

# ARTICLES

## CHARITY WITH CHINESE CHARACTERISTICS

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*Over the past 30 years, scholars and activists have called on the Chinese government to ease the registration and oversight rules for non-governmental organizations (NGOs) and to increase funding for such organizations by, among other things, broadening the charitable deduction. While China has made significant progress in this regard, the government continues to throw up roadblocks for NGOs, suggesting that it has not fully embraced this path.*

*This Article considers the extent to which the justifications for a broad charitable deduction adduced in the West make sense in China. The goal is to develop a normative basis for the deduction consistent with Chinese values and interests that Chinese authorities would find compelling. This Article also considers the extent to which China's political and social culture may affect efforts to foster an autonomous civil society through a broad charitable deduction. I conclude that even if China were to adopt Western-style laws governing NGOs and provide for a broad charitable deduction, China's culture would shape both how government officials implement the laws and how the Chinese people respond to them, resulting in a distinct system of charity with Chinese characteristics.*

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## INTRODUCTION

Over the past 30 years, China has opened its economy to private enterprise and competition as part of a policy known as “reform and opening.”<sup>1</sup> In connection with this reform, the government’s role in promoting social welfare has changed. In the new economic system termed “socialism with Chinese characteristics,”<sup>2</sup> the government no longer provides the “iron rice bowl,”<sup>3</sup> the colloquial term used for the idea that the government would provide jobs, housing, food, and medical care for its people.<sup>4</sup> Instead, a substantial number of these needs are now met by private employers or are left to individuals.<sup>5</sup> While a large segment of the society has thrived under this new system, an even larger segment remains mired in poverty.<sup>6</sup> Addressing the welfare concerns of those left behind is one of the biggest problems facing China’s leaders.<sup>7</sup>

Reform and opening also opened the door to civil society organizations,<sup>8</sup> which operate in the space between government,

1. 改革开放 (Gǎigé kāifàng).

2. 具有中国特色的社会主义 (Jùyǒu Zhōngguó tèshè de shèhuìzhuyì). For a description of this phrase, see Liu Jianwu, *What is Socialism with Chinese Characteristics?*, available at [http://actuelmarx.u-paris10.fr/cm5/com/M15\\_Contr\\_liujianwu.rtf](http://actuelmarx.u-paris10.fr/cm5/com/M15_Contr_liujianwu.rtf) (presented at the Congrès Marx International V at Paris-Sorbonne et Nanterre – 3/6 octobre 2007).

3. 铁饭碗 (Tiěfǎnwǎn).

4. The government did not provide such services directly. Rather it did so through state-owned enterprises, many of which were owned by provincial governments, and not the central government. For a description of the iron rice bowl and how it functioned, see Joe C.B. Leung, *Social Security Reforms in China*, 12 INT’L J. SOC. WELFARE 73, 77-81 (2003), available at <http://onlinelibrary.wiley.com/doi/10.1111/1468-2397.t01-1-00246/pdf>.

5. For a discussion of the dislocations caused by the transition to a market economy, see Darryl K. Jones, *The Neglected Role of International Altruistic Investment in the Chinese Transition Economy*, 36 GEO. WASH. INT’L L. REV. 71, 93-110 (2004).

6. See Rebecca Lee, *Modernizing Charity Law in China*, 18 PAC. RIM L. & POL’Y J. 347, 347 n.3 (2009) (reporting that, in 2005, 75 million rural residents lived in poverty and over 140 million elderly were in need of aid).

7. See, e.g., *China Formulates Rural Poverty Reduction Plan*, CHINA DAILY USA (Nov. 29, 2011), [http://usa.chinadaily.com.cn/china/2011-11/29/content\\_14181966.htm](http://usa.chinadaily.com.cn/china/2011-11/29/content_14181966.htm) (describing a meeting of China’s top leaders to formulate a ten-year plan to address rural poverty).

8. 公民社会 (gōngmín shèhuì). The term “civil society” has a long history, but no set meaning. CIVICUS, an organization dedicated to advancing civil society globally, defines it as the arena outside the family, the state and the market where people associate to advance common interests. See NGO RESEARCH CENTER, TSINGHUA UNIVERSITY, *A NASCENT CIVIL SOCIETY WITHIN A TRANSFORMING EN-*

family, and business, often referred to as non-governmental organizations (NGOs).<sup>9</sup> Starting in the 1980s, the Chinese government promulgated a number of laws allowing for NGOs.<sup>10</sup> In the 1990s, it introduced tax provisions designed to support such organizations, including a deduction for charitable donations to eligible organizations.<sup>11</sup> In the 2000s, the government unveiled a number of initiatives that expressly identified NGOs as important partners in its efforts to address pressing social needs, including economic, social, and geographical inequality.<sup>12</sup>

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VIRONMENT: CIVICUS CIVIL SOCIETY INDEX REPORT 13 (2006) [hereinafter CIVICUS REPORT]), available at [https://www.civicus.org/new/media/CSI\\_China\\_Country\\_Report.pdf](https://www.civicus.org/new/media/CSI_China_Country_Report.pdf). It is often used to refer to a society's non-profit or charitable sector.

9. The term NGO also has a long history, but no set meaning. It derives from the United Nations Charter, Sec. 71, and was originally used to refer to neutral international organizations, such as the International Red Cross. It has grown to encompass any organization that is independent of government and not-for-profit. NGOs exist in the space between the state, family, and business and tend to focus on the public good. See Wang Ming & Liu Qiushi, *Analyzing China's NGO Development System*, 1 CHINA NON-PROFIT REV. 5, 5-6 (2009). The terms NGO, civil society organization (CSO), non-profit organization (NPO), public benefit organization (PBO), and charitable organization have all been used to describe non-profit, non-governmental organizations in China. These terms do not overlap perfectly; nor do they always make sense in the Chinese context. Authors use different terms even where different meanings are not intended. Given the confusion that would arise from switching between the different terms, I use the term NGO to refer to all non-profit, non-governmental organizations.

10. See *infra* Part I.A.

11. See *infra* Part I.B.

12. For instance, in 2001, the government announced a 10-year plan to address poverty and indicated that it would partner with NGOs to help implement it. See Vladimir Ganshin & Gudrun Torgeirsdottir, *New View of Old Concepts (Combining the Terms "Civil Society" and "Socialist Harmonious Society" Under Chinese Conditions)*, FAR EASTERN AFFAIRS, no. 3, 2008 at 88, 92-93. In 2004, the National People's Congress (NPC) adopted the slogan "big society, small government." See generally Terry Boychuk, *Big Society, Small Government*, 18 MACALESTER INT'L 201 (2007) (describing the 2004 slogan as part of the government's campaign to enlist civil society in the task of addressing China's pressing social needs), available at <http://digitalcommons.macalester.edu/cgi/viewcontent.cgi?article=1344&context=macintl>. In 2005, China's President and General Secretary of the Central Party Committee Hu Jintao unveiled "harmonious society" (和谐社会 (héxié shèhuì)) as an important tenet of the modern Chinese socialist state. For a description of "harmonious society," see Chan Kin Man, *Harmonious Society*, in INTERNATIONAL ENCYCLOPEDIA OF CIVIL SOCIETY 821, 822 (H.K. Anheier & S. Toepler, eds., 2009), available at [http://www.cuhk.edu.hk/centre/ccss/publications/km\\_chan/CKM\\_14.pdf](http://www.cuhk.edu.hk/centre/ccss/publications/km_chan/CKM_14.pdf). See also Wen Jiabao, Premier, People's Republic of China, *Report to the Third Session, 10th National People's Congress, Report on the Work of the Government, The Master Work Plan for 2005*, CHINA.ORG.CN (Mar. 14, 2005), <http://www.10thnpc.org.cn/english/2005lh/122817.htm>. See also Karla W. Simon, *Two Steps Forward One Step Back-Developments in the Regulation of Civil Society Organizations in China*, 7 INT'L J. CIV. SOC. L. 51, 54, available at [http://iccs.org/pubs/09-10\\_IJCSL.pdf](http://iccs.org/pubs/09-10_IJCSL.pdf) [hereinafter *Two Steps*] (describing the 2009-2010 National Human Rights Action Plan, which encourages social organizations to participate in social management

Despite the government's apparent embrace of civil society, China's NGOs remain weak, underfunded,<sup>13</sup> and suspect in the eyes of at least some government officials.<sup>14</sup> Burdensome oversight rules cause significant number of NGOs to masquerade as for-profit businesses or to forego registration altogether and operate illegally.<sup>15</sup> This situation has resulted in repeated calls for the government to relax registration rules for NGOs and to increase government support for NGOs by making tax incentives, including the charitable deduction, more broadly available.<sup>16</sup> However, from the perspective of some Chinese leaders, empowering an autonomous and well-funded civil sector could threaten social harmony.<sup>17</sup> Moreover, many of the benefits associated with a robust civil society can be achieved through a direct government subsidy of NGOs, which would give the government a high level of control. Thus, those promoting relaxed registration rules and a more robust charitable deduction must address why the Chinese government should prefer that path to one where the government retains a more active role.

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and public services in the fields of education, science and technology, culture, health care, sports, and public welfare).

13. See, e.g., Deng Guosheng, *The Value of the Non-Government Sector in China and Comparative Analysis*, 28 SOC. SCI. IN CHINA 83,84 (2007) [hereinafter *The Value of the Non-Government Sector in China*]; Wang & Liu, *supra* note 9, at 26-27; CIVICUS REPORT, *supra* note 8, at 33. But see Jia Xijin and Sun Long, *Measurement Indices of Civil Society and Exploration of Their Localization*, 1 THE CHINA NONPROFIT REV. 37, 46-49 (2009) (arguing that the CIVICUS approach to measuring civil society was ill-suited to the Chinese context because, among other things, it embraces Western, but not Chinese, standards).

14. Julia Greenwood Bentley, *Survival Strategies for Civil Society Organizations in China*, 6 INT'L J. NOT-FOR-PROFIT L. (2004), available at [http://www.icnl.org/research/journal/vol6iss2/art\\_1.htm](http://www.icnl.org/research/journal/vol6iss2/art_1.htm) (noting the suspicion with which many government officials view China's NGOs); Deyong Yin, *China's Attitude Toward Foreign NGOs*, 8 WASH. U. GLOBAL STUD. L. REV. 521, 534-36 (2009) (describing the government's concerns regarding foreign NGOs as a potential threat to national security, stability, and the one-party system).

15. Illegal organizations are at risk of being shut down at any moment and are not eligible to receive any of the tax benefits on offer. See, e.g., Deng Guosheng, *The Hidden Rules Governing China's Unregistered NGOs: Management and Consequences*, 10 CHINA REV. 183 (2010) [hereinafter *Hidden Rules*].

16. See, e.g., *id.*; Lee, *supra* note 6, at 361-63; LEON E. IRISH, JIN DONGSHENG, & KARLA W. SIMON, CHINA'S TAX RULES FOR NOT-FOR-PROFIT ORGANIZATIONS, A STUDY PREPARED FOR THE WORLD BANK I, VII (Dec. 2004) [hereinafter 2004 WORLD BANK REPORT]; Karla W. Simon, *Regulation of Civil Society in China: Necessary Changes after the Olympic Games and the Sichuan Earthquake*, 32 FORDHAM INT'L L. J. 943, 967 (2008-09) [hereinafter *Necessary Changes*]; See also XIN CHUNGYIN & ZHANG YE, PHILANTHROPY AND LAW IN ASIA: A COMPARATIVE STUDY OF THE NONPROFIT LEGAL SYSTEMS IN TEN ASIA PACIFIC SOCIETIES, 99 (Thomas Silk, ed., 1999).

17. See, e.g., the government's efforts to shut down house churches and other grassroots NGOs. See *infra*, notes 67 and 158.

Numerous justifications for the charitable deduction have been advanced in the U.S. and elsewhere. In this Article, I consider those justifications from a Chinese perspective. While some justifications make little sense given China's political system, many do, supporting the claim that it is in the government's best interest to embrace the charitable sector fully and grant it greater autonomy by relaxing NGO registration rules and increasing tax incentives for a much broader group of NGOs.

Equally important from the Chinese perspective, allowing more NGOs to register and receive indirect funding through a charitable deduction does not require the government to give up control over such organizations because the government retains the ability to oversee NGOs through an *ex post* review of their activities. In noting this, I do not mean to endorse the government's desire for control, but rather I believe that arguments that speak to Chinese values and interests are more likely to be persuasive. The Chinese tradition of firm political control in the interest of social harmony dates back thousands of years, and the Chinese are not likely to abandon it lightly.

Finally, even if China were to adopt laws similar to those in the U.S. or other Western countries, many of the benefits we associate with the charitable deduction may not materialize because Chinese culture would likely affect the operation of the laws in two important ways. First, government officials can be expected to implement the laws in ways that restrict NGO autonomy. Second, the Chinese people are unlikely to donate at the same levels or to the same array of institutions as is seen in the U.S. This is not to say that China would not benefit from such reforms, but rather it is to caution against unrealistic expectations. There will be charity in China, but it will be charity with Chinese characteristics.

Part I describes China's laws governing NGOs and the tax benefits afforded to such organizations since the reform and opening. Part II sets out the justifications advanced in the U.S. in support of the charitable deduction and considers the extent to which those justifications apply in the Chinese context. Part III addresses the government's concern that permitting a more autonomous civil society could threaten social harmony. Part IV considers the impact China's culture will have on how a broadly available charitable deduction is likely to function in China.

## I. CIVIL SOCIETY AND THE CHARITABLE DEDUCTION IN CHINA

When Deng Xiaoping assumed China's leadership in 1978, he set the country on a course away from Marxist doctrine and

toward economic and social reform. This shift gathered significant steam in 1992, when he took his “Southern Tour,” where he is rumored to have travelled to a sleepy fishing village near Hong Kong—what is now the booming metropolis of Shenzhen—and planted a small tree, stating “Let some people get rich first.”<sup>18</sup> Over the past 30 years, the government has allowed private enterprise to flourish and privatized many of its businesses. It has also pulled back from its role as the provider of housing, education, and other social services for all citizens.<sup>19</sup> As a result, a segment of the Chinese have become gloriously rich, while a far larger portion has been left behind.<sup>20</sup>

These developments have had two important consequences, one for civil society and the other for public finance. First, the dismantling of the iron rice bowl opened the door for private, non-state actors to step in and to provide much-needed social services. China has had to develop rules governing these new organizations.<sup>21</sup> Second, the government has had to develop a public finance system suited to the new economic regime.<sup>22</sup> Before reform and opening, the government simply requisitioned needed funds from state-owned businesses.<sup>23</sup> With privatization, the government’s captive sources of income were significantly di-

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18. 让一部分人先富起来 (ràng yībùfèn rén xiān fù qǐ lai). There is some controversy whether Deng actually planted a tree and what, if anything, he said. Some have suggested that he said 致富光荣 (zhìfù guāngróng), which means “To get rich is glorious,” while others contend it never happened.

19. See LINDA WONG, *PRIVATIZATION OF SOCIAL WELFARE IN POST-MAO CHINA*, ASIAN SURVEY, Vol. XXXIV 307, 313 (1994).

20. See World Bank, 2004 World Development Indicators; see also Chen Jia, *Country's Wealth Divide Past Warning Level*, CHINA DAILY (May 12, 2010), [http://www.chinadaily.com.cn/china/2010-05/12/content\\_9837073.htm](http://www.chinadaily.com.cn/china/2010-05/12/content_9837073.htm); see also Tom Orlik, *China's Inequality Gini out of the Bottle*, Sept. 30, 2012, WALL ST. JOURNAL CHINA, available at <http://blogs.wsj.com/chinarealtime/2012/09/17/chinas-inequality-gini-out-of-the-bottle/>.

21. See Wang Ming & Sun Weilin, *Trends and Characteristics in the Development of China's Social Organizations*, 2 CHINA NONPROFIT REV. 153, 157 (2010), for a chart showing growth of registered social organizations and non-business enterprises from 1988 to 2007. See also *Hidden Rules*, *supra* note 15, at 185–88, for estimates of the number of unregistered NGOs in China. While the number of unregistered NGOs depends on how one classifies the organizations, they run into the millions.

22. For a description of the development of tax law in modern China, see Li Jin & Richard Krever, *Globalization and Modernization as Drivers for Tax Reform in the Socialist Market Economy*, 11 THEORETICAL INQUIRIES L. 687 (2010). For a discussion of the different taxes in modern-day China, see Bin Yang & Eva Huang, *Characteristics of the Chinese Tax System and Its Cultural Underpinnings: A Comparison with the West*, 1 J. CHINESE TAX & POL'Y 13 (2011).

23. Jin and Krever, *supra* note 22, at 690-91.

minished, leading the government to adopt an income tax to allow it to tap into privately held business profits.<sup>24</sup>

These two developments intersect in the form of special tax rules that provide deductions to those who donate to NGOs. Such provisions amount to indirect government subsidies and effectively cede discretion to private actors to direct government resources to NGOs in the form of tax-deductible contributions. This Part describes the evolution of those rules over the past 30 years and their implications for the autonomy and funding of NGOs.

### A. THE REGULATION OF NGOS

NGOs in China can take many forms, including foundations,<sup>25</sup> social organizations (SOs),<sup>26</sup> civil non-business institutions,<sup>27</sup> and charitable trusts.<sup>28</sup> Some, such as SOs, are organized to benefit their members, while others are public benefit organizations (PBOs), designed to aid the public as a whole or some especially disadvantaged group.<sup>29</sup> Regardless of the form or purpose, NGOs may not be primarily engaged in business activities or intended to make a profit.<sup>30</sup> Nor may they distribute any profits to owners or others.<sup>31</sup>

24. It has also imposed a tax on state-owned enterprises. For a discussion of those taxes and the possible justifications, see Wei Cui, *Taxing State-Owned Enterprises: Theory, Evidence and Implications for U.S. Policy*, (forthcoming 2012).

25. 基金会 (jījīnhuì). There are actually two types of foundations – those that are permitted to solicit funds from the public, 公募基金会 (gōngmù jījīnhuì), and those that may not, 非公募基金会 (fēi gōngmù jījīnhuì). For a detailed review of the different types of foundations in China and their development, see Wang Ming & Xu Yushan, *Foundations in China*, 2 CHINA NONPROFIT REV. 19 (2010).

26. 社会团体 (shèhuì tuántǐ). These organizations are member-based and focused and are supposed to “promote the construction of socialist material and spiritual civilization.” Shèhuì tuántǐ dǎngjì guǎnlǐ tiáoli 社会团体登记管理条例 [Regulations on Registration and Management of Social Organizations (1998 Revisions) (P.R.C.)] (promulgated by the St. Council, Oct. 25, 1998, effective Sept. 25, 1998) art. 2, translated in *Regulations for Registration and Management of Social Organisations*, CHINA DEVELOPMENT BRIEF (Nov. 11, 1999), <http://www.chinadevelopmentbrief.com/node/298> [hereinafter 1998 SO Regulations]. Examples of SOs include professional associations and business leagues. For an in-depth discussion of the development of SOs in China, see Wang & Sun, *supra* note 21.

27. 民办非企业单位 (mínbàn fēi qǐyè dānwèi). These organizations are not member-based and tend to focus on areas such as health or education. They are the closest analog to public charities in the U.S.

28. 公益信托 (gōngyì xìntuō).

29. A common term for all of these organizations is 民间 (mínjiān), meaning popular organizations. See *Necessary Changes*, *supra* note 16, at 943 n.2.

30. See, e.g., 1998 SO Regulations, *supra* note 6, at art. 4.

31. *Id.* at art. 29. For a history of the purpose of and laws governing these different types of organizations, see Thomas Von Hippel & Knut B. Pißler, *Nonprofit organizations in the People's Republic of China*, in *COMPARATIVE CORPORATE GOVERNANCE OF NON-PROFIT ORGANIZATIONS* (Klaus J. Hopt and Thomas Von

Regulation of NGOs in modern China ostensibly began in 1978, with the creation of the Ministry of Civil Affairs (MoCA), with whom all NGOs were supposed to register.<sup>32</sup> In 1984, the government required NGOs to affiliate with a government agency in the NGO's field,<sup>33</sup> often referred to as a sponsor, in addition to registering with MoCA.<sup>34</sup> Thus was born the "dual oversight" regime.<sup>35</sup>

In 1988, the State Council<sup>36</sup> reiterated that MoCA was to be the lead agency overseeing NGOs. The State Council set up the Department of Social Organizations<sup>37</sup> within MoCA<sup>38</sup> and vested the Bank of China with the job of overseeing foundations.<sup>39</sup> In 1988 and 1989, the government issued regulations governing SOs,<sup>40</sup> Foundations,<sup>41</sup> and Foreign Chambers of Commerce.<sup>42</sup> In 1998, the government promulgated an updated version of the regulations on SOs<sup>43</sup> along with provisional regulations for civil non-business institutions.<sup>44</sup> In 2001, the government enacted a

Hippel ed., 2010). See also XIN & ZHANG, *supra* note 16, at ch. 3; 2004 WORLD BANK REPORT, *supra* note 16, at II.

32. 民政部门 (Mínzhèng bùmén). See XIN & ZHANG, *supra* note 316, at 93.

33. 业务主管单位 (yèwù zhǔguǎn dānwèi).

34. *Id.*; Document 25 issued by the Central Committee of the Communist Party and the State Council (1984).

35. 双重管理体制 (Shuāngchóng guǎnlǐ tǐ zhì). Under a 2009 agreement, in some areas, and on an experimental basis, some NGOs are being allowed to be sponsored by and register with MoCA, thus eliminating the dual oversight issues. See *Two Steps*, *supra* note 12, at 55.

36. 国务院 (Guówùyuàn).

37. 社团司 (Shètuán sī).

38. XIN & ZHANG, *supra* note 316, at 94.

39. The Bank of China continued in this capacity until 1999, when the Public Welfare Donations Law was passed. See Wang & Xu, *supra* note 25, at 45.

40. Shèhuì tuántǐ dēngjì guǎnlǐ tiáoli (社会团体登记管理条例) [Regulations on Registration and Management of Social Organizations] (promulgated by the St. Council, Oct. 25, 1989, effective Oct. 25, 1989), translated in XIN & ZHANG, *supra* note 31, at 110.

41. Jījīnhuì guǎnlǐ tiáoli (基金会管理条例) [Regulations on Management of Foundations] (promulgated by the St. Council, Sept. 27, 1988, effective Sept. 27, 1988).

42. Wàiguó shānghuì guǎnlǐ zànxíng guīdìng (外国商会管理暂行规定) [Provisional Regulations on Management of Foreign Chambers of Commerce] (promulgated by the St. Council, June 14, 1989, effective July 1, 1989), translated in XIN & ZHANG, *supra* note 31, at 117.

43. See 1998 SO Regulations, *supra* note 26.

44. Mínbàn fēi qǐ yè dānwèi dēngjì guǎnlǐ zànxíng tiáoli (民办非企业单位登记管理暂行条例) [Provisional Regulations on Registration and Management of Popular Non-Enterprise Work Units] (promulgated by the St. Council, Sept. 25, 1998, effective Sept. 25, 1998), translated in *Provisional Regulations on Registration and Management of Popular Non-Enterprise Work Units*, CHINA DEVELOPMENT BRIEF (Nov. 11, 1998), <http://www.chinadevelopmentbrief.com/node/300> [hereinafter Provisional Regulations on Registration and Management of Popular Non-Enterprise Work Units].

law permitting charitable trusts.<sup>45</sup> The government issued revised regulations on foundations in 2004.<sup>46</sup>

Many of the early NGOs were actually created by the government and staffed by current or recently retired government officials.<sup>47</sup> Examples include the Chinese Red Cross Society,<sup>48</sup> the China Association for the Blind and Deaf,<sup>49</sup> and the China Children and Teenager's Fund.<sup>50</sup> These organizations, frequently referred to as GONGOs (government-organized NGOs), served as unofficial branches of the state, often employing the same administrative hierarchy, funding mechanisms, personnel systems, wage scales, etc., as government agencies.<sup>51</sup> Not surprisingly, such organizations work closely with the government and generally do not find the registration regime or government oversight burdensome.<sup>52</sup> They also have access to significant resources.<sup>53</sup>

In 1995, China hosted the World Conference on Women's NGOs, which has been generally credited with opening the door to grassroots NGOs.<sup>54</sup> In contrast to GONGOs, grassroots NGOs have had a far more difficult time with the registration rules. Finding a government sponsor in an NGO's field and then registering with MoCA can be quite difficult. Government units have little incentive to serve as sponsor to an organization with which they do not already have some relationship. Sponsorship entails taking on risk and responsibility with little potential up-

45. 信托法 (xintuō fǎ).

46. Jījīnhuì guǎnlǐ tiáolì (基金会管理条例) [Regulations on Management of Foundations] (promulgated by the St. Council, Mar. 8, 2004, effective June 1, 2004), translated in *Regulations for the Management of Foundations*, CHINA DEVELOPMENT BRIEF (June 11, 2006), <http://www.chinadevelopmentbrief.com/node/301>. These regulations impose the dual management regime on foundations, include capital requirements, and, in a departure from the regulation of SOs and non-business units, set forth detailed rules covering internal governance. For a description of these regulations, see Jillian S. Ashley & Pengyu He, *Opening One Eye and Closing the Other: The Legal and Regulatory Environment for Grassroots NGOs in China Today*, 26 BOSTON U. INT'L L. J. 29, 48–50 (2008).

47. See Wang & Sun, *supra* note 21, at 168. See also *Necessary Changes*, *supra* note 16, at 953.

48. 红十字会 (Hóngshízhìhuì).

49. 中国盲人聋哑人协会 (Zhōngguó mángrén lóngyǎrén xiéhuì).

50. 中国儿童少年基金会 (Zhōngguó értóng shàonián jījīnhuì).

51. See Wang & Sun, *supra* note 21, at 168.

52. See, e.g., Milton Cerny and Yan Zhang, *An Awakening Giant: China and the New Civil Society*, THE EXEMPT ORGANIZATION TAX REVIEW at 2 (“The operation and administration of those organizations is more like that of governmental organs . . . They are also exempt from the registration and administration requirements that ‘true’ non-governmental organizations usually have to go through.”).

53. For instance, a limited number of organizations, mostly GONGOs, are authorized to raise money publicly. Shawn Shieh & Guosheng Deng, *An Emerging Civil Society: The Impact of the 2008 Sichuan Earthquake on Grass-Roots Associations in China*, 65 CHINA J. 181, 184 (2011).

54. See *Hidden Rules*, *supra* note 15, at 186.

side, especially if the NGO focuses on sensitive issues.<sup>55</sup> Agencies are not required to act as sponsors or to decide whether they will do so within a specific time, and thus the process may drag on indefinitely.<sup>56</sup>

Registering with MoCA can be equally difficult. There is no legal right to register an NGO in China; thus, MoCA can refuse to register NGOs even though organizers have complied with all of the rules.<sup>57</sup> In addition, the government can insist that only one NGO operate within a given area.<sup>58</sup> While ostensibly designed to avoid duplication of effort and harmful competition for scarce resources, the rule gives significant discretion to the government, which in some cases has established GONGOs to preclude independent NGOs.<sup>59</sup>

Moreover, registering in one city or province only conveys the right to operate in that city or province. Organizations seeking to expand must find local sponsors wherever they go, again providing the government an opportunity to weigh in on their activities.<sup>60</sup> Given these significant hurdles, it is not surprising that many of the most successful “grassroots” NGOs were started by current or retired government officials or have such people on their boards.<sup>61</sup> Nor is it surprising that many of the most successful grassroots organizations work closely with the government

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55. Karla W. Simon, *The Regulation of Civil Society Organizations in China: Current Environment and Recent Developments*, 9 INT'L J. CIV. SOC'Y L. 55, 59-60 (2011) [hereinafter *The Regulation of Civil Society Organizations*]; *Hidden Rules*, *supra* note 15, at 187. For a case study of some of the problems faced by NGOs that seek sponsors, see Ashley & He, *supra* note 46, at 55-58.

56. See *Necessary Changes*, *supra* note 16, at 962; Ashley & He, *supra* note 46, at 29-32 (describing the failed multi-year effort of Dong Jian, an eye-care expert, to find a sponsor for an organization focused on eye care).

57. See Ashley & He, *supra* note 46, at 55 (recounting that almost all NGOs registered with MoCA in Beijing were GONGOs and that many NGOs registered with as for profit enterprises because MoCA refused to register them).

58. See 1998 SO Regulations, *supra* note 26, art. 13; Provisional Regulations on Registration and Management of Popular Non-Enterprise Work Units, *supra* note 44, art. 13. This rule is known as 一业一会 (yīyè yīhuì).

59. *Necessary Changes*, *supra* note 16, at 962-63. In some cases, GONGOs have forcibly absorbed competing grassroots NGOs. See Ashley & He, *supra* note 466, at 56.

60. *The Regulation of Civil Society Organizations*, *supra* note 55, at 5; Ashley & He, *supra* note 466, at 44.

61. *Necessary Changes*, *supra* note 16, at 953-54; XIN & ZHANG, *supra* note 16, at 99, 103-105.

and GONGOs<sup>62</sup> and are therefore subject to significant government oversight.<sup>63</sup>

In light of these hurdles, NGOs lacking political connections often skirt the law. Some have registered with the Industrial and Commercial Bureau<sup>64</sup> as for-profit businesses.<sup>65</sup> Registering as a business gives such organizations an official identity, which allows them to open bank accounts, among other things, but which precludes them from partaking of the tax benefits available to registered NGOs. Few of them actually show a profit, so the income tax bite is not necessarily a significant burden.<sup>66</sup> However, because such organizations are not truly for-profit organizations, they risk being shut down for being improperly registered.<sup>67</sup>

Other organizations simply forego registration altogether.<sup>68</sup> The regulations authorizing NGOs and the Interim Measure for Banning Illegal NGOs all make clear that organizations operating without approval are illegal and therefore banned.<sup>69</sup> Participants may be both civilly and criminally liable.<sup>70</sup> Nonetheless, millions of illegal NGOs operate throughout China under an informal “three ‘no’ policy,”<sup>71</sup> whereby the government tolerates their existence so long as they do not harm state security or social

62. See Bentley, *supra* note 14 (describing how NGOs can benefit from close association with the government). In some cases, GONGOs actually act as sponsors for grassroots NGOs, sometimes charging significant fees to do so. See Ashley & He, *supra* note 466, at 46.

63. Wang & Liu, *supra* note 9, at 29. But see Bentley, *supra* note 14 (noting that most NGOs report that they have sufficient autonomy).

64. 工商局 (gōngshāng jú).

65. XIN & ZHANG, *supra* note 31, at 92; Ashley & He, *supra* note 46, at 56 (indicating that the number of NGOs that engage in this practice may be as high as 200,000).

66. However, such organizations may be subject to other taxes, such as the sales tax, that they cannot avoid.

67. See, e.g., the Open Constitution Initiative, or 公盟 (gōngméng), which was shut down for improperly acting as an NGO while registered as a business. *China v. Civil Society*, WALL ST. J., Jul. 29, 2009, <http://online.wsj.com/article/SB10001424052970203946904574299913158787226.html>.

68. For a detailed discussion of unregistered NGOs and why the government permits so many, see Guosheng Deng, *Hidden Rules*, *supra* note 15 at 183–206.

69. *Id.* at 187 nn.12–14; Qǔdì fēifǎ mǐnjiān zǔzhī zàn xíng bānfā (取缔非法民间组织暂行颁发) [Interim Measures for Banning Illegal Non-Governmental Organizations] (promulgated by the Ministry of Civil Affairs, Apr. 10, 2000, effective Apr. 2000), INT’L CENTER CIV. SOC’Y L., art. 2 (2000), [http://www.iccl.org/pubs/Interim\\_Measures\\_for\\_Banning\\_Illegal\\_Non.pdf](http://www.iccl.org/pubs/Interim_Measures_for_Banning_Illegal_Non.pdf).

70. Ashley & He, *supra* note 466, at 45.

71. The three “nos” are no recognition, no banning, and no interference. This system has also been described as “opening one eye and closing another.” See Ashley & He, *supra* note 466, at 80–84. This approach likely results from the government’s lack of resources to formally regulate all such organizations and the fact that many of these organizations do, in fact, increase societal welfare. *Id.* at 193–96.

stability.<sup>72</sup> While this policy creates space for unregistered NGOs to operate, it creates a significant chilling effect on such organizations, as the Sword of Damocles constantly hangs over their heads.<sup>73</sup> It also makes them unattractive to most funding sources, severely limiting their reach.

## B. SUBSIDIZING NGOS

It is one thing to permit NGOs to exist and operate. It is quite another to subsidize them. Over the past 30 years, the Chinese government has subsidized NGOs in a number of different ways, ranging from direct funding to indirect funding through tax incentives.

### 1. Direct Subsidies

Partnering with NGOs to combat societal problems is now the dominant model in most developed countries.<sup>74</sup> Of 39 countries surveyed in one study, the government provided an average of 36% of NGO funding, with the remainder consisting of fees and philanthropy.<sup>75</sup> Among a number of developed countries, government support for NGOs reached well into the 60% range.<sup>76</sup> Direct funding can take many forms, including block allocations, categorical grants, block grants, and contracts, each with its own costs and benefits.<sup>77</sup> Direct subsidies allow the government to exercise significant control over NGOs by selecting partners and controlling the terms of the partnership.

In the early years after the reform and opening, government support and control over NGOs was especially high, in large part because many of the early NGOs were GONGOs.<sup>78</sup> While a large number of grassroots NGOs followed, many have close ties

72. Estimates of the number of illegal NGOs vary from 1 to 2.7 million, depending in part on how they are classified. See *Hidden Rules*, *supra* note 15, at 188. By some accounts, unregistered NGOs outnumber registered NGOs by a factor of 10 to 1. Wang & Liu, *supra* note 9, at 29.

73. *Hidden Rules*, *supra* note 15, at 194, 196–99 (identifying several unregistered NGOs that were shut down for operating illegally and describing how unregistered NGOs limit their size and scope to avoid getting in trouble with the authorities).

74. See Leon E. Irish, Lester M. Salamon, & Karla W. Simon, *Outsourcing Social Services to CSOs: Lessons from Abroad 3* (2009), <http://siteresources.worldbank.org/DEV/DIALOGUE/Resources/OutsourcingtoCSOs.pdf> [hereinafter *Outsourcing Social Services*].

75. See LESTER M. SALAMON ET AL., *GLOBAL CIVIL SOCIETY* (3d ed. 2010). Fees accounted for 50%, while philanthropy accounted for the remaining 15%.

76. See *Outsourcing Social Services*, *supra* note 74, at 10.

77. For a detailed discussion of these mechanisms and how they differ, see *Outsourcing Social Services*, *supra* note 74, at 19–20.

78. The motivation for establishing such organizations in many cases was to create an entity eligible under foreign laws or other rules to receive foreign donations. Nonetheless, the government was often the primary source of funding.

to the government and continue to receive significant government support, typically by working closely with GONGOs, which funnel funds to such organizations.<sup>79</sup> Grassroots NGOs not closely affiliated with GONGOs have been far less able to attract government funding.

## 2. Tax Subsidies

China also provides funding to NGOs in the form of tax incentives, some of which go to NGOs directly and others of which go to those who support them.

### a. Tax Exemption for NGOs

China does not have any NGO-specific tax statutes.<sup>80</sup> Instead, the generally applicable tax laws apply to NGOs. The government imposes a broad variety of taxes on its citizens and enterprises, including the Individual Income Tax, Enterprise Income Tax, Business Tax, Value Added Tax, Tariffs, Real Estate Tax, and Vehicle Acquisition Tax, to name but a few.<sup>81</sup> Many of these tax laws contain exemptions for NGOs, either in their entirety<sup>82</sup> or based on factors such as the type of income received or the activity in which the NGO is engaged.<sup>83</sup> Such exemptions provide indirect funding to covered NGOs by reducing their costs, leaving them with more money to achieve their goals. The government retains the ability to decide who gets these subsidies by controlling who is eligible to receive them.<sup>84</sup>

### b. Income Taxation and the Charitable Deduction

China's modern income tax dates from 1980, when the National People's Congress (NPC), China's main legislative body, enacted both an Individual Income Tax Law (IIT)<sup>85</sup> and an En-

79. See Shieh & Deng, *supra* note 53, at 193 (describing how a number of NGOs received funds from the Chinese Red Cross after the Wenchuan earthquake to carry out construction projects).

80. See 2004 WORLD BANK REPORT, *supra* note 16, at VII.

81. *Id.* at 12-16.

82. See, e.g., 2004 WORLD BANK REPORT *supra* note 16, at 14 (describing the Vehicle and Vessel Usage Tax).

83. For instance, organizations engaged in scientific research may exempt from the Enterprise Income Tax income derived from the technology they develop and any advisory services they provide. *Id.* at 12-16.

84. See, e.g., 1998 SO Regulations, *supra* note 26, arts. 7-16 and 2007 Circular, *infra* note 114.

85. Gèrén suǒdé shuǐfǎ (个人所得税法) [Individual Income Tax Law of the People's Republic of China] (promulgated by the Nat'l People's Cong., Sept. 10, 1980, effective Sept. 10, 1980), translated in *Individual Income Tax Law of the People's Republic of China*, MINISTRY OF COMM., PEOPLE'S REPUBLIC OF CHINA, <http://english.mofcom.gov.cn/article/lawsdata/chineselaw/200211/20021100053866.html> (last visited Feb. 12, 2012) [hereinafter 1980 IIT].

terprise Income Tax Law (EIT) on joint ventures using Chinese and foreign investment.<sup>86</sup> Later that year, the State Council issued regulations construing both statutes, indicating that the Ministry of Finance<sup>87</sup> would be charged with interpreting them.<sup>88</sup>

The original EIT statute is silent regarding a deduction for donations.<sup>89</sup> However, the regulations issued shortly thereafter indicate that a deduction was available for donations for public welfare or relief purposes.<sup>90</sup> In 1991, the NPC enacted a new income tax for enterprises with foreign investment and foreign enterprises.<sup>91</sup> Again, the statute was silent regarding a deduction for donations; however, the implementing rules indicated that a deduction was available for certain welfare-related donations, with the added proviso that they be “used in China.”<sup>92</sup> In 1993,

86. Zhōngwài hézī jīng yíng qǐ yè suǒdé shuǐfǎ (中外合资经营企业所得税法) [Enterprise Income Tax for Sino-Foreign Joint Ventures] (promulgated by the Nat'l People's Cong., Sept. 10, 1980, effective Sept. 10, 1980), translated in *Income Tax Law Concerning Chinese-Foreign Equity Joint Ventures*, ASIANLII, <http://www.asianlii.org/cn/legis/cen/laws/itlcccejv613> (last visited Feb. 12, 2012) [hereinafter 1980 EIT]. This statute was amended in 1983. For a copy of the revisions, see *Income Tax Law of the People's Republic of China Concerning Joint Ventures Using Chinese and Foreign Investment*, ASIANLII, <http://www3.asianlii.org/cn/legis/cen/laws/itlotprocjv ucafi991/> (last visited Feb. 12, 2012).

87. 财政部 (Cáizhèngbù).

88. Gèrén suǒdé shuǐfǎ shíshī tiáolì (个人所得税法实施条例) [Rules for the Implementation of the Individual Income Tax Law] (promulgated by the Ministry of Finance, Dec. 14, 1980, effective Sept. 10, 1980), translated in *Rules for the Implementation of the Individual Income Tax Law*, ASIANLII, <http://asianlii.org/cn/legis/cen/laws/rftiotit560> (last visited Feb. 12, 2012) [hereinafter 1980 IIT Regulations]; Zhōngwài hézī jīng yíng qǐ yè suǒdé shuǐfǎ shíxíng xìzè (中外合资经营企业所得税法施行细则) [Rules for the Implementation of the Income Tax Law Concerning Chinese-Foreign Equity Joint Venture] (promulgated by the St. Council, Dec. 14, 1980, effective Dec. 10, 1980), translated in *Rules for the Implementation of the Income Tax Law Concerning Chinese-Foreign Equity Joint Venture*, ASIANLII, <http://www.asianlii.org/cn/legis/cen/laws/rftiotitlcccejv932/> (last visited Feb. 12, 2012) [hereinafter 1980 EIT Regulations].

89. See Enterprise Income Tax for Sino-Foreign Joint Ventures, *supra* note 86.

90. Article 9 lists those items for which no deduction is to be allowed. Included in the list are “donations other than those for public welfare or relief purposes.” See 1980 EIT Regulations, *supra* note 88, art. 9.8. By negative implication, donations and contributions for public welfare and relief purposes were deductible.

91. Wàishāng tóuzī qǐyè hé wàiguó qǐyè suǒdé shuǐfǎ shíshī xìzè (外商投资企业和外国企业所得税法实施细则) [Income Tax Law of the People's Republic of China for Enterprises with Foreign Investment and Foreign Enterprises] (promulgated by the Nat'l People's Cong., Apr. . 9, 1991, effective Jul. 1, 1991), translated in *Income Tax Law of the People's Republic of China for Enterprises with Foreign Investment and Foreign Enterprises*, ASIANLII, <http://asianlii.org/cn/legis/cen/laws/itlotprocfewfiafe1032> (last visited Feb. 12, 2012).

92. Wàishāng tóuzī qǐyè hé wàiguó qǐyè suǒdé shuǐfǎ shíshī xìzè shíshī tiáolì (外商投资企业和外国企业所得税法实施细则实施条例) [Rules for the Implementation of the Income Tax Law for Enterprises with Foreign Investment and Foreign Enterprises] (promulgated by St. Council, June 30, 1991, effective July 1, 1991), art. 19(8), translated in *Rules for the Implementation of the Income Tax Law for Enterprises with Foreign Investment and Foreign Enterprises*, ASIANLII, <http://asianlii.org/>

the State Council issued provisional regulations that established a limit on charitable donations of 3% of an enterprise's taxable income,<sup>93</sup> though there is some suggestion that well-connected enterprises could obtain greater deductions through negotiations with the relevant authorities.<sup>94</sup> In 2007, the NPC overhauled the EIT once again, eliminating the different treatment of foreign and domestic companies and increasing the amount enterprises could deduct for donations to eligible organizations to 12% of "total annual profits."<sup>95</sup>

In contrast, neither the original IIT nor its regulations contained a provision allowing taxpayers to deduct donations to NGOs.<sup>96</sup> However, in 1993, the NPC amended the IIT, consolidating the rules governing foreigners and nationals.<sup>97</sup> The new

cn/legis/cen/laws/rftiotitlfewfiafe1112/ (last visited Feb. 12, 2012) [hereinafter 1991 EIT Implementation Rules].

93. Qiyè suǒdèshuì zànxíng tiáoli (企业所得税暂行条例) [Provisional Regulations on Enterprise Income Tax] (promulgated by the St. Council, Dec. 13, 1993, effective Jan. 1, 1994) art. 6(4), translated in *Provisional Regulations on Enterprise Income Tax*, ASIANLII, <http://www.asianlii.org/cn/legis/cen/laws/procit510/> (last visited Feb. 12, 2012) [hereinafter 1993 Provisional EIT Regulations]. See also Cáishuì fǎ (财税法) [Rules for the Implementation of Provisional Regulations on Enterprise Income Tax of the People's Republic of China] (promulgated by the Ministry of Finance, Feb. 4, 1994, effective Feb. 4, 1994), art. 12, translated in *Rules for the Implementation of Provisional Regulations on Enterprise Income Tax of the People's Republic of China*, STATE ADMIN. OF TAXATION OF THE PEOPLE'S REPUBLIC OF CHINA (Oct. 27, 2007), <http://www.chinatax.gov.cn/n6669073/n6669088/6888513.html> [hereinafter Cáishuì fǎ [1994] No. 3].

94. XIN & ZHANG, *supra* note 16, at 102.

95. Qiyè suǒdè shuìfǎ (企业所得税法) [Enterprise Income Tax Law] (promulgated by the Nat'l People's Cong., Mar. 16, 2007, effective Jan. 1, 2008), translated in *Enterprise Income Tax Law of the People's Republic of China*, ASIANLII, <http://www.asianlii.org/cn/legis/cen/laws/eitlotproc504/> (last visited Feb. 12, 2012) [hereinafter 2008 EIT].

Total annual profits were defined as the annual accounting profit, determined using the state's accounting rules. Qiyè suǒdè shuì fǎ shíshī tiáoli (企业所得税法实施条例) [Regulations of the People's Republic of China on the Implementation of the Enterprise Income Tax Law] (promulgated by the St. Council, Dec. 6, 2007, effective Jan. 1, 2008), art. 53, ¶ 2, translated in *Regulations of the People's Republic of China on the Implementation of the Enterprise Income Tax Law*, INVEST IN CHINA (Dec. 6, 2007), [http://www.fdi.gov.cn/pub/FDI\\_EN/Laws/law\\_en\\_info.jsp?docid=122121](http://www.fdi.gov.cn/pub/FDI_EN/Laws/law_en_info.jsp?docid=122121) [hereinafter 2007 Regulations on the Implementation of the Enterprise Income Tax Law].

96. See 1980 IIT, *supra* note 85; 1980 IIT Regulations, *supra* note 88; Gèrén shōurù tiáojiéshuì zànxíng tiáoli (个人收入调节税暂行条例) [Provisional Rules of the People's Republic of China on Individual Income Adjustment Tax] (promulgated by the St. Council, Sept. 25, 1986, effective Jan. 1, 1987), translated in *Provisional Rules of the People's Republic of China on Individual Income Adjustment Tax*, ASIANLII, <http://www.asianlii.org/cn/legis/cen/laws/protproc0iiat800/> (last visited Feb. 12, 2012).

97. See Quánguó réndà chángwèihui guānyú xiūgǎi «Zhōnghuá rénmin gònghéguó gèrén suǒdè shuìfǎ» de juéding (全国人大常委会关于修改《中华人民共和国个人所得税法》的决定) [Decision of the Standing Committee of the National People's Congress on Amending the Individual

law contained language permitting individual taxpayers to deduct charitable donations.<sup>98</sup> Regulations were issued in 1994 that defined the undertakings to which tax deductible donations could be made and imposed a limit on donations of 30% of taxable income.<sup>99</sup> The NPC amended the IIT in 1999, 2005 and 2007 without altering the provisions relating to the charitable deduction.<sup>100</sup>

That the tax laws allowed a charitable deduction does not mean that the deduction functioned like that in the U.S. or was a source of significant funding for NGOs. Both the EIT and IIT and their regulations made deductions available only for donations that contributed to “public welfare,” though different terms were sometimes used.<sup>101</sup> Administrative pronouncements made clear that the government would carefully control which organizations could receive tax deductible donations.

For instance, the 1994 rules implementing the 1993 provisional regulations construing the 1991 EIT defined “payments by a taxpayer for public welfare donations” as referring to donations “paid to public welfare undertakings of the educational and

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Income Tax Law] (promulgated by the Standing Comm. Nat'l People's Cong., Oct. 31, 1993, effective Jan. 1, 1994), translated in *Decision of the Standing Committee of the National People's Congress on Amending the Individual Income Tax Law*, ASIANLII, <http://www.asianlii.org/cn/legis/cen/laws/dotscotnmpcoatiitltwtfro1261/> (last visited Feb. 12, 2012) [hereinafter 1993 IIT Amendments]. For a description of the law, see Howard Gensler, *The 1994 Individual Income Tax Law of the People's Republic of China*, 26 CAL. W. INT'L. L. J. 115 (1995).

98. Art. 6 included flush language that read: “The part of individual income donated to educational and other public welfare undertakings shall be deducted from the taxable income in accordance with the relevant stipulations made by the State Council. 1993 IIT Amendments, *supra* note 97, art. 6.

99. See *Gèrén suǒdé shuìfǎ shíshī tiáolì* (个人所得税法实施条例) [Regulations for Implementation of the Individual Income Tax Law] (promulgated by the St. Council, Jan. 28, 1994, effective Jan. 28, 1994), art. 24, translated in *Regulations for Implementation of the Individual Income Tax Law*, ASIANLII, <http://www.asianlii.org/cn/legis/cen/laws/rfiotiit1590/> (last visited Feb. 12, 2012) (effective retroactively to January 1, 1994).

100. See *Gèrén suǒdé shuìfǎ* (个人所得税法) [Individual Income Tax Law of the People's Republic of China] (promulgated by the Nat'l People's Cong., Aug., 30, 1999, effective Aug., 30, 1999) [hereinafter IIT (1999)], translated in *Personal Income Tax Law of the People's Republic of China*, ASIANLII, <http://www.asianlii.org/cn/legis/cen/laws/pitlotproc477> (last visited Feb. 12, 2012); *Gèrén suǒdé shuìfǎ* (个人所得税法) [Individual Income Tax Law of the People's Republic of China] (promulgated by the Nat'l People's Cong., Oct. 27, 2005, effective Jan. 1, 2006) [hereinafter IIT (2005)], art. 6.1, Rules, art. 24; *Gèrén suǒdé shuìfǎ shíshī tiáolì* (个人所得税法实施条例) [Implementation Rules Concerning the Individual Income Tax Law of the People's Republic of China] (promulgated by the St. Council, Dec. 19, 2005, effective Jan. 1, 2006).

101. See, e.g., 1993 IIT Amendments, *supra* note 97, art. 6 (education and public welfare undertakings); 1991 EIT Implementation Rules, *supra* note 92, art. 19(8) (public welfare or relief purposes); 1993 Provisional EIT Regulations, *supra* note 92, art. 6(4) (community benefits and charitable donations).

civil affairs departments,” that is, to the government.<sup>102</sup> The rules also provided for deductions for donations to “victims of natural calamities and people in poor regions via social organizations and government institutions.”<sup>103</sup> The “via social organizations” language seems to expand the scope of eligible organizations to the entire class of social organizations, of which there were many; however, the document then identifies by name a small number of social organizations actually eligible to receive deductible donations.<sup>104</sup> While there is a catchall for other organizations approved by MoCA, few organizations qualified under this language. Indeed, as of 2006, before the rules were purportedly relaxed, the government had identified only 62 NGOs eligible to receive tax deductible donations.<sup>105</sup>

The government also attempted to channel charitable giving to specific organizations and to certain purposes by relaxing the deduction limits for those organizations. For instance, the regulations permitted donations without limit to the Chinese Red Cross Society, welfare institutions that cared for the old, and NGOs involved in compulsory rural education, among others.<sup>106</sup>

Starting in 1999, the government began to relax controls on which organizations could receive tax-free charitable donations by issuing the Public Welfare Donation Law.<sup>107</sup> This law was designed to “encourage donations; standardize the behaviour of do-

102. Cáishuì fǎ [2004] No. 3, *supra* note 93, art. 12.

103. *Id.*

104. The organizations include the China Youth Development Foundation, the Hope Project Foundation, Soong Ching Ling Foundation, the Disaster Relief Society, the China Red Cross, the China Handicapped Union, the All-China Aged Fund, the Society for the Promotion of Old Liberated Areas, and “other non-profit making organizations founded with the approval of the departments of civil affairs.” *Id.*

105. *See* Ashley & He, *supra* note 46, at 61.

106. *See* Cáizhèngbù guójiā shuìwù zǒngjú guānyú jiàoyù shuìshōu zhèngcè de tōngzhī (财政部 国家税务总局关于教育税收政策的通知) [Notice of the Ministry of Finance and the State Administration of Taxation on Education Tax Policies] (promulgated by the Ministry of Finance, Feb. 5, 2004, effective Jan. 1, 2004), pt. I, ¶ 8, translated in *Notice of the Ministry of Finance and the State Administration of Taxation on Education Tax Policies*, ASIANLII, <http://asianlii.org/cn/legis/cen/laws/notmofatsaotoetp897> (last visited Feb. 12, 2012) [hereinafter *Cáishuì Fǎ* [2004] No. 39]; 2004 WORLD BANK REPORT *supra* note 16, at 17. In many regards, this approach is similar to that found in the U.S. Congress has imposed a limit of 50% of income for donations to a wide range of institutions, including churches, educational organizations and those that provide medical care. I.R.C. § 170(b)(1)(A). For donations to other organizations, the limit is 30%. I.R.C. § 170(b)(1)(B). At times, Congress has suspended the limits for certain types of donations. *See, e.g.*, I.R.C. § 170.

107. Gōngyì shìyè juānzèng fǎ (公益事业捐赠法) [Public Welfare Donation Law] (promulgated by the Standing Comm. Nat’l People’s Cong., June 28, 1999, effective Sept. 1, 1999), translated in *People’s Republic of China Public Welfare Donation Law*, CHINA DEVELOPMENT BRIEF (Nov. 11, 1999), <http://www.china-development-brief.com/node/299>.

nors and recipients [shou zeng]; protect the legal rights of donors, recipients and beneficiaries; and promote the development of public welfare undertaking.”<sup>108</sup> The law defines “public welfare undertakings” broadly to include disaster relief, poverty alleviation, education, scientific and public health undertakings, among others.<sup>109</sup> It did not explicitly broaden the number or type of organizations eligible to receive tax-deductible donations, but it was an important first step. The law contained no tax provisions, but it made clear that donors who complied with its requirements would receive the appropriate tax benefits<sup>110</sup> set forth in the IIT and EIT and their respective implementing regulations.<sup>111</sup>

In 2004, a report was prepared for the World Bank on China’s NGO tax regime, comparing it to those found in the U.S., the U.K. and Germany.<sup>112</sup> The report recommended that the Chinese government broaden the tax incentives for NGOs to conform them more closely to those found in the comparison countries. In particular, the report recommended that (1) the government exempt NGOs from most taxes, but that NGOs focused on public benefits receive tax exemptions beyond those afforded to regular NGOs; (2) deductions be allowed only for donations to public benefit NGOs; (3) deduction limitations be increased to 10% and 50% for enterprises and individuals, respectively; (4) NGOs eligible to receive deductions be broadened beyond specifically listed organizations to all certified NGOs; and (5) taxpayers be allowed to designate that some portion of their taxes be contributed to designated NGOs.<sup>113</sup>

Whether in response to this report or on their own initiative, the Ministry of Finance and State Administration of Taxation announced in 2007 that SOs and foundations meeting the requirements set forth in the regulations and devoted to public welfare could register to receive tax-deductible donations.<sup>114</sup> The NPC

108. *Id.* art. 1.

109. *Id.* art. 3.

110. *Id.* arts. 24–27.

111. See IIT (1999), *supra* note 1000, art. 6.6.

112. See 2004 WORLD BANK REPORT, *supra* note 16, at VI.

113. *Id.* at pts. I–VI.

114. Cáizhèngbù guójiā shuìwù zǒngjú guānyú gōngyì jiùjì xìng juānzèng shuì qián kòuchū zhèngcè jí xiāngguān guǎnlǐ wèntí de tōngzhī (财政部、国家税务总局关于公益救济性捐赠税前扣除政策及相关管理问题的通知) [Circular of the Ministry of Finance and the State Administration of Taxation on the Policies and Related Management Issues Concerning the Pre-Tax Deduction of Public Welfare Relief Donations] (promulgated by the Ministry of Finance, Jan. 18, 2007, effective Jan. 18, 2007), translated in *Circular of the Ministry of Finance and the State Administration of Taxation on the Policies and Related Management Issues Concerning the Pre-Tax Deduction of Public Welfare Relief Donations*, ASIANLII, <http://www.asianlii.org/cn/legis/cen/laws/cotmofatsaototparmiectpdopwrd1638/> (last visited Feb. 12, 2012) [hereinafter Cáishuì Fǎ [2007] No. 6]. For a discussion of this

also increased the amount enterprises were allowed to deduct from 3% to 12%.<sup>115</sup> Rather than identify in the regulations the specific organizations eligible to receive donations, the government identified a broad category of organizations, social organizations and certain government agencies described in the 1999 Public Welfare Donations Law.<sup>116</sup>

In 2008, the Ministry of Finance and State Administration of taxation issued a circular reiterating the ability of enterprises and individuals to deduct contributions for public welfare.<sup>117</sup> Among other things, this circular set forth the requirements for an organization to qualify to receive tax-deductible donations and the steps necessary to obtain authority from the appropriate agencies.<sup>118</sup> It also set forth the circumstances under which permission would be rescinded, including failing the annual exam, engaging in deception, facilitating tax evasion, misusing funds, or being administratively punished.<sup>119</sup>

A 2009 circular, which addresses the treatment of donors under the 2008 EIT,<sup>120</sup> similarly made clear that tax-deductible donations may be made to public institutions, SOs, foundations, civil non-business units, or business sites that have been established and registered according to the laws,<sup>121</sup> so long as they are focused on public welfare or approved non-profit activities within China.<sup>122</sup> The circular sets forth the rules that such organizations must follow to be eligible and makes clear that they must receive government approval before being allowed to re-

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notice, see KARLA W. SIMON, *Important Developments in China's Legal and Fiscal Framework for the Support of Civil Society*, INT'L CENTER FOR CIV. SOC'Y L., (Mar. 2007), [http://www.iccs.org/pubs/china\\_fiscal\\_changes\\_march\\_07.pdf](http://www.iccs.org/pubs/china_fiscal_changes_march_07.pdf).

115. 2008 EIT, *supra* note 95, art. 9.

116. 2007 Regulations on the Implementation of the Enterprise Income Tax Law, *supra* note 95. The regulations contain a list of requirements for such organizations that mirror those found in the NGO regulations, including that they be legally established, focused on public welfare, subject to the non-distribution constraint, etc. *Id.* art. 52.

117. Cáishuì Fǎ [2008] No. 160 [Circular of the Ministry of Finance, the State Administration of Taxation and the Ministry of Civil Affairs on Relevant Issues of Pre-tax Deduction of Public Welfare Donations] (promulgated Dec. 31, 2008, effective Jan. 1, 2008).

118. *Id.* arts. 4, 6, 7.

119. *Id.* art. 10.

120. The Circular on Management Issues Concerning NPOs' Eligibility of Tax Deduction (promulgated by the Ministry of Fin., Nov. 11, 2009, effective Jan. 1, 2008), *Caishui [2009] No. 123* (China), translated in <http://www.iccs.org/pubs/caishui123eng.pdf> [hereinafter Cáishuì Fǎ [2009] No. 123]. Although the law interprets the EIT, as Karla Simon suggests, it seems safe to assume that similar rules would apply to individuals under the IIT. See *The Regulation of Civil Society Organizations*, *supra* note 55, at 85 n.65.

121. Cáishuì Fǎ [2009] No. 123, *supra* note 1200, art. 1(1).

122. *Id.* arts. 1(2), (3).

ceive tax-deductible donations.<sup>123</sup> Approval lasts 5 years.<sup>124</sup> Thus, while the government remains involved in deciding which organizations are eligible to receive tax-deductible donations, it appears to have moved away from prior practice, where only a few organizations were deemed eligible, and most of those were GONGOs.

Work has been underway since at least 2006 on a comprehensive “Charity Law,”<sup>125</sup> which might address in a single place many of the issues now dealt with in a variety of different laws and regulations. The prospect of such a law has generated significant excitement, with numerous commentators offering advice as to how it should be crafted to address the myriad issues affecting China’s non-profit sector.<sup>126</sup> However, despite hopes that it would be forthcoming soon, the law appears to be on hold.<sup>127</sup>

Finally, a number of sub-national and private efforts are underway to reform NGO oversight. For instance, Jiangsu and Hunan provinces and some smaller political entities, such as Beijing and Ningbo city, are experimenting with new rules that loosen the restrictions on NGOs.<sup>128</sup> The Capital Philanthropy Foundation, an organization consisting of numerous NGOs, is set to issue guidelines for internal regulation that its members will be expected to follow.<sup>129</sup> The China Foundation Center is collecting annual foundation reports in one central location and may issue internal regulation guidelines.<sup>130</sup>

### C. SUMMARY

Two narratives emerge from the history described above. On the one hand, there appears to be continual progress toward permitting a more autonomous and privately funded civil society.

123. *Id.* art 4.

124. *Id.*

125. 慈善法 (*císhàn fǎ*).

126. *See, e.g., Lee, supra* note 6, at 358.

127. *See The Regulation of Civil Society Organizations, supra* note 55, at 53 n.8.

128. *Id.* at 78–83. *See also* Karla W. Simon & Hang Gao, *Opening the Space: New Developments for China’s Community Organizations*, CUA Columbus School of Law Legal Studies Research Paper Research Paper No. 2010-25, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1581687](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1581687) (forthcoming) (describing recent efforts in Qingdao, Jiangsu province, China to create innovative registration and oversight regimes for Community Civil Organizations, Trade Associations, and SOs).

As a sign of how such efforts are viewed by the government, in 2011, Ma Hong, Shenzhen’s top administrator, was awarded China’s highest award for innovation in government for her role in relaxing registration requirements and for her efforts to get NGOs involved in welfare, health, and education services. *See Taming Leviathan*, *THE ECONOMIST* (Mar 17, 2011), <http://www.economist.com/node/18359896>.

129. *See The Regulation of Civil Society Organizations, supra* note 55, at 19–23.

130. *Id.*

In official pronouncements, NGOs have gone from pariahs to valuable partners, critical to the government's efforts to address societal problems.<sup>131</sup> Tax incentives, originally restricted to a handful of government-picked and controlled organizations, are now purportedly available under generally applicable laws to a broad array of eligible organizations. Indeed, on the surface, the system in place resembles that found in the U.S. On the other hand, many believe that Chinese civil society has a long way to go.<sup>132</sup> In particular, there is a sense that many in government have not fully embraced the notion of a broadly available charitable deduction. The registration rules continue to pose significant barriers to grassroots NGOs, and unregistered NGOs remain at risk of being shut down and criminally prosecuted. Such organizations cannot avail themselves of the tax incentives available. Even for organizations that have registered, few have actually been approved to receive tax-deductible donations.

To date, those who have called for reform have identified a number of different justifications. First and foremost, they argue that NGOs can play an important role in addressing societal ills, such as poverty, by providing social services and by redistributing wealth.<sup>133</sup> They can also mobilize people and resources in a way that government arguably cannot.<sup>134</sup> NGOs can also be a place for people to develop leadership and other business skills and may help inculcate civil values.<sup>135</sup> In addition, NGOs can model good government and, through competition, may improve its functioning.<sup>136</sup> A robust and independent civil society has also been promoted as a means of preparing the public for democratic participation, fostering pluralism, and spurring an interest in public affairs.<sup>137</sup>

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131. See Introduction.

132. See CIVICUS REPORT, *supra* note 8; *The Value of the Non-Government Sector in China*, *supra* note 143, at 93 (noting that China needed both a "powerful, effective and clean government and a lively and innovative market and a powerful, autonomous, and orderly non-governments sector."); Wang Ming, *The Development and Present Situation of NGOs in China*, 28 SOC. SCI. CHINA 96, 101 (2007) (noting that China's NGOs generally face funding, problems, issues with mobilization, and inadequate specialist skills). See also *Necessary Changes*, *supra* note 16, at 953 (describing ways in which the Chinese government has blurred the lines between the government and NGOs); Lee, *supra* note 6, at 348 (arguing that lack of a comprehensive charity law, failure of existing laws, and inefficient bureaucracy all hinder the development of a robust civil society).

133. Wang & Xu, *supra* note 25, at 50.

134. See *Hidden Rules*, *supra* note 15, at 195.

135. Ashley & He, *supra* note 466, at 34–38.

136. See Bentley, *supra* note 14; Wang & Liu, *supra* note 9, at 20.

137. Ashley & He, *supra* note 466, at 34–38; see also Bentley, *supra* note 14; Yin, *supra* note 14, at 530–32.

Many of these justifications originate in the West and may seem persuasive or even compelling to those of us who grew up with them; but we are not the target audience. Some of these benefits, such as the balancing of rights between individuals and the government or supporting democratic ideals, likely hold little appeal for Chinese policymakers. Other benefits can be achieved through direct subsidies to NGOs, which afford the government significant control over the civil sector.<sup>138</sup> Thus, the burden is on those advocating for reform to make arguments that China's government officials would embrace.

Identifying the benefits of a broadly available charitable deduction is only half the battle. A convincing argument must also acknowledge and accommodate the government's desire for control and harmony. To reject such desires serves only to delegitimize the goals of those advocating change in the eyes of China's leaders and thereby undermine the arguments themselves. Fortunately, this can be readily accomplished. Part II considers the extent to which the justifications for the charitable deduction advanced in the U.S. apply in the Chinese context. Part III addresses the tension between an autonomous civil sector and the government's desire for control and social harmony.

## II. JUSTIFYING THE CHARITABLE DEDUCTION IN CHINA

Western scholars have offered two basic justifications for the charitable deduction. The first is that amounts earned and then given to charity do not constitute income and therefore should be excluded from the tax base via an unlimited deduction.<sup>139</sup>

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138. See *Outsourcing Social Services*, *supra* note 774 (explaining how the government can directly fund NGOs through grants or contracts that harness the creativity of the private sector without ceding total control to the NGOs).

139. The income definition found in any real-world tax code typically reflects some ideal notion of income. Items that are income in an ideal sense are generally included in the real-world tax base, while items not considered income are usually excluded. The two definitions do not match up because it is often necessary to make allowances for custom, administrative concerns, or non-tax policy reasons, all of which might make the ideal definition undesirable or impossible to implement.

The most common ideal income definition for tax purposes is the Haig-Simons formulation, which defines income as "the algebraic sum of (1) the market value of rights exercised in consumption and (2) the change in the value of the store of property rights between the beginning and end of the period in question." HENRY C. SIMONS, *PERSONAL INCOME TAXATION: THE DEFINITION OF INCOME AS A PROBLEM OF FISCAL POLICY* 50 (1938). Someone who earns money and then donates it to charity has no net increase in tangible wealth of the type typically included in the tax base. Thus, whether amounts donated to charity should be included in the donor's tax base depends on whether charitable giving is considered a form of consumption.

If charitable giving is not consumption, then an unlimited deduction is appropriate to ensure that amounts given to charity are not included in the donor's tax base. See, e.g., William D. Andrews, *Personal Deductions in an Ideal Income Tax*, 86

Neither the U.S. nor the Chinese government permits an unlimited deduction for charitable donations,<sup>140</sup> suggesting that policy-makers in both countries have not adopted this justification. The second, and the one that I focus on here, is that the charitable deduction provides an indirect subsidy to charitable organizations, either by creating an incentive for individuals to give or by allowing individuals to direct government funds to their chosen charities. In this Part, I consider the subsidy justification and assess its applicability in the Chinese context.

Scholars have advanced two conceptions of the charitable deduction as a subsidy. In the first, the deduction induces people to give more than they otherwise would by lowering the cost of giving.<sup>141</sup> In the second, the deduction is viewed as form of matching grant system, where the taxpayer donates an amount to a charitable NGO and the government indirectly contributes the tax owed on that amount by reducing the donor's taxes in the amount that would have been paid on the donated funds.<sup>142</sup> Either way charities benefit at the expense of the public fisc.

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HARV. L. REV. 309, 313 (1972); Douglas A. Kahn & Jeffery H. Kahn, "Gifts Gifts and Gifts" - *The Income Tax Definition and Treatment of Private and Charitable "Gifts" and a Principled Policy Justification for the Exclusion of Gifts from Income*, 78 NOTRE DAME L. REV. 441, 461 (2003). If it is consumption, no deduction should be allowed. See, e.g., Mark G. Kelman, *Personal Deductions Revisited: Why They Fit Poorly in an "Ideal" Income Tax and Why They Fit Worse in a Far From Ideal World*, 31 STAN L. REV. 831 (1979); Marjorie E. Kornhauser, *The Constitutional Meaning of Income and the Income Taxation of Gifts*, 25 CONN. L. REV. 1, 29-30 (1992) (arguing that charitable giving contains an element of personal consumption).

Similar debates over the appropriate treatment of charitable donations exist using other conceptions of ideal income. See, e.g., Alvin Warren, *Would a Consumption Tax Be Fairer Than an Income Tax?*, 89 YALE L. J. 1081, 1088 (1980) (arguing that charitable deductions should be allowed as a matter of income definitions because societal income should equal the sum of individual incomes); Boris I. Bittker, *Charitable Contributions: Tax Deductions or Matching Grants?*, 28 TAX L. REV. 37 (1972) (arguing that charitable deductions are appropriate as a matter of income definition under an ability to pay theory of income).

140. See I.R.C. § 170(b), *supra* note 106; Part I.B.2.b above.

141. Some charitable giving is no doubt inelastic and would occur regardless of the deduction. The extent to which taxpayers at different income levels respond to the charitable deduction is a matter of significant debate. See, e.g., Yong S. Choe & Jinook Jeong, *Charitable Contributions by Low- and Middle-Income Taxpayers: Further Evidence with a New Method*, 46 NAT'L TAX J. 33 (1993); Amy E. Dunbar & John Phillips, *The Effect of Tax Policy on Charitable Contributions: The Case of Nonitemizing Taxpayers*, 19 J. AM. TAX'N ASS'N 1, 5 (Supp. 1997); CONG. BUDGET OFFICE, EFFECTS OF ALLOWING NONITEMIZERS TO DEDUCT CHARITABLE CONTRIBUTIONS (2002).

142. See Paul R. McDaniel, *Federal Matching Grants for Charitable Contributions: A Substitute for the Income Tax Deduction*, 27 TAX L. REV. 377, 390-91 (1972). Great Britain has made this explicit through its Gift Aid program, where charitable organizations report to the government the donations received, and the government forwards to them the tax paid on such amounts. See *Giving to Charity Through Gift Aid*, HM REVENUE & CUSTOMS, <http://www.hmrc.gov.uk/individuals/giving/gift-aid.htm> (last visited Feb. 6, 2012).

This raises the questions (1) why government should subsidize charitable NGOs, and (2) why it should do so indirectly through a charitable deduction. After all, the government could provide services or goods itself or distribute money directly to NGOs it deems worthy. Scholars have set forth a number of different answers to these questions. The first response focuses on the production of public goods and goods with positive externalities.<sup>143</sup> The market may fail to produce such goods at welfare-maximizing levels because producers are unable to capture all the benefits. Governments may also fail to provide such goods at appropriate levels for a variety of reasons. Indirect subsidies through the charitable deduction are seen as a way correct for this double failure.<sup>144</sup> A second response posits that charitable giving increases welfare generally or reinforces important societal values. A third response rests on the assumption that private charity may reduce the government's costs by involving private actors in the pursuit of public goals. Finally, subsidizing charity through a charitable deduction may be desirable insofar as it fosters an independent civil society.

The question that must be addressed by those who hope to convince China's leaders to embrace a broad charitable deduction is whether these justifications make sense in the Chinese context. I address each in turn.

### 1. *Market and Governmental Failure to Optimize Public Good Production*

Producers of public goods cannot capture the full benefits they create and therefore will typically fail to produce such goods at welfare-maximizing levels. The inability to force those who benefit to contribute is often referred to as the free-rider problem.<sup>145</sup> The government can overcome this problem by using its

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143. Public goods are nonrival and non-excludable, meaning that the consumption by one person does not diminish the ability of others to consume, and the producer cannot exclude people from consuming it. Positive externalities are benefits associated with a good or activity that the producer cannot capture.

144. See Rob Atkinson, *Altruism in Nonprofit Organizations*, 31 B.C. L. REV. 501, 505 (1990) (describing the twin failure argument as “[t]he emerging orthodox account”).

145. The market failure argument for giving tax benefits to non-profit organizations was first put forth by Henry B. Hansmann, who was responding in part to an article by Boris Bittker and George Rahder, *The Exemption of NPOs from Federal Income Tax*, 85 YALE L.J. 299 (1976), in which the authors argued that an exemption from income tax for donation-receiving organizations was warranted on the grounds that it would be difficult to determine the income of such organizations. See Henry B. Hansmann, *The Role of Nonprofit Enterprise*, 89 YALE L.J. 835 (1980); Henry Hansmann, *The Rationale for Exempting Nonprofit Organizations from Corporate Income Taxation*, 91 YALE L.J. 54, 58 (1981). For more recent analyses of whether income taxation of non-profit organizations is appropriate on income mea-

taxing power to force all beneficiaries to contribute and then either produce the good itself or contract with outside organizations to do so. Alternately, the government could indirectly subsidize public-good production by exempting non-profit organizations from tax and permitting a charitable deduction. The transfer of tax dollars to private charities through tax incentives effectively forces everyone to contribute to the production of the public good the charity provides.<sup>146</sup> This latter approach makes the most sense if one believes that the government is likely to fail to provide the optimal mix or level of public goods and that devolving the choice to the people will produce a better result.

Selling the notion that markets are not perfect should not be a hard sell in China. After all, the government maintains tight control over the economy, insisting that current policy be called “socialism with Chinese characteristics.”<sup>147</sup> More difficult may be the notion of government failure. For almost 30 years, under Chairman Mao’s leadership, the government insisted that it alone could and should supply whatever public goods were necessary.<sup>148</sup> Indeed, the notion that the government is responsible for caring for the people is part of the Confucian tradition that dates back thousands of years.<sup>149</sup> The government’s continued tight control over NGOs suggests that some still believe the government is best suited to decide how to allocate resources in pursuit of the public good.

Scholars in the U.S. have articulated several reasons why government might fail to pursue welfare maximizing policies, in-

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surement grounds, see Daniel Halperin, *Is Income Tax Exemption for Charities a Subsidy?*, 64 TAX L. REV. 283 (2011).

In addition to pointing out the free-rider problems associated with public good production, Hansmann also noted that non-profit status, and in particular the non-distribution constraint, served as an important signaling device in cases where the market cannot adequately monitor behavior.

146. Both the tax exemption and the charitable deduction shift some of the cost of public goods production to those who do not directly contribute to charity by increasing tax rates generally to account for revenue lost in this way. See Hochman & Rogers, *The Optimal Tax Treatment of Charitable Contributions*, 30 NAT’L TAX J. 1 (1977), reprinted in *THE ECONOMICS OF NONPROFIT INSTITUTIONS* 224 (S. Rose-Ackerman ed., 1986).

147. See Vice President stresses socialism with Chinese characteristics, Party building, ENGLISH.NEWS.CN (Jul. 24, 2012), [http://news.xinhuanet.com/english/china/2012-07/24/c\\_131736132.htm](http://news.xinhuanet.com/english/china/2012-07/24/c_131736132.htm).

148. See J. Stapleton Roy, *Generational Change, Economic Development, and Political Reform in China*, CHINA US FOCUS (June 8, 2011), <http://www.chinausfocus.com/political-social-development/generational-change-economic-development-and-political-reform-in-china/> (“In the 1970s, China had a totalitarian political system in which the government controlled literally every aspect of people’s lives”). See also Linda Wong, *Privatization of Social Welfare in Post-Mao China*, ASIAN SURVEY, Vol. XXXIV 307, 312 (1994).

149. See Elizabeth Z. Lang, *Some Reflections on “Charity Law” in the People’s Republic of China*, 15 BOND L. REV. 358, 361 (2003).

cluding incentives or constraints imposed by the political system, politician's pursuit of self-interest outside the political sphere, and the inability of government officials to identify which policies will actually enhance welfare. This section sets forth those reasons and analyzes the extent to which they are likely to resonate with China's leaders.

a. The Political System May Create Incentives for Government Leaders to Ignore Welfare Maximizing Policies

The most prominent government failure argument is based on the notion that the political system creates incentives for politicians not to pursue policies that maximize welfare. Allowing taxpayers to pick and choose which charities to support may help correct for this feature of the political system.

Although one might hope that government officials pursue the public good, public choice theory posits that politicians pursue their own political self-interests instead.<sup>150</sup> In a democracy, this means that they will pursue election or re-election. Under one view, politicians will rationally set the levels and mix of public goods to satisfy the preferences of the median voter, knowing that they need 50% plus 1 voter to be elected.<sup>151</sup> Under another view, officials will favor small groups of motivated voters, perhaps in return for campaign contributions.<sup>152</sup> Either way, the democratic system creates strong incentives for politicians to ignore the optimal level of public good production when setting government policies.

The problems of making policy to satisfy those who can contribute the most to a campaign are readily apparent; the downside of satisfying the median voter's preferences is less so. After all, the very notion of a democracy is that the majority gets to decide how to allocate government resources. Nonetheless, the majority's preferences, and in particular those of the median

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150. For an overview of public choice theory, see Gordon Tullock, *The Theory of Public Choice, in* GOVERNMENT FAILURE: A PRIMER IN PUBLIC CHOICE (Gordon Tullock et al. eds., 2002).

151. Burton A. Weisbrod, *Toward a Theory of the Voluntary Non-Profit Sector Economy, in* ALTRUISM, MORALITY AND ECONOMIC THEORY 171, 175–83 (Edmund S. Phelps ed., 1975). For a contrary view, see Brian Galle, *The Role of Charity in a Federal System*, 53 WM & MARY L. REV. 777 (2012). Galle argues that Weisbrod's theory is flawed because it fails to take voter mobility into account. In the U.S., numerous jurisdictions exist, each setting its own level of public goods in response to the will of its voting population. Assuming low transaction costs, people can move to a location where public goods levels better match their own preferences.

152. See Tullock, *supra* note 150.

voter, may lead to a sub-optimal production of public goods, thus reducing welfare.<sup>153</sup>

This problem is less pronounced where voter preference is homogeneous because satisfying the median voter's preferences is likely to lead to the production of public goods at levels that satisfy a large number of voters.<sup>154</sup> In other words, democratic principles and welfare maximization are likely to line up. However, when preferences are heterogeneous, and the preferences of the minority differ significantly from the median voter, confidence that following the median voter results in optimal public good production decreases.<sup>155</sup> For instance, if the choice is between funding the opera and the ballet and the median voter prefers the ballet, in a winner take all system only the ballet will receive government funding. Those in the minority can donate their own funds to fund the opera, but it will almost certainly be under-funded because of the free-rider problem.

Subsidizing charitable giving addresses this concern by allowing taxpayers to decide which NGOs to fund, thus taking the decision regarding public good levels out of the politicians' hands. Partially funding public good production through deductible donations devolves such decisions to the people and increases the chances that the mix and level of public goods will be at levels that they prefer.<sup>156</sup> It also overcomes disagreement among voters as to what deserves funding.

Ceding such power to the minority arguably runs afoul of the basic tenets of democratic rule, where the majority is typically entitled to set the mix or level of public goods, even if it is sub-optimal. However, subsidizing private charity may be justifiable on democratic grounds as well. The majority has approved the deduction, thus making it legitimate. Indeed, the decision to subsidize charity may reflect a collaboration among different minorities whose public goods needs are not being met. While no majority exists for any one group's preferences, together they form a majority for the proposition that taxpayers should be allowed some discretion to spend government money to supplement the level of public goods provided through the democratic process.<sup>157</sup>

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153. Unease with democratic rule dates back to the founding of the republic. See, e.g., The Federalist No. 10 (James Madison). While the founding fathers may have feared that the majority would oppress the minority, it is also possible that the majority will simply make bad decisions that reduce overall welfare.

154. Miranda P. Fleischer, *Generous to a Fault? Fair Shares and Charitable Giving*, 93 MINN. L. REV. 165, 185–86 and n. 100 (2008).

155. *Id.*

156. See Saul Levmore, *Taxes as Ballots*, 65 U. CHI. L. REV. 387, 405 (1998).

157. See Fleischer, *supra* note 154, at 207 et seq.

Arguments that focus on the incentives associated with democratic governance do not apply in the Chinese context. China is not a democracy and government officials in China do not need to develop their policies with elections in mind. While the government has been experimenting with local elections in small villages,<sup>158</sup> and there are periodic calls for creating a more democratic political system,<sup>159</sup> the worry that government officials will act to appease the electorate is premature. Nonetheless, a public choice argument for the charitable deduction can still be made.

Absent elections, government officials in China advance their careers through a variety of means, including by cultivating relationships with those higher up within the government, all of which may affect their decision-making.<sup>160</sup> If public choice theory is correct, Chinese officials, like their Western counterparts, will develop policies with their careers-and not the public good-in mind. While this does not entail identifying the preferences of the median voter, it likely entails making decisions aimed at pleasing political patrons. To develop this point further, it will be necessary to develop a strand of public choice theory based on the structure and incentives that the Chinese government creates for its officials.

The more interesting question is whether the argument for devolving the decision regarding public good production to the people makes as much sense in China as it does in the U.S. If the goal is to set public good production at levels that satisfy the largest number of people, subsidizing private charity will produce a better outcome than leaving the decision with government officials. However, this may not be the appropriate goal. Implicit in the public goods justification for the charitable deduction is the belief that satisfying people's preferences is welfare maximizing. After all, basic market theory tells us that allowing people to pursue their own interests will lead to the greatest overall good.<sup>161</sup>

However, letting people decide where to spend the government's money may lower overall societal welfare in some cases. For example, assume that poverty relief creates more overall util-

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158. See John W. Head, *Feeling the Stones When Crossing the River: The Rule of Law in China*, 7 SANTA CLARA J. INT'L L. 25, 57 (2010) (describing village elections in China as one way of selecting government officials).

159. The most famous of these were the 1989 demonstrations at Tiananmen Square, but there have been numerous others, such as the Charter '08 democracy movement. See CHARTER 08 FOR REFORM AND DEMOCRACY IN CHINA, <http://www.charter08.eu/> (last visited Feb. 6, 2012).

160. See Susan V. Lawrence and Michael F. Martin, CONG. RESEARCH SERV., R41007, *Understanding China's Political System* (2012).

161. Emma Rothschild, *Adam Smith and the Invisible Hand*, 84 AMER. ECON. REV. 319 (1994).

ity than the opera. If the populace, or some portion thereof, prefers to fund opera over poverty relief, societal welfare will suffer if the government honors that preference. The question then becomes whether the people pursuing their own interests will make better decisions than government officials pursuing their political self-interests. Unfortunately, this poses a difficult empirical question that depends on the nature of people's preferences, the choices government officials might make, and the relationship between people's preferences and overall societal welfare.

In a democratic society, the argument that people's preferences should be satisfied even when they cause welfare to decline has some pull. After all, the majority has permitted the minority to allocate government money through the charitable deduction, and the majority's wishes should normally be honored. Such arguments are harder to make in a non-democratic system, where the government purports to act in the people's interests without involving them in the decision-making process. Thus, this argument for the charitable deduction depends on the ability to convince Chinese officials that allowing people to direct government money to their favored NGOs will enhance welfare over what the government officials would have picked. This may be a tough sell in a country where the government is viewed as the *paterfamilias* entrusted with caring for the people.

b. The Political System May Preclude Government Leaders From Pursuing Welfare Maximizing Policies

Another justification for the charitable deduction is that government leaders may fail to optimize public good production because constitutional or other political limits preclude them from doing so. For instance, in the U.S., the first amendment significantly restricts the government's ability to support religious organizations.<sup>162</sup> The government cannot directly provide religious goods even if doing so might enhance welfare. Thus, the government must rely on indirect subsidies to support churches and other religious organizations.

This argument likely has little force in China. Although the Chinese constitution establishes rights for its citizens that ostensibly limit the government's power, the Communist party retains a tight control over the courts, such that any limitations are difficult to enforce.<sup>163</sup> Moreover, even if the courts were to hold that the constitution limits government power, the government re-

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162. *Id.* at 187.

163. For instance, China's constitution guarantees the right of association. See XIANFA (宪法) art. 35 (1982). However, the government shuts down any association deemed a threat, without regard to this right.

tains the power to change the constitution and could easily side-step any limitations. As a result, the Chinese government need not rely on indirect subsidies via a charitable deduction to provide specific types of public goods it cannot supply directly.<sup>164</sup>

c. Corrupt Government Leaders May Simply Refuse to Pursue the Public Good

Even absent impediments created by the political system, government officials may nonetheless fail to optimize public good production. Those in power might seek to enrich themselves or their friends and allies rather than to pursue the public good. Allowing people to allocate tax dollars to NGOs through a charitable deduction could partially correct for this problem by bypassing government officials and taking at least part of the decision out of their hands.

These arguments should have particular salience in China, where the government has long recognized that corruption is one of the largest threats to its legitimacy. In a poll taken just a few years ago, 75% of respondents listed corruption as their top concern.<sup>165</sup> It has also cost the government a significant amount of money. By some accounts, public officials have stolen over \$120 billion and moved it overseas.<sup>166</sup> Accordingly, the government has made rooting out corruption one of its most important initiatives.<sup>167</sup>

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164. For instance, with regard to public goods of a religious nature, the government sponsors a number of official churches, including a branch of the Catholic Church that it controls to the consternation of the Catholic Church. See John Thavis, *Vatican: Chinese Bishop Excommunicated*, NAT'L VATICAN REP. (Jul. 18, 2011), <http://ncronline.org/news/global/vatican-chinese-bishop-excommunicated>. It has also sought to appoint the religious leaders of Tibetan Buddhism. See *Panchen Lama Makes Rare Public Appearance at Buddhist Conference*, N.Y. TIMES, Apr. 13, 2006, <http://www.nytimes.com/2006/04/13/world/asia/13iht-web.0413budd.html>. As evidenced by the plethora of illegal "house" churches, government-provided goods of this type are not a perfect substitute for those provided by independent organizations. See William Ide, *Religious Rights Groups: China "House Churches" Face Increasing Persecution*, VOICE AM., Apr. 24, 2011, <http://www.voanews.com/english/news/asia/Religious-Rights-Groups-China-House-Churches-Face-Increasing-Persecution-120580474.html>.

165. David Barboza, *Politics Permeates Anti-Corruption Campaign*, N.Y. TIMES, Sept. 4, 2009, <http://www.nytimes.com/2009/09/04/business/global/04corrupt.html?pagewanted=all>.

166. A 2007 report estimated that in 2003, corruption cost China about \$86 billion or roughly 3% of its GDP. *Id.* See also Xin Haiguang, *China's Great Swindle: How Public Officials Stole \$120 Billion and Fled the Country*, TIME, June 26, 2011, <http://www.time.com/time/printout/0,8816,2079756,00.htm>.

167. For instance, the government has created a website where people can report bribes they have paid, see *Anti-Corruption Campaign Websites Can Help Govt Campaign*, GLOBAL TIMES, June 22, 2011, [http://www.china.org.cn/opinion/2011-06/22/content\\_22836153.htm](http://www.china.org.cn/opinion/2011-06/22/content_22836153.htm), and issued reports detailing the extent of and its efforts to combat corruption. See also Steve Dickenson, *China's Campaign against Corrup-*

Given how much larger the for-profit sector is, most corruption likely occurs in the context of for-profit undertakings. However, the potential for corruption exists whenever low-paid government workers are given discretion over how to spend significant amounts of money. If the government is serious about partnering with NGOs to address issues such as poverty, a direct funding approach would entail the government directly allocating significant funds to NGOs. While those in charge of NGOs would be subject to the non-distribution constraint, and therefore legally prohibited from pulling money out of NGOs, lax oversight could make those rules easy to circumvent. Government contracts could also be valuable because they would confer significant social and political status on NGO leaders. Finally, even absent corruption, there is also the risk that funding decisions would be made based on personal connections as opposed to the qualifications of an NGO or the merits of a given project.

The government can certainly fight corruption using traditional means, that is, by uncovering and prosecuting it. Shifting at least part of the funding for NGOs to an indirect method such as the charitable deduction could be another important tool in this effort. It would reduce the amount of money flowing through the government and remove some of the decision-making authority from government officials. It would also be consistent with recent statements by party leaders that the country must move to a “big society, small government” model to address China’s social needs.<sup>168</sup>

#### d. The Government May Be Unable to Determine the Welfare-Maximizing Level of Public Goods

Even assuming that government officials are motivated to optimize public goods production, they may be unable to determine the appropriate mix of goods and services. As described above in Part II.B.1.a, when preferences are homogeneous, it is relatively easy to determine the mix of goods and services that will satisfy the largest number of people. It becomes far more difficult if preferences are heterogeneous. Allowing people to direct government resources to their preferred charities through a charitable deduction not only reveals those myriad preferences

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tion, CHINA LAW BLOG (Jan. 25, 2011), [http://www.chinalawblog.com/2011/01/chinas\\_campaign\\_against\\_corruption.html](http://www.chinalawblog.com/2011/01/chinas_campaign_against_corruption.html) (describing a government report on court cases involving corruption).

168. See *supra* note 12. Admittedly, corruption may also be a concern with charities. However, steps are underway to increase governance practices and oversight of charitable organizations. See Part I.B.2.b.

but also directs resources to the organizations most likely to satisfy them.<sup>169</sup>

This argument for the charitable deduction may hold true in China, but it is not at all clear that Chinese leaders will find it persuasive. First, the Chinese may not view themselves as heterogeneous as the U.S., thus lessening the problem. While China celebrates its 55 minorities, the country is less heterogeneous than the U.S.<sup>170</sup> More important, the Chinese value conformity to societal norms over individual expression.<sup>171</sup> Second, the notion of governmental ineptitude has not taken root in the political class there as it has here.<sup>172</sup> As described more fully below in Part IV, China's long political tradition posits that the government is supposed to guide the people, much as the paterfamilias guides his family. It seems unlikely that a Chinese official would ever declare that the government is the problem, not the solution, as Ronald Regan famously remarked. Third, it seems unlikely that government leaders would concede that devolving decision-making on which NGOs to fund to the people would lead to a better mix of public goods than the government itself would select, assuming that government officials were in fact pursuing the public good.

Nonetheless, even in China, this argument has force. As is evidenced by the variety of different consumer products available in China, the Chinese are far more heterogeneous in their preferences than they might admit. One need only go to a public park in any major Chinese city on a weekend to witness groups ballroom dancing, singing Chinese opera, performing tai chi, or playing hacky sack. It seems unlikely the government could accurately divine its diverse populace's preferences for public goods. Moreover, China's explosive economic growth over the past 30 years demonstrates the link between allowing people to express their preferences in the marketplace and increased socie-

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169. Mark A. Hall & John D. Colombo, *The Charitable Status of Nonprofit Hospitals: Toward a Donative Theory of Tax Exemption*, 66 WASH. L. REV. 307 (1991) (arguing that donative intent inherent in charitable giving signals to government the preferences of the populace and helps identify projects deemed worthy of support); See also Levmore, *supra* note 156. But see David M. Schizer, *Subsidizing Charitable Contributions: Incentives, Information, and the Private Pursuit of Public Goals*, 62 TAX L. REV. 221, 229–30 (2009) (noting that this approach may lead to over-investment in low-value projects).

170. Wenfang Tang and Gaochao He, *Separate But Loyal: Ethnicity and Nationalism in China*, EAST-WEST CENTER POLICY STUDY 56 (2010).

171. Heejung Kim and Hazel Rose Markus, *Deviance or Uniqueness, Harmony or Conformity? A Cultural Analysis*, 77 STAN. U. J. OF PERSONALITY & SOC. PSYCHOL. 785, 798 (1999).

172. Tony Saich, *Chinese Governance Seen Through the People's Eyes*, EAST ASIA FORUM (Oct. 14, 2012 10:48 am), <http://www.eastasiaforum.org/2011/07/24/chinese-governance-seen-through-the-people-s-eyes/>.

tal welfare. There is no reason to believe that the marketplace for public goods will be any less successful at increasing welfare. Finally, even if the government believes that it can divine the public good better than the people, partially funding public good production through a charitable deduction can provide important information to the government and therefore justified as a signaling mechanism.

## 2. *Charitable Giving Increases Welfare and Reinforces Important Social Values*

A second justification offered for the charitable deduction is that charitable giving enhances welfare, regardless of any public goods NGOs may produce. In particular, charitable giving can increase welfare by redistributing income, augmenting the well-being of those who give, and reinforcing important social values that are in themselves welfare enhancing.

To the extent charitable giving transfers funds from the wealthy to those less well-off,<sup>173</sup> it should enhance societal welfare because the utility gains to the recipients will likely outweigh the loss to those giving.<sup>174</sup> Charitable giving may also increase welfare by narrowing the gap between the poor and the wealthy. Studies have shown that relative wealth is an important factor in individual happiness.<sup>175</sup> It is one thing to be poor. It is another to be poor when others are rich. The implication is that people prefer to live in societies where wealth is more evenly distributed.<sup>176</sup> Thus, charitable giving may play a role in increasing general happiness above and beyond the utility gained by the receipt of funds by those who are less well off.

In addition, charitable giving may increase welfare by increasing the utility of those who give.<sup>177</sup> Donors may feel better by virtue of pure altruism, knowing that others have been helped, or by virtue of the “warm glow” that comes from *their* having

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173. This is an empirical question that depends on the nature of the giving. Large gifts to the opera are unlikely to benefit the poor directly.

174. Miranda Perry Fleischer, *Theorizing the Charitable Tax Subsidies: The Role of Distributive Justice*, 87 WASH. U. L. REV. 505 (2010). This assumes a decreasing marginal utility of money, which is difficult to prove or measure, but is intuitively correct.

175. See, e.g., Thomas D. Griffith, *Progressive Taxation and Happiness*, 45 B.C. L. REV. 1363, 1381–84 (2004).

176. For support of this inference, see Dan Ariely, *Americans Want to Live in a Much More Equal Country (They Just Don't Realize It)*, THEATLANTIC.COM (Aug. 2, 2012, 12:41 PM), <http://www.theatlantic.com/business/archive/2012/08/americans-want-to-live-in-a-much-more-equal-country-they-just-dont-realize-it/260639/>.

177. Alice M. Thomas, *Re-Envisioning the Charitable Deduction to Legislate Compassion and Civility: Reclaiming our Collective and Individual Humanity Through Sustained Volunteerism*, 19 KAN. J. L. & PUB. POL'Y 269, 304–06 (2010).

provided the help.<sup>178</sup> Charitable acts may also foster compassion, civility, and interpersonal connectedness, all of which affect daily interactions and may foster a sense of well-being.<sup>179</sup>

Redistribution may top the list of reasons for the Chinese government to embrace private charity. While “spreading the wealth” and socialism are dirty words in the U.S.,<sup>180</sup> in China, they are official policy. Redistribution of wealth is a key tenet of communism,<sup>181</sup> and it remains an important consideration in Chinese society. When Deng Xiao Ping made his fateful statement that that some should be allowed to get rich first, he probably had little idea of how successful his policy would be. Some Chinese have become fabulously wealthy, while others remain mired in poverty. The result has been three decades of unparalleled economic growth, but a relatively high Gini co-efficient.<sup>182</sup> There are now calls from the highest echelons of government to rectify the inequality of wealth and opportunity.<sup>183</sup> Indeed, rectifying inequality is one of key goals of President Hu Jintao’s harmonious society.<sup>184</sup> This could take many forms.

One solution is to levy significant taxes on the wealthy and then use the revenues generated to support those less fortunate. However, high taxes of the type necessary to significantly address income inequality would likely cripple the economy, an outcome the government would not accept. Sustained economic growth is one of the government’s key accomplishments, and many view it as a key reason the government has been able to resist calls for political reform.<sup>185</sup> In addition, the Chinese people, like Americans, have little love of taxes. Forced redistribution is likely to

178. See James Andreoni, *Impure Altruism and Donations to Public Goods: A Theory of Warm-Glow Giving*, 100 *ECON. J.* 464 (1990).

179. See Thomas, *supra* note 177, at 304–06.

180. See, e.g., Howard Kurtz, *Obama a Socialist? Fox News Exec Said So, but Didn’t Believe It*, *DAILY BEAST* (Mar. 29, 2011), <http://www.thedailybeast.com/articles/2011/03/29/obama-a-socialist-fox-news-exec-said-so-but-didnt-believe-it.html>; Rick Perry’s New Ad: ‘Obama’s Socialist Policies Are Bankrupting America’ (VIDEO), *HUFFINGTON POST* (Nov. 16, 2011), [http://www.huffingtonpost.com/2011/11/16/rick-perry-ad-obama-socialist\\_n\\_1097786.html](http://www.huffingtonpost.com/2011/11/16/rick-perry-ad-obama-socialist_n_1097786.html).

181. One of Karl Marx’s most famous slogans is “From each according to his ability, to each according to his needs.” See Karl Marx, *CRITIQUE OF THE GOTH A PROGRAM* 26 (1875).

182. See World Bank, *supra* note 20, at 60–62; see also Jia, *supra* note 20; Orlik, *supra* note 20 (China’s Gini coefficient at 4.38 in 2010).

183. For instance, Hu Angang, a prominent intellectual and government actor, has publicly stated that China has moved past the time of some getting rich and moved into a time where all should get rich. See Ganshin & Torgeirsdottir, *supra* note 12, at 91.

184. See Man, *supra* note 13.

185. See, e.g., Richard A. Easterlin, *When Growth Outpaces Happiness*, *N.Y. TIMES* (Sept. 27, 2012), <http://www.nytimes.com/2012/09/28/opinion/in-china-growth-outpaces-happiness.html>.

face strong opposition from both government officials and those who would be subject to higher taxes.

Encouraging charity offers another route to redistributing wealth and reducing inequality. While some question the extent to which the charitable deduction increases charitable giving, most agree that the deduction has some positive impact.<sup>186</sup> To the extent that it does encourage private giving, it not only transfers government funds to the less fortunate but also promotes the voluntary transfer of private funds. Indeed, a charitable deduction may help reinvigorate some of the Chinese traditions of giving rooted in religion that the Communist government spent so much effort trying to eradicate during its early years.<sup>187</sup> When one combines the utility gains from voluntary giving with the utility that arises from wealth transfers and a reduction of income inequality, promoting redistribution through the charitable deduction seems far more likely to increase general welfare and lower inequality than forced redistribution.<sup>188</sup>

The only question is whether private giving alone can affect significant redistribution. Unless charitable giving increases to levels far greater than can reasonably be expected, this seems doubtful. Nonetheless, broadening the availability of the deduction may lead to more redistributive government spending. For instance, well-funded NGOs can identify and publicize social needs in ways that may draw the attention of government officials, such that private giving may help shape government policy and spur additional government funding that may be redistributive in effect.<sup>189</sup>

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186. See Choe & Jeong, *supra* note 141; see also Dunbar & Phillips, *supra* note 141, at 5.

187. China has a rich history of charitable giving that stems from its traditional religions and philosophies, such as Confucianism, Buddhism, and Daoism. Exploring those traditions is beyond the scope of this article.

188. This point also applies to the provision of public goods. When compared with direct government provision of goods funded by compulsory taxes, the provision of goods through voluntary giving may increase welfare, even if at the same cost to individuals, simply by virtue of the fact that the giving is voluntary. See Schizer, *supra* note 169, at 230–31.

For a discussion of the reasons people give to charities and the distinction between warm glow and true altruism, see, e.g., Andreoni, *supra* note 178 (identifying the factors motivating charitable giving, such as guilt, sympathy, peer pressure, and a desire for “warm glow”); Brian Galle, *Keep Charities Charitable*, 88 TEXAS L. REV. 1213, 1222–25 (2010).

189. For instance, organizations focused on AIDS relief for the farmers in Henan province are attempting to draw attention and government resources to help AIDS sufferers. See, e.g., John Pomfret, Washington Post Foreign Service, *China Detains Health Official for Publicizing AIDS Coverup*, posted on the website of the Wei Jingsheng Foundation, <http://www.weijsingheng.org/aids/post100803.html>, (last visited October 14, 2012).

Supporting a charitable deduction may also help reinforce important values, such as pluralism<sup>190</sup> or diversity<sup>191</sup> or public participation on societal issues, all of which may enhance welfare. Pluralism is not typically thought of as an important Chinese value. Nonetheless, the government has spent considerable efforts promoting its minorities and their diverse cultures.<sup>192</sup> While skeptics may question the government's commitment to these values,<sup>193</sup> it is at least paying lip service to them. A charitable deduction could further those values by subsidizing donations to NGOs focused on diverse groups and sets of issues.

Similarly, democratic participation is not often considered a core Chinese value. Nonetheless, Hu Jintao has publically identified increased democracy as part of his conception of a harmonious society.<sup>194</sup> Experiments in small-scale democracy have already begun in some villages.<sup>195</sup> Allowing provincial and national elections, holding referenda, or conducting polls seem a long way off. However, the charitable deduction could serve as a bridge to greater democratic participation in government activities. As noted above, charitable giving reveals a donor's preferences<sup>196</sup> and can serve as a type of ballot.<sup>197</sup> If it is coupled with a charitable deduction, it also directs government money to the

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190. See, e.g., Levmore, *supra* note 156, at 404 n.54 (describing the pluralism argument). Levmore's conception of charitable giving as a form of voting, can be seen as a form of pluralism argument. *Id.* at 405. Others contend that pluralism arguments are likely overblown. See, McDaniel, *supra* note 142, at 390–91.

191. David A. Brennan, *A Diversity Theory of Charitable Tax Exemption—Beyond Efficiency, Through Critical Race Theory, Toward Diversity*, 4 PITTSBURG TAX REV. 1 (2006).

192. For instance, there is a museum dedicated to minority culture in Beijing, and minorities were prominently featured in the 2008 Olympic opening ceremony. See CULTURAL PALACE OF MINORITIES, [http://www.chinamuseums.com/cultural\\_palace.htm](http://www.chinamuseums.com/cultural_palace.htm) (last visited Feb. 28, 2013).

193. Despite celebrating its minorities in the Olympic opening ceremony, the government came under significant criticism when it was discovered that the minority children on display were Han Chinese dressed up as minorities. See “Ethnic Minority” Children at Olympics Ceremony were Fake: Report, AFP (Aug. 14, 2008), <http://afp.google.com/article/ALeqM5ijm2i9qyr5mG6icgCv0gBqnpwx0g>. Ethnic violence and government crackdowns just before the Olympics also suggest that China's attitude towards its minority populations may not be as rosy as suggested. See *US lawmakers condemn crackdown on China's minority Muslims*, AFP (July 11, 2008), <http://afp.google.com/article/ALeqM5i8o5zrwIoiVvk3SDPHk79FIHuQ7-g>. See also *Authorities Crack Down on Rights Ahead of Beijing Olympics*, COMPASS DIRECT NEWS (July 12, 2007), [http://www.compassdirect.org/english/country/china/2007/newsarticle\\_4942.html/](http://www.compassdirect.org/english/country/china/2007/newsarticle_4942.html/) (describing treatment of Christian minorities in advance of the 2008 Olympics).

194. See Man, *supra* note 12.

195. See, e.g., *China's Real Rise – in Wukan's Village Election*, CHRISTIAN SCI. MONITOR, Jan. 31, 2012, <http://www.csmonitor.com/Commentary/the-monitors-view/2012/0131/China-s-real-rise-in-Wukan-s-village-election>.

196. See Hall & Colombo, *supra* note 169.

197. See Levmore, *supra* note 156.

donor's preferred charities, effectively aligning government funding with those preferences. This affords the people a limited role in government decision-making, without opening the doors to a full-fledged democracy. This half-step may appeal to China's leaders.

Finally, the charitable deduction may serve democratic aims by giving voice to those who otherwise would not be heard, such as migrant workers or those relocated because of construction projects. Autonomous NGOs are more likely to focus on people or areas the government overlooks. In so doing, they can provide important information to policymakers and help shape policy in accord with the needs of the people the government serves.

### 3. *Private Charity Enlists Citizens in the Pursuit of Public Goals*

Another justification for the charitable deduction is that it helps create a private-public partnership in pursuit of public goals.<sup>198</sup> This partnership may decrease the government's costs in a number of important ways. NGOs may provide goods or services that the government would normally be called on to provide. To the extent these organizations do so with private donations, as opposed to with tax revenues, the government conserves resources. The U.S. Congress and courts have offered this justification for the deduction at various times over the past 70 years.<sup>199</sup>

The charitable deduction may also serve as a recruiting device for volunteers. Donors to an organization may be more likely to volunteer their time, providing both manpower and know-how at no cost to the government. Indeed, large donors are likely to be interested in ensuring their donations are well spent. Accordingly, they may provide their expertise to such organizations, helping improve their operations.<sup>200</sup>

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198. See Schizer, *supra* note 169.

199. See Barbara K. Bucholtz, *Reflections on the Role of Nonprofit Associations in a Representative Democracy*, 7 CORNELL J.L. & PUB. POL'Y 555, 562-64 (1998) (cataloguing different pronouncements to the effect that the loss of revenue from charitable deduction would be offset by the services received that the government would otherwise have had to provide).

200. See Schizer, *supra* note 169, at 256-67. The government could design the charitable deduction for this purpose. For instance, the subsidy could be directed toward the wealthy on the theory that large donors are more likely to give large amounts and serve those functions. Indeed, the deduction could be conditioned on the donor actually becoming involved in the NGO's operations. However, if the goal were to get common people involved in advancing public goals or to raise as much private money for NGOs as possible, a broadly available deduction would be more appropriate. *Id.* at 230-42.

Finally, donors may help the government oversee NGOs. As governments outsource more and more of their social welfare functions to NGOs, the need to monitor NGOs increases.<sup>201</sup> The government's ability to monitor contractors is limited, and the possibility of fraud or mismanagement is significant. To the extent that private donors monitor NGOs to ensure that their money is being well spent, they add to the oversight efforts, reducing the need for government oversight.<sup>202</sup>

All of these justifications work in the Chinese context. Indeed, they may be more relevant in China than in the U.S. The economic argument is fairly straight-forward. To the extent that private donors fund NGOs, the government does not need to. If the slogan "big society, small government" is to have any meaning, incentives should be put in place to induce people to give voluntarily to NGOs so that society can grow and the government can reduce its role and financial commitment.

Far more important is the effect a charitable deduction might have in recruiting private citizens to give their attention and their time to public goals. Under Confucian theory, which permeates Chinese culture, the state is responsible for managing societal issues.<sup>203</sup> Perhaps as a result, China's volunteer rate falls significantly below that found in most developed countries.<sup>204</sup> Scholars have identified the lack of skilled workers at NGOs as one of the key impediments to China developing a strong non-profit sector.<sup>205</sup> If a charitable deduction induces people to give to NGOs, it could lead donors to become vested in the NGOs' missions and to volunteer. Large donors are more likely to be sophisticated than small ones, and their involvement will increase the chances that NGOs will be well managed.<sup>206</sup> Finally, those who volunteer their time and money to NGOs may be in a better position than the government to identify worthy projects and the

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201. See *Outsourcing Social Services*, *supra* note 74, at 13 (identifying the need for government resources devoted to oversight as an important component of outsourcing public goods production to civil society organizations).

202. This is the idea that underlies "venture philanthropy," where donors apply the evaluative and management techniques typically used in venture capital funding. See Henry Blodget, *Grant Away, Why venture philanthropy is important, even if it sounds ridiculous*, SLATE (Nov. 13, 2006, 7:29 AM), [http://www.slate.com/articles/life/philanthropy/2006/11/grant\\_away.html](http://www.slate.com/articles/life/philanthropy/2006/11/grant_away.html).

203. See Lang, *supra* note 149, at 361 (noting that under the influence of Confucianism, the people became used to depending upon the government to solve societal and social problems).

204. CIVICUS REPORT, *supra* note 8, at 8, 35.

205. See Wang, *supra* note 1322, at 101.

206. Large donors are also more likely to have the requisite skills and the incentive to ensure that their donation is well spent. See Schizer, *supra* note 169, at 256-67.

means of accomplishing them. Thus, the charitable deduction could lead to better outcomes in this way as well.

#### 4. *A Robust and Independent Civil Society is a Good In-and-of-Itself that Should be Supported*

Finally, subsidizing charity through a charitable deduction may be desirable because it helps create a robust and independent civil society, which provides a number of benefits apart from the goods or services NGOs provide.<sup>207</sup> According to proponents, a robust civil society teaches self-government skills, and inculcates habits of tolerance and civility. It may also model good government and provide important information to the government to help shape public policy.<sup>208</sup> NGOs may also mediate the space between government, business, and individuals, acting as a buffer against oppressive regimes.<sup>209</sup> An independent civil sector has also been described as critical to a well-functioning democracy.<sup>210</sup>

These types of arguments seem unlikely to persuade Chinese officials of the value of a broadly available charitable deduction. While the Chinese government may be interested in developing in its citizens the skills that could be learned from working in NGOs, such skills can also be learned in NGOs that receive direct support from the state or in private business enterprises. The notion that independent organizations can act as buffers between the government and the people and protect individuals from the power of the state also would appear to be a non-starter. As described more fully below in Part IV, power sharing of the sort envisioned by those who promote an independent civil society strikes at the heart of one of the core cultural beliefs, that power is exclusive and flows in one direction. The government appears to view NGOs as a tool to be used to carry out government policy, and not something to be nurtured for the ancillary benefits they produce.<sup>211</sup>

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207. For a detailed discussion of the purported value of civil society, see Robert C. Post & Nancy L. Rosenblum, *Introduction*, in *CIVIL SOCIETY AND GOVERNMENT* (Robert C. Post & Nancy L. Rosenblum eds., 2002).

208. Ashley & He, *supra* note 466, at 34–38.

209. See Bucholtz *supra* note 192, at 577.

210. *Id.* at 571–72.

211. See, e.g., Wang & Liu, *supra* note 9, at 20 (describing how NGOs partner with the government); Ganshin & Torgeirsdottir, *supra* note 12, at 92 (describing how the government has partnered with NGOs to combat AIDS); Alfred L. Chan & Paul Nesbitt-Larking, *Critical Citizenship and Civil Society in Contemporary China*, 28 *CAN. J. OF POL. SCI.* 293–309 (1995) (arguing that no real NGOs existed in China as of that 1995); Shieh & Dung, *supra* note 533, at 183 (noting that many argue China has no real civil society).

## 5. Summary

While some of the justifications advanced in the West in favor of the charitable deduction are unlikely to persuade Chinese officials, many should. Those advocating for looser registration requirements and a broader charitable deduction would be well advised to emphasize redistribution, the possibility of reducing the call on government resources, and the recruitment of private citizens in pursuit of public goals. Each of these goals is consistent with the goals set forth by the government itself.

### III. RECONCILING A BROADLY AVAILABLE CHARITABLE DEDUCTION WITH THE GOVERNMENT'S INTEREST IN A HARMONIOUS SOCIETY

Identifying the benefits of a charitable deduction and demonstrating that it will advance China's interests is only the first step of the analysis. The second step is to demonstrate that any perceived negative effects are acceptable or can be mitigated. Here, the concern is a loss of government control.<sup>212</sup> In this Part, I explore the extent to which China can broaden the charitable deduction while still maintaining its ability to ensure that harmony, however defined, prevails. The point is not to endorse the Chinese government's desire for control. Rather, addressing the Chinese government's concerns is likely to be more persuasive than simply telling the Chinese to replace their values with ours.

#### A. RELAXING NGO REGISTRATION RULES WILL ALLOW NGOS TO REACH THEIR POTENTIAL AND HELP FOSTER THE RULE OF LAW

Were China to relax its registration requirements by eliminating dual oversight and the one NGO per sector rule, it seems likely that the millions of unregistered NGOs and NGOs that have registered as for-profit organizations with the Industrial and Commercial Bureau would seek official non-profit status. Doing so would not only give them official status, but it would also allow them to take advantage of the tax incentives on offer. Registered entities would be subject to greater government oversight, which Chinese authorities would presumably prefer. However, allowing a million or more NGOs to register could overwhelm

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212. See Ashley & He, *supra* note 466, at 36–38 (noting that Chinese scholars have not accepted the liberal Western view of civil society, with its emphasis on independence and checks and balances); Jones, *supra* note 5, at 126–33 (noting the inherent conflict between an independent civil sector and a socialist regime in which the government retains absolute power).

MoCA, which is already stretched too thin.<sup>213</sup> Thus, absent a significant increase in MoCA's funding, which seems unlikely, actual government oversight may not increase at all.

The government currently exercises authority over unregistered NGOs informally through its "three 'no' policy,"<sup>214</sup> which gives the government discretion to shut them down at any time and without even providing a reason. Thus, it is difficult to see why Chinese leaders should give up this nearly absolute power over unregistered NGOs if registration will not lead to greater oversight. Three answers rise to the top. First, the uncertain legal status of NGOs thwarts their development and therefore limits their effectiveness. Second, bringing NGOs within the legal framework will promote the rule of law for both NGOs and the government. Third, as addressed in Part III.B, *infra*, the government has other means to control NGOs that it believes threaten social harmony.

Because unregistered NGOs operate in the shadow of the law, they must be careful not to offend those with power over them. Thus, they may shy away from controversial projects or those that highlight government failures, which could reflect poorly on government officials. They may also seek to remain small and limit the scope of their activities to remain "under the radar" and therefore be free to operate.<sup>215</sup> If one accepts the notion that NGOs increase welfare and that part of the benefit flows from their independent assessment of social needs, eliminating the legal uncertainty surrounding unregistered NGOs should increase their ability to fulfill their potential.

Allowing NGOs to register will also strengthen the rule of law in China. After the reform and opening, and especially as China sought foreign investment and international trade, China undertook significant efforts to change its legal system and legal norms to bring them closer to those found in the West.<sup>216</sup> The notion was that a stable legal environment, with clear rules, neutrally applied, was necessary to attract investment from abroad, foster international trade, and nurture domestic private enterprise.<sup>217</sup> In other words, China sought to establish the rule of law

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213. See *Hidden Rules*, *supra* note 15, at 193 (describing one office of MoCA that employs 4 people to oversee 1000 SOs).

214. *Id.*

215. See *id.* at 195–99 (describing how unregistered NGOs must tread lightly to avoid being shut down).

216. Carl F. Minzner, *China's Turn Against Law*, 59 AM. J. COMP. L. 935, 976 (2011).

217. Wang Xiangwei & Gary Cheung, *Keeping Economic Drive on Track will Require Huge Effort, Warns Hu*, S. CHINA MORNING POST, Mar 8, 2003.

as an important tool in its efforts to grow its economy and integrate with the rest of the world.<sup>218</sup>

In 2000, China signed a United Nations pact for cooperation and training to develop the rule of law.<sup>219</sup> A few years later, Hu Jintao was quoted as saying: “We must build a system based on the rule of law and should not pin our hopes on any particular leader.”<sup>220</sup> Indeed, the government recently announced that it had succeeded in constructing a “socialist system of laws with Chinese Characteristics.”<sup>221</sup> There is some question as to what China’s leaders mean by the rule of law,<sup>222</sup> and many outside the government question whether the rule of law has been fully implemented.<sup>223</sup> Some even suggest that the government’s commitment to the rule of law may be on the wane.<sup>224</sup> Nonetheless,

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218. The idea of the rule of law has a long pedigree but no set meaning. It has had many different formulations over the years but can generally be summarized as the notion that (1) law, as opposed to arbitrary power, is the means by which disputes are resolved, and that (2) all people, including the government and its officials, are equal before the law. Some conceive of the rule of law as also embodying human rights, democracy and other liberal ideals. For a detailed discussion of the history and different meanings attributed to the rule of law, see BRIAN Z. TAMANAHA, *ON THE RULE OF LAW: HISTORY, POLITICS, THEORY* (2004). For definitions of the rule of law used by a number internationally-focused organizations, see UNITED NATIONS RULE OF LAW, [http://www.unrol.org/article.aspx?article\\_id=3](http://www.unrol.org/article.aspx?article_id=3) (last visited Feb. 6, 2012); THE WORLD JUSTICE PROJECT, <http://worldjusticeproject.org/about/> (last visited Feb. 6, 2012); *American Bar Association Rule of Law Initiative*, AM. BAR ASS’N, <http://apps.americanbar.org/rol/> (last visited Feb. 6, 2012); *Rule of Law*, USAID (Nov. 12, 2009), [http://www.usaid.gov/our\\_work/democracy\\_and\\_governance/technical\\_areas/rule\\_of\\_law/](http://www.usaid.gov/our_work/democracy_and_governance/technical_areas/rule_of_law/).

Over the past half century, there have been many attempts to export the rule of law to developing countries. Starting in the 1990s, the U.S. has been deeply involved in efforts to promote and develop the rule of law in China, with mixed results. For a discussion and critical assessment of these efforts and the different Chinese and American conceptions of the concept, see Matthew Stephenson, *A Trojan Horse in China?*, in *PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE* (Thomas Carothers ed., 2006).

219. Eric Eckholm, *China Signs UN Pact on Rights and Rule of Law*, N.Y. TIMES, Nov. 21, 2000, at A4.

220. Xiangwei & Cheung, *supra* note 217. See also, Steven Mufson, *Chinese Movement Seeks Rule of Law to Keep Government in Check*, WASH. POST, Mar. 5, 1995, at A25.

221. See *After 30 Years, China’s Legal System Fully Formed*, CHINA WIRE (Oct. 31, 2011), <http://china-wire.org/?p=16533> (describing an article in the People’s Daily from October 31, 2011).

222. In China, the concepts are generally known as 依法治国 (yǐfǎ zhìguó) and 建设社会主义法制国家 (jiànshè shèhuì zhūyì fǎzhì guójiā). Whether the Chinese have a different understanding of the term than the words alone may suggest is an open question. For a discussion of Chinese attitudes toward the rule of law, see Head, *supra* note 15858.

223. See Jerome A. Cohen, *China’s Legal Reform at the Crossroads*, FAR E. ECON. REV. 23, 23 (Mar. 2006) (describing the lack of independence for China’s judiciary, even after embracing the rule of law).

224. See Minzner, *supra* note 216, at 972.

promoting the rule of law within China remains official government policy.

Reforming the registration rules so that more NGOs can legally organize would further this goal in two key ways. First, NGOs that fail to register may be more likely to violate the law in other areas, especially to the degree they view the registration laws as unjust.<sup>225</sup> They may improperly register as for-profit organizations, use front men to gain access to bank accounts and to enter into contracts, or fail to comply with tax laws in an effort to remain unseen. They may also feel compelled to bribe government officials to protect themselves from being shut down, thus causing others to break the law. There is a virtuous circle associated with complying with the law, and bringing unregistered NGOs into the system will begin this cycle.

Second, government officials may be more likely to follow the rule of law if they operate within a statutory framework. The current system affords unbounded discretion to government actors. If NGOs were properly registered, the right to shutter an NGO would not be a foregone conclusion. Instead, officials would be put to the test of justifying their actions, subject to oversight. As with NGOs, following the law in this area could have positive spillover effects in others, reinforcing the notion that government actors too must act in accordance with the law.

#### B. CERTIFYING MORE NGOS AS ELIGIBLE TO RECEIVE TAX INCENTIVES DOES NOT REQUIRE THE GOVERNMENT TO ABANDON CONTROL

The great fear of allowing millions of organizations to register without an adequate oversight system is that the government will lose control. Newly recognized NGOs may engage in activities that disturb social harmony, at least in the government's eyes. However, *ex ante* approval is not the only mechanism at the government's disposal for overseeing NGOs. Registered NGOs are not automatically entitled to tax benefits that might lead to financial autonomy. Any organization that hopes to receive tax-deductible donations must first receive approval from MoCA.<sup>226</sup> Thus, the government could allow NGOs to register,

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225. The possibility of noncompliance in one area leading to noncompliance in other areas is a common concern. *See, e.g.*, INTERNAL REVENUE SERVICE, NATIONAL TAXPAYER ADVOCATE 2008 ANNUAL REPORT TO CONGRESS 223, available at [http://www.irs.gov/pub/irs-utl/08\\_tas\\_arc\\_intro\\_toc\\_msp.pdf](http://www.irs.gov/pub/irs-utl/08_tas_arc_intro_toc_msp.pdf) (suggesting that non-compliance with tax laws in the context of virtual worlds may lead to noncompliance in other areas); Janice Nadler, *Flouting the Law*, 83 TEX. L. REV. 1399, 1406 (2005) (describing how non-compliance with a perceived unjust law may lower compliance with other unrelated laws).

226. Cáishuì Fǎ [2007] No. 6, *supra* note 114.

while still precluding them from receiving donations. Of course, if it were too restrictive in allowing NGOs to receive tax-deductible donations, it would effectively be in the same position it was in when it picked only a small handful of organizations eligible to receive donations and listed them in the regulations. Excessive control at this stage would significantly thwart the benefits associated with a robust charitable deduction.<sup>227</sup>

However, the government can also conduct *ex post* reviews, which permits it to move against organizations that actually pose a threat (or are perceived to). For instance, the regulations governing non-business civil enterprises prohibit such organizations from harming national interests, going against “prevailing social morality,” or violating other laws and regulations.<sup>228</sup> These categories are fairly broad, giving the government significant discretion to act. Organizations ordered to cease operations will have their registration, official seal, and financial records frozen.<sup>229</sup> Thus, were the government to grant tax-exempt status to an NGO that the government later determined had acted inappropriately, the government could exercise its authority to revoke the NGO’s ability to receive tax-deductible donations or shut the NGO down altogether.

The U.S. employs this approach. Most organizations seeking to receive tax-deductible donations must obtain recognition from the IRS that they qualify. To do so, they must provide a number of documents detailing their operations.<sup>230</sup> The IRS reviews the application, asks any questions it has, and issues a determination letter. A large percentage of those organizations that apply are granted such status. Organizations whose application is denied are afforded an appeal.<sup>231</sup> Most approved organizations must file an annual report to apprise the IRS of their ongoing activities.<sup>232</sup>

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227. See Ashley & He, *supra* note 466, at 58.

228. See Provisional Regulations for the Registration and Management of Popular Non-Enterprise Work Units, *supra* note 444, arts. 4, 26.

229. *Id.* art. 28.

230. Most organizations must file a Form 1023 and provide their charter, articles of incorporation, or similar document, bylaws, conflicts policy, the names of and information about their officers, as well as a budget and a description of what the organization does or intends to do. Churches need not file. For a discussion of the procedures for obtaining recognition, see BRUCE R. HOPKINS, *THE LAW OF TAX EXEMPT ORGANIZATIONS* 619–52 (8th ed. 2003).

231. For a discussion of the requirements and process for obtaining tax exempt status in the U.S., see *THE LIFE CYCLE OF A PUBLIC CHARITY*, <http://www.irs.gov/Charities-&-Non-Profits/Charitable-Organizations/Life-Cycle-of-a-Public-Charity>.

232. This report is filed on a Form 990. Given the volume, it seems unlikely that the IRS reviews them. However, GuideStar, a private organization, posts the Form 990s online, which allows for public oversight. See GUIDESTAR, <http://www2.guidestar.org/> (last visited Feb. 6, 2012).

However, the right to receive tax-deductible donations may be revoked. For instance, the tax code suspends favored tax status for organizations deemed to be associated with terrorists.<sup>233</sup> Sometimes, the IRS determines that an organization does not meet the requirements for such status.<sup>234</sup> The IRS also has been known to revoke the tax status of organizations that violate public policy, even though they comply with the formal rules.<sup>235</sup>

Under the “three ‘no’” policy, the government has shown little reluctance to shutter organizations and silence those who, in the government’s eyes, threaten social or political stability.<sup>236</sup> Were the government to allow such NGOs to register and qualify for tax benefits, NGOs would gain legitimacy and have an increased opportunity to attract volunteers and funding. In short, they will be better positioned to play the role in addressing China’s social issues that China’s leaders envision for them. Nonetheless, the NGOs would still be subject to rules that permit authorities to shutter organizations perceived to harm national interests or that go against prevailing morality. Given this protection, the government loses little by taking this route, and it has much to gain.

#### IV. CHARITY WITH CHINESE CHARACTERISTICS

Implicit in the push for China to adopt laws governing NGOs that mirror those in the U.S. or other Western countries is the assumption that such laws will function in China as they do in the West. However, there are good reasons to think that this may not be the case. Culture plays a significant role in determining both how governments implement laws and also in how people respond to them. In this Part, I consider the impact Chinese culture would likely have on how a broad charitable deduction would actually function in China. I conclude that, even if China adopts Western style laws, absent a significant change in Chinese culture, Chinese civil society will not obtain the degree of autonomy and financial support that proponents of such changes envision. Put differently, adopting Western-style laws governing NGOs and the charitable deduction will result in charity, but with Chinese characteristics.

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233. See I.R.C. § 501 (2008).

234. See, e.g., I.R.S. Priv. Ltr. Rul. 200801040 (Jan. 4, 2008).

235. See *Bob Jones v. United States*, 461 U.S. 574 (1983) (concerning a ban on interracial dating).

236. See, e.g., the government’s decision to ban Falun Gong, shut down house churches, and jail those who actively promoted Charter ‘08. [Decision Concerning Outlawing Falun Dafa Research Association] (promulgated by the Ministry of Civil Affairs, July 7, 1999, effective July 7, 1999).

To start, it is important to define culture. The anthropologist Edward Tylor defined culture as “that complex whole which includes knowledge, belief, art, law, morals, custom, and any other capabilities and habits acquired by man as a member of society.”<sup>237</sup> I use it here to refer to a society’s behaviors and rules as well as the moral values and norms that shape them.<sup>238</sup> China is a vast country, including 55 minority groups, many of which have traditions and customs far different from those of the dominant Han culture.<sup>239</sup> For purposes of this paper, I will focus on the Han culture, recognizing that I paint with a broad brush, even when attempting to describe that culture, which itself is not monolithic.

Traditional Chinese culture has many influences, including Confucianism, Buddhism, and Taoism. Of these, Confucianism is the most dominant. While the Communist government spent considerable effort to eradicate traditional practices it viewed as old-fashioned, nonetheless many of the core values remain entrenched in Chinese society.<sup>240</sup> Of primary importance for our purposes are the “three cardinal guides and five constant virtues.”<sup>241</sup> The three guides support a hierarchical, authoritarian system in which a ruler guides his subjects, a father guides his son, and a husband guides his wife.<sup>242</sup> The five virtues, which are aimed at individual behavior, are benevolence,<sup>243</sup> righteousness,<sup>244</sup> propriety,<sup>245</sup> wisdom,<sup>246</sup> and fidelity.<sup>247</sup>

As described more fully below, China’s political culture suggests that the government would likely implement the laws in ways that limit the availability of a charitable deduction and that curtail NGO autonomy. The social culture suggests that people may not give as generously or broadly as they do in the U.S. in response to the charitable deduction.

#### A. POLITICAL CULTURE AND THE CHARITABLE DEDUCTION

The Confucian notion that the leader guides the people has translated into a long-standing political tradition that supports a hierarchical government and vests almost absolute authority in

237. EDWARD B. TYLOR, *PRIMITIVE CULTURE* I (6th ed. 1920).

238. See Yang & Huang, *supra* note 22, at 28.

239. See, e.g., the Uyghur people in Xinjiang, who are of Turkic origin.

240. See Yang & Huang, *supra* note 22, at 28.

241. 三纲 (sān gāng) and 五常 (wǔcháng).

242. See Yang & Huang, *supra* note 22, at 28.

243. 仁 (rén).

244. 义 (yì).

245. 礼 (lǐ).

246. 智 (zhì).

247. 信 (xìn).

those in power. Social structures in China have been described as relation-oriented.<sup>248</sup> Power within these relationships is exclusive and flows in one direction; power sharing does not exist.<sup>249</sup> Alternately, relations within China can be conceived of as consisting of a series of concentric circles, with those in the larger circles having power over those in the smaller circles, who have power over those in still smaller circles.<sup>250</sup> Government officials, whether the emperor of old or the government of today, reside in the largest circle and therefore exercise power over all. In contrast, the governed reside in the interior circles, and while they may exercise power over those within smaller circles, they exercise no power over the government.

This conception of political power creates a significant problem for those who hope to establish a vibrant and independent civil society. Grassroots NGOs represent people power,<sup>251</sup> and empowering such NGOs upsets the balance of power between the government and the governed. Historically, those who challenge power or pose a threat to it are dealt with harshly. For instance, during the Tang Dynasty, Buddhist temples were shut down when the emperors perceived them to be a threat.<sup>252</sup> More recently, movements like Falun Gong and the Open Constitution Initiative were outlawed when they openly challenged or were perceived to challenge the government.<sup>253</sup>

Unless and until government officials, who benefit from the traditional conception of power, accept the idea that power should be shared with the people, they are unlikely to implement the rules governing NGOs in ways that would foster autonomy. In practical terms, this means that whenever government officials have discretion toward NGOs, such as whether to sponsor them or approve an application to qualify for tax benefits, government officials are likely to exercise that discretion in a manner that restricts autonomy and limits power.

Indeed, this is precisely what we have seen. The 1999 Public Welfare Donations Law was supposed to move China away from a system where a limited number of charities eligible to receive donations were hand-picked. Yet, as late as 2007, only 62 charities had actually received government permission.<sup>254</sup> Officials

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248. See Jia Xijin, *An Analysis of NGO Avenues for Civil Participation in China*, 28 SOC. SCI. CHINA 137, 143 (2007).

249. *Id.*

250. *Id.*

251. *Id.*

252. See Whalen Lai, *Chinese Buddhist and Christian Charities: A Comparative History*, 12 BUDDHIST-CHRISTIAN STUDIES 5 (1992).

253. See *China v. Civil Society*, *supra* note 67.

254. See Ashley & He, *supra* note 466, at 58.

have also used their authority to shutter a number of NGOs deemed disruptive.<sup>255</sup> So long as China's political culture embraces the idea of government control, efforts to foster an independent civil society are unlikely to succeed, regardless of the laws on the books or rhetoric coming from China's leaders.

## B. POPULAR CULTURE AND THE CHARITABLE DEDUCTION

Even if government officials were to embrace the notion of power sharing with grassroots NGOs and allow all qualifying organizations to receive tax-deductible donations, it is not clear that the civil sector in China would develop as it has in the West. Equally important as the government's implementation is how people respond to the law. Serious questions exist whether (1) the Chinese would significantly increase their donations were the charitable deduction expanded and (2) how much of any such increase would go to independent, grassroots NGOs.

The first question is whether the Chinese will give, and, if so, how much. Under the current rules, charitable giving to tax-exempt organizations in China significantly lags the U.S. both in absolute and relative terms. In 2008, Americans gave approximately \$308 billion to charitable organizations, accounting for about 2.2% of Gross Domestic Product (GDP).<sup>256</sup> In contrast, in 2009, Chinese donated only RMB 33 billion (about \$4.7 billion dollars) to charitable organizations, accounting for just .01% of GDP.<sup>257</sup> No data exist detailing how much the Chinese give to unregistered charitable organizations or directly to needy individuals, but it seems unlikely that the amounts come close to matching the level of giving found in the U.S.<sup>258</sup>

The difference in charitable giving in the U.S. and China likely has many causes. Some may be structural, such as the lack of incentives to give and the relative obscurity of NGOs in China. Another may be lack of confidence that money donated will be well spent.<sup>259</sup> A decision to broaden the charitable deduction

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255. See *China v. Civil Society*, *supra* note 677.

256. *U.S. Charitable Giving Estimated to be \$307.65 Billion in 2008*, CENTER ON PHILANTHROPY AT IND. UNIV. (June 10, 2009), [http://www.phildev.iupui.edu/about/executivedirectorletters/docs/2009/06/2009\\_June.pdf](http://www.phildev.iupui.edu/about/executivedirectorletters/docs/2009/06/2009_June.pdf).

257. *China Issues Charity Blue Book*, PEOPLE'S DAILY (Nov 3, 2010), <http://china-wire.org/?p=6825>.

258. See also CHARITIES AID FOUNDATION, WORLD GIVING INDEX 2011 9 (ranking China's giving at 140th), available at <https://www.cafonline.org/publications/2011-publications/world-giving-index-2011.aspx>.

259. According to one report, charitable donations in China fell more than 80 percent because of public mistrust in the wake of recent allegations that some charities, including the Chinese Red Cross, have misused money. See *Donations to Charities in China Plunge after Scandals*, REUTERS, Dec. 8, 2011, <http://www.reuters.com/article/2011/12/08/us-china-donationsidUSTRE7B70F820111208>.

would increase the incentives to give. It could also provide some legitimacy to currently unregistered NGOs in the eyes of potential donors. Private efforts to create codes of conduct and promote best practices among NGOs could also engender greater confidence in NGOs, which could lead to increased giving.<sup>260</sup>

Yet, a number of cultural barriers to charitable giving exist that will be harder to overcome. For instance, differences in religious or philosophical traditions may play a significant role in the level of charitable giving. Charity is a key tenet of the Judeo-Christian tradition,<sup>261</sup> which permeates U.S. culture. This tradition creates a moral imperative for individual giving and has helped establish long-standing tradition of charitable giving. Chinese traditional systems also reveal a deep and abiding commitment to charity. Buddhism stresses charitable giving as one of its core tenets (Paramitas).<sup>262</sup> Taoism also encourages charitable giving.<sup>263</sup> Confucius also stressed charitable giving, linking it to benevolence, one of the five constant virtues.<sup>264</sup> However, many in modern China lead completely secular lives.<sup>265</sup> Thus, any imperative to give based on Buddhist, Taoist or Confucian precepts is likely to be far more limited than the Judeo-Christian imperative in the West.

Moreover, Confucian teachings, with their emphasis on hierarchy, were often construed to reserve charity to the ruling class, as opposed to imposing an obligation on private individuals. One story recounts how Confucius rebuked a minister for providing food to the poor because charity was the prerogative of the ruler, who had an obligation to take care of his subjects.<sup>266</sup> Those who receive charity owe an obligation of loyalty to the provider. As a result, private charity effectively usurps the role

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260. See *supra* Pt. I.B.2.b.

261. See Adam S. Chodorow, *Maaser Kesafim and the Development of Tax Law*, 8 FLA. TAX REV. 153 (2007), for a discussion of the Biblical imperative to do charity.

262. The notion is that individuals who lead virtuous lives will be reincarnated into a better position. Providing charity is the type of act that counts on the positive side of the ledger. Buddhist temples, which were funded by donations, have long cared for the sick and provided other social services. See Lai, *supra* note 252.

263. See EVA HONG, *THE SHAMHALA GUIDE TO TAOSIM* 190 (1997) (describing Action and Karma Daoism on embracing charity as a core virtue).

264. The Analects contain a number of examples that tie charity to rén. For instance, one disciple is reported to have asked Confucius "If one can be generous to the people and can help the masses, how would that be? Could it be called humanness?" Confucius responded "One would not only be humane; one would surely be a sage." Analects 6:30, in *THE ESSENTIAL CONFUCIUS* (Thomas Cleary trans., Harper 1992).

The benevolent societies that arose during the late Ming Dynasty reflect this imperative. For a discussion of benevolent societies, see JOANNA HANDLIN SMITH, *THE ART OF DOING GOOD, CHARITY IN LATE MING CHINA* (2009).

265. See Yang & Huang, *supra* note 22, at 30.

266. This is analogous to the French concept *noblesse oblige*.

of the ruler and steals loyalty due to him.<sup>267</sup> Under this view, those outside the ruling class have no responsibility to care for others,<sup>268</sup> a sentiment expressed in the aphorism “I only have to clean the snow in front of my door, I don’t worry about the ice on the neighbor’s roof.”<sup>269</sup>

Indeed, when one looks closely at China’s benevolent societies, often held up as evidence of the Chinese people’s charitable nature, it becomes apparent that many were founded and funded by current or retired government officials. The key participants were often local leaders.<sup>270</sup> In many regards, China’s GONGOS and successful NGOs, most of which were established by current or former government officials, are the modern day versions of such societies and continue this Confucian tradition of government responsibility for charitable activities. Thus, while Confucianism may support charity, it is not the type of widespread personal charity one sees in the West.

Nonetheless, examples of tremendous generosity from ordinary Chinese abound. For instance, people have donated significant sums in response to a variety of natural disasters, such as the Wenchuan earthquake in 2008.<sup>271</sup> However, these donations are often made in response to officially orchestrated campaigns and directed to government-approved recipients.<sup>272</sup> They may reflect the imperative to obey authority found in the three cardinal guides rather than a pent up demand to donate broadly to grassroots organizations that will be released once donations are deductible. Whether the Chinese will significantly increase

267. See Lai, *supra* note 252, at 7. Indeed, this may have been the reason Buddhist temples were suppressed during the Yuan and Song Dynasties. *Id.* at 12.

268. In 1995, 99% of Chinese corporations did not give to charity. See Lee, *supra* note 6, at 368.

269. 各人自扫门前雪，莫管他人瓦上霜 (geren zi sao men qian xuě, mǒguǎn tā rén wǎ shàng shuāng). See Yang & Huang, *supra* note 22, at 31. See also Lang, *supra* note 149, at 361 (noting that under the influence of Confucianism, the people became used to depending upon the government to solve societal and social problems).

270. See Joanna F. Handlin Smith, *Benevolent Societies: The Reshaping of Charity During the Late Ming and Early Ch’ing*, 46 JOURNAL OF ASIAN STUDIES 309, 313 (1987).

271. For example, after the Wenchuan earthquake in 2008, Chinese government received approximately 66 billion yuan (approximately \$9.7 billion dollars) in cash donations. While some of this came from abroad, the majority was from domestic sources. *Donations Exceed 65.9 Billion Yuan for Wenchuan Earthquake*, PEOPLE’S DAILY ONLINE (May 12, 2009), <http://english.peopledaily.com.cn/90001/90776/90882/6655947.html>.

272. See, e.g., Simon Elegant, *Sichuan Earthquake: How to Donate*, TIME (May 13, 2008), [http://world.time.com/2008/05/13/sichuan\\_earthquake\\_how\\_to\\_donate/](http://world.time.com/2008/05/13/sichuan_earthquake_how_to_donate/) (advocating that people donate to the Chinese Red Cross, a GONGO that works hand in glove with the Chinese government).

charitable donations in response to a broadly available charitable deduction is an open question.

Assuming the Chinese will give in response to a charitable deduction, the second question is to whom they would give. Again, culture may play an important role and lead to outcomes different from what those in the West might expect. In particular, it is not at all clear that additional giving would go to independent, grassroots organizations, as opposed to government-affiliated NGOs. Government affiliated NGOs will have the backing and support of the government, and people may be inclined to donate to them for this reason. While some chafe at government controls, a large number of Chinese have internalized the Confucian view that the government acts in the people's best interest and that they should follow.<sup>273</sup> Grassroots organizations that challenge the government may not receive the warm welcome or financial support one might expect, even if they were allowed to receive tax-deductible donations.

Government-affiliated NGOs may also have an advantage over grassroots organizations because donors may seek to cultivate relationships with their leaders, who are likely to have close ties to powerful government officials. This certainly occurs in the West.<sup>274</sup> However, in China, the importance of relationships and status is likely to make this behavior even more pronounced. One study examined the giving patterns of Chinese entrepreneurs in the 1990s and suggests that charitable giving in China is an important means of buying influence, social status, and political office, much as occurred in France in the 18th century.<sup>275</sup> In contrast, donations to independent grassroots NGOs would not only fail to create status for the donor, but they could also create significant problems for the donor if the NGO were to draw negative attention to itself.

The reliance on social networks may also affect giving patterns. The Chinese form a wide array of social networks, including family, school, and work.<sup>276</sup> Mutual trust and the obligation to treat people fairly within those networks, and in particular

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273. See Ian Bremmer, *As free market democracies flail, watch out for China*, USA TODAY (May 20, 2010), [http://usatoday30.usatoday.com/news/opinion/forum/2010-05-26-column26\\_ST1\\_N.htm](http://usatoday30.usatoday.com/news/opinion/forum/2010-05-26-column26_ST1_N.htm).

274. Lobbyists routinely donate to charities associated with politicians to gain favor. See, e.g., Eric Lipton, *Wife's Charity Offers Corporate Tie to a Governor*, N.Y. TIMES, Mar. 2, 2011, <http://www.nytimes.com/2011/03/03/us/politics/03jindal.html?pagewanted=all>.

275. Dali Ma & William Parish, *Tocquevillian Moments: Charitable Contributions by Chinese Private Entrepreneurs*, 85 SOC. FORCES 943 (2006) (detailing how entrepreneurs who made large donations to government affiliated charities often were picked for higher political offices).

276. See Yang & Huang, *supra* note 22 at 31.

within the family network, is strong.<sup>277</sup> However, for those outside a person's networks, no such trust or obligations exist. This contrasts starkly with the West, where trust extends well beyond blood ties.<sup>278</sup> The result is that the Chinese are less likely than others to donate to organizations that help strangers. They are also less likely to donate to organizations run by strangers. As one article notes, "Chinese people are not used to giving money to strangers, and giving money to an intermediary organization to manage and use on their behalf is even less familiar."<sup>279</sup>

Potential donors may not trust that the organizations will be well managed or that the funds they donate will actually be used for the advertised purposes. Repeated scandals regarding even the most prominent Chinese charities suggest that these concerns may be well-founded.<sup>280</sup> Lack of public trust has been identified as one of the key impediments to a robust civil society.<sup>281</sup> Bringing illegal NGOs within the legal framework and subjecting them to government oversight may ameliorate some of the concern, but it is unlikely to overcome the deep-seated reliance on personal relationships and distrust of strangers as the primary means to evaluate the wider world.

In sum, given the myriad cultural influences at play, it seems doubtful that grassroots organizations will receive a flood of funding even if China opens the door to a broad charitable deduction. Legal reform may be an important step toward changing China's culture. However, legal reform alone will be insufficient to create the autonomous and vibrant civil society that many in the West believe China requires to address its social issues.

## CONCLUSION

China's leaders have identified NGOs as important partners in addressing China's social ills, and they have made significant strides over the past 30 years to permit and even promote civil society. Nonetheless, significant roadblocks exist that may prevent civil society from fulfilling its role. Numerous scholars have called on China to remove these roadblocks by, among other things, easing the registration requirements for NGOs and broadening government subsidies, including the deduction for charitable giving.

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277. *Id.*

278. *Id.* at 29.

279. See Xin & Zhang, *supra* note 16, at 91.

280. See *Donations to Charities in China Plunge after Scandals*, *supra* note 259.

281. See Ashley & He, *supra* note 46, at 84–95 (describing the average person as being unwilling to give because NGOs lack public accountability).

Those promoting civil society within China face two hurdles. The first is to convince Chinese leaders to adopt the legal reforms necessary to allow civil society to flourish. I showed in this Article that a robust charitable deduction is consistent with Chinese values and interests and that it can be implemented without requiring the government to abandon its concern for social and political stability.

The second challenge may be more difficult. Even if China were to adopt Western-style laws, China's political culture will cause government officials to implement the laws in ways that constrict civil society, and people may be hesitant to fund grass-roots organizations, thus blunting the laws' impact. In making these observations, I do not mean to discourage efforts to promote legal reform within China. Rather, my goal is to caution that legal reform alone will likely not be enough to engender a vibrant and autonomous civil society. Serious reform efforts must focus on changing both China's legal rules and its political and social culture.