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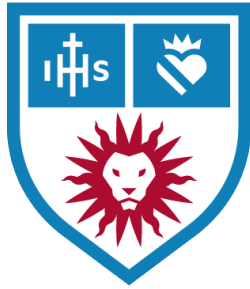
Tax Notes Federal, 179(5)

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Publication Date

2023-05-01



Loyola Law School
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Los Angeles

Legal Studies Paper No. 2023-15
(May 1, 2023)

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Reprinted from *Tax Notes Federal*, May 1, 2023, p. 825

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by Ellen P. Aprill

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In this book review, Aprill examines *For-Profit Philanthropy: Elite Power and the Threat of Limited Liability Companies, Donor-Advised Funds, and Strategic Corporate Giving* by Dana Brakman Reiser and Steven A. Dean. Published by Oxford University Press (2023). Hardcover, 344 pages. Price: \$49.99.

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Introduction

The superwealthy's deployment of resources, including their giving to tax-exempt organizations, such as charities and political organizations, has an oversize impact on the shape of our civil society. Since 2019, MacKenzie Scott has given away \$14 billion to 1,600 charitable organizations.¹ In 2021 Mark Zuckerberg and Priscilla Chan committed \$500 million to Harvard to establish the Kempner Institute for the Study of Natural and Artificial Intelligence.² In the summer of 2022, Barre Seid donated stock valued at \$1.6 billion to a newly created conservative tax-exempt organization,³ a gift that has been described as "the largest known political advocacy donation in U.S. history."⁴ The largest charitable gift of 2022

was Bill Gates's \$5 billion donation to the Gates Foundation.⁵ Early in 2023, the network of donors and activist groups led by billionaire Charles Koch announced that they will oppose Donald Trump's efforts to win back the White House.⁶

Only one of these examples — that of Gates — involved a gift to what tax law considers a private foundation,⁷ the type of section 501(c)(3) tax-exempt and nonprofit charitable entity that is funded by a small set of contributors and is the traditional vehicle for charitable giving by the wealthy elite. Most private foundations make grants to operating charities — known as "public charities" — rather than engaging in charitable activities directly. To ensure private foundations adhere to their charitable missions, they are subject to several onerous excise taxes that function as regulatory prohibitions rather than revenue raisers. For example, private foundations must annually distribute 5 percent of the market value of their investment assets and follow a strict set of rules prohibiting self-dealing.⁸ They must file annual information returns, available to the public, with detailed information about their operations, including investments, grants, and names of donors.⁹ Donors to private foundations face various limits on the donations they can make, depending on their income and the type of donation.¹⁰

At the same time, private foundations enjoy generous tax benefits. Donors and their families can maintain control of the entity indefinitely.

¹Yield Giving (Scott's disclosure platform) (a series of essays, including "116 Organizations Driving Change," which lists names of organizations and the amount of her donations to them as of July 2020).

²Jonathan Shaw, "Chan Zuckerberg Commits \$500 Million to Harvard Neuroscience and AI Institute," *Harvard Magazine*, Dec. 7, 2021.

³Kenneth P. Vogel and Shane Goldmacher, "An Unusual \$1.6 Billion Donation Bolsters Conservatives," *The New York Times*, Aug. 22, 2022.

⁴Andrew Perez, Andy Kroll, and Justin Elliott, "How a Secretive Billionaire Handed His Fortune to the Architect of the Right-Wing Takeover of the Courts," *ProPublica*, Aug. 22, 2022.

⁵Maria Di Mento, "Bill Gates Made 2022's Biggest Charitable Donation: \$5 Billion," *Los Angeles Times*, Dec. 30, 2022.

⁶Perez, Kroll, and Elliott, *supra* note 4.

⁷See section 509(a).

⁸Sections 4941 and 4942.

⁹See Form 990-PF, "Return of Private Foundation."

¹⁰See section 170(b)(1)(B), (b)(1)(D), and (e)(1)(B)(ii).

They can take a charitable contribution deduction for income tax purposes, subject to complicated limits, at the time of contributing funds, even if the funds are not used for charitable purposes for many years. Their gifts are not subject to gift tax or estate tax.

In *For-Profit Philanthropy: Elite Power and the Threat of Limited Liability Companies, Donor-Advised Funds, and Strategic Corporate Giving*, Dana Brakman Reiser and Steven A. Dean scrutinize philanthropy's landscape, defined broadly to include not only traditional private foundations but also various forms of social enterprise. The breadth of their examination in and of itself makes a significant contribution. They do far more, however. They make a bold argument that "practices, players, and norms native to the business sector are migrating into philanthropy, muddying the distinction between commerce and charity and eliding the regulatory framework designed to keep them separate" (p. 2).¹¹ They lament what they see as the increasing use by the wealthy elite of vehicles other than private foundations. To them, this development represents the "unraveling of a pact between elites and the public that fueled half a century of philanthropic achievement" (p. 1). They submit that the Tax Reform Act of 1969 created this pact, which they name the Grand Bargain, by establishing in the Internal Revenue Code a set of rules that not only defined but also benefited and burdened private foundations. This bargain, they believe, enacted rules grounded on principles of targeting, timing, and transparency to ensure that elite resources serve public rather than private ends. For them, new approaches that renounce this Grand Bargain destroy trust in elite giving.

The enormous influence of the wealthy elite demands the critical examination the book gives. The book's framing serves as an enormously powerful rhetorical tool. It is difficult to resist, especially given the strength of the writing that

advances it. Consider this expression of the introduction: "When for-profit philanthropists spurn this Grand Bargain, they do not merely opt out of a burdensome tax regime. They threaten the future of what has been one of the cornerstones of American society for hundreds of years" (p. 2). Another, from the middle of the book: "This Grand Bargain made the immense private power of elite philanthropy inoffensive by staking out boundaries for its conduct" (p. 143). And here is one from the conclusion: "Philanthropy relies on an improbable collaboration, with the market's victors teaming up with its victims to gamble on their shared future" (p. 221).

For all the book's strengths, I find that its thesis — that philanthropy by today's wealthy elites betrays a Grand Bargain — claims somewhat too much. I view TRA 1969 not as a Grand Bargain but as, at best, a pretty good and dated deal. As the authors themselves recognize later in the book, "in the half-century since the Grand Bargain was struck, the world has changed. A regulatory architecture designed for 1969 has not" (p. 195). That is, toward the end of the book, they treat their own thesis as a bit of a straw horse. Moreover, tax law includes other not-so-bad bargains, vehicles recognized both before and after the 1969 reform act, that offer taxpayers other paths for philanthropy. Moreover, recent developments in the law have repudiated transparency and accountability. Neither the public nor Congress is calling for additional transparency and accountability. A 2021 Supreme Court decision suggests that any such requirements could be unconstitutional. Renewing even a slightly revised Grand Bargain faces enormous difficulties.

Below, I first discuss the three vehicles named in the book's title — limited liability companies, donor-advised funds, and strategic corporate giving. I then make a recommendation regarding the power of wealthy philanthropists that differs from the voluntary action, small tweaks, and major structural changes to our tax system that the book suggests. I call for changes to charitable incentives available to individuals in order to encourage giving by middle-income individuals as well as the wealthy citizens who are the focus of the book.

¹¹ Several of these elite wealthy, sometimes called philanthrocapitalists, embrace what Reiser and Dean decry — an aim to apply business methods to philanthropy. See generally Matthew Bishop and Michael Green, *Philanthrocapitalism: How Giving Can Save the World* (2009). The extent to which charities should be run more like business is a long-standing debate. See "Should Philanthropies Operate Like Businesses?" *The Wall Street Journal*, Nov. 28, 2011 (including Charles R. Bronfman and Jeffrey R. Solomon, "Yes: Good Intentions Aren't Enough," and Michael Edwards, "No: The Poorest Will Suffer").

Limited Liability Companies

Reiser and Dean open their book with a lengthy treatment of LLCs. Now the most common form for new business entities (p. 157), LLCs lead a schizophrenic existence. They are entities separate from their owners for state law purposes and thus offer liability protection to those who hold their membership interests (owners), even if only one person does so. Tax law, however, gives LLCs a choice under the check-the-box regulations.¹² A domestic LLC with at least two members is classified as a partnership for federal income tax purposes unless it affirmatively elects otherwise,¹³ and a single-member LLC (SMLLC) is treated as a disregarded entity for income tax purposes unless it affirmatively elects to be treated as a corporation.¹⁴ An SMLLC does not exist for income tax purposes; it is, as the authors state, a “tax nothing.” Under tax law, any transactions from an SMLLC are treated as coming directly from its owner.

Reiser and Dean describe in some detail philanthropic LLCs, including those of Chan and Zuckerberg (the Chan Zuckerberg Initiative or CZI), Laurene Powell Jobs (the Emerson Collective), Pam and Pierre Omidyar (the Omidyar Network), and John and Laura Arnold (Arnold Ventures). To the best of my knowledge, all these LLCs and the others the authors discuss qualify as SMLLCs, with only individuals or spouses in a community property state as members. The authors criticize all these entities for “eschewing a traditional foundation” with its “capacity to generate accountability and maintain public trust in philanthropy” (pp. 25-26). The

authors question for-profit and political endeavors undertaken under the SMLLC umbrella.

I find these criticisms misplaced. Use of an SMLLC means that for income tax purposes, any transfer is treated as coming directly from the donor’s pocketbook. Those donations are deductible as charitable contributions only when given to section 501(c)(3) organizations. Consistent with the American value of individual liberty, which includes respect for privacy, wealthy individuals have always had the option to retain their wealth and to spend when and how they choose without accounting to the public. We as a nation have respected the freedom of individual donors, including a choice of anonymity. For example, donors may prefer to make charitable gifts anonymously¹⁵ out of religious or other moral principles, to avoid controversy about the causes they support, or “to avoid unwanted pleas for donations or risks to personal safety.”¹⁶ Donors to private foundations cannot remain anonymous.

The creation in 1969 of the private foundation as we know it today did not eliminate the choice of giving directly. That is, I believe the appropriate comparison for a philanthropic SMLLC, with philanthropic defined broadly, is not to a private foundation but to donors who give directly from their resources to operating charitable and exempt organizations, without use of intermediary entities. Scott is the best-known philanthropist adopting the approach of direct giving. Reiser and Dean criticize her as well. They contend that by not using a private foundation, she “has displayed a troubling commitment to secrecy” (p. 41).

Yet our tax and other laws have never denied secrecy or demanded accountability from those giving directly, without intermediaries. The size of Scott’s giving has raised questions about this tradition, and, indeed, Scott has begun making

¹² See reg. sections 301.7701-1 to -6.

¹³ Partnerships are flow-through entities; their owners are subject to just one level of tax. Owners of a corporation are subject to two levels; the corporation itself pays tax, and shareholders pay tax on dividends they receive. See generally IRS Publication 541, “Partnerships” (Mar. 2022); and IRS Publication 542, “Corporations” (Jan. 2022).

¹⁴ A married couple in a community property state can choose to treat the LLC as a single-member entity. See Rev. Proc. 2002-69, 2002-2 C.B. 831; see also IRS, “Joint Ownership of LLC by Spouse in Community Property State” (Aug. 19, 2022). Although an SMLLC is a disregarded entity for income tax purposes, that is not the case for gift and estate tax purposes. Case law on these transfer taxes has treated SMLLCs as regarded rather than disregarded. See F. Philip Manns Jr. and Timothy M. Todd, “The Tax Lifecycle of a Single-Member LLC,” 17 *Va. Tax Rev.* 323 (2017). Tax law also treats SMLLCs as entities for purposes of employment and certain excise taxes. See reg. sections 301.7701-1 to -3.

¹⁵ See Whizy Kim, “Why Is There So Much Secrecy in Philanthropy?” *Vox*, Feb. 7, 2023; The Bridgespan Group, “Should I Give Anonymously or Publicly?” (2023); and Elizabeth McGuigan, “Unheralded Generosity: A 50-State Look at Anonymous Giving,” *Philanthropy Roundtable* (May 24, 2022).

¹⁶ Bridgespan Group, *supra* note 15. The article notes that according to Indiana University’s Center on Philanthropy, 3 to 5 percent of large gifts over the past decade have been made anonymously. *Id.*

some disclosures about her giving.¹⁷ As historian of philanthropy Benjamin Soskis has observed:

At a certain point, philanthropy becomes a public act because of the power that the giver holds. . . . Philanthropy is a combination of public and private, in its essence. I think anyone who says it's entirely public isn't capturing its full nature. But anyone who says that philanthropy is entirely private is missing something pretty key: That tussle between how much accountability the public can demand, and how much discretion a donor can claim is one of the definitional tensions of the current moment.¹⁸

As Soskis lays out, issues today of transparency and accountability go far beyond the choice of using a private foundation. Reiser and Dean, however, do not make this more general argument about transparency and accountability. They limit their critique to failure to adhere to the contours of the Grand Bargain. That bargain, however, demanded accountability only when funds were transferred to a private foundation, with the accompanying benefits for income, gift, and estate tax.

In fact, as the book recognizes, the philanthropists who use SMLLCs have not eschewed private foundations. Zuckerberg and Chan, the Omidyars, and the Arnolds all have private foundations. These philanthrocapitalists, unlike John D. Rockefeller or Andrew Carnegie, have not waited until their days of industry have ended to establish private foundations. That is, they do one better than the Grand Bargain anticipated by establishing private foundations relatively early in life.

The wealthy elite often include section 501(c)(4) organizations under their SMLLC umbrellas, as the authors note specifically for Arnold Ventures and the Omidyar Network (p. 32). Applicable Treasury regulations provide that a section 501(c)(4) organization "is operated exclusively for the promotion of social welfare if it is primarily engaged in promoting in some way

the common good and general welfare of the people of the community."¹⁹ Section 501(c)(4) organizations can engage in campaign intervention, so long as that intervention is not their primary activity, and lobby without limit.²⁰ Contributing to section 501(c)(4) organizations does not violate the Grand Bargain. That bargain prohibited lobbying and campaign intervention only for private foundations — the entities funded by elites that sought the benefits of section 501(c)(3) status. The Grand Bargain did not disturb the rules for other kinds of organizations exempt under section 501(c). The regulations permitting section 501(c)(4) organizations to engage in a campaign intervention predated the Grand Bargain by a decade; the revenue ruling on unlimited lobbying was issued just two years after the Grand Bargain.

Moreover, the wealthy elite give through their SMLLCs to section 501(c)(3) public charities as well as to section 501(c)(4) social welfare organizations. To the extent that they do so, it seems to me an overstatement to say that they engage in for-profit philanthropy. Those donations are sanctioned by our laws. I know of no evidence to suggest that these gifts are designed to advance, or are motivated by, their for-profit business interests any more than such donations by taxpayers without SMLLCs.

Admittedly, these SMLLCs can make impact investments in for-profit businesses. And they do, as the book details. For example, the Emerson Collective invested in Neighborly (p. 28), which began as an online municipal bond broker, moved to blockchain technology and then telecom infrastructure before running out of money, and the Chan Zuckerberg Initiative made a less-than-successful attempt to develop talent in Africa by investing in an enterprise named Andela (p. 28). Reiser and Dean accurately point out that one set of excise taxes applicable to private foundations would prevent investments in those business endeavors, whatever social good they may also be designed to do. But as I argue above, I believe that the better comparison is to direct investment by

¹⁷ See *Yield Giving*, *supra* note 1.

¹⁸ See Kim, *supra* note 15.

¹⁹ Reg. section 1.501(c)(4)-1(a)(2)(i).

²⁰ Reg. section 1.501(c)(4)-1(a)(2)(ii); and Rev. Rul. 71-350, 1971-2 C.B. 237.

individuals. Individuals are free to take the risk of venture capital investments.

What distinguishes the SMLLCs of the wealthy elite is the ability to benefit from both the schizophrenic existence and misunderstanding regarding the treatment of these vehicles. Under state law, LLCs — even SMLLCs — are entities, even if they are not entities for tax purposes.²¹ They share this quality of “entity-ness” with private foundations, a comparison the book does not discuss, although it supports the authors’ thesis. That entity-ness offers more than liability protection. It also offers economies of scale for oversight and management of the varied activities undertaken by these members of the wealthy elite. Importantly, the entity-ness of SMLLCs permits the wealthy elite to develop an identity that carries prestige and use it to publicize their activities. As a former high-up IRS official once told me, that identity offers advantages; for example, it is much more attractive for someone to be hired as an official of an SMLLC with a well-known name and a website of its own than as a manager of a home office coordinating activities of the wealthy.²² That is, there is both psychological and practical benefits to establishing an SMLLC, benefits they share with private foundations. We should not underestimate those benefits. In these regard, SMLLCs do resemble private foundations, but without the burden private foundations must bear.

The disparate state and federal income tax treatment of SMLLCs permits arbitrage — taking advantage of the different regimes.²³ The entity-ness of SMLLCs suggests a possible reform that Reiser and Dean do not consider. That reform would involve official IRS guidance that SMLLCs with purposes such as those discussed in the book would be treated as electing corporate status. Admittedly, setting forth the purposes that would trigger this rule in a way to avoid gaming would be challenging, but not, I think, impossible.

²¹ And as noted, even for some tax purposes — employment tax and some excise taxes.

²² See Adam Hayes, “What Is a Home Office and Do You Need One?” Investopedia (Aug. 21, 2022).

²³ See generally Victor Fleischer, “Regulatory Arbitrage,” 89 *Tex. L. Rev.* 227 (2010).

If SMLLCs like the ones the book discusses were treated as corporations, they could generally qualify as section 501(c)(4) organizations. Conducting activities now under the umbrella of SMLLCs as a section 501(c)(4) organization would respond to many of Reiser and Dean’s concerns — lack of transparency, self-dealing rules that are too strict, and limits on investment in for-profit businesses. Section 501(c)(4) organizations must file an annual information return on Form 990, “Return of Organization Exempt From Income Tax,” which is made available to the public.²⁴ Section 501(c)(4) organizations face an excise tax on self-dealing, but only if and to the extent that transactions involve amounts above fair market value.²⁵ Unlike private foundations, section 501(c)(4) organizations face no limits on investments in businesses. Limiting the tax-nothings of philanthropic SMLLCs and thus encouraging the use of organizations exempt under section 501(c)(4), with its own not-so-grand tax bargain,²⁶ seems to me preferable to the targeted reform the authors suggest of voluntarily incorporating reporting requirements into SMLCC operating agreements.

Donor-Advised Funds

Reiser and Dean follow their discussion of SMLLCs with a chapter on DAFs. The development of DAFs demonstrates that the law has already abandoned the Grand Bargain that Reiser and Dean so prize. DAFs were long blessed through private letter rulings and Treasury regulations but now are recognized in the code itself.²⁷

²⁴ Disclosure would be less detailed than that required of private foundations on Form 990-PF. Form 990 does not require public disclosure of the names of even major donors and has far less detail on the entity’s investments.

²⁵ See section 4958. See also Ellen P. Aprill, “Reconciling Nonprofit Self-Dealing Rules,” 48 *ABA Real Prop., Tr. & Est. L.J.* 411 (Winter 2014).

²⁶ Contributions to a section 501(c)(4) organization are not deductible and may be brought back to an estate under section 2036. But these contributions are not subject to gift tax, and donors do not face tax on donations of appreciated assets. Seid’s gift, discussed *supra*, was made to a conservative section 501(c)(4) organization. Yvon Chouinard’s recently gave all the nonvoting stock of Patagonia to a section 501(c)(4) organization on the liberal end of the political spectrum. See Joseph De Avila and Joseph Pisani, “Patagonia Founder Is Giving His Company Away in Pledge to Fight Climate Change,” *The Wall Street Journal*, Sept. 14, 2022. Eliminating the tax-nothing option would encourage others to do the same.

²⁷ See sections 4966 and 4967.

Donors with DAFs make donations to a dedicated account maintained by a sponsoring organization. The sponsoring organization becomes the owner of the funds, but the donor retains the right to advise on the timing and destination of the funds as well as the right to offer investment advice. Those recommendations are almost always accepted. The charitable dollars needed to make it worthwhile to establish a DAF account are far less than those needed to support a private foundation with all its regulatory requirements. A DAF has been called “a kind of a ‘mini’ private foundation or perhaps a (not very) poor man’s private foundation” (p. 59, footnotes omitted), although by dollars they are used primarily by the wealthy elite (p. 75).

DAFs are better than private foundations on several tax dimensions. Because of the number of donors, sponsoring organizations qualify as public charities and not as private foundations. They thus operate free of the transparency and timing requirements applicable to private foundations. Donors receive charitable deductions for the FMV at the time of transfer to a DAF sponsor for all assets, whether stock of private companies or hard-to-value assets such as limited partnership interests. DAF sponsors have no distribution requirements, either from the entity itself or from individual accounts, and individual donors remain anonymous.

The book documents the continued calls for reform to make DAFs adhere more closely to the principles of transparency, accountability, and timing. Most recently, professor Ray Madoff and the billionaire philanthropist John Arnold of Arnold Ventures teamed with others to propose the Initiative to Accelerate Charitable Giving.²⁸ Its suggested reforms to DAFs include allowing donors an immediate charitable contribution deduction only if the DAF sponsors distribute monies within 15 years. Based on this work, Sens. Angus S. King Jr., I-Maine, and Chuck Grassley, R-Iowa, proposed the Accelerate Charitable Efforts Act (p. 70), but it has gone nowhere in Congress. At the same time, DAFs continue to grow. According to the 2022 “Donor-Advised Fund Report” from the National Philanthropic Trust,

²⁸ Initiative to Accelerate Charitable Giving, “About Us” (2020).

total DAF assets in 2021 amounted to \$167.81 billion, a 39.5 percent increase over 2020; contributions in 2021 totaled \$72.78 billion, an increase of 46.6 percent over 2020.²⁹

Other recent legal developments have sharply limited rather than expanded accountability. In the face of opposition by DAF sponsors, California in 2020 was unable to pass a bill to require large sponsors to submit fund-by-fund disclosures to the state (p. 70).³⁰ The IRS in 2020 eliminated the requirement that noncharitable section 501(c) organizations supply the agency with the names of major donors.³¹ The Supreme Court, in its 2021 decision in *Americans for Prosperity Foundation*, held that California's requirement that section 501(c)(3) organizations operating in the state file an unredacted copy of Schedule B — a list of major donors with names, addresses, and amounts — was facially unconstitutional.³² Note that these strictures apply to disclosures only to the state and not to the public. That is, even efforts for disclosure limited to government agencies have failed.

In light of these developments, any attempt to increase transparency and accountability requires careful structuring and consideration of First Amendment doctrines. In the case of DAFs, Reiser and Dean have particular concern about commercially affiliated sponsors. Today, commercially affiliated DAF sponsors dominate. Fidelity, Vanguard Schwab, Goldman Sachs “and virtually every other player in the investment

²⁹ National Philanthropic Trust, “The Donor-Advised Fund Report,” at 11 (2022).

³⁰ Toward the end of 2022, the Office of the California Attorney General released a report summarizing an audit of DAF sponsors registered with the state attorney general. Among its findings was that the most frequent grant ratio distributions were “less than 5 percent and greater than 50 percent.” Further, “the distribution of grant ratios less than 5 percent and greater than 50 percent was almost evenly split for commercial sponsors,” while “community foundations reported a greater share of grant ratios less than 5 percent than grant ratios greater than 50 percent.” Different readers of the report had very different reactions. The Philanthropy Roundtable saw the report as refuting the need to restrict DAFs, while a panel of speakers, which included Ray Madoff, at the CalNonprofits annual symposium, renewed calls for regulations.

³¹ See T.D. 9898.

³² *Americans for Prosperity Foundation v. Bonta*, 141 S. Ct. 2373 (2021). The Court held that this requirement failed an exacting scrutiny standard of review under which, to avoid violating the First Amendment, any compelled disclosure to government must be “narrowly tailored to an asserted and substantial government interest.” The Buckeye Institute has filed suit arguing that the decision requires the same result for filing Schedule B with the IRS.

foundations and corporate strategic giving. On one hand, Reiser and Dean remain agnostic about these choices: "It would certainly be premature to read too much into a few prominent examples. Corporate philanthropy through internal giving departments has always outpaced foundation giving . . . [N]ew foundations are being formed, and at a clip that suggests the overall number of such entities could stay constant or even rise" (pp. 98-99). They also caution, "It is too soon to offer firm conclusions about a trend one way or the other, but each shift demonstrates the nimbleness with which corporations deploy their largess" (p. 99). On the other hand, 10 pages later they assert, "With strategic corporate philanthropy's ascendance, the boundary demarcating the line between charitable acts and business decisions is disappearing" (p. 108).

The authors tie strategic corporate philanthropy to efforts by corporations to embrace environmental, social, and governance efforts (ESG) and corporate social responsibility (CSR). At the largest companies, they state, “strategic corporate philanthropy can be found operating within a broader CSR, citizenship or ESG umbrella” (p. 99). Citibank in 2020 declared in its global ESG report, “Our ESG commitments are an essential part of our firm-wide strategy” (p. 100). These commitments ranged from COVID-19 initiatives to tying executive compensation incentives to ESG goals. Apparel manufacturers have formed foundations to address working conditions, worker safety, training, and sustainability.

Yet even since the January publication of the book, the political climate has shifted further to well-publicized political attacks on corporate ESG investing. Florida Gov. Ron DeSantis (R) has established an alliance with 18 other governors that has dismissed ESG investing as “fraud,” calling it “a direct threat to the American economy, individual economic freedom, and our way of life.”³⁵ *The New York Times* reports, “[ESG investing] has been a widely accepted trend in financial circles for nearly two decades. But suddenly, Republicans have launched an assault on a philosophy that says companies should be

concerned with not just profits but also how their businesses affect the environment and society.”³⁶ Some tied the collapse of Silicon Valley Bank to ESG investments.³⁷ In March President Biden needed to use his first veto to reject legislation supported by congressional Republicans to forbid investment managers from considering ESG in investment decisions.³⁸

Despite efforts to counter these attacks,³⁹ any sustained and increasing attack on ESG as a form of strategic corporate philanthropy may pressure large corporations to exercise the nimbleness that the book praises and return to greater dependence on corporate foundations. At the same time, however, private foundations face attacks from both conservative and progressive populists who share, in the words of William A. Schambra of *The Giving Review*, itself a conservative journal, “a distrust of concentrated power in the hands of the wealthy, which foundations embody.”⁴⁰ If such is one possible future, the alternatives to the private foundations — and their faults — that are the subject of the book gain importance.

Recommendations and Conclusion

Reiser and Dean endorse both private ordering and some small changes to the private foundation rules, such as loosening self-dealing rules and permitting some political activity, changes unlikely to herald a return to the use of private foundations by the wealthy elite. They do not call for the dismantling of private foundations as a failed attempt to constrain the power of the wealthy elite. That is, the book as a whole focuses on control, not rejection, of elite power. Nonetheless, the authors also propose broad systemic reform aimed at such rejection, including a return to steeply progressive income tax rates and the enactment of a wealth tax. These considerations reflect the authors' deep

³⁶David Gelles, "How Environmentally Conscious Investing Became a Target of Conservatives," *The New York Times*, Feb. 28, 2023.

³⁷ See Kimberly A. Strassel, “Did ESG Help Sink SVB?” *The Wall Street Journal*, Mar. 16, 2023.

³⁸ Katie Rogers, "Biden Issues First Veto to Protect Socially Conscious Investing," *The New York Times*, Mar. 20, 2023.

³⁹ See Patrick Temple-West, “Influential Local U.S. Banks Fight Back Against Republicans’ ESG Attacks,” *Financial Times*, Feb. 14, 2023.

⁴⁰ Schambra, "Populist Anger and a Sole Resort to Push Back Against Philanthropic Elites," *The Giving Review*, Mar. 2, 2023.

³⁵ Amanda Umpierrez, “DeSantis Forms 19-State Alliance in Latest ESG Attack,” *401(k) Specialist*, Mar. 16, 2023.

commitment to reducing inequality (pp. 195-197). However, those potential major tax changes link only indirectly to the principles of targeting, timing, and transparency that they so fervently believe shaped the Grand Bargain. Moreover, the authors are rightly uncertain about the adoption of such changes to our tax system. Further, should a wealth tax limit the tax benefits of private foundations,⁴¹ the issues the book raises about the deleterious effect of for-profit philanthropy would increase in importance.

Where Reiser and Dean focus on systemic changes that would limit the power of elite wealth, I would suggest a less far-reaching change to our tax law, one focused on a different kind of inequality — the need to encourage charitable giving beyond the wealthy members of society, who are the focus of the book. That is, the dominance of the wealthy elite on charitable giving needs to be addressed from the bottom up as well as the top down.

The 2017 tax reform legislation known as the Tax Cuts and Jobs Act almost doubled the standard deduction through 2025.⁴² As a result, the number of itemizers since tax year 2018 has dropped precipitously.⁴³ As C. Eugene Steuerle of the Urban-Brookings Tax Policy Center testified before the Senate Finance Committee in 2022, “The current charitable tax incentive now benefits only about one-tenth of all households, mainly those with higher incomes.”⁴⁴ He further

explained that although individual giving “overall increased somewhat near the end of the last decade,” that increase resulted from other factors, “such as income growth, higher employment, and in response to the COVID crisis.”⁴⁵ But he emphasized that the 2017 legislation “almost assuredly decreased giving from what it otherwise might have been.”⁴⁶ (Emphasis in original.) Steuerle made a crucial point: “I doubt seriously that the public will long support a deduction so narrowly applied.”⁴⁷ He underscored the need for Congress to send a “broader signal . . . to the public about the role of charitable giving in our society.”⁴⁸

Professor Roger Colinvaux has made a similar argument. He maintains that “broad-based participation in the giving incentive is central to its integrity and provides a base for a dynamic and worthy charitable sector.”⁴⁹ He asserts that an incentive limited to the wealthy few undermines both the altruistic and pluralistic rationales for the deduction. For him, “the ironic vision represented by a charitable deduction claimed by the few is to squeeze section 501(c)(3) further to reflect the giving preferences of the most affluent in society.”⁵⁰

Steuerle and Colinvaux make different recommendations. Steuerle and his colleagues at the Tax Policy Center have long endorsed a floor for the charitable deduction to increase giving.⁵¹ Colinvaux prefers a credit.⁵² He spells out how a

⁴¹ See Emmanuel Saez and Gabriel Zucman, “Progressive Wealth Taxation,” Brookings Papers on Economic Activity (Sept. 5, 2019) (arguing that monies in DAFs and private foundations be subject to a wealth tax until the funds are spent or out of the donor’s control). See also Brian Galle, “Tax-Exempt Entities Under a Wealth Tax,” *Medium*, Jan. 25, 2019.

⁴² P.L. No. 115-97, section 11021 (codified at section 63(c)(7)).

⁴³ IRS, “SOI Tax Stats — Stats-at-a-Glance” (Mar. 3, 2023). Before the TCJA, some 30 percent of taxpayers itemized. See Scott Eastman, “How Many Taxpayers Itemize Under Current Law,” Tax Foundation (Sept. 12, 2019). For 2023, the standard deduction is \$13,850 for individuals and \$27,800 for married taxpayers filing jointly. See Rev. Proc. 2022-38, 2022-45 IRB 445, section 3.15(1). Only those who itemize rather than take the standard deduction benefit from the charitable contribution deduction.

⁴⁴ Steuerle, “Options for Improving the Lives of Charitable Beneficiaries Through Reform of the Charitable Deduction” (Mar. 17, 2022) (testimony before the Senate Finance Committee). See also Steuerle, “Challenges and Opportunities for Charities After the 2017 Tax Cuts and Jobs Act,” Urban-Brookings Tax Policy Center (May 11, 2017). In 2020 and 2021, nonitemizers could take up to a \$300 (\$600 for a married couple filing jointly for 2021) charitable deduction for cash gifts in addition to the standard deduction. See Coronavirus Aid, Relief, and Economic Security Act, P.L. No. 116-136, section 2204 (2020) (codified at section 62(a)(22) and (f)); Consolidated Appropriations Act, 2021, P.L. 116-260, Div. EE, section 212 (2020) (codified at section 170(p)).

⁴⁵ Steuerle testimony, *supra* note 44.

⁴⁶ *Id.* Steuerle continues, “Using a commonly used estimate on behavioral response, my colleagues at the Tax Policy Center calculated that giving declined about 4 percent to 7 percent.” *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* at 3.

⁴⁹ Colinvaux, “The Importance of a Participatory Charitable Giving Incentive,” *Tax Notes*, Jan. 30, 2017, p. 605.

⁵⁰ *Id.* at 608. See also Colinvaux, “Fixing Philanthropy: A Vision for Charitable Giving and Reform,” *Tax Notes*, Mar. 4, 2019, p. 1007.

⁵¹ See Steuerle testimony, *supra* note 44; Steuerle et al., “Designing an Effective and More Universal Charitable Deduction,” Urban-Brookings Tax Policy Center (Mar. 17, 2021); and Rob McClelland et al., “Tax Incentives for Charitable Contributions,” Urban-Brookings Tax Policy Center (Nov. 12, 2019).

⁵² Colinvaux, “Participatory Giving,” *supra* note 49, at 611-612. He also discusses the consequences of eliminating the charitable giving incentive, both for all giving and only for giving to private foundations. *Id.* at 612-613. Samuel D. Brunson has a paper in progress arguing that a credit would particularly increase Black giving. See Brunson, “Black Giving Without Subsidy” (2023). Thus, a credit for charitable giving should appeal to Reiser and Dean, with their concerns about racial inequality.

credit gives the same dollar benefit to taxpayers regardless of their taxable income, while the deduction is more valuable to taxpayers the higher their marginal rate of tax. A credit thus would permit altruism to be equally rewarded in ways our current system does not. But both seek to achieve more inclusive incentives for charitable giving.

Steuerle reminds us all that the purpose of incentives for charity is to maximize gains for beneficiaries. We should not focus only on the impact of these incentives on taxpayers and government revenue. Steuerle calls for nonpartisan or bipartisan staff to provide options on how to improve charitable giving, options that consider promoting the societal as well as the individual value of giving.⁵³ The increased standard deduction introduced by the TCJA is set to expire in 2025.⁵⁴ Thus, now would be a particularly good time to engage in that effort. Such a study should not neglect ways to reform tax rules that are particularly important to the wealthy elite; for him, the charitable deduction for income tax is unimportant. Those issues include unlimited gift and estate tax deductions for contributions to section 501(c)(3) organizations and the failure to tax built-in gain upon the contribution of appreciated assets, especially gifts to section 501(c)(4) organizations.⁵⁵

As Reiser and Dean's provocative analysis in *For-Profit Philanthropy* shows us, any effort to reconsider charitable incentives must revisit the rules adopted in 1969 for private foundations. But their book challenges us to do much more. It reminds us that we must test all charitable giving incentives against the principles of transparency, timing, and targeting. The authors teach us that tax rules do not exist in isolation; we cannot ignore the effect of state entity law and the pressures businesses face. They prompt us to ponder the nature of the relationship we want to

nurture between philanthropy and business. Although I take issue with some aspects of their analysis, I believe that if we take their lessons to heart, civil society will be the better for it. ■

⁵³ Steuerle testimony, *supra* note 44, at 11-12.

⁵⁴ See section 63(c)(7).

⁵⁵ As discussed *supra*, section 501(c)(4) organizations can engage in political campaign intervention so long as those activities are not their primary ones. Political organizations, in contrast, are defined in section 527 as organizations operated primarily for such intervention. See section 527(e)(1). Unlike donors to section 501(c)(4) organizations, donors of appreciated assets to a political organization are treated as having engaged in a deemed sale and are subject to the appreciation. See section 84.