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VIEWPOINT

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The Undemocratic Charitable Contribution Deduction

by Darryll K. Jones

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In this article, Jones argues that the Israel-Hamas war demonstrates that the limitation of the charitable contribution deduction to itemizers facilitates wealthy taxpayers' undemocratic control over public charities.

The 2023 war between Israel and Hamas[1] exposes a major policy issue relating to whether the U.S. tax code encourages and subsidizes illiberal and undemocratic concentrations of power in civil society. After Hamas attacked Israeli towns near the Gaza Strip, wealthy U.S. donors began demanding that charities act and speak in strident opposition to Hamas.[2] Those donors insist that universities disavow all expressions of Palestinian sympathy and punish speakers, even retroactively,[3] by public condemnation or by more serious sanctions.[4] Some donors object even when universities say nothing at all[5] or speak less stridently than those donors think is appropriate.[6] Some demand that universities sanction stakeholders within their jurisdictions when stakeholders engage in activities interpretable as sympathetic to Hamas.[7] The most common reactionary example is the assertion that charities invariably justify Hamas atrocities whenever they speak or allow speech about Palestinian motivations or grievances, even

[1]For more information on the 2023 war, with references to historical causes, see "Israeli-Palestinian Conflict," Center for Preventive Action (Oct. 16, 2023; updated Nov. 6, 2023).

[2]Andrew Jack, "US Universities Lose Millions as Donors Pull Funding Over Hamas Stance," *Financial Times*, Oct. 19, 2023.

[3]As evidence of the University of Pennsylvania's alleged condoning of Hamas's violence, donors point to an event celebrating Palestinian literature occurring on Penn's campus in the month prior to the Hamas attack. Kelly Garrity, "Former U.S. Ambassador Jon Huntsman to Cease Donations to UPenn Over School's Response to Hamas Attack," Politico, Oct. 16, 2023.

[4]*Id.*

[5]One donor, explaining his family's decision to withdraw all donations from the University of Pennsylvania, stated:

> To the outsider, it appears that Penn has become deeply adrift in ways that make it almost unrecognizable. Moral relativism has fueled the university's race to the bottom and sadly now has reached a point where remaining impartial is no longer an option. The University's silence in the face of reprehensible and historic Hamas evil against the people of Israel (when the only response should be outright condemnation) is a new low. Silence is antisemitism, and antisemitism is hate, the very thing higher ed was built to obviate.

Letter from Jon Huntsman, former ambassador and former governor of Utah, to University of Pennsylvania President Liz Magill (undated).

[6]The criticism takes on a "damned if you do, damned if you don't" flavor. "At Harvard University, President Claudine Gay has issued three muddled statements, under pressure, on the horrific events. Her first statement was a tepid confession of 'heartbreak' that implied an equivalence between the Hamas attacks and Israel neutralizing the terrorists." Marc Zvi Brettler and Michael B. Poliakoff, "Why Was It So Hard for Elite Universities to Condemn Hamas Terrorism?" The Center Square, Oct. 20, 2023. At Columbia University, observers labeled the university president's statement that she was "devastated by the horrific attack on Israel this weekend and the ensuing violence" as an intolerable suggestion of equivalence between Hamas and Israel. *Id.* At UC Berkeley, some characterized the president's failure to publicly condemn a student group for expressing "unwavering support" for Hamas as just more evidence of the university's antisemitism. *Id.*

[7]The Wexner Foundation, a multimillion-dollar donor to Harvard University, said that the university failed to condemn a student group for statements perceived to be supportive of Hamas:

> We are stunned and sickened at the dismal failure of Harvard's leadership to take a clear and unequivocal stand against the barbaric murders of innocent Israeli civilians by terrorists last Saturday, the Sabbath and a festival day. . . .
>
> In the absence of this clear moral stand, we have determined that the Harvard Kennedy School and The Wexner Foundation are no longer compatible partners. Our core values and those of Harvard no longer align. [The Harvard Kennedy School] is no longer a place where Israeli leaders can go to develop the necessary skills to address the very real political and societal challenges they face.

Letter from B. Elka Abrahamson et al., The Wexner Foundation, to the Harvard Board of Overseers (Oct. 16, 2023).

in academic or humanitarian relief discussions.[8] And on that basis, donors demand that the charity be starved of tax-deductible funding.

Of course, donor efforts to dictate or influence their favorite charity's words and actions by dispensing or withholding contributions are entirely legitimate.[9] It is part of the grassroots democratic tradition that folks support or scorn the charities that pursue their individual conception of public good. But the tax code magnifies the power of that effort only when wealthy taxpayers dispense or withhold contributions.

This article is about the effectiveness of laws, particularly the charitable contribution deduction, that would otherwise ensure the representative independence of civil society.[10] Donor reactions to the Israel-Hamas war show that the availability of the charitable contribution deduction works against the independence of civil society by concentrating financial influence of charities in the hands of the very wealthy.[11]

The Predicate

On October 7 Hamas fighters invaded Israel from northern Gaza. They killed at least 1,400 civilians and kidnapped as many as 200 others.[12] Many of the fighters had body cameras, allowing them to record and then post their savagery on social media. Countries around the world condemned Hamas, some with stronger language than others, and some of those countries included statements against Israeli policies.[13] Israel responded with fierce military force against Hamas. More civilian casualties and suffering ensued. Unsurprisingly, international nongovernmental organizations pleaded for an immediate cease-fire.[14] Those pleas were typically accompanied by acknowledgments of historically complex arguments Hamas might assert in justification of its grievances and even its atrocities. It is as though NGOs stated in unison, "Hamas, we know you are angry. We know why Palestinians in Gaza are angry. The expression of your anger is intolerable and unjustifiable." And then, "Hamas and Israel, please stop the war."[15] Reactions to NGO pleas were almost as swift as reactions to Hamas's crimes. Many observers and even other charities roundly condemned those NGOs, accusing them of showing sympathy to

[8] An Israeli NGO, for example, collected the public statements of more than 50 international NGOs, including Save the Children, Amnesty International, and Oxfam. On its webpage, the Israeli NGO initially characterized those statements as "justifications" for Hamas violence, before amending the post to characterize the statements as "downplaying terror." "'Resistance,' 'Apartheid,' and Downplaying Terror: Immediate NGO Responses to the Hamas Pogrom," NGO Monitor (Oct. 8, 2023).

[9] "'Ultimately, all donors have the right to decide the organizations they will support, and they have every right to share their opinions,' said Brian Otis, vice president for University Advancement for the University of New Haven. 'I encourage benefactors contributing to all colleges and universities to remember that higher education and the academic environments created on college campuses have proven for centuries to be the safest place imaginable for individuals to engage in debate and the rigorous exchange of ideas. We should cherish and protect that.'" Lexi Lonas, "Top Universities Facing Antisemitism Accusations, Losing Long-Time Donors Amid Israel-Hamas Conflict," The Hill, Oct. 18, 2023.

[10] IRC section 170.

[11] Chuck Collins and Helen Flannery, "Gilded Giving 2022: How Wealth Inequality Distorts Philanthropy and Imperils Democracy," Institute for Policy Studies, at 4 (2022):

> As inequality has grown in the U.S., the nation's charitable system is in danger of becoming a taxpayer-subsidized platform of private power for the ultra-wealthy. This poses risks to the independent nonprofit sector and our society as a whole.
>
> In fact, concentrated private philanthropic power imperils democratic norms. When a small number of wealthy donors dominate charity, they usurp the public's power to define what problems are, which ones get addressed, and what their solutions should be. But as taxpayers, we subsidize the tax deductions taken by wealthy donors — giving us both the right and the responsibility to oversee and fix it.

[12] Matthew Mpoke Bigg, "What We Know About the War Between Israel and Hamas," *The New York Times*, Nov. 6, 2023.

[13] "At least forty-four nations have publicly expressed their unequivocal condemnation of Hamas and explicitly decried its tactics as terrorism. Others, including regional players such as Qatar, Saudi Arabia, Kuwait, Syria, and Iraq, have placed responsibility on Israel for the attacks." Cleary Waldo et al., "International Reactions to the Hamas Attack on Israel," The Washington Institute for Near East Policy (Oct. 11, 2023).

[14] "UN Agency, NGO Heads Make Rare Joint Plea for Israel-Hamas Ceasefire," Al Jazeera, Nov. 6, 2023.

[15] Amnesty International's October 12 statement follows the pattern. "Palestinian Armed Groups Must Be Held Accountable for Deliberate Civilian Killings, Abductions and Indiscriminate Attacks," Amnesty International (Oct. 12, 2023). It begins by stating that "Hamas and other Palestinian armed groups flagrantly violated international law and displayed a chilling disregard for human life by carrying out cruel and brutal crimes including mass summary killings, hostage-taking, and launching indiscriminate rocket attacks into Israel." It continues by asserting that there can be no justification but with a reference to Israeli behavior. "Israel's well-documented record of war crimes does not excuse Palestinian armed groups' horrendous actions, nor absolve them from upholding their obligations under international law to respect fundamental principles of humanity and protection of civilians." *Id.*

murderers through contemporaneous discussion of crimes and their underlying motivations.[16]

The Theory

First, a few theoretical points of presumed agreement. In an ideal democratic state, rights of political participation are not allocated according to wealth. Democracies presume one person, one vote in part because the cost of government is equally shared under perfectly progressive tax rates. Thus, government policy is not answerable to wealth. We do not grant wealthy voters extra votes because of their wealth. They get no enhanced franchise by donations or other voluntary, extra-legislative payments enhancing public good.[17] In a properly calibrated progressive tax system, all pay the same price, and everyone is therefore entitled to equal rights of influence.

Charities operate for bottom-up, grassroots governance and policymaking, the costs of which are borne just as equally as the costs of top-down governance and policymaking. In a perfectly progressive system, the cost of tax exemptions and charitable contribution deductions are shared equally.[18] Tax exemptions therefore convey to taxpayers an equal interest in what charities do and how they operate.

Charities really are part of the democratic fabric. As with the other necessary parts — government and business — civil society's effective contribution is contingent on its independence. Civil society is not answerable to government or business, but to its own charitable conception, consistent or not with government policy or business motivations. Although counterintuitive, it is nevertheless true that donor capture is contrary to the independence of civil society.[19] When, for example, the government demands allegiance from civil society, civil society is illegitimately drafted to government service.[20] Likewise, when donors demand allegiance to an individual interest, civil society is illegitimately drafted to private advantage.[21] These axioms are true even if the government and donor interests are coincidentally consistent with a singular conception of the public good in a given instance. It is the usurpation of independence that is problematic.

The Reality

Theory is not always reality. All three sectors seek influence in their counterparts' activities for the purpose of effectuating their different desires. Each would gladly appropriate the others' role. Tax laws often operate to keep charities in their own proverbial lanes. Charities, for example, are sanctioned for undue participation in politics or business.[22] In less specific ways, and generally by constitutions or other laws, governments and businesses are sanctioned for undue participation

[16] Presidential candidates quickly contributed their own calls to punish universities and other charities. *See* Zach Kessel, "Nikki Haley Vows to Revoke Tax-Exempt Status for Universities Ignoring Antisemitism," *National Review*, Oct. 26, 2023; and Anjali Huynh, "Candidates Accuse Student Protesters of 'Siding With Hamas,'" *The New York Times*, Nov. 8, 2023 (discussing the proposals of Florida Gov. Ron DeSantis (R) and Sen. Tim Scott, R-S.C., to punish nonprofits that "support" Hamas).

[17] "Donors provide funds to help a university service its vision or fulfill a specific purpose, providing capital to empower innovation and provide more access to students," according to the Council for Advancement and Support of Education, "but in giving that gift it does not 'buy them a say' in how the university runs." Susan Snyder, "Penn's Donor Backlash Raises Questions About How Much Influence Philanthropists Should Have," *Philadelphia Inquirer*, Nov. 12, 2023.

[18] The subsidy theory underlying the charitable contribution deduction and tax exemption means that all taxpayers pay for, or donate to, charities. *See generally* Ellen P. Aprill and Lloyd Hitoshi Mayer, "Tax Exemption Is Not a Subsidy — Except for When It Is," *Tax Notes Federal*, Sept. 20, 2021, p. 1887.

[19] The simplest legislative expression that donor control is undemocratic is hidden in the prohibition against private benefit:

> An organization is not organized or operated exclusively for one or more of the purposes specified in subdivision (i) of this subparagraph unless it serves a public rather than a private interest. Thus, to meet the requirement of this subdivision, it is necessary for an organization to establish that it is not organized or operated for the benefit of private interests such as designated individuals, the creator or his family, shareholders of the organization, or persons controlled, directly or indirectly, by such private interests.

Reg. section 1.501(c)(3)-1(d)(1)(ii). Democratic ideals also underlie the private foundation excise taxes, enacted in part because of perceived "dangerous concentrations of economic and social power." Treasury Department Report on Private Foundations, Senate Finance Committee, 89th Cong., 1st Sess., at 5, 13-14 (Feb. 2, 1965).

[20] Although it is too much for elaboration here, *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010), is fairly read as a sanction on government for its attempt to appropriate the efforts of a 501(c)(4) organization to its own use. In that case, the government sought to require a social welfare's participation in ensuring fair elections. The Supreme Court famously rejected that effort as one not legitimately undertaken by government.

[21] There is a difference in charitable fiduciaries undertaking an activity or position because it is consistent with the charitable mission, and a charity undertaking an activity or position consistent with the charitable mission because a donor demands that the charity do so. The former exemplifies public benefit; the latter exemplifies private benefit.

[22] Section 501(c)(3) (regarding the prohibition against campaign intervention and substantial lobbying) and section 511 (imposing a tax on unrelated business income).

in charities.[23] While occasional crossover is inevitable, we generally expect the sectors to operate within separate parameters.

There is nothing inappropriate about the underlying competition, at least not by democratic standards. Democracies value even hyperbole in sociopolitical discourse. As the representative of the center, government may take a position on the public good, as the United States has in the Israel-Hamas war. Nor is there anything wrong with stakeholders insisting that charities take stances entirely consistent with their own personal sentiments. The essence of grassroots public policy is that individuals exercise rights of participatory influence unhindered by anything other than moral conscience. So donors may and ought to give or withhold donations however they see fit, and nothing in the tax code prohibits or devalues that right.[24]

But recent data suggest that limiting charitable contributions to itemizers devalues the influence non-wealthy donors have relative to wealthy donors. And as non-itemizer's influence decreases, the influence of wealthy taxpayers necessarily increases. As a final theoretical matter, we presume that the government ought to remain neutral regarding a donor's decision to support a favorite charity or any charity at all, as well as a charity's conception of the public good. But when the government is not neutral, we ought to consider that effect on the role civil society plays in a democratic society.

The Conclusion

Here finally is the essence of the tax law problem with charitable contributions. The code subsidizes, to a much greater extent, donations made by wealthy taxpayers.[25] In fact, most taxpayers pay a tax cost for charitable contributions because the deduction is available only to itemizers. Itemizers forgo the standard deduction to deduct charitable contributions and doing that is especially nonsensical unless the charitable deduction is greater than the standard deduction by itself or aggregated with other itemizable deductions.[26] Simply put, it is only the wealthiest 10 percent of taxpayers who benefit by foregoing the standard deduction. The effect, researchers suggest, is that tax policy crowds out less wealthy taxpayers who give less as a group, thereby decreasing their influence in civil society.[27] The exact extent to which tax policy correspondingly increases wealthy donors' influence is probably a matter of interminable debate.[28] But it seems indisputable that the code advantages very wealthy taxpayers and disadvantages everyone else relative to grassroots control of charities.

Others have noted that the code gives wealthier taxpayers concentrated power and disproportionate influence in grassroots policymaking:

> Ideally, we would have a vibrant independent sector supported by a broad and diverse range of donors, so that no single benefactor has outsized power over what charities do with their donations. But when wealthy donors dominate the philanthropic sector, the dangers are manifold. Top-heavy philanthropy takes away the broader public's power to decide which problems to address, and how to

[23] *See supra* note 19. The excise tax on excess benefit transactions can be conceptualized as a prohibition against the use of charitable wealth for private gain, preventing the infringement of the profit motive into charitable lanes. *See* section 4958.

[24] Donors "are doing exactly what they should be doing and really calling to account their alma maters for moral and intellectual failure," according to Michael B. Poliakoff, president and chief executive officer of the American Council of Trustees and Alumni. Snyder, *supra* note 17. "These people own that money and it is their absolute right to direct it to the things that align with their moral and intellectual vision. It makes absolute sense for them to be articulating that their hearts are broken and their wallets will be shut until significant changes happen," Poliakoff added. *Id.*

[25] It is worth admitting that to the extent the standard deduction includes an assumed charitable contribution — without requiring record keeping, receipts, or itemized notations — it may well subsidize charitable contributions. The data, however, suggest that donations by non-itemizers have decreased since the increase in the standard deduction. *See* Collins and Flannery, *supra* note 11.

[26] *See* section 63(a). Only about 10 percent of all taxpayers itemize. Collins and Flannery, *supra* note 11, at 5.

[27] "The share of charitable deductions claimed by those at the top of the income scale has grown particularly quickly: households making over one million dollars accounted for just 10 percent of charitable deductions in 1993, but accounted for 40 percent in 2019." Collins and Flannery, *supra* note 11, at 5. *See also id.* at 8.

[28] "As charities face a loss of broad-based support, they rely more and more on smaller numbers of major donors to stay afloat. These major donors then gain increasing influence over charities' activities and even their core missions. And this endangers not only the charities themselves, but also those who depend on their work." *Id.* at 11.

address them. It siphons money away from working charities. And it allows some donors to abuse our publicly-financed charitable system for personal gain.[29]

Donor reaction to the way charities respond to the Israel-Hamas war remains a tax policy peril, a peril that is far less serious than the one faced by those in the war. But the independence of civil society, even from major benefactors, is critical to a democratic society. Our administration of the charitable contribution deduction hardly supports that independence. ■

[29] *Id.* at 13.