IMPLEMENTING DISASTER RELIEF THROUGH TAX EXPENDITURES: AN ASSESSMENT OF THE KATRINA EMERGENCY TAX RELIEF MEASURES

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Over the past several decades, Congress has turned increasingly to tax expenditures rather than to direct outlay programs to implement social welfare programs. Such a trend creates economic distortions and has proven disadvantageous to taxpayers in lower socioeconomic classes. The newest twist is in the area of disaster relief. Unprecedented before 2001, tax relief targeted to a disaster in a specific geographic region has now been established on two occasions—in the wake of the 9/11 attacks and in the aftermath of Hurricane Katrina. This Note argues that, in a disaster, both the vulnerability of lower-income taxpayers and the weaknesses of the Internal Revenue Code as an instrument for social programs are amplified. This problem was particularly acute after Hurricane Katrina. Congress should therefore reconsider the current trend toward using tax expenditures rather than direct relief in such situations, or alternately structure other relief to correct for its shortcomings.

INTRODUCTION

On Monday, August 29, 2005, Hurricane Katrina, the twelfth tropical depression of the year,[1] slammed into the Gulf Coast just outside New Orleans with winds of up to 145 miles per hour and a record-setting storm surge,[2] "submerging entire neighborhoods up to their roofs, swamping Mississippi's beachfront casinos and blowing out windows in hospitals, hotels and high-rises."[3] Immediate reaction was guarded relief: The storm had not hit New Orleans directly, as

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[1] *Katrina's Path*, GLOBE & MAIL (Toronto), Sept. 3, 2005, at A12 (tracing development of Hurricane Katrina through its immediate aftermath).

[2] Anthony R. Wood, *Storm Surge May Have Set Record*, FORT WORTH STAR-TELEGRAM, Sept. 14, 2005, at A10 (citing estimate from expert with National Hurricane Center in Miami).

[3] Allen G. Breed, *Katrina Swamps Entire LA Neighborhood*, ASSOCIATED PRESS, Aug. 29, 2005, *available at* http://www.ohsep.louisiana.gov/newsrelated/katrinaswamps.htm.

initially feared.[4] That relief soon turned to panic and horror as several of the city's strained levees gave way and eighty percent of the city was submerged under the waters of Lake Pontchartrain.[5] Many residents without the means to evacuate took shelter in New Orleans's Superdome and its Convention Center.[6] The disaster caused over one thousand deaths[7] and economic and physical devastation to New Orleans and large portions of the Gulf Coast.[8] Caught off guard by the extent of the disaster, federal, state, and local agencies and officials were slow to respond.[9] Nearly one month after Katrina made landfall, Congress approved the first legislation to assist victims of Katrina: the Katrina Emergency Tax Relief Act of 2005 (KETRA).[10] This tax relief was later extended to other Gulf Coast regions through the Gulf Opportunity Zone Act of 2005 (GOZA)[11] with the creation of special tax "zones."[12]

KETRA and GOZA resemble two packages of tax relief created in response to an earlier disaster: the Victims of Terrorism Tax Relief

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4 "'I was so happy that the worst-case scenario didn't unfold,' Mayor Nagin [of New Orleans] says." *Katrina's Path*, *supra* note 1.

5 *Id.*

6 Twenty-five thousand people were estimated to have sheltered in the Superdome and twenty thousand at the Convention Center. *Id.*

7 *See* Eric Lipton, *Republicans' Report on Katrina Assails Administration Response*, N.Y. TIMES, Feb. 13, 2006, at A1 (estimating deaths along Gulf Coast as result of Katrina at 1400).

8 Katrina is anticipated to become the costliest natural disaster in U.S. history, with some experts estimating the total economic impact at up to $300 billion. Pamela Gaynor, *Ivan, Katrina Work Overlaps for Local Firms*, PITTSBURGH POST-GAZETTE, Sept. 15, 2005, at E1. The Associated Press estimated that 90,000 square miles of coastal area were affected, nearly 293,000 homes were damaged or destroyed, and more than one million people left their homes. Associated Press, *Hurricane Katrina: By the Numbers*, SUN-HERALD (Biloxi, Miss.), Sept. 12, 2005, at A6. Hurricane Katrina was followed by Hurricanes Wilma and Rita, which caused further damage to areas of the Gulf Coast. Richard Burnett, *Insurers Tally Up Storm Damage; Experts Worry About a Possible Shortage of Adjusters*, ORLANDO SENTINEL, Oct. 25, 2005, at C1. This Note will use "Hurricane Katrina" generally to refer to the three hurricanes and their effects.

9 *See, e.g.*, Gregory Stanford, *Poverty: A Storm That Batters the Poor Every Day*, MILWAUKEE J. SENTINEL, Sept. 11, 2005, at 4 ("The storm [Katrina] showed up this great nation—the richest and mightiest and wisest in the world—as a bumbler, incapable of mounting a timely and effective rescue operation in the aftermath of a great storm.").

10 The Katrina Emergency Tax Relief Act of 2005 (KETRA) was passed by Congress on September 21 and signed into law by President Bush on September 23. Pub. L. No. 109-73, 119 Stat. 2016 (codified at I.R.C. §§ 170, 7508 (2006)); *see also* Andrew Martin & Andrew Zajac, *Literal, Political Debris Clogs City*, ADVOCATE (Baton Rouge, La.), Jan. 8, 2006, at B6 (pointing out that as of January 2006, only tax relief had passed both houses).

11 Gulf Opportunity Zone Act of 2005, Pub. L. No. 109-135, 119 Stat. 2577 (codified at I.R.C. §§ 38, 54, 1400N (2006)). The Gulf Opportunity Zone Act (GOZA) was passed in the wake of Hurricanes Rita and Wilma.

12 GOZA created the "Gulf Opportunity Zone." § 101, 119 Stat. at 2578.

Act of 2001 (VTTRA)[13] and the Job Creation and Worker Assistance Act of 2002 (JCWAA),[14] both enacted following the events of 9/11. In public comments, officials often compared Hurricane Katrina victims to victims of the 9/11 attacks,[15] and the tax package for the Gulf Coast explicitly borrowed from that designed for New York.[16]

The comparison, and the plan, met with some opposition. In hearings before the Joint Committee on Taxation regarding the tax breaks that were to become part of KETRA, Senator Charles Schumer of New York contended that tax incentives aimed at bringing business back to New York's affected areas were relatively useless because most affected businesses had little income immediately following 9/11.[17] George Yin, then Chief of Staff of the Joint Committee, warned that prior attempts at providing relief from disaster through the Internal Revenue Code (the Code) were unproven and that tax relief provisions that may have been effective in response to 9/11 would not necessarily be effective in Louisiana.[18]

Tax relief was not the sole form of government aid provided.[19] The Small Business Administration offered loans for both individuals

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13 Victims of Terrorism Tax Relief Act of 2001, Pub. L. No. 107-134, 115 Stat. 2427 (2002) (codified in scattered sections of I.R.C. and other titles).

14 Job Creation and Worker Assistance Act of 2002, Pub. L. No. 107-147, 116 Stat. 21 (codified in scattered sections of I.R.C. and other titles). The Act created the "Liberty Zone," § 301, 116 Stat. at 33, which was the model for the "Gulf Opportunity Zone" described *infra* note 125.

15 For instance, Senator Chuck Grassley remarked:

> Tax relief was valuable for families and businesses directly hit by 9-11. It's sure to be key in helping individuals and communities recover from Hurricane Katrina. . . . [Another] goal is to encourage charitable giving outside of Katrina relief to prevent . . . [other] charities from seeing a downturn in giving as they did after Sept. 11.

Press Release, U.S. Senate Comm. on Fin., Grassley Describes House-Senate Deal on Katrina Tax Relief Bill (Sept. 20, 2005), http://www.senate.gov/~finance/press/Gpress/2005/prg092005a.pdf; *see also* John M. Broder, *Amid Criticism of Federal Efforts, Charges of Racism Are Lodged*, N.Y. TIMES, Sept. 5, 2005, at A9 (quoting Bruce S. Gordon, president of NAACP, as contending that "the benchmark for recovery [for Katrina victims] should be 9/11").

16 *See infra* notes 119–23, 139–41, 148–52, and accompanying text.

17 Mark Battersby, *PBGC Says Legislation Could Worsen Its Financial Woes*, INVESTMENT NEWS, Oct. 17, 2005, at 26.

18 *Hurricane Katrina: Community Rebuilding Needs and Effectiveness of Past Proposals: Hearing Before the S. Comm. on Finance*, 109th Cong. (2005) (statement of George K. Yin, Chief of Staff, J. Comm. on Taxation), *available at* http://finance.senate.gov/hearings/testimony/2005test/092805gytest.pdf.

19 In fact, a November 2005 search by the author on the electronic database Westlaw (available online by subscription at http://www.westlaw.com) revealed that over 167 bills grappling with issues related to Hurricane Katrina had been proposed in the House and Senate. The search, "Katrina" & da(aft 8/30/2005) & da(bef 11/18/2005), was performed in database us-billtrk. *See, e.g.*, Oversight of Vital Emergency Recovery Spending Enhancement and Enforcement Act of 2005, S. 1700, 109th Cong. (2005) (proposing appointment

and businesses.[20] The Federal Emergency Management Agency (FEMA) received approximately $36 billion for relief operations for individuals (such as providing trailers and/or housing vouchers to displaced victims of the hurricane[21]) and for assistance to state and local governments (such as debris cleanup).[22] The National Flood Insurance Program paid out approximately $16 billion to flood victims by December 2005.[23] In the private sector, the Red Cross spent an estimated $2.1 billion on in-kind aid such as food, water, medicine, and emergency financial assistance to individuals.[24]

Other federal agencies offered relief from regulatory requirements and other assistance with disaster-related issues. The Securities and Exchange Commission provided emergency regulatory relief to investors, companies, and securities firms affected by Hurricane Katrina, conditionally exempting affected persons from, among other requirements, filing and the delivery of proxy statements.[25] The Army Corps of Engineers was allocated $3.3 billion, primarily to be used for the repair of flood-protection structures.[26] This Note, however, will focus on the disaster aid provided through tax provisions, particularly those aimed at Hurricane Katrina victims.[27]

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of Chief Financial Officer to oversee use of federal funds in Katrina recovery); Rebuild with Respect Act, S. 1925, 109th Cong. (2005) (proposing employment requirements for Gulf Coast rebuilding effort, including reinstatement of wage requirements of Davis-Bacon Act and extension of disaster unemployment benefits for affected workers).

20 *See, e.g.*, U.S. GEN. ACCOUNTING OFFICE, SEPTEMBER 11: OVERVIEW OF FEDERAL DISASTER ASSISTANCE TO THE NEW YORK CITY AREA 15 (2003), *available at* http://www.gao.gov/new.items/d0472.pdf.

21 *See, e.g.*, Press Release, Fed. Emergency Mgmt. Agency, By the Numbers: FEMA Recovery Update in Louisiana (Feb. 22, 2006), http://www.fema.gov/news/newsrelease.fema?id=23801 (estimating number of FEMA trailers and manufactured housing units in Louisiana at 42,460, with 62,800 units total across Gulf Coast).

22 CONG. BUDGET OFFICE, THE BUDGET AND ECONOMIC OUTLOOK: FISCAL YEARS 2007 TO 2016 app. A, at 107 (2006).

23 *Id.* at 108.

24 *See, e.g.*, Press Release, Am. Red Cross, Generous Donors Meet American Red Cross Hurricane Relief Costs: Red Cross Honors Commitment to Donors and Public (Feb. 3, 2006), http://www.redcross.org/pressrelease/0,1077,0_314_5090,00.html (announcing that donations and pledges would cover estimated $2.116 billion cost of Red Cross response to Hurricanes Katrina, Wilma, and Rita, and that as of December 31, 2005, eighty percent of that estimate had already been spent).

25 Order Under Securities Exchange Act of 1934 Granting Exemptions From Specified Provisions of the Exchange Act and Certain Rules Thereunder, Order Under Investment Company Act of 1940 Granting Exemptions From Specified Provisions of the Company Act and Certain Rules Thereunder, 70 Fed. Reg. 55,432 (Sept. 15, 2005).

26 CONG. BUDGET OFFICE, *supra* note 22, at 107.

27 This Note also does not examine aid geared toward the rebuilding effort on the Gulf Coast. *See, e.g.*, Spencer S. Hsu, *Post-Katrina Promises Unfulfilled*, WASH. POST, Jan. 28, 2006, at A1 (describing problems with both rescue and recovery efforts).

Providing financial aid through tax provisions is not new,[28] nor is it new to offer relief from taxes in the wake of disasters or misfortune.[29] In fact, over the past several decades, Congress has increasingly turned to the Code rather than to direct outlay programs for the implementation of many social policies, some of them redistributive.[30] What *is* new is the attempt to target disaster-related tax provisions to specified regions.[31] Many commentators have suggested that the general shift toward tax-based implementation of social policies (often called "tax expenditures") disadvantages taxpayers in lower socioeconomic classes (those with low income, with little to no wealth, or with little or no higher education).[32] Others have argued against tax expenditures on policy grounds, criticizing the unpredictability of both the costs and the effects.[33]

In this Note, I argue that disasters can magnify the drawbacks associated with tax expenditures and distort the scope of relief, thereby affording the least help to those who most need it. In Part I, I discuss the nature and potential shortcomings of tax expenditures more fully. Part II briefly describes the specific provisions of the hurricane tax legislation. In Part III, I show how disasters can exacerbate the general disadvantages of tax expenditures and suggest that the current application of geographic targeting is flawed. I also examine the timing of relief provided through tax expenditures, pointing out that many of the legislation's incentives may expire before it is possible to use them and offering suggestions for alternative or additional solutions. I conclude that if the tax relief package provided after the 9/11 attacks is to become the boilerplate for disaster relief, Congress

[28] *See infra* notes 114–15 and accompanying text.

[29] *See infra* notes 114–18 and accompanying text.

[30] *See, e.g.*, *infra* notes 70–79 and accompanying text.

[31] The Liberty Zone tax benefits package was the first ever targeted to a specific geographic area. U.S. GEN. ACCOUNTING OFFICE, *supra* note 20, at 6, 85.

[32] *See infra* notes 94–99 and accompanying text. In fact, many critical tax studies scholars view the entire Code framework as disadvantageous to certain classes. *See* john a. powell, *How Government Tax and Housing Policies Have Racially Segregated America*, *in* TAXING AMERICA 80, 80, 83 (Karen B. Brown & Mary Louise Fellows eds., 1996) (concluding that facially neutral tax preferences for homeownership disproportionately benefit whites); Anne L. Alstott, *Tax Policy and Feminism: Competing Goals and Institutional Choices*, 96 COLUM. L. REV. 2001, 2002–33 (1996) (arguing that Code disadvantages women because they tend to perform greater share of unpaid work of family care and offering specific feminist proposals for reform of tax laws); Dorothy A. Brown, *The Tax Treatment of Children: Separate But Unequal*, 54 EMORY L.J. 755 (2005) (describing different requirements for Earned Income Tax Credit (EITC) and Child Tax Credit (CTC) and arguing that more strenuous requirements for EITC harm blacks, since more whites utilize CTC).

[33] *See infra* notes 90–91 and accompanying text.

should reexamine its suitability for specific disasters, or at least consider additional forms of relief that take these flaws into account.

I
The Trend Toward Using Tax Expenditures

A. *Tax Expenditures Defined*

In his highly influential 1970 article, Professor Stanley Surrey advanced the concept of "tax expenditures"—the idea that providing deductions and credits is a form of revenue loss that should be considered analogous to direct transfer programs.[34] The Joint Committee on Taxation began preparing estimates of tax expenditures in 1972 and has published such estimates annually since 1975.[35] The Office of Management and Budget (OMB) publishes a separate estimate as part of the President's annual federal budget.[36] The OMB tax expenditures are based on estimates from the Department of the Treasury (Treasury).[37] The two estimates differ because of disagreement over which deductions should be classified as "expenditures."[38]

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[34] Stanley S. Surrey, *Tax Incentives as a Device for Implementing Government Policy: A Comparison with Direct Government Expenditures*, 83 Harv. L. Rev. 705 (1970). Surrey distinguished two kinds of tax expenditures: hardship relief (such as the extra exemption for the blind, which is "designed to provide tax reduction in order to relieve misfortune or hardship") and tax incentives (such as capital gains treatment of income earned from a certain activity, which provides "an incentive to engage in that activity"). *Id.* at 712–13. Surrey distinguished the taxpayer qualifications for each type of expenditure on the basis of whether they were involuntary or voluntary. *Id.* For instance, one cannot voluntarily get sicker in order to take advantage of the medical deduction.

[35] *See, e.g.*, Staff of J. Comm. on Taxation, 109th Cong., Estimates of Federal Tax Expenditures for Fiscal Years 2006–2010 (Comm. Print 2006), *available at* http://www.house.gov/jct/s-2-06.pdf [hereinafter Estimates 2006–2010] (explaining estimates of tax expenditures and presenting distributions by income class); *see also* Staff of J. Comm. on Taxation, 109th Cong., Overview of Revenue Estimating Procedures and Methodologies Used by the Staff of the J. Comm. on Taxation 11 & n.10 (Comm. Print 2005), *available at* http://www.house.gov/jct/x-1-05.pdf (providing overview of procedures used in revenue estimating process).

[36] *See, e.g.*, Office of Mgmt. & Budget, Executive Office of the President, Analytical Perspectives, Budget of the United States Government, Fiscal Year 2007, at 287–90 tbl.19-1 (2006) (listing income tax expenditures).

[37] *Id.* at 4.

[38] The Department of the Treasury's (Treasury) list of tax expenditures excludes some provisions that are on the Joint Committee on Taxation's list. For example, the deduction for overnight travel expenses for members of the National Guard and the Guard in Reserve is included in the Joint Committee's list of expenditures, but not in the Treasury list. Estimates 2006–2010, *supra* note 35, at 22 (listing tax expenditures contained in Joint Committee estimates but not in Treasury estimates). Controversy over such definitions, and over the usefulness of the concept of tax expenditures in the absence of agreement on a clear definition, continues in the academic community. *See, e.g.*, Douglas A. Kahn & Jeffrey S. Lehman, *Tax Expenditure Budgets: A Critical View*, 54 Tax Notes 1661 (1992) (arguing that concept of tax expenditures is flawed because it assumes existence of one

A brief discussion of the framework of the Code will illuminate this concept.

B. *Structure of the Income Tax*

Under the U.S. federal income tax, individuals and businesses determine their tax liability by multiplying their applicable tax rates by their taxable income, which, broadly speaking, is receipts minus the cost of producing those receipts.[39] Relief from tax liability therefore comes in four basic forms: reducing the rate at which income is taxed,[40] excluding or exempting certain kinds of income from the definition of "income,"[41] deducting certain expenditures from income,[42] and applying credits against tax owed.[43] Some provisions of the Code also provide relief by deferring the time when accrued income is taxed,[44] accelerating deductions,[45] or postponing the payment of taxes.[46]

To use an exclusion, exemption, or deduction, a taxpayer must have gross income; to fully use a deduction, his gross income must be greater than or equal to the deduction. Taxpayers with no or very low gross income typically cannot take advantage of such tax relief provisions. Because the U.S. tax system is progressive,[47] a deduction gives a higher-bracket taxpayer a greater benefit than a lower-bracket tax-

standard of taxation applicable in all circumstances, attaches moral significance to that standard, and confuses discussion of tax policy by implying that all tax expenditures are equivalent of subsidies).

39 There are other forms of federal tax, including excise taxes, gift taxes, and estate taxes (at least for now). Many taxpayers who do not have sufficient income to pay significant amounts of (or any) income tax are still subject to payroll and excise taxes (and, indirectly, some portion of corporate taxes). Nancy C. Staudt, *Taxation Without Representation*, 55 TAX L. REV. 555, 589 (2002).

40 For example, the preferential rate on capital gains and dividends. I.R.C. § 1(h) (West Supp. 2006).

41 For example, the exclusion of qualified scholarships. I.R.C. § 117(a)–(c) (2000).

42 For example, allowing a business owner to deduct from income salaries paid to employees. I.R.C. § 162(a)(1) (2000).

43 For example, the Child Tax Credit, which provides families with a $1000 per child tax credit. I.R.C. § 24 (West Supp. 2006).

44 For example, nonrecognition of capital gain upon a rollover of pension funds. I.R.C. § 401(a)(31) (2000 & Supp. III 2003) (providing for rollover of qualified plans); I.R.C. § 402(c)(6)(D) (2000) (providing for nonrecognition of gain upon rollover).

45 For example, expensing of certain capital investments. I.R.C. § 179 (West Supp. 2006).

46 For example, the Treasury Secretary can, among other actions, extend the filing, reporting, or payment deadlines for taxpayers affected by a presidentially declared disaster. I.R.C. §§ 7508(a)(1) (West Supp. 2006), 7508A (Supp. II 2002) (empowering Treasury Secretary to take these actions).

47 The marginal rate at which income is taxed rises as income increases. *See* I.R.C. § 1(a)–(f), (i) (West Supp. 2006) (setting marginal income tax rates).

payer.[48] Not all deductions are available to all taxpayers; itemized deductions can only be taken instead of the standard deduction. If a taxpayer's total itemized deductions are less than the standard deduction, they are of no benefit.[49] Some deductions are subject to further limitations.[50]

Similarly, credits against tax liability generally affect only those who actually owe taxes, with two exceptions. The Earned Income Tax Credit (EITC)[51] is refundable to the extent a taxpayer does not have the equivalent liability, and the Child Tax Credit (CTC)[52] is partially refundable. Both credits are available, however, only to taxpayers with income.[53] Eligibility for the EITC requires earned income and phases out at a relatively low ceiling.[54] Eligibility for the CTC requires income (not necessarily earned income), but eligibility for the refundable portion of the CTC requires earned income.[55] In fact, the

48 Surrey, *supra* note 34, at 720–25.

49 Each taxpayer is allowed to deduct from his or her taxable income a fixed amount (the "standard deduction") that varies according to filing status. I.R.C. § 63(c)(2) (West Supp. 2006). Some taxpayers are entitled to an additional standard deduction for age, blindness, or both. I.R.C. § 63(f) (2000). Taxpayers who have allowable deductions in excess of the standard deduction amount may elect to itemize deductions rather than claim the standard deduction, but it is advantageous to do so only if the sum of the itemized deductions is greater than the standard deduction. *See* I.R.C. § 63(a)–(b) (2000) (allowing taxpayers to take either standard deduction or itemized deductions). Most taxpayers take the standard deduction. *See infra* note 96.

50 For instance, medical expenses not covered by insurance can be deducted, but only the portion that exceeds 7.5% of a taxpayer's adjusted gross income (AGI). I.R.C. § 213 (West Supp. 2006).

51 I.R.C. § 32(a) (2000 & Supp. III 2003) (providing for full refundability of Earned Income Tax Credit by not limiting credit to amount of income tax liability).

52 I.R.C. § 24(d) (West Supp. 2006) (allowing for partial refundability of Child Tax Credit).

53 A similar credit, the Child and Dependent Care Credit, allows taxpayers to credit a percentage of dependent care costs necessary for gainful employment. I.R.C. § 21 (West Supp. 2006). However, the credit is not refundable. I.R.C. § 26(a)(1) (2000 & Supp. III 2003) (limiting credit to amount of income tax liability).

54 *See* I.R.C. § 32 (West Supp. 2006) (providing for Earned Income Tax Credit). The credit is determined by multiplying an individual's earned income below a maximum amount (called the earned income amount and adjusted for inflation) by the appropriate credit percentage, which varies depending on the number of qualified children claimed. *Id.* The credit is subject to a phase-out determined by multiplying the phase-out percentage by the excess of the amount of the taxpayer's modified AGI (or earned income, if greater) over the inflation-adjusted phase-out amount. *Id.* For instance, the maximum credit in 2006 for a taxpayer with one qualifying child would be $2747 (34% of the $8080 earned income amount) and would be reduced by 15.98% of modified AGI over $14,810. The credit for such a single taxpayer phases out completely at $32,001, or $34,001 for a married taxpayer filing jointly. *See id.* (providing phase-in and phase-out rates); Rev. Proc. 2005-70, 2005-47 I.R.B. 979 (giving 2006 earned income amount, maximum credit, phase-out thresholds, and point of complete phase-out).

55 *See* I.R.C. § 24 (2000) (creating Child Tax Credit), I.R.C. § 24(d) (West Supp. 2006) (setting size of refundable credit equal to fifteen percent of amount by which person's

refundable portion of the CTC is subject to an earned-income floor. In 2006, a family that earned less than $11,300—for instance, a family with one full-time minimum-wage worker—would have been ineligible for the CTC.[56]

Deductions, exemptions, credits, and rate differentials, in combination, tend to encourage certain economic transactions. A common example is home ownership. Taxpayers may deduct the interest on mortgages taken out to purchase a principal residence.[57] When a taxpayer sells her principal residence, she may not have to declare any gain from the sale as income.[58] A taxpayer may borrow money using her home as collateral (a home equity loan) and deduct the interest.[59] A taxpayer may withdraw money from a qualified retirement plan[60] for the first-time purchase of a home without incurring the ordinary penalties for early withdrawal.[61] At death the taxpayer's beneficiary receives the home with a basis equal to its fair market value, and thus will never pay taxes on the amount of appreciated value that accumulated during the taxpayer's ownership.[62] Finally, the owner of the home enjoys its occupation rent-free (that is, in addition to the bene-

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earned income exceeds inflation-adjusted threshold, which in 2006 is $11,300). High-income taxpayers also face limitations on the size of their Child Tax Credit. The credit phases out once income exceeds a certain threshold. The phase-out begins for joint filers at a modified AGI of $110,000, for married taxpayers filing separately at $55,000, and for single individuals at $75,000. I.R.C. § 24(b)(1)–(2) (2000 & Supp. III 2003) (providing for phase-out of credit). These thresholds are not indexed for inflation. Because the credit is reduced by $50 for each $1000, or fraction thereof, of modified AGI above these limits, the level at which the CTC is completely phased out depends on the number of qualifying children.

56 *See* Rev. Proc. 2005-70, 2005-47 I.R.B. 979 (giving 2006 earned income floor for Child Tax Credit). A study by the Tax Policy Center revealed that twenty-five percent of American children and fifty percent of black American children fall into this category. Jason DeParle, *Study Finds Many Children Don't Benefit from Credits*, N.Y. TIMES, Oct. 2, 2005, at A1. Senators Olympia Snowe and Blanche Lincoln sponsored a bill to lower the earnings threshold, Working Family Child Assistance Act, S. 1775, 109th Cong. (2005), but withdrew it from the Katrina tax legislation package under pressure, *see* Martin Vaughan, *Katrina Bill Back on Track as Dems Back Off Key Demand*, CONGRESSDAILY, Nov. 1, 2005, http://nationaljournal.com (select "CongressDaily," enter search string "Katrina bill back track Vaughan" in search box, select Item 1 on results list) (last visited Oct. 2, 2006).

57 I.R.C. § 163(h)(2)(D), 163(h)(3)–(4) (2000) (allowing deductibility of interest on principal residence and, in some cases, second home).

58 I.R.C. § 121 (West Supp. 2006) (excluding gain on sale of principal residence from taxation). There is a ceiling on the amount of gain ($250,000 for individuals, $500,000 for married taxpayers filing jointly). *Id.*

59 I.R.C. § 163(h)(3)(A)(ii), 163(h)(3)(C) (2000) (allowing taxpayer to deduct interest on home equity loan of up to $100,000).

60 I.R.C. § 401 (2000) (defining and setting requirements for qualified plans).

61 I.R.C. § 72(t)(2)(F) (2000) (allowing for penalty-free distribution from retirement plan for qualified first-time home buyers).

62 I.R.C. § 1014 (West Supp. 2006) (setting basis of inherited assets equal to fair market value of assets upon decedent's death).

fits of owning the house as property) but does not pay taxes on this form of income, which is referred to as "imputed" income.[63]

Taken together, these advantages are an example of a tax expenditure. The provisions encourage a particular economic behavior—homeownership—that is not part of a taxpayer's cost of producing income. Such encouragement through Code provisions has become increasingly common.

C. *Increasing Use of Tax Expenditures*

Even before the concept of tax expenditures was widely accepted, there were proposals to enact many or most federal social welfare programs through the Code. For example, in 1962 Milton Friedman put forward a plan for a negative income tax,[64] a version of which was proposed by President Richard Nixon as a type of welfare reform.[65] Some of the features of tax expenditures that make them less desirable as a policy matter (for instance, lack of transparency and a lower likelihood of voter oversight)[66] may make them more attractive to elected officials.[67]

Whatever the reason, tax expenditures are growing, both in absolute terms and in comparison to direct outlay programs.[68] The estimated outlay equivalent of tax expenditures for fiscal year 1999 was $831 billion—140% of the direct spending budget for that year.[69] Not

[63] Imputed rent on owner-occupied housing is included in Treasury's list of tax expenditures. OFFICE OF MGMT. & BUDGET, *supra* note 36, at 292 tbl.19-1.

[64] MILTON FRIEDMAN, CAPITALISM AND FREEDOM 190–95 (40th anniversary ed. 2002) (discussing advantages of negative income tax for alleviating poverty).

[65] *See generally* DANIEL P. MOYNIHAN, THE POLITICS OF A GUARANTEED INCOME: THE NIXON ADMINISTRATION AND THE FAMILY ASSISTANCE PLAN (1973) (detailing political history of President Nixon's proposal to reform welfare system by instituting negative income tax). The idea of replacing much of the social welfare system with a negative income tax continues to circulate. *See, e.g.*, Jonathan B. Forman, *Synchronizing Social Welfare Programs and Tax Provisions*, 59 TAX NOTES 417, 421–23 (1993) (suggesting refundable tax credits to replace welfare system).

[66] *See infra* Part I.D.

[67] Urban Institute scholar Gene Steuerle has commented that politicians prefer to spend by means of expenditures because they can simultaneously claim to be reducing government (by cutting taxes) while increasing spending through expenditures. Gene Steuerle, *Summers on Social Tax Expenditures*, 89 TAX NOTES 1639, 1639 (2000).

[68] *See, e.g.*, Charles A. Borek, *Decoupling Tax Exemption for Charitable Organizations*, 31 WM. MITCHELL L. REV. 183, 185–86 (2004) ("[T]he Code's traditional function of revenue raising has been eclipsed by its social engineering function . . . . [Congress has] moved in the direction of using the Code as a repository of expenditure provisions designed to implement federal social policies.").

[69] *See* Harry L. Gutman, *Reflections on the Process of Enacting Tax Law*, 86 TAX NOTES 93, 94 (2000) (comparing outlay and tax expenditure figures for fiscal year 1999 and noting dramatic growth in tax expenditures over last thirty years). Observers have noted this trend for several years. *See, e.g.*, Linda Sugin, *Tax Expenditure Analysis and*

only are tax expenditures growing relative to direct outlays, but tax expenditures for social programs are growing relative to those for business.[70] An often-cited example of this trend is the welfare reform of 1996. Groundwork for reform was laid when Congress, in 1990 and again in 1993, expanded the Earned Income Tax Credit,[71] accompanied by rhetoric extolling its consistency with "basic American values."[72]

President Bill Clinton's campaign pledge to eliminate "welfare as we know it,"[73] combined with the Republican Congress's "Contract with America,"[74] culminated in the enactment of the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA).[75] PRWORA replaced the Aid to Families with Dependent Children (AFDC) program, which offered direct cash subsidies to poor families,[76] with Temporary Assistance to Needy Families (TANF), a fixed block grant to states accompanied by stringent work requirements for recipients.[77] This combination of legislative events effectively replaced a direct outlay program with one based on tax relief[78]—a

Constitutional Decisions, 50 HASTINGS L.J. 407, 408 (1999) (noting that "the federal government spent more money through [tax expenditures in 1998] than through the discretionary appropriations process").

70 David A. Weisbach & Jacob Nussim, *The Integration of Tax and Spending Programs*, 113 YALE L.J. 955, 997 (2004) ("Social tax expenditures as a percentage of GDP increased over 40% [from 1968 to 1998] while business tax expenditures were cut in half. Social tax expenditures accounted for 79% of all tax expenditures in 1999, compared to 57% in 1980.").

71 The Earned Income Credit was enacted as part of President Ford's Tax Reduction Act of 1975. Pub. L. No. 94-12, § 204, 89 Stat. 26, 30–32 (1975) (current version at I.R.C. § 32 (West Supp. 2006)). It was originally intended to offset payroll taxes for workers who fell below a certain income level by means of a refundable tax credit, and later was renamed the Earned Income Tax Credit (EITC).

72 Christopher Howard, *Happy Returns: How the Working Poor Got Tax Relief*, AM. PROSPECT, Spring 1994, at 46, 46 (discussing origins and bipartisan popularity of EITC).

73 *See, e.g.*, John King, *Clinton Courts Black Voters*, TIMES-PICAYUNE (New Orleans), Mar. 14, 1992, at A10 (quoting Clinton as saying "I will change welfare as we know it but I will do it in ways that give people dignity in their lives").

74 Republican Contract with America, http://www.house.gov/house/Contract/CONTRACT.html (last visited Aug. 22, 2006).

75 Personal Responsibility and Work Opportunity Reconciliation Act, Pub. L. No. 104-93, §§ 101–16, 110 Stat. 2105, 2110–85 (1996) (codified as amended at 42 U.S.C. §§ 601–619 (West 2002, Supp. 2006 & Supp. July 2006)).

76 42 U.S.C. §§ 601–617 (1994) (repealed 1996).

77 Personal Responsibility and Work Opportunity Reconciliation Act, §§ 101–116, 110 Stat. at 2110–85.

78 For an argument that the current system, including the EITC and CTC plus work requirements, is a variation on Friedman's original scheme, see Robert A. Moffitt, *The Negative Income Tax and the Evolution of U.S. Welfare Policy*, 17 J. ECON. PERSP. 119 (2003).

program that has become a very significant "source of federal dollars" for low-income taxpayers.[79]

The rhetoric of welfare reform may reveal one reason Congress increasingly prefers tax expenditures.[80] The policy rationale behind public assistance—altruism—conflicts with the fear that public assistance raises the possibility of moral hazard.[81] Replacing direct aid with tax relief ensures that only the poor who pay taxes (the "worthy poor") will benefit.[82] Public officials and other commentators used similar rhetoric about moral worth when opining on the subject of federal aid for Katrina's victims.[83] However, this focus overlooks the potential disadvantages of using tax expenditures.

D. *Arguments Against Using Tax Expenditures*

Many commentators argue that providing benefits through tax expenditures rather than direct outlay programs is poor policy. Such commentators criticize the decreased transparency to voters of tax

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[79] Martha B. Coven, *The Freedom to Spend: The Case for Cash-Based Public Assistance*, 86 MINN. L. REV. 847, 849 (2002) (arguing that cash transfers are best form of assistance). Coven also notes that federal spending on TANF, a direct program, has fallen in real dollars, while the EITC has grown. *Id.* at 864–65.

[80] *See, e.g.*, Patrick Brogan, *"Welfare Mothers" Become Public Enemy No. 1 in U.S.*, HERALD (Glasgow), June 16, 1994, at 4 (discussing American politicians' characterization of welfare system as giving "subsidies to the undeserving poor," leading to criminal activity, and discouraging poor "from looking for jobs").

[81] "Moral hazard" refers to the increased risk of immoral behavior, and thus a negative outcome, where the person who causes a problem does not suffer the full (or any) consequences, or may actually benefit, from the problem. For example, fire insurance could decrease a building owner's incentive to invest in fire prevention. *See, e.g.*, Saul Levmore, *Coalitions and Quakes: Disaster Relief and its Prevention*, 3 U. CHI. L. SCH. ROUNDTABLE 1, 7 (1996) ("The most familiar example [of a fear of moral hazard] is that flood relief or subsidized flood insurance may encourage inefficient building on flood plains.").

[82] *See supra* note 39 (describing types of taxes often paid by low-income taxpayers). Professor Michele Landis has argued persuasively that "American relief efforts have historically sorted the poor by their relative moral worth" and that this preference has been used as a normative framework for our modern welfare state. "[T]he history of the American welfare state is inextricably bound up with disaster relief." Michele L. Landis, *Fate, Responsibility, and "Natural" Disaster Relief: Narrating the American Welfare State*, 33 LAW & SOC'Y REV. 257, 257–61 (1999) (pointing out that early efforts to offer welfare used rhetoric comparing poverty to earlier natural disasters).

[83] *See, e.g.*, Eric Deggans, *Add to Katrina's Toll Race-Tinged Rhetoric*, ST. PETERSBURG TIMES, Sept. 14, 2005, at 6A (quoting, among others, Rush Limbaugh and Fox News's Bill O'Reilly as indicating that at least some Katrina victims had themselves to blame for situation); States News Service, *Snowe, Lincoln Work to Bring Child Tax Credit to Needy Children*, Sept. 30, 2005 (reporting that Hurricane Katrina gave "added impetus" to efforts of Senators Snowe and Lincoln, *see supra* note 56, to increase availability of CTC because many "hard-working American families" did not make enough to qualify). In a later news story, Senator Snowe said, "These aren't people who are lounging around all day. They're working to provide for their families." Editorial, *Family Value: The Poor, Especially, Need the Child Tax Credit*, PITTSBURGH POST-GAZETTE, Oct. 11, 2005, at B6.

expenditures as compared to direct outlays,[84] the unpredictability of revenue loss and of taxpayer behavior,[85] possible economic distortions,[86] and the unsuitability of the Code, the Internal Revenue Service (the Service), and the tax bar as arbiters of social policy.[87]

The costs of tax breaks or exemptions are less visible to voters than the costs of a direct outlay program,[88] in part because it is easier to understand straightforward spending than the possible effect of a particular tax provision. Additionally, voters are less likely to object to an expenditure enacted through a tax provision (a tax break) even if they do not agree with its purpose.[89]

Programs that are effectuated through tax expenditures have less predictable results than a direct outlay program. Since it is not entirely certain how many taxpayers may change their behavior in order to take advantage of a tax break, and since, unlike direct expenditures, tax exemptions usually do not require an annual evaluation and approval process, the amount of forgone revenue is unknown.[90] A tax expenditure may grow unseen.[91]

The behavior of a taxpayer who receives a tax benefit may not align with the desired policy goal. Or the benefit may introduce economic distortion into a taxpayer's decision. For instance, the tax deduction for interest on mortgages may serve only to encourage the purchase of more expensive homes by the same people who would

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[84] *See infra* notes 88–89 and accompanying text.

[85] *See infra* notes 90–91 and accompanying text.

[86] *See infra* notes 92–99 and accompanying text.

[87] *See infra* notes 100–05 and accompanying text.

[88] *See, e.g.*, Mark P. Gergen, *The Selfish State and the Market*, 66 TEX. L. REV. 1097, 1111–12 (1988) (arguing that cost of direct subsidy "is more clearly signaled" than cost of tax preference). Of course, it can also be argued that this might be a good thing—for instance, when a program is socially very beneficial but distasteful to taxpayers in direct outlay form.

[89] Many taxpayers regard all taxation as the government taking away what is actually theirs. *See* Marjorie E. Kornhauser, *Legitimacy and the Right of Revolution: The Role of Tax Protests and Anti-Tax Rhetoric in America*, 50 BUFF. L. REV. 819, 899–900 (2002) (characterizing federalist anti-tax argument as "stressing that tax money is the people's money that 'belongs' to them, not the government"). *See generally* LIAM MURPHY & THOMAS NAGEL, THE MYTH OF OWNERSHIP: TAXES AND JUSTICE 42–45 (2002) (pointing out fallacy in concept that property rights are "natural" since property rights are conferred by legal system, including tax system).

[90] *See* Peter D. Enrich, *Saving the States from Themselves: Commerce Clause Constraints on State Tax Incentives for Business*, 110 HARV. L. REV. 377, 395 (1996) (discussing politicians' fondness for tax breaks due to their opacity, ease of adoption, and manipulable revenue estimates, in context of state taxes).

[91] Dan T. Coenen, *Business Subsidies and the Dormant Commerce Clause*, 107 YALE L.J. 965, 989 (1996). At the federal level, tax expenditures are not subject to the appropriations process. Mary L. Heen, *Reinventing Tax Expenditure Reform: Improving Program Oversight Under the Government Performance and Results Act*, 35 WAKE FOREST L. REV. 751, 759 & n.29 (2000).

have bought homes absent the deduction, rather than encouraging nonhomeowners to become homeowners.

Tax expenditures are also disadvantaged as a policy tool in comparison to in-kind programs because cash is fungible. Suppose a program has the goal of providing better nutrition to poor children.[92] Replacing such a program with a tax break may not fulfill the policy goal, because recipients of the tax break may spend the cash benefit on something else (although in theory tax breaks can be conditioned on certain behaviors).[93]

The progressive structure of the federal income tax system arguably makes tax expenditures more likely than direct outlays to create inequitable effects. Because of progressive rates, deductions give greater benefits to higher-bracket taxpayers than to lower-bracket taxpayers. This "upside-down" benefit[94] seems inconsistent with the policy rationale of progressive tax rates.[95] It also distorts economic preferences. For instance, deductions for charitable contributions are only available to taxpayers who itemize (wealthier taxpayers),[96] and are taken at the taxpayer's tax rate. Thus, the deduction gives preference to the charitable choices of the wealthy over those of the middle class or the poor.[97] Finally, tax expenditures rarely, if ever, provide a benefit to the poorest citizens, since citizens with low or no income cannot take advantage of tax expenditures.[98]

[92] The Commodity Supplemental Food Program supplies USDA commodity foods to states to supplement the diets of low-income pregnant and breastfeeding women, other new mothers up to one year postpartum, infants, children up to age six, and elderly people at least 60 years of age. 7 C.F.R. § 247 (2004).

[93] *See generally* Firouz Gahvari, *In-Kind Versus Cash Transfers in the Presence of Distortionary Taxes*, 33 ECON. INQUIRY 45 (1995).

[94] Surrey, *supra* note 34, at 720–25.

[95] Of course a lower tax bracket doesn't always correspond to a lower socioeconomic level. For instance, a wealthy person whose sole income is capital gains would be taxed at the (lower) capital gains rate.

[96] About two-thirds of the nation's individual taxpayers take the standard deduction. Most of those who itemize are high-income taxpayers. For instance, in 2003, 33.7% of submitted tax returns (43,949,941) used itemized deductions, while the remainder used the standard deduction. More than 90% of taxpayers with incomes over $100,000 itemize their deductions, while less than 9% of taxpayers with incomes under $25,000 do so. Internal Revenue Service, All Returns: Adjusted Gross Income, Exemptions, Deductions, and Tax Items for 2003, http://www.irs.gov/pub/irs-soi/03in12ms.xls (last visited Aug. 20, 2006). Even if a taxpayer has enough losses to itemize deductions, these losses do not produce a refundable credit.

[97] *See, e.g.*, Vada Waters Lindsey, *The Charitable Contribution Deduction: A Historical Review and a Look to the Future*, 81 NEB. L. REV. 1056, 1083–85 (2003) (citing statistics showing lower-income taxpayers contribute greater percentage of income to charitable organizations than higher-income taxpayers, but that majority of charitable contribution deductions are claimed by higher-income taxpayers).

[98] *See supra* notes 47–56 and accompanying text.

Therefore, the overall benefit system created by tax expenditures is skewed.[99]

The Internal Revenue Code and Regulations are incredibly complex. A recent estimate put the number of words in the combined Code and Regulations at approximately nine million.[100] Yet in recent years this cumbersome tool has been utilized for the new task of implementing social policy.[101] The Code's structure and purpose do not serve this task well.

The Service is not especially suited to the implementation of social programs. Its mission is to help taxpayers "understand and meet their tax responsibilities" and to "apply[ ] the tax law with integrity and fairness to all."[102] Tax scholars contend that efforts to implement social programs through the Code "burden[ ] the Internal Revenue Service with administrative and enforcement responsibilities for subsidy programs outside of its traditional revenue collection function, costs that are not always considered when new tax incentives are enacted."[103] Many members of the tax bar are trained primarily in assisting large businesses to structure corporate transactions in a way that is tax-advantaged.[104] In sum, the Code, the Service, and the tax bar are not well-suited to administer a "vehicle for social policy."[105]

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99 A specialist in economic policy at the Congressional Research Service echoed this view when asked to provide tax policy options that would aid in recovery of the region:

> The most effective way to stimulate the economy through fiscal measures is to increase direct spending, or to provide tax cuts to people who are likely to spend most of it, which are likely to be lower and moderate income individuals. . . . Some provisions that already exist in the tax law can aid victims of the disaster, although the benefits are more likely to be concentrated among higher income individuals.

JANE G. GRAVELLE, CONG. RESEARCH SERV., TAX POLICY OPTIONS AFTER HURRICANE KATRINA 2–5 (2005), *available at* http://fpc.state.gov/documents/organization/53669.pdf (also discussing timing issues and difficulties with directing tax aid to particular geographic region).

100 *See, e.g.*, Editorial, *Taxing Words*, WALL ST. J., Nov. 1, 2005, at A16 (estimating number of words in Title 26 of United States Code at 3.4 million and number of words in combined Code and Regulations at approximately nine million).

101 *See supra* Part I.C.

102 Internal Revenue Service, The IRS Mission, http://www.irs.gov/irs/article/0,,id=98141,00.html (last visited Aug. 8, 2006).

103 Mary L. Heen, *Congress, Public Values, and the Financing of Private Choice*, 65 OHIO ST. L.J. 853, 911 (2004).

104 *See, e.g.*, Joseph Bankman, *The Business Purpose Doctrine and the Sociology of Tax*, 54 SMU L. REV. 149, 150 (2001) (describing practice of tax bar).

105 Leslie Book, *The IRS's EITC Compliance Regime: Taxpayers Caught in the Net*, 81 OR. L. REV. 351, 360 (2002) (positing that current compliance regime does not reflect understanding of true circumstances of low-income taxpayers, and arguing for increased funding and publicity for low-income tax clinics).

E. *Arguments in Favor of Using Tax Expenditures*

Any means-tested social program (one for which eligibility is determined on the basis of income, such as Medicaid[106]) may be a good candidate for administration by the Service, given its institutional expertise;[107] the Service is already in the business of calculating taxpayers' incomes. Even if putting a program under the auspices of the Service is an additional burden to it, such a shift might be a lesser burden to government as a whole.[108]

Some programs may produce better results when implemented through tax expenditures than through direct expenditure programs. A prominent study by David Neumark and William Wascher concluded that the EITC was more effective than the minimum wage in lifting poor families above the poverty level.[109]

Another possible advantage of tax expenditures is the perceived "permanence" of the tax code—its provisions are not reevaluated on an annual basis, unlike the direct outlays in an annual budget. A taxpayer may be more likely to participate in the desired behavior, such as homeownership, if he perceives the subsidy for the behavior to be permanent. The embodiment of the mortgage deduction in the Code can be perceived as permanent and therefore more secure, in contrast to a direct housing subsidy given under an annual budget, which must be reapproved every year.[110]

A final argument in favor of tax expenditures deals with circumstances of local corruption. If direct aid must be funneled through local public officials who cannot be trusted to treat funds lawfully, one could argue that tax expenditures are preferable. Certainly Louisiana has a reputation (apparently well-deserved) for corrupt public officials.[111]

These possible advantages are not relevant in the context of disaster relief, however. None of the provisions of KETRA or GOZA

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106 42 U.S.C. § 1396 (2000).

107 Weisbach & Nussim, *supra* note 70, at 1001–02.

108 *Id.* at 981–82.

109 David Neumark & William Wascher, *Using the EITC to Help Poor Families: New Evidence and a Comparison with the Minimum Wage*, 54 NAT'L TAX J. 281, 315 (2001) (finding higher minimum wage helps families with adults in work force, whereas increasing EITC helps families that initially have no adult workers).

110 Edward A. Zelinsky, *Do Tax Expenditures Create Framing Effects? Volunteer Firefighters, Property Tax Exemptions, and the Paradox of Tax Expenditure Analysis*, 24 VA. TAX REV. 797, 805 (2005) (arguing taxpayer might view tax subsidy as more secure than direct outlay assistance).

111 Gerard Shields, *Jefferson Cloud Only the Latest for La.*, ADVOCATE (Baton Rouge, La.), Aug. 14, 2005, at 9B (citing study showing Louisiana as third in nation for number of public officials convicted of federal crimes per capita).

required means testing, for example.[112] Disasters create short-term emergencies that require rapid responses, unlike enduring problems such as poverty that require long-term solutions. The "permanence" advantage is also irrelevant because most disaster provisions are temporary.[113] The argument that tax expenditures avoid local corruption does not explain why individual tax relief is superior to individual direct grants, nor does it take into account the need for large-scale restoration of infrastructure—a task not easily accomplished by means of relief to individuals.

F. Disaster Relief Under the Code, Generally

Congress has offered forms of tax relief in response to disasters since 1789.[114] Provisions permitting deductions for "losses" due to "fires, storms, shipwreck or other casualty" were part of the earliest Internal Revenue Code.[115] Since 1997, a presidential disaster declaration triggers certain Code provisions,[116] automatically giving Treasury the ability to provide affected taxpayers with extensions of dead-

[112] *See infra* Part II. Provisions of KETRA relating to the EITC and CTC did not, of course, remove the existing income level requirements, and neither did they alter them. However, certain provisions did permit use of a "look-back" rule under which taxpayers may use a prior year's income in calculating the EITC and CTC. *See infra* notes 142–43 and accompanying text.

[113] For example, KETRA permits certain pension fund withdrawals for Katrina victims until year-end 2007, *see infra* notes 127–29 and accompanying text; authorizes a deduction for taxpayers who host a Katrina "displaced individual" as a guest in their homes in 2005 or 2006, *see infra* notes 136–38 and accompanying text; and allows unlimited charitable donations made through year-end 2006 to be deducted from an individual's taxable income, *see infra* notes 155–56 and accompanying text.

[114] Michele L. Landis, *"Let Me Next Time Be 'Tried By Fire'": Disaster Relief and the Origins of the American Welfare State 1789–1874*, 92 Nw. U. L. Rev. 967, 978–79 (1998) (describing "private bill" process by which refunds of excise taxes on destroyed or damaged goods were made).

[115] An Act to Increase the Revenue (Revenue Act of 1916), ch. 463, 39 Stat. 756, 759 (current version at I.R.C. § 165 (2000)).

[116] The current framework governing federal relief in presidentially declared major disasters derives from the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. §§ 5121–5197 (2000), enacted in 1988. The Act superseded earlier laws, often prompted by some specific disaster, which also sought to coordinate disaster relief programs. *See, e.g.*, Disaster Relief Act of 1969, Pub. L. No. 91-79, 83 Stat. 125 (prompted by Hurricane Camille). More recent amendments have attempted to tie aid to local efforts to mitigate the effect of natural disasters. *See, e.g.*, Disaster Mitigation Act of 2000, Pub. L. No. 106-390, § 104, 114 Stat. 1552, 1538 (2000) (amending 42 U.S.C. § 5165 to offer increased disaster aid to localities that have submitted "mitigation plan" and taken steps to reduce natural hazards). The Act establishes the protocol for requesting and obtaining a major disaster declaration by the President, authorizes the President to direct federal agencies to provide assistance, defines the type and scope of assistance available from the federal government, and sets the conditions for obtaining assistance. 42 U.S.C. § 5170a, 5170c(c)(2).

lines.[117] Other Code sections permit exclusion or deferral of certain disaster-related income.[118]

Congress expanded or extended many existing provisions in designing VTTRA[119] and JCWAA,[120] the first geographically targeted relief provisions.[121] As I discuss in the next Part, both KETRA[122] and GOZA[123] were built on the existing design of these earlier packages.

II
The Provisions of KETRA and GOZA

A. *Income Exclusions, Exemptions, and Deferrals*

Several Code provisions exclude certain income received under disaster conditions.[124] KETRA and GOZA expanded and added to these provisions. For instance, the period for replacing property destroyed in a disaster in order to avoid recognition of casualty gains was extended from two to five years for property within the zones

117 The Service has authority to postpone deadlines for filing, suspend the running of interest, and waive or abate interest, penalties, and additions to tax. I.R.C. § 7508A (Supp. II 2002) (originally enacted as Taxpayer Relief Act of 1997, Pub. L. No. 105-34, § 911, 111 Stat. 788, 877–78). Originally the permitted period of suspension was specified as 90 days. I.R.C. § 7508A (2000). In 2001, Congress amended section 7508A to increase the possible extension to as much as one year. Victims of Terrorism Tax Relief Act of 2001, Pub. L. No. 107-134, § 112, 115 Stat. 2427, 2433 (2002) (amending I.R.C. § 7508A). Taxpayers affected by Hurricane Katrina had until February 28, 2006 to file returns, pay taxes, file claims for credits or refunds, or file a petition with the Tax Court if the prior deadline for those acts had not expired before August 25, 2005. Katrina Emergency Tax Relief Act, Pub. L. No. 109-73, § 403, 119 Stat. 2016, 2027 (2005) (amending I.R.C. § 7508(a) and applying relief provisions of I.R.C. § 7508A to Katrina victims).

118 *See, e.g.*, I.R.C. § 1033(h)(1)(A)(i) (2000) (permitting exclusion of insurance proceeds received for personal property destroyed in presidentially declared disaster); *see also infra* Part II.A.

119 Victims of Terrorism Tax Relief Act of 2001, Pub. L. No. 107-134, 115 Stat. 2427 (2002) (codified in scattered sections of I.R.C. and other titles).

120 Job Creation and Worker Assistance Act of 2002, Pub. L. No. 107-147, 116 Stat. 21 (codified in scattered sections of I.R.C. and other titles).

121 *See supra* note 31.

122 Katrina Emergency Tax Relief Act, Pub. L. No. 109-73, 119 Stat. 2016 (codified at I.R.C. §§ 170, 7508 (2006)). The Act gave temporary tax breaks estimated by the Joint Committee on Taxation at over $6 billion over a ten year period to victims of Hurricane Katrina—both individuals and businesses. Staff of J. Comm. on Taxation, 109th Cong., Estimated Revenue Effects of the House Resolution of Concurrence with an Amendment to the Senate Amendment to H.R. 3768, the "Katrina Emergency Tax Relief Act of 2005" (Comm. Print 2005), *available at* http://www.house.gov/jct/x-68-05.pdf. Most provisions were specific to Hurricane Katrina victims, and even within that group benefits varied depending on location. *See infra* note 125.

123 Gulf Opportunity Zone Act of 2005, Pub. L. No. 109-135, 119 Stat. 2577 (codified at I.R.C. §§ 38, 54, 1400L-T (West Supp. 2006)).

124 For an excellent overview of the current "disaster regime" under the Code, see Francine J. Lipman, *Anatomy of a Disaster Under the Internal Revenue Code*, 6 Fla. Tax Rev. 953 (2005).

defined by the legislation.[125] KETRA also added a new item to the "excluded income" list: the forgiveness of outstanding mortgage balances. A taxpayer whose principal residence was in the "core disaster area" or who suffered economic loss and had his principal residence in the general disaster area may exclude this cancellation of debt from income.[126] KETRA also expanded certain income deferral provisions. A taxpayer whose principal residence was in the disaster area may withdraw up to $100,000 penalty-free from qualified pension plans between August 25, 2005 and January 1, 2007; has three years to roll the funds back into those accounts; and if unable to roll back, may average the income over three years (thus also averaging taxes over three years).[127] If the taxpayer later manages to roll the income over into the plan, she can refile and get a refund of any tax she paid on the income.[128] The taxpayer may also borrow up to $100,000 from a qual-

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[125] KETRA § 405, 119 Stat. at 2028 (modifying I.R.C. § 1033(h)(1)(B) (West Supp. 2006)). This extension was first enacted as part of the Victims of Terrorism Tax Relief Act and codified at I.R.C. § 1400L(g) (Supp. III 2003). The term "Hurricane Katrina disaster area" is defined in the law as an area with respect to which a major disaster has been declared by the President by reason of Hurricane Katrina. STAFF OF J. COMM. ON TAXATION, 109TH CONG., TECHNICAL EXPLANATION OF H.R. 3768, THE "KATRINA EMERGENCY TAX RELIEF ACT OF 2005" AS PASSED BY THE HOUSE AND THE SENATE ON SEPTEMBER 21, 2005 at 2 (Comm. Print 2005), *available at* http://www.house.gov/jct/x-69-05.pdf [hereinafter TECHNICAL EXPLANATION]. This includes the states of Alabama, Florida, Louisiana, and Mississippi. *Id.* The term "core disaster area" refers to specific areas within those states which were designated by the President as eligible for individual, or individual and public, assistance from the federal government under the Stafford Act. *Id.* For example, all the parishes of the New Orleans Metropolitan Area (Orleans, Jefferson, Plaquemines, St. Bernard, St. Charles, St. John the Baptist, and St. Tammany) received federal funding. Press Release, Fed. Emergency Mgmt. Agency, President Declares Major Disaster for Louisiana (Aug. 29, 2005), *available at* http://www.fema.gov/news/newsrelease.fema?id=18478. The Gulf Opportunity Zone Act added a number of definitions identifying geographical areas entitled to certain tax relief due to the impact of Hurricanes Rita and Wilma (and replaced the term "core disaster area" with the term "Opportunity Zone"). § 101(a), 119 Stat. at 2578–79 (codified at I.R.C. § 1400M (West Supp. 2006)).

[126] KETRA § 401, 119 Stat. at 2026–27. (This provision was not extended by GOZA to cover victims of Hurricanes Rita and Wilma.) Ordinarily the discharge of debt is income, I.R.C. § 108 (2000), with certain exceptions, TECHNICAL EXPLANATION, *supra* note 125, at 28. The discharges or reductions of debt must be made between August 25, 2005 and January 1, 2007, and must be made by specific entities such as banks or credit unions (i.e., not other individuals). *Id.* at 28–29. Taxpayers must still reduce their basis in the property by the amount of debt forgiven. *Id.* at 29.

[127] KETRA § 101, 119 Stat. at 2017–19 (exempting Hurricane Katrina distributions from I.R.C. § 72(t) (2000), which imposes a ten percent early withdrawal tax for early withdrawals). This provision was extended to cover victims of Hurricanes Rita and Wilma by GOZA § 201, 119 Stat. at 2596–2598 (codified at I.R.C. § 1400Q(a) (West Supp. 2006)).

[128] KETRA § 101, 119 Stat. at 2017–19.

ified employer plan; such a loan will have its due date extended for one year.[129]

B. Deductions

Other Code provisions permit deductions for certain disaster-related losses;[130] KETRA and GOZA increased the availability of these deductions and also created a new deduction. First, KETRA removed the one hundred dollar and ten percent "floors" for casualty losses[131] that occurred in the disaster area and are attributable to Hurricane Katrina.[132] Such losses must be itemized, are accounted for separately from other casualty losses, and, under the throwback election rule,[133] can be deducted from an amended 2004 return for faster relief.

GOZA also extended the period over which a certain type of deduction, the net operating loss (NOL), may be "carried back." When a taxpayer's losses exceed his gross income, he has an NOL, which ordinarily may be "carried back" and deducted from taxable income in the two prior tax years or "carried forward" for the next

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129 KETRA § 103, 119 Stat. at 2019–20 (exempting loans taken from qualified plans for relief relating to Hurricane Katrina from I.R.C. § 3405(c) (2000), which imposes mandatory twenty percent withholding penalty for distributions not rolled over to another qualified plan). This provision was extended to cover victims of Hurricanes Rita and Wilma by GOZA § 201, 119 Stat. at 2599–2600 (codified at I.R.C. § 1400Q(c) (West Supp. 2006)). The Service made changes to the hardship loan rules for such plans such that family members outside the Katrina area also may take such loans or distributions to help family members in the area. I.R.S. Announcement 2005-70, 2005-40 I.R.B. 682.

130 *E.g.*, I.R.C. § 165(a) (2000) (permitting deduction for losses in general); I.R.C. § 165(h) (2000) (permitting deduction for casualty losses). The deduction is reduced by any insurance payments. § 165(a).

131 Usually a taxpayer who suffers a loss due to a casualty (defined in I.R.C. § 165(c)(3) (2000) as a "fire, storm, shipwreck, or other casualty, or from theft") may deduct it from income so long as the loss is at least one hundred dollars, I.R.C. § 165(h)(1) (2000), and also at least ten percent of the taxpayer's AGI, § 165(h)(2).

132 KETRA § 402, 119 Stat. at 2027. This section of KETRA was later replaced with similar language that applied more broadly to victims of Hurricanes Katrina, Wilma, and Rita. GOZA § 201, 119 Stat. at 2605 (codified at I.R.C. § 1400S(b) (West Supp. 2006)). This deduction is available even for individuals who would pay tax under the alternative minimum tax (AMT) regime. The AMT is an alternative tax regime created in an effort to prevent high-income taxpayers from using special tax benefits to completely avoid tax liability. MICHAEL J. GRAETZ & DEBORAH H. SCHENK, FEDERAL INCOME TAXATION: PRINCIPLES & POLICIES 768–71 (5th ed. 2005); *see also* I.R.C. § 55 (2000). A taxpayer whose income is above a certain level must calculate his tax liability both with and without taking certain deductions and exemptions into account. GRAETZ & SCHENK, *supra*, at 773. If under the AMT rules his tax liability is greater, he must pay that amount. *Id.*; *see also* § 55.

133 I.R.C. § 165(i) (2000).

twenty years.[134] NOLs attributable to Hurricane Katrina may be carried back five years.[135]

KETRA introduced a deduction for housing a "Hurricane Katrina displaced individual."[136] A taxpayer who houses individuals displaced as a result of Hurricane Katrina may take a deduction of $500 for each person, up to four people, so long as the guest is housed in the taxpayer's principal residence for at least sixty days in 2005 or 2006 and is not the taxpayer's spouse or other dependent.[137] This deduction is available in addition to the standard deduction, can be claimed only once in all taxable years for any given person, and must be authenticated with the guest's taxpayer identification number on the taxpayer's return.[138]

GOZA offered an additional fifty percent depreciation allowance for business real property placed in service in the Gulf Opportunity Zone.[139] GOZA also permitted businesses to expense (deduct) certain business property rather than to capitalize its cost over time,[140] and to deduct fifty percent of any cleanup costs associated with the hurricane.[141]

C. *Credits Against Tax Liability*

Two provisions of KETRA modified the EITC and the CTC.[142] A taxpayer whose principal residence was in the core disaster area, or whose principal residence was in the general disaster area and who was displaced, may use her 2004 income for purposes of calculating

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134 I.R.C. § 172 (2000).

135 GOZA § 101, 119 Stat. at 2587–89 (codified at I.R.C. § 1400N(k) (West Supp. 2006)).

136 KETRA § 302, 119 Stat. at 2023–24. This provision was not extended by GOZA to cover victims of Hurricanes Rita and Wilma.

137 *Id.*

138 *Id.* Again, this deduction is applicable even to a taxpayer under the AMT regime. If the guest's principal residence was outside the core area but within the disaster area, that residence must have been damaged by Hurricane Katrina or such person must have been evacuated from the residence by reason of Hurricane Katrina; there is no such requirement for guests whose principal residence was in the core area. KETRA § 302(c), 119 Stat. at 2024.

139 GOZA § 101, 119 Stat. at 2582–83 (codified at I.R.C. § 1400L(d) (West Supp. 2006)). Congress had previously granted an additional thirty percent depreciation allowance to Liberty Zone businesses. Job Creation and Worker Assistance Act of 2002, Pub. L. No. 107-147, § 301, 116 Stat. 21, 34 (amending I.R.C. § 1400L(b) (West Supp. 2006)).

140 I.R.C. § 1400N(e) (West Supp. 2006), as added by section 101 of the Gulf Opportunity Zone Act, permits an increased amount of such property (referred to as "179 property") to be expensed, just as I.R.C. § 1400L(f)(1)(A) (West Supp. 2006), added by section 301 of the Job Creation and Worker Assistance Act, did for property in the Liberty Zone.

141 GOZA § 101, 119 Stat. at 2584 (amending I.R.C. § 1400N(f)(2)).

142 For an explanation of the EITC and the CTC, see *supra* notes 51–56 and accompanying text.

both credits for the 2005 tax year, so long as her earned income for 2005 is less than that for 2004.[143] Second, KETRA granted Treasury the authority to relax the residency requirements for the CTC and the EITC.[144] Finally, KETRA mitigated the usual harsh penalty for a fraudulent EITC claim[145] by providing that the incorrect use of earned income on a tax return "shall be treated as a mathematical or clerical error,"[146] exempting the return from the penalty.

KETRA modified the Work Opportunity Tax Credit (WOTC), which is available to a business that employs a member of certain targeted groups.[147] After 9/11, employees of businesses in the New York Liberty Zone were declared to be a targeted group for purposes of this credit;[148] similarly, KETRA added "Hurricane Katrina employees" to the list.[149] Any business in the core disaster area that hires such an employee within two years may claim the credit.[150] If an employer is located in an Opportunity Zone,[151] it may claim an

[143] KETRA § 406, 119 Stat. at 2028 (repealed 2005). The provision was repealed by GOZA but replaced with language reenacting the same benefit and extending it to victims of Hurricanes Rita and Wilma. GOZA § 201, 119 Stat. at 2605–06 (codified at I.R.C. § 1400S(d) (West Supp. 2006)) (referencing I.R.C. §§ 24(d), 32 (West Supp. 2006)).

[144] KETRA § 407, 119 Stat. at 2029 (repealed 2005) ("[Treasury] may make such adjustments in the application of the internal revenue laws as may be necessary to ensure that taxpayers do not lose any deduction or credit or experience a change of filing status by reason of temporary relocations by reason of Hurricane Katrina."). The provision was repealed by GOZA but replaced with language identical but for the inclusion of victims of Hurricanes Rita and Wilma. GOZA § 201, 119 Stat. at 2607 (codified at I.R.C. § 1400S(e) (West Supp. 2006)). The Joint Committee on Taxation has suggested that one such adjustment would be to the residency requirement. TECHNICAL EXPLANATION, *supra* note 125, at 38–39.

[145] Congress and the Service have expressed concern over a high percentage of fraudulent claims for the EITC. I.R.S. Fact Sheet FS-2003-14 (June 2003) (reporting $716 million congressional appropriation to reduce EITC reporting errors and announcing five-point initiative to reduce "persistent compliance problems" associated with EITC). If a taxpayer files fraudulently, he may not file for the EITC for ten years. I.R.C. § 32(k) (2000).

[146] KETRA § 406(d)(3), 119 Stat. at 2028 (repealed 2005). This section was replaced by substantively identical language in GOZA § 201, 119 Stat. at 2607 (codified at I.R.C. § 1400S(d)(5)(C) (West Supp. 2006)).

[147] I.R.C. § 51 (2000). Targeted groups include TANF recipients, veterans, ex-felons, high-risk youths, and others. § 51(d).

[148] Job Creation and Worker Assistance Act of 2002, Pub. L. No. 107-147, § 301, 116 Stat. 21, 33 (amending I.R.C. § 1400L(a)(1) (West Supp. 2006)); I.R.C. § 38(c)(3) (West Supp. 2006).

[149] KETRA § 201, 119 Stat. at 2020–21 (applying I.R.C. § 51 to "Hurricane Katrina employees"). A "Hurricane Katrina employee" is defined as "any individual who on August 28, 2005, had a principal place of abode in the core disaster area" and either (1) is hired during the subsequent two years for a position located in the core disaster area or (2) was displaced from his principal residence and is hired before December 31, 2005 for a position without regard to its location. § 201(b), 119 Stat. at 2020–21.

[150] KETRA § 201, 119 Stat. at 2020–21. The credit is based on a percentage of the employee's wages. I.R.C. § 51(a) (2000).

[151] *See supra* note 125.

Employee Retention Credit for workers employed on August 28, 2005. This credit is applicable only during the period when the business is inoperable but continuing to pay employees that were employed at its core area location.[152]

D. *Indirect Relief to Victims*

Certain Code provisions are designed to encourage investment or donations by some taxpayers to benefit others; these provisions provide indirect aid to victims of a disaster rather than direct tax relief. Charitable donations are an example of such a provision. KETRA, as well as the Service itself, altered the treatment of charitable donations. After 9/11, the Service created a program by which employees could donate vacation or other leave time to a 9/11 charity. The employee's business then donated a corresponding amount of cash and received a deduction.[153] The Service revived this program after Katrina.[154] Congress took other steps to encourage charitable donations: It removed the usual limitation on deductions for contributions made through the end of 2006,[155] and did not require that contributions be earmarked for Katrina relief.[156] Congress also removed the

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152 KETRA § 202, 119 Stat. at 2021–22 (repealed 2005). The provision was repealed by GOZA but replaced with language reenacting the credit and extending it to victims of Hurricanes Rita and Wilma. GOZA § 201, 119 Stat. at 2601 (codified at I.R.C. § 1400R (West Supp. 2006)). The credit is available regardless of whether such employees are working for the business elsewhere or are not working at all. *Id.*

153 I.R.S. Notice 2001-69, 2001-46 C.B. 491, as modified and superseded by I.R.S. Notice 2003-1, 2003-1 C.B. 257.

154 I.R.S. News Release IR-2005-97 (Sept. 8, 2005). The Service also fast-tracked tax-exempt status to organizations, I.R.S. News Release IR-2005-93 (Sept. 6, 2005), just as it had done after 9/11, I.R.S. News Release IR-2001-82 (Sept. 18, 2001).

155 KETRA § 301, 119 Stat. at 2022–23 (repealed 2005). The provision was repealed by GOZA but replaced with language substantively identical but for the inclusion of charitable contributions related to Hurricanes Rita and Wilma as well as to Katrina. GOZA § 201, 119 Stat. at 2604–05 (codified at I.R.C. § 1400S(a) (West Supp. 2006)). Ordinarily an individual may not deduct more than fifty percent of his AGI. I.R.C. § 170(b)(1) (2000).

156 *See* Press Release, U.S. Sen. Comm. on Fin., *supra* note 15. The lack of earmarking was an explicit response to certain problems with 9/11 charities. Many were oversubscribed soon after the disaster, leading to public outcry when they directed donations elsewhere, and non-9/11 charities suffered a drop in donations. *See* Robert A. Katz, *A Pig in a Python: How the Charitable Response to September 11 Overwhelmed the Law of Disaster Relief*, 36 IND. L. REV. 251 (2003) (describing problems of oversubscribed 9/11 charities); Diana Penner, *Area Charities See Drop in Contributions*, INDIANAPOLIS STAR, Oct. 28, 2001, at 1A (describing precipitous drop in donations to non-9/11 charities). The plan may not have worked so well. *See* Miriam Kreinin Souccar, *Disasters Hit NY Charities' Holidays*, CRAIN'S N.Y. BUS., Dec. 5, 2005, at 1 (stating that some charities "have seen donations plummet by as much as 50%" and attributing diminution in part to Katrina donations).

ten percent ceiling for corporate donations,[157] but did require that corporate donations be earmarked for hurricane relief efforts.[158] Finally, KETRA provided that Katrina charity volunteers need not include mileage reimbursement in their taxable income.[159]

The qualified mortgage revenue bond provides a similar form of indirect relief.[160] Here, tax relief is designed as an incentive to those who invest in bonds: The interest paid to investors on qualifying bonds is tax-exempt as long as the bonds meet certain requirements.[161] The requirements are meant to encourage states to offer mortgages to low-income, first-time home buyers. For example, ninety-five percent or more of the proceeds must be used to finance mortgage loans to first-time home buyers,[162] the residence purchase prices cannot exceed a certain amount,[163] and some portion of the loans must be placed in "targeted" areas (areas in which a specified percentage of residents have income below a certain level).[164] The interest savings made possible by the tax exemption are then passed along to the mortgagors, lowering the cost of the mortgages.[165]

Some of these requirements are relaxed under KETRA; most importantly, potential mortgagors need not be first-time homeowners. Anyone who owned a principal residence in the core Katrina area at the time of the disaster, or who owned a principal residence that Katrina rendered uninhabitable within the larger disaster area, is eli-

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157 KETRA § 301, 119 Stat. at 2022 (repealed 2005) (temporarily suspending ten percent ceiling for corporate donations under I.R.C. § 170 (2000)). Although repealed by GOZA, the provision was replaced by a substantially identical provision also including corporate donations for victims of Hurricanes Rita and Wilma. GOZA § 201, 119 Stat. at 2604 (codified at I.R.C. § 1400S(a)(1) (West Supp. 2006)).

158 KETRA § 301(d)(1)(B), 119 Stat. at 2023 (repealed 2005). Again, a parallel provision, this time for all three hurricanes, was included in GOZA. § 201, 119 Stat. at 2605 (codified at I.R.C. § 1400S(a)(4)(A)(ii) (West Supp. 2006)). Additional deductions for in-kind contributions by corporations have been expanded. For instance, the deduction for food inventory donations is generally not available to S corporations, LLCs or partnerships, but this deduction was made available to these entities until the end of 2005. KETRA § 305, 119 Stat. at 2025. The deduction for contributions of book inventories has also been enhanced. KETRA § 306, 119 Stat. at 2025–26. These deductions are beyond the scope of this Note.

159 KETRA § 304, 119 Stat. at 2024–25. This provision was not extended by GOZA to cover volunteers providing relief for Hurricanes Rita and Wilma.

160 Qualified mortgage revenue bonds are issued by state or local governments. The government then loans the revenue from sales of these bonds to citizens of the state or municipality as low-interest residential mortgages, in order to encourage homeownership.

161 *See* I.R.C. § 143(d)–(i), (m) (2000) (outlining requirements).

162 I.R.C. § 143(d)(1) (2000).

163 I.R.C. § 143(e) (2000).

164 I.R.C. § 143(h)(1) (2000).

165 I.R.C. § 143(g)(2) (2000) (effective rate of interest on mortgages offered cannot exceed bond yield by more than 1.125 percentage points).

gible.[166] In addition, Alabama, Louisiana, and Mississippi may issue similar tax-exempt bonds to improve or rebuild certain public utility property (but not dams, levees, bridges, or roads).[167]

Even this brief discussion shows that KETRA and GOZA offer tax relief in the usual forms (deferral, exclusions, exemptions, and deductions from income; credits against income; acceleration of deductions; and postponement of deadlines) with a geographic variation (most of the relief is available only to persons who lived in a specific area or suffered economic loss because of Hurricanes Katrina, Wilma, or Rita). In the next Part, I will examine the "fit" between the specific features of this legislation and its intended targets: the population and the economy of the Gulf Coast.

III
Potential Effects of KETRA and GOZA on the Gulf Coast Population

As noted earlier, KETRA and GOZA were based on existing tax relief packages that were designed to help the New York economy recover from the 9/11 attacks.[168] At the time the Katrina legislation was proposed, some lawmakers and commentators questioned whether a package designed for one disaster could be suitably retrofitted for another.[169] Among other distinctions,[170] the income levels of the affected populations were quite different.[171] This difference is significant given two acknowledged effects of tax expenditures—producing upside-down benefits and offering few benefits to

166 Katrina Emergency Tax Relief Act, Pub. L. No. 109-73, § 404, 119 Stat. 2016, 2027–28 (limiting financing to residences in core disaster area or those in same state as prior residence). The Gulf Opportunity Zone Act of 2005 extended the date before which financing must be provided, but did not extend the provision to areas affected by Hurricanes Rita and Wilma. Pub. L. No. 109-135, § 104, 119 Stat. 2577, 2595.

167 GOZA § 101, 119 Stat. at 2579–80 (codified at I.R.C. § 1400N(a)); *see also* I.R.C. § 168(i)(10) (2000) (defining "public utility property").

168 *See supra* notes 13–16 and accompanying text.

169 *See supra* notes 17–18 and accompanying text.

170 The World Trade Center attacks resulted in a greater loss of life than did Hurricane Katrina. *See* Nat'l Comm'n on Terrorist Attacks Upon the U.S., The 9/11 Commission Report 552 (2004) (stating that over 2700 people died in World Trade Center attacks); Lipton, *supra* note 7 (estimating 1400 deaths along Gulf Coast as result of Katrina). The effect of the Trade Center attacks on infrastructure was concentrated in a small area, in comparison to the 90,000 square miles affected by Katrina. *See* Associated Press, *supra* note 8. The area devastated by the 9/11 attacks was primarily a business sector; the number of Lower Manhattan residents who lost homes (or at least access to their residences for a period of time) is miniscule compared to the number of people displaced by Katrina, estimated at one million. *Id.*

171 *See infra* notes 183–87 and accompanying text.

lower-income taxpayers.[172] Additionally, doubts about the efficacy of both the Code's timing framework and geographic targeting, in the context of disaster relief, remained after the 9/11 legislation.[173]

A. *Failure to Reach the Most Affected Victims*

The very poor do not benefit from tax expenditures in general,[174] and the effects of a disaster make the very poor even less likely to benefit. The most obvious example is families with no income, or income so low that they do not owe taxes. Provisions of KETRA and GOZA that permit taxpayers to exclude or deduct income are useless to such taxpayers. For instance, a taxpayer with no taxable income cannot use the casualty loss deduction, even as expanded by KETRA.[175] Tax credits are similarly unhelpful (with the exception of the provisions modifying the EITC and CTC,[176] since those are at least partially refundable). Given the high poverty rate of those affected,[177] relief through the tax code will not reach many of Katrina's victims.

Tax relief tends to skew benefits toward higher-income taxpayers and away from lower-income taxpayers, and this phenomenon is even more significant in the context of a disaster like the 2005 hurricane season, which affected poor citizens in large numbers. The poor suffer disproportionately greater economic harm;[178] they are slower to return to pre-disaster income levels;[179] and they have little wealth to provide an economic cushion during hard times.[180]

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172 *See supra* notes 94–99 and accompanying text.

173 *See* GRAVELLE, *supra* note 99, at 2–5 (questioning effectiveness of geographic targeting and discussing systematic "lag" in passing laws and getting money to taxpayers).

174 *See supra* notes 47–56 and accompanying text.

175 *See supra* notes 131–33 and accompanying text for a description of this deduction. A taxpayer whose taxable income is less than her losses cannot fully use this deduction, and even some taxpayers with sizeable taxable income will not end up using it because it must be itemized, and the total of their losses will fall below the standard deduction. *See supra* notes 47–49, 96–97 and accompanying text.

176 *See supra* notes 143–46 and accompanying text.

177 GABE ET AL., CONG. RESEARCH SERV., HURRICANE KATRINA: SOCIAL-DEMOGRAPHIC CHARACTERISTICS OF IMPACTED AREA 14–17 (2005), *available at* http://www.gnocdc.org/reports/crsrept.pdf (noting that 21% of those impacted by Katrina were living in poverty, compared to U.S. average of 12.4%); John R. Logan, The Impact of Katrina: Race and Class in Storm-Damaged Neighborhoods 7–8, 7 tbl.2 (Jan. 2006) (unpublished paper, on file with the New York University Law Review), *available at* http://www.s4.brown.edu/Katrina/report.pdf (finding 20.9% poverty rate in damaged areas, versus 15.3% rate in undamaged areas, within region affected by Katrina).

178 *See infra* notes 181–87 and accompanying text.

179 *See infra* Part III.A.2.

180 *See infra* notes 196–99 and accompanying text.

1. Greater Economic Harm to Poor Populations

The greater vulnerability of lower socioeconomic classes to the effects of disasters is well documented.[181] A number of recent studies have investigated this trend in the context of worldwide disasters, concluding that poor countries (and poorer populations within those countries) suffer a disproportionate amount of relative economic harm.[182] For instance, poorer populations tend to live in physically vulnerable locations (often because they are priced out of safer areas).

There are striking parallels between the populations described in these studies and those affected by the Gulf Coast hurricanes. The states hit hardest by Katrina—Mississippi, Louisiana, and Alabama—are, respectively, the first, second, and eighth poorest of the United States.[183] Nearly one-fifth of those who lived in these hardest-hit areas lived in poverty before Katrina.[184] The poverty rate in New Orleans itself is one of the worst in the country: It hovers around twenty-five percent, more than twice the U.S. average.[185] The poor in New Orleans are more likely to live in the lower-lying, flood-prone areas like the Lower Ninth Ward,[186] and are more likely to be black.[187]

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[181] *See, e.g.*, Alice Fothergill & Lori A. Peek, *Poverty and Disasters in the United States: A Review of Recent Sociological Findings*, 32 NAT. HAZARDS 89, 90–104 (2004) (finding that in United States, poor people are especially vulnerable to natural disasters, and detailing reasons); Eric Neumayer & Thomas Plümper, The Gendered Nature of Natural Disasters: The Impact of Catastrophic Events on the Gender Gap in Life Expectancy, 1981–2002 (Jan. 2006) (London Sch. of Econ. Working Paper Series) (discussing disproportionately severe impact of disasters on women).

[182] *See, e.g.*, Paul K. Freeman et al., *Dealing with Increased Risk of Natural Disasters: Challenges and Options* 9 (Int'l Monetary Fund, Working Paper No. 03/197, 2003) ("Between 1985 and 1999, the world's wealthiest countries sustained 57.3 percent of the measured economic losses to disasters, representing 2.5 percent of their combined GDP. Over the same period, the world's poorest countries endured 24.4 percent of the economic loss of disasters representing 13.4 percent of their combined GDP.").

[183] ARLOC SHERMAN & ISAAC SHAPIRO, CTR. ON BUDGET & POLICY PRIORITIES, ESSENTIAL FACTS ABOUT THE VICTIMS OF HURRICANE KATRINA (2005), http://www.cbpp.org/9-19-05pov.pdf.

[184] *Id.*

[185] U.S. CENSUS BUREAU, POVERTY IN THE UNITED STATES 1 (2001), *available at* http://www.census.gov/prod/2001pubs/p60-214.pdf (reporting national poverty rate of 11.3% in 2000); U.S. Census Bureau, Orleans Parish QuickFacts, June 8, 2006, http://quickfacts.census.gov/qfd/states/22/22071.html (indicating that 25.5% of New Orleans population lived below poverty rate in 2003).

[186] Jason DeParle, *Cast Away: Broken Levees, Unbroken Barriers*, N.Y. TIMES, Sept. 4, 2005, § 4, at 1. A study by Brown University Professor John R. Logan shows that while some affluent neighborhoods were hit hard and some poor neighborhoods escaped damage, if New Orleans post-Katrina "were limited to the population previously living in areas that were undamaged by the storm . . . New Orleans is at risk of losing more than 80% of its black population." Logan, *supra* note 177, at 1.

[187] *See* DeParle, *supra* note 186; *see also* DeWayne Wickham, Editorial, *Blacks*

The studies also point to the dependence of developing countries on geography-dependent industries that are most easily affected by disaster, such as tourism.[188] Many New Orleans businesses, such as freight passage through the ports (Port of New Orleans, Port of Plaquemines, Port of St. Bernard, and Port of South Louisiana)[189] and the tourism industry,[190] are similarly geography-dependent and were crippled by the disaster.[191]

2. *Difficulty in Recovering Income Levels*

Lower-income taxpayers are not only less likely to benefit from tax expenditures, they are also unlikely to maintain or improve income levels after a disaster. Lower-income taxpayers are more likely to be dependent for income on wages rather than investments.[192] Their jobs—particularly those in the tourism industry—are more likely to be location-specific.[193] And their skills are often less portable (knowledge of one Ford assembly line is useful only in

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Suffering over Race or Class? Some of Both, USA TODAY, Sept. 13, 2005, at 13A ("Before Hurricane Katrina struck, New Orleans's population was 67% black, but a whopping 84% of the city's poor were black.").

188 Freeman et al., *supra* note 182, at 8 ("Natural disasters are of special concern to [small island developing states] because of their . . . dependence on agriculture and tourism, which are particularly vulnerable to natural and environmental disasters . . . .").

189 *On Revitalizing the Economy of South Louisiana: Empowering the Region for Recovery and Growth: Hearing Before the S. Comm. on Commerce, Sci. and Transp.*, 109th Cong. (2005) (statement of Michael J. Olivier, Secretary, Louisiana Department of Economic Development), *available at* http://commerce.senate.gov/public/index.cfm?FuseAction=Hearings.Testimony&Hearing_ID=1664&Witness_ID=4746 (follow link to Mr. Olivier's testimony) (estimating damage to ports alone to be in billions of dollars).

190 *A Vision and Strategy for Rebuilding New Orleans: J. Hearing Before the H. Comm. on Transp. & Infrastructure, Subcomm. on Econ. Dev., Public Bldgs. and Emergency Mgmt., Subcomm. on Water Resources and Mgmt.*, 109th Cong. (2005) (statement of J. Stephen Perry, President and Chief Executive Officer, New Orleans Metropolitan Convention & Visitors Bureau), *available at* http://www.house.gov/transportation/water/10-18-05/perry.pdf (describing tourism as "primary catalyst and driver of the New Orleans economy," employing some 85,000 people out of total parish population of 500,000).

191 Alan Sayre, *N.O. Convention Business Still Crippled*, ADVOCATE (Baton Rouge, La.), Nov. 2, 2005, at 3 (reporting that all business conventions for remainder of 2005 were cancelled in wake of hurricanes, at cost of $3.5 billion).

192 INST. ON TAXATION & ECON. POLICY, FEDERAL TAXATION OF EARNINGS VERSUS INVESTMENT INCOME IN 2004 app. 1 (2004), http://www.itepnet.org/earnan.pdf (showing that lowest 20% of taxpayers derive 54% of their income from earnings, 9.9% from investment, and 36.1% from transfers (including welfare and Social Security) in contrast to highest 1% of taxpayers, who derive 48.1% of their income from earnings and 51.5% from investment).

193 *Unskilled Work Force in Hurricane-Swept Area Could Complicate the Rebuilding Process*, N.Y. TIMES, Sept. 9, 2005, at C2 ("[T]he makeup of the Gulf Coast work force—heavy on warehouse employees and blackjack dealers, light on bankers and factory workers—has already complicated relief efforts and appears likely to worsen Hurricane Katrina's economic damage.").

another Ford factory).[194] Lower-income taxpayers are less likely to have higher education, which is directly correlated with a significantly lower possibility of income mobility.[195] Thus, a disaster like Hurricane Katrina has a more devastating impact on their incomes than on those of taxpayers whose incomes are tied either to investment or to a more portable set of job skills.

3. *Lack of Wealth*

Although the Code is designed to tax income, it also deals with wealth (assets such as savings or property) and the income from investment in wealth.[196] Wealth can provide an economic "safety net" when earned income is interrupted. For instance, a taxpayer who participates in a qualified retirement plan (a form of wealth) and loses her job can withdraw or borrow funds from the plan. KETRA expanded the advantage of participation in such plans by permitting taxpayers to withdraw or borrow funds without the usual penalties.[197] But lower-income taxpayers are less likely to participate in retirement plans,[198] and they have less total wealth than higher-income taxpayers;[199] such a provision is unlikely to help them. However, Congress could assist poorer taxpayers by applying the same principle to other forms of debt cancellation. For example, forgiveness of the financing on a car that was damaged or destroyed as a result of the hurricane could also be exempted from income.[200]

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[194] *See, e.g.*, Timothy Egan, *No Degree, and No Way Back to the Middle*, N.Y. TIMES, May 24, 2005, at A15 (describing limited mobility and employment options for skilled factory workers with no college degrees).

[195] *See* DANIEL P. MCMURRER & ISABEL V. SAWHILL, GETTING AHEAD: ECONOMIC AND SOCIAL MOBILITY IN AMERICA 33–36 (1998) (stating that evidence suggests those with college education are most likely to move up).

[196] For example, the gain (profit) from the sale of a capital asset (such as real property) held for investment is taxed at the long-term capital gains rate if the asset was held for more than one year. I.R.C. §§ 1(h), 1221 (West Supp. 2006).

[197] *See supra* notes 127–29 and accompanying text.

[198] *See* PATRICK J. PURCELL, CONG. RESEARCH SERV., PENSION SPONSORSHIP AND PARTICIPATION: SUMMARY OF RECENT TRENDS 14 (2005), *available at* http://digital.library.unt.edu/govdocs/crs//data/2005/upl-meta-crs-7140/RL30122_2005Sep08.pdf (stating that, in 2004, only 29.9% of workers who earned less than $25,000 annually participated in pension plans, compared with 71.4% of workers who earned more than $58,000 annually).

[199] *See* Edward N. Wolff, *Recent Trends in Wealth Ownership, from 1983 to 1998*, *in* ASSETS FOR THE POOR: THE BENEFITS OF SPREADING ASSET OWNERSHIP 34, 39–41 (Thomas M. Shapiro & Edward N. Wolff eds., 2001) (showing that in 1998, bottom 80% of households owned only 16.6% of U.S. wealth, while wealthiest 20% of households owned 83.4%).

[200] Some debt forgiveness could potentially fall under the gift exclusion. I.R.C. § 102(a) (2000). Payments from charities, family, or friends made without expectation of repayment are considered gifts. *See* Comm'r v. Duberstein, 363 U.S. 278, 285 (1960).

Thus, one reason that the tax system is not well-suited to supply disaster assistance under circumstances like the 2005 Gulf Coast hurricanes is that it offers little, if any, help to the lower-income population most affected by such disasters. Since it is clear that low-income residents will not benefit from tax expenditures, Congress should ensure that grants and other direct financial aid are directed to that population. Several existing programs, including Code provisions, employ means testing; such tests could be used to determine which taxpayers should qualify for direct aid.[201] Alternately, Congress could restructure tax relief to correct for upside-down benefits,[202] as it has done with the Saver's Credit.[203] The credit has shown promise in this regard.[204]

B. *Poor Timing of Tax Relief*

A second flaw in the use of tax expenditures for disaster relief is the annual structure of the tax system; it is designed to measure income and to provide benefits on an annual basis. This timing is less than ideal in disaster situations.

201 In this context, it is worthwhile to note that a scant two months after Katrina made landfall, a stringent new version of the federal bankruptcy code went into effect. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (setting tighter requirements for filing, including means test for Chapter 7 filings, which requires debtor's family income to be below median for debtor's state). Congress declined to pass any bills that would have offered relief from the new requirements for Katrina victims. Geri L. Dreiling, *Cloudy Forecast: Lawyers Are Still Trying to Assess How Changes in Federal Law Will Affect Katrina Victims*, A.B.A. J., Feb. 2006, at 49. For examples of failed legislation that would have provided relief from the new law for Katrina victims, see Hurricane Katrina Bankruptcy Relief and Community Protection Act of 2005, S. 1647, 109th Cong. (2005); Hurricane Katrina Recovery, Reclamation, Restoration, Reconstruction and Reunion Act of 2005, H.R. 4197, 109th Cong. (2005); Relief to Victims of Hurricane Katrina and Other Natural Disasters Act, S. 1787, 109th Cong. (2005).

202 For a discussion of upside-down benefits, see *supra* notes 94–99 and accompanying text.

203 The Saver's Credit offers a credit of up to $2000 against tax liability in contributions to qualified retirement plans. I.R.C. § 25B(a) (West Supp. 2006), added to the Code by the Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, § 618(a), 115 Stat. 38, 107–08. The credit rate is fifty percent, twenty percent, or ten percent, depending on the taxpayer's adjusted gross income. I.R.C. § 25B(b) (2000). The rate at which contributions are credited increases as the taxpayer's income decreases. *Id.* Taxpayers with an adjusted gross income of more than $50,000 for joint returns, $37,500 for heads of households, and $25,000 for single returns are not eligible for the credit. *Id.* Under current law, the credit expires after 2006. *Id.* § 25B(d).

204 *See* William G. Gale et al., *Improving Tax Incentives for Low-Income Savers: The Saver's Credit* 15 (Urban-Brookings Tax Policy Ctr., Discussion Paper No. 22, 2005) ("The limited experience with the saver's credit has been encouraging.").

1. *Timing Features of the Tax System*

The structure of the tax system does not lend itself well to programs that require a quick response to needs that arise suddenly, particularly short-term needs.[205] The system is based upon self-reporting rather than external monitoring and uses an annual basis for measuring income (or need) as well as for the provision of any benefit.[206] In a disaster such as Hurricane Katrina, taxpayers need a rapid response system and often do not have access to the extensive documentation required for transactions with the Service.[207] Such circumstances magnify the disadvantage of an annual system.[208]

2. *Impractical Expiration Periods*

Disaster-related tax benefits should be temporary. However, short-lived tax relief is problematic because there is a delay in passing legislation, a delay in getting relief to individuals, and a delay in getting information to taxpayers about new provisions.[209]

3. *Delay in Rebuilding*

The tax-exempt bond provisions, as applied to public utility projects, present another timing problem.[210] The bonds are a potential incentive to local governments to rebuild infrastructure. Such incentives are vital to the continued economic viability of the Gulf Coast but will take a long time to work in their current form. First, bond issuances must be approved by local authorities, and then the bonds must be sold to raise revenue before any rebuilding can begin. Delay will have a debilitating effect on the entire economy, as many

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205 *See* Weisbach & Nussim, *supra* note 70, at 1016–23 (discussing problem of integrating food stamp program with tax system, due to tax system's lack of timely responsiveness, both in measurement period and provision of benefits). For a thoughtful discussion on the general strengths and weaknesses of the Service as an administrator of various programs, see Eric J. Toder, *Tax Cuts or Spending—Does It Make a Difference?*, 53 NAT'L TAX J. 361 (2000).

206 Weisbach & Nussim, *supra* note 70, at 1016.

207 It is clear that the Service recognizes this disadvantage. For instance, following the hurricanes, the Service provided expedited service for obtaining copies of past tax records from its files and waived the usual fees. *See* Internal Revenue Service, Order Copies or Transcripts of Tax Returns, http://www.irs.gov/newsroom/article/0,,id=148237,00.html (last visited Aug. 20, 2006) (explaining procedure and providing hyperlinks to necessary forms).

208 There are exceptions to the annual period requirement. For example, workers eligible for the EITC who have an eligible child may elect to have a portion of the credit advanced each month through their paychecks. I.R.C. § 3507 (2000). However, taxpayers unemployed due to Katrina do not have this option unless and until they are reemployed, despite an arguably greater need for expediting EITC payments.

209 *See* GRAVELLE, *supra* note 99, at 2–3.

210 *See supra* note 167 and accompanying text.

evacuees may decide not to return at all.[211] The tax-exempt status of bonds is both too little (it excludes dams and levees[212]) and too late.

Tax relief does not help anyone quickly and does not help the worst-off at all; its utilization in emergency settings exacerbates these shortcomings. If Congress looks first to the Code, other forms of aid will be delayed. Ideally tax relief should not be the first feature in a package of disaster aid.

C. *Geographic Targeting*

A third challenge to implementing disaster relief through the Code is that disasters are often specific to a particular region. The effort to direct benefits regionally through use of the tax system has had limited success so far.

Because Code provisions are imposed at a national level, they are difficult to target geographically.[213] The Service tracks taxpayers through taxpayer identification numbers[214] and can check these against the zip codes from which prior returns were filed. KETRA's benefits are based on a taxpayer's principal location prior to the hurricane.[215] But because returns are filed annually,[216] this excludes any taxpayer who moved into a targeted zone within that year and includes any taxpayer who moved out. Disasters like Hurricanes Katrina, Wilma, and Rita further complicate geographic targeting because many victims have had to leave the area.[217]

Geographic targeting can prove both over- and underinclusive. Even within the zones defined by KETRA and GOZA, some areas were essentially untouched, while other areas were destroyed.[218] Thus, it is possible for a taxpayer with little real economic difficulty to

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211 *See Small Businesses and Hurricane Katrina: Rebuilding the Economy: Hearing Before the H. Comm. on Small Business*, 109th Cong. 79 (2005) (statement of Guy T. Williams, President and Chief Executive Officer, Gulf Coast Bank & Trust) (describing effect of delay on overall recovery of region).

212 *See supra* note 167 and accompanying text.

213 *See* GRAVELLE, *supra* note 99, at 5 ("[T]ax benefits that are limited by region present administrative problems.").

214 I.R.C. § 6109(a) (2000) mandates that "any person required . . . to make a return, statement, or other document" include the appropriate identifying number "in such return, statement, or other document."

215 For a discussion of these benefits, see *supra* Part II. For a definition of the various disaster areas under the legislation, see *supra* note 125. Add inclusion with GOZA

216 I.R.C. § 441(a) (2000) imposes the requirement that income be computed annually.

217 *See supra* note 8.

218 *See, e.g.*, Sherri Day, *Symbols Weather Storm, Stand Tall*, ST. PETERSBURG TIMES, Sept. 16, 2005, at 5A (pointing out that some of New Orleans, including French Quarter, Garden District, and Audubon Park, were relatively undamaged).

benefit from the legislation (for instance, by taking advantage of the pension withdrawal tax deferral).[219]

This is true for businesses as well. For instance, the Gulf Opportunity Zone extends to Baton Rouge, which sustained little damage compared to other parts of Louisiana; the city's economy is thriving, spurred in part by the tax benefits offered under GOZA.[220] On the other hand, out-of-state businesses that depended on Gulf Coast dollars may not benefit from the legislation, even though their economic difficulties were caused by the hurricanes. New Orleans's Port of South Louisiana is the most active port in the United States in terms of tonnage;[221] agricultural products, poultry, steel, and rubber products flow through it.[222] Many midwestern businesses that depend on the ports could feel the economic pinch just as much as, or more than, local businesses.

KETRA and GOZA represent only the second attempt at targeting tax benefits to a particular area.[223] The current application, with its assumption that location is a proxy for economic loss,[224] may have been an appropriate design for the more confined district affected by the World Trade Center attacks, but it does not seem as useful in the context of a widespread but selective disaster such as the 2005 Gulf Coast hurricanes.

Surprisingly, one major provision is not geographically targeted at all: that for charitable donations. Some have criticized the provision because it will benefit only the very wealthy (those who have already given away fifty percent of their adjusted gross income, who can afford to give away more, and who will find it advantageous to do

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219 While the pension withdrawal provision requires a showing of economic hardship, the taxpayer need not show a minimum amount of economic loss, nor that the withdrawal is used to address the loss. *Katrina Emergency Tax Relief of 2005: Special Report*, CCH Tax Briefing (Commerce Clearing House, Chicago, IL), Sept. 23, 2005, at 2–3.

220 Robert Travis Scott, *B.R. Area Thriving, Chamber Says: Economic 'Revolution' Comes Post-Katrina*, Times-Picayune (New Orleans), Jan. 31, 2006, at A4.

221 Overview of the Port of South Louisiana, http://www.portsl.com/pages/15_overview.html (last visited Aug. 18, 2006).

222 *A Vision and Strategy for Rebuilding New Orleans: J. Hearing Before the H. Comm. on Transp. & Infrastructure, Subcomm. on Econ. Dev., Pub. Bldgs. and Emergency Mgmt., Subcomm. on Water Resources and Mgmt.*, 109th Cong. (2005) (statement of Gary P. LaGrange, President and Chief Executive Officer, Port of New Orleans, Chairman, American Association of Port Authorities).

223 *See supra* note 31.

224 A taxpayer who can show his presence in the "core area" is subject to less stringent requirements than a taxpayer outside the "core area" but inside the "disaster area." *See supra* notes 125 (defining zones under legislation); 138 (discussing different requirements for "Katrina displaced individual" definition depending on presence of principal residence in "core area" or "disaster area").

so for tax purposes).[225] That feature is less troubling than the lack of a requirement that donations benefit Katrina victims or the Gulf Coast area. Advantaging the wealthy in this instance may advance a redistributive goal; after all, the wealthy can afford to provide more funds. But in the absence of an earmarking condition, the very wealthy are not likely to donate funds where urgently needed; instead, they are more likely to give to institutions such as universities rather than service-oriented nonprofits.[226] It should be possible to create tax advantages for Katrina-related charitable donations while avoiding the problems attached to 9/11 charities.[227] For instance, Congress could combine a relaxation of the ceiling rule with an increased deduction rate for contributions to Katrina-related charities.

Conclusion

Many forms of aid were made available to Katrina victims in the weeks following Katrina's landfall, but the *first* legislation approved by Congress to assist victims was tax relief.[228] This is further evidence that tax expenditures have become the preferred method of providing financial aid. An examination of the relief provided through KETRA and GOZA shows, unsurprisingly, that it tends to be distorted in a manner typical of similar tax relief. This is particularly tragic in the circumstances of Hurricane Katrina, since the very people who are least helped by tax relief make up a high percentage of the affected population. In addition, the nature of the disaster makes many of the provisions, including geographic targeting, less effective than they might be in other circumstances. Congress should reexamine its preference for offering relief through tax expenditures in light of these structural and policy shortcomings or shape additional relief to obviate those disadvantages.

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[225] Stephanie Strom, *Storm and Crisis: Fund-Raising: In Hurricane Tax Package, a Boon for Wealthy Donors*, N.Y. Times, Oct. 27, 2005, at A29 (describing this provision as "a windfall for charity and a drain on government coffers").

[226] *See* Mark Redmond, *Defining Charity Upward*, Forbes, Nov. 15, 2004, at 52 (pointing out donation preferences of very wealthy). In fact, recent news stories about Vice President Dick Cheney bear out this observation. Cheney and his wife were able to take greater deductions on the money they donated to non-Katrina charities. Christopher Lee, *Cheneys Getting Refund of Nearly $2 Million*, Fort Worth Star-Telegram, Apr. 15, 2006, at A4.

[227] For a discussion of problems confronting 9/11 charities and congressional reaction when crafting Katrina-related provisions, see *supra* note 156.

[228] *See supra* note 10 and accompanying text.