations).

315. See *supra* text accompanying notes 266-69 (describing the absence of a positive theory of charitable organizations).

among institutions requires an ability to describe the competing institutions. Reinventing government bases its characterization of the charitable sector on the uncritical acceptance of the market or government failure theory³¹⁶ and contract failure theory.³¹⁷ For example, it advocates using a GCCO where "consumer trust" is important, but it never asks whether charitable organizations warrant such consumer trust.³¹⁸ At the same time reinventing government uses these theories to inform institutional choice, the very existence of GCCOs prompt a reevaluation of the underlying theories.³¹⁹ For example, the emergence of the government as a charitable entrepreneur undermines the notion of government failure as the impetus for charitable organizations. It also could give rise to a preferred government-sponsored class of charitable organizations that have certain advantages in attracting corporate support.³²⁰

Reinventing government represents that latest instance where policy is based on unquestioned assumptions regarding the charitable sector.³²¹ The New Federalism of the Reagan era saw the beginning of a reallocation of responsibility for the provision of certain social services from the federal government to the charitable sector.³²² Each year significant tax expenditures are provided to encourage giving to charitable organizations.³²³ The assumptions underlying these choices include a strong belief that the charitable sector is more efficient than the government and that it lessens the burdens of government.³²⁴ They must be tested before becoming any more enshrined in our political conventional

316. *See supra* text accompanying notes 274-82 (explaining the market or government failure theory).

317. *See supra* text accompanying notes 283-300 (explaining the contract failure theory).

318. *See supra* text accompanying notes 299-300 (noting that the proposition that consumers trust charitable organizations is very different from stating that charitable organizations warrant such trust).

319. *See supra* text accompanying notes 266-72 (explaining the need to reexamine the accepted theories).

320. *See supra* text accompanying notes 235-43 (describing the potential for creating such a class of organizations).

321. *See supra* note 24 (discussing related assumptions concerning tax incentives).

322. *See* Knauer, *supra* note 6 (providing a detailed account of this reallocation).

323. *See supra* note 86 (explaining the tax expenditure theory).

324. *See* Knauer, *supra* note 6.

wisdom. If not, reinventing government risks exploiting unexamined consumer trust to convert an otherwise unsympathetic government program into a worthwhile charitable cause.³²⁵

325. *See supra* note 74 (discussing that charitable organizations offer access to nontax revenue because generally taxpayers do not elect to contribute to the federal government).

