Corporate Charitable Contributions: Expanding the Judicial Analysis in a Post-Economic Recovery Act World

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The Economic Recovery Act of 1981 reflects many significant changes in tax policy. In particular, the Act has several provisions which represent a policy shift in the area of charitable contributions. Major revisions were made in those sections of the Internal Revenue Service Code dealing with charitable contributions by individuals, private foundations and corporations. It was not coincidental that these changes accompanied con-


2 I.R.C. § 170(i) (Supp. V 1981) (amending I.R.C. § 170 to permit a charitable deduction for individuals who do not itemize). Of all the amendments affecting charitable deductions, this section has had the most colorful history, having been proposed but rejected in two previous sessions of Congress. See 127 Cong. Rec. S343 (daily ed. Jan. 20, 1981). Senator Moynihan, the amendment’s sponsor, advocated the enactment of this provision primarily because of the prospect that “contributions to charities will increase greatly.” Id. at S7961. He quoted estimates indicating that had this deduction been available in 1975, charitable contributions would have increased by over three billion dollars. See id. at S7960-64. See also Salamon, Will The Tax Act Hurt Giving?, 120 Tr. & Est. 8 (Dec. 1981); Smith, Above-The-Line Tax Treatment for Charitable Contributions, PHILANTHROPY MONTHLY, Sept. 25, 1980, at 34.

3 I.R.C. § 4942(d), (j) (Supp. V 1981) (amending the definition of a private foundation’s distributable amount, and the definition of an operating foundation). As a result of the Tax Reform Act of 1969, Pub. L. No. 91-172, 83 Stat. 487, I.R.C. § 4942(d) required foundations to distribute for charitable purposes five percent of the foundation’s net worth, or the foundation’s entire net investment income, whichever was greater. This system was beginning to erode the giving efficiency of private foundations because of the combined effects of inflation and the requirement to distribute all investment income. See generally Williamson, Foundations and the Payout Requirement, FOUND. NEWS, Mar.-Apr., 1981. In order to preserve the foundation’s charitable reserves, Congress amended § 4942(d) to require only that private foundations distribute five percent of their net assets, leaving the rest to be reinvested in the foundation. See 127 Cong. Rec. E190-91, E334 (daily ed. Jan. 28, 1981) (comments of Reps. Conable and Frenzel); id. at S1385-86 (daily ed. Feb. 19, 1981) (comments of Sen. Moynihan); id. at S8280-83 (daily ed. July 23, 1981) (comments of Sens. Durenberger and Moynihan). Thus, the thrust of the newly amended § 4942(d) is to increase future charitable contributions of private foundations.

4 I.R.C. § 170(b)(2), (e)(4) (Supp. V 1981) (amending statute to increase charitable allowance for corporations from 5% to 10%, and adding provision to allow certain corporations to increase deductions for contributions of inventory property). While this note focuses on the § 170(b)(2), 10% deduction allowance, the same policy underlies both § 170(b)(2) and § 170(e)(4). That policy, as stated on the floor of the Senate, is to “bring the corporations of this country into the process of meeting the needs of the people of our society.” 127 Cong. Rec. S8352 (daily ed. July 24, 1981) (comments of Sen. Kennedy). The amended § 170(b)(2) was intended to “facilitate that effort by raising the limit on corporation contributions to charity.” Id. Senator Byrd used slightly more emphatic language, stating, “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 S8353.

In the House, Representative Archer was also adamant in his belief that there was a need for increased corporate charitable activity. He felt that the necessity for increased corporate contributions “should be obvious,” and that the present law was unnecessarily restrictive. Id. at E3088 (daily ed. June 22, 1981).
gressional approval of massive federal budget reductions. Concern over the decrease in government funding of nonprofit and social service organizations caused many senators and congressmen to support legislation encouraging increased voluntary support from the private, philanthropic sector.

The revisions dealing with corporate charitable donations are perhaps the most striking because they mark the first major statutory alteration in that area for nearly five decades. From a judicial standpoint, those provisions may also present the greatest challenge because courts have not demonstrated a clearly articulated, uniform approach to resolving disputes arising in the context of corporate charitable transfers. Rather, the past decisions have evidenced an uneven and convoluted growth in this area of the law.

In the first instance, the courts' inconsistency in this area may be attributed to their inability to agree on whether they should apply the same standard in section 170 charitable contribution cases as they routine-

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7 The percentage ceiling on corporate charitable deductions has remained unchanged since Congress incorporated into the Revenue Act of 1935, Pub. L. No. 74-407, 49 Stat. 1014 (adding subsection (r) to § 23), a provision allowing corporations to deduct up to five percent of their pre-tax net income in charitable contributions. See infra note 31. In 1962 a "carry forward" feature was added to the Code, and in 1964 the carry forward period was extended to five years. Revenue Act of 1964, Pub. L. No. 88-272, 78 Stat. 19, 46, § 170(d)(2) (former § 170(b)(3)) (permitting corporations to carry forward into the next taxable year deductions in excess of the percentage limit). Section 170(d)(2) remains in effect for the 10% limit, so that conceivably a corporation could deduct more than 10% of their pre-tax net income in any given year. See source cited infra note 9.

8 See Southern Pac. Transp. Co. v. Commissioner, 75 T.C. 497, 602 n.114 (1980) ("The courts have not followed a consistent pattern in this area."); Dockery v. Commissioner, T.C.M. (P-H) ¶ 78,063, at 321 (1978) ("As can be seen, the cases do not consistently apply the same test.").

9 I.R.C. § 170 (1976). Section 170 reads in pertinent part:
(a) ALLOWANCE OF DEDUCTION
   (1) GENERAL RULE—There should be allowed as a deduction any charitable contribution (as defined in subsection (c)) payment of which is made within the taxable year . . . .

(b) PERCENTAGE LIMITATIONS . . . .
ly use under the section 102(a)\(^\text{10}\) gift analysis.\(^\text{11}\) A further complication derives from the fact that those courts which have decided to adopt different tax analyses for individual charitable contributions and gifts have been unable to reach a consensus on whether the gift analysis is also inappropriate when a business, as opposed to an individual, claims a charitable deduction.\(^\text{12}\) Ultimately, determining whether a given business contribution is in fact charitable is an important question from a tax policy

\(\text{(2) CORPORATIONS—In the case of a corporation, the total deductions under subsection (a) for any taxable year shall not exceed 10 percent of the taxpayer's taxable income . . . .} \)

\(\text{(c) CHARITABLE CONTRIBUTION DEFINED—For purposes of this section, the term ‘charitable contribution’ means a contribution or gift to or for the use of—} \)

\(\text{(1) A State, a possession of the United States, or any political subdivision of any of the foregoing, or the United States or—} \)

\(\text{the District of Columbia, but only if the contribution or gift is made for exclusively public purposes.} \)

\(\text{(2) A corporation, trust, or community chest, fund, or foundation . . . .} \)

\(\text{(d) CARRYOVERS OF EXCESS CONTRIBUTIONS—} \)

\(\text{(2) CORPORATIONS—} \)

\(\text{IN GENERAL—Any contribution made by a corporation in a taxable year (hereinafter in this paragraph referred to as the "contribution year") in excess of the amount deductible for such year under subsection (b)(2) shall be deductible for each of the 5 succeeding taxable years in order of time . . . .} \)

\(\text{(1976).} \) Section 102(a) reads in pertinent part: "GENERAL RULE—Gross income does not include the value of property acquired by gift . . . ." \(\text{Id.}\)

\(\text{See} \text{ Haak v. United States, 451 F. Supp. 1087, 1089 (W.D. Mich. 1978) ("Courts have split on the appropriate test to be used in determining whether a particular transaction was a 'contribution or gift.'"); Morton v. Commissioner, 39 T.C.M. (CCH) 621, 625 (1979) ("Some years ago we commented that the term 'gift' as used in section 170, as reflected in the decided cases, represented a 'thicket of subjective and occasionally ephemeral concepts.' Later decisions have done little to cause us to change that description.") (citing Perlmutter v. Commissioner, 45 T.C. 311, 317 (1965); Marquis v. Commissioner, 49 T.C. 695, 702 (1968) ("Indeed ... the principles underlying the gift exclusion decisions may not be fully applicable in the area of charitable contributions."). Compare Dowell v. United States, 533 F.2d 1233, 1238 (10th Cir. 1977); Considine v. Commissioner, 74 T.C. 955, 967 (1980); Rhodes v. Commissioner, T.C.M. (P-H) ¶ 77,033, at 147, 151 (1978); Pettit v. Commissioner, 61 T.C. 634, 639 (1974); Seed v. Commissioner, 57 T.C. 265, 275 (1971); DeJong v. Commissioner, 36 T.C. 896, 899 (1961), aff'd, 309 F.2d 373, 376-79 (1962) (all cases applying the § 102(a) gift standard in § 170 charitable contribution cases) with Allen v. United States, 541 F.2d 786, 787-88 (9th Cir. 1976); Oppewal v. Commissioner, 468 F.2d 1000, 1002 (1st Cir. 1972); Stubbs v. United States, 428 F.2d 585, 886-87 (9th Cir. 1970); Crosby Valve & Gage Co. v. Commissioner, 360 F.2d 146, 146-47 (1st Cir. 1967); Haak v. United States, 451 F. Supp. 1087, 1090 (W.D. Mich. 1978) (all cases refusing to apply a gift analysis in charitable contribution cases).} \)

This page discusses the issue of corporate charitable contributions and the changes in legislative endorsement. It argues that the determination of how much economic benefit a corporation may derive from a charitable transfer will affect the long-term efficacy of the new legislation. The note concludes that the current standards are inappropriate and offers a preferable analysis. Some background on the historical development of the relationship between charitable contributions and business expenditure is also presented.

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13 The relationship between the tax test used to determine whether a contribution is in fact charitable and the level of corporate charitable activity was noted over a decade ago by Professor Blumberg, who wrote that "the tax test may . . . also be the decisive test of validity in a tax-oriented business world. It is plain that as a practical matter, corporate activities in the social sphere will be undertaken only if the expenditures are tax deductible." Blumberg, Corporate Responsibility, 50 B.U.L. Rev. 157, 180 (1970). See infra note 57 and accompanying text.


15 Most, if not all, of the discussion, however, applies to the general category of business charitable contributions. The courts' discussion of the issue of charitable contributions in a business context applies both to corporations and other business entities. See Southern Pac. Transp. Co. v. Commissioner, 75 T.C. 497, 602 n.114 (1980).

16 See supra note 4 and accompanying text.


18 See infra note 35.

19 See infra text accompanying notes 155-59. If the courts continue to apply an unnecessarily restrictive analysis in business charitable contribution cases, it is unlikely that a majority of corporations will be able to increase adequately their current level of contributions. Id.

20 There are two levels to this "appropriateness" inquiry: first, whether the standard is appropriate, that is, defensible, in light of the history of corporate charitable activity; and second, whether that standard is appropriate in light of the charitable contribution policy incorporated in the Economic Recovery Act of 1981, Pub. L. No. 97-34, 95 Stat. 172. While the two are analytically separable, under either inquiry the courts' analysis is unacceptable.

21 One of this note's major criticisms of the courts' current business charitable contribution standards is that the analysis unduly restricts the definition of a charitable contribution so as to exclude certain economic benefits that from a historical perspective are entirely acceptable. See infra text accompanying notes 22-54. The courts' restrictive analysis seems unwarranted in light of the historical overlap in the function of the business charitable contribution and the business expense. See infra text accompanying notes 55-83.
HISTORICAL BACKGROUND

The Early Case Development

The early case law in the area of corporate charitable donations focused primarily on the question of whether a corporation was legally empowered to make charitable contributions. The earliest judicial analysis applied in corporate contribution cases, the "strict constructionist" doctrine, was not particularly conducive to gratuitous transfers. In 1917, however, the courts replaced that approach with a less restrictive "benefit" standard, which allowed donations that were consideration for a benefit flowing to the corporation. In order for a corporate contribution to survive the benefit analysis, the corporation had to demonstrate a relationship between the business of the corporation and the designated charity. Until 1924, the judicial decisions applying the benefit criteria arose exclusively in the context of employee relations, not philanthropic concern. In these cases it was generally not difficult for the courts to find the type of direct benefit flowing to the corporation necessary to validate the expenditures: business judgment, not eleemosynary sentiment, provided the judicial justification for distributions of corporate funds outside the immediate profit-making sphere of activity.

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23 Blumberg, supra note 13, at 168. The strict constructionist approach was based on a literal reading of the corporation's charter, which specified the type of business activity the corporation was empowered to undertake. Corporate distributions that were found to be outside the sphere of authorized authority were held to be ultra vires. See, e.g., Brinson Ry. v. Exchange Bank, 16 Ga. App. 425, 85 S.E. 634 (1915); Davis v. Old Colony R.R., 131 Mass. 258 (1881). Modern case law and enabling statutes have effectively eliminated ultra vires attacks on corporate charitable distributions. See Garrett, Corporate Donations, 22 Bus. Law. 297, 297 (1967). There is still the possibility, however, that a charitable donation authorized by a corporate officer would be in violation of his duty to act intra vires and within his respective authority. See Comment, Corporate Conscience: Charitable Donations, 9 Ariz. L. Rev. 421, 425 (1968).
24 Blumberg, supra note 13, at 170. The court's formulation of this test in Chicago & N.W.R.R. v. Commissioner, 114 F.2d 882, 888 (7th Cir. 1940) is a typical example: "Corporations are not entitled to deductions for charitable contributions, but...they are authorized to take deductions for 'donations which legitimately represent a consideration for a benefit flowing directly to the corporation as an incident to its business ...'." See also Steinway v. Steinway & Sons, 17 Misc. 43, 40 N.Y.S. 718 (1896).
25 Garrett, supra note 23, at 298.
26 Blumberg, supra note 13, at 170. Others have also agreed with this position. See F. Andrews, Corporate Giving 231-33 (1952); R. Eells, Corporate Giving In A Free Society 6-8 (1956). See generally M.F. Smith, supra note 22, at 9-13. Typically, these donations took the form of contributions to employee relief funds or provided financing for the construction of libraries, homes, and other buildings in the immediate business community. Blumberg, supra note 13, at 170.
27 See People ex rel. Metropolitan Life Ins. Co. v. Hotchkiss, 136 A.D. 150, 163, 120 N.Y.S. 649, 651 (1909); Steinway v. Steinway & Sons, 17 Misc. 43, 43, 40 N.Y.S. 718, 719 (1896); see generally Blumberg, supra note 13, at 170-72.
28 Blumberg, supra note 13, at 170; but see Armstrong Cork Co. v. H.A. Meldrum Co., 285 F. 58 (W.D.N.Y. 1922) (court refused to invalidate corporate contribution to an educa-
The Nebraska Supreme Court in *State ex rel. Sorenson v. Chicago, B. & Q. Railroad* \(^{29}\) began to enlarge the benefit concept when it upheld a railroad's practice of gratuitously providing ministers with free boarding passes.\(^{30}\) Subsequent case development continued to give a more expansive meaning to the term "direct" benefit, gradually eviscerating (but not expressly rejecting) the original requirement that the contribution produce an immediate economic advantage for the corporation.\(^{31}\) The notion of benefit was broadened to the point where "a contribution, not resulting in immediate economic results, was made a matter of business judgment to fulfill [some] objective."\(^{32}\)

Concurrently, attitudes about corporate responsibility began to evolve into an expanded recognition of the corporation's role in society and its fiduciary obligations to the general public.\(^{33}\) The visible shift toward an acceptance of corporate activity in the public domain as a legitimate, indeed, desirable exercise of corporate discretion was recognized by Congress in the Revenue Act of 1935.\(^{34}\) By amending the IRS Code to permit corporations to deduct contributions not in excess of five percent of their

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\(^{29}\) 112 Neb. 248, 199 N.W. 534 (1924).

\(^{30}\) Id. at 250, 199 N.W. at 538; see also Carey v. Corporation Comm'n of Okla., 168 Okla. 487, 492, 33 P.2d 788, 794 (1934).

\(^{31}\) See Blumberg, *supra* note 13, at 176; but see Old Mission Portland Cement Co. v. Helvering, 293 U.S. 289 (1934) (denying a charitable deduction which the corporation had made with the expectation of generating goodwill and increased business, because of the absence of any direct economic benefit flowing to the corporation).

\(^{32}\) Blumberg, *supra* note 13, at 176.


pre-tax net income, Congress implicitly validated the concept of a corporate charitable donation.  

It was, however, nearly two decades later before the narrow benefit criteria articulated in the early decisions was formally rejected by the courts. The landmark case of *A.P. Smith Mfg. Co. v. Barlow*, 36 decided by the New Jersey Supreme Court in 1953, was the first case to discard "singleminded reliance on the . . . benefit test." The court in *A.P. Smith* upheld the contribution of $1500 to a private educational institution as a valid exercise of corporate prerogative. 39 The contribution was justified on three separate bases: the donation reasonably furthered corporate interests, which resulted in a benefit; 39 a New Jersey statute expressly authorized contributions; 40 and the corporation had a broad responsibility to society. 41 Despite the court's sweeping language on the merits and necessity of corporate responsibility, 42 the court's holding was somewhat more limited. The court noted that the donation furthered a corporate, not personal, end, 43 that the amount was modest and within the statutory prescription, and that the contribution was reasonably calculated to ad-
ance the interests of the corporation. Thus, the court's holding did not totally remove either the language of, or the need for, some corporate benefit in the contribution, although clearly the term was given a profoundly new meaning.

Later, in *Union Pacific Railroad v. Trustees, Inc.*, the Utah Supreme Court joined in what it considered the widespread acceptance of the concept of corporate social responsibility, by validating a $5000 corporate contribution to a nonprofit organization. The court did so, however, only because it thought that corporate managers would never undertake a contribution program unless they were confident that the company would receive, either immediately or in the near future, some benefit which would constitute a *quid pro quo*. Holding the donation permissible, the court recognized an implied corporate power to make contributions if they were "of reasonable amounts . . . [and] appear reasonably designed to assure a present or foreseeable future benefit to the corporation . . . ."

As in *Smith*, *Union Pacific* validated and encouraged corporate charitable activity, but did not entirely remove the notion of business benefit from judicial regulation of corporate charitable contributions. Rather, it expanded the definition of benefit to include not only those corporate donations or transfers directly benefiting the corporation, but also those legitimately furthering some business objective. In both the *Smith* and *Union Pacific* decisions the courts remained concerned that the charitable transfer exhibit some business nexus. They did not overtly distinguish a charitable contribution from a business expense because, under their analysis, the power to make contributions still had to be exercised in the interests of the corporation. In short, there had to be "a reasonable relationship between the activity and the fulfillment of the objectives of the business."

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44 *A.P. Smith*, 13 N.J. at 161, 98 A.2d at 590.
45 One critic comments that the "vague criteria of 'insuring and strengthening' society was held [in *A.P. Smith*] to constitute a sufficient corporate benefit." Note, *supra* note 33, at 105.
47 Id. at 105, 329 P.2d at 401.
48 Id. at 107, 329 P.2d at 402.
49 Id. at 106, 329 P.2d at 401. But see Id. at 112, 329 P.2d at 405 (Worthen, J., dissenting) (Chairman of Board of Union Pacific admitted in testimony that "[the corporation] cannot seek always to put the gift on a *quid pro quo* basis").
50 Id. at 103, 107, 329 P.2d at 399, 402. In this sense, the court's holding is broader than that of *A.P. Smith* because in that case the court partially based its holding on the presence of a New Jersey enabling statute. *See supra* text accompanying note 40.
51 *Union Pacific*, 8 Utah 2d at 107, 329 P.2d at 402. The court declared such a policy of making contributions one of sound business. Id. at 106, 329 P.2d at 401. The challenging party was assigned the burden of proving either waste or lack of a corporate benefit. Id.
52 Id. at 107, 329 P.2d at 402. The court believed the decision to make a charitable contribution should properly be left to the discretion of management, and should be made with the "studied and not unreasonable conviction that it would benefit the corporation." Id.
53 Blumberg, *supra* note 18, at 176.
54 Id. There have been few recent cases in the area of corporate social responsibility.
The right of a business entity to engage in charitable activity has remained essentially inviolate since the passage of the Revenue Act of 1935. The corollary question, however, of whether a particular transfer qualifies as a charitable contribution for purposes of tax analysis, has not enjoyed similar judicial unanimity. As a practical matter, determining whether a transfer is charitable in nature may be the more important question because a court must decide whether a contribution is in fact charitable before a deduction will be allowed. Unfortunately, modern courts have been unable to articulate a standard that adequately distinguishes a charitable donation from a business expense for purposes of deductibility.

The problem of separating a business-oriented charitable donation from

In the only recent case of any significance, Theodora Holding Corp. v. Henderson, 257 A.2d 398 (Del. Ch. 1969), the court, while differing on at least one point with the decision in A.P. Smith, see supra text accompanying note 43, upheld a corporate donation to a private foundation in the face of shareholder disapproval. Theodora Holding Corp. v. Henderson, 257 A.2d 398, 405 (Del. Ch. 1969). In doing so, the court mentioned the responsibility of corporations to support charitable causes, id. at 404, but also noted that the loss in immediate income would be outweighed in the long run by the overall benefits flowing to the corporation. Id. at 405. See also Kelly & Wyndham, Inc. v. Bell, 266 A.2d 878 (Del. 1969) (upheld payment of five million dollars by corporation to county in Pennsylvania on basis of business judgment rule, not reaching question of whether financial benefit to corporation precludes treating payment as charitable contribution).

See Center on Corp. Responsibility, Inc. v. Schultz, 368 F. Supp. 863, 874 n.21 (D.D.C. 1973) ("It is only reasonable that corporations begin to realize that they have duties beyond simply making money for their shareholders .... [I]t is incumbent upon corporations to use their substantial economic power for the community good, rather than solely for self-enrichment ....") (emphasis in original); Manne, The Limits And Rationale Of Corporate Altruism: An Individualistic Model, 59 VA. L. REv. 708, 722 (1973) ("Clearly what can pass as corporate altruism must be near an all-time high today.").

The vast majority of recent decisions dealing with the issue of whether a business charitable deduction is legally permissible have arisen in the context of a transfer of some property interest. In both of the major decisions in the area of corporate charitable transfers, the courts' finding that the legal requirements for a § 170 charitable deduction had not been met resulted in no deduction at all for the transferring corporation. See United States v. Transamerica Corp., 392 F.2d 522 (9th Cir. 1968); Singer Co. v. United States, 449 F.2d 413 (Ct. Cl. 1971). Moreover, courts will often classify a denied corporate charitable contribution as a capital expenditure, which is a nondeductible expense under I.R.C. § 263 (1976). See Dockery v. Commissioner, T.C.M. (P-H) ¶ 78,063, at 321 n.8 (1978). Even in those situations where a denied charitable transfer might qualify for a § 162(a) business-expense deduction, the disallowance of the charitable deduction could have a significant adverse financial impact. This is especially true with respect to the transfer of appreciated capital gain property. A judicial finding that a transfer of appreciated capital gain property did not constitute a charitable contribution would trigger a tax on the long term capital gain and reduce the benefit of the deduction. See STAND. FED. TAX REP. (CCH) ¶ 206.012 (1982); Treas. Reg. § 1.170A-1(c) (1981). The corporation would no longer be able to deduct the fair market value, but only the corporation's basis in the property. The corporation would therefore pay a tax on the difference between the fair market value and the basis. The risk of paying the additional capital gains tax is a powerful disincentive to potential corporate charitable contributors.

55 See infra notes 86 & 149 and accompanying text.
an ordinary business expenditure developed after the passage of the Revenue Act of 1935. After 1935, corporations were able to circumvent the five percent limitation on charitable contributions by claiming that a transfer, although charitable in nature, actually represented consideration for benefits flowing to the corporation or in some way benefited the corporation and was thus tantamount to a business expense. The fact that courts were receptive to arguments of benefit and consideration in the context of charitable contributions indicates the relative imprecision with which those courts approached the distinction between a business deduction and a charitable contribution. In response to either the corporation's ingenuity or the judiciary's apathy, Congress enacted section 23(a)(2) of the Revenue Act of 1938, which was incorporated virtually verbatim into the language of current Code section 162(b). Congress was concerned with the fact that expenditures that were actually charitable in character were being deducted under the guise of business-related expenses. In passing what is now section 162(b) of the Code, Congress intended that a wholly gratuitous transfer, which generated no benefit for the corporation, should constitute a charitable contribution and be subject to the then current five percent limit. Conversely, a transfer that contemplated a benefit flowing to the corporation commensurate in value to the transferred interest was not considered charitable, but rather a section 162(a) business expense.

Congress' legislative distinction, however, was not exhaustive. Between the Revenue Act of 1935, Pub. L. No. 74-407, 49 Stat. 1014. In Fairmont Cremery Corp. v. Helvering, 89 F.2d 810, 813 (D.C. Cir. 1937), for example, the court held that contributions by the corporation to a YMCA and a college pursuant to a solicitation by customers with whom it did considerable business were deductible as legitimately representing consideration for benefits flowing to the corporation. This imprecision reinforces the impression suggested earlier, see supra text accompanying notes 49-51 that even after the passage of the 1935 enabling legislation charitable contributions were routinely distributed in a business context, and that this practice did not offend the courts' notion of corporate charity. See, e.g., Halst v. New York Stock Exch., 252 A.D. 233, 299 N.Y.S. 255 (1937); People v. S.W. Strauss & Co., 158 Misc. 186, 285 N.Y.S. 648 (1936).

The Revenue Act of 1938, Pub. L. No. 75-554, 52 Stat. 447 (adding subsection (a)(2) to § 23). Section 23(a)(2) of the Revenue Act of 1938, id., provided that "no [business] deduction shall be allowable to a corporation for any contribution or gift which would be allowable as a [charitable] deduction . . . were it not for the 5 percent limitation therein contained." Cf. I.R.C. § 162(b) (1976) ("No [business] deduction shall be allowed under section 162(a) for any contribution or gift which would be allowable as a deduction under section 170 were it not for the percentage limitations . . . set forth in such section."). See Singer Co. v. United States, 449 F.2d 413, 419 (Ct. Cl. 1971); Marquis v. Commissioner, 49 T.C. 665, 699 (1968).

the polar points of no benefit and commensurate benefit there exist many types of contributions or transfers which generate some benefit to the corporation, albeit benefits which are not commensurate in value to the contribution or transfer. Two important cases decided under section 162(b) have attempted to refine the distinction between a charitable contribution and a business expenditure in these "gray-area" transfers. The first, Marquis v. Commissioner, involved cash payments by a travel agent to charities who were her clients. The issue was whether the payments to qualified charitable organizations could be deducted as business expenses without regard to the section 162(b) five percent limitation on charitable donations. The government argued that a contribution could not be deductible under 162(a) as a business expense, and therefore could not avoid the section 162(b) restriction, unless there was a direct and apparent quid pro quo—a binding obligation, anticipated in advance of the exchange. If none existed, then the payments necessarily had to be considered a section 170 contribution and therefore subject to section 162(b). After reviewing the legislative history, the United States Tax Court rejected the government's interpretation and refused to apply the section 162(b) limitation to the transfer. The court held that the government's "binding obligation" theory of section 162(b) was overly restrictive and inconsistent with the statute's intent, thus indicating that some voluntary or gratuitous transfers should not be properly characterized as charitable deductions. The court cast its analysis in terms of the derived benefit, not the existence of an obligation, thereby rendering the distinction between a business charitable contribution and a business expense somewhat indistinguishable.

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6 The court in Crosby Valve & Gage Co. v. Commissioner, 380 F.2d 146 (1st Cir. 1967), listed some of these as "community goodwill, the desire to avoid community bad will, public pressures of other kinds, tax avoidance, prestige, [and] conscience solving . . . ." Id. at 146. The derivation of some economic benefit also appears to fall in this "gray" area. Given the language of the congressional comment, see sources cited supra note 65, there seems to be no statutory prohibition on a corporation receiving some economic benefit from a charitable contribution as long as it is not commensurate with the value of the transferred interest. See infra note 142.

6a 49 T.C. 695 (1968).
6b Id. at 696.
6c Id. at 700.
6d Id.
7 Id. at 701. The court stated, "neither the statutes, the legislative history, nor the government's regulations require the existence of a binding obligation . . . as a precondition to deductibility under § 162(a)."
7a Cf. Hartless Linen Serv. Co. v. Commissioner, 32 T.C. 1026 (1959); United States Potash Co. v. Commissioner, 29 T.C. 1071 (1958); McDonald Aircraft Corp. v. Commissioner, 16 T.C. 189 (1951) (§ 162(b) limitation applied where no benefits or only tangential benefits accrued to corporation).
7b Marquis, 49 T.C. at 702.
7c Id. In reaching its conclusion the court expressly refused to apply either the govern-
In *Singer Co. v. United States* the Court of Claims also refused to formulate an inflexible distinction between a business deduction and a charitable contribution. In *Singer*, the corporation made bargain sales of sewing machines to certain charitable groups, some of which were public and parochial schools. Contending that the school discounts represented charitable contributions, the corporate taxpayer argued that voluntary contributions were governed exclusively by section 170. Consequently, Singer proposed that the only time a contribution could qualify as a business deduction for purposes of section 162, was when there was evidence of a “specific and direct *quid pro quo* flowing from the transfer.”

In reaching its decision, the Court of Claims rejected the proposition that section 170 was the controlling statutory provision for all voluntary and gratuitous transfers to charities, concluding instead that conceivably a transfer to a charitable organization could be deductible under section 162(a) as a legitimate business expense. In so deciding, the *Singer* court, as did the court in *Marquis*, indicated that the proper focus was on the nature of the benefit received by the corporation by virtue of the transfer, not the form of the transfer.

The holdings in *Singer* and *Marquis*, taken together, demonstrate that a voluntary and gratuitous contribution or transfer may sometimes constitute business expenditure for purposes of the Tax Code, despite the absence of an expectation of some commensurate benefit. Not surprisingly, therefore, the nature of the business expense and the business-

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75 449 F.2d 413 (Ct. Cl. 1971).
76 Id. at 420.
77 The public and parochial schools receiving discounts were schools and colleges under federal, state, county, municipal, and parochial administration. The other charities included government and nonprofit hospitals, government agencies (federal, state, county, and municipal), the Red Cross, salaried county home-demonstration agents, 4-H Girls Club leaders, churches, and other charitable organizations. All of these groups received 45% discounts, except the churches and charitable organizations, which received 25%. Id. at 415.
78 Id. at 419. The corporation's argument, interestingly, is similar to the argument the government raised in *Marquis*, 49 T.C. 695 (1968). See supra text accompanying notes 70-76.
79 *Singer*, 449 F.2d at 419.
80 Id. at 421. (“[W]e ... reject [the company's] first argument that section 170 has exclusive control over all voluntary and gratuitous transfers to charities.”) (emphasis in original).
81 The court did not decide whether this particular transfer by Singer would constitute a legitimate business deduction because Singer did not claim a business deduction on their corporate return. Id. at 421 n.10.
82 Id. at 423. Thus, even if the derived benefit did not originate or flow directly from the designated transferee, that benefit would be subject to judicial scrutiny under a § 170 analysis.
83 See *Singer*, 449 F.2d at 423; *Marquis*, 49 T.C. at 702.
oriented charitable contribution will inevitably merge somewhat in the
courts' analysis, with the distinction ultimately resting on the magnitude
of the benefit conferred, not on the presence or absence of a corporate
benefit.

CORPORATE CHARITABLE CONTRIBUTION ANALYSIS

The Duberstein Criteria

As indicated above, the courts' mode of analysis in business charitable
contribution cases has varied from decision to decision, with no one case
being consistently cited as controlling precedent. The confusion generated
by the courts' inconsistency is exasperating in its own right, but in an era
where the charitable role of the corporation and other business enti-
ties is being encouraged and expanded, such a state of affairs is partic-
ularly egregious. More importantly, the analysis most often employed
by the courts, the so-called Duberstein criteria, is entirely inappropriate.

The current difficulties with the courts' analysis of business charitable
contributions may be traced to the Supreme Court's decision in
Commissioner v. Duberstein, a case involving a corporation's gift to the
widow of a past employee. The Court held that for purposes of section
102(a), the transferor's intent or state of mind was the critical factor. A
valid legal gift was said to be a voluntary transfer stemming from
"detached and disinterested generosity" or "out of affection, respect, ad-
miration, charity or like impulses."

Because section 170 defines a charitable transfer as a "contribution or
gift" many courts have applied the Duberstein criteria when determining
the validity of a claimed charitable contribution. In the leading case of
DeJong v. Commissioner, the Ninth Circuit expressly held that the term
"charitable contribution" was synonymous with the word "gift, and

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84 See supra note 10 and accompanying text.
85 This has been particularly true in the tax courts. See infra note 135.
86 See supra note 4.
n.1 (W.D. Mich. 1978) ("It is not clear that Duberstein focused solely on motive or state
of mind in assessing whether a transaction was properly characterized as a gift.").
90 Duberstein, 363 U.S. at 285; see also Commissioner v. LoBue, 351 U.S. 243, 246 (1956);
92 309 F.2d 373 (9th Cir. 1962).
93 Id. at 376-79. The court cites Channing v. United States, 4 F. Supp. 33 (D. Mass. 1933),
as authority for equating a gift with a charitable contribution. In Channing, the court had
quoted the sponsor of the Senate amendment permitting individuals to take a charitable
deduction as saying, "[w]e are now going to exempt . . . gifts to charitable, educational
and scientific institutions . . . ." 55 Cong. Rec. 6730 (1928) (emphasis added).
ANALYZED THE CLAIMED CHARITABLE DEDUCTION UNDER THE DUBERSTEIN TEST. Relying on DeJong's authority, courts have become accustomed to equating a charitable contribution with a gift, so much so that for some courts, the two terms seem conceptually inseparable. Those judicial opinions which have disagreed with DeJong's reliance on the traditional gift test in the area of corporate charitable contributions, however, are analytically preferable and historically correct. Neither of the formulative cases in the area of corporate charity, A.P. Smith Mfg. Co. v. Barlow and Union Pacific Railroad v. Trustess, Inc., discarded the language of benefit in the process of validating corporate charitable contributions. Implicit in those courts' acknowledgment of the propriety and desirability of corporate charitable donations was the notion that these transfers or expenditures benefited the business in some manner. Thus, while both the New Jersey and Utah Supreme Courts expanded the definition and character of a corporate benefit, neither removed the need for some form of business benefit from the analysis of the pro-

94 DeJong, 309 F.2d at 379.
96 See, e.g., Dowell, 553 F.2d at 1238, where the court makes the analytical leap from charitable contribution to gift in a perfunctory fashion: "[S]ection 170(a) ... allows a deduction for 'charitable contributions.' It is firmly established that a gift is ... ") (emphasis added). The fact that the congressional policies behind the enactment of § 102(a) and § 170 are significantly dissimilar, however, would seem to indicate that a court's analysis under the two sections should not be identical. This is especially true with respect to the element of intent. See infra note 132.
97 As early as 1961, the Court of Appeals for the Tenth Circuit rejected in unequivocal language the application of the Duberstein test in the context of corporate distributions or transfers. Joshel v. Commissioner, 296 F.2d 645, 647-48 (10th Cir. 1961). The court stated that "it is difficult to understand how a corporation for profit can transfer property out of a detached and disinterested generosity..." Id.
98 Two cases decided subsequent to Joshel have expressly recognized that some business benefit does not invalidate, and in fact may be necessary to, a corporation's charitable transfer. In Citizens & S. Nat'l Bank of S.C. v. United States, 243 F. Supp. 900 (W.D.S.C. 1965), the court found nothing in the IRS Code to prohibit a charitable contribution. Id. at 904. In fact, the court suggested that it was only proper that a corporation have some business purpose or extract some type of benefit from the transfer so as to be able to justify the contribution to its shareholders. Id.; see infra note 151. The Ninth Circuit's language, rejecting use of the Duberstein criteria in United States v. Transamerica Corp., 392 F.2d 522 (9th Cir. 1968), was even more emphatic. Distinguishing its earlier decision in DeJong because that case involved an individual taxpayer, the court recognized that a strict requirement of detached and disinterested generosity or lack of any business purpose would essentially render ultra vires every corporate charitable contribution. United States v. Transamerica Corp., 392 F.2d at 524. This in turn would frustrate the congressional intent that corporations receive such deductions. Id. Cf. United States v. Tsanas, 572 F.2d 340, 347 n.9 (2d Cir. 1978) (court rejects the reasoning of Joshel and Transamerica, noting that Duberstein involved a transfer by a corporation).
101 See supra text accompanying notes 52-54.
priety of corporate gifts. As such, it seems that corporate charitable contributions for those two courts were by definition self-interested contributions made in expectation of some return benefit. They were not disinterested donations.

The analysis employed by the courts in Marquis v. Commissioner and Singer Co. v. United States lend additional support to the view that the detached and disinterested test of Duberstein is inappropriate in business charitable contribution cases. The courts' reasoning in both cases seems to anticipate some overlap, both as to function and form, between business expenditures and charitable contributions. One implication of such a view is the possibility that although charitable contributions and legitimate business expenditures represent different types of corporate distributions, both are made with the expectation of some benefit accruing to the corporation. To acknowledge that a corporation may expect a benefit from a charitable contribution is tantamount to rejecting the notion that a business entity must approach a charitable transfer in a detached and disinterested fashion.

Viewed in conjunction with past legislative and judicial development, the proper result is reached by those courts that have refused to apply the Duberstein criteria in the area of business charitable contributions. The concept of a detached and disinterested transfer is simply misplaced in the context of business transfers, both historically and from a shareholder's viewpoint. Much of the present confusion in this area of legal analysis would be eliminated by a formal rejection of Duberstein and its progeny in business charitable contribution cases.

101 Id. Indeed, the history of corporate contributions may be understood as involving the continuous expansion of the definition of a legitimate business benefit. See supra text accompanying note 53. From the strict, charter-related analysis used in the early cases, see supra note 23 and accompanying text, the concept of benefit eventually grew into the broad "insuring and strengthening" criteria utilized in A.P. Smith, 13 N.J. 145, 98 A.2d 581. See supra note 45.

102 49 T.C. 695 (1968).

103 449 F.2d 413 (Ct. Cl. 1971).

104 In fact, both courts refused to endorse the Duberstein criteria in their holdings. See Singer, 449 F.2d at 422; Marquis, 49 T.C. at 702.

105 See supra text accompanying notes 83-84. In fact, the Singer court expressly stated that "we do not contend that absolutely no benefits can be derived from an otherwise charitable contribution or gift." Singer, 449 F.2d at 423. The Marquis court made no such express statement, but its holding did not preclude this conclusion. See supra note 74.

106 Only two cases have expressly acknowledged that a contribution by a corporation or other business entity should be made with some expectation of a benefit. See United States v. Transamerica Corp., 392 F.2d 522, 524 (9th Cir. 1968); Citizens & S. Nat'l Bank of S.C. v. United States, 243 F. Supp. 900, 904 (W.D.S.C. 1965).

107 See generally supra text accompanying notes 24-84.

108 Other than the two Delaware cases of Kelly & Wyndham, Inc. v. Bell, 266 A.2d 878 (Del. 1969), and Theodora Holding Corp. v. Henderson, 257 A.2d 398 (Del. Ch. 1969), there has been little recent activity in the area of direct shareholder challenge to a corporation's charitable expenditures in spite of predictions to the contrary. See, e.g., Blumberg, supra note 13, at 168.
A judicial standard that recognizes the propriety and acceptability of some benefit flowing to the corporation is even more desirable in light of the express congressional policy of encouraging increases in corporate charitable contributions, manifested in the newly amended sections 170(b)(2) and 170(e)(4). The management decision to make additional contributions, however, will remain a business decision based to a large extent on the benefits the corporation may expect in return for its transfer. If the courts continue to apply Duberstein and refuse to allow some corporate economic benefit to result from the transfer, then the judicial standard will act as a disincentive to corporate contributions and effectively frustrate the congressional purpose in amending the IRS Code.

Alternative Methods of Analysis:
Transamerica & Singer

The inquiry into what standards courts should apply in business charitable contribution cases should not end with a rejection of Duberstein. Having postulated that a business should be able to make a charitable contribution with the expectation of receiving some benefit in return, the question then becomes the extent to which a corporation or other business entity may enjoy a benefit before the contribution loses its charitable character. The receipt of a commensurate benefit by the transferor has been held sufficient for a court to deny a charitable deduction. In such situations, the transferor is said to have received a quid pro quo sufficient to nullify the charitable deduction, or to have made the transfer for consideration. Conversely, when the corporation has received no benefit from the transfer, courts have routinely held the transfer to be charitable. Since the corporation received no benefit at all, the transfer is unobjectionable, even under a standard of detached and disinterested transfers, provided all other requirements are met.

Between these two situations of commensurate benefit and no benefit, there remain myriad gray-area transfers where both the transferring corporation and the transferee are benefited to some extent. The distinc-

\[ \text{See supra note 4.} \]
\[ \text{See supra note 16.} \]
\[ \text{See infra note 151.} \]
\[ \text{See, e.g., Sedam v. United States, 518 F.2d 242, 245 (7th Cir. 1975); Grinsdale v. Commissioner, 59 T.C. 566, 577 (1973).} \]
\[ \text{See United States v. Transamerica Corp., 392 F.2d 522, 524 (9th Cir. 1968).} \]
\[ \text{See, e.g., Dockery v. Commissioner, T.C.M. (P-H) 78,063 (1978); Wolfe v. Commissioner, 54 T.C. 1707 (1970).} \]
\[ \text{If there is no benefit accruing to the corporation, then there is no evidentiary or factual basis to claim that the contribution was made with less than disinterested intent. See, e.g., Collman v. Commissioner, 511 F.2d 1263, 1269 (9th Cir. 1975); Stubbs v. United States, 428 F.2d 885, 887 (9th Cir. 1970).} \]
tions between such transfers lie in the magnitude of the benefit received by each party. It is in this intermediate area, where gratuity and benefit are intertwined, that the policy concern over what standard to apply to business contributions becomes critically important and analytically difficult. Ultimately, the questions that the courts must resolve are how much benefit a corporation may enjoy and whether that benefit may be direct and economic in nature.

The courts that have undertaken the difficult task of reformulating the legal standard to be used in business charitable contribution cases rely on an analysis that focuses on the distinction between an incidental and a direct benefit.\(^{116}\) The first court to utilize this distinction was the Court of Appeals for the Ninth Circuit in United States v. Transamerica Corp.\(^{117}\) Although the court refused to allow the claimed charitable deduction, it did seek to distinguish between a permissible and impermissible benefit.\(^{118}\) The court indicated that a contribution would not lose its charitable status if the corporation only realized some indirect business benefit, such as one incidental to public use of the donated property or public recognition of its act of generosity. If, however, the corporation receives some type of direct economic benefit, "a quid pro quo . . . the securing of which was the sole purpose of its transfer," then the contribution would not be eligible for deduction under section 170.\(^{119}\) Thus, although the court also contrasted economic with noneconomic benefits, the court's primary concern was insuring that any derived corporate benefit was a mere incident to the public benefit conferred by the transfer.\(^{120}\)

Three years later in Singer Co. v. United States,\(^{121}\) the Court of Claims fashioned and applied, ostensibly, a different test. Apparently wishing to avoid a rigid and unnecessarily restrictive standard,\(^{122}\) the court held:

> If the benefits received, or expected to be received, are substantial, and meaning by that, benefits greater than those that inure to the general public from transfers for charitable purposes (which benefits are merely incidental to the transfer), then in such case we feel the

\(^{116}\) Aside from the courts' analysis in United States v. Transamerica Corp., 392 F.2d 522 (9th Cir. 1968); Citizens & S. Nat'l Bank v. United States, 243 F. Supp. 900 (W.D.S.C. 1965); and Singer Co. v. United States, 449 F.2d 413 (Ct. Cl. 1971), there has been little judicial discussion of these questions outside of the Tax Court.

\(^{117}\) 392 F.2d 522 (9th Cir. 1968).

\(^{118}\) Id. at 524.

\(^{119}\) Id.

\(^{120}\) It is not clear, however, whether the court felt any economic benefit to the corporation would prohibit deduction, or whether it was only those economic benefits that constituted a quid pro quo that were fatal. By equating the quid pro quo in this case with a derived economic benefit which was the sole reason for the corporation entering the transaction, id. at 524, the court seems to leave open the question of whether any economic benefit is sufficient to constitute a quid pro quo, or whether an economic benefit is sufficient to deny deductibility only if it provides the impetus for the transfer.

\(^{121}\) 449 F.2d 413 (Ct. Cl. 1971).

\(^{122}\) See id. at 422-23.
transferor has received, or expects to receive, a *quid pro quo* sufficient to remove the transfer from the realm of deductibility under section 170.122

The court's standard clearly recognizes that a business may derive some type of benefit from a charitable transfer.124 That benefit, however, must be incidental in nature and balanced against the benefit inuring to the relevant public beneficiary. While the language of the *Singer* test appears to be more responsive to the nature of corporate charitable activity than the *Transamerica* test,125 the court's narrow application of its own standard indicates an unwillingness to fully liberate the analysis of corporate charitable contributions from the unrealistic and unwarranted restrictions inherent in the *Duberstein* criteria.

As noted above,126 the court in *Singer* refused to allow a charitable deduction for Singer's bargain sales of sewing machines to public and parochial schools, while at the same time approving the deductions claimed for similar sales to other charities. With respect to the public and parochial schools, the court denied the charitable deductions on the basis of its belief that Singer had made the contributions in the expectation of being benefited by future increased sales. Remarkably, the court reached this conclusion despite a showing by Singer that, at most, only 1.75% of its retail customers bought Singer machines because of their use during previous school training.127 The court's finding that the bargain sales were made with the expectation of future increased sales, therefore, was not readily apparent from the facts before the court. In justifying its holding, the court stated that Singer's expectation of future sales, "even though perhaps not fully realized, provided a *quid pro quo* for those discounts which was substantial."128

The court contrasted these denied contributions with those made to charities other than the schools.129 As to the latter contributions, the court endorsed the Commissioner's findings that the benefits flowing to Singer by virtue of those transfers were only "incidental," and that it was difficult to see how Singer "could derive substantial benefits... in the way of increased sales."130 Accordingly, those deductions were permitted.

One can only speculate as to how the court was able to separate the multifarious motivations and considerations underlying Singer's decision to make bargain sales to the schools from those underlying the decision to make sales to the other charities. Indeed, the fact that the court's at-

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122 Id. at 423.
123 Id.; see supra note 105.
124 See supra notes 117-20 and accompanying text.
125 See supra note 77.
126 *Singer*, 449 F.2d at 424.
127 Id.
128 See supra note 77.
129 *Singer*, 449 F.2d at 424.
tention focused exclusively on whether the benefits were incidental indicates an overwhelming concern about the subjective intent of the corporation at the moment of the transfer—a concern all too reminiscent of the Duberstein criteria.\textsuperscript{131} Surely such an approach is misplaced. As the First Circuit noted long ago: “If the policy of the income tax laws favoring charitable contributions is to be effectively carried out, there is good reason to avoid unnecessary intrusions of subjective judgments as to what prompts the financial support of the organized but non-governmental good works of society.”\textsuperscript{132}

The unfortunate consequence of the Singer court’s preoccupation with the corporation’s intent is that the court never really undertakes a

\textsuperscript{131} The Duberstein standard, after all, was premised on the idea that only those contributions motivated by disinterested generosity were deductible. The Singer court, with its concern for the predominant motive of the transferring corporation, only partially liberates the corporate charitable analysis from the quagmire of an intent-based inquiry. See infra note 132.

\textsuperscript{132} Crosby Valve & Gage Co. v. Commissioner, 380 F.2d 146, 146-47 (1st Cir. 1967). See also Haak v. United States, 451 F. Supp. 1087, 1091 (W.D. Mich. 1978) (“In enacting section 170 it is clear that Congress was not attempting to encourage beneficient states of mind among taxpayers.”) The Crosby court made this statement based upon their conclusion that “the law’s policy finds charity in the purposes and work of the qualifying organization, not in the subjective intent of the contributor.” Crosby Valve, 380 F.2d at 147.

Indeed, the congressional objective underlying § 170 was not simply to permit charitable contributions, but rather to encourage them. See Comment, Disinterested Generosity: An Emerging Criteria Under Section 170, 1968 UTAH L. REV. 475, 479 (1968). This policy was, and continues to be, premised on the theory that by exempting money or property devoted to charitable causes from taxation, “the Government is compensated for the loss of revenue by its relief from financial burden which would otherwise have to be met by appropriations from public funds, and the benefits resulting from the promotion of the general welfare.” H.R. REP. No. 1860, 75th Cong., 2d Sess. 19-20 (1938).

Conversely, while § 102(a) allows an exemption for transfers qualifying as gifts, it is not the result of a congressional desire to “positively encourage” them. Crosby Valve, 380 F.2d at 147. The gift exemption, then, exists at the sufferance, rather than the behest, of the government. From this, several courts and commentators have concluded that the judicial concern with intent in § 102(a) cases is a product of the unfavored status of gifts, and is therefore inapplicable under a § 170 inquiry. In the corporate context, the rejection of an intent-based analysis is buttressed by the fact that contributions have historically been made and justified in terms of corporate self-interest.

Accordingly, it is the charitable transfer’s contribution to the social welfare of the community which should be seen as triggering the deduction provisions of the Code. The Singer court’s failure to recognize this principle in their contribution analysis is, in the end, why their test is unacceptable. To evaluate a corporate benefit on the basis of whether it is incidental to some overarching charitable purpose necessarily involves the court in the very “mare’s nest of uncertainty woven of judicial value judgments irrelevant to eleemosynary reality” the Crosby court warned against. Id. at 146. How could the Singer court finally know, for instance, that the corporate purpose behind the discounts made to the charities other than the schools was primarily philanthropic, rather than a desire to encourage future purchases of their sewing machines? Simply put, it cannot, and even if it could, it should not matter in light of the “[c]ongressional intent to focus on the use to which an alleged contribution is put, rather than on the state of mind of the transferor.” Haak, 451 F. Supp. at 1091 (emphasis supplied). Cf. Allen v. United States, 541 F.2d 786, 788 (9th Cir. 1976); Stubbs v. United States, 428 F.2d 885, 887 (9th Cir. 1970) (court inquiries into dominant motive or purpose of individual charitable donor).
balancing of the relative corporate and public benefits evident in the transfer. The court seems to have reasoned that because bargain sales to the schools were made with the intent of increasing future sales the benefit obtained was not incidental and was therefore sufficient to outweigh any conceivable public benefit. Putting aside the question of intent, however, it seems implausible to conclude that the corporate benefit of influencing 1.75% of Singer's retail customers to buy Singer sewing machines at some future date outweighs the interests of training young adults in the skill of sewing—a training they might not otherwise receive—and of saving either the local government or the parents part of the substantial cost of providing the machines. Manifestly, the court chose to subjugate the balancing aspect of its standard to the speculative inquiry of whether the corporation's primary motive was to secure some future economic benefit.

Ultimately, then, it appears that Singer stands for the same type of incidental benefit-direct benefit dichotomy that Transamerica represents. Both courts seem to agree that corporations are able to benefit in at least some incidental fashion, but a finding that the transfer either was motivated by the expectation of economic benefit or actually resulted in an economic benefit to the corporation would nullify the deduction. The terms direct and incidental benefit and quid pro quo, however, are merely conclusory descriptions, reminiscent of Duberstein, which depend on the court's evaluation of the corporation's dominant motivation for making the transfer.

Unfortunately, neither the IRS nor the courts have formally adopted and refined the type of comparative analysis articulated in Singer and Revenue Ruling 76-257. Courts should apply a balancing approach in business charitable contribution cases, weighing the relative benefits which flow to the corporation and the general public by virtue of the transfer. Conversely, courts should ignore that aspect of the Singer standard, and presumably Revenue Ruling 76-257, which focuses on the corporate intent fostering the contribution.

The court's holding in Transamerica, unlike that in Singer, was limited to transfers which actually resulted in a corporate benefit. United States v. Transamerica Corp., 392 F.2d 522, 524 (9th Cir. 1968).

Courts that have chosen not to apply the criteria of Duberstein, have often cited the language of Singer, with approval. The first tax court to cite the Singer test was Louisville & Nashville R.R. v. Commissioner, 66 T.C. 962 (1976), rev'd in part on other grounds, 641 F.2d 453 (6th Cir. 1981). The court there cited Singer as authority for the somewhat conclusory proposition that a transfer did not qualify under § 170 if the transferring business had an expectation of receiving something in return as quid pro quo. Id. at 1009. The court did not attempt to distinguish between permissible and impermissible business benefits.
TOWARD A MORE EFFECTIVE STANDARD  

Expanding The Singer Analysis

While the analysis adopted by both Singer Co. v. United States$^{128}$ and United States v. Transamerica Corp.$^{127}$ is more responsive to the nature of corporate charitable activity than the Commissioner v. Duberstein$^{129}$ criteria, the implicit requirement that a corporation be only incidentally or noneconomically benefited from a charitable transfer is still unnecessarily restrictive.$^{129}$ As long as a corporation or other transferring business entity does not receive a benefit commensurate with the value of the in-
interest transferred and the general public is sufficiently benefited, there is no statutory or policy justification for denying a claimed charitable deduction. The state of mind or purpose behind the corporate decision to make the transfer is not relevant to the analysis.

In Singer, for instance, it could not be said that the corporation received a commensurate return on its bargain sales of sewing machines to the public and parochial schools, since the machines were sold for nearly one-half the regular price. Further, the benefits received by the recipient

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140 See supra note 66. Judging whether the value of the benefit received by the corporation is commensurate with the interest transferred involves the often sticky issue of valuation and the balancing of interests. Valuation is not a new difficulty for the courts, however, since it has often been the case that a claimed contribution of real property was contingent upon the court's determination of its real worth. See generally Treas. Reg. 1.170-1(c) (1981). See, e.g., Knapp King Size Corp. v. United States, 527 F.2d 1392 (Ct. Cl. 1975); Clayton v. Commissioner, 42 T.C.M. (CCH) 670 (Aug. 13, 1981); Blake v. Commissioner, 42 T.C.M. (CCH) 1386 (Oct. 1, 1981); Intercon, Inc. v. United States, 45 A.F.T.R.2d (P-H) § 80,585 (1985); Kewanee Eng'g Corp. v. Commissioner, 38 T.C.M. (CCH) 672 (April 18, 1979). Concern over abuses in valuation by taxpayers led to the inclusion of § 6659 in the Economic Recovery Act of 1981, Pub. L. No. 97-34, 95 Stat. 172. That provision amended I.R.C. § 6653 (1976), and provided for a graduated tax penalty if an individual, closely held corporation, or personal service corporation overstates the value of certain property by over 150% of the amount determined by the IRS to be the correct value. I.R.C. § 6653 (Supp. V 1981).

141 Where the transfer is made directly to a political subdivision or other public donee, rather than a private charity, courts have held that the transferor must establish that the transfer actually resulted in a benefit. See Doty v. Commissioner, 62 T.C. 587, 590-93 (1974); Markham v. Commissioner, 39 B.T.A. 465, 471-72 (1939); see generally Southern Pac. Transp. Co. v. Commissioner, 75 T.C. 497, 600-05 (1980). The policy behind this requirement is to prevent corporations from taking a deduction for a transfer of worthless or useless property.

142 In enacting what is now § 162(b), Congress obviously sought to limit somewhat the business character of corporate charitable contributions. See supra notes 64-65 and accompanying text. The distinction between a business expense and a charitable contribution made in a business context, as noted earlier, seems somewhat artificial. Indeed, one commentator has advocated the repeal of § 162(b) in order that corporations would not be arbitrarily "deprived of the right to establish that their gifts have a business motivation, comparable to advertising and public relations expenses." Bittker, The Propriety and Vitality of a Federal Income Tax Deduction for Private Philanthropy (Dec. 2, 1971) (unpublished manuscript based on remarks made at Tax Institute Symposium on Impact of Taxes on Philanthropy, Washington, D.C.), reprinted in M.F. SMITH, supra note 22, at 16. It is Bittker's contention that judicial doctrine would have been able to keep pace with the changing social expectations of the corporation if Congress had not intervened in 1938 and passed what is now § 162(b). Bittker, Charitable Donations, 28 Tax L. Rev. 37, 58 (1972). Bittker also indicates that the § 162(b) limitation on corporate charitable deductions possibly increases the costs to corporations of contributing to causes serving both a business and social function. Id.

Perhaps, then, the congressional policy objective of increasing corporate charitable contributions would have been enhanced by repealing § 162(b) contemporaneously with the expansion of the § 170(b)(2) percentage limitation. Given that Congress did not repeal § 162(b), however, the courts must continue to distinguish charitable contributions from business expenses, and yet develop an analysis which is compatible with the policy of increasing corporate contributions. Allowing a corporation to receive economic benefits under certain circumstances is an acceptable judicial approach. As long as transfers resulting in a truly commensurate benefit are denied charitable treatment, the congressional intent in passing § 162(b) will not be violated. See supra note 65.

143 Singer, 449 F.2d at 422.
school systems in the form of financial savings and enhanced curriculum were sufficiently important and useful to the communities to allow the deduction.\textsuperscript{144} Under these circumstances there was simply no compelling policy reason for the Court of Claims to deny the deduction, especially in light of the fact that the only possible financial benefit flowing to the Singer Corporation was the entirely speculative future sale of other machines.\textsuperscript{145}

The newly expressed congressional policy exacerbates the deficiencies of the current judicial standards being applied in business charitable contribution cases. Ten percent is such a significant proportion of a corporation's total income\textsuperscript{146} that it seems inconceivable to expect many corporations to reach that percentage without a reasonable expectation that they will be entitled to enjoy some significant financial benefit in return. If the courts continue to apply an analysis which prohibits a charitable deduction in situations where a corporation contributes with the intent of increasing future sales,\textsuperscript{147} avoiding the cost of future litigation,\textsuperscript{148} or simply acquiescing to prevailing public sentiment,\textsuperscript{149} then the policy objective of increasing corporate charitable activity will be decisively hampered.

Even those situations where a corporate decision is made to increase the level of charitable contributions without regard to reciprocal economic benefits,\textsuperscript{150} it is questionable whether that decision would be able to

\textsuperscript{144} The mere fact that a corporation gratuitously transfers some interest or asset without receiving a commensurate return benefit is obviously insufficient to justify a charitable deduction. The critical factor is the nature of the public use to which the transferred interest or asset may be put. See supra note 132. While the resulting benefit to the corporation may at times be relevant in evaluating the overall significance of the public benefit, factors such as the public's need for the conferred benefit, the fiscal savings to the state, local, or county governments by virtue of the transfer, and the desirability of encouraging similar transfers in the future should be given preeminent consideration.

\textsuperscript{145} Where the cumulative future benefit accruing to the corporation can be clearly ascertained by reference to municipal or federal tax law, however, a court may determine that by operation of those laws the corporation will receive a commensurate benefit in the future sufficient to deny a claimed deduction.

\textsuperscript{146} As noted above, the original five percent figure was thought to be significant in terms of its proportionate relationship to total corporate income. See supra note 26. Given that the new amendment doubles that "significant" allowance, it seems safe to say that shareholders will pay considerable attention to contributions approaching the 10% limit.

As a practical matter, it should be noted that a minority of corporations are currently giving at the five percent limit. The Conference Board, U.S. Philanthropy (Jan. 1980) (Economic Road Maps Nos. 1870-71). However, corporate charitable contributions rose 18% from 1977 to 1980, and reached record levels in 1979. Id. See generally Borris, In Minnesota, Business is Part of the Solution, HARB. BUS. REV., July-Aug. 1981, at 85-93; Moskal, Business Meets Its Social Responsibility, INDUSTRY WEEK, Apr. 20, 1981, at 55-59. See also 127 CONG. REC. S8332 (daily ed. July 24, 1981) (comments of Sen. Kennedy) ("At the present time, corporate contributions to charity average only about 1.2 percent of corporate income . . . . But some corporations are at their limit, so it is appropriate to increase the limit now.").

\textsuperscript{147} See, e.g., Singer, 449 F.2d at 424.

\textsuperscript{148} See, e.g., Saba v. Commissioner, 40 T.C.M. (CCH) 446, 454 (1980).

\textsuperscript{149} See, e.g., United States v. Transamerica Corp., 392 F.2d 522, 523 (9th Cir. 1968).

\textsuperscript{150} See, e.g., Knott v. Commissioner, 87 T.C. 681, 683 (1977) (dominant shareholder in a
withstand a shareholder challenge. Although there have been few shareholder-initiated suits challenging a corporation's policy of contribution in recent years, the doubling of the percentage limitation coupled with increased public demand for corporate contributions creates the potential for renewed dispute in this area. If corporate managers are unable to point to some significant corporate benefit flowing to the corporation as a result of the increased contributions, a shareholder action would pose a severe threat to the continuation of that corporation's contribution program. The fact that the IRS Code permits charitable deductions does not appear to be an adequate defense to a shareholder action, since it has been held that while section 170(b)(2) and other relevant

closely held corporation made large amounts of charitable contributions without claiming a deduction).

Traditionally, the affirmative decision by management to make a charitable contribution has been protected by the business judgment rule. See Kelly & Wyndham, Inc. v. Bell, 266 A.2d 878, 879 (Del. 1969); Comment, supra note 23, at 426. The essence of the business judgment doctrine is that courts are hesitant to substitute their judgment for a reasonable judgment by corporate management. See Alaska Plastics, Inc. v. Coppock, 621 P.2d 270, 278 (Alaska 1980). Further, it is assumed that a business objective is reasonable "only if its accomplishment is intended to serve the corporation's best interest." Arsh, The Business Judgment Rule Revisited, 8 Hofstra L. Rev. 93, 107 (1980). Thus, those cases which have upheld corporate charitable contributions in the face of shareholder disapproval have taken pains to note that the contributions approved were "reasonable" in amount. See Theodore Holding Corp. v. Henderson, 257 A.2d 398, 405 (Del. Ch. 1969); Union Pac. R.R. v. Trustees, Inc., 8 Utah 2d 101, 107, 329 P.2d 398, 402 (1958); A.P. Smith Mfg. Co. v. Barlow, 13 N.J. 145, 161, 95 A.2d 581, 600 (1959). If, however, a corporation did so under the current judicial standard disallowing any "direct" economic benefit, a shareholder could potentially raise vigorous objections to the corporation's charitable policy on the grounds that 10% represented an unreasonable amount and that this constituted waste, or, in the alternative, an improper failure to distribute dividends. See, e.g., Union Pac. R.R. v. Trustees, Inc., 8 Utah 2d 101, 107, 329 P.2d 398, 401; Miller v. Magline, Inc., 76 Mich. App. 284, 311, 256 N.W.2d 761, 773 (1977). If management were unable to point to a substantial benefit, economic or otherwise, which would tend to prove a reasonable business purpose, they would lose the protective mantle of the business judgment rule. See Maldonado v. Flynn, 413 A.2d 1251, 1256-57 (Del. 1980); Gimbel v. Signal Co., 316 A.2d 599, 615 (Del. Ch.), aff'd, 316 A.2d 619 (Del. 1974); Sinclair Oil Corp. v. Levien, 280 A.2d 717, 720 (Del. 1971). See also Arsh, supra, at 122.

Allowing some direct benefits to accrue to the corporation by virtue of its charitable transfer would ameliorate this potentially difficult management position. The benefits still may not be as significant as the shareholders would prefer, but their burden of proving "unreasonableness" or "unsound" business objective would become far more difficult. Without the imminent threat of liability resulting from a shareholder suit, corporate directors and managers will be more receptive to the congressional encouragement to increase their charitable giving levels. In addition, the important judicial policy of having shareholders and management resolve what is essentially a business dispute through the proxy machinery, rather than the courts, would be furthered. See generally Cleveland, The Man With the Proxy Proposal: Lawrence A. Wein, Colum., Spring 1981, at 27-30 (shareholder uses proxy machinery to influence corporation's contribution policy).
Code sections provide some guidance in determining whether a transfer will survive a shareholder challenge, they are not dispositive.\textsuperscript{155} The newly amended IRS Code, then, when viewed in conjunction with presently employed judicial standards, has placed corporate managers in an awkward position. On the one hand, they are faced with considerable congressional and public exhortation to donate an increased percentage of their total corporate assets to charitable causes.\textsuperscript{156} On the other hand, the duty of care owed to shareholders requires that corporate assets be used reasonably and in the corporation's best interest.\textsuperscript{157} Courts have consistently held that a corporate officer's paramount duty, when given only this dichotomous choice, is owed to the shareholders, not to the public.\textsuperscript{158}

Corporate managers will not have to face this unfortunate choice, however, if the courts are willing to recognize that the receipt of some incidental economic benefit by a corporation in a charitable transfer is acceptable. The focus should not be on whether the benefit was economic or noneconomic, or direct or incidental, but rather on the relative magnitude of benefit flowing to the corporation. As long as the court determines that the derived corporate benefit is not financially commensurate with the value of the transferred interest and that some public interest has in fact been furthered, then the contribution should be judicially validated as charitable and deductible under section 170. Under this analysis, the policies of increasing corporate charitable activity and adequately protecting shareholder interests are vindicated, as is the policy prohibiting corporations from taking charitable deductions in the face of a return commensurate benefit.

CONCLUSION

Since the Supreme Court's analysis in \textit{Duberstein} was extended to section 170 charitable contribution cases over two decades ago, the judicial development in the area of business charitable contributions has been confusing and overly restrictive. Not only have the courts been unable to agree upon the standard to be employed in this area, but those standards which have received primary judicial acceptance, the detached and disinterested criteria and the distinction between direct economic benefits and incidental benefits, are not dictated by either the early judicial and legislative history or the Internal Revenue Code. In fact, early 20th-cen-

\textsuperscript{155} See Theodora Holding Corp. v. Henderson, 257 A.2d 398, 405 (Del. Ch. 1969) (court concludes that the test for determining whether a charitable contribution is valid is "reasonableness," with the Internal Revenue Code playing the role of "a helpful guide").

\textsuperscript{156} See supra note 4.

\textsuperscript{157} See supra note 151.

\textsuperscript{158} See, \textit{e.g.}, Dodge v. Ford Motor Co., 204 Mich. 459, 170 N.W. 668 (1919).
tury judicial interpretation validated corporate charity specifically on the basis of the perceived economic benefit to the corporation. While the definition of benefit was eventually expanded by the courts to include certain noneconomic benefits such as goodwill, the definition was never stated so as to totally exclude all direct economic benefits until the DeJong decision applied the Duberstein criteria in a charitable context.

The detached and disinterested and incidental benefit standards also represent a major stumbling block to the Economic Recovery Act’s policy of encouraging increased corporate charitable contributions. If the section 170(b)(2) ten-percent provision is to have the desired policy impact, then courts must expand their analysis to allow some direct economic benefits to flow to the corporation.

For both historical and policy reasons, then, the courts should reject Duberstein and expand the Singer analysis in business charitable contribution cases. The judicial focus should be on the aggregate benefits accruing to both the corporation and the general public, not the type of benefit realized. If the courts refuse to expand their analysis to include any direct economic benefits, then the policy of encouraging greater corporate charitable activity will be frustrated.

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