Getting around the State and Local Tax Deduction Limit

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Abstract

The 2017 tax bill put a cap of $10,000 on the deduction for state and local taxes, while retaining existing rules for charitable donations. It has been suggested that states could enact 100% state tax credits for people who donate money to the state, so taxpayers could donate instead of pay taxes and thus still be able to deduct as much as they want on their federal tax returns. I disagree, and argue that under the past and present Tax Code these "donations" would and should be treated as quid pro quo items, since the recipient transfers something of value to the donor.

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This paper: http://www.rasmusen.org/papers/state-tax.pdf or https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3099296.

This draft has been very rapidly written so as to respond to another paper just posted on SSRN and to Prof. Shaviro's blog post. I don't know if it will become a finished paper or not. It will be most useful if posted quickly, though, for the arguments it contains and the "ingredients" such as statute texts and tax return figures which may be useful to others writing on the subject.

1. Introduction

The 2017 tax bill put a cap of $10,000 on the deduction for state and local taxes, while retaining existing rules for charitable donations. It has been suggested that states could enact 100% state tax credits for people who donate money to the state, so taxpayers could donate instead of pay taxes and thus still be able to deduct as much as they want on their federal tax returns. I disagree, and argue that under the past and present Tax Code these donations would and should be treated as quid pro quo items, purchases and not donations, since the recipient transfers something of value to the donor.

To be concrete, consider the following proposal.

> Proposal: Create a 100% state tax credit for donations to the State of Indiana. Someone with income that would generate $20,000 in state income tax could make a $20,000 donation to the state treasury. He would then pay zero in state income tax and he would be able to deduct the full $20,000 from his income in paying federal tax.

But there is a problem.

> Problem: The proposed credit/donation scheme doesnt count as a charitable donation, because the donor receives back 100% equal value from the recipient.

There is also a possible solution.

> Amended Proposal: Create a 100% Indiana income tax credit for donations to Indiana University, subject to a limit of $500 million in total credits to all taxpayers. Someone with income that would generate $20,000 in state income tax could make a $20,000 donation to the University. He would then pay zero in state income tax and he would be able to deduct the full $20,000 from his income in paying federal tax.

I will argue that the problem above is insuperable under existing law, but the amended proposal *might* be valid, though I am not sure even in my own mind. This paper will mostly be about existing law. I will comment at the end about the politics of the situation, which could rescue the two proposals even under existing law but would raise a second and a third hurdle. The second hurdle is IRS regulations. The IRS, under the Republican President Trump, could write a regulation clarifying existing law in such a way as to ruin both proposals, because under the Chevron doctrine, if the statute is ambiguous, courts are supposed to follow the agency's regulation rather than their own best judgement. The third hurdle is amendment of the Tax Code. Congress, with both chambers controlled by Republicans and with a Republican President to sign the bill, could amend the Tax Code so as to ruin the proposals. Senate rules might require this to be done by at least a 60% supermajority (or maybe not— it's complicated), but Democrats might find it difficult in an election year to oppose an amendment that strips special, contorted, tax breaks from rich people in rich states.

Jared Walczak of the Tax Foundation comes to the same conclusion as I do, in a shorter piece on the Web.[1]

Sections 2 and 3 will lay out the key legal texts with my interpretation of them and try to estimate the number and income level of the people who would be affected by the proposal. Section 4 will lay out a number of hypothetical examples to illustrate the argument. Section 5 will discuss the arguments of Bankman et al. Section 6 will look at policy considerations. Section 7 will look at political considerations.

[1] Jared Walczak, "State Strategies to Preserve SALT Deductions for High-Income Taxpayers: Will They Work?" The Tax Foundation.

2. The Statute and Regulation, and How They Should Be Interpreted

Let us start with the statute and regulation. All boldfacing is by me. US Code 26 US 170 (a) says

> (a) Allowance of deduction
> (1) General rule
> There shall be allowed as a deduction **any charitable contribution** (as defined in subsection (c)) payment of which is made within the taxable year. A charitable contribution shall be allowable as a deduction only if verified **under regulations** prescribed by the Secretary.

The question is what is a charitable contribution. It is not the same as money transferred to the charity, since that would include money paid for purchases. A regulation clarifies the conclusion any reasonable person would reach anyway: that to the extent you get something for your money transfer, it is not a gift. The regulation, or courts, could have concluded that if you get even the slightest thing of value, the donation is non-deductible, but that would be the wrong interpretation of the statute. The purpose is to avoid having people make donations just for tax benefits, with no real benefit to the charity. Treasury Regulations provide in 26 CFR 1.170A-1(h)(2)(i) that the amount deductible may not exceed the

> (2) Limitation on amount deductible—
> (i) In general. The charitable contribution deduction under section 170(a) for a payment a taxpayer makes partly in consideration for goods or services may not exceed the excess of
> (A) The amount of any cash paid and the fair market value of any property (other than cash) transferred by the taxpayer **to an organization** described in section 170(c); over
> (B) The fair market value of the goods or services **the organization provides** in return.

"Organization" include government organizations such as the State of Indiana or the Monroe County Community School Corporation.

The Substance over Form doctrine matters too. Its general purpose is to avoid having people do *anything* just for tax benefits, while allowing people to have tax benefit as one of a set of motivations. A good statement by the IRS (persuasive but not authoritative, since it is just from a memo and not a notice-and-comment regulation) is found in Office of Chief Counsel Internal Revenue Service Memorandum 20123401F (July 18, 2012) on "Application of Judicial Doctrines to Monetization Transaction":

> Substance Over Form Doctrine
>
> In Gregory v. Helvering, 293 U.S. 465 (1935), the court held that where a transaction has no substantial business purpose other than the avoidance or reduction of Federal tax, the tax law will not respect the transaction. The doctrine of substance over form is essentially that, for Federal tax purposes, a taxpayer is bound by the economic substance of a transaction where the economic substance varies from its legal form.
>
> The concept of the substance over form doctrine is that the tax results of an arrangement are better determined based on the underlying substance rather than an evaluation of the mere formal steps by which the arrangement was undertaken. Joint Committee on Taxation, Background and Present Law Relating to Tax Shelters (JCX19-02), March 19, 2002. Under this doctrine, two transactions that achieve the same underlying result should not be taxed differently simply because they are achieved through different legal steps. As stated by the Supreme Court, a "given result at the end of a straight path is not made a different result because reached by following a devious path. Minnesota Tea Co. v. Helvering, 302 U.S. 609, 613 (1938).
>
> The application of the substance over form doctrine is highly factual. In Newman v. Commissioner, the Second Circuit

> (citing Frank Lyon v. U.S., 435 U.S. 561 (1978)), indicated that relevant criteria in applying the substance over form doctrine included: (1) the existence of a legitimate non-tax business purpose, (2) whether the transaction has changed the economic interests of the parties, (3) whether the parties dealt with each other at arms length, and (4) whether the parties disregarded their own form. 902 F.2d 159, 163-164 (2d Cir. 1990).

Three parts of the 2017 tax bill are relevant to the discussion.

(1) The state and local tax deduction is limited to $10,000.

(2) The standard deduction is raised to $12,000 for individuals, $18,000 for heads of household, and $24,000 for married couples filing jointly. Thus, someone whose itemized deductions are less than that will not itemize and is unaffected by the $10,000 limit.

(3) The Alternative Minimum Tax (AMT) is unchanged. This provision, added in the 1986 tax bill, is complicated, but what matters here is that if a rich person to pay too low an average tax rate because of such things as the low marginal rate on capital gains or by taking various deductions, then he is not allowed to take the state and local income tax deduction at all, even if it would be below $10,000. Thus, someone who must pay AMT is unaffected by the new limit. The charitable deduction is *not* used in the calculations and is *not* lost by someone who has to pay AMT. See 26 U.S.C. 56(b)(1)(A)(ii).

My argument will turn on the idea in the Treasury regulations that a donation is not charitable if the recipient– not just anyone, the recipient— gives back something of equal value to the donor. Thus, if someone donates $20,000 to the state and receives a tax credit of $20,000 from the state, the donation is not charitable. The economic substance doctrine reaches the same result, but by a different path. It says that it does not matter whether (a) someone donates $20,000 to the state and receives a tax credit of $20,000 from the state, or (b) someone pays $20,000 in taxes to the state, because the effect on all parties concerned (federal tax policy aside) is exactly, numerically, the same.

3. The Extent of the Problem

I want to get something online in just a day, so I have thrown this together hastily, but I thought I should find out how many taxpayers are affected and how rich they are. This ought to be available online, but rather than trust someone else's analysis, let's do a rough job here using tax year 2015 (filing year 2016) numbers from the estimates the IRS makes from a sample of returns and publishes in everybody's source, SOI Tax Stats - Individual Income Tax Returns Publication 1304 (Complete Report)).

Consider the 18.5 million individual returns with incomes between \$100,000 and \$200,000. Of those, 14.0 million itemized and .6 million paid AMT. The 13.7 million returns that deducted state and local taxes at all deducted an average of \$6.5 thousand (I see that $.6+13.7 > 14.0$; I don't know what's going on.) So the \$10,000 limit doesn't apply to many people earning less than \$200,000 per year. (18.5 from Table 1.2; other numbers from Table 2.1.)

So let's consider the 5.4 million individual returns with incomes between \$200,000 and \$500,000. Of those, 5.1 million itemized and 3.1 million paid AMT. The 5.0 million returns that deducted state and local taxes at all deducted an average of \$15.1 thousand. So the \$10,000 limit also doesn't apply to a lot of people earning between \$200,000 and \$500,000. A maximum of 2.0 million avoided AMT and were able to deduct state taxes. Let's suppose that 3/4 of them went over the \$10,000 limit. That leaves us with 1.5 million returns that are affected by the new bill. (5.4 from Table 1.2; other numbers from Table 2.1.)

Of returns with incomes above \$500,000, 1.2 million itemized and .5 million paid AMT. Thus we have a maximum of .7 million who are affected by the new bill.

There is a total of 150.5 million individual returns (Table 2.1), and our estimate of the maximum number of those affected is 2.2 million (1.5+.7=2.2). Thus at most 1.5% of taxpayers are affected, virtually all of them in households earning over $200,000 per year. Note also that we can estimate that .5 million of them exceed the deduction limit by less than $5,000, so their additional tax is less than $2,000.

Tax relief for these people is not the most pressing issue the nation faces. For me it is one of the most interesting issues, though, so let us proceed.

4. Examples

I think going through hypothetical examples will be the most useful way to think about the Proposal and the Amended Proposal.

> **Hypothetical 1:** John Doe donates $500 to the West Dakota state treasury under the current state tax regime. He can deduct the full $500 from his income for federal tax, as a charitable deduction. His state tax is unaffected.

Hypothetical 1 is the status quo:

> **Hypothetical 2:** John Doe donates $500 to the Salvation Army and in gratitude they give him a $50 jacket. He can deduct the $450 from his income for federal tax, as a charitable deduction, because the donation was partly payment for goods and services.

Hypothetical 2 illustrates that even if a donation is not entirely a donation, it still partially qualifies for tax deduction:

> **Hypothetical 3:** John Doe donates $500 to the School Fund, a nonprofit corporation authorized by the state of West Dakota to give scholarships to poor kids at private schools. West Dakota allows a 50% tax credit for such donations. Doe

> can deduct the full $500 from his income for federal tax, and can subtract $250 from his West Dakota income tax.

Hypothetical 3 is the reason people are hopeful about the Proposal of tax credits. But note the difference from Hypothetical 2: in Hypothetical 3, the donor receives nothing of value from the recipient. He does receive something of value from a third party, but that is okay. This is clearly not an attempt to use state laws to reduce the taxes of West Dakota residents. The federal government has its tax policy, and the state government has its policy, and the two happen to supplement each other. Many states have tax credits like this. Often, they are for funding schools, private or public. Another common credit is for conservation property, donations of land for the purpose of returning to a natural state. The identity of the recipient matters. In Hypothetical 3, the recipient is in no way a state organization.

> **Hypothetical 4:** John Doe donates $500 to Lighthouse Christian School to give scholarships to poor kids. Richard Roe has agreed to forgive debt owed him by anyone who donates to the School, dollar for dollar. John Doe can deduct the full $500 from his income for federal tax, though he has an extra $500 in forgiveness-of-debt income (or perhaps its earned income; I dont know and it doesnt matter). He does have to pay state income tax on this new $500 in income. Note that Richard Roe cannot deduct anything; he has not made a charitable contribution; he has either forgiven a personal debt or paid someone to do something for him, or made a gift.

Hypothetical 4 involves a private third party instead of Hypothetical 3's state tax credits. This is perhaps the key hypothetical. I argue that John Doe's contribution is deductible even it ends up costing him nothing. The amount it costs donor Doe is irrelevant. What matters is whether the donation is an exchange between the donor and the recipient. It is not. The donor gives something to the recipient, but receives nothing from the recipient.

Donor Doe *does* receive something from third party Roe in exchange for his donation. Perhaps they even have a valid contract and Doe can sue Roe in court if Roe refuses to keep his promise to forgive the debt. That is irrelevant. The gift is not a sham. Recipient Lighthouse does end up ahead by $500, even though donor Doe's net change is $0.

Also, notice that there is no double counting for deductions. Third-party Roe does not get to deduct anything. I'm not sure exactly how we would classify his action (debt forgiveness, purchase, or gift), but whatever we do, it's not a charitable donation. To be sure, Roe could have made a $500 donation to Lighthouse directly, which would have had the same benefit for Lighthouse and would have allowed Roe to get a $500 deduction. But if Roe sets it up this way, he is letting Doe make the deduction, and perhaps he has some good reason for doing so (maybe Roe doesn't itemize, or maybe he's a nonprofit corporation himself).[2]

How would things work out if we used a legal theory that a taxpayer gets to take a charitable donation if and only if his donation makes him bear a cost at the end of the day? Clearly Doe could not take a deduction then. Could Roe? It seems not— he hasn't given anything to the charity. So nobody gets the donation— yet Roe's altruism has resulted in a benefit to a charity, and it's that kind of thing which the charitable deduction is designed to encourage.

[2] I have suggested that something like this applies to some of the donations made to the Clinton Foundation while Hillary Clinton was Secretary of State. Large donations were made by the beneficiaries of Hillary Clinton's policy decisions with extremely suspicious timing. It is not beyond a reasonable doubt that this was bribery, but it is more likely than not. If it was, then the Secretary of State should have (and did, for all I know) include the amount of the donations as income on her federal tax return and then deducted them as charitable contributions, up to the 50% of income limit that exists for cash charitable donations. The potential for civil penalties is interesting.

So suppose the state wants to get away from Hypothetical 2, and convert its scheme to something like Hypothetical 3 or 4, where it as third party is not the recipient, but still provides an incentive?

Daniel Shaviro has written a blog post where he worries about the Substance over Form doctrine.[3] He suggests the scheme in Hypothetical 5:

> **Hypothetical 5:** West Dakota allows a 100% West Dakota income tax credit for donations to spending on Infrastructure by the state. John Doe donates $20,000 to the Infrastructure fund to offset the $20,000 he would otherwise pay in state tax. He cannot deduct the $20,000 on his federal taxes, because the recipient has given him something of value.

Hypothetical 5 helps with the substance over form doctrine because the tax credit scheme is not exactly the same as paying state income tax. The difference is that the tax credit is only for donations for infrastructure, whereas the state can use income tax revenue for any purpose it likes. Professor Shaviro notes that it is conceivable that a government might want to set its budget allocations this way, by letting taxpayers choose what they want to pay for. On the other hand, we could be 100% sure that that is zero part of the state's motivation if it decided to switch to this scheme in 2018.

Whatever help Hypothetical 5 may have in avoiding the substance over form doctrine, though, it gives no help in avoiding the problem of donation versus purchase. The recipient is still giving something to the donor. West Dakota is still the person to whom the donation is given and the person who provides something of value in return. It does not matter that the donation is limited to a particular purpose, even though I think (I'm not sure) that the state would be legally bound to use the donation for infrastructure. (I'm not sure, because courts are lax about the cy pres doctrine, and the state might argue that spending

[3]Dan Shaviro, "Restoring state and local tax deductibility through self-help", January 9, 2018. *Start Making Sense* blog.

on roads would be useless and the closest useful spending would be for raises for legislators. That's humorous— but how about raises for state police?)

We are getting closer to a solution, though. Since the problem is the identity of the recipient, how about if we devolve some of the state's powers to a different person? That' what Hypothetical 6 does:

> **Hypothetical 6:** John Doe donates \$100 to West Dakota University. West Dakota allows a 100% tax credit for such donations, up to a limit of \$100. Doe can deduct the full \$100 from his income for federal tax and pay \$100 less in state income tax.

This is the "Amended Proposal" I suggested in the Introduction. Indiana has a long-standing tax credit like this, for donations to any college in Indiana, including private colleges. In Hypothetical 6, it's limited to a single state university, but I think that's still okay. West Dakota University is a distinct legal person— or so I assume. I also assume that, like Indiana University, it is governed by directors that is partly or wholly appointed by the state but who cannot be fired by it. It also helps, I think, if West Dakota University receives large donations from people who live out of state and cannot take advantage of the tax credit or from people who are giving in excess of the eligible \$100. The state still controls the recipient, in some sense, and it still can reduce taxes by \$1 for each \$1 of donation and keep its support of the university the same, but they are clearly distinct organizations.

There is no IRS regulation for the situation in Hypothetical 6, but IRS policy has been to allow the deduction— what Bankman et al. call "the full deduction rule". Moreover, West Dakota could put a ceiling on the amount of taxpayer credits available, first-come first served for taxpayers making donations. Indiana does this with its %50 tax credits for donations to scholarships for poor children to attend private schools. I am not sure of whether this avoids the form over substance doctrine, since a new scheme of this sort would clearly have the purpose of enabling West Dakota taxpayers to reduce their federal taxes while making no change in state support for the university, but a judge would have to think carefully about it.

Joseph Bankman, David Gamage, Jacob Goldin, Daniel Hemel, Darien Shanske, Kirk Stark, Dennis Ventry, and Manoj Viswanathan are much-esteemed tax professors who have jointly written "Federal Income Tax Treatment of Charitable Contributions Entitling Donor to a State Tax Credit" and posted it at the SSRN working paper site (January 8, 2018). This is an admirable joint effort, written quickly to address a pressing problem. One well-known law school professor wrote on Twiiter, "Remarkable collaboration from this tax dream team. Plausible, creative argument, at least to me as a non-expert." Their paper discusses in detail the legal treatment of state tax credits in IRS documents and court cases. They fully establish that the IRS and courts have followed what they call the Full Deduction Rule of allowing 100% deduction of donations from income for federal taxes even if the state has established tax credits for donors. They say,

> We believe that, at least in this latter and more typical set of cases, the Full Deduction Rule represents a correct and long--standing trans-substantive principle of federal tax law. According to judicial and administrative pronouncements issued over several decades, nonrefundable state tax credits are treated as a reduction or potential reduction of the credit recipients state tax liability rather than as a receipt of money, property, contribution to capital, or other item of gross income.
>
> The combination of precedent and policy justifications suggests that the Full Deduction Rule should survive administrative and judicial challenge. We believe that changes to the Full Deduction Rule would require legislation. We also caution Congress that a legislative override of the Full Deduction Rule would raise significant administrability concerns and would implicate important federalism values. Congress

> should tread carefully if it seeks to alter the Full Deduction Rule by statute.

They present a detailed analysis that supports the idea that the IRS and courts have used the Full Deduction Rule, with a valuable appendix which lists the tax credits each of the 50 states grants for various kinds of charitable donations. I agree with the conclusion about the Full Deduction Rule, but disagree, crucially, with the reasoning. They look at whether we define benefit to the taxpayer as including the tax benefit. I look at whether the benefit comes from the recipient of the donation. I may revisit the materials they discuss, because I am not sure that courts have always adopted my view, though I think courts would adopt it if confronted with a case in which it mattered. I also suspect that courts and the IRS have allowed conservation easements which should not have been allowed, as a result of a faulty legal theory. But I lack the time to address these things now.

Bankman et al. also discuss policy considerations, to which we will next turn.

5. Policy Considerations

I have been discussing the law, both the statutory language and general principles. But what of policy? Would it be a good thing for the world if the courts allowed the Proposal to work, with donations to the state replacing taxes so that we return to the situation before the 2017 tax bill passed— and, indeed, to before the 1986 tax bill passed and eliminated deductibility for so many people? I will discuss this briefly.

1. Fairness. If someone earns $100,000, but spends $40,000 in expenses to produce that income, everyone would agree that their income for tax purposes should be $60,000, not $100,000. If someone has net income of $60,000, but must pay $15,000 of it in state taxes, isn't that a similar cost, and shouldn't they only be taxed on the remaining $45,000? On the other hand, they are getting something back in the form of state services for that $15,000, so perhaps it should be treated like consumption rather than like a cost, and so should not be deductible. They are living in a state with lots of government services if their tax rate is higher than average, and people in that state shouldn't get both lots of services and a break on their federal taxes.

I cannot see a clear victor between these two arguments. One thing I will note is that if the argument is valid, it should be reciprocal— if a taxpayer should be able to deduct state taxes from federal income, he should be able to deduct federal taxes from state income too. Six states do allow the deduction. These states, with their rank in state and local taxes as a fraction of state income in 2012, are Alabama (39), Iowa (31), Louisiana (45), Missouri (29), Montana (38), and Oregon (10). Remarkably, it is the *low-tax states* (except for Oregon) which think it fair to deduct federal taxes from state taxable income. If high-tax states are arguing that fairness requires deduction of taxes before tax rates are applied, they are being hypocritical.

2. Complexity and administration. Curiously, people are just now thinking about this issue when a substantial limitation on deductibility of state and local taxes has existed since 1986. As we have seen earlier, the 2017 tax bill is by no means a radical departure, since a large number of high-income people, the ones affected by the $10,000 limit, are already subject to a $0 limit because they pay the AMT instead of normal tax. Perhaps it is that the 1986 limitation is complicated because the Alternative Minimum Tax is so complicated, and so it has attracted less attention. Or, more likely, it is that we are already accustomed to the 1986 limitation, and changes are more noticeable than levels.

The state tax credit proposal clearly introduces complexity. Instead of just paying state income tax, the taxpayer must donate to the state, take the state tax credit, and file the state tax return. Each step requires paperwork and has possible snafus. I, personally, have had considerable time taken up when the state of Indiana failed to recognize, in more than one year, the credit-worthy donation I had made, despite the charity assigning me an identification number for each donation so that the state could verify that it was worthy of a credit. Unusual items confuse most taxpayers and confuse mediocre accountants and state tax systems. More recordkeeping is required.

Even the more straightforward deductibility of state taxes has created considerable complexity in administration. One example is the problem of a taxpayer who pays estimated tax to the state, but overpays (as is prudent), and receives a refund. The taxpayer must then count the refund as income in the next year, since he deducted it in the previous year.

Thus, as far as compliance costs, administration costs, and fraud are concerned, the less deductibility, the better.

3. Who bears the tax burden. As we have noted earlier, the $10,000 limit only affects the very richest taxpayers. If the tax credit Proposal were to work, then we should expect all states to adopt it, whether their taxes are higher than the average state or lower and whether the state is rich or poor, since in any case it would be beneficial to some of the state's taxpayers to be able to take more federal deductions. Of course, this is a zero-sum game, so at the end of the day, although all states would bear the administrative and compliance costs, only the states that were richer and with higher tax rates would benefit. The Proposal is extremely regressive, which should be cheered by those who favor a flat tax and criticized by those who favor more progressive taxes than we have now. Thus, this policy consideration could go either way.

6. Politics and the Other Two Hurdles

The first hurdle to the Proposal comes from the courts. I have argued in this paper that the Proposal would fail because courts would, looking at the language of the regulation, the common-sense interpretation of the statute, and the form-over-substance doctrine, reject the deductibility of donations to the extent they are offset by tax credits, whether the extent is 100% or 10%. Courts, however, are not always unbiased. Judges are members of America's elite. They personally or with their spouses are rich, and they tend to sympathize with the views of the rich and of people who live in rich, high-tax states such as California, New Jersey, Connecticut, and New York, even if they themselves live in Louisiana or New Mexico. Tax Court judges are even more likely to live in this milieu, though they also are more likely to understand and be swayed by impersonal, purely legal, concerns. Thus, political considerations favor the Proposal at the judicial level, even if the law should go the other way.

A second hurdle is the IRS. Even if we put aside the merits, on which career officials at the IRS will put great weight, we can predict that politics will make the IRS oppose the Proposal. President Trump is a Republican and a supporter of the 2017 tax bill. Despite personally losing from nondeductibility of state taxes, we can expect him to oppose the Proposal. The Internal Revenue Service is part of the Treasury, and the President is in charge of the Treasury and the rest of the executive branch. Thus, he can direct the IRS Commissioner and Chief Counsel, who are appointed by the President, to follow his policy preferences. This is, in fact, desirable; the idea in a democracy is that the winner of the election make the policy decisions, not the loser, and not unaccountable bureaucrats. The IRS has the ability to propose regulations saying that donations offset by tax credits are not deductible. The Supreme Court has said that courts are supposed to follow the Chevron Doctrine, which says that if a statute is ambiguous, the court will adopt the interpretation of the executive agency if it has gone through the notice-and-comment procedure, even if the court thinks that a different interpretation is better. Thus, even if the judiciary is biased, it may find it difficult to favor the Proposal without sacrificing legitimacy.

A third hurdle is the ability of Congress to amend the statute. Both the House of Representatives and the Senate will controlled by the Republican Party in 2017, as well as the Presidency. If they can amend the Tax Code by simple majority, they can frustrate any state attempt to avoid the limitation on state tax deductibility. The Senate does require a 60-vote supermajority for most bills, a custom that the Republicans would be loath to override despite being formally able to do so. 2018 is, however, an election year, and even if they could stop an amendment by voting against it, they might find it difficult. The amendment would hurt a small number of high-tax states and benefit a larger number of low-tax states, which would favor passage in the Senate. In the House, Republicans from New York and California would oppose the amendment, but Democrats from low-tax states would find it equally difficult to vote with their party. More important, the amendment would favor the poorest 98% of taxpayers at the expense of the richest 2%. It seems unlikely the Democrats would be eager to face such odds, despite the ability of the 2% to make larger political contributions.

Thus, I conclude that the effort to get around the 2017 tax bill's $10,000 limit on deduction of state and local taxes is doomed to failure.