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ABSTRACT

Donor-advised funds (DAFs) are conduits for charitable giving that support immediate tax deductions while creating a reservoir of assets for subsequent disposition to end-use charities. The number of new DAF accounts has skyrocketed in the wake of the 2017 Tax Cuts and Jobs Act (TCJA). This Article presents evidence suggesting that bunching charitable contributions to game the TCJA-enhanced standard deduction likely motivates much of the onslaught of new DAF accounts established since 2016 and argues that the typical buncher is likely to differ from other DAF account holders in ways that matter from a policy perspective. Thus, while DAF critics have generally focused on the unproductive accumulation of assets in DAF accounts and have advanced reforms aimed at speeding up DAF payouts, this Article argues that in the context of bunchers, unproductive accumulation of assets in DAF accounts is unlikely to be a major problem. The more significant problem with DAF-facilitated bunching is that the cost to the public fisc is unlikely to be justified by incremental charitable giving. Thus, while this Article concludes that regulation targeting DAF payouts is unobjectionable, it argues that a wholly different set of reforms targeting the deductibility of charitable giving generally would be needed to address the cost of DAF-facilitated bunching under current law and under thoughtfully reformed laws involving universal charitable deductions above a floor.

Professor of Law and Maurice Poch Faculty Research Scholar, Boston University School of Law. Acknowledgements to follow.

INTRODUCTION

Donor-advised funds (DAFs) are conduits for charitable giving. Taxpayers create a DAF account, most commonly with a commercial DAF sponsor such as Fidelity Charitable.[2] They contribute cash or other assets to their DAF account, direct the investment of their DAF account balances, and then make grants out of their DAF accounts to public charities such as the Red Cross, BU, or the United Way. Under current law, taxpayers are entitled to a deduction at the time assets are contributed to DAF accounts despite the fact that the funds may rest in a DAF account indefinitely.[3] Also, as with other contributions of appreciated assets, in many cases DAF donors are never taxed on unrealized gains on these assets despite being entitled to a full fair market value deduction.[4]

The tax and other rules governing DAFs have long been controversial. In particular, critics bemoan the lack of any requirement or even incentive for taxpayers to move funds out of their DAFs to end-use charities, sometimes resulting in significant gaps between DAF contribution and distributions to end-use charities.[5] Moreover, DAFs facilitate the contribution of appreciated assets, including illiquid assets, often leading to large tax subsidies and raising valuation concerns.[6]

While DAFs have been growing in popularity over the last decade, the 2017 Tax Cuts and Jobs Act (TCJA) spurred growth to unprecedented heights with the number of DAF accounts more than doubling in just two years.[7] The data suggest, but do not prove, that much of this growth in DAF activity resulted from taxpayers seeking to "bunch" several years of philanthropy into a single year in order to increase their total deductions over time given the TCJA's massive increase in the standard deduction and adoption of a $10,000 cap on deductions for state and local taxes. While DAFs are not essential for deduction bunching, as discussed below, they facilitate bunching.[8]

Assuming that deduction bunching is driving much of the recent growth in DAFs, this Article asks how, as a tax policy matter, we should feel about DAFs and about various proposals to increase DAF regulation. The Article makes several observations. First, indefinite warehousing of assets in DAF accounts may be less of a problem to the extent that the creation of these accounts is motivated by bunching charitable contributions to take advantage of the TCJA enhanced standard deduction. These are not cases, for example, in which taxpayers seek to accumulate enough assets in their DAF accounts to make transformative gifts. Of course, having received

[2] As discussed infra, DAF accounts are divided between community foundations, single issue charities, and commercially sponsored funds. The latter held 86% of DAF accounts in 2020. National Philanthropic Trust (NPT) 2021 DAF Report at 22-30.

[3] DAF sponsoring entities are considered public charities for federal tax purposes. Thus, contributions to DAF accounts are deductible in the year of contribution. Throughout this Article, I will generally refer to DAF accounts simply as "DAFs."

[4] Infra.

[5] Infra.

[6] Infra.

[7] NPT 2021 DAF Report at 16. Contributions to DAFs accounted for 10% of total U.S. charitable giving in 2020. NPT 2021 DAF Report at 10.

[8] Infra.

their tax deduction for their bunched contribution, bunchers, like other DAF account holders, might inadvertently fail to distribute assets out of the account for some time.[9]

The presence of bunchers should also affect how we conceptualize DAF account balances. DAF critics generally assume that assets going into DAFs and remaining in DAFs would go directly to end-use charities in the absence of DAFs.[10] Under that assumption, any lag between a taxpayer's contribution to a DAF and grant from the DAF to an end user is a loss to the real charitable sector. To be sure, not all commentators view this lag as a negative. After all, funds held by DAFs are invested and earn returns, and future generations may be as deserving of charitable support as the current generation.[11] But many commentators do view the lag as a loss. This Article argues, however, that for bunchers this view of end-use charities missing out on assets stockpiled in DAFs may be inapposite. Absent DAFs, bunchers might decide to accumulate assets in taxable accounts for a number of years before making bunched donations in a single year to one or more charities. To the extent that this is an accurate picture, DAF account balances do not represent an opportunity cost for end-use charities.

The more significant policy concern raised by contribution bunching is likely to be the cost to the public fisc. This Article argues that the cost could approach or exceed a billion dollars a year.[12] To be sure, in some cases bunching charitable contribution deductions restores a marginal incentive for philanthropy that was eliminated by the TCJA's changes. The TCJA slashed the number of itemizers from about 30% to about 11% of U.S. taxpayers and the number taking the itemized deduction for charitable contributions from about 25% to about 9% of U.S. taxpayers.[13] Some of the taxpayers who lost the deduction and incentive for philanthropy have restored it through bunching. For those who find value in broadly available subsidies for charitable giving, DAFs make a very small dent in the loss engineered by the TCJA.

In a likely majority of cases, however, taxpayers who would itemize post-TCJA with or without contribution bunching, and who already experience an incentive for marginal charitable giving, bunch philanthropy solely in order to reduce their overall tax bill in light of the increased standard deduction. In short, bunching is costly for the public fisc and only creates useful incentives in what is likely to be a small subset of cases.[14]

A final policy issue is DAF facilitation of the donation of liquid and illiquid appreciated assets. Certainly bunchers, like other DAF users, may contribute such assets to DAFs, but the tax treatment of contributions of appreciated assets is unlikely to drive DAF formation by bunchers. Put another way, suppose that Congress were to, sensibly, in my view, limit the deduction for appreciated asset contributions to the taxpayer's basis, a move that would generally result in

[9] Infra.

[10] Infra.

[11] Infra.

[12] Infra.

[13] IRS Statistics of Income (SOI). Infra.

[14] Infra.

liquidation prior to DAF contribution.[15] I would expect such a rule to have very little impact on the use of DAFs by bunchers.[16]

Critics have targeted DAFS with several proposed reforms, principally to discourage accumulation of assets in DAFs, but perhaps also to discourage DAF use more generally. One proposed reform is to place a cap on the number of years assets can be held in a DAF without disbursement before the donor loses any say as to disposition. In 2021 Senators King and Grassley proposed a fifteen-year maximum.[17] Professor Edward Zelinsky has proposed subjecting individual DAF accounts to the payout rules applicable to private foundations, i.e., requiring DAFs to pay out a minimum of five percent of assets each year.[18] A more drastic reform proposal would defer the deduction for charitable contributions made through DAFs to the point of disbursement to end-use charity.[19]

I would not expect DAF payout requirements to have a significant impact on bunchers. Although the tax savings from bunching increases with the number of years between bunched contributions, asset limitations (the amount available to bunch) and other concerns (e.g., potential changes in tax rates or rules) are likely to result in bunching cycles and payouts of DAF assets that are much less than fifteen years. By contrast, deferring deductions for DAF contributions until payout would essentially end the use of DAFs by bunchers, resolving the accumulation issue and perhaps reducing but probably not precluding bunching to game the TCJA's expanded standard deduction.[20]

While the focus of this Article is on the TCJA amendments and their impact on DAF use, the analysis has implications for one long-standing and important proposal for the reform of the tax treatment of individual philanthropy more broadly. Given that, this Article concludes with a brief look ahead. Recognizing the costs and benefits of federal subsidies for philanthropy, some commentators have proposed a universal deduction (i.e., an "above-the-line" deduction available to all taxpayers irrespective of itemizing) but only above a floor amount set as a percentage of income.[21] The idea is that most taxpayers will give a certain amount to charity with or without a subsidy. This base amount does not need to be subsidized. The payoff from subsidization is encouraging philanthropy that goes above and beyond this base amount. But, of course, for taxpayers giving near the floor, bunching (with or without DAFs, but facilitated by DAFs), would

[15] See Daniel Halperin, A Charitable Contribution of Appreciated Property and the Realization of Built-in Gains, 56 Tax L. Rev. 1, 29 (2002).

[16] Infra.

[17] Accelerating Charitable Efforts Act. S. 1981, 117th Cong., 1st Sess. (June 9, 2021) (introduced by Senators Angus King of Maine and Charles Grassley of Iowa) (hereinafter "ACE Act").

[18] Edward A. Zelinsky, A Response to the Initiative to Accelerate Charitable Giving, 170 Tax Notes 755, 761-62 (2021). Private foundations are IRC § 501(c)(3) organizations that do not qualify as public charities. IRC § 509(a). Private foundations are generally funded by a small number of individuals, controlled by their funders, and make grants to public charities rather than providing philanthropic services directly. Samuel D. Brunson, "I'd Gladly Pay You Tuesday for a [Tax Deduction] Today": Donor-Advised Funds and the Deferral of Charity, 55 Wake Forest L. Rev. 245, 254 (2020).

[19] Roger Colinvaux and Ray D. Madoff, Charitable Tax Reform for the 21st Century, Tax Notes, Sept. 16, 2019, at 1867.

[20] It is important to keep in mind that DAFs facilitate bunching but are not a prerequisite for bunching. See infra.

[21] Infra.

be an obvious strategy to effectively avoid or minimize the impact of the floor. Some rule would be needed to block this end run, but again, to be clear, this would be true in a world with or without DAFs.[22]

Ultimately, this Article concludes that bunching-motivated DAF use, which apparently is increasing in the wake of the TCJA, raises a different set of policy issues. Concerns about assets accumulating unproductively in DAFs and DAF facilitation of illiquid asset contribution are probably mitigated for bunchers. On the other hand, many bunchers are likely using DAFs simply to exploit the TCJA expanded standard deduction, at great cumulative cost to the public fisc and with little benefit in the form of incentive creation. Reformers should likely shift their focus given these realities.

The remainder of this Article is organized as follows. Part I provides background on DAFs and the TCJA and explains how taxpayers can bunch charitable contributions, with or without DAFs, to take full advantage of the TCJA-expanded standard deduction. Part II provides data revealing explosive growth in DAF accounts beginning in 2017 and suggesting a new, somewhat lower income class of account holder. This data suggests that bunching charitable contributions likely drives much of the growth in accounts post-TCJA. Part III reconsiders DAF policy issues in light of the shifting motivation of account holders, arguing that the cost of contribution bunching to the public fisc is a more serious issue with respect to this group than unproductive asset accumulation in DAFs or contribution of appreciated assets. Part IV considers an eclectic set of DAF and broader charitable reforms arguing principally that reforms aimed at DAF asset accumulation will have no effect on bunchers. A different set of reforms is required to address the costs imposed by bunching today and going forward in a post-post-TCJA tax world.

I. BACKGROUND

A. DAFs

Donor-advised funds have been with us for decades. The first funds were associated with geographically focused community foundations or trusts. Several commentators credit the New York Community Trust with creating the first DAF accounts in the 1930s.[23] Other mission-specific DAF funds were created by so-called "single issue" sponsors, such as universities or religious organizations.[24] Later, investment giants, such as Fidelity, Vanguard, and Schwab, innovated by introducing commercial DAF funds that essentially serve as a neutral conduit, allowing account holders wide latitude to support the charities of their choice.[25] Today, these commercial funds are the largest players in the DAF landscape,[26] and my focus henceforth will be on commercial DAF sponsors unless otherwise noted.

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[22] Infra.

[23] John R. Brooks, The Missing Tax Benefit of Donor-Advised Funds, 150 Tax Notes, 1013, 1014 (2016); Brunson, supra, at 259; Roger Colinvaux, Donor Advised Funds: Charitable Spending Vehicles for 21st Century Philanthropy, 92 Wash. L. Rev. 39, 44 (2017).

[24] Colinvaux (2017), supra, at 46.

[25] Colinvaux (2017), supra, at 45 (noting that the Fidelity Charitable Gift Fund was established as a public charity in 1991).

[26] Commercial sponsors held 86% of accounts and 63% of total DAF assets in 2020. NPT 2021 Report at 20-30.

The process, in brief, works like this. A donor creates a DAF account with a sponsor, say Fidelity Charitable. The donor contributes cash, publicly traded securities, or "complex" illiquid assets.[27] In the latter two cases, the DAF sponsor liquidates the assets creating a cash reserve for donations.[28] The donor directs the investment of her DAF account balance much like 401(k) participants direct the investment of those accounts.[29] Because the DAF sponsor is a public charity, investment gains within the DAF are not taxed.[30] Finally, the donor makes disbursements (known as grants) to end-use charities.[31] Technically, the donor plays only an advisory role in directing disbursements, but in practice donors control disbursements.[32]

The reason for the artifice regarding donor advice is tax. Under current law, donors receive a tax deduction for their contributions to a DAF fund, which is a public charity, in the year in which those contributions are made.[33] The deduction at that point is justified based on the argument that the donor has given up control; that the gift is complete.[34] Certainly, the funds cannot be regained by the donor, but in reality donors retain control regarding disposition.[35]

1. Are DAFs Tax Advantaged?

One might infer that the receipt of a tax deduction at the time assets are contributed to a DAF – versus at a later point when the assets are distributed to end-use charities – results in a tax advantage for DAF donors.[36] But this isn't necessarily the case. Indeed, as Professor John Brooks has shown "for most donors most of the time, there is no substantial tax benefit to donating to a DAF, and there may even be a tax cost."[37]

Brooks compares 1) donating to a DAF today followed by distribution from the DAF to a charity in one year to 2) retaining the asset for a year and then donating to charity.[38] Suppose first that the asset is cash, that the cash can be invested at a 10% rate, and that the donor faces a marginal tax rate of 40%. First, assume that donor has $100 that she contributes to a DAF. Her immediate tax deduction provides a tax savings of $40. A year later, the DAF can distribute $110 to charity,

[27] Fidelity Charitable Giving Report 2022 at 6.

[28] Fidelity 2022 at 19.

[29] Fidelity 2022 at 6.

[30] Fidelity 2022 at 6.

[31] Fidelity 2022 at 6.

[32] As numerous commentators have pointed out, the DAF sponsor market is competitive. If a sponsor failed to follow the disposition advice of account holders, those holders would likely move their accounts to another sponsor. Brunson, supra, at 259; Colinvaux (2017), supra, at 52; Roger Colinvaux, Speeding Up Benefits to Charity: Donor Advised Fund and Foundation Reform, 63 B.C. L. Rev. (2022) at 9; Colinvaux & Madoff (2019), supra, at 1871; Zelinsky (2021), supra, at 759; Daniel J. Hemel et al, Are Donor-Advised Funds Good for the Nonprofit Sector?, 87 Exempt Org. Tax Rev. 287 (2021), at 3; Brian Galle, Pay it Forward? Law and the Problem of Restricted Spending Philanthropy, 93 Wash. U. L. Rev. 1143, 1150 (2016).

[33] IRC § 170.

[34] Colinvaux & Madoff (2019), at 1870; Colinvaux (2017), at 44.

[35] Colinvaux & Madoff (2019), at 1870; Colinvaux (2017), at 44.

[36] The issue here is whether DAFs produce better after-tax results than the alternative, a situation that I will refer to as a tax advantage in a conventional sense. DAF accounts may also be treated more favorable than alternatives under various limitations on deductibility. These tax advantages are discussed infra.

[37] Brooks (2016), at 1022.

[38] Brooks (2016). I have adjusted Brooks' hypotheticals slightly but not, I think, in any meaningful way.

since returns within a DAF are not taxed.[39] And the donor's tax savings grows to $42.40 after tax, assuming her 10% return is taxable as ordinary income. If instead the donor holds the $100 cash for a year in an interest earning taxable account, the amount grows to $106 after tax. Donation of $106 yields the donor tax savings of $42.40. So, in this hypothetical, the donor's tax savings is unaffected by the use of a DAF, but the charity receives $4 more (3.8%) if a DAF is employed. The reason, of course, is that the investment earnings within the DAF are not taxed. Assuming that the donor cares about the net amount distributed to charity as well as her own tax position, the use of a DAF in this hypothetical is tax advantaged.

Suppose, however, that the $100 asset consists of shares of a mutual fund that also grows at a 10% rate. Immediate contribution to a DAF produces the same result as above: $110 to charity in a year and $42.40 tax savings to donor in a year assuming the earnings on her tax savings are taxed as ordinary income. But in this scenario, if the donor forgoes the DAF, holds the shares for a year, and then contributes to charity, the unrealized appreciation of $10 on the shares will not be taxed.[40] In a year, the charity will receive $110, and the donor will enjoy a tax savings of $44. In this scenario, there is a tax *disadvantage* to use of a DAF.[41]

Because the bulk of contributions to DAFs consist of non-cash assets, Brooks concludes that any DAF tax advantage is likely to be minimal at best.[42] Brooks was writing in 2016. As depicted in Figure 1 below, if Fidelity Charitable's experience is typical, the DAF contribution mix has continued to shift away from cash in favor of liquid securities over the past decade.[43] The enactment of the TCJA in 2017 had no visible impact on these trends, which are more likely to be driven by the extended bull market which resulted in more and more taxpayers holding appreciated securities, at least through 2021. In any event, Brooks' conclusion that DAFs are not tax advantaged in this conventional sense seems likely to be even more true today.

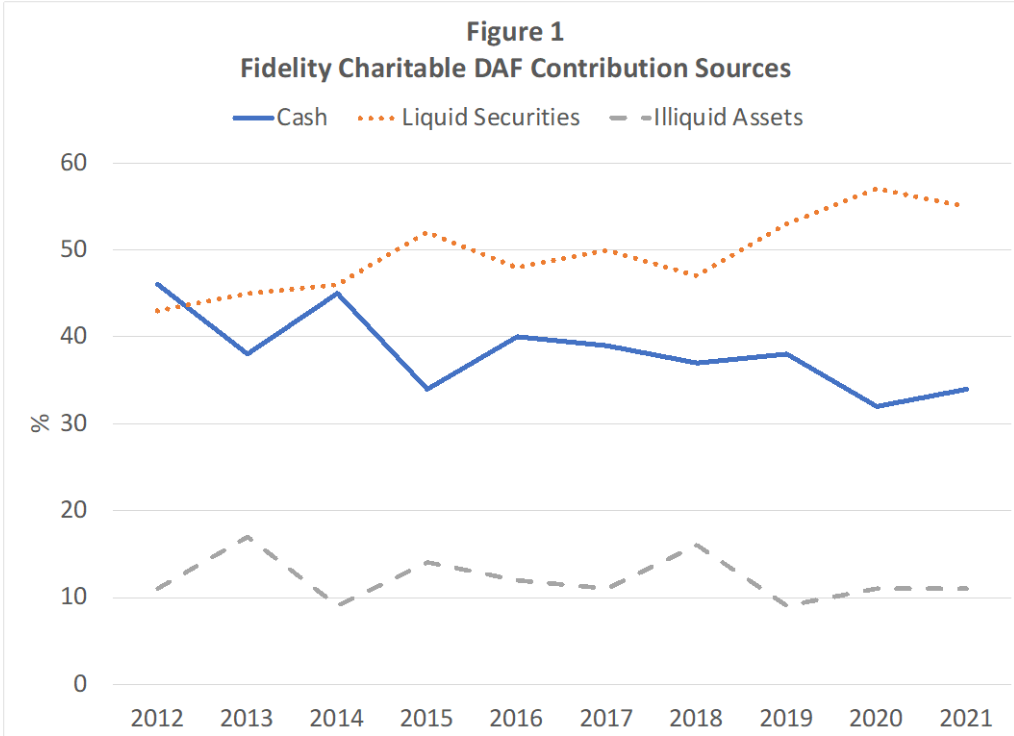
[39] IRC § 501(c)(3). Recall that the DAF is a public charity.

[40] As discussed infra, the donor of market traded securities held for more than a year receives a full fair market value deduction and is not taxed on unrealized appreciation.

[41] Brooks (2016).

[42] Brooks (2016).

[43] Fidelity Charitable Giving Reports, 2013-2022. Fidelity Charitable is the largest DAF sponsor accounting for 15% of DAF accounts. Fidelity Charitable, 2021 Giving Report at 8; NPT 2020 DAF Report at 16.



2. Why Else Do Donors Create DAFs?

Although DAFs are not tax advantaged in terms of maximizing after-tax results, DAFs do provide donors with tax and other benefits. From a tax perspective, DAFs allow donors to accumulate assets leading towards a transformative contribution while avoiding annual limitations on deductions for charitable contributions.[44] Moving beyond tax, DAFs facilitate the liquidation of complex assets that might be difficult for an end-use charity to manage if donated directly.[45] DAFs also facilitate the division of contributions of non-cash assets between multiple end-use charities.[46] And DAFs facilitate shifting philanthropy across time.[47] The bunching motivation for DAF creation that is discussed below is not entirely new. For example, prior to the TCJA donors nearing retirement and expecting to face a lower marginal tax rate in their retirement years might have pre-funded a DAF with expected contributions for several years in order to take advantage

[44] Generally, contributions by individuals to public charities within a tax year are not deductible beyond 60% of AGI. IRC § 170(b)(1)(G). Suppose a taxpayer earning $1 million per year wished to make a $1 million gift to her alma mater. If made directly to the school in a single year, only $600,000 would be deductible. However, the taxpayer could donate to a DAF, and fully deduct, $500,000 for each of two years. At that point she could make the $1 million grant.

The tax rules applied to DAFs are much less onerous than those applied to private foundations. See, e.g., Colinvaux (2017), at 52-53. For the middle to upper-middle income taxpayers who are the focus of this Article, however, the most relevant comparison is likely to be between contributions to public charities with or without a DAF intermediary. See Brunson (2020), at 258 (noting that given the administrative complexity of running a private foundation, these vehicles will only make sense for certain wealthy individuals who intend to contribute substantial sums to charity).

[45] See, e.g., Fidelity 2022 at 19 (noting that Fidelity Charitable "facilitates contributions of … complex assets [that] can be complicated for individuals to give and for some nonprofits to accept").

[46] Hemel et al (2021), at 3-4.

[47] Hemel et al (2021), at 3.

of the larger tax subsidy associated with the higher marginal rate.[48] Of course, all of these benefits come at a cost. Fidelity, for example, charges DAF account holders an annual administrative fee of 0.6% of assets under management in addition to investment fees.[49]

B. The TCJA and Subsidies for Charitable Giving

The TCJA had a dramatic impact on tax subsidies for charitable giving. With a small exception for tax years 2020 and 2021, the deduction for charitable contributions is an itemized deduction.[50] In 2016 and 2017, prior to the advent of the TCJA, 30% of U.S. taxpayers itemized deductions, and 25% of taxpayers claimed the itemized deduction for charitable contributions.[51] In 2018 and 2019, following the TCJA, those numbers were reduced to 11% and 9%, respectively.[52] In other words, the fraction of U.S. taxpayers claiming the deduction for charitable contributions declined by about two-thirds. Three TCJA changes primarily drove this result. First, the TCJA increased the standard deduction for married couples filing jointly from $12,700 in 2017 to $24,000 in 2018.[53] (With inflation adjustments, the figure for 2021 was $25,100.[54]) Second, the aggregate deduction for state and local taxes, including income, sales, and real estate taxes (often referred to as the "SALT" deduction), was capped at a non-inflation adjusted $10,000.[55] Third, the TCJA suspended miscellaneous itemized deductions.[56]

Historically, the four most economically significant itemized deductions have been the deductions for state and local taxes, interest paid (chiefly home mortgage and home equity interest), charitable contributions, and miscellaneous itemized deductions.[57] Given the TCJA's disallowance of miscellaneous itemized deductions, a taxpayer without less commonly claimed itemized deductions for, e.g., medical expenses or casualty losses arising from federally declared disasters,[58] would need deductible interest expense and charitable contributions in excess of about $15,000 to itemize post-TCJA. Apparently, two-thirds of those itemizing prior to the TCJA did not.

A second subsidy for charitable giving was unaffected by the TCJA. As noted above, donors of appreciated property are entitled to a deduction equal to fair market value but in many

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[48] James Andreoni, The Benefits and Costs of Donor-Advised Funds, in 32 Tax Policy and the Economy (2018), at 13.

[49] Fidelity Charitable website: https://www.fidelitycharitable.org/giving-account/what-it-costs.html?immid=PCD&account=MICROSOFT&campaign=Fidelity+CGF+-+Brand&adgroup=Brand+What+it+Costs&msclkid=5ed630d0b5741d05f9d053d44328d2b1&gclsrc=ds&gclsrc=ds

[50] IRC § 170(p) (allowing nonitemizers a maximum deduction for cash contributions of $300 for single taxpayers or $600 for married couples filing jointly).

[51] IRS SOI. These figures represent averages for the two years.

[52] IRS SOI. These figures represent averages for the two years.

[53] Rev. Proc. 2016-55; Rev. Proc. 2018-18.

[54] Rev. Proc. 2020-45.

[55] IRC § 164(b). As with most other TCJA adjustments, this limitation is scheduled to disappear at the end of 2025.

[56] IRC § 67(g). Again, through 2025.

[57] Scott Greenberg, The Most Popular Itemized Deductions, Tax Foundation, Feb. 29, 2016: https://taxfoundation.org/most-popular-itemized-deductions.

[58] These deductions are less economically significant because the Code places floors on otherwise deductible expenses in these two categories. Medical and dental expenses are deductible in excess of 7.5% of AGI. IRC § 213(a). Casualty losses arising from federally declared disasters are deductible in excess of 10% of AGI. IRC § 165(h).

cases are not taxed on the unrealized appreciation.[59] This rule applies to all contributions of market quoted securities held for more than a year and many gifts of other property held for more than a year.[60] The subsidy is a function of the tax rate on long term capital gains which was not adjusted by the TCJA.[61]

C. Bunching Philanthropy Post-TCJA

Given these changes, some taxpayers can reduce their post-TCJA tax bills substantially by bunching their charitable contributions, with or without a DAF account. Bunching will most often be attractive to married taxpayers of moderate to moderately high income, but less likely attractive for singles, lower income married taxpayers or the very affluent. Consider the following examples:

1. Alex and Blair are married taxpayers filing jointly with AGI of $150,000. They are entitled to the maximum SALT deduction of $10,000, pay home mortgage interest of $5,000, and give $5000 each year to public charities, yielding total itemized deductions of $20,000.[62] For 2021 their standard deduction is $25,100, which, of course, they take, and the upshot is that Alex and Blair receive no tax benefit for their charitable contributions (or any of their other itemized deductions). But suppose that Alex and Blair have sufficient resources to bunch their charitable contributions. Suppose they contribute $15,000 to a DAF in year one and make no other charitable contributions for the next two years, instead drawing down their DAF account to distribute funds to various charities.

Absent this plan (and rounding the standard deduction to $25,000 for marrieds filing jointly), Alex and Blair would have total below-the-line deductions of $75,000 for three years. With bunching they will take itemized deductions of $30,000 in year one ($10,000 SALT, $5,000 interest, and $15,000 charity), and the $25,000 standard deduction in years two and three, for a three-year total below-the-line deduction of $80,000, an increase of $5,000.

2. Colby and Dana are married taxpayers filing jointly with AGI of $750,000. They are entitled to deduct $10,000 of their $15,000 SALT expenses, but having paid off their mortgage, their only other itemized deduction is for charitable contributions. They typically give $20,000 to charities each year.[63] Absent bunching, Colby and Dana would take total itemized deductions of $30,000 each year, or $90,000 for three years. If instead they have the resources to bunch three years of charity into a year one DAF contribution of $60,000, their three-year total below-the-line deduction will be $120,000 ($70,000 in year one; $25,000 in years two and three).

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[59] IRC § 170(e).

[60] IRC § 170(e)(1). The rules are complex but, inter alia, the deduction for contributions of long term gain property is limited to basis for contributions to private foundations that do not consist of marketable securities, for contributions of tangible personal property if the use by the donee is unrelated to the donee's charitable purpose or, in some cases, the property is not retained by the donee, for certain IP contributions, and for most contributions of taxidermy property.

[61] The top tax rate on long term capital gains and qualified dividends is currently 23.8% consisting of a 20% rate under IRC § 1(h) and an additional 3.8% rate on the net investment income of higher income taxpayers under § 1411. The additional tax on net investment income was enacted as part of the Affordable Care Act.

[62] For 2016, the average deduction for charitable contributions for itemizing taxpayers with AGI between $100,000 - $200,000 was about $4,300. IRS SOI.

[63] For 2016, the average deduction for charitable contributions for itemizing taxpayers with AGI between $500,000 - $1,000,000 was about $19,000. IRS SOI.

3. Elaine is a single taxpayer entitled to the maximum SALT deduction of $10,000 who pays $5000 annually in mortgage interest. Because the total of these two deductions exceeds her 2021 standard deduction of $12,550, bunching charitable contributions will not reduce her tax bill.

Note that for the married couples in these examples the bunching opportunity is the direct result of the TCJA. In 2017, the year prior to the TCJA's changes, the standard deduction for married couples filing jointly was $12,700 and there was no cap on SALT deductions. Under the assumptions described above, bunching charitable contributions would not have affected either couple's total aggregate below-the-line deductions prior to the TCJA because each couple would have itemized deductions each year, with or without bunching.

As these examples suggest, taxpayers need not be in the upper 1% of the income distribution to take advantage of bunching, and bunching can be attractive even if taxpayers are already itemizing post-TCJA without bunching. The real advantage to bunching is shifting deductions so as to maximize them in some years and minimize them in other years when the taxpayers can take advantage of the TCJA enhanced standard deduction.

And this explains why singles are less likely to be in a position to take advantage of bunching than married couples. Because the standard deduction for singles is one-half that for marrieds but singles face the same $10,000 cap on SALT deduction under the TCJA, it is more likely that the total of SALT and interest deductions for singles will exceed the standard deduction, eliminating the advantage to bunching charitable contributions.[64] Similarly, for very affluent married couples, it is more likely that their interest deduction alone will fill the gap between the standard deduction and the $10,000 SALT limitation, again leaving no scope for advantageously bunching contributions.[65] And, of course, for very affluent taxpayers, the opportunity to bunch contributions and increase deductions by $10,000 to $15,000 per year would be relatively insignificant.

It is important to emphasize that taxpayers do not need a DAF in order to achieve the tax savings from bunching philanthropy. Taxpayers could simply make larger charitable gifts every third year, for example. What a DAF achieves for bunchers is the ability to garner the tax advantages of bunching while maintaining ratable contributions to end-use charities, which is often important for donors who want to provide sustained annual support.[66]

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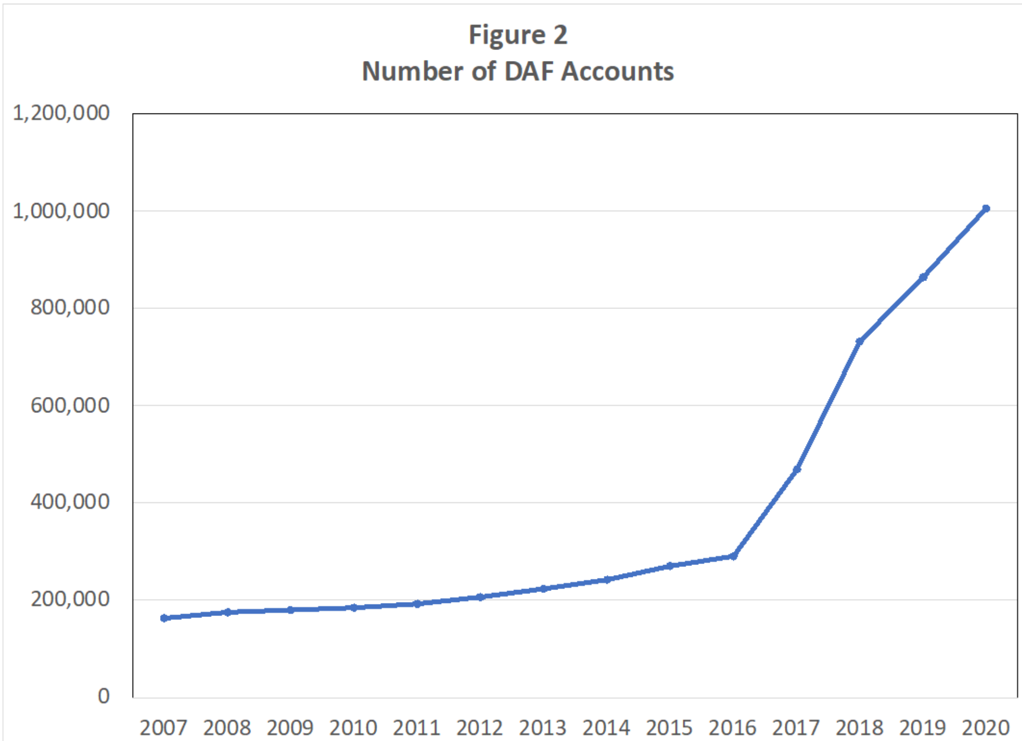
[64] As a result of these differences in tax treatment, for tax year 2019, 45% of single taxpayers with AGI between $100,000 and $200,000 itemized deductions, while only 19% of married couples in this income range did so. IRS SOI.

[65] To provide some context, the average itemizing taxpayer in the $500,000 to $1,000,000 AGI range deducted $21,000 in interest expense in 2019. IRS SOI.

[66] See, e.g., Fidelity Charitable, Tax Strategies for Charitable Giving, "Bunching" Contributions to Reach Tax Savings, chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.fidelitycharitable.org/content/dam/fc-public/docs/advisors/bunching-contributions-to-reach-tax-savings.pdf (noting that "[m]any taxpayers want to continue supporting their favorite charities with regular contributions, and a donor-advised fund makes that possible for taxpayers who use the 'bunching' strategy to maximize their tax savings"); Jackie Youssef, Tax-Smart Charitable Giving Strategies, Sept. 19, 2019; https://investor.vanguard.com/investor-resources-education/article/tax-smart-charitable-giving-strategies ("Many individuals considering 'bunching' can look at DAFs. [DAFs] allow the taxpayer

II. Trends in DAF Accounts

The National Philanthropic Trust has been collecting data on donor-advised funds since 2007.[67] The number of accounts climbed fairly steadily through the first half of the previous decade, but, as portrayed in Figure 2 below, the growth rate of accounts hit an inflection point (in the colloquial sense) starting in 2017, with the number of accounts more than doubling in two years and more than tripling in four years.[68]



Although the TCJA's changes to the standard deduction and the SALT deduction did not take effect until 2018 and the legislation was not signed by Trump until late December 2017, it defies logic to think that the spike in DAF accounts starting in 2017 was not related to the TCJA.

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to receive the charitable tax deduction in the year of donation, while granting desired amounts annually from the DAF to their favorite charities to maintain the charities' annual funding needs.").

Given a large pool of donors, it is not obvious from a financing perspective why ratable annual contributions to a charity would be superior to a series of lumpy gifts. However, charities generally act as if ratable giving matters, focusing on participation targets and providing recognition of donors participating within the annual cycle. See, e.g., James M. Greenfield, Fundraising Fundamentals: A Guide to Annual Giving for Professionals and Volunteers (2nd ed.) at 17 (observing that "annual giving is … a means to expand the involvement and participation of current donors" and "offers opportunities for donors to become active as volunteers and to exercise leadership"). Regular recognition is likely to be an important factor in donor and donee preferences for ratable giving. See Anya Savikhin Samek & Roman M. Sheremeta, Visibility of Contributors and Cost of Information: An Experiment on Public Goods (working paper, May 6, 2013) at 2 (noting that "it has been generally acknowledged that recognizing contributors by revealing their identity increases contributions").

[67] 2021 DAF Report at 6.

[68] NPT 2021 DAF Report at 16; NPT 2016 DAF Report at 6; NPT 2014 DAF Report at 5.

Work on the legislation began in July 2017, and presumably taxpayers paying attention would have seen these changes coming. Moreover, this pattern of taxpayer response kicking in prior to the year in which new tax rules take effect is consistent with a somewhat similar earlier episode. The Affordable Care Act, signed in 2010, included an increase in the top tax rate on long term capital gains from 15% to 23.8% beginning in 2013.[69] Since DAFs can help taxpayers avoid tax on the unrealized appreciation on gifted property, this means that DAFs should have become more attractive beginning in 2013. But as Professor James Andreoni demonstrates, the rate of growth of DAF accounts rose sharply beginning in 2012, the year before the tax rate increases took effect.[70]

Unlike that earlier episode, however, the TCJA did not impact the rate of tax on long term capital gains, so the surge in DAF accounts cannot be explained on the basis of a greater incentive post-TCJA to avoid tax on gifts of appreciated property.[71] Another possible explanation for the surge in DAF accounts might be a surge in capital gains realizations, but a glance at the S&P 500 index across this period does not support that supposition.[72] The year 2017 fell in the middle of a sustained bull run; there was nothing special going on in the market. All of this leads me to conclude that the likely explanation for the surge in DAF accounts beginning in 2017 was the TCJA's introduction of a significant incentive to bunch charitable contributions.[73]

Although critics have decried the recent growth in assets tied up in DAFs,[74] the growth in total DAF assets only ticked up slightly in the wake of the TCJA despite the massive surge in accounts, or, put another way, the size of the average DAF account plummeted following enactment of the TCJA. These patterns are exhibited in the following figures.[75]

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[69] Andreoni (2018), at 34.

[70] Andreoni (2018), at 35. The earlier inflection point is obscured in the figure given the magnitude of the later one, but the number of accounts grew by about 7% between 2011 and 2012 after 2% to 4% annual growth over the three prior years. NPT data.

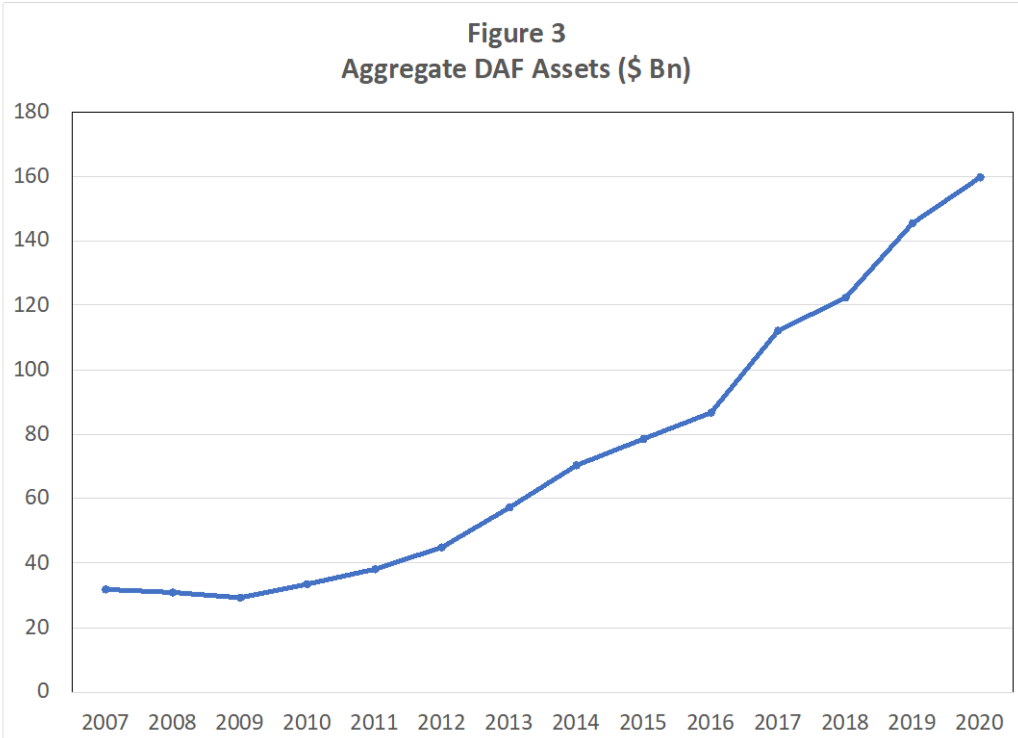
[71] The top effective rate on long term capital gains was 23.8% before and after the enactment of the TCJA. Supra.

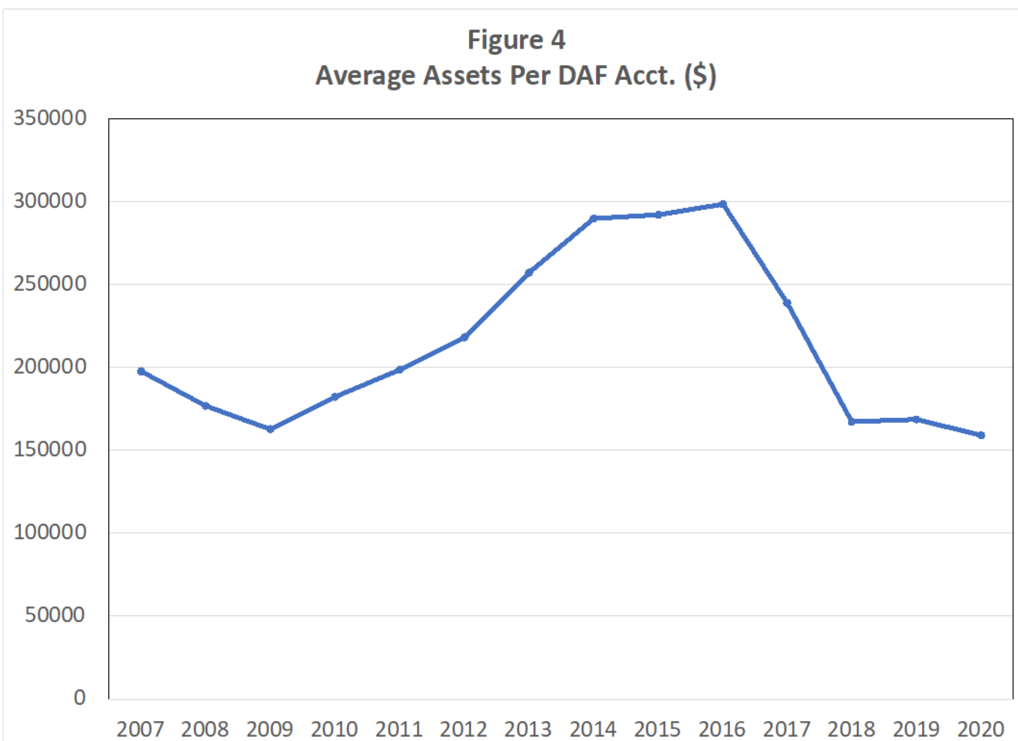
[72] https://www.macrotrends.net/2488/sp500-10-year-daily-chart.

[73] The surge was undoubtedly assisted by the marketing efforts of DAF sponsors, such as Fidelity Charitable, that explained the tax benefits of bunching post-TCJA. See, e.g., Fidelity Charitable, Tax Strategies for Charitable Giving, "Bunching" Contributions to Reach Tax Savings, chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.fidelitycharitable.org/content/dam/fc-public/docs/advisors/bunching-contributions-to-reach-tax-savings.pdf (explaining how DAF-facilitated bunching can restore tax deductions for charitable contributions post-TCJA); see also Slate, The Disrupter, How Fidelity and its Donor-Advised Fund Are Shaking Up Charitable Giving for the Better; https://slate.com/business/2018/05/fidelitys-donor-advised-fund-is-shaking-up-charitable-giving.html (discussing Fidelity's creation of its Fidelity Charitable University to educate financial advisors on the benefits of DAFs, presumably as a way of attracting new accounts).

[74] See, e.g., Colinvaux (2022), at 22, 58.

[75] NPT 2021 DAF Report at 16; NPT 2016 DAF Report at 5; NPT 2014 DAF Report at 6.





These trends are, I believe, consistent with the idea that well off, but not super-rich taxpayers have opened DAF accounts following the TCJA to bunch their contributions and take advantage of the TCJA's expanded standard deduction.

Evaluating data for the period prior to the TCJA, Andreoni estimated (roughly) that the average DAF holder had income of $1.4 to $2.2 million, and perhaps much more.[76] The post-TCJA data suggests that the taxpayers opening DAF accounts in the wake of the TCJA are in a different league financially than those who preceded them.[77] Certainly, their accounts are of a different magnitude. This supposition is buttressed by data from the National Philanthropic Trust indicating that the average DAF account at "national charities," e.g., Fidelity, Vanguard, etc., dropped from $269,206 in 2016 to $115,901 in 2020.[78] And even these averages are skewed upwards by a few very large accounts. For example, Fidelity reports that the median DAF account balance at that institution was only $24,000 in 2021.[79]

III. DAF Policy Issues and Responses – The Impact of Bunching

Assuming that a sizable portion of recent DAF activity is principally motivated by bunching, how does that circumstance affect the way we should view DAFs from a policy perspective? This Part considers this question along a number of dimensions, but its principal argument is that, with respect to bunching-motivated DAF account holders, concerns regarding unproductive asset accumulation within DAF accounts are likely overblown and perhaps inapposite. The larger policy concern for this population of account holders should be the cost imposed on the public fisc by taxpayers gaming the expanded standard deduction, a cost that is unlikely to be justified by the minimal increase in incentives for charitable giving that some DAFs create.

A. Asset Accumulation Inside DAFs

Perhaps the most common concerns about DAFs are that they accumulate assets that otherwise would go to end-use charities and that this accumulation is growing.[80] Critics have proposed several reforms that would encourage speedier disbursement.[81] This section reconsiders the accumulation issue in the context of bunching motivated DAF account holders, arguing that the idea that end-use charities are missing out on assets accumulated in DAFs may be inapposite in this context.

Professor Roger Colinvaux has stressed the problem of growing accumulation of assets in DAF accounts, noting that "DAFs controlled $32 billion in 2007, $70 billion in 2014, $142 billion

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[76] Andreoni (2018), at 7.

[77] See also Ruth McCambridge & Patrick M. Rooney, Did the Tax Overhaul Create a Spike in Donor-Advised Funds? Well, It's Complicated…, Nonprofit Quarterly, Feb. 7, 2018; https://nonprofitquarterly.org/tax-overhaul-donor-advised-funds-spike-daf/ (citing DAF sponsors who observed a shift in the market for DAFs post-TCJA driven by middle income taxpayers who see the benefit of bunching contributions).

[78] NPT, 2021 DAF Report at 23.

[79] Fidelity 2022 report.

[80] Roger Colinvaux, Fixing Philanthropy: A Vision for Charitable Giving and Reform, 162 Tax Notes 1007, 1010 (2019) (arguing that "there is reason to be concerned that the institutional default of the DAF industry is toward accumulating, not spending" and that "there is a social cost to the delay because that money cannot be put to active use"); Andreoni (2018), at 39 (arguing unspent balances in DAF accounts represent lost tax revenues that are not offset by "gains to society through charitable giving").

[81] These reforms are discussed infra.

in 2019, and $160 billion in 2020."[82] As Colinvaux argues, "viewed as public charity substitutes, contributions to [DAFs] represent a delay to charity, pure and simple."[83]

But is it so simple? Even setting aside arguments about the merits of philanthropy directed towards future versus current generations, investment gains on DAF balances, etc., it is not so clear that these accumulations are problematic for bunching motivated DAF holders.[84] First, return to Figures 2 to 4 above. DAF assets are growing primarily because so many more taxpayers are taking advantage of the opportunity. In fact, average account levels are falling, not rising, despite the existence of a sustained bull market in the 2010s that boosted most investment portfolios. The fact that 13% of charitable dollars are funneled through DAFs today,[85] or perhaps 33% tomorrow, should not be terribly worrying in steady state, *if* DAFs are otherwise acceptable as a policy matter. In other words, it is not the size of the conduit or the number of taxpayers taking advantage of it that should matter. The question is whether DAFs advance or retard our tax policy goals.

Second, it seems probable that TCJA-motivated bunchers are less likely than some other DAF holders to allow assets to rest in DAFs indefinitely. The whole idea here is that bunchers actively manage their DAF contributions and disbursements over the years to minimize tax given the TCJA's enhanced standard deduction and limit on SALT deductions. This is an ongoing process, a repeat game. As discussed below, tax savings are maximized by increasing the number of years between bunched contributions to a DAF, but doing so is limited by a taxpayer's liquid resources available to bunch and perhaps by concerns that the rules of the game may change at any time.[86] Compare a recent retiree who pre-funded her DAF account with all the assets she plans to disburse during retirement. This individual is also tax motivated, but for her it is not a repeat game, and not knowing how long her retirement may last, she might be tempted to hang on to these DAF dollars indefinitely. Or consider the wealthy taxpayer who has decided to contribute a complex asset – say a piece of real estate or a partnership interest – to a DAF. That individual might be motivated by the convenience of letting the DAF sponsor handle the liquidation, or perhaps the prospect of a favorable valuation. Once the asset is liquidated, however, this individual might or might not want to speedily disburse the funds.

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[82] Colinvaux (2022), at 22.

[83] Colinvaux (2017), at 58.

[84] As Professor Brunson explains,

> If we should take future generations into account in our current decision-making-and especially if they count equally to current generations-the idea of preferring current charitable distributions may lose some of its power. That is especially the case if the private foundation or donor-advised fund that holds charitable dollars instead of distributing them earns a high enough return on those assets. Provided that the discount rate applied to the future charitable donation is equal to the market rate of return a foundation or donor-advised fund can earn on the money, society should be indifferent as to whether charitable expenditures occur today or in the future. (Citations omitted.)

Brunson (2020), at 264. But see Galle, supra at 1159 (arguing that "short-term spending can have long-lasting impact, that future charitable spending is likely to be less valuable because the growing philanthropic sector will have to turn to lower priority projects, and that spreading spending out over time introduces several different forms of agency and information costs").

[85] Colinvaux (2022), at 7 (citing the NPT 2020 Report).

[86] Infra.

Third and finally, it is not clear that we should even think of contributions to DAFs as delays of charity, at least for bunchers. Absent DAFs, bunchers would have two options.[87] They could make ratable contributions to end-use charities and leave tax dollars on the table, or they could accumulate assets in a taxable account at a financial institution and make bunched contributions to various charities every three or four years, for example. To the extent that bunchers would follow the second path in order to minimize their taxes, amounts accumulating in DAFs are not dollars that would be in the hands of end-use charities, but for DAF contributions.[88]

B. The Cost of Bunching to the Public Fisc

The larger public policy concern raised by bunching-motivated DAF account holders should be the cost to the public fisc of taxpayers gaming the TCJA enhanced standard deduction; a cost that may or may not be offset in part by the creation of greater incentives to contribute to charity.[89] Consider again the case of Colby and Dana, a married couple filing jointly who take the maximum $10,000 SALT deduction and give $20,000 to charity each year, on average.[90] As shown above, bunching three years of charity into a single year $60,000 DAF contribution increases their three-year total below-the-line deductions from $90,000 to about $120,000, or by about $10,000 a year.[91] At a 37% marginal tax rate, they save $3,700 per year in federal income tax. Assuming that Congress did not intend or foresee high income taxpayers like Colby and Dana taking advantage of the TCJA-expanded standard deduction, it seems reasonable to treat Colby and Dana's tax savings as a cost to the fisc.

More generally, in cases in which taxpayers would itemize each year with ratable charitable contributions and without a DAF, the annualized cost of bunching is equal to the difference between the standard deduction and other itemized deductions, multiplied by the number of years in the bunching cycle minus one, divided by the number of years in the bunching cycle, multiplied by the marginal tax rate.[92] The benefit of bunching and the cost to the fisc increases with the number of years between bunched contributions and decreases with the amount of a taxpayer's itemized deductions other than charitable contributions.

The cost of bunching to the fisc is less in cases like that of Alex and Blair who would not itemize absent bunching and is zero in a case like that of Elaine, the single taxpayer who receives no benefit from bunching. Presumably, the universe of bunching-motivated DAF account holders is made up largely of taxpayers in Colby and Dana's situation, who see the greatest bunching

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[87] Setting aside the private foundation option, which does not seem realistic for the merely affluent bunching population. Supra.

[88] Bunching donations outside of DAFs might be inconvenient for the reasons discussed in Part I.C., but the tax dollars at stake are considerable and would likely offset that inconvenience for some taxpayers.

[89] Another offset to the cost to the public fisc of bunching-motivated DAFs that I will not explore in this Article might be the fact that DAFs commit donors to part with assets in favor of charitable institutions, which could lead to greater total contributions. Compared with holding assets for later contribution to an operating charity, the contribution of assets to a DAF eliminates the option to change one's mind and deploy those assets in a different direction, e.g., consumption. I thank Gregg Polsky for this observation.

[90] In the hypothetical, these are Colby and Dana's only itemized deductions.

[91] For comparison, the average taxpayer in Colby and Dana's AGI range ($500,000 - $1,000,000) reported total itemized deductions of about $60,000 in 2019. IRS SOI.

[92] For Colby and Dana (and rounding the standard deduction) this equation is (25,000 – 10,000) x 2/3 x .37 = $3700.

benefit. Other taxpayers may open DAFs, but likely for reasons unrelated or less related to bunching.

Bunching likely represents a significant cost to the public fisc. Suppose, for example, that half of all DAF account holders are married couples filing jointly who engage in bunching and, like Colby and Dana, would itemize each year with or without bunching. Suppose that, on average, their non-charity itemized deductions are $15,000 per year, they bunch every three years, and they face a marginal tax rate of 35%. This yields a ballpark estimate of a $1.2 billion annual cost to the public fisc.

C. Incentive Effects of DAFs

If the cost to the fisc of bunching-motivated DAFs is offset by increased charitable giving, we might feel more charitably, so to speak, about the trade-off. Unfortunately, the incentive effects are likely to be modest. For taxpayers in the position of Alex and Blair, bunching, facilitated by a DAF, creates a tax subsidy for charitable giving that would not exist absent bunching. This is a benefit that I believe is unique to DAF accounts that are created to facilitate bunching. Compare, for example, a DAF account that serves primarily to liquidate complex assets held by a high-income taxpayer who itemizes every year with or without bunching contributions. This taxpayer's marginal incentive to contribute is unaffected by the creation of a DAF.

However, while only bunching-motivated DAFs generate a tax incentive; not all bunching motivated accounts do so. Recall the case of Colby and Dana. With the maximum SALT deduction of $10,000 and charitable contributions of $20,000 per year, Colby and Dana itemize with or without bunching. DAF-facilitated bunching allows the couple to reduce their tax bill, but the subsidy on their marginal contribution dollar is unaffected by bunching. In their hypothetical, the cost of DAF-facilitated bunching to the public fisc - $30,000 less taxable income reported over three years – is not offset by enhanced philanthropic incentives.

For Colby and Dana, DAFs likely do nothing to spur greater charitable giving.[93] For Alex and Blair, there is a follow-up question: to what extent do taxpayers respond to tax subsidies for giving? The literature on this question is inconclusive. We know that the average individual responds to tax subsidies for charitable giving, but it is very uncertain how strong that response is.[94] Some studies indicate that higher income individuals are more responsive to tax subsidies for charitable giving than are lower income individuals.[95] To the extent that DAF-facilitated bunching extends tax subsidies for charitable giving to middle or upper-middle income taxpayers, it is possible that the response is modest.

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[93] To be more precise, in this situation bunching does not affect the after-tax cost of the marginal contribution. But there could be an income effect. It is possible that Colby and Dana might contribute part of their tax savings to charity. Some DAF sponsors highlight this possibility. See, e.g., Fidelity (Tax Strategies for Charitable Giving) at 2 (explaining the tax advantages of bunching charitable contributions with a DAF and stating that the use of this strategy "maximize[s] your charitable giving – both for yourself and the charities you love").

[94] C. Eugene Steuerle et al, Designing an Effective and More Universal Charitable Deduction, Tax Policy Center, Urban Institute and Brookings Institution, Mar. 17, 2021, at 4.

[95] Steuerle et al (2021) at 4.

Given the likelihood that many bunching-motivated DAF holders will be in the position of Colby and Dana whose after-tax cost of giving is unaffected by the DAF and others in the position of Alex and Blair whose after-tax cost is affected but perhaps with little response, it is hard to be sanguine about the cost/benefit tradeoff of bunching-motivated DAFs.

D. Expanding the Reach of the Deduction for Individual Philanthropy

There is a related but equally modest benefit of bunching-motivated DAFs. By facilitating bunching, donor-advised funds slightly expand the effective reach of the deduction and the tax incentive for individual philanthropy beyond the population that would itemize in the absence of DAFs, and perhaps in a slightly more progressive manner.

As noted above, in the wake of the TCJA, the fraction of households taking itemized deductions for philanthropy fell from about 25% to about 9%. Several commentators have recognized and criticized this change. In testimony before the Senate Finance Committee, economist Eugene Steuerle urged Congress to think about designing tax subsidies for philanthropy in terms of, inter alia, value promotion, arguing that "a deduction for only a few taxpayers weakly promotes and markets the value our society places on charitable giving."[96] Similarly, Professors Roger Colinvaux and Ray Madoff argue that a "goal of charitable tax incentives is to foster a strong culture of giving in America" and that "if only a few voices are encouraged to support the charitable sector, charities will have to cater to a narrow set of interests and lose a main source of strength and legitimacy – widespread public support."[97]

In this light, re-consider the hypothetical case of Alex and Blair above. DAF-facilitated bunching provides them with an effective deduction for charitable giving and an incentive that would not exist without bunching. And as this example also illustrates, taxpayers do not have to have very high incomes or hold a large amount of assets in order to generate an effective deduction and subsidy through bunching charitable contributions. As noted above, Fidelity reports that the median DAF account balance in 2021 was only $24,000. It seems likely that DAF-facilitated bunching not only broadens the reach of philanthropic subsidies but does so in a somewhat more progressive fashion.

However, while the potential for DAFs to expand the reach of philanthropic subsidies may be significant, current use is relatively modest. Even if every new DAF account opened since 2016 created an effective deduction and incentive for charitable giving, which is certainly *not* the case, these roughly 700,000 accounts would represent less than one-half of a percentage point bump in the fraction of taxpayers receiving such subsidies.[98]

E. Facilitation of Donation of Appreciated Assets

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[96] C. Eugene Steuerle, Options for Improving the Lives of Charitable Beneficiaries Through Reform of the Charitable Deduction, Testimony Before the Senate Finance Committee, Mar. 17, 2022, at 3.

[97] Colinvaux & Madoff (2019), at 1868.

[98] Based on 158 million taxpayers in 2019. IRS SOI. Since the stakes are greater for higher income taxpayers who already itemize, like Colby and Dana, and because these taxpayers would tend to have greater assets to bunch, it seems likely that these cases would dominate among bunching-motivated DAF creators.

Critics complain that DAFs facilitate the contribution of appreciated assets, and, in particular, illiquid, complex assets lacking transparent valuation. Indeed, DAF sponsors like Fidelity Charitable market their ability to liquidate complex assets and highlight the tax advantage of contributing appreciated assets.[99] There are a number of issues here, but little that is particular to bunchers. Since illiquid assets are likely to be lumpy to begin with, one would expect that bunching-motivated donors would be somewhat less likely to contribute such assets, but this supposition is not borne out by the data. This subsection briefly explores these issues.

The contribution of appreciated assets to public charities under current law is problematic for two reasons. First, as Professor Daniel Halperin has argued, whatever one thinks of the merits of the basic subsidy for charitable contributions – the tax deduction – the additional subsidy arising from the failure to tax unrealized gains on contributed property is extremely hard to justify. It is certainly inequitable, and it is unlikely to be the most efficient way of subsidizing charitable giving.[100] Second, contributions of illiquid assets – real estate, ownership interests in private companies, etc. – raise valuation problems.[101] Generally, the deduction for such contributions is based on fair market value at the time of the contribution, in many cases derived from an appraisal, not the value ultimately enjoyed by the charity.[102]

These problems exist, of course, with or without DAFs, but DAFs clearly facilitate the contribution of such assets and in that way contribute to these problems. But do TCJA-motivated bunchers contribute to these problems equally with other DAF account holders? My intuition was that bunchers would be equally likely to contribute liquid appreciated assets but less likely to contribute complex assets, but the data thus far fails to bear this out.

The reasoning regarding complex, illiquid assets is as follows. These assets are typically "lumpy" to begin with; they are pre-bunched. The advantage of running such assets through a DAF has to do with valuation and convenience, not with bunching. In other words, the TCJA's expansion of the standard deduction and limit on SALT deductions seem unlikely to change the calculus of the holder of complex assets who contemplates their donation with or without a DAF.

A buncher, on the other hand, has discovered the opportunity created by the TCJA-enhanced standard deduction and is looking for assets to bunch. Of course, in some cases a complex asset might be at hand, but this would seem to be rare and serendipitous. Absent this, a buncher would look at her portfolio and, like any other charitably minded donor, lean towards contributing appreciated securities, if she holds any.

As noted, however, the data on sources of DAF contributions from Fidelity Charitable does not bear this out. If my suppositions were right, one would expect the fraction of illiquid asset contributions to dip with the influx of bunchers post-TCJA, but this has not happened.

[99] Fidelity 2022.

[100] Halperin (2002), at 36.

[101] To be sure, given the limitations of IRC § 170(e), the universe of non-cash property contributed to DAFs is generally limited to real estate and intangibles such as securities. Supra.

[102] Vehicle donations represent a notable exception to this rule. Per IRC § 170(f)(12), the deduction for contributions of a vehicle generally is limited to the proceeds received by the donee on disposition of the vehicle.

IV. Proposals for DAF and More General Philanthropic Reform

This Part examines a selective set of reform proposals targeting DAFs and individual philanthropy more generally, focusing on their impact on bunching motivated use of DAFs and considering the impact of such DAFs on the efficacy of these proposed reforms. I argue that 1) most reform proposals aimed at DAF asset accumulation are unlikely to impact bunchers and certainly would not mitigate the cost that bunchers impose on the public fisc, 2) limiting the deduction for contributions of appreciated assets to basis would not vitiate DAF use by bunchers, and 3) bunching of charitable contributions, via DAFs or otherwise, would undermine the adoption of a universal above-the-line deduction for charitable contributions above a floor, absent additional restrictions.

A. Reforms Targeting DAF Asset Accumulation

I have argued above that bunching-motivated DAF account holders are less likely to accumulate assets in DAFs indefinitely and that it may be inappropriate to think of their DAF accumulated assets as representing a loss or opportunity cost to the real charitable sector. All that said, one must concede that current law provides no incentives for DAF holders to disburse account funds at any time and that some carrot or stick would lead to speedier disbursement by some account holders, including some bunchers, which could at least potentially advance the public good. At least three reforms have been proposed. In 2021 Senators King and Grassley introduced the Accelerating Charitable Efforts (ACE) Act.[103] If enacted, the ACE Act would require disbursement of DAF contributions and the earnings on those contributions within fifteen years for account holders who receive deductions at the time of contribution.[104] The fifteen-year limit would be imposed by requiring the DAF sponsor to revoke an account holder's advisory privilege with respect to assets held beyond the fifteen year maximum.[105] DAF creators who were willing to forgo the tax deduction at the time of contribution would have 50 years to disburse funds before facing a confiscatory tax.[106]

Another approach has been proposed by Professor Edward Zelinsky. Zelinsky would prefer to see DAF accounts regulated like private foundations and subjected to the rule requiring private foundations to distribute a minimum of five percent of their assets to charity each year.[107] Finally, in 2019 Colinvaux and Madoff proposed deferring the income tax deduction for DAF contributions until the funds are disbursed to an end-use charity.[108] This approach not only creates a carrot for speedy disposition but also resolves the problem of valuing complex assets contributed

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[103] S. 1981, 117th Cong., 1st Sess. (June 9, 2021); see also, Colinvaux (2022), at 3.

[104] ACE Act, § 2(a).

[105] ACE Act, § 2(a). The act would also apply a tax on DAF sponsors equal to 50% of any contributions that have not been disbursed at the end of the fifteen-year period.

[106] ACE Act, § 3(a) (applying a tax equal to 50% of "nonqualified" DAF contributions that have not been distributed at the end of the fifty-year period).

[107] Zelinsky, Tax Notes (2021).

[108] Colinvaux & Madoff (2019). Colinvaux and Madoff were leaders of the coalition that designed and advanced the ACE Act, which offers a less aggressive approach to regulating DAFs. See https://acceleratecharitablegiving.org/about/ It is not clear whether they continue to support their 2019 proposal, but either way, it remains a credible regulatory approach that bears consideration.

to DAFs. The deduction for such assets would be based on the cash that is ultimately distributed, not the fair value of the asset when donated to a DAF.

The first two proposals should have minimal impact on bunchers. Although the tax savings from bunching increases with the number of years between bunched contributions, asset limitations (the liquid assets available to bunch) and other concerns (possible changes in tax rates or rules) are likely to result in bunching cycles and payouts of DAF assets that are far less than fifteen years. It is almost inconceivable that anyone motivated to create a DAF account in order to take advantage of the TCJA's enhanced standard deduction would plan to bunch charitable gifts less frequently than this. And it follows that these proposals would not materially mitigate the cost that bunchers impose on the public fisc. In my hypotheticals, Alex and Blair and Colby and Dana bunched their contributions every three years. If taxpayers were willing to bunch for 14 years, just satisfying the King/Grassley cut off, the cost to the fisc would be larger.

On the other hand, deferring the tax deduction for DAF dollars until disbursed, as Colinvaux and Madoff proposed in 2019, would completely defeat the goals of the bunchers and end the use of DAFs for this purpose. Under this proposal, DAF holders could only achieve tax savings by bunching disbursements, and that they can easily do without a DAF. There would be very little reason to pay Fidelity 0.6% of assets each year for such a product. If one wants to kill DAFs for bunchers, this is the way to do it. It is important to recall, however, that DAFs only facilitate bunching. Taxpayers could still take advantage of the TCJA enhanced standard deduction by bunching charitable contributions to end-use charities without a DAF conduit.

B. Limiting the Deduction for Contributions of Appreciated Property to Basis

Charitable contributions of appreciated property can result in over-sized tax subsidies and in some cases in questionable valuations. Suppose that Congress were to attack the problems associated with contributions (to DAFs or otherwise) of appreciated property by adopting Professor Halperin's proposal to limit the tax deduction for appreciated asset donations to the taxpayer's basis.[109] Although such a reform would reduce the attractiveness of contributing appreciated property in some cases, it would by no means vitiate the use of DAFs by bunchers.

Obviously, such a reform would have no impact on taxpayers in the position of Alex and Blair or Colby and Dana if they hold no appreciated assets and simply bunch their cash donations. Suppose, instead, that Alex and Blair have held appreciated stock for more than a year. Hewing as close as possible to the example in Part I.C, suppose that the stock's fair market value is $15,000 and that their basis is zero (for simplicity). Under current law, Alex and Blair could donate the entire $15,000 in year one giving them total itemized deductions of $30,000 in that year (given assumptions of a $10,000 SALT deduction and a $5000 interest deduction) followed by two years taking a roughly $25,000 standard deduction.[110] The result is three year below-the-line deductions totaling $80,000, which is $5000 better than contributing the stock ratably over three years (and taking the standard deduction each year).

[109] As Halperin suggests limiting the deduction to basis would generally result in taxpayers liquidating appreciated assets prior to donation in order to take advantage of the fact that long term capital gains are taxed at a lower rate than ordinary income. Halperin (2002), at 29.

[110] The earlier example assumed $10,000 SALT and $5000 mortgage interest.

With the reform, however, Alex and Blair would be well advised to sell the stock, generating a $15,000 long term capital gain and a tax bill of $3,000 (at a simplified 20% rate), leaving them with $12,000 after tax. Alex and Blair are still better off from a tax perspective contributing the $12,000 in year one to a DAF and nothing in years two and three than contributing $4,000 each year to a DAF or to end-use charities.[111] In other words, they are still better of bunching. The stakes are somewhat lower, but still significant.

In the case of Colby and Dana, however, taxation of their investment gains does not reduce their incentive to bunch at all. Suppose again that Colby and Dana have held appreciated stock for more than a year. Suppose the stock's fair market value is $60,000 and that their basis is zero. Under current law, Colby and Dana could donate the entire $60,000 in year one, giving them total itemized deductions with their $10,000 SALT deduction of $70,000 in that year followed by two years of taking a roughly $25,000 standard deduction. The result is a three year below-the-line total deduction of $120,000, which is $30,000 better than contributing the stock ratably over three years.

With the reform, however, Colby and Dana will likely sell the stock, generating a $60,000 long term capital gain and a tax bill of $12,000 (at a simplified 20% rate), leaving them with $48,000 after tax. Contributing a bunched $48,000 in year one to a DAF and nothing in years two and three generates total three-year below-the-line deductions of $108,000. Contributing a ratable $16,000 each year to a DAF or to end-use charities yields three-year total BTL deductions of $78,000. In this scenario, taxing investment gains on appreciated property contributions does not undermine the incentives to bunch donations.

C. Fundamental Reform of Philanthropic Subsidies

Current tax subsidies for individual charitable giving are inequitable and inefficient. The below-the-line deduction for charitable contributions is currently available to only about 11% of taxpayers who itemize.[112] While the recently adopted short-term deduction for charitable contributions by non-itemizers had much greater reach, the design – no floor; modest $300 or $600 cap – virtually ensured the deduction would spur little incremental giving but would be very costly to the fisc.[113] This is not the place to undertake an exhaustive review of potential reforms of the tax treatment of individual philanthropy, but DAFs would be problematic in the case of one long-standing and important reform proposal, which I highlight here.

For over 50 years various commentators have proposed placing a floor on the deduction for charitable contributions that would be similar to the floor placed on deductions for medical

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[111] Bunching yields total three-year below-the-line deductions of $77,000; ratable contributions yield three year below-the-line deductions of $75,000.

[112] Supra. As Colinvaux and Madoff argue, "if only a few voices are encouraged to support the charitable sector, charities will have to cater to a narrow set of interests and lose a main source of strength and legitimacy – widespread public support." Colinvaux & Madoff (2019), at 1868.

[113] Steuerle (2022), at 5 (estimating that the "$300 per tax unit nonitemizer charitable deduction in 2020 provided charitable recipients with as little as $100 million at a cost of $1.5 billion in forgone federal revenue" because the deduction "created an incentive for almost no one"). The lack of a floor on the long standing below-the-line deduction is also a source of inefficiency. Colinvaux & Madoff (2019), at 1870.

expenses and casualty losses.[114] Some commentators would combine this reform with moving the deduction for charitable contributions above the line, making the deduction available to all taxpayers irrespective of itemizing.[115] One recent proponent of this idea is economist Eugene Steuerle. Steuerle has argued that a universal (above-the-line) deduction for charitable contributions beyond a floor of, say, 1% to 2% of AGI would be more equitable than current law and provide a greater incentive bang for our tax subsidy buck.[116] The idea to a floor is that most taxpayers give a certain amount to charity and would continue to do so irrespective of a tax incentive. Allowing a deduction for the first dollar contributed is wasteful. It's expensive and generates little or no behavioral change. Applying the subsidy only to contributions in excess of, say, 1% or 2% of AGI is much less expensive and encourages taxpayers to give more to charity than they might absent the incentive. Steuerle and his co-authors show that the tradeoff between the costs and benefits of charitable subsidies are significantly improved by the introduction of such a floor.[117]

So where do DAFs come in? Suppose Congress were to follow Steuerle's advice and adopt an above-the-line deduction for charitable contributions in excess of, say, 2% of AGI. Suppose a taxpayer with AGI of $100,000 contributes $5000 to charity each year. With the floor, the taxpayer can deduct $3000 of charitable giving each year. But with a DAF this taxpayer can do much better. Suppose she bunches three years of contribution into a year one DAF contribution of $15,000 followed by no further DAF contributions in years two and three. In year one, she can deduct $13,000, which is $4000 better than the aggregate three-year deduction without bunching.

Clearly, under current rules DAFs would provide an obvious way of avoiding much of the impact of a floor on the charitable contribution deduction. Some reform would be needed to block the work-around. One possibility would be to follow Colinvaux and Madoff's 2019 proposal and defer the charitable deduction until amounts are distributed from DAFs.[118] But this would not plug the loophole if taxpayers are willing to bunch disbursements to end-use charities.[119] A more foolproof approach would be to maintain the floor but base the charitable deduction on average contributions (to DAFs and other public charities) over a short period of years. The point here is that bunching would have to be addressed head on to fully achieve the aims of reforms along these lines.

Readers traveling this far will have no doubt realized that the TCJA reforms that have been the focus of this Article bear a resemblance to Steuerle's proposed floor on charitable contribution deductions. By increasing the standard deduction to about $25,000, capping SALT deductions at

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[114] See, e.g., Stanley S. Weithorn, "Tax Simplification"-Grave Threat to the Charitable Contribution Deduction: The Problem and a Proposed Solution, 1967 Duke L.J. 943, 954 (1967); Boris I. Bittker, Charitable Contributions: Tax Deductions or Matching Grants?, 28 Tax L. Rev. 37, 63 (1972).

[115] Weithorn, at 954.

[116] Steuerle et al (2021); Steuerle (2022). See also Colinvaux & Madoff (2019).

[117] Steuerle et al (2021), at 10.

[118] Colinvaux & Madoff (2019), at 1871.

[119] It has long been recognized that the possibility of bunching charitable contributions undermines floors placed on their deduction. See, e.g., Martin Feldstein & Amy Taylor, The Income Tax and Charitable Contributions, 44 Econometrica 1201, 1219-1220 (1976) (noting that comparison of placing a floor on the charitable contribution deduction to existing floors on deductions for medical expenses are "inappropriate because of the much greater ease with which charitable gifts can be postponed and 'bunched' to obtain the deduction").

$10,000, and disallowing miscellaneous itemized deductions, the TCJA places a floor on the deduction for charitable contributions for most taxpayers at $15,000 less home mortgage interest and any other deductible personal interest expense.[120] DAFs allow taxpayers to avoid much of the impact of this floor, and this is exactly what Colby and Dana have done in the hypothetical discussed in Part I.C above and why DAF-facilitated bunching is costly to the public fisc.

Of course, there is a difference between the TCJA charitable deduction floor and Steuerle's proposal. The latter is an intelligently designed policy intervention while the former is not. The TCJA floor is inequitable – the floor is the same for taxpayers earning $100,000, $1,000,000, or $100,000,000 – and likely inefficient given that no thought was put into the tradeoff between the cost and efficacy of the subsidy. Thus, one could rationally conclude that the use of DAFs to facilitate bunching in the face of an unintentional TCJA deduction floor is less objectionable than employing the same strategy to minimize the impact of a thoughtfully designed floor, but at one level they are the same. Gaming an AGI-based floor on universal charitable deductions or the TCJA enhanced standard deduction imposes costs on the public fisc – costs that are unlikely to be recouped through increased contributions. Additional restrictions on deductions of contributions should be considered.

V. Conclusion

The evidence suggests that bunching charitable contributions to game the TCJA-enhanced standard deduction motivates much of the onslaught of new DAF accounts established since 2016. The Article has argued that the typical buncher is likely to differ from other DAF holders in ways that matter from a policy perspective. Chiefly, in the context of bunchers, unproductive accumulation of assets in DAF accounts is unlikely to be a major problem. The problem with DAF-facilitated bunching is that the cost to the public fisc is unlikely to be justified by incremental charitable giving. Thus, while I find the ACE Act's regulation of DAF payouts to be unobjectionable, this Article argues that a wholly different set of reforms targeting the deductibility of charitable giving generally would be needed to address the cost of bunching under current law and under thoughtfully reformed laws involving universal charitable deductions above a floor.

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[120] This assumes that most itemizers are entitled to the maximum $10,000 SALT deduction.