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Who's Afraid of Philanthrocapitalism ?

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WHO'S AFRAID OF PHILANTHROCAPITALISM?

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This Article explores the concept of philanthrocapitalism—an emerging model for charitable giving intended to enhance the practice of philanthropy through the application of certain business techniques, particularly envisioned as being deftly carried out by a subset of ultra-rich, experienced business people. During the past fifteen years, but most strikingly in the past five, private foundations influenced by philanthrocapitalism and its forbearers have become increasingly directive, controlling, metric focused, and business oriented with respect to their interactions with grantee public charities in an attempt to demonstrate that the work of the foundations is "strategic" and "accountable." Combining empirical analysis and theoretical critique, this Article challenges the prevailing wisdom that philanthrocapitalism offers a better, smarter philanthropy, thereby strengthening the entire nonprofit sector. In fact, after observing and documenting the tenets of and rhetoric associated with philanthrocapitalism, there is a serious risk that the shift to business-like, market-driven giving may change the nature of philanthropy in ways we will come to regret. Moreover, this Article links concerns about philanthrocapitalism to a broader disquiet about the blurring lines between the public and the private. I argue that nonprofit scholars and advocates should pay greater attention to this movement and what its "success" might mean for the social sector.

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INTRODUCTION

Powerful grantmaking institutions profoundly influence much of civic life, in both the United States and abroad. Decisions made by foundation board members and staffs greatly affect millions of nonprofit organizations and the people they serve. Today the relationship between private foundations (philanthropic grantmaking entities) and public charities (grant-receiving nonprofit enterprises)[1] is

[1] There are two types of organizations that qualify for recognition of federal income tax exemption under § 501(c)(3) of the Internal Revenue Code: private foundations and non-private foundations. *See* I.R.C. § 509 (2006). Entities primarily engaged in grantmaking and relying on their own principal fund, usually an endowment, are private foundations. Generally, 501(c)(3) organizations that are not private foundations have been colloquially referred to as "public charities" by lawyers. Most private foundations make grants to public charities, which tend to receive substantial support from the government, general public, and private foundations. These donor-reliant organizations often provide direct services or advocacy to fulfill their charitable mission. The term public charity, however, encompasses a broad set of modern nonprofit entities, including advocacy and civic organizations, arts and cultural organizations, colleges and universities, hospitals, religious organizations, among others. Therefore, this Article uses the term "public charities" or "charities" to refer to all organizations that are not private foundations under § 509(a). For more detail on the distinction between private foundations and public charities, see Carter G. Bishop, *The Deontological Significance of Nonprofit Corporate*

very much in flux. In particular, philanthrocapitalism—the application of business techniques to philanthropy by a new generation of self-made, hands-on donors—and strategic grantmaking, as new models of giving, have burst onto the scene, commandeering attention and potentially reshaping philanthropy.[2] For the past decade, there have been growing calls for the nonprofit sector to consider new innovative approaches in conducting its work—borrowed principally from the private sector—in order to improve capacity, efficiency, accountability, and effectiveness.[3] At first these calls were primarily focused on the work of public charities. Lately, however, private foundations have become the target of those seeking to harness the power of "market-based" innovation, as a sort of new technology, to contribute to the project of smarter philanthropy. Further evidencing the concept's prominence, a recent article included philanthrocapitalism among the ten most important philanthropy buzzwords and phrases of the past decade.[4]

Led by billionaires and multimillionaires—armed with their keen business skills—philanthrocapitalism seeks to improve the practice of philanthropy through the application of techniques common to for-profit businesses. Driven by a desire to bring hard-nosed strategy, performance metrics, and an emphasis on effectiveness to the nonprofit sector, a new guard of influential donors is changing the standards for what is considered effective philanthropy. Private foundations, grant-receiving public charities, nonprofit boards, and

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Governance Standards: A Fiduciary Duty of Care Without a Remedy, 57 CATH. U. L. REV. 701, 759–61 (2008).

2 *See, e.g.*, James Edward Harris, *Level Five Philanthropy: Designing a Plan for Strategic, Effective, Efficient Giving*, U. ARK. LITTLE ROCK L. REV. 19 (2003) (discussing the potential impact of strategic philanthropic giving); Dana Brakman Reiser, *For-Profit Philanthropy*, 77 FORDHAM L. REV. 2437, 2472 (2009) (noting the advent of philanthrocapitalism); *The Birth of Philanthrocapitalism*, ECONOMIST, Feb. 25, 2006, at 8 (noting how the leading new philanthropists see themselves as social investors, and how the philanthropic infrastructure increasingly will resemble capitalism); Kristine Henry, *An Expert on Philanthropy Takes Think-Tank Job*, CHRON. PHILANTHROPY, June 12, 2008, at 57 (quoting Jane Wales, vice president for philanthropy and society of the Aspen Institute, who stated that "[t]he question of applying private-sector metrics to social-change goals, what some people call 'philanthrocapitalism,' is an area of a good deal of debate with the philanthropic community right now"); Christopher Quinn, *Buy Coffee, Help a Village*, ATLANTA J.-CONST., May 23, 2009, at D1 (noting that philanthrocapitalism is "a concept that is getting a lot of attention in the world of nonprofits").

3 *See, e.g.*, Bill Bradley et al., *The Nonprofit Sector's $100 Billion Opportunity*, HARV. BUS. REV., May 2003, at 94.

4 *See* Lucy Bernholz, Editorial, *'Impact Economy': A Look Ahead and Back at a Decade of Nonprofit Buzzwords*, CHRON. PHILANTHROPY, Jan. 13, 2011, at 44 (ranking "philanthrocapitalism" as the number-six buzzword).

the professionals who counsel and advise grantors and grantees are feeling the impact.

The most prominent chroniclers of this movement are Matthew Bishop, the New York bureau chief of the *Economist*, and Michael Green, an economist. Their book, *Philanthrocapitalism: How the Rich Can Save the World*, is a rosy meditation on the future of American philanthropy that combines analysis, profiles, and anecdotes to reveal a new wave of charitable grantmaking with a new vocabulary and renewed strength.[5] Bishop and Green applaud "[t]he new philanthropists" whom they believe are greatly improving a system they see as ineffective and in desperate need of reshaping.[6] In their assessment, "The past couple of decades have been a golden age for capitalism, and today's new philanthropists are trying to apply the secrets behind that money-making success to their giving."[7]

The appeal of philanthrocapitalism is easy to grasp. It is tempting to imagine society's most pressing social ills being solved by a new breed of entrepreneurs-turned-philanthropists, who revolutionize grantmaking through the application of their business acumen, ambition, and "strategic" mindset. Traditionally, philanthropy has been cast as a welcome partner of government in addressing public needs.[8] But, following the rise of neoliberalism as a dominant cultural and political ideology[9] and the significant private wealth creation of the past twenty years,[10] the social sector has looked to markets and business as sources of inspiration to improve the work of public charities.[11] Thus we have a new wave of thought in philanthropy looking to imbue capitalist/business principles and market-based

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5 MATTHEW BISHOP & MICHAEL GREEN, PHILANTHROCAPITALISM: HOW THE RICH CAN SAVE THE WORLD (2008).

6 *Id.* at 2.

7 *Id.* at 2–3.

8 *See* PETER FRUMKIN, STRATEGIC GIVING: THE ART AND SCIENCE OF PHILANTHROPY 30 (2006) ("One explanation for the tax code's inclination to support giving is that government sees private philanthropy as a necessary partner in the pursuit of public purposes."); Shelly Banjo, *Is It Public, or Is It Private?*, WALL ST. J., Nov. 9, 2009, at R5 (discussing increase in partnerships between government and philanthropic organizations).

9 *See* DAVID HARVEY, A BRIEF HISTORY OF NEOLIBERALISM (2005); THE RISE OF NEOLIBERALISM AND INSTITUTIONAL ANALYSIS (John L. Campbell & Ove K. Pederson eds., 2001); Scott Burris et al., *Changes in Governance: A Cross-Disciplinary Review of Current Scholarship*, 41 AKRON L. REV. 1, 46 (2008).

10 *See* Todd J. Zywicki, *An Economic Analysis of the Consumer Bankruptcy Crisis*, 99 NW. U. L. REV. 1463, 1484 (2005) ("During the past fifty years, Americans have benefited from a dramatic increase in household net wealth. Moreover, this increase in wealth has accelerated dramatically during the past twenty years . . . ."); Jim Krane, *More People Making Their First Million/Strong Global Economy Adds to Wealthy Rolls*, HOUSTON CHRON., June 21, 2006, at 3 (noting the rapid growth in the number of millionaires worldwide).

11 *See, e.g.*, J. Gregory Dees, *Enterprising Nonprofits*, HARV. BUS. REV., Jan.–Feb. 1998, at 54, 56.

theory into the work of not-for-profit, private foundations. Moreover, this past decade has seen academics and policymakers embrace "third way" solutions that blend public and private regulatory modalities.[12] In light of these converging trends, it is no surprise to find people enticed by an idea that promises to "save the world" through business thinking and market methods.

The movement started with a small group of initial practitioners—successful-entrepreneurs-turned-philanthropists—and expanded to include hundreds of foundations and advisory firms that have become its most forceful advocates.[13] The principles of philanthrocapitalism have now captured the attention of journalists, foundation professionals, and trustees at "mainstream" foundations, governments, and beyond. Philanthropic institutions and even ordinary individuals are watching, mimicking this new development, and rapidly absorbing its messages all too well.[14] This Article critiques the discourse of philanthrocapitalism and suggests that the rhetoric behind it has consequences.

This Article proceeds from the premise that this emerging conception of what it means to practice "effective" philanthropy warrants examination because it has implications for how we think about the accountability and stewardship of tax-privileged resources managed by private individuals for the public benefit. Certainly, the additional philanthropic resources contributed by successful business

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[12] *See* ANTHONY GIDDENS, THE THIRD WAY: THE RENEWAL OF SOCIAL DEMOCRACY (1998); MARTHA MINOW, PARTNERS, NOT RIVALS: PRIVATIZATION AND THE PUBLIC GOOD (2002); Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 547–49 (2000); Michele Estrin Gilman, *Poverty and Communitarianism: Toward A Community-Based Welfare System*, 66 U. PITT. L. REV. 721, 741 (2005) (noting President Clinton's penchant for "Third Way" problem solving); Kathleen D. Hall, *Science, Globalization, and Educational Governance: The Political Rationalities of the New Managerialism*, 12 IND. J. GLOBAL LEGAL STUD. 153, 158–64 (2005) (describing the emergence of Third Way problem solving in the United States and Great Britain through the 1990s and 2000s); Lili Levi, *The Four Eras of FCC Public Interest Regulation*, 60 ADMIN. L. REV. 813, 854 n.157 (2008) (noting the profusion of "third way" literature during the last decade); Cass R. Sunstein, *A New Progressivism*, 17 STAN. L. & POL'Y REV. 197, 199–201 (2006) (discussing the "New Progressivism" and is relationship with the "Third Way").

[13] *See* BISHOP & GREEN, *supra* note 5, at 220–77, 232–35.

[14] *See infra* text accompanying notes 63–67 (discussing philanthropic institutional responses); *see also* Kristi Heim, *Got Cash to Spare? Starting Soon, Gates Foundation Will Accept It*, SEATTLE TIMES, Dec. 1, 2006, at B1 (describing a seven-year-old girl inspired by Warren Buffett's gift to the Bill and Melinda Gates Foundation who donated $35 of her own to the Foundation causing the Gates Foundation to adopt a new policy on accepting gifts); BILL & MELINDA GATES FOUND., 2008 ANNUAL REPORT: PROGRESS AND PRESSING NEEDS 21–22 (2009) [hereinafter BILL & MELINDA GATES FOUND., 2008 ANNUAL REPORT] (reporting that the Bill & Melinda Gates Foundation received more than $10 million in unsolicited donations from the general public, other than Gates and Buffett, in 2008 which was up from $1.6 million in 2007); BILL & MELINDA GATES FOUND., ANNUAL REPORT 2007, at 44–45 (2008) (reporting that several members of the general public made contributions).

entrepreneurs and investors are greatly needed and welcomed by recipients. But a giving model that exclusively subscribes to the notion that this particular subgroup, through their use of business methods, is always engaged in better, smarter, and more effective grantmaking has dangerous appeal. This Article identifies and focuses on the dangers.

Because charitable giving is generally presumed to be beneficial, regardless of its form, philanthropy is often taken for granted and rarely subjected to intense scrutiny. Many people have the normative impulse to assume that as long as charitable activity is undertaken in a manner consistent with law, it must therefore advance the greater good. In addition, recipients are often so grateful for the funding that they may overlook other concerns. Furthermore, a common line of thinking that starts with a recognition that giving is an optional act (e.g., "it's their money"), an understanding that resources could be used for private consumption rather than public benefit (e.g., "they don't have to donate it"), and an appreciation for the expressive value of giving to shape solutions and society (e.g., "so they should be able to do what they want") leads people to be hesitant to criticize or question the philanthropic system. But even within the domain of what is legal, there are many activities that we might rightfully be concerned about because of their influence on society and infringement on other important values. My concern with the new form of philanthropy is not about its end uses—i.e., where the charitable donation goes—but rather the new ways that philanthrocapitalism governs and constrains how the funding flows. While I strongly support the independence and limited role of the state to dictate matters of charity governance,[15] the self-governance exercised by foundations should be subject to critical evaluation and reflection. Although I would not legally regulate these new forms of philanthropic giving, I would encourage robust conversation about best practices in light of what I see as its harmful effects.

Its proponents have billed this new form of philanthropy as one that is more ambitious, more strategic, more global, and more results oriented, requiring higher levels of personal involvement by donors than more traditional approaches.[16] Less often discussed in the literature, however, is the fact that although donors have always had a certain degree of disproportionate control in grantor-grantee

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[15] For an excellent discussion of foundation independence, see Evelyn Brody & John Tyler, *Respecting Foundation and Charity Autonomy: How Public Is Private Philanthropy?*, 85 CHI.-KENT L. REV. 571, 579–583 (2010).

[16] John A. Byrne, *The New Face of Philanthropy*, BUS. WK., Dec. 2, 2002, at 82, 83–84.

relationships, this new movement, with its use of cutting-edge language about strategy and effectiveness, exacerbates the divide and strains these relationships further. As a result, grantmakers influenced by this movement are becoming more paternalistic, leaning toward foundation-centered problem-solving models that disempower grantees and the communities they serve. And more and more grantmakers are remaking themselves in this troubling new image.

As I see it, philanthrocapitalism is the Martha Stewart of philanthropy: haughty and self-important, but simultaneously charming with mass appeal. To be fair, the problem lies less with the idea's overarching goals than with its specific claims. It is important to appreciate the broader context in which the debate over philanthrocapitalism takes place, one in which public and private boundaries, market and communitarian values, and new global governance structures are being renegotiated and reevaluated. Although philanthrocapitalists may raise important questions about grantmaking, there are significant drawbacks to embracing philanthrocapitalism as a new paragon for carrying out charitable giving. Many of the practices associated with the attitude and style of this new form of giving endanger some of the most essential benefits and values the nonprofit sector brings to society, namely the role of nonprofit institutions in social change, the promotion of democratic values, and the building of communities and social ties through empowerment and participation. The goal of this Article is to encourage readers to critically examine the philanthrocapitalism movement to determine whether its core principles are deserving of broad application. Toward that end, this Article breaks new ground in presenting significant empirical research and offering a critical perspective of a seemingly positive trend.

With philanthropy on the brink of an evolutionary shift, the question of what type of giving model will predominate the more than \$580 billion in foundation assets[17] is especially important to the nonprofit sector. Nothing less than the heart and soul of philanthropy is at stake. It is essential for lawyers to understand this major dialogue in the charitable sector. Private foundations and public charities rely on attorneys for advice on a range of issues, and lawyers are well represented on nonprofit boards.[18] Therefore, it is not enough for nonprofit lawyers to be just skilled technicians capable of crafting

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17 *See* STEVEN LAWRENCE & REINA MUKAI, FOUND. CTR., FOUNDATION GROWTH AND GIVING ESTIMATES: CURRENT OUTLOOK 2 (2010) [hereinafter FOUNDATION GROWTH AND GIVING 2010].

18 *See* RICHARD P. CHAIT ET AL., GOVERNANCE AS LEADERSHIP: REFRAMING THE WORK OF NONPROFIT BOARDS 4 (2005).

grant agreements; they also need to understand this major shift in the way funders and grantees interact. Just like their for-profit counterparts, nonprofit clients need and want their lawyers to understand relevant industry trends and developments in order to provide high quality service and sophisticated advice.[19] Lawyers must have a deeper understanding of these trends, the pressures, and cultural dynamics facing the organizations, and the potential costs and benefits to the nonprofit sector (the relevant "industry" in this case) as a whole. This is the case whether lawyers are representing grantmaking foundations or grant-receiving charities, in order to provide counsel with a practical wisdom and a sense of judgment (which often requires balancing what is legal with what is right).

This Article traces the genealogy of the philanthrocapitalism project, analyzes data to contextualize the rapid growth of this movement and its ideals, and describes why its rise should be worrisome. Part I explains philanthrocapitalism and strategic philanthropy with a focus on the language and the key principles of the movement. This Part explores the new philanthropy and compares it to more traditional grantmaking practices. Part II undertakes important descriptive work, detailing and documenting the broad effect of this new philanthropic movement. It presents original empirical research to illustrate the ways in which some of the principles advanced by philanthrocapitalism are slowly being embraced by foundation boards and professionals and impacting the practice of philanthropy on the ground. Part III provides a normative argument that identifies the dangers of philanthrocapitalism. The discussion invokes important principles of effectiveness in social change, core democratic and charitable values, and civic participation at stake for the nonprofit sector. In addition, I explore how, ironically, philanthrocapitalism purports to extol the values and virtues of free-market ideals, but instead may distort the behavior of private foundations in ways that lead them to employ a command-and-control approach to their work that is inconsistent with commonly held free-market principles. In this sense, the movement may be in tension with its own ends.

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[19] *See* David E. Van Zandt, *Foundational Competencies: Innovation in Legal Education*, 61 RUTGERS L. REV. 1127, 1134 (2009) ("[T]he most successful lawyers—in firms and beyond—need to understand not only their clients' legal challenges, but also the business, organizational, and strategic contexts in which they arise."); David B. Wilkins, *Team of Rivals? Toward a New Model of the Corporate Attorney-Client Relationship*, 78 FORDHAM L. REV. 2067, 2088 (2010) (noting that research indicates that clients place "a high premium on finding lawyers who 'understand their business'").

To be clear, charitable giving should be admired and encouraged. This Article does not aim to criticize the creation of grantmaking foundations or to impugn the munificence of wealthy corporate executives and business investors, such as Bill Gates, Warren Buffett, and others mentioned herein. To the contrary, I praise the generosity of spirit displayed by all donors willing to share substantial private resources for the public good or to help those in need. Rather, the Article asserts that an idealized model of effectiveness, focused predominantly on applying the business techniques of self-made billionaires in order to determine where and how funds are allocated, is an impoverished model. In doing so, this Article hopes to contribute to a broader conversation about the role and mission of philanthropy and to place the discussion in a broader academic conversation about private ordering and social policy.

I. UNDERSTANDING PHILANTHROCAPITALISM AND STRATEGIC GRANTMAKING

Philanthrocapitalism has developed as a subcategory of social enterprise work, the term used to describe efforts to combine social goals with commercial business methods.[20] Discussions of social enterprise have traditionally focused on the work of public charities and for-profit entities. Over the past decade, the concept of social enterprise or social entrepreneurship has aroused significant interest and attention in the charitable sector and in the scholarly literature.[21]

Both social enterprise and social entrepreneurship, however, are diffuse concepts that have been used and defined in a myriad of ways. Social entrepreneurship is most often used in connection with public charities. It focuses either on the formation by public-minded "change agents" of a new organization or project with a compelling social mission or on the promotion by nonprofit organizations of innovative programs and initiatives intended to generate earned income through commercial revenue, user fees, etc.[22] Social enterprise, usually used

[20] *See* James J. Fishman, *Wrong Way Corrigan and Recent Developments in the Nonprofit Landscape: A Need for New Legal Approaches*, 76 FORDHAM L. REV. 567, 599–601 (2007); Reiser, *supra* note 2, at 2449–51.

[21] *See, e.g.*, Janet E. Kerr, *Sustainability Meets Profitability: The Convenient Truth of How the Business Judgment Rule Protects a Board's Decision to Engage in Social Entrepreneurship*, 29 CARDOZO L. REV. 623, 633 (2007) ("Social entrepreneurship is significantly impacting traditional philanthropy as there is a growing push for charities to become more business-like in how they are operated.").

[22] *See* Thomas Kelley, *Rediscovering Vulgar Charity: A Historical Analysis of America's Tangled Nonprofit Law*, 73 FORDHAM L. REV. 2437, 2463–64 (2005) (providing examples of entrepreneurial charities); David E. Pozen, *We Are All Entrepreneurs Now*, 43 WAKE FOREST L. REV. 283, 294–300 (2008) (describing different definitions and uses of the term "social

in connection with for-profit corporations, focuses on ventures seeking "a double bottom line," that is, the pursuit of both social impact and financial reward through the delivery of services or products.[23] Interestingly, philanthrocapitalism has evolved from an effort to apply these same principles to the work of private foundations. The first-wave effort to apply a combination of business and social practices to philanthropy led to the advent of "venture philanthropy," generally considered a form of engaged grantmaking loosely based on the practices of venture-capital investing.[24] Professor Thomas Kelley, for example, refers to venture philanthropy as the "better-funded doppelganger of 'social entrepreneurship.'"[25] Philanthrocapitalism appears to represent a second-wave, that is, a more advanced version of venture philanthropy.

As the portmanteau implies, philanthrocapitalism is a heightened combination of philanthropy and capitalism. At its core, it describes an ambitious new movement of charitable giving promoted by ultra-rich "social investors, not traditional donors,"[26] using big-business strategies. Among the most prominent faces of philanthrocapitalism are Bill Gates[27] (billionaire founder of Microsoft[28]), Pierre Omidyar[29] (billionaire founder of eBay[30]), and Eli Broad[31] (billionaire founder of KB Home and SunAmerica, now a subsidiary of the American

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entrepreneur"); J. Gregory Dees, *The Meaning of "Social Entrepreneurship,"* CTR. FOR THE ADVANCEMENT OF SOC. ENTREPRENEURSHIP (May 30, 2001), http://www.caseatduke.org /documents/dees_sedef.pdf (describing key elements of social entrepreneurship).

23 *See* Lisa M. Fairfax, *Achieving the Double Bottom Line: A Framework for Corporations Seeking to Deliver Profits and Public Services*, 9 STAN. J.L. BUS. & FIN. 199, 200–01 (2004) (discussing double bottom line corporations).

24 *See* Susan R. Jones, *Promoting Social and Economic Justice Through Interdisciplinary Work in Transactional Law*, 14 WASH. U. J.L. & POL'Y 249, 266 (2004) (describing social-venture philanthropy as a venture-capital influence on charitable giving); Christine W. Letts et al., *Virtuous Capital: What Foundations Can Learn from Venture Capitalists*, HARV. BUS. REV., Mar.–Apr. 1997, at 36.

25 Kelley, *supra* note 22, at 2464.

26 BISHOP & GREEN, *supra* note 5, at 6.

27 *See id.* at 51–81 (discussing the world's largest charitable foundation, headed by Bill Gates); *see also* BILL & MELINDA GATES FOUND., 2008 ANNUAL REPORT, *supra* note 14.

28 *See* JAMES WALLACE & JIM ERICKSON, HARD DRIVE: BILL GATES AND THE MAKING OF THE MICROSOFT EMPIRE (1992); *The Forbes 400: Top 10*, FORBES, Oct. 6, 2008, at 46, 46.

29 *See* BISHOP & GREEN, *supra* note 5, at 116–24, 134–37 (discussing Omidyar's philanthropy); *see also* Omidyar Network Fund, Inc., I.R.S. Form 990-PF (2008), http://www.omidyar.com/sites/default/files/file/2008%20990-PF,%20Return%20of%20Private %20Foundation.pdf (reporting the assets and expenditures of the Omidyar Network Fund).

30 *See* ADAM COHEN, THE PERFECT STORE: INSIDE EBAY (2002); *The Forbes 400: Tech Titans*, FORBES, Oct. 6, 2008, at 168, 172.

31 *See* BISHOP & GREEN, *supra* note 5, at 138–41 (discussing Broad's philanthropy); *see also* THE BROAD FOUNDS., 2008 FOUNDATION REPORT (2009).

International Group, Inc.[32]). As depicted by Bishop and Green, the new philanthrocapitalists "see a world full of big problems that they, and perhaps *only* they, can and must put right."[33] These are the kind of entrepreneurs who are used to large-scale success and now are seeking to apply that same approach to philanthropy. The concept encompasses more than just the marginal importation of sound, basic management principles and high levels of grantor engagement. Rather, the rhetoric of philanthrocapitalism emphasizes a complete remaking of philanthropic giving in the image of business, in part by appropriating business management values (e.g., data focused, results based, etc.). Philanthrocapitalism has also adopted a belief that business methods are superior and that experienced, private-sector business people to replicate corporate achievements in philanthropy.

Bishop and Green describe the present period as a new "golden age"[34] of foundation giving by an elite class of entrepreneurs. The authors describe the ways in which such giving and the publicity surrounding it are part of an emerging cultural zeitgeist.[35] As a result, this form of giving—highly engaged grantmaking with a focus on bottom-line results—is gaining currency, popularity, and devotees. The charitable-giving style of Bill Gates and Warren Buffett has become part of a larger global trend, reinforced and supported by new institutions, such as the Clinton Global Initiative[36] and the World Economic Forum in Davos, Switzerland,[37] where philanthrocapitalists gather and exchange notes. According to Bishop and Green, the shift in philanthropy has been striking: individual philanthropists and

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32 *See The Forbes 400: Market Masters*, FORBES, Oct. 6, 2008, at 246, 250

33 BISHOP & GREEN, *supra* note 5, at 3 (emphasis added).

34 *Id.* at 21. The authors also note studies that have demonstrated increased giving by the superrich and the addition of both new bequests coupled with endowment growth of established foundations, which have greatly increased the amount of giving by private foundations over the past fifteen years. *See id*. at 5–6.

35 *See id.* at 6, 8–9 (describing new links between philanthropy and media as well as philanthropy and celebrity); *see also Face Value: The Brand of Clinton*, ECONOMIST, Sept. 22, 2007, at 84 ("Clinton . . . espouse[s] a businesslike approach to giving money that is now fashionable among the new rich."); Liz Hunt, *A Lesson in Quietly Doing Good from God's Postman*, DAILY TELEGRAPH (London), Apr. 1, 2008, at 20 (noting that "philanthropy is fashionable again"); Sherri Begin Welch, *Family Foundations on Rise; Creating a Legacy Among the Benefits*, CRAIN'S DETROIT BUS., Nov. 10, 2008, at 24 (quoting an advisor to wealthy families who stated that "people establish family foundations because they think it's a trendy thing" (internal quotation marks omitted)).

36 *See* BISHOP & GREEN, *supra* note 5, at 214–18; *see also* Philip Rucker, *On Eve of Philanthropy Forum, Clinton Worries About Economy*, WASH. POST, Sept. 23, 2008, at A6 (quoting a corporate executive who stated that the Clinton Global Initiative "creates the idea that you may be successful as a chief executive of your company . . . , but if you do not think of philanthropy as part of your job description, you are not cool, you are not good" (internal quotation marks omitted)).

37 *See* BISHOP & GREEN, *supra* note 5, at 175, 217.

corporations are "embracing the profit motive" and "catching the philanthrocapitalism bug . . . . This is very different from traditional corporate philanthropy, which has often been ineffective . . . ."[38]

But just how is philanthrocapitalism new and different? After all, successful business figures of prior generations founded many of the largest and most established grantmaking foundations in the United States. In fact, the "mainstream" foundations that today's philanthrocapitalists decry as traditional and ineffective were founded by the likes of Andrew Carnegie,[39] John D. Rockefeller,[40] and Will Kellogg.[41] Michael Edwards, a former foundation executive who has written critically about this new movement, argues that

> philanthrocapitalists are drinking from a heady and seductive cocktail, one part 'irrational exuberance' that is characteristic of market thinking, two parts believing that success in business equips them to make a similar impact on social change, a dash or two of the excitement that accompanies any new solution, and an extra degree of fizz from the oxygen of publicity.[42]

Upon close study, three central features of philanthrocapitalism emerge: (1) the application of business principles to grantmaking, (2) high engagement by the funder, and (3) the tendency of funders to seek leverage to expand their spheres of influence. First, a central feature of philanthrocapitalism (and a key aspect of what supposedly makes it new and "improved") is the application of business thinking and strategy drawn directly from the funder's personal experience and success in the private sector. Bishop and Green characterize the spirit of philanthrocapitalism as "successful entrepreneurs trying to solve big social problems because they believe they can, and because they feel they should. . . . [T]hey know how to fix problems, for that is what they do all day in business."[43] Ultimately, as the project spreads,

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[38] *Id.* at 7.

[39] *See* HAROLD C. LIVESAY, ANDREW CARNEGIE AND THE RISE OF BIG BUSINESS 206 (Mark C. Carnes ed., 3d ed. 2007) (summarizing Andrew Carnegie's giving over the course of his life, including the establishment of the Carnegie Foundation); DAVID NASAW, ANDREW CARNEGIE (2006) (describing the life and work of Andrew Carnegie as a businessman and philanthropist).

[40] *See* RON CHERNOW, TITAN: THE LIFE OF JOHN D. ROCKEFELLER, SR. 563–70 (2d ed. 2004) (describing the establishment of the Rockefeller Foundation).

[41] *See* WALDEMAR A. NIELSEN, THE BIG FOUNDATIONS 111–14 (1972) (describing Kellogg's creation and management of the Kellogg Foundation).

[42] Michael Edwards, *"Philanthrocapitalism" and Its Limits*, INT'L J. NOT-FOR-PROFIT L., Apr. 2008, at 22, 23–24.

[43] BISHOP & GREEN, *supra* note 5, at 30. Several prominent philanthrocapitalists have established private foundations with especially ambitious goals. For example, the Bill &

its proponents see a path to a better world, not just because of an increase in the *amount* of philanthropy, but also because of an increase in the *quality* of philanthropy practiced. Bishop and Green contend that "one key ingredient of philanthrocapitalism is the responsibility and willingness of economic winners to . . . apply to their giving the same talents, knowledge, and intellectual vigor that made them rich in the first place. Philanthrocapitalism is about being a businesslike giver."[44] The practitioners of philanthrocapitalism have developed a new, albeit familiar, language to convey their business-oriented-giving approach. In their hands, "philanthropy is 'strategic,' 'market conscious,' 'impact oriented,' [and] 'knowledge based.'"[45]

Furthermore, philanthrocapitalism embraces the use of business and market-based tools, techniques, and methods to address intractable social problems. Its practitioners talk of applying "business principles" to the charitable sector to "lift people out of poverty,"[46] and of "apply[ing] the entrepreneurial principles we have brought to business to charity . . . [to] have a shot at having a really strong impact, to be able to transform the lives of children."[47] As part of its business-knows-best philosophy, the movement also seeks opportunities to harness the profit motive for social problems, when possible.[48]

Second, the private foundations backed by philanthrocapitalists believe in a high engagement—oftentimes a directive—form of grantmaking. This engagement allows them to exercise substantial control over the manner and uses of their funding in a drive for measurable results.[49] Drawing on a record of their own business

Melinda Gates Foundation has sought to "find a vaccine that will prevent AIDS, . . . eradicate malaria, spark an agricultural revolution in Africa and ensure that every child in the United States has access to a quality education, among other things." Stephanie Strom, *Gates Foundation Head to Leave Longtime Post*, N.Y. TIMES, Feb. 7, 2008, at A18. More recently, Jeffrey Skoll, the first president of eBay and founder of the Skoll Foundation, also formed the Skoll Urgent Threats Fund to focus on dire global threats like water shortages, pandemics, and the Middle East conflict. Stephanie Strom, *A New Foundation Is Taking Aim at Urgent Threats*, N.Y. TIMES, Apr. 15, 2009, at A18.

44 BISHOP & GREEN, *supra* note 5, at 271.

45 *Id.* at 6.

46 Douglas McGray, *Network Philanthropy: The Men Behind eBay Are Leading a High-Tech Revolution That Is Turning Charitable Giving on Its Head*, L.A. TIMES, Jan. 21, 2007, (Magazine), at 14 (internal quotation marks omitted) (quoting Pierre Omidyar).

47 Jamie Doward, *Can a Friend of the Stars Save British Schools?*, OBSERVER (London), May 29, 2005, at 13 (quoting Arpad Busson, a multi-millionaire hedge-fund executive, discussing education initiatives).

48 BISHOP & GREEN, *supra* note 5, at 117.

49 *See, e.g.*, Louise Armitstead, *Financier's Pounds 460m Giveaway Fund Manager Makes Single Biggest Donation to Charity in UK*, DAILY TELEGRAPH (London), June 21, 2008, at 1 (describing "the 'new philanthropists,' the super-rich who are not only giving away a large

accomplishments, philanthrocapitalists are focused on results and the measurable impact of their giving. Although the foundations still work with and rely on nonprofit public charities to implement work on the ground, philanthrocapitalism encourages foundations to set the agenda.[50] This hands-on approach to philanthropy is gaining adherents, and as Part II of this Article demonstrates, is impacting the manner in which philanthropy is conducted.

The third signature element of philanthrocapitalism is that these powerful men[51] use their influence and personal access to people and resources to further advance their philanthropic goals.[52] Philanthrocapitalists refer to this as "achiev[ing] leverage."[53] For the philanthrocapitalists, it is not enough to use their own charitable giving to direct the pursuit of philanthropic solutions. They also seek to bring governments, businesses, and other funders to embrace and support *their* particular vision and *their* proposed solutions. Bishop and Green highlight the importance of leverage:

> [E]very philanthrocapitalist talks about the importance of leverage, and rightly so. . . . The high hopes for philanthrocapitalism are based on the belief that the wealthy can be hyperagents, able to achieve impact far greater than their relative financial resources would suggest by targeting their dollars . . . [and entering into] [p]artnership[s] with government, business, or NGOs . . . .[54]

Accordingly, super-philanthropists also may use their high-profile giving and "convening power" to form and strengthen a variety of linkages and relationships: connections with celebrity partners,[55]

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proportion of their wealth but increasingly controlling the charities too"); Daniel Golden, *Teachers' Pest*, BLOOMBERG BUSINESSWEEK, July 19, 2010, at 58, 60 (quoting University of Michigan professor Maris Vinovskis who noted that historic benefactors "were not as prescriptive about how they wanted their money spent" as the new philanthropic billionaires like Gates, Broad, and others (internal quotation marks omitted)); Jennifer Steinhauer, *Wielding Iron Checkbook to Shape Cultural Los Angeles*, N.Y. TIMES, Feb. 8, 2010, at C1 (describing Eli Broad as "[a] billionaire philanthropist whose beneficence comes with not just strings but with ropes that could moor an ocean liner").

50 *See* BISHOP & GREEN, *supra* note 5, at 52, 57–59 (noting that Gates, "the ultimate philanthrocapitalist," takes an approach in which "the foundation sets policy" on the issues it funds).

51 I note that virtually all the examples noted by Bishop and Green are men, with the notable exception of celebrity-philanthropists, referred to as "celanthropists," Angelina Jolie and Oprah Winfrey. *Id.* at 197–98.

52 *Id.* at 274.

53 *Id.* at 275.

54 *Id.* at 274.

55 *See, e.g.*, *id.* at 204 (quoting Patty Stonesifer, the former CEO of the Bill & Melinda

contacts with current and former world leaders and public officials,[56] and interactions with fellow titans of industry.[57] Philanthrocapitalists view leveraging their personal networks of contacts as the key to success and believe that it is even more important than the money they give.[58]

While the notion that these networks will be put to public uses may be admirable, the idea that well-practiced philanthropy requires a powerful Rolodex is troubling. Part of the freedom philanthrocapitalists have to exercise their power and influence comes not just from the access to powerful figures, but also from their sense of independence, a notion that one is virtually unaccountable and unbound, so long as one abides by the law. This freedom is part and parcel of the privilege of being superwealthy. Even Bishop and Green acknowledge that "[a]s hyperagents, the superrich can do things to help solve the world's problems that the traditional power elites in and around government cannot. They are free from the usual pressures that bear down on politicians and activists and company bosses with shareholders to please."[59] Thus, these particular tax-privileged foundations, usually heavily dominated by a single, individual founder, operate without significant accountability to the public. As explained in Part III.B.1, this can result in an active and aggressive form of philanthropy, which may undermine democratic values.

At bottom, philanthrocapitalism is about more than just the celebration of charitable giving by the wealthy. Rather, philanthrocapitalism touts a new, more active and assertive style of giving, driven by a business-like giver bringing his own insight and direction, vision and solutions, as well as power and access to produce social change. It is nothing short of an effort to remodel the prevailing philanthropic patterns by supplying a new language, a new mindset, and new techniques for addressing social problems. In the words of Steve Case, the billionaire-turned-philanthropist who

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Gates Foundation who stated that "[o]ne of [the Foundation's] most important partners is Bono [the lead singer of the prominent rock band U2]" (internal quotation marks omitted)).

56 *See, e.g.*, *id.* at 214–15.

57 *See* Ian Wilhelm, *Secret Meeting of the Super-Philanthropists*, CHRON. PHILANTHROPY, June 4, 2009, at 34 (describing a private meeting of a dozen billionaires in early May 2009).

58 *See* BISHOP & GREEN, *supra* note 5, at 227 ("In the for-profit world, networking is hot, online and off-line. Increasingly, the same is true in philanthropy, as some philanthrocapitalists—Bill Clinton first among them—even believe they can have a greater impact by leveraging their personal networks of contacts for good than by the money they give.").

59 *Id.* at 255.

cofounded Internet-services company America Online, Inc. (AOL),[60] the movement is designed to "unleash a new entrepreneurial, collaborative kind of philanthropy . . . [to] create new patterns that will help reshape the entire system."[61]

The calls for a more "strategic" approach to giving have already advanced several trends in philanthropy, affecting the entire philanthropic sector, including traditional philanthropy. Established grantmaking organizations are adopting these concepts and practices and suffusing them into their own procedures and activities. Private foundations of all sizes and origins are trying to prove that they are just as "smart," "strategic," and "effective" as this new breed of philanthropists.[62] Beyond the fortunes of Gates and Buffett, traditional foundation managers are applying the methods of philanthrocapitalism to "reinvigorate the giving away of fortunes made by long-dead tycoons."[63]

Interestingly, the appropriation of the philanthrocapitalism model by more traditional grantmakers—such as corporate funders, family-run foundations, and more established independent foundations—transforms the phenomenon into something a bit different in the hands of these users. Lacking the self-made business experience, each funder has defined the contours of what strategic giving means somewhat differently. Like philanthrocapitalism, however, these approaches are still intensely focused on impact, high levels of engagement, and measurement. Generally speaking, advocates of strategic philanthropy believe in top-down strategies—"the power of ideas, persuasively communicated, to influence policy and compel action"[64]—as the most effective way to allocate scarce philanthropic dollars. As characterized by one independent foundation in the field, many funders are "'proactive,' with its practitioners taking the initiative to craft innovative solutions to significant problems and engaging in hard-nosed efforts to measure real outcomes."[65] The strategic approaches can be contrasted with traditional philanthropy, which frequently contains an express preference for a "responsive"

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[60] *See* Hillary Prey, *Poor Billionaires*, FORBES, Oct. 6, 2008, at 34 (noting Stephen Case among the list of U.S. billionaires).

[61] BISHOP & GREEN, *supra* note 5, at 227.

[62] *See* JOEL L. FLEISHMAN, THE FOUNDATION: A GREAT AMERICAN SECRET 279 (2007) (noting that trustees have and will continue to push long-established foundations to adopt methods and practices of philanthrocapitalism).

[63] BISHOP & GREEN, *supra* note 5, at 151.

[64] TOM DAVID, THE CAL. WELLNESS FOUND., REFLECTIONS ON STRATEGIC GRANTMAKING 3 (2000), *available at* http://www.calwellness.org/assets/docs/reflections/nov2000.pdf.

[65] *Id.*

model of grantmaking based on bottom-up strategies emphasizing "the power of investment in institutional capacity and individual leadership at the local level"[66] to achieve impact.

In this Article, I refer to the more assertive, donor-centric approach to philanthropy as "muscular philanthropy." Although money is still usually directed to various grant-seeking public charities to carry out charitable work, as in traditional philanthropy, private foundation grantors operating under this new philanthropy exert their power not just through their dollars but also through an unspoken sense that they know best. They assume that smart giving requires a *foundation-led* plan of attack on any given problem. It places the foundation at the center of the social problem-solving endeavor, relegating grantees to the role of subcontractors expected to execute the grand vision of the private foundation funder. In contrast, the prevailing conception attached to traditional (less muscular) incarnations of philanthropy, with their emphasis on building civil society, has been that of a coequal partnership, a relationship sometimes successfully achieved and other times less so. An apt metaphor for the philanthrocapitalism model would be the manager-subordinate corporate relationship.[67] This relationship threatens to turn grant-seeking charities into constrained participants without full recognition of their value, autonomy, and expertise.

The choice between the competing relationship frameworks has consequences for "on the ground" operations. Here is what a large corporate foundation[68] wrote in a document explaining strategic philanthropy and its view of the relationship between grantors and grantees:

> Donors today have come to expect—and in many cases, require—that their nonprofit partners not only show the ability to get the job done, but that they can deliver on their promises by achieving measurable results. This disciplined approach can lead to more effective philanthropy . . . . In certain ways this is a sea change. . . . Increasingly, donors are now committed to having a real impact in shorter time periods, and applying fresh thinking and tactics to problems

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66 *Id.*

67 Of course I acknowledge that historic relations between foundations and the grant-seeking charities have always faced challenges. Accordingly, I do not wish to exaggerate the "good old days" or present a Pollyanna-ish account of charitable giving before philanthrocapitalism came along, but I do wish to draw attention to how these different mindsets affect the influence and voice of nonprofit organizations.

68 For the sake of full disclosure, I must note that I served as the foundation's chief operating officer and general counsel earlier in my career.

> that have eluded conventional approaches. As they take on the role of change-agents many donors today regard demonstrable accomplishment as key to their success.[69]

This passage reveals that many funders in the field have so altered expectations and behaviors that the foundation community now recognizes something of a "sea change" in the charitable sector, acknowledgement that this trend is widely felt. It also reveals that for some funders, being "disciplined" and "effective" has become synonymous with holding the grant-receiving charity's proverbial feet to the fire, as funders make their expectations explicit and require delivery of the goods within shorter time frames. Additionally, to prove their own success, funders see their job as holding grant recipients accountable to them. Most important, in this version of strategic philanthropy, it is the donor—not the nonprofit partner in the field or the constituencies it serves—that takes on the role of the change-agent and contributes the heralded "fresh thinking and tactics."[70] The point for now is that, if donors are not careful, this instrumentalization of charitable organizations to further the foundation's goals can reinforce relational hierarchies and paternalism, placing the voice and expertise of operating nonprofits in the background, and leaving those closest to the problems on the ground disempowered.

I do not mean to imply that philanthrocapitalists and other donors using strategic methods do not value the contributions of the nonprofit organizations they support. They do. That same corporate primer on strategic philanthropy cited earlier goes on to state, "*Through strategic philanthropy*, the Foundation seeks to promote effectiveness of the organizations it supports. . . . Our success is derived from the passion, energy, and intellect of the Foundation's Board and staff and those of the organizations we support."[71] The important question, however, is: To what extent are the supported nonprofits treated as equal partners? Are they valued as resources and issue experts, freely contributing their best ideas? Or are they merely seen as excellent subcontractors executing the foundation's vision? Philanthrocapitalist rhetoric suggests that foundations should consider grant-receiving nonprofits as merely passionate implementers, and

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69 THE GOLDMAN SACHS FOUND., MAXIMIZING IMPACT: A PRIMER ON STRATEGIC PHILANTHROPY 1, *available at* http://wwwqa2.goldmansachs.com/citizenship/philanthropy/publications-and-resources/other-publications/maximizing-impact-primer-on-strategic-philanthropy.pdf (last visited Jan 10, 2011).

70 *Id.*

71 *Id.* at 20

encourage them to leave the high-level problem solving and direction setting to the foundation; this vision, however, opens the new philanthropy to long-standing left-leaning criticisms of philanthropy that depict it as a tool of the powerful used to control the disenfranchised and entrench powerful interests.[72]

The philanthrocapitalism movement and the broader reinvention of the institution of philanthropy have implications for lawyering and governance. These shifts in grantmaking practices are in response to a variety of pressures and criticisms of traditional philanthropy. Thus, philanthrocapitalism and strategic philanthropy have roots—even if not exclusively so—in calls for accountability.[73] The appeal of philanthrocapitalism has been driven by questions about the legitimacy of perpetual private foundations in a democratic society, by calls that private foundations demonstrate their added value, and by demands that they use the tax-privileged dollars under their control effectively and wisely. So far the dialogue about philanthrocapitalism has been fairly muted, perhaps because "nobody wants to bite the hand that feeds them or seem out of step with the latest fashions of the funders."[74] Yet all people should be concerned—including lawyers who populate foundation board rooms and counsel wealthy individuals in establishing grantmaking foundations.

II. TRENDS IN FOUNDATION GIVING

Although still relatively new, the principles embodied by philanthrocapitalism and strategic grantmaking are beginning to infiltrate deep within the charitable-giving sector. One report on

[72] *See* Alice Gresham Bullock, *Taxes, Social Policy and Philanthropy: The Untapped Potential of Middle- and Low-Income Generosity*, 6 CORNELL J.L. & PUB. POL'Y 325, 343–45 (1997) (describing philanthropic giving as a means to perpetuate the interests and concerns of the wealthy); Rob Reich, *Philanthropy and Its Uneasy Relation to Equality*, *in* TAKING PHILANTHROPY SERIOUSLY: BEYOND NOBLE INTENTIONS TO RESPONSIBLE GIVING 27, 30 (William Damon & Susan Verducci eds., 2006) ("Left-wing critics, especially those of a Gramscian bent, have long suggested that philanthropy is but another self-interested way for the powerful to continue their dominion over the poor and entrench the ideological interests of the wealthy in all of society.").

[73] *See, e.g.*, Dana Brakman Reiser, *Enron.org: Why Sarbanes-Oxley Will Not Ensure Comprehensive Nonprofit Accountability*, 38 U.C. DAVIS L. REV. 205, 272 (2004) (noting that private foundations represent the "segment of the nonprofit sector [that] is often singled out as most prone to accountability failures"); Michael E. Porter & Mark R. Kramer, *Philanthropy's New Agenda: Creating Value*, HARV. BUS. REV., Nov.–Dec. 1999, at 121 (questioning "[w]hether foundations are fulfilling their potential"); Jon Christensen, *Exploring New Ideas for Making Finances Clearer and Scandals Rarer*, N.Y. TIMES, Nov. 17, 2003, at F16 ("Everywhere you turn in the world of philanthropy and nonprofits these days, people are talking about accountability.").

[74] MICHAEL EDWARDS, SMALL CHANGE: WHY BUSINESS WON'T SAVE THE WORLD, at viii (2010).

strategic philanthropy noted the following two "typical comments" from a series of conversations with nonprofit agency leaders:

> "Funders are not open to genuine dialogue and tend to discount what we know. Program officers are more interested in giving us advice than in listening to us."
>
> "Top-down, foundation-driven initiatives are tying up more and more dollars, cutting down the pool of funds available for unsolicited ideas and grants."[75]

To determine whether these complaints are widespread enough to reflect significant shifts, I analyzed a series of recent trends in foundation giving. My analysis identifies three trends that indicate the growing influence of philanthrocapitalism and the type of muscular philanthropy lamented by many nonprofit agency directors. First, foundations are concentrating their grantmaking[76] by devoting proportionally more resources to larger and larger projects. Second, they are asserting more control over the use of the grant funds they disperse through the use of limited-purpose grants.[77] Third, they are becoming increasingly closed to the ideas and innovations proposed by nonprofit organizations operating on the ground, working directly on the critical social issues.[78] Although no single trend confirms the ascendency of philanthrocapitalism, taken together they demonstrate that private foundations in general are moving toward practices that allow them to exercise greater, rather than less, control over nonprofit activity. These trends are consistent with and indicative of the broader shift toward muscular philanthropy, in which foundations increasingly treat grantees more like contractors than partners.

I do not mean to suggest that general operating support is always preferable to program support, that small grants are somehow better than large grants, or that foundations should never approach potential grant recipients with project ideas. Each of these practices (large grants, program support, proposal invitations) has value and may be appropriately used by grantmakers under certain circumstances. These data, however, present a larger picture of the trends in grantmaking and uncover shifts in the power dynamics between private foundations and grant-seeking nonprofit organizations and raise questions about how these new arrangements will affect public charities and the people they serve.

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75 DAVID, *supra* note 64, at 2.
76 *See infra* Figures 1–2 and Table 1.
77 *See infra* Figures 3–4.
78 *See infra* Figures 5–6.

A. Increased Concentration of Large Grants

Over the past decade or so, private foundations have tended to concentrate their grants by awarding more funding to the selected recipients. Specifically, the Foundation Center, which tracks the giving of more than 1000 large foundations each year,[79] reports a substantial increase in the number of exceptionally large grants. Figure 1 shows that the raw number of grants of $5 million or more in their sample study increased by 572% between 1997 and 2008. During that same period, the raw number of $10 million-or-more grants saw a 919% increase.[80] Although grantmaking grew during this period, Table 1 demonstrates that the increase was not nearly as sharp; the raw number of all grants increased by just 90.7% and the total dollar value of all grants increased by 218%.[81]

The data from the sample funders also demonstrates that the combined dollar value allocation to these megagrants increased by 862% from 1997 to 2008.[82] As indicated above, during this same period, the total dollar value of all grants increased by only 218%.[83] As a consequence of this move to exceptionally large grants, the percentage of total grant dollars allotted to megagrants has increased as well. Figure 2 demonstrates this trend. In 1997, grants of $5 million or more constituted only 9.9% of total grant dollars in the sample; by 2008, that percentage had risen to 29.9%.[84] In other words, for every $1 in grantmaking activity by the largest foundations in the U.S. approximately 10 cents went to megagrants in the late

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79 The Foundation Center's annual study is based on a sample of large foundations. For example, the 2008 sampling base included more than 800 of the 1000 largest foundations and the fifteen largest foundations in nearly every state, ranked by total grant giving and a sampling of other foundations. Consequently, the sample is not a "stratified random sample" of the nation's full foundation community. In addition, the composition of the set varies from year to year. *See* STEVEN LAWRENCE & REINA MUKAI, FOUND. CTR., FOUNDATION GIVING TRENDS: UPDATE ON FUNDING PRIORITIES 39–40 (2010) [hereinafter FOUNDATION GIVING TRENDS 2010]. As a result, the data "should be interpreted as suggestive of grantmaking trends across the United States—especially among larger foundations—but not conclusive." *See id.* at 40. Yet the Foundation Center's figures still offer important data to study general trends in foundation giving.

80 *See* Figure 1. Without fuller data from the Foundation Center's annual samples, which are unpublished, I am not able to conduct more sophisticated measures of concentration.

81 *See* Table 1.

82 Grants of $5 million or more in 1997 totaled more than $785 million. *See* LOREN RENZ ET AL., FOUND. CTR., FOUNDATION GIVING: YEARBOOK OF FACTS AND FIGURES ON PRIVATE, CORPORATE, AND COMMUNITY FOUNDATIONS 78 (1999) [hereinafter FOUNDATION GIVING YEARBOOK 1999]. In 2008, grants of $5 million or more totaled more than $7.55 billion. *See* FOUNDATION GIVING TRENDS 2010, *supra* note 79, at 2.

83 *See* Table 1.

84 *See* Figure 2.

1990s and by the late 2000s nearly thirty cents of each dollar is allocated to the very largest grants.

Although these data reflect a healthy growth in private foundations and U.S. grantmaking in general, the focus should be on the much more dramatic growth of large grants, which reflects a change in giving practices in the philanthropic sector. This growth in the number and value of megagrants, when compared to the substantially slower growth of the total number and value of all grants, tells us that grantmakers are directing relatively more resources to larger projects, perhaps at the expense of other worthwhile but smaller projects. The overall growth in foundation giving over the past decade or so, fueled by a booming stock market and the creation of new foundations,[85] masks the fact that proportionally, the number of grants has not kept apace with the growth in dollars given or the proliferation of exceptionally large grants.

Furthermore, Figure 1 shows that in just the past few years the number of grants of $10 million or more has increased greatly. It increased by 20.5% between 2006 and 2007, and another 13.8% between 2007 and 2008.[86] This contrasts with the much slower growth in the number of all grants: 7.0% and 8.3% for those same two time periods, respectively.[87]

In terms of the total dollar value of these very large grants, the Foundation Center reports that in 2008 the total value of the $10 million-or more-grants from sampled funders reached a record of $5.5 billion,[88] a 34% increase from the prior year.[89] By comparison, the total value of all grants increased a more modest 16.7% over that time.[90] And in particular, grants under $50,000 increased only 11% to $2 billion.[91] This direct comparison of large-dollar grants and small-dollar grants indicates an increased concentration in large grants.

[85] *See* FOUNDATION GROWTH AND GIVING 2010, *supra* note 17, at 4 (noting that the number of U.S. grantmaking foundations has increased steadily since the early 1980s and more sharply during the economic boom years of the late 1990s).

[86] *See* Figure 1.

[87] *See* Table 1.

[88] FOUNDATION GIVING TRENDS 2010, *supra* note 79, at 1.

[89] STEVEN LAWRENCE ET AL., FOUND. CTR., FOUNDATION GIVING TRENDS: UPDATE ON FUNDING PRIORITIES 1 (2009) [hereinafter FOUNDATION GIVING TRENDS 2009] (reporting $4.1 billion to grants of $10 million or more).

[90] *See* Table 1.

[91] FOUNDATION GIVING TRENDS 2009, *supra* note 89, at 1 [hereinafter FOUNDATION GIVING TRENDS 2009]; FOUNDATION GIVING TRENDS 2010, *supra* note 79, at 1.

Figure 1. Change in Number of Larger Grants Awarded, 1997 to 2008[92]

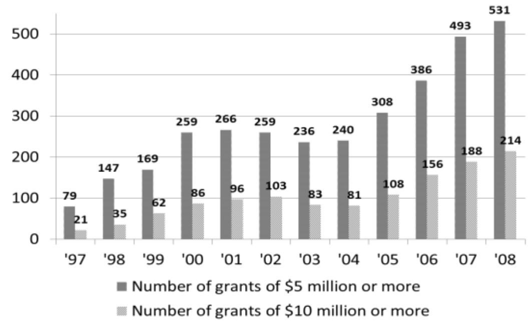
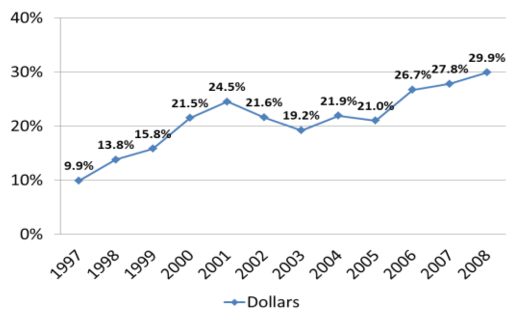


Figure 2. Percentage of Total Dollars Allocated to Grants of $5 Million or More, 1997 to 2008[93]



[92] This chart is reprinted from data presented in FOUNDATION GIVING TRENDS 2009, *supra* note 89, at 1 and FOUNDATION GIVING TRENDS 2010, *supra* note 79, at 1.

[93] These data are drawn from the following sources. FOUNDATION GIVING TRENDS 2010, *supra* note 79, at 2. FOUNDATION GIVING TRENDS 2009, *supra* note 89, at 2; JOSEFINA ATIENZA & REINA MUKAI, FOUND. CTR., FOUNDATION GIVING TRENDS: UPDATE ON FUNDING PRIORITIES 1 (2008) [hereinafter FOUNDATION GIVING TRENDS 2008]; JOSEFINA ATIENZA ET AL., FOUND. CTR., FOUNDATION GIVING TRENDS: UPDATE ON FUNDING PRIORITIES 1 (2007) [hereinafter FOUNDATION GIVING TRENDS 2007]; JOSEFINA ATIENZA & ASHLEY BAILEY, FOUND. CTR., FOUNDATION GIVING TRENDS: UPDATE ON FUNDING PRIORITIES 1 (2006) [hereinafter FOUNDATION GIVING TRENDS 2006]; JOSEFINA ATIENZA & JENNIE ALTMAN, FOUND. CTR., FOUNDATION GIVING TRENDS: UPDATE ON FUNDING PRIORITIES 2 (2005) [hereinafter FOUNDATION GIVING TRENDS 2005]; JOSEFINA ATIENZA & LESLIE MARINO, FOUND. CTR., FOUNDATION GIVING TRENDS: UPDATE ON FUNDING PRIORITIES 2 (2004) [hereinafter FOUNDATION GIVING TRENDS 2004]; JOSEFINA ATIENZA & LESLIE MARINO, FOUND. CTR., FOUNDATION GIVING TRENDS: UPDATE ON FUNDING PRIORITIES 2 (2003) [hereinafter FOUNDATION GIVING TRENDS 2003]; STEVEN LAWRENCE & DIA GANGULY, FOUND. CTR., FOUNDATION GIVING TRENDS: UPDATE ON FUNDING PRIORITIES 2 (2002) [hereinafter FOUNDATION GIVING TRENDS 2002]; STEVEN LAWRENCE ET AL., FOUND. CTR., FOUNDATION GIVING TRENDS: UPDATE ON FUNDING PRIORITIES 2 (2001) [hereinafter FOUNDATION GIVING TRENDS 2001]; STEVEN LAWRENCE ET AL., FOUND. CTR., FOUNDATION GIVING TRENDS: UPDATE ON FUNDING PRIORITIES 2 (2000) [hereinafter FOUNDATION GIVING TRENDS 2000]; FOUNDATION GIVING YEARBOOK 1999, *supra* note 82, at 78.

Table 1. Distribution of Total Sampled Grants in Dollars and Number, 1997 to 2008[94]

Year	Number of Foundations	Dollar Value of Grants	Number of Grants
1997	1,016	$7,944,658,137	86,203
1998	1,009	$9,711,394,984	97,220
1999	1,016	$11,574,183,489	108,169
2000	1,015	$15,015,467,259	119,778
2001	1,007	$16,763,304,425	124,844
2002	1,005	$15,924,894,589	127,728
2003	1,010	$14,323,389,414	120,721
2004	1,172	$15,477,594,664	126,497
2005	1,154	$16,428,068,369	130,961
2006	1,263	$19,123,032,669	140,484
2007	1,339	$21,649,908,987	150,392
2008	1,490	$25,265,887,063	164,353

B. Growth of Limited-Purpose Grants

Driven largely by a determination to prove impact from their grantmaking, many grantmakers are increasingly making limited-purpose grants to narrowly circumscribed projects. These "program support" grants restrict the uses of money to a greater degree than "general support" grants, which nonprofits may use at their discretion for a variety of purposes. A 2007 study of America's wealthiest foundations indicated that foundation management felt greater pressure from trustees and others to measure the effectiveness of their grantmaking. These pressures led them to favor restricted giving because proving effectiveness is more difficult with unrestricted giving.[95] In addition, program-support grants allows foundations to exert control over donees by dictating the purposes for which funding may be used. Many donors restrict their giving to specific uses to

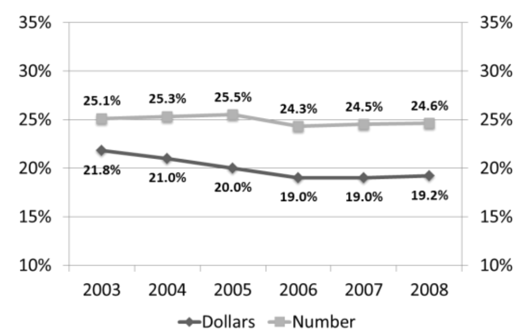
[94] These data are drawn from the following sources. FOUNDATION GIVING TRENDS 2010, *supra* note 79, at 36; FOUNDATION GIVING TRENDS 2009, *supra* note 89, at 36; FOUNDATION GIVING TRENDS 2008, *supra* note 93, at 57; FOUNDATION GIVING TRENDS 2007, *supra* note 93, at 68; FOUNDATION GIVING TRENDS 2006, *supra* note 93, at 72; FOUNDATION GIVING TRENDS 2005, *supra* note 93, at 57; FOUNDATION GIVING TRENDS 2004, *supra* note 93, at 58; FOUNDATION GIVING TRENDS 2003, *supra* note 93, at 63; FOUNDATION GIVING TRENDS 2002, *supra* note 93, at 64; FOUNDATION GIVING TRENDS 2001, *supra* note 93, at 54; FOUNDATION GIVING TRENDS 2000, *supra* note 93, at 50; FOUNDATION GIVING YEARBOOK 1999, *supra* note 82, at 114.

[95] JUDY HUANG ET AL., CTR. FOR EFFECTIVE PHILANTHROPY, IN SEARCH OF IMPACT: PRACTICES AND PERCEPTIONS IN FOUNDATIONS' PROVISION OF PROGRAM AND OPERATING GRANTS TO NONPROFITS 8–9 (2006), *available at* http://www.effectivephilanthropy.org/assets/pdfs/CEP_InSearchOfImpact.pdf.

ensure greater accountability and to attempt to prove a grant's impact.[96] My analysis of the giving patterns of the past several years indicates that large private foundations are increasingly favoring more restrictive funding over unrestricted general operating support.

The reported data compares the percentage of overall giving allocated to general support and program support in a given year from the total overall distribution of grants. It does not address changes on an absolute dollar basis. On an absolute dollar basis, both general and program support are on the rise because of the growing number of grantmaking foundations. Examining the data on a proportional basis does, however, provide information on relative growth or contraction—which reflects the shifts in overall funder preferences.

Figure 3. Distribution of General Support Grants as a Percentage of Total Grantmaking by All Foundation Types, 2003 to 2008[97]



[96] *See id.* (discussing the results of a survey of foundation CEOs in which "[e]ase of assessing outcomes" was frequently cited as the rationale for their expressed preference for program support); FRUMKIN, *supra* note 8, at 191 (discussing donor beliefs that program support "make[s] accountabilty, reporting, and assessment easier").

[97] These data are drawn from the following sources. FOUNDATION GIVING TRENDS 2010, *supra* note 79, at 31; FOUNDATION GIVING TRENDS 2009, *supra* note 89, at 31; FOUNDATION GIVING TRENDS 2008, *supra* note 93, at 36; FOUNDATION GIVING TRENDS 2007, *supra* note 93, at 40; FOUNDATION GIVING TRENDS 2006, *supra* note 93, at 42; FOUNDATION GIVING TRENDS 2005, *supra* note 93, at 36.

Figure 4. Distribution of Program Support Grants as a Percentage of Total Grantmaking by All Foundation Types, 2003 to 2008[98]

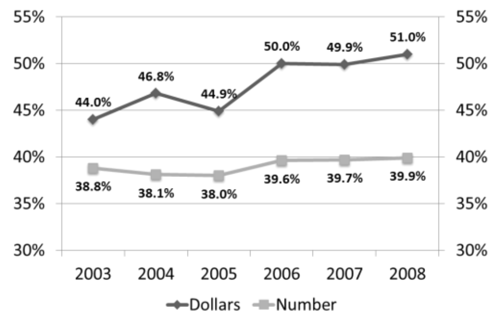


Figure 3 shows that the proportion of foundation funding by the sampled foundations allocated to general support has declined slightly. It displays the distribution of general-support grants as a percentage of total giving by all foundation types, measured in grant dollars and number of grants, for the six-year period covering 2003 to 2008. While the percentage of grants for general support by number has remained relatively flat, Figure 3 shows that by grant dollars, the general support distribution is decreasing relative to other areas. In comparison, Figure 4 shows program support levels for the same group of foundations. It illustrates that the dollar allocation to grants for program support is on the rise. From 2003 to 2008, the proportion of total foundation spending on program support has increased by more than six percentage points, while the number of such grants has increased by less than one percentage point. Thus, the Foundation Center's statistics suggest that as foundations shift toward larger grants,[99] they also are directing more and more of their grant funds to restricted purposes.

C. Expansion of Foundation-Initiated Grantmaking

Another increasingly popular trend is proactive grantmaking. The idea behind this trend is that effective funders should not sit around and wait for good ideas to reach a program officer's desk; instead

[98] These data are drawn from the following sources. FOUNDATION GIVING TRENDS 2010, *supra* note 79, at 31; FOUNDATION GIVING TRENDS 2009, *supra* note 89, at 31; FOUNDATION GIVING TRENDS 2008, *supra* note 93, at 36; FOUNDATION GIVING TRENDS 2007, *supra* note 93, at 40; FOUNDATION GIVING TRENDS 2006, *supra* note 93, at 42.

[99] *See supra* Part II.A.

they should employ a proactive, foundation-initiated approach to finding the recipient-organizations they want to carry out their project ideas. Therefore, some proactive donors simply contact specific nonprofit organizations and invite submissions. Others have used a modified request for proposal (RFP) system: the RFPs describe "in great detail what the donor wants to accomplish and how the program should be carried out."[100] Like the other trends documented in this Part, the move toward foundation-initiated grantmaking projects often stems from a desire to be considered strategic or to prove impact.[101]

This Section presents the results of a study of foundation policies regarding their openness to unsolicited grant proposals. The data reveal that closed and semi-closed grant-proposal policies, which were exceedingly rare fifteen years ago, are becoming significantly more common. Although time consuming for foundation staff, open-application processes allow funders to be responsive to the needs and ideas of public charities. In contrast, proactive grantmaking, despite its efficiencies, is subject to criticism because it "appears to assume that the donor knows more about how to solve a given social problem than the service delivery community in the field."[102] Below I briefly describe the methods of data collection and then report the principal findings.

1. Method

The analysis is based on comparisons of two paired sets of data on proposal-acceptance policies of foundations. It offers a sense of the foundation sector's openness to ideas and potential solutions offered by community-based organizations and other organizations as the guiding source for funded projects.

The first paired set compares the proposal-acceptance policies of the largest independent[103] and corporate foundations[104] in 1994 and

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[100] FRUMKIN, *supra* note 8, at 194.

[101] *See* JOEL J. OROSZ, THE INSIDER'S GUIDE TO GRANTMAKING: HOW FOUNDATIONS FIND, FUND, AND MANAGE EFFECTIVE PROGRAMS 26–28 (2000) (labeling the most extreme version of this as "peremptory" and describing a "[w]e fund the best we can imagine, and no others need apply" attitude as "extremely strategic"); *see also* CONRAD N. HILTON FOUND., *For Grantseekers*, http://www.hiltonfoundation.org/grantmaking/grantseekers (last visited Mar. 1, 2011) ("The Foundation *does not encourage* unsolicited proposals for funding. . . . This proactive approach helps us maximize effectiveness and impact."); COMMUNITY FOUND. SARASOTA COUNTY (FL), *Competitive Grantmaking*, https://www.cfsarasota.org/grants/competitivegrantmaking/tabid/291/default.aspx (last visited Mar. 1, 2011) (noting that because donors are "requiring more accountability and impact" the foundation shifted "from a largely 'reactive' to a more 'proactive' approach to grantmaking").

[102] FRUMKIN, *supra* note 8, at 194.

[103] An independent foundation refers to a private nonoperating foundation that does not directly deliver any charitable programs or services. By far the largest type of foundation,

2008. For this comparison, the populations included all independent and corporate foundations on the lists of the 100 largest foundations by total giving and by asset size from the 1994 and 2008 editions of the *Foundation Directory*.[105] Those lists generated a population of 116 foundations for 1994 and 90 foundations for 2008, after community foundations[106] and private operating foundations[107] were excluded.

In addition to examining the very largest foundations, I also sought to review the practices of a broader cross section of independent and corporate foundations. The second set of data also looks at grant-acceptance practices, but compares two randomly drawn samples of 100 independent and corporate foundations with a wider range of sizes. Again, community foundations and private operating foundations were excluded, as well as foundations with assets of less than $10 million. The random samples were also drawn from the 1994 and 2008 editions of the *Foundation Directory*.[108]

For both data sets, a research assistant examined each entry in the directory to determine whether the foundation indicated that grant recipients were selected (1) by invitation only, (2) primarily by invitation with unsolicited proposals rarely funded, or (3) by an open selection process designated in the *Directory* as "Accepting Applications." All of the data was compiled in July and August 2009.

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independent foundations make grants supported by an endowment; they usually do not raise funds or seek grants. Generally, they receive funding primarily from one source, such as an individual or a family. A private foundation is required to distribute approximately 5% of its assets annually to public charities or their equivalents. *See* I.R.C. § 4942 (2006) (imposing a tax on a private foundation's undistributed income).

104 A corporate foundation is a private foundation subject to all of the same laws and regulations as an independent foundation. In the field, the name suggests that instead of receiving funding from an individual or family, the primary funding source is a corporation.

105 *See* FOUND. CTR., THE FOUNDATION DIRECTORY: 1994 EDITION (Margaret Mary Feczko & Elizabeth H. Rich eds., 16th ed. 1994); FOUND. CTR., THE FOUNDATION DIRECTORY: 2008 EDITION (David G. Jacobs ed., 30th ed. 2008).

106 A community foundation is classified as a public charity rather than as a private foundation. Instead of receiving most of its funding from a single source like independent foundations, corporate foundations, and operating foundations, community foundations seek funding from many individuals to engage in grantmaking focused on a particular geographic area. *See* I.R.C. § 170(b)(1)(A)(vi).

107 A private operating foundation is a private foundation that primarily carries out its own charitable programs, like a publicly supported charity, instead of engaging in grantmaking. The operating foundation must spend substantially all of its income on the activities for which it is organized and operated. *See* I.R.C. § 4942(j)(3) (defining an "operating foundation").

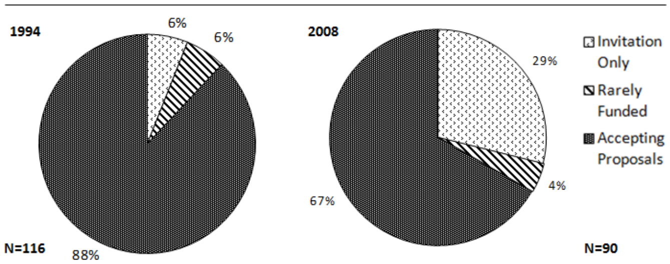
108 In selecting the foundations to be included in the sample, I used the identification numbers assigned to each foundation in the directory. I then used an Internet-based research random-sampling program to select the foundations for inclusion while minimizing bias. *See* RESEARCH RANDOMIZER, http://www.randomizer.org (last visited Mar. 3, 2011).

2. Data and Summary Results

Figure 5 presents the percentage distribution of grant-application policies for the largest independent and corporate foundations in 1994 and 2008. The charts reveal that just 6% of all large foundations had an invitation-only grant policy in 1994. By 2008, that percentage had increased to 29%. This sizeable and statistically significant difference[109] demonstrates that today's large foundations are substantially more likely to have a "don't call us, we'll find you" approach when it comes to application practices and interaction with potential grantees.

Collecting the same data on a broader set of foundations, I found similar results. In 1994, only 10% of the sampled foundations had adopted a proactive grantmaking style in which they declined to consider unsolicited proposals. As shown in Figure 6, by 2008 nearly half (48%) of the independent and corporate foundations sampled reported that their grantmaking was overwhelmingly foundation initiated. In this set, the difference was also statistically significant.[110]

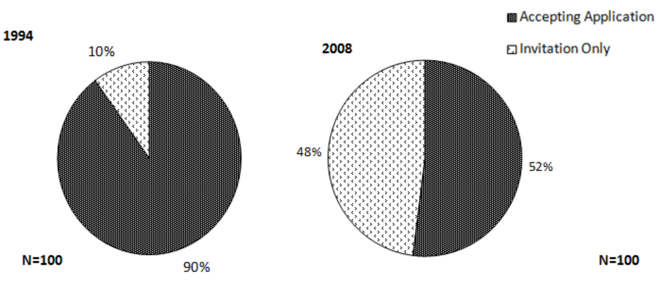
Figure 5. Distribution of Application-Acceptance Practices of the Largest Independent and Corporate Foundations, 1994 and 2008



[109] The difference between the paired population sets of large foundations was statistically significant at the 1% significance level in a two-tailed test.

[110] The difference between the paired random samples of foundations was statistically significant at the 1% significance level in a two-tailed test.

Figure 6. Distribution of Application-Acceptance Practices of Independent and Corporate Foundations from a Random Sample of 100 Foundations, 1994 and 2008.



The foundations studied were more than four times as likely to have adopted an invitation-only grant-screening policy in 2008 as in the mid-1990s.

3. Limitations of the Study

This study necessarily is limited by the data and the data sources, and a few observations are worth noting. First, although foundations may have formal invitation-only grant-proposal policies, they may invite competition among potential grantees through targeted RFP competitions. Sometimes advertised and open to any applicant meeting the proposal guidelines and sometimes limited to a number of preselected organizations, the use of RFPs is nevertheless generally considered a form of proactive, foundation-driven grantmaking.[111] A foundation that regularly uses this method as the means for grantee organizations to put their own ideas in front of funders may be classified as "invitation only" in the directory. Second, some foundations that require an invitation for a full "formal" proposal do meet with organizations, review preliminary letters of inquiry, or engage in other informal communications with a wide range of organizations. Thus, there may be varying degrees of openness to public charities at a pre-grant proposal stage by private foundations with an "invitation only" policy. Third, the quality of the data is limited by the reliability of the information regarding proposal acceptance listed in the *Directory*. As a general reference source on thousands of U.S. private foundations, some of the underlying profile

[111] *See* FRUMKIN, *supra* note 8, at 194.

information may be out of date, mistaken, or misreported. That being said, I have no reason to suspect any material differences between the 1994 and 2008 versions.

These limitations underscore the often complex and idiosyncratic relationships between private foundations and grant-seeking entities. Although the study documents formal policies as published in the directory of foundations, the interactions on the ground may be more nuanced and complicated. Whatever the nuances, however, there has been a rather dramatic shift in the stated formal policies on proposal acceptance announced in the *Directory*; this suggests that the practices and disposition of many grantmakers has shifted.

D. Implications

Together, Figures 1 and 2 and Table 1 show that large foundations are increasing both the absolute and proportional amount of grant dollars allocated to exceptionally large grants. Although not every grantmaker is capable of awarding grants at the $10 million-plus level, foundations of all sizes appear to be expressly moving toward making fewer grants in larger amounts.[112] When foundations alter their grantmaking philosophy by shifting toward larger grants, they most often justify the approach by arguing that a smaller number of larger grants produces greater societal impact.[113]

This efficiency argument is complicated, however, by considering who might be harmed by such reallocations and what cultural changes might result. On the one hand, many foundations view the shift to larger grants as a smart, tactical "move away from disjointed and dissipated gift giving" and an acknowledgment of the reality that some projects may require significant resources to achieve certain objectives.[114] On the other hand, however, this shift may leave certain

[112] *See, e.g.*, Press Release, Wash. Reg'l Ass'n of Grantmakers, Grantmakers in Washington Region Anticipate Making Fewer, But Larger Grants in 2009 (Nov. 12, 2008), *available at* http://www.washingtongrantmakers.org/s_wash/bin.asp?CID=4501&DID=21499&DOC=FILE.PDF (stating that 47% of D.C.-area private foundations anticipated making fewer but larger grants).

[113] *See* Justin Cord Hayes, *Foundation Changing Philosophy About Grants: The High Point Community Foundation Will Award Larger Grants to Fewer Agencies*, GREENSBORO NEWS & REC. (N.C.), Aug. 11, 2004, at A1 (quoting the executive director's explanation of the foundation's policy shift as "Our grants committee has decided it wants to be able to award large enough grants to have a significant impact on programs that could dramatically change the quality of life in[the community]"); Randy Krehbiel, *Foundation Makes Its Point: $25.5 Million Grant to UA Aims at Big Impact in Geriatrics*, TULSA WORLD, Feb. 5, 1997, at A-1 (quoting a local foundation's executive director who explained that while "[m]ost foundations give much smaller amounts to more organizations," his particular foundation did not because "[o]ur trustees determined they wanted to truly make an impact" (internal quotation marks omitted)).

[114] FRUMKIN, *supra* note 8, at 193.

groups out. Pablo Eisenberg, a senior fellow at Georgetown University's Center for Public & Nonprofit Leadership, argues that "[f]ar fewer awards will go to local community-organizing groups and to nascent, small nonprofit groups."[115] After all, with larger grants come higher stakes, which often lead funders toward accepting less risk, at least with respect to interacting with new or marginalized groups. The high stakes also may encourage foundation staff to adopt a more hands-on approach in an attempt to protect their "investment."[116] The concentration on big projects suggests an underlying belief that we already have the answers to big problems, but lack the funding to solve them. It neglects, however, the real possibility that we do not yet have the solutions and that we need more experimentation and innovation, a mindset that cuts toward less concentration. In this view, the problem is that accountability pressures on individual foundations—from board members and others—now push foundations toward big grants, ignoring the benefits of spreading the wealth.

The final point is that the large-grant trend may also unwittingly encourage private foundations to place themselves more firmly in the driver's seat. When a foundation makes a systematic decision to give larger grants to a smaller and more selective number of organizations, there is an unstated presumption that the grantmaker will chose grant recipients wisely. Thus, at least in part, the move signals a foundation's heightened confidence in its ability to make high-risk philanthropic bets. Significantly, the dollar values associated with what constitutes "large" and "small" grants are relative terms, almost always defined from the perspective of the donor foundation (using its historic baselines) rather than that of the recipient charity. In this respect, the decision to shift toward larger grants reinforces the foundation-centric orientation I see as endemic to the new philanthropy.

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[115] Pablo Eisenberg, Editorial, *A Foundation's Attempt to Make a Difference May Produce the Opposite Result*, CHRON. PHILANTHROPY, Nov. 29, 2007, at 33.

[116] Some foundations, in an attempt to embrace philanthrocapitalism principles, have begun to think of or refer to grants as investments. *See, e.g.*, The Legatum Found., Our Mission, http://www.legatum.org/OurApproach.aspx (last visited April 8, 2011); The Rhode Island Found., Strategy Grants, http://www.rifoundation.org/Nonprofits/GrantOpportunities/StrategyGrants/tabid/350/Default.aspx (last visited Apr. 8, 2011); Press Release, Social Venture Partners, Social Venture Partners Continues to Grow and Give −$26.5 Million in Grant Investments Made to More than 300 Nonprofit Organizations (June 17, 2008), *available at* http://www.svpbouldercounty.org/files/SVP%20Network%20Grants%20$26%205M_0.pdf; *see also* Sean Stannard-Stockton, Op-Ed, *Providing the Capital Organizations Need to Run — and Grow*, CHRON. PHILANTHROPY, Oct. 1, 2009, at 37 ("As many philanthropists have rushed to use the currently trendy vocabulary of financial investments when they talk about giving, the meaning of the word "investment" has become confused.").

For public charities seeking grants, the shift toward more project funding and relatively less unrestricted general support by private foundations, as reflected in Figures 3 and 4, creates significant conflicts and challenges. The narrow tailoring of program grants requires detailed planning in the early stages, which can benefit an organization in the execution phase. This diversion of effort makes it more difficult to devote resources to organizational capacity building or to sustain on-going core activities, however.[117] The problem is exacerbated by the fact that most grant-seeking charities attempt to limit internal administrative (i.e., overhead or organizational) expenses because the nonprofit marketplace already penalizes organizations if their administrative-to-program expense ratio appears high.[118] Thus, if grantmakers' focus on program support begins to detract from support for general operations, it also begins to convey the message that investments in recruiting and retaining high-quality staff, developing infrastructure to support activities, and other forms of organizational capacity-building are not valued.[119]

Grantseekers have long faced tremendous variability in dealing with grant application processes as they searched for funding. Figures

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[117] *See* FRUMKIN, *supra* note 8, at 192 ("As more and more funders have sought leverage through project giving, some nonprofits have complained about the difficulty of sustaining core activities.").

[118] *See* Jeffrey L. Bradach et al., *Delivering on the Promise of Nonprofits*, HARV. BUS. REV., Dec. 2008, at 88, 91, 97 (describing how donors' preference that their contributions go to programs has resulted in the proliferation of new programs and the underinvestment in overhead expenses); *see also* Evelyn Brody, *The Twilight of Organizational Form for Charity: Musings On Norman Silber, A Corporate Form of Freedom: The Emergence of the Modern Nonprofit Sector*, 30 HOFSTRA L. REV. 1261, 1270–71 (2002) (book review) (discussing pressures stemming from misunderstanding of overhead expenses); Elizabeth Schwinn, *Americans Say Charities Spend Too Much on Overhead, Poll Finds*, CHRON. PHILANTHROPY, Mar. 6, 2008, at 29 ("Sixty-two percent of Americans think that charities spend too much money on overhead costs such as fund raising and administration . . . ."). *But see* CTR. ON PHILANTHROPY AT IND. UNIV., PAYING FOR OVERHEAD STUDY 1 (2007), *available at* http://www.philanthropy.iupui.edu/research/33537%20Rev%20Overheard%20Book.pdf ("[While n]onprofit professionals believe that foundations prefer to pay for program expenses instead of overhead expenses. . . . more than two-thirds (69 percent) of responding foundations indicated they are willing to fund all types of nonprofit overhead expenses. . . . Still, 64.5 percent of foundations report they do not have a history of funding administrative costs.").

[119] There are some high-profile exceptions to this trend that have placed an emphasis on capacity-building grants for nonprofit organizations, such as the Edna McConnell Clark Foundation. *See* Ben Gose, *A Singular Focus on Kids*, CHRON. PHILANTHROPY, Feb. 9, 2006, at 7, 13 (describing the Foundation's grantmaking strategy which is focused on unrestricted grants with grantees "encouraged to use [funds] to develop their central-office capabilities"). It is also worth noting that some notable philanthrocapitalists have engaged in capacity-building grantmaking. But, general support and capacity-building grants are not considered the same by grant recipients. General support provides the recipient with full discretion to use funding as it determines necessary usually to meet on-going needs whereas "[c]apacity-building grants are synonymous with change" intended to alter the organization in some specific way. Lee Draper, *When Capacity-Building Grants Flatline*, FOUND. NEWS & COMMENT., May/June 2003, *available at* http://www.foundationnews.org/CME/ article.cfm?ID=2489.

5 and 6 reveal that increasingly foundations are creating a new hurdle by adopting invitation-only policies with respect to grant requests. Suggestions that proactive grantmaking is somehow more rigorous or strategic are unproven and dubious. The answers to most community problems do not rest in the offices of foundation staff; grantmakers that think they hold all the solutions may end up imposing them on communities without the support or engagement necessary for sustained success. From my perspective, the increase in invitation-only grant-proposal policies, especially when combined with the increase in large grants and restricted-purpose grants, signal the degree to which foundations are more assertively using their power and placing themselves in the driver's seat to control the agenda of nonprofit-sector projects. This quiet shift seems to say something important about the confidence funders have in their ability to envision and initiate effective problem solving from the top down.

In the final analysis, philanthrocapitalism may not be the cause for each of these three trends, but the movement has encouraged and accelerated the expansion of several of these practices, particularly as certain tenets—most notably the emphasis on measurable impact—morph and are reinterpreted by other foundations and their trustees. The deeper, underlying connection I see between these trends and the rhetoric and practices so closely identified with philanthrocapitalism and strategic grantmaking is the emphasis on the funder's needs, desires, goals, and power. It is this subtle turn toward a more foundation-centric approach to problem solving that muffles the voices of the nonprofit organizations working in the field and the communities they serve. The philosophy of philanthrocapitalism positions being "strategic" against being "responsive" to community needs, as those needs are articulated by the nonprofit organizations that work most closely with them. But these objectives are not necessarily opposites and should not be viewed as working against each other.

III. THE DANGERS OF PHILANTHROCAPITALISM

Philanthropy is at a critical moment of reinvention. The extensive financial resources and prominent visibility of those represented by "new philanthropy" certainly make their reforms worthy of careful scrutiny. The advocates of philanthrocapitalism believe that the new business-oriented, foundation-focused approach to giving will free nonprofits "to think long-term, to go against conventional wisdom,

[and] to take up ideas too risky for government."[120] My less sanguine view is that by overemphasizing these goals—casting them as requisites for effectiveness—they may be too easily misappropriated or misinterpreted by grantmaking foundations and end up undermining efforts to strengthen the nonprofit sector. This Part discusses several concerns associated with the corporatization of philanthropy and how the tenets of philanthrocapitalism and the muscular philanthropy it encourages may negatively impact the effectiveness of the nonprofit sector, generate spillover effects that erode or skew individual giving and government support for social change, and alter the ways in which we think about philanthropic and democratic values.

A. Misapplication of Business Concepts

1. Overemphasizing Metrics

We have seen that proponents of philanthrocapitalism often differentiate themselves from other socially minded actors, including more traditional philanthropic entities, by describing their efforts as uniquely "results-oriented."[121] In doing so, they imply that others either do not really care about results and outcomes or that others measure things that are less important, e.g., inputs. Many have praised this focus on metrics as a hard-nosed and business-savvy approach to grantmaking,[122] and there is little doubt that the trend is spreading.[123]

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[120] *See* BISHOP & GREEN, *supra* note 5, at 12.

[121] *See, e.g.*, BISHOP & GREEN, *supra* note 5, at 87 (quoting a philanthrocapitalist from the hedge fund industry); HELMUT K. ANHEIER & DIANA LEAT, CREATIVE PHILANTHROPY 21 (2006) ("The new philanthropists are generally results-oriented. . .").

[122] *See, e.g.*, ANHEIER & LEAT, *supra* note 121, at 21 ("[T]here seems to be some indication that aspects of the new 'bottom-line thinking' are proving to be a valuable addition to the nonprofit sector's operations because it creates a new way of thinking and operating that, in the long term, could be a value-added commodity."); Peter Wilby, *It's Better to Give Than Receive*, NEW STATESMAN (U.K.), Mar. 24, 2008, at 17 ("The 21st-century philanthropists take a more hard-nosed approach to giving. They behave like investors . . . [looking for] 'social return.'").

[123] *See generally* Raymond H. Brescia, *Sheltering Counsel: Towards a Right to a Lawyer in Eviction Proceedings*, 25 TOURO L. REV. 187, 240–41 (2009) (discussing the philanthropic sector's "greater emphasis on measurable results"); Jon Gertner, *For Good, Measure*, N.Y. TIMES, Mar. 9, 2008, § 6 (Magazine), at 62 (describing the "push for measurements, or 'metrics,'" within philanthropy and the influence of the "radical . . . handful of foundations that have begun to approach philanthropy the way a money manager might, considering . . . whether a grant can result in a good 'return' on investment"); William A. Schambra, Op-Ed., *Big Philanthropy Has Reasons to Fear Populist Fervor*, CHRON. PHILANTHROPY, Feb. 25, 2010 ("[F]oundations and their grantees are themselves deliberately becoming more like big business, adopting [a] very measurement-obsessed approach . . . ."); Adam Thomas, *Nonprofits Face Important Challenges, Smith Says as Conference Opens*, STATES NEWS SERVICE, Mar. 23, 2010 (paraphrasing Steven Rathgeb Smith, the Waldemar A. Nielson Chair in Philanthropy at Georgetown University who delivered the opening keynote address for the "Future of the

One legal scholar pithily observes that "[o]ld-style charity is out. Performance metrics[and] business jargon . . . are in."[124] However, it is important to state the obvious: an overemphasis on metrics and an insistent effort to measure things that sometimes, by their very nature, cannot be measured can end up harming rather than improving philanthropy.

My point is not to argue that assessment and measurement are wholly out of place in the social sector. Rather, the point is simply that the lack of universal measures such as profit—so easily applied in the for-profit world—makes nonprofit assessment far more complex.[125] Philanthrocapitalism seems to fail to acknowledge such difficulties and to advance the myth that the measurement of nonprofit performance and goals is merely a matter of discipline, will, and intellectual power.

Funders should remain mindful of the fact that not all desirable social outcomes can be easily or accurately measured. Instead, the goals of philanthropic work reach beyond concrete, instrumentalized targets set by a stern manager, and extend to such intangible ideals as community empowerment, justice, creativity, compassion, expression, preservation of legacies, or the like. For example, Professors Scott Cummings and Deborah Rhode have noted this difficulty of accurate performance measurement is particularly evident in many public-interest legal contexts, where they ask, "How do we price due process?"[126] When charitable programs address intangible ideals, they are usually seeking to intervene in a complex network of activities that make up vast social and economic systems. I am not persuaded that either foundations or experienced business executives can successfully reduce these goals into accurately measurable component parts without risking oversimplification, distortion, or the devaluing of those ideals. Like it or not, success is complicated, and public goods are not easily reducible to categories similar to those used to calculate profits.

Furthermore, many outcomes cannot be predicted in advance or determined in the short term, and the correlation between a

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Nonprofit Sector in Delaware and the Nation" Conference, as saying that "government and private funders [are] placing more emphasis on evaluation and performance measurements").

[124] Pozen, *supra* note 22, at 321.

[125] *See* Deborah L. Rhode, *Rethinking the Public in Lawyers' Public Service: Pro Bono, Strategic Philanthropy, and the Bottom Line*, 77 FORDHAM L. REV. 1435, 1451 (2009) (discussing the difficulty of quantifying the "social return" on an investment).

[126] Scott L. Cummings & Deborah L. Rhode, *Public Interest Litigation: Insights from Theory and Practice*, 36 FORDHAM URB. L.J. 603, 634 (2009).

contribution and specific outcomes is not always clear. For example, one traditional philanthropic technique, which ironically has been embraced by philanthrocapitalism, has been the use of prizes.[127] But one of the most prominent prize initiatives, widely viewed as successful, does not lend itself well to outcome measurement. The John D. and Catherine T. MacArthur Foundation's Fellows Program, often referred to by the nickname "the genius awards,"[128] provides unrestricted, "no strings attached" grants "to talented individuals who have shown extraordinary originality and dedication in their creative pursuits and a marked capacity for self-direction."[129] In a volume describing some of the most important and influential examples of foundation grantmaking initiatives, the authors acknowledge that "the [MacArthur Fellows] program's effectiveness [is] difficult to judge. . . . [E]ach MacArthur fellowship is a risk, the return on which is impossible to determine."[130] Yet, despite these measurement challenges, most observers have little problem in considering the prestigious program "an investment well-made."[131]

A further concern is that even when we think we have designed appropriate metrics, experience has shown that we may not have included relevant variables or that we cannot predict the proper measures in advance. Take the example of the Children's Television Workshop (CTW), which created *Sesame Street*—unquestionably one of the most successful developments in educational television programming, and originally funded by the Ford Foundation and the Carnegie Corporation.[132] The early reports determined that *Sesame Street* failed to meet its primary measurable strategic objective, namely, to close the educational gap between minority and underprivileged children and middle-class children.[133] Thus, it was labeled a failure in some circles because it did not meet its key metric. Under the philanthrocapitalism model, CTW might have had its funding cut off because of its failure to deliver the promised results. In this instance, however, it turned out that it was the metric that was the problem, not the program's effectiveness. In fact, *Sesame Street*

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127 *See* BISHOP & GREEN, *supra* note 5, at 112–13 ("Philanthrocapitalists believe that incentive prizes can potentially leverage their money many times over.").

128 *See, e.g.*, Nicole Wallace, *Founder of Rural Health Clinic Is Among 25 Winners of 'Genius' Grants*, CHRON. PHILANTRHOPY, Oct. 2, 2008, at 39.

129 THE JOHN D. & CATHERINE T. MACARTHUR FOUND., 2008 REPORT ON ACTIVITIES 74 (2009).

130 JOEL L. FLEISHMAN ET AL., CASEBOOK FOR THE FOUNDATION: A GREAT AMERICAN SECRET 164 (2007).

131 *Id.*

132 *Id.* at 99.

133 *Id.* at 101.

was improving educational outcomes for millions of disadvantaged children. The problem was that all children—black and white, rich and poor alike—were drawn to the program, thereby neutralizing the intended compensatory effect and actually exacerbating the educational gap.[134]

The lesson here is that even when the parties agree on reliable metrics, how the metrics are used matters. Flexible metrics can be helpful tools in the field if those closest to the ground ~~need to~~ have control over them. Grantees need to be empowered to critique and change plans, directions, and even the metrics themselves when necessary. Flexible metrics can guide operating nonprofits and their funders, working collaboratively. Conversely, rigid metrics used to discipline grant recipients undermine relationships and limit the usefulness of measurement. If metrics are used primarily as a top-down tool to evaluate charities (i.e., to punish organizations if the foundation's goals are not achieved), the narrow focus on specific measurements may backfire and "may inhibit learning from experience and degrade performance."[135] Although this distinction is not made to make claims about the experiences of all funders, it illustrates the tensions and risks associated with attempts to measure social impact.

Even more troubling are the negative side effects associated with an emphasis on nonprofit performance measurement. Simply put, it makes people preoccupied with achieving specific goals. While in some instances such intense focus may yield positive results, it can also cause people to narrow their focus in ways that may be harmful to larger objectives or values.[136] As a result, charities, under pressure from funders, can become so focused on achieving specific targets or metrics that they run the risk of losing sight of broader goals, which may be related or unrelated to measured targets. Findings from several well-known studies of inattentional blindness illustrate the point. These studies document the phenomenon of people being unable to perceive things in plain sight because they are so focused on a particular task.[137] Similarly, a heightened emphasis on a small

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[134] *See id.* at 101.

[135] Lisa D. Ordóñez et al., *Goals Gone Wild: The Systematic Side Effects of Overprescribing Goal Setting*, ACAD. MGMT. PERSP., Feb. 2009, at 6, 11.

[136] *See, e.g.*, *id.* at 8 ("With goals, people narrow their focus. This intense focus can blind people to important issues that appear unrelated to the goal . . . .").

[137] *See* Jean R. Sternlight & Jennifer Robbennolt, *Good Lawyers Should Be Good Psychologists: Insights for Interviewing and Counseling Clients*, 23 OHIO ST. J. ON DISP. RESOL. 437, 450 (2008) (describing a psychology study in which people were asked to watch a video of two three-person teams passing a basketball and to count the passes; nearly half of those watching failed to notice that a gorilla or person with an umbrella walked through the

number of high-stakes metrics might diminish the ability of nonprofit executives to focus on other matters and to engage in creative problem solving. For example, in the elementary-education context, a foundation focused on easily available performance measures might cause a grantee charter school to focus narrowly on hitting certain standardized test targets in verbal and math skills. Such a focus, however, could inadvertently cause the charity to fail to see or address shortcomings in other areas, such as critical reasoning, writing, higher-order problem solving, creativity, or leadership development skills.[138]

Additionally, overemphasis on measurement may lead organizations to focus on what is easily measured rather than what is most important. This distortion may be especially pronounced as foundations "invest" through a smaller number of high-dollar grants, giving funders greater power.[139] The emphasis on measurable results may make grantseekers "reluctant to 'swing for the fences' on 'complicated, messy, seemingly insoluble problems' where charitable funds and creativity are most needed."[140] Measurement frenzy may also incentivize charities to ignore groups or peoples deemed difficult to reach.

Put differently, measurement in the social sector is immensely complicated. Often, attempts to measure the immeasurable do not answer the hard questions, fail to measure what planners hope to capture, or skew behavior in unintentional ways. Sometimes the process of measurement imposes rigidity on a fluid and dynamic social process and naively attempts to govern or control complex, interrelated systems and events to an extent that is simply not realistic.[141] In the excitement of this more pronounced emphasis on metrics as an accountability tool, proponents have largely overstated the benefits of performance measurement, while understating its harms. Indeed the business world customarily privileges market

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game); *see also* Daniel J. Simons & Christopher F. Chabris, *Gorilla in Our Midst: Sustained Inattentional Blindness for Dynamic Events*, 28 PERCEPTION 1059 (1999) (discussing same).

138 For a discussion on the pitfalls of measurement pressures in elementary and secondary education, see generally Philip T.K. Daniel & Maurice R. Dyson, *Bringing Every Child Forward: Lessons Learned Under No Child Left Behind & a Roadmap for Obama's Educational Reform*, 19 TEMP. POL. & CIV. RTS. L. REV. 63 (2009); Liz Hollingworth, *Unintended Educational and Social Consequences of the No Child Left Behind Act*, 12 J. GENDER, RACE & JUST. 311 (2009); James E. Ryan, *Standards, Testing, and School Finance Litigation*, 86 TEX. L. REV. 1223 (2008).

139 *See supra* Part II.

140 Cummings & Rhode, *supra* note 126, at 635.

141 *See, e.g.*, Debora Spar & James Dail, *Of Measurement and Mission: Accounting for Performance in Non-Governmental Organizations*, 3 CHI. J. INT'L L. 171, 178 (2002).

share, growth rates, and investment rates of return over empowerment, participation, and the quality of relationships—but civil society may not benefit from the same approach to philanthropy.[142] As this trend grows "it is conceivable that philanthropy itself might be demeaned by a process that depends less and less on the bond of trust between . . . a foundation and its beneficiary and more and more on an algorithm that calculates the quantitative return on a grant."[143]

Statistics and measurement have a place in philanthropy, but I worry that the language and approach of philanthrocapitalism may overemphasize their effectiveness and obfuscate their appropriate role. A philanthropic culture dominated by quantifiable targets can significantly harm overall performance rather than promote better solutions. Metrics can sometimes be used effectively by philanthropists. In some settings, they can provide helpful information for problem diagnosis or midcourse corrections, but too many foundations have become "obsessed with"[144] measurement in ways that demean and undermine the very philanthropy they seek to advance.

2. Capturing the Meaning of "Strategy"

Philanthrocapitalism equates "serious" philanthropy with the adoption of business principles.[145] There is no question that grantmaking is serious work, but that alone does not make it the province of business. In other words, business and market-based practices and processes have no monopoly on effectiveness.

A central problem with the rhetoric of philanthrocapitalism is that it mistakenly conflates "businesslike" and "strategy," two concepts that should not be presumed to go hand-in-hand. Those who have worked in and with many for-profit businesses as well as nonprofit organizations understand that sound analytical thinking and wise decision making may be found in both sectors, just as bastions of mediocrity may also be found.[146] Especially with the hindsight of the

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[142] *See* EDWARDS, *supra* note 74, at 77–78 (questioning what happens to democratic accountability when private foundations take over the task of solving social problems).

[143] Gertner, *supra* note 123, at 74.

[144] *Id.*

[145] *See* BISHOP & GREEN, *supra* note 5, at 273 ("The real worry about philanthrocapitalism is not that the new generation of big givers will be too businesslike, but that they will not be businesslike enough. If philanthrocapitalism is to succeed, it will be because these philanthropists . . . apply their business talents just as rigorously as they did when they made their money.").

[146] *See, e.g.*, JIM COLLINS, GOOD TO GREAT AND THE SOCIAL SECTORS 1 (2005) (rejecting the "well-intentioned, but dead wrong" idea that social sectors can be strengthened by the

recent financial crisis, we know that private enterprise does not hold all the answers.

Profit maximization lies at the heart of capitalism, while philanthropy is concerned with altruism and the betterment of humankind.[147] When philanthrocapitalism glorifies business models and practices as the standard for excellence and effectiveness, it misses this crucial difference and inevitably disparages the nonprofit sector. It is important that we guard against efforts to co-opt broad, positive terms like "strategic" or "effective" and turn them into synonyms for businesslike or market-based.

B. Transforming Nonprofit Institutions

1. Foundation vs. Charity Expertise

Although the nonprofit sector is a central element of American life and is steadily gaining recognition, it remains one of the least understood and most undervalued elements.[148] Unfortunately, the rhetoric and tenets of philanthrocapitalism only exacerbate the problem. Just beneath the surface of efforts to incorporate business and the market into charitable giving lies an attack on traditional foundations, and in some iterations, there may also be an implicit attack on public charities as well. While perhaps not intentional, the new muscular philanthropy casts most nonprofit organizations as crisis-prone, desperately poor, starry-eyed, even witless do-gooders. This characterization can lead to condescension and fractured relationships.[149] Of course, I should be careful not to overstate this point. It must be remembered that funders are still, for the most part, conducting their philanthropic work through grantee public charities, money and power differentials have always caused strains in grantor-

simple importation of commonly accepted business practices).

[147] *See* ROBERT H. BREMNER, AMERICAN PHILANTHROPY 3 (2d ed. 1988) ("The aim of philanthropy . . . is improvement in the quality of human life."); Robert L. Payton, *Philanthropic Values*, *in* 4 PHILANTHROPY: PRIVATE MEANS, PUBLIC ENDS 21, 23 (Kenneth W. Thompson ed., 1987) (arguing that philanthropy is more concerned with the long-term betterment of mankind than in alleviating short-term problems).

[148] *See* LESTER M. SALAMON, THE RESILIENT SECTOR: THE STATE OF NONPROFIT AMERICA 7 (2003) ("If the nonprofit sector is one of the most important components of American life, it is also one of the least understood."); Garry W. Jenkins, *The Powerful Possibilities of Nonprofit Mergers: Supporting Strategic Consolidation Through Law and Public Policy*, 74 S. CAL. L. REV. 1089, 1090 (2001).

[149] *See* BISHOP & GREEN, *supra* note 5, at 135 (quoting a former executive of a foundation closely associated with philanthrocapitalism who described the foundation's leadership as "very condescending to nonprofits" and noting that "[s]uch comments are not atypical").

grantee relationships,[150] and some small nonprofits (as well as small businesses) do fit the stereotype. However, the language and methods of philanthrocapitalism do emphasize the unique ability of an elite class of funders to employ their business know-how because "they know how to fix problems, for that is what they do all day in business."[151] This idolization of business skills and experience coupled with a desire to ensure that the funder remains firmly in the driver's seat in the grantor-grantee relationship[152] heightens the sense among both funders and their recipients that there has been a shift in the locus of control in that relationship. Put bluntly, philanthrocapitalism seems to encourage the myth of a huge gap in the strategic expertise, sophistication, and level of quality between business entities and nonprofit organizations. To accept that view, of course, leaves us with a weakened, essentialized view of nonprofit organizations. Accordingly, philanthrocapitalism may inadvertently advance a notion that grant-recipient charities, almost by definition, lack clearheadedness and thus should only be instrumentalized to achieve the foundation's objectives.

This characterization—even if only implied—is particularly damaging because it is happening at a moment in time when the stature and standing of nonprofit organizations has been on the rise in many circles.[153] The case for the emerging strength of the nonprofit sector has been stronger during this period than at any other time in history. Simply put, the underestimation of nonprofit effectiveness embedded in philanthrocapitalism is in sharp contradiction to a growing discourse and acknowledgment over the past three decades that an increasing number of nonprofit organizations are becoming world class. In several arenas, for instance on the international stage,

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150 *See* Kent D. Fairfield & Kennard T. Wing, *Collaboration in Foundation Grantor-Grantee Relationships*, 19 NONPROFIT MGMT. & LEADERSHIP 27, 28–29 (2008) (describing the sometimes-poor state of foundation-charity relationships); Garry W. Jenkins, *Soft Power, Strategic Security, and International Philanthropy*, 85 N.C. L. REV. 773, 830 (2007) (noting the problems that arise from "unequal power dynamics" between foundations and grantees).

151 BISHOP & GREEN, *supra* note 5, at 30.

152 *See id.* at 57 (describing the typical philanthrocapitalist approach to engagement as one in which "the foundation sets policy and provides funding, but others do the work on the ground").

153 *See, e.g.*, SHAMIMA AHMED & DAVID POTTER, NGOS IN INTERNATIONAL POLITICS 37 (2006) (discussing the new roles—beyond traditional disaster-relief work—played by nonprofit organizations that "have greatly expanded the opportunity for the voluntary sector's influence in international politics"); NGOS AT THE TABLE: STRATEGIES FOR INFLUENCING POLICIES IN AREAS OF CONFLICT *passim* (Mari Fitzduff & Cheyanne Church eds., 2004) (discussing the vast number of nonprofit organizations working internationally and their status as a vital component of both local and international responses to conflicts); Christiana Ochoa, *The Individual and Customary International Law Formation*, 48 VA. J. INT'L L. 119, 124 (2007) (noting the increasing prominence of nongovernmental organizations).

nonprofits are becoming powerful players, respected by governments and corporations as equals at the table. For example, from the vantage point of the U.S. presidency, Bill Clinton has stated that the influence of the charitable sector "has been reinforced by the proven ability of [nonprofit organizations] of all sizes and missions to have a positive effect on problems at home and abroad."[154]

In its most extreme forms, strategic philanthropy is excessively controlling. Foundations that seek to impose their vision, their strategic frameworks, and their metrics on a nonprofit grant recipient is often unduly intrusive and may thereby weaken the organizations they are funding. Of course, only a few foundations may have pushed this model to its extremes, but it serves as a reminder that a foundation's drive to achieve results can have negative effects. Moreover, as I noted above in Part II, in recent years a significant percentage of foundations have shifted to a "don't call us, we'll call you" philosophy of considering grant proposals.[155] Rather than just an effort to streamline administrative processes, this is an important shift toward a more muscular philanthropy, with funders calling the shots and perhaps closing themselves off from creative ideas.

Peter Laugharn, an experienced international foundation executive, has criticized the style of philanthropy favored by philanthrocapitalists because "the funder may not have sufficient understanding of situations and actors to achieve its goals, or enough flexibility to adjust its approach when necessary."[156] He warns that an overly proactive approach can become "directive, essentially turning grantees into contractors, and running the risk of ignoring the partners' strength."[157] This disregard of partner's strengths is surprising given how proponents of philanthrocapitalism frequently invoke the language of entrepreneurship and risk taking. For example, when Bishop and Green explain that philanthrocapitalism hews to the view that "[t]he best philanthropy often involves taking risks, and more risk means more failures, as well as (hopefully) more successes,"[158] I am left to wonder *whose risks* they are referring to—the foundation's or the public charity's? For all the talk about its embrace of risk taking, philanthrocapitalism seems primarily interested in solutions philanthrocapitalists formulate. They seem to consider *themselves* as the ultimate risk takers, not the nonprofit institutions they support. Furthermore, they do not seem to consider

[154] BILL CLINTON, GIVING: HOW EACH OF US CAN CHANGE THE WORLD 11 (2007).
[155] *See supra* Part II.C.
[156] Peter Laugharn, *Proactive vs Responsive Philanthropy*, ALLIANCE, Sept. 2008, at 44.
[157] *Id.*
[158] BISHOP & GREEN, *supra* note 5, at 79.

the risk that comes with undervaluing the contributions and ignoring the ideas of those closer to the ground.

When it comes to addressing social problems, nonprofit organizations operating on the ground—i.e., public charities—have a central role to play. Society benefits from institutional arrangements that seek innovation coming not only from the top, where they are centrally planned by a grantmaking foundation, but also from the bottom, where those organizations working most directly on public problems are continuously refining, modifying, and improving design solutions. As several scholars note, those who drive social innovation are often those closest to the ground, who have direct contact with the challenges that need to be addressed.[159] Professor Angela Banks's observation about participatory decision making in constitution making fits the nonprofit world as well, where the exercise of tight control by private foundations can deprive operating nonprofits of the space they need for "innovative solutions and approaches to problems . . . that are qualitatively better than the solutions and approaches developed in elite or exclusive settings."[160] Such space is even more important when the philanthropy focuses on issues of poverty, social justice, and community building, because it requires strong community-based organizations and locally grounded mediating institutions.[161]

If donors are serious about strengthening the capacity of the charitable sector, an essential precursor to "taking successful projects to scale," is that they should seek to conduct their philanthropy in ways that support the development of worthy nonprofits as they formulate and pursue their own solutions based on their experience, knowledge of problems, direct contact with beneficiaries, and visions for social change. As Sheela Patel, the founder and executive director

[159] *See, e.g.*, Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 314 (1998) (arguing that innovation is spurred by those closest to problems); Susan Sturm, *Gender Equity Regimes and the Architecture of Learning*, *in* LAW AND NEW GOVERNANCE IN THE EU AND THE US 323, 325 (Gráinne de Búrca & Joanne Scott eds., 2006) (describing benefits of bottom-up, participatory innovation).

[160] Angela M. Banks, *Expanding Participation in Constitution Making: Challenges and Opportunities*, 49 WM. & MARY L. REV. 1043, 1050 (2008) (discussing the advantages of participatory decision making); *see also* Archon Fung & Erik Olin Wright, *Deepening Democracy: Innovations in Empowered Participatory Governance*, 29 POL. & SOC'Y 5, 18 (2001) (noting the benefits of bottom-up solutions).

[161] *See* Pablo Eisenberg, *Philanthropy and Community Building*, 87 NAT'L CIVIC REV. 169, 169 (1998), *reprinted in* PABLO EISENBERG, CHALLENGES FOR NONPROFITS AND PHILANTHROPY: THE COURAGE TO CHANGE 126 (Stacy Palmer ed., 2005) (noting that the "most important" lesson from urban development philanthropy is that community residents must be a major part of community problem solving); Paul Horwitz, *Churches as First Amendment Institutions: Of Sovereignty and Spheres*, 44 HARV. C.R.-C.L. L. REV. 79, 108 (2009) (arguing that mediating institutions serve a vital role in maintaining a sense of community).

of a nonprofit organization in India working on global poverty relief, writes, "[A] fundamental question donors need to ask is this: [D]o they want subcontractors to carry out their mission? Or do they want to support those who have a vision for their own transformation?"[162] Grantmakers who seek to set the agenda themselves may test their preferred solutions, but in so doing may also stifle creativity and ambition. Grantmaking at its best employs practices that most effectively help nonprofits achieve their missions.

Consider, for example, the different approaches of the Bill & Melinda Gates Foundation and the Ford Foundation. The Gates Foundation, the nation's largest private foundation,[163] which is invoked as a paradigmatic example of philanthrocapitalistic grantmaking,[164] plays an assertive role in setting the philanthropic agenda of the grantmaking it underwrites.[165] For example, in November 2008, the Gates Foundation announced that it planned to shift the focus of its education grantmaking from structural change (i.e., the creation of small high schools) toward an effort to double the number of low-income young people who complete a college degree or certificate by age twenty-six.[166]

What I find interesting in this example is that both the former and the new focus of the Gates Foundation grantmaking is so driven by the foundation and its view of the most effective solution to problems in the U.S. public education system. Here, the Gates Foundation is employing an approach characteristic of philanthrocapitalism—that is, it acts largely on its own[167] to determine a single strategy for education reform (a theory of change), it does the heavy lifting of developing potential solutions, and then it goes out to find or create organizations to execute its agenda. Notice that "[t]he new approach

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[162] Sheela Patel, *Subcontractors or Visionaries*, ALLIANCE, Sept. 2008, at 36, 36.

[163] *See Top 100 U.S. Foundations by Asset Size*, FOUND. CTR. (Feb. 22, 2011), http://foundationcenter.org/findfunders/topfunders/top100assets.html.

[164] *See* BISHOP & GREEN, *supra* note 5, at 52 (noting that "Gates has . . . become the ultimate philanthrocapitalist"); Joe Nocera, *Self-Made Philanthropists*, N.Y. TIMES, Mar. 9, 2008, § 6 (Magazine), at 60 (referring to Gates as "[t]he quintessential philanthrocapitalist").

[165] *See, e.g.*, Julie Schmit, *Inside the Gates Foundation; It Has $35 Billion to Give, and Strong Ideas About How to Do It*, USA TODAY, June 2, 2010, at 6A ("[T]he Gates Foundation has been painted by critics and even admirers as sometimes too heavy-handed in saying how its money is used and too prone to listening to the recommendations of experts vs. grass-roots groups when setting its strategies . . . .").

[166] *See* Ben Gose, *Gates Foundation Unveils New Approach Designed to Improve American Education*, CHRON. PHILANTHROPY, Nov. 27, 2008, at 10.

[167] I do not mean to imply that the Gates Foundation does not consult with experts. Rather, they make decisions and find nonprofit grantees to execute their vision after the fact. Observers have described the Foundation's decision-making process as "a closed internal process." *See* Donald G. McNeil, Jr., *W.H.O. Official Complains of Gates Foundation Dominance in Malaria Research*, N.Y. TIMES, Feb. 16, 2008, at A6 (internal quotation marks omitted) (quoting Dr. Arata Kochi of the World Health Organization).

reflects the *foundation's view* that the decade beginning in high school and ending at about age 26 is a make-or-break period for low-income youths."[168] Notably, the Gates Foundation declared its shift without the announcement of any specific or even potential grantees. Prior to that November announcement, the Foundation had been executing a strategy based on its theory of change that creating smaller high schools would improve education outcomes. In both cases, the Foundation defines the problem, sets the agenda, devises the strategy, and determines how long it should take to solve the problem. Finding grantee organizations to execute the Foundation's chosen experiment is the last piece of the puzzle.

In contrast, the Ford Foundation—the nation's second-largest private foundation[169] and a favorite target of the new-guard philanthropists[170]—takes a different approach. As any regular listener of National Public Radio well knows, the Ford Foundation has long sought to summarize its ethos with the tagline "a resource for innovative people and institutions worldwide,"[171] and more recently, as an organization "[w]orking with [v]isionaries on the [f]rontlines of [s]ocial [c]hange [w]orldwide."[172] These slogans capture and emphasize the Ford Foundation's focus on embracing the ideas of the public charities. Therefore, even in describing its own mission, the language clearly places the grant-recipients and their innovative ideas at the center of the problem-solving activity undertaken on any given issue.[173] An example of this approach is cited by Harvard researcher Steven Lawry in a recent article in the *Stanford Social Innovation Review*, wherein he describes the Ford Foundation's initial support for Muhammad Yunus and his Grameen Bank, eventual winners of the Nobel Peace Prize, which sparked the microfinance movement.[174]

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168 Gose, *supra* note 166, at 10 (emphasis added).

169 *See supra* note 163.

170 *See* BISHOP & GREEN, *supra* note 5, at 158 (describing the Ford Foundation's grantmaking as an example of "unstrategic funding").

171 FORD FOUND., 2007 ANNUAL REPORT 3 (2008).

172 FORD FOUND., 2008 ANNUAL REPORT 1 (2009); *see also* Ian Wilhelm, *Slogans Teach Public-Radio Listeners About Grant Makers' Missions*, CHRON. PHILANTHROPY, Oct. 1, 2009, at 1 (describing the change in slogans).

173 *See* Susan V. Berresford, President, Ford Found., Address at the Nat'l Found. India, Philanthropy's Potential: Can We Grasp It? (Mar. 4, 2002), *available at* http://www.fordfound.org/newsroom/speeches/118 ("Grantmakers will have to become braver about seeking and supporting people with unfamiliar approaches and stick with them long enough to learn about them. As donors become more strategic in tackling important and difficult problems, they will need good advice from people who know how to bring about change, including the most disadvantaged men and women who are the likely beneficiaries. We must remember the Ford Foundation is not the answer—it is a resource for people who have ideas about the answer.").

174 *See* Steven Lawry, *Effective Funding: How Foundations Can Best Support Social Innovators*, STAN. SOC. INNOVATION REV., Spring 2009, at 21 (describing the Ford Foundation's partnership with Grameen Bank).

Lawry notes that although the Ford Foundation funding was important, the grant recipient led the way. It was Yunus who developed the idea, took the lead, and provided the expertise to craft a solution to a public problem.[175] Lawry argues that this success demonstrates that "foundations should open their doors wide to the potentially powerful ideas"[176] of grant recipients, whose visions, ideas, and plans are tested and borne out of "the complex social, economic, and political environments in which they live and work."[177]

In my view, the key difference between the approaches is mindset. Distilled down to its most simple terms, in one approach the foundation perceives itself as an expert decisionmaker using its resources to implement chosen technical solutions; in the other, the foundation is the facilitator, using its resources to empower organizations and communities on the ground to focus on adaptive work.[178] These two examples highlight some potential long-term problems with muscular philanthropy. It is not that muscular philanthropy never achieves positive results—it most surely does. Sometimes a foundation may adopt a winning strategy. But such a myopic approach is underinclusive in promoting social innovation. As Lawry writes:

> Innovative grantees, who have the advantages of local knowledge, intuitive insights into local social and institutional dynamics, and social and professional standing in their communities, are in a better position than foundations to push and pull the levers that move other essential institutions toward adopting the kinds of pro-poor policies necessary for their ideas to work.[179]

In addition, the trends discussed in Part II suggest that U.S. foundations are adopting policies and practices that may decrease competition and may isolate these entities from the ideas and expertise of organizations working most closely on the ground,

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[175] *Id.*
[176] *Id.*
[177] *Id.*
[178] *See* RONALD A. HEIFETZ, LEADERSHIP WITHOUT EASY ANSWERS 22, 72–76 (1994) (distinguishing "technical work" which employs authoritative expertise and mechanical know-how or established procedures to solve problems from "adaptive work" which requires people with the problems to engage in a process to solve problems where they learn new ways, i.e., attitudes, behaviors, relationships, etc., internalize the change through experimentation and discovery); RONALD A. HEIFETZ & MARTY LINSKY, LEADERSHIP ON THE LINE: STAYING ALIVE THROUGH THE DANGERS OF LEADING 13–15 (2002) (making a similar distinction between adaptive and technical work).
[179] Lawry, *supra* note 174, at 22.

reducing the prospects for innovation from the bottom to emerge. There is evidence that grantmakers are limiting the pool of ideas that receive consideration and exerting greater control over the projects that they ultimately choose to fund. When foundations instead pick which entities they will hear from and which organizations they will interact with via invitations for proposals,[180] they reduce the competition in the marketplace of social ideas. Collectively foundations are choosing to concentrate on larger grants, often awarding fewer numbers of grants than in the past and giving the selected projects larger dollar awards.[181] These practices may lend themselves to a decrease in experimentation and innovation in the social sector.

Many have applauded the shift to more concentrated grantmaking as a means to bring more focus to philanthropy and to provide grantees more funding to pursue large-scale initiatives. Of course, foundation leaders have always faced a breadth-versus-depth trade-off in grantmaking.[182] It remains open for debate, however, whether this is a sign of a maturing nonprofit sector coalescing around promising ideas or simply overconfidence in the grantmakers' self-perceived ability to place charitable bets. Finally, by focusing on targeted limited-purpose grants,[183] short-term measurable outcomes,[184] leverage, and high engagement, foundations have taken on the attributes of a hierarchical, directive, centralized power, usurping both the autonomy and energy of the public charities on the ground. In an attempt to push the venture capital analogy,[185] funders are using their power advantage over their grantees to exercise control (sometimes aggressively so) over grantee behavior[186] and, in some cases, to dictate public policy. Even the World Health Organization, the powerful public health arm of the United Nations, has expressed worry that the Gates Foundation has created a "cartel" in health research that "discourages smaller rivals and intellectual competition."[187] Similar concerns have been raised about the Gates Foundation's work in other areas as well.[188]

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180 *See supra* Part II.C.

181 *See supra* notes 79–93 and accompanying text.

182 *See* JOEL J. OROSZ, EFFECTIVE FOUNDATION MANAGEMENT 93–95 (2007).

183 *See supra* Part II.B.

184 *See supra* Part III.A.1.

185 *See supra* note 24 and accompanying text.

186 *See supra* text accompanying notes 164–81.

187 BISHOP & GREEN, *supra* note 5, at 72 (internal quotation marks omitted).

188 *See e.g.*, Schmit, *supra* note 165 (noting a similar concern expressed regarding work on world hunger issues).

In many respects, philanthrocapitalism conflicts with the preference for experimentation and the aversion to command-and-control-style management often associated with free-market economic theories.[189] Once shorn of the philosophical and structural strengths of free-market principles, what remains of philanthrocapitalism is exceedingly narrow and elitist in scope. Thus even on its own terms, philanthrocapitalism is not likely to recreate the conditions we associate with effective free markets but instead will likely lead only to a concentration of power and decision making in the hands of business elites.

2. Market-Based Solutions

Philanthrocapitalism, like any movement or theory, embodies a set of explicit and implicit values. It expresses a preference for entrepreneurial, market-oriented solutions, places an emphasis on performance measurement, and attaches overriding importance to the guidance of experienced business leaders. To the extent that philanthrocapitalism espouses this new set of values, it seeks to alter the nature of grantmaking as well as the social change projects and experiments undertaken with foundation dollars; funders shape both what nonprofits do and how they conduct their activities. These new

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[189] Free-market-based principles and policies have been embraced because of their ability to foster environments that value decentralization over command-and-control approaches, encourage creative competition, and promote innovation through experimentation. *See, e.g.*, Michael Abramowicz & John F. Duffy, *Intellectual Property for Market Experimentation*, 83 N.Y.U. L. REV. 337, 347 (2008); Amy J. Cohen, *Dispute Systems Design, Neoliberalism, and the Problem of Scale*, 14 HARV. NEGOT. L. REV. 51, 57 (2009); Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 369, 443 (2004); Amy Sinden, *The Tragedy of the Commons and the Myth of a Private Property Solution*, 78 U. COLO. L. REV. 533, 536–537 (2007). Accordingly, traditional adherents to market-based principles have long championed environments that cultivate learning, broad-based experimentation, and open competition to promote innovation. Friedrich Hayek, one of the leading free-market economists of the twentieth century, wrote that

> to do more harm than good . . . to improve the social order, [we] . . . will therefore have to use what knowledge [we] can achieve, not to shape the results as the craftsman shapes his handiwork, but rather to cultivate a growth by providing the appropriate environment, in the manner in which the gardener does this for his plants.

F.A. HAYEK, NEW STUDIES IN PHILOSOPHY, POLITICS, ECONOMICS AND THE HISTORY OF IDEAS 34 (1978); *see also* Amy J. Cohen, *Governance Legalism: Hayek and Sabel on Reason and Rules, Organization and Law*, 2010 WIS. L. REV. 357, 364 n.26. Despite rhetorical appeals to the market, in practice, foundations animated by the new philanthropy are increasingly taking on dominant roles as central planners, crowding out competition or dissent. As critics of some of the prominent philanthrocapitalists have noted and as foundation trends suggest, private foundations are asserting greater control in designing philanthropic solutions. To borrow Hayek's analogy, muscular foundations have been acting like the craftsman rather than the gardener.

values may lead to subtle but important shifts in emphasis regarding specific programmatic decisions, which may skew nonprofit grantees toward projects that adopt market-based approaches, favor individual over collective action, provide clear measurement, and impact personnel decisions.

In the marketplace of social change ideas, where only a limited number of ideas or projects are ultimately funded, a funder's preference—whether expressed or not—for certain types of solutions carries considerable influence. With its emphasis on applying business and market models, as philanthrocapitalism expands it may privilege initiatives using market mechanisms to address large-scale change. Bishop and Green suggest that some prominent philanthrocapitalists seek to support projects that reflect their "view that the entrepreneurship of the business world needs to be applied to social problems and that often . . . this should involve *harnessing the profit motive*."[190] The authors also state that this approach has resonated deeply with a certain class of funders.[191] Michael Edwards argues, however, that such an emphasis is misplaced because "market values and human values are not just different; they pull in opposite directions in many important ways."[192]

For instance, consider microfinance, a favorite example of a business-inspired solution to address global poverty favored by philanthrocapitalists.[193] Through the provision of financial services (microloans, savings accounts, insurance, etc.) in small amounts, usually without monetary collateral requirements, to low-income individuals, particularly in the developing world, microfinance has been used to support entrepreneurial activity so that individuals can rise from poverty and secure their own economic future.[194] It is incontrovertible that extending access to financial resources and

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190 BISHOP & GREEN, *supra* note 5, at 117 (emphasis added).

191 *See id.* ("[P]hilanthropreneurship is a challenge that is attracting not only Omidyar and Skoll, but also many other entrepreneurial philanthropists.").

192 EDWARDS, *supra* note 74, at 66.

193 *See* BISHOP & GREEN, *supra* note 5, at 130 ("Microfinance is the testing ground for [the] belief that for many nonprofits, and social problems, the best strategy is to harness the profit motive."). It is worth noting the irony, however, that microfinance was initially developed and widely expanded through "bottom-up" philanthropy. *See* text accompanying notes 174–77.

194 *See* Anita Bernstein, *Pecuniary Reparations Following National Crisis: A Convergence of Tort Theory, Microfinance, and Gender Equality*, 31 U. PA. J. INT'L L. 1, 37 (2009) (discussing how microfinance supports women and gender equality); Pamela Das, *Avoiding a Subprime-Like Crises in Microfinance: Lessons from the Mexican and Bolivian Experience*, 15 L. & BUS. REV. AM. 819, 823 (2009) (discussing the relationship between microfinance and the alleviation of poverty); Terry M. Dworkin & Cindy A. Schipani, *Linking Gender Equity to Peaceful Societies*, 44 AM. BUS. L.J. 391, 410–14 (2007) (discussing how microfinance supports women and gender equality).

services to the poor is a beneficial undertaking,[195] but microfinance may be especially attractive to philanthrocapitalists because it draws on market norms and seeks to replicate familiar private sector structures. Notice that microfinance as a solution to global poverty is focused on reimagining poor individuals primarily as sellers and buyers of goods, is based on competition with actors vying with one another for a scarce resource (in this case, profit), privileges wealth creation over distribution, and is grounded in the idea of individual self-help as the driver of change.

Although microloans may assist individual borrowers, there is no evidence that microfinance as an institution has led to systematic change transforming poor countries into rich ones or impoverished communities into wealthy ones. Edwards argues that microfinance will not eradicate poverty on its own.[196] In his view, sustainable, widespread poverty reduction requires larger shifts in social and political dynamics, such as creating many well-paying jobs through agro-industrialization, addressing land rights, and providing large-scale access to health care, education, and public works.[197] What is worrisome is that using microfinance as a paradigmatic example of the kind of preferred social change intervention encourages a bias toward business-like initiatives that favor competition, efficiency, and individualism.[198] If enough funders believe that to "save the world" means adopting these particular principles, our giving may change in ways that lose sight of inclusiveness and equity, expression, institutional reform, and broad-based participation as means of effective social transformation.

In fact, some philanthrocapitalists have advocated refashioning microfinance to more aggressively pursue profit as a dominant purpose in order to expand their capacity to serve more people.[199] Although surely well intentioned, this thinking demonstrates the

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195 Economist Muhammad Yunus and his Grameen Bank of Bangladesh received the Nobel Peace Prize in 2006 for pioneering microfinance. *See* Press Release, Norwegian Nobel Comm., The Nobel Peace Prize for 2006 (Oct. 13, 2006), *available at* http://nobelprize.org /nobel_prizes/peace/laureates/2006/press.html ("Micro-credit has proved to be an important liberating force in societies where women in particular have to struggle against repressive social and economic conditions."). For more the origins of Grameen and microfinance, see MUHAMMAD YUNUS, BANKER TO THE POOR: MICRO-LENDING AND THE BATTLE AGAINST WORLD POVERTY (2003).

196 EDWARDS, *supra* note 74, at 40.

197 *Id.*

198 *See id.* at 68 ("Philanthrocapitalism assumes that competition will make civil society more efficient and thereby bring more social change, but this is a particularly damaging form of social Darwinism that misreads the way social change actually occurs.").

199 *See* BISHOP & GREEN, *supra* note 5, at 116–17 (describing an argument made to a group of philanthropists that relying on a nonprofit model rather than a for-profit model for the expansion of microfinance was "a big mistake" (internal quotation marks omitted)).

extent to which the border between the nonprofit and for-profit sectors has become so porous that a new vision of "smart philanthropy" can encompass treating the poor simultaneously as charitable beneficiaries and as profit-generating targets ripe for market exchanges with the funder.[200]

As commentators have long noted, charity, particularly when targeted at the less advantaged, sometimes does more than just provide aid and material support to those in need. It may also seek to express the values of the donor[201] and/or to instill particular values in the individual beneficiaries of charity, such as democracy,[202] religion,[203] cleanliness,[204] and morality,[205] among others. Here we see the promotion of market-based principles that have the effect of turning people into individual self-maximizers, rational calculators of costs and benefits. Law and development scholars, such as Amy Cohen, among others, argue that development initiatives, such as microfinance, advance efforts to produce new, and potentially neoliberal, forms of personhood.[206] In a recent article, Cohen observes how development programs aspire to "processes of self-transformation that produce both marked and manageable change.

200 *See* Connie Bruck, *Millions for Millions: This Year's Nobel Peace Prize Winner and Some High-Tech Entrepreneurs Are Competing to Provide Credit to the World's Poor*, NEW YORKER, Oct. 30, 2006, at 62 (recounting Yunus's reaction to the suggestion that a for-profit model would be preferable: "Let them [for-profit entities] make money—but why do you want to make money off the poor people? You make money somewhere else. Here, you come to help them. When they have enough flesh and blood in their bodies, go and suck them, no problem. But, until then, don't do that." (internal quotation marks omitted)).

201 *See* PETER FRUMKIN, ON BEING NONPROFIT: A CONCEPTUAL AND POLICY PRIMER 104–07 (2002) (discussing the role of values in the nonprofit sector); ROBERT L. PAYTON & MICHAEL P. MOODY, UNDERSTANDING PHILANTHROPY: ITS MEANING AND MISSION 35 (2008) (noting that philanthropy conveys collective values).

202 *See* Jenkins, *supra* note 150, at 832 (arguing that public charities conducting work abroad convey democratic ideals to local communities).

203 *See* FRUMKIN, *supra* note 201, at 106–07 (discussing the desire of donors to promote faith through charity); *cf.* Martha Minow, *Public and Private Partnerships: Accounting for the New Religion*, 116 HARV. L. REV. 1229, 1239 (2003) (discussing the religious motives and influences connected to certain social welfare activities).

204 *See, e.g.*, Richard Delgado, *Locating Latinos in the Field of Civil Rights: Assessing the Neoliberal Case for Radical Exclusion*, 83 TEX. L. REV. 489, 507–08 (2004) (book review) (noting that early settlement houses served as "'Americanization' agents, self-appointed and otherwise, who taught . . . American standards of cleanliness . . . and social behavior").

205 *See, e.g.*, PAYTON & MOODY, *supra* note 201, at 111–14 (discussing philanthropy as a form of "moral action" and an intervention into peoples lives "that can sometimes offend or disturb"); *see also* Boy Scouts of Am. v. Dale, 530 U.S. 640, 650 (2000) (discussing a nonprofit's effort to impart "moral straightness").

206 *See* Amy J. Cohen, *Thinking with Culture in Law and Development*, 57 BUFF. L. REV. 511, 570 (2009) (noting that Professor Katharine Rankin refers to these as efforts to generate "rational economic woman").

That is, these programs would produce people who come to hold different values and self-understandings . . . ."[207]

These insights raise important questions about how a preference for increased market-based philanthropy might not only reshape grantee organizations but also the people served by them. The ideology of market-based social change initiatives usually seeks to create individual winners within an existing economic system. Alternative views of philanthropy that promote social transformation based on, for example, instilling more communitarian or egalitarian values,[208] may lead to different types of solutions and the promotion of different values. Another problem is that market-led interventions will likely create only small shifts in an unequal world. Without broader political, social, and cultural shifts, increased individual participation in markets is likely to reproduce existing inequalities rather than unsettle traditional hierarchies.[209]

This is not to say that economic and market-led charitable activity is without merit. Quite the contrary, market-based solutions to public problems may work in some settings, but they are hardly a panacea. Social transformation also requires collective action, relationship building, participation, and political change. In Edwards's view,

> [T]he world needs more civil society influence on business, not the other way around—more cooperation not competition, more collective action not individualism, and a greater willingness to work together to change the fundamental structures that keep most people poor so that all of us can live more fulfilling lives.[210]

In addition, philanthrocapitalism may lead to an increase in profit-motivated decision making by charitable organizations,[211] thus, exacerbating problems related to what is known as mission creep or

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[207] *Id.* at 574 (emphasis omitted).

[208] *See, e.g.*, PAYTON & MOODY, *supra* note 201, at 50; Lisa M. Fairfax, *"With Friends Like These . . .": Toward a More Efficacious Response to Affinity-Based Securities and Investment Fraud*, 36 GA. L. REV. 63, 95–96 (2001).

[209] *See* EDWARDS, *supra* note 74, at 43 (quoting nonprofit activists who stated that "[p]hilanthrocapitalists may wish to see more wealth trickle down to the poor, but NGOs—if the truly wish to minister to the needs of the poor—must strive to change the shape of the pyramid itself" (internal quotation marks omitted)).

[210] Edwards, *supra* note 42, at 27.

[211] *See* Norman I. Silber, *Anticonsultative Trends in Nonprofit Governance*, 86 OR. L. REV. 65, 74 (2007) (describing corporate influence leading to a "new nonprofit culture of financial effectiveness and accountability," as well as a new corporate-oriented vocabulary of organizational services "routinely called 'the product,' and its reputation referred to as 'the franchise'").

mission drift.[212] While nonprofits, of course, need to be mindful of responsible fiscal management and stewardship, their constant search for additional resources can obfuscate key priorities, causing them to emphasize more profitable activities at the expense of other more traditional, but perhaps less lucrative, activities.

Challenges faced by university presses illustrate this trend. For decades the university press was considered a core aspect of the intellectual mission and contribution of great research universities, but in recent years, university boards and presidents have redefined their academic mission to exclude publishing quality scholarship.[213] In fact, often viewed as "too costly" or an "economic drain[]," university presses have been severely cut back[214] or shuttered altogether.[215] Of course, research universities, like all nonprofits, often need to make difficult financial decisions. However, what is interesting about this recent shift regarding higher education's view of the worthiness of knowledge—a social good that private markets do not necessarily sustain[216]—is how the publication of research is so easily analogized to a business, with its survival based on commercial profitability, rather than excellence or scholarly contributions.[217] The

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212 *See id.* at 89 (discussing issues related to mission creep). Mission creep refers to an organizational phenomenon in which entities inadvertently, over time, stray from their fundamental mission by engaging in activities or behaviors less closely related to the core charitable purpose.

213 *See, e.g.*, Willis G. Regier, *Profit or Perish: Today's University Presses*, 1 AM. ACAD. 111 (2004) (exploring how university presses have responded to the pressure to publish profitable books); John B. Thompson, Editorial, *Survival Strategies for Academic Publishing*, CHRON. HIGHER EDUC. June 17, 2005, at B6 (discussing growing pressures for university presses to become "self-supporting" and institutional uncertainty over their status as "academic units or business units").

214 *See* Peter Applebome, *Profit Squeeze for Publishers Makes Tenure More Elusive*, N.Y. TIMES, Nov. 18, 1996, at A1 (reporting that university presses are "cutting back" on publications and focusing more on issues of marketability in its decisions, which is a threat to "works of academic importance but narrow appeal"); *see also* Richard S. Markovits, *Legal Scholarship: The Course*, 48 J. LEGAL EDUC. 539, 546 (1998) ("[U]niversity presses are increasingly interested in the financial bottom line and are reluctant to publish any book, regardless of its merit, on which they may not break even."); David Spielberg, *The Case for Books: Past, Present, and Future*, 9 J. HIGH TECH. L. 1, 3 (2009–10) (book review), *available at* http://law.suffolk.edu/highlights/stuorgs/jhtl/book_reviews/2009_2010/David%20Spielberg%20 Book%20Review.pdf ("[U]niversity presses unwillingness to publish for lack of a market and distribution").

215 *See* Jennifer Howard, *When a University Press Falls, Who Catches Its Authors?*, CHRON. HIGHER EDUC., Feb. 26, 2010, at A13 (discussing the closure of Eastern Washington University Press); Peter Monaghan, *Financial Squeeze on University Presses Is Likely to Persist, Insiders Agree*, CHRON. HIGHER EDUC., July 9, 2004, at A20 (noting the closure of both the Northeastern University Press and the University of Idaho Press); Michael E. Young & Steven R. Thompson, *SMU Press Suspending Its Operations*, DALL. MORNING NEWS, May 6, 2010, at 7B (reporting on the suspension of operations of SMU Press).

216 *See* MINOW, *supra* note 12, at 44.

217 *See* Lawrence B. Solum, *Blogging and the Transformation of Legal Scholarship*, 84 WASH. U. L. REV. 1071, 1080 (2006) ("[M]ost university presses must now 'float on their own

subsequent move then has been for some academic leaders to dismiss the dissemination of research as falling outside the academic core.[218] This example demonstrates how the introduction of business values can have subtle effects on the work of institutions in potentially undesirable ways.[219]

To be clear, philanthrocapitalism is not the sole cause of nonprofit mission drift, nor is it responsible for nonprofit entities engaging in cost-benefit calculations.[220] Indeed, I fully recognize that nonprofits have always balanced ideals with financial realities. For example, certain nonprofits, particularly universities, have long charged fees, which serve to limit access to their services. The real concern, however, is that the principles of philanthrocapitalism may push tax-exempt organizations to substitute mission-related goals with a profit motive. In this respect, philanthrocapitalism advances the long-observed trend toward commercialization in the nonprofit sector. When profit seeking becomes a foundation-approved guiding principle, then it becomes much easier for the profit motive to guide decision making instead of social utility.

Moreover, philanthrocapitalism, with its emphasis on measuring success in terms of quantifiable outcomes, may limit the space for participatory, bottom-up problem solving, which is intrinsically valuable.[221] If we consider, for example, the earlier hypothetical foundation working on elementary- and secondary-school reform through support of charter schools discussed in section III.A.1,[222] we recall that the school's emphasis on metrics at the behest of the foundation is an attempt to create accountability. But it may instead

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bottom.' That is, they are expected to turn a profit or at least break even.").

[218] *See, e.g.*, Jennifer Howard, *Louisiana State U. Press Fights to Preserve Its Essential Value*, CHRON. HIGHER EDUC., May 28, 2009, http://chronicle.com/article/Louisiana-State-U-Press-Fi/44417 (quoting a university chancellor who stated that the university press was perceived as "a valuable asset," but not within the "academic core" of its parent institution (internal quotation marks omitted)).

[219] *See generally* Kate O'Neill, *Against Dicta: A Legal Method for Rescuing Fair Use from the Right of First Publication*, 89 CAL. L. REV. 369, 402 n.118 (2001) (explaining that university presses are likely to be among the most restrictive publishers regarding authorizing free and low-cost uses of copyrighted material, because of financial pressures they face). Such a willingness to protect commercial interests seems to conflict with the ideal of university scholars freely engaged in an exchange of ideas and research to disseminate knowledge.

[220] *See* TO PROFIT OR NOT TO PROFIT (Burton Weisbrod ed., 1998); David A. Brennen, *A Diversity Theory of Charitable Tax Exemption—Beyond Efficiency, Through Critical Race Theory, Toward Diversity*, 4 PITT. TAX REV. 1, 35–36 (2006); John D. Colombo, *Commercial Activity and Charitable Tax Exemption*, 44 WM. & MARY L. REV. 487, 489–90 (2002); Garry W. Jenkins, *Incorporation Choice, Uniformity, and the Reform of Nonprofit State Law*, 41 GA. L. REV. 1113, 1167–69 (2007) ; Kelley, *supra* note 22, at 2463–64.

[221] *See supra* text accompanying notes 159–61.

[222] *See supra* text accompanying note 138.

create an accountability shift. Rather than being accountable to parents, the community, teachers, and students, schools that are obsessively focused on test results can be said to become "accountable" to an unregulated testing industry. A recent study on the impact of performance measurement on grantor-grantee relationships determined that "a funder's focus on short-term quantifiable results can stifle grantee learning and steer attention away from the concerns of other important stakeholders, particularly beneficiaries."[223]

The desire to incorporate a business perspective into philanthropy also may influence organizational governance. A wide range of nonprofit boards of directors, who are largely made up of elites and individuals with corporate backgrounds, are increasingly selecting individuals with significant private-sector experience when they make important personnel decisions. In 2011, two of the three largest U.S. private foundations were headed by chief executive officers drawn from the corporate sector without prior extensive professional work experience with either government or nonprofits.[224] My research indicates that this is the first time in at least half a century that executives who spent the bulk of their careers in the for-profit sector have so dominated the top echelons of philanthropic foundation posts.[225] Of course, these anecdotal observations are too small in number to draw definitive conclusions, but they help illustrate the sector's increasing interest, not just in transferring corporate management skills to the nonprofit sector, but also in bringing in corporate management experience through their hiring, a trend which may be connected to the rhetoric and principles associated with philanthrocapitalism. It may be too soon to determine what results will be achieved by business-managers-turned-foundation-CEOs. If it

[223] Lehn M. Benjamin, *Funders as Principals: Performance Measurement in Philanthropic Relationships*, 20 NONPROFIT MGMT. & LEADERSHIP 383, 386 (2010).

[224] The Bill & Melinda Gates Foundation is headed by Jeffrey S. Raikes, who prior to being named chief executive officer in 2008, served as a software product executive for twenty-seven years. *See* Ben Gose, *Longtime Microsoft Executive Is Chosen to Lead Gates Foundation*, CHRON. PHILANTHROPY, May 29, 2008, at 40. The Ford Foundation is headed by Luis Ubinas, who prior to assuming the presidency in 2008, advised Fortune 100 media, telecommunications and technology companies at McKinsey & Company for eighteen years. *See* Stephanie Strom, *Ford Foundation Selects Its New Leader from Outside the Philanthropic World*, N.Y. TIMES, Aug. 14, 2007, at A11.

[225] I examined the professional backgrounds of the presidents of the three largest U.S. private foundations in the early part of each of the past four decades: 2010, 2000, 1991, 1981, and 1972. The three largest private foundations were identified by the Foundation Center through publication in the *Foundation Directory* (2000, 1991, and 1981 editions) or listed on the Foundation Center website (2010). For the 1972 data I relied on the list provided in Waldemar Nielsen's classic book on private foundations from that year. *See* NIELSEN, *supra* note 41, at 22.

turns out like other experiments with business leaders transitioning to public office, however, then the results will likely be mixed.[226]

More than just a buzzword, philanthrocapitalism presupposes certain values that may not be fully understood, especially to the extent the term becomes conflated with "strategic" or "effective" grantmaking. Accepting its tenets without critical examination may turn the practice of philanthropy in new directions and generate unintended side effects for charitable organizations.

C. Changing Individual and Government Giving

As discussed previously, philanthrocapitalism focuses on the power of business elites actively using their corporate skills and vocabulary to engage in "high performance" philanthropy.[227] The rhetoric of philanthrocapitalism centers on the activity of the superwealthy. This emphasis carries a risk that the goal of increased giving by some could supplant the also-important goal of increasing giving by a wider cross section of ordinary individuals or governments. Fueled by the prospects of big results, the rhetoric of the philanthrocapitalism movement positions "effective giving" as something that ordinary individual donors who lack serious wealth cannot mimic in size, scope, or style. Thus, the more typical individual donors may feel left out of this new vision of effectiveness and possibly become disinclined to give or to donate less than they otherwise might.[228]

One core message of philanthrocapitalism is that smart philanthropy is too difficult for those who have not been vetted by the rough-and-tumble world of the stock exchange. However, once "smart" or "strategic" philanthropy is seen as requiring an M.B.A. degree, proven business acumen, donations large enough to allow the donor to call the shots, and direct access to world leaders, it calls into

[226] *Cf.* Andrew Romano & Michael Hirsh, *America, Inc.*, NEWSWEEK, Feb. 22, 2010, at 36 (stating that Jon Corzine, a former Fortune 50 CEO who served as a U.S. senator and a governor, no longer believes that being a corporate chieftain prepares one for the public leadership after having had the experience of holding elected office); Erik Sherman, *Meg Whitman and Carly Fiorina: Why Ex-Tech CEOs Make Dangerous Politicians*, BNET (June 8, 2010), http://www.bnet.com/blog/technology-business/meg-whitman-and-carly-fiorina-why-ex-tech-ceos-make-dangerous-politicians/4025 ("[T]he skills of a good public leader are usually quite different from those of a CEO.").

[227] *See* Matthew Bishop, *A Tarnished Capitalism Still Serves Philanthropy*, N.Y. TIMES, Nov. 11, 2008, at F25 (noting philanthrocapitalists oft-stated desire to make "high performance" donations).

[228] Of course, some ordinary individual donors have relied on institutional expertise when it comes to charitable contributions by making gifts through intermediary organizations, such as the United Way, which raises money and disburses general operating support grants to local public charities. But the philanthrocapitalism rhetoric goes further.

question the value of the philanthropy conducted by the average donor. Despite the image projected by philanthrocapitalism, most charitable giving in 2009 was not from billionaire-funded private foundations or large corporate enterprises. Instead, the largest portion of total private giving to nonprofit organizations in 2009—eighty-three percent—was contributed by individuals through direct giving and charitable bequests.[229] In contrast, foundations and corporations combined gave seventeen percent.[230] These figures illustrate the importance of individual giving in philanthropy.[231] With so much support coming from individuals, the nonprofit sector has a stake in assuring that the culture of giving remains inclusive. In a recent book explaining one reason why people do not donate more to important charitable causes, Princeton University ethicist Peter Singer points to a sense of futility and a diffusion of responsibility that contributes to a belief that others will take care of a problem.[232] The rhetoric of philanthrocapitalism compounds this phenomenon. This is particularly problematic for Singer and others who argue for a significant increase in giving by ordinary individuals targeted at global development and relief efforts as the best means to end extreme global poverty.[233] The professionalization of the nonprofit sector should not dampen the desire of those who are not extremely wealthy from engaging in meaningful philanthropy.

Messages about effectiveness that may discourage individual giving are undesirable not simply because of the potential lost revenue to the charitable sector, but because charitable giving provides an important means of expression and associational affiliation that binds civil society. Nonprofit engagement serves a critical role by providing civic glue that holds the social fabric together, contributing to social capital, and strengthening public life.[234] Personal giving by individuals reflects human compassion,

[229] *See* GIVING USA FOUND. & THE CTR. ON PHILANTHROPY AT IND. UNIV., GIVING USA 2010: THE ANNUAL REPORT ON PHILANTHROPY FOR THE YEAR 2009, at 10–11 (2010) (noting that of the $303 billion donated, $251.2 billion was from individuals and $52.5 billion from foundations and corporations).

[230] *See id.*

[231] It is worth noting, however, that the statistics mentioned above aggregate giving for a variety of different purposes (e.g., education, religious, arts, health, environmental, etc.), and that depending on the specific purpose, the proportional influence of institutional donors relative to individual donors may vary.

[232] PETER SINGER, THE LIFE YOU CAN SAVE: ACTING NOW TO END WORLD POVERTY 52–54 (2009).

[233] *See, e.g.*, *id.* at 151–73 (proposing that individuals should give five percent, but in some cases more, of their income to help people living in extreme poverty around the world).

[234] *See* ROBERT D. PUTNAM, BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY 336–49 (2000); Elizabeth T. Boris, *Nonprofit Organizations in a Democracy—Roles and Responsibilities*, *in* NONPROFITS & GOVERNMENT: COLLABORATION &

deepens ties between individuals and organizations, connects people to other citizens, permits a means for one to lend direct support for concrete action, facilitates civic and political engagement, and instills democratic values. Accordingly, it is the work of all citizens, not just the province of the superrich. Broad-based individual giving engenders a sense of mutual dependence and shared values that build connections among the people in a democracy.[235]

In addition to impacting ordinary individuals, we must also consider the effect of philanthrocapitalism and its rhetoric on the role of governments in social problem solving. Because the movement emphasizes wealthy private citizens as those most able to "save the world," the state is distanced from solutions and positioned as an unnecessary bureaucratic link. In many respects, philanthrocapitalism is linked to three decades of neoliberal policies that have sought to privatize social welfare.[236] It teaches people that corporations and compassionate and powerful individuals will care for societal problems, presumably obviating the need for government regulation, liberal welfare policies, progressive taxation, and the like. As a result, the lure of philanthrocapitalism may further limit our imagination or political will to engage in collective, broad-based, bottom-up social transformation.

As the philanthrocapitalism model has spread, by positioning itself as *the* model for effective grantmaking, it has also influenced government-funding processes. Both local and federal governments are beginning to mirror the muscular practices of the new philanthropists. For example, in New York City, a senior policy official writes that the city government has "taken dramatic steps to . . . *demand* measurable results *from* [supported nonprofits]."[237] The language of the statement acknowledges that the state's interactions with grantee nonprofits have changed in significant ways and conveys a mindset about the relationship: that the state makes demands and

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CONFLICT 1, 2 (Elizabeth T. Boris & C. Eugene Steuerle eds., 2d ed. 2006); Jenkins, *supra* note 150, at 788–89.

[235] *See* CLAIRE GAUDIANI, THE GREATER GOOD: HOW PHILANTHROPY DRIVES THE AMERICAN ECONOMY AND CAN SAVE CAPITALISM 2 (2003); *see also* Alice M. Thomas, Re-*Envisioning the Charitable Deduction to Legislate Compassion and Civility: Reclaiming Our Collective and Individual Humanity Through Sustained Volunteerism*, 19 KAN. J.L. & PUB. POL'Y 269, 302 (2010).

[236] *See* Eduardo R.C. Capulong, *Which Side Are You On? Unionization in Social Service Nonprofits*, 9 N.Y. CITY L. REV. 373, 376 (2006); Dorothy E. Roberts, *Privatization and Punishment in the New Age of Reprogenetics*, 54 EMORY L.J. 1343, 1348 (2005).

[237] Jeanne B. Mullgrav, *Government Gets in the Game: Strategic Philanthropy Isn't Just for Foundations Anymore*, 9 N.Y. CITY L. REV. 295, 295 (2006) (emphasis added) (writing as Commissioner of the New York City Department of Youth and Community Development).

expects the nonprofits to follow. Moreover, the city government has explicitly "adopted the strategic philanthropy model of investment familiar to the corporate and foundation worlds."[238]

At the federal level, a newly created Social Innovation Fund Pilot Program (SIF) serves as an example of strategic philanthropy principles being incorporated into government-funding processes from Washington, D.C. Created by the Edward M. Kennedy Serve America Act of 2009 and administered by the Corporation for National and Community Service (CNCS),[239] the SIF supports nonprofit organizations working in underserved neighborhoods and communities on various issue areas.[240] For five years, beginning in 2010 with a $50 million allocation and through 2014 when the allocation grows to $100 million,[241] the SIF is authorized to make grants ranging from $1 million to $10 million each to intermediary organizations.[242] The intermediary grantees will then make subgrants to nonprofit organizations, in amounts not less than $100,000.[243] The program requires matching funds of two nonfederal dollars for every SIF dollar given: one dollar matched by the intermediary and one raised by the local recipient grantee of the intermediary.[244]

In many respects, several of the statutory requirements and plans to administer the SIF seem to be taken right out of the philanthrocapitalism playbook: leveraging other funders (through the matching grants ultimately turning the federal government's $50 million into $200 million), emphasizing data measurement and results-oriented outcomes, using business/philanthrocapitalism jargon (e.g., "investments," "leveraging capital," "measurable outcomes," "social entrepreneurs"), favoring replication and expansion of established programs, and preferring "hands on" engagement by the intermediary.[245] Even prior to its completion of the review of grant applications, CNCS publicly announced its intention to concentrate the SIF funding on larger grants at the high end of its discretion in the $5 to $10 million range, thus favoring a smaller number of grantees receiving larger dollar amounts;[246] the program chose to divide the

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238 *Id.*

239 42 U.S.C. § 12501 (Supp. III 2010).

240 *Id.* § 12653k(b), (f)(3).

241 *Id.* § 12681(a)(4)(E).

242 *Id.* § 12653k(e).

243 *Id.* § 12653k(j)(2).

244 *Id.* § 12653k(i), (k).

245 *See* Stephen Goldsmith, *Introducing the Social Innovation Fund*, THE WHITE HOUSE BLOG (Feb. 17, 2010, 3:00 PM), http://www.whitehouse.gov/blog/2010/02/17/introducing-social-innovation-fund (describing the goals and strategies of the Social Innovation Fund).

246 *See* Suzanne Perry, *Federal Agency Spells Out Criteria for Spending Innovation Fund*, CHRON. PHILANTHROPY, Jan. 14, 2010, at 16 (discussing the Corporation for National and

inaugural funding among just eleven recipients.[247] Taken together, these examples suggest that the reach of philanthrocapitalism principles has affected grantmaking practices far beyond the activities of just a few very large foundations, and that government is now an active participant in the new philanthropy as well.

Finally, there is concern that philanthrocapitalism and other forms of muscular philanthropy may divert attention from and participation in community-based philanthropy. The danger is that "the rich will save us" arguments may generate an apathy that undermines grassroots philanthropy, which seeks to involve communities in solving their own problems. Without the full engagement of communities and multiple parties in society working together to forge new social arrangements, our solutions are more likely to be tinkering around the edges rather than systematic reforms, which usually require greater involvement of and support from multiple constituencies. To a large extent, the contributions of nonprofits to civil society are not just valued for their achievement or end results, but also because nonprofits are organizations by and for the people, creating binding ties and relationships. In other words, in nonprofit work, the means are just as important as the ends.[248] Peter Singer has reminded us that we may applaud the generosity of Gates and Buffett, but still be uneasy with a brand of philanthropy that places the fates of so many in the hands of so few.[249] Both foundations and their nonprofit partners should not lose sight of the fact that there is no monopoly on creative public problem solving and experimentation in the social sector, and that philanthropy can only become dangerously insular and elitist if it confuses wealth with wisdom.

Community Service's plans to spend the monies that it received from the Social Innovation Fund).

[247] *See* Press Release, Corp. for Nat'l & Cmty. Serv., Inaugural Social Innovation Fund Grants Awarded to Experienced Innovators (July 22, 2010), *available at* http://www.nationalservice.gov/about/newsroom/releases_detail.asp?tbl_pr_id=1829 (describing the distribution of the agency's initial grants).

[248] *See* PUTNAM, *supra* note 234, at 336–49 (arguing that participation in voluntary groups fosters development of important civic skills); Jenkins, *supra* note 150, at 788–89 (discussing the connections between philanthropic activity, civic life, social capital, and democratic governance); *see also* Miriam Galston, *Civic Renewal and the Regulation of Nonprofits*, 13 CORNELL J.L. & PUB. POL'Y 289, 291 (2004) (same).

[249] Peter Singer, *What Should a Billionaire Give—and What Should You?*, N.Y. TIMES, Dec. 17, 2006, § 6 (Magazine), at 58.

D. Undermining Democratic Values

The goals and spirit embedded in a particular philosophy of philanthropy inevitably will shape its practices and attitudes. It is not surprising that a philanthropic system based on market principles would favor solutions grounded in competition and individualism, whereas one based on communitarian principles would emphasize solutions grounded in cooperation and collective action. The rhetoric and philosophy of philanthrocapitalism thus implicate democratic values and philanthropic values, which in turn may impact the types of projects more likely to receive funding.

Over the past decade, academics have focused their attention on the pervasive pattern of outsourcing and privatization by which core government functions are being transferred to private contractors.[250] Prominent law professors, including Laura Dickinson, Jody Freeman, and Martha Minow, have raised important questions about the commitment to democratic values, accountability, and public participation associated with this emergent form of governance through private contract.[251] Out of their work has come a push to ensure that those important public values do not become divorced from vital functions. They stress that in cases when outsourcing may be appropriate, essential democratic norms should travel with the work, regardless of the service provider. Scholars are increasingly recognizing the hybridization of public and private functions in the government and for-profit contexts.[252] Similarly, in the philanthropic setting, I argue that as private foundations take on public issues in their role as active participants in civil society governance, the way in which they conduct their activities holds the potential either to

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[250] *See* Edward Rubin, *The Possibilities and Limitations of Privatization*, 123 HARV. L. REV. 890, 890–91 (2010) (reviewing GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY (Jody Freeman & Martha Minow eds., 2009)) (noting that the debate about privatization dates back to "the 1970s, but [is now] accelerating in response to the second Bush Administration's unalloyed enthusiasm for privatization").

[251] *See generally* GOVERNMENT BY CONTRACT, *supra* note 250; MINOW, *supra* note 12; Laura A. Dickinson, *Government For Hire: Privatizing Foreign Affairs and the Problem of Accountability Under International Law*, 47 WM. & MARY L. REV. 135 (2005); Laura A. Dickinson, *Public Law Values in a Privatized World*, 31 YALE J. INT'L L. 383 (2006); Jody Freeman, *Extending Public Law Norms Through Privatization*, 116 HARV. L. REV. 1285 (2003); Martha Minow, *Outsourcing Power: How Privatizing Military Efforts Challenges Accountability, Professionalism, and Democracy*, 46 B.C. L. REV. 989 (2005); Minow, *supra* note 203.

[252] *See, e.g.*, Sharon Dolovich, *State Punishment and Private Prisons*, 55 DUKE L.J. 437 (2005) (examining private prisons); Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367 (2003) (discussing the delegation of welfare, public education, and other public functions to private entities); David A. Super, *Privatization, Policy Paralysis, and the Poor*, 96 CAL. L. REV. 393 (2008) (discussing the effects of privatization on public benefit programs).

advance or erode fundamental public values. The more ambitious philanthrocapitalists, in particular, are undertaking projects focused on addressing global poverty, education, terrorism, environmental issues,[253] and democracy,[254] all deeply associated with matters we might think of as governmental. Accordingly, their work should be critically examined to ensure that public values also travel with them as they claim the mantle of superior public issue problem solvers on behalf of society.

The largest concern is that philanthrocapitalism as a model for philanthropy may be unhealthy for democracy. Professor Evelyn Brody has acknowledged the conflicted relationship between private philanthropy and democratic values.

> Democracies feel ambivalent about private philanthropy: 'We expect rich men to be generous with their wealth and criticize them when they are not; but when they make benefaction, we question their motives, deplore the methods by which they obtained their abundance, and wonder whether their gifts will not do more harm than good.'[255]

Brody and the Filer Commission are acknowledging deep-seated concerns for democracy when rich elites make philanthropic decisions affecting large segments of the polity. This concern becomes especially meaningful if we value the work of the nonprofit sector not simply for what results it achieves (as the philanthrocapitalists so often do), but for its potential to inculcate democratic practices of self-government and serve as a mediating space between markets and government.[256] As private foundations "help[] to meet public needs[,] . . . respond[] to human problems, shap[e] the moral agenda, and express[] cultural values" through their work, they assume "a vital role in maintaining (and reforming) . . .

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[253] *See* BISHOP & GREEN, *supra* note 5, at 3 (describing the range of problems that philanthrocapitalists seek to address).

[254] *See id.* at 9 (discussing the philanthropy of George Soros).

[255] Evelyn Brody, *Institutional Dissonance in the Nonprofit Sector*, 41 VILL. L. REV. 433, 442 (1996) (quoting COMMISSION ON PRIVATE PHILANTHROPY AND PUBLIC NEEDS REPORT, better known as the Filer Commission Report, from 1975).

[256] *See* Barbara K. Bucholtz, *Reflections on the Role of Nonprofit Associations in a Representative Democracy*, 7 CORNELL J. L. & PUB. POL'Y 555, 556 (1998) ("[T]he nonprofit sector makes a significant, probably pivotal, contribution to the American form of representative democracy in at least three respects. First, the nonprofit sector teaches the skills of self-government. Second, it inculcates habits of tolerance and civility. Finally, it mediates the space between the individual and the other two sectors of society, that is, the 'public' or governmental sector and the 'private' or 'entrepreneurial' or 'proprietary' sector."); Jenkins, *supra* note 150, at 832 (noting the contributions of nonprofits to creating social capital and constructing civil society).

democra[tic society]."[257] This deep connection between philanthropy and democracy is important because changes in one sphere potentially influence the other. As philanthropic studies scholars Robert Payton and Michael Moody argue, "Democracy needs philanthropy because democracy is not simply a political phenomenon; it is a cultural one as well. Many of the values that uphold the culture of democracy are fostered not in government or in the marketplace but in philanthropy."[258] Through both the content and the process of their giving, foundations contribute to democratic governance by directing resources to selected people, ideas, and programs and by facilitating the practices of self-government with public charity partners. As grant-seeking charities compete for funding, they develop projects that engage and ultimately aggregate the individual voices, opinions and perspectives of various organizational stakeholders (i.e., staff, board members, volunteers, members, and community members served by the entity). Thus viewing philanthropy as an ally of representative democracy makes philanthrocapitalism all the more worrisome. To the extent that private foundations treat grantees as subcontractors and dominate public charities, they undercut opportunities for foundation giving to support civic participation and broad-based involvement in a dynamic and diverse civil society.

By its very terms, the philanthrocapitalism project advances the concentration of power and influence in the hands of small numbers of the wealthiest Americans: an elite set of philanthrocapitalists relying on their personal views and business experience to select social solutions for the rest of society. But if they are to "save the world," the preferences of philanthrocapitalists must match the needs and desires of the broader global society. From this perspective, the idea that the superwealthy should maintain a strong directive hand in controlling the nonprofit sector's resources and approaches to problem solving looks self-serving and suspect. For example, some of our most pressing social problems—environmental justice, human rights, healthcare, to name a few—lie in highly contested areas where people hold differing perspectives on the underlying assumptions, root causes, and solutions, divisions which often pit business interests against other social goals. Those whose careers have been steeped in business and who have deep ties to corporate America are likely to hold views colored by their experiences and interests.[259] Furthermore,

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[257] PAYTON & MOODY, *supra* note 201, at 156.

[258] *Id.* at 157.

[259] *Cf.* Dan M. Kahan & Donald Braman, *Cultural Cognition and Public Policy*, 24 YALE L. & POL'Y REV. 149 (2006) (describing effect of differing cultural worldviews on perception and policy priorities).

the social, cultural, and economic experiences of the superwealthy often are not representative of that of the broader citizenry, which may also influence their view on social problem solving. For example in 2009, in the midst of a severe U.S. economic downturn, the average income of the top five percent of all earners increased, while the remaining ninety-five percent of citizens saw a decrease in income.[260] Relying on muscular philanthropy to address these divisive problems thus threatens to paper over social conflict and to mistake the foundation's perspective for social consensus. A major tenet of democracy is that a variety of independent and representative parties should be involved for effective problem solving around transformative social problems, including poverty, justice, bigotry, international conflict, education, and ethical transparency. Such responsibility cannot be turned over to an unelected class of corporate chieftains (even well-intentioned ones) no matter how grateful we may be for their generosity.

Moreover, with its emphasis on superrich hyperagents solving social problems,[261] philanthrocapitalism amplifies the voice of those who already wield substantial influence, access, and power.[262] This reality lies in sharp contrast to the traditional role of nonprofit organizations, which have often provided a means for voices and views that might otherwise go unheard to be expressed and become part of the public conversation.[263] Instead, the philanthrocapitalism movement, with its emphasis on the funder, turns that view on its head and strengthens the voices of the powerful. Not surprisingly, philanthrocapitalists seem to fully recognize their power base and embrace the enhanced status and influence to be garnered from their muscular philanthropy. An explicit strategy of philanthrocapitalists is

[260] *See* Robert C. Lieberman, *Why the Rich Are Getting Richer: American Politics and the Second Gilded Age*, FOREIGN AFF., Jan.–Feb. 2011, at 154, 154 (reviewing JACOB S. HACKER & PAUL PIERSON, WINNER-TAKE-ALL POLITICS: HOW WASHINGTON MADE THE RICH RICHER—AND TURNED ITS BACK ON THE MIDDLE CLASS (2010)) (noting that this statistic was a continuation of a forty-year trend).

[261] *See* BISHOP & GREEN, *supra* note 5, at 255.

[262] *See id.* at 49 (noting that "increasingly entrepreneurs . . . form the power elite. . . . Being rich tends to bring other assets, such as access to other powerful people, that only increases their hyperagency.").

[263] *See* Nina J. Crimm, *Toward Facilitating a Voice for Politically Marginalized Minorities and Enhancing Presidential Public Accountability and Transparency in Foreign Health Policymaking*, 39 VAND. J. TRANSNAT'L L. 1053, 1063 (2006) (describing nonprofit organizations as "official voices of politically marginalized minorities"); Patricia Julianelle, *Using What We Know: Supporting the Education of Unaccompanied Homeless Youth*, 7 SEATTLE J. FOR SOC. JUST. 477, 522 (2009) ("Private, nonprofit organizations can play an important role . . . ensuring that the voices and wisdom of youth are part of the conversation."); Reiser, *supra* note 73, at 214 (discussing the potential of nonprofits to aggregate individual voices).

to seek the ultimate leverage of philanthropic giving by influencing government to *follow their lead* in choosing what social initiatives (both problems and preferred solutions) are worthy of support.[264] Traditionally, prominent private foundations have sought similar influence by viewing themselves as providers of seed funding or seeking to demonstrate the success of programs and initiatives that government will be inspired to expand.[265] The philanthrocapitalism movement, however, has taken these modest notions to new levels.[266]

Diane Ravitch, a prominent historian of education, writing about the new guard of philanthropists (which she calls "the Billionaire Boys Club"), states:

> We have never in the history of the United States had foundations with the wealth of the Gates Foundation and some of the other billionaire foundations—the Walton Family Foundation, The Broad Foundation. And these three foundations—Gates, Broad and Walton—are committed now to charter schools and to evaluating teachers by test scores. And that's now the policy of the U.S. Department of Education. We have *never seen anything like this*, where foundations had the ambition to direct national educational policy, and in fact are succeeding.[267]

To mention another recent example: a consortium of four family foundations controlled by philanthrocapitalists jointly informed the District of Columbia government that they would withdraw $64.5 million in funding if a named individual ceased to serve as the city's schools chancellor.[268] Although such employment provisions—often

[264] *See* BISHOP & GREEN, *supra* note 5, at 274; *see also id.* at 63 (describing Gates as "trying to leverage the foundation's money . . . by persuading governments and others to put up money to buy the drugs that result from [its] research").

[265] *See* FLEISHMAN, *supra* note 62, at 5 (describing examples of major public innovations supported by the civic sector such as the national 911 emergency-response system, the public broadcasting system, and Pell grants); NIELSEN, *supra* note 41, at 384 ("The giants of the early years . . . Rockefeller [Foundation], Carnegie [Corporation]… had sought . . . to lead the evolution of government policy in new directions.").

[266] *See* Schmit, *supra* note 165, at 6A (discussing social critic Raj Patel's unease with the fact that the Gates Foundation has so much leverage that its "agenda shapes those not only of other foundations, but governments and international development organizations" with respect to issued related to hunger in Africa).

[267] *Democracy Now!: No Child Left Behind Has Left US Schools with Legacy of "Institutionalized Fraud"* (independent radio and television broadcast Mar. 5, 2010), *available at* http://www.democracynow.org/2010/3/5/protests (emphasis added) (statement of guest Diane Ravitch, former assistant secretary of education); *see also* DIANE RAVITCH, THE DEATH AND LIFE OF THE GREAT AMERICAN SCHOOL SYSTEM: HOW TESTING AND CHOICE ARE UNDERMINING EDUCATION 195–222 (2010) (describing the role of foundations in educational philanthropy and the risks that their involvement presents to American education).

[268] *See* Bill Turque, *If Rhee Leaves, Donors Could Pull Funds*, WASH. POST, Apr. 28,

referred to as "key-man provisions" in corporate deals, which condition performance on the continued employment of certain designated personnel—may be commonplace in certain high-level business agreements, the use of this tool of the business world by nonprofit entities dealing with a local government is alien to democratic values. It is striking that the four foundations, formed by a hedge-fund manager,[269] a former hedge-fund manager,[270] a retail heir,[271] and an insurance industry entrepreneur,[272] based in locations far from D.C.,[273] have intentionally sought to use the power of their substantial giving to influence local-government personnel decisions. According to press reports at the time this provision came to light, the leading mayoral candidates—the position responsible for appointing the schools chancellor—held divergent views about whether to retain the incumbent chancellor. The foundations' actions could be viewed as a calculated attempt to either pressure the political candidates into taking a specific position on an important public-policy matter or as a veiled attempt to influence the voting public[274] likely to benefit from

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2010, at A1.

[269] *See* LAURA ~~AND~~ & JOHN ARNOLD ~~FOUNDATION~~FOUND., I.R.S. Form 990-PF (2008), http://www. guidestar.org/FinDocuments/2008/263/241/2008-263241764-0505c60c-F.pdf (founded by billionaire John Arnold, a former Enron natural gas trader, who formed Centaurus Energy, a Houston-based hedge fund, and Laura, his wife); *see also* Kaja Whitehouse, *The Kid's a Natural – Gas: Ex-Enron Trader Earns $1.5B in '08*, N.Y. POST, Mar. 29, 2009, at 33.

[270] *See* ROBERTSON ~~FOUNDATION~~FOUND., http://www.robertsonfoundation.org/index.html (last visited Feb. 7, 2011) (formed by billionaire Julian H. Robertson, Jr., the founder of Tiger Management Corp., and Josie, his wife; *see also Julian Robertson Receives Hedge Fund Industry Lifetime Achievement Award*, INSTITUTIONAL INVESTOR, Mar. 31 2010, *available at* 2010 WLNR 9351228.

[271] *See* WALTON FAMILY ~~FOUNDATION~~FOUND., http://www.waltonfamilyfoundation.org (last visited Feb. 15, 2011) (formed by Sam Walton, founder of Wal-Mart Stores, Inc. and Helen, his wife, but controlled by their descendants since their deaths); *see also* Erik W. Robelen, *Walton Family Puts Stamp on Education Landscape*, EDUC. WK., Nov. 5, 2008, at 18 (identifying Sam and Helen Walton as the founders of the Walton Family Foundation and noting that the Waltons' descendants now control the foundation).

[272] *See* BROAD FOUNDS., http://www.broadfoundation.org (last visited Feb. 7, 2011) (formed by billionaire Eli Broad, founder of SunAmerica, a financial services firm that is now a subsidiary of American International Group, Inc. (AIG), and Edythe, his wife); *see also* Steinhauer, *surpa* note ~~48~~49.

[273] The Laura and John Arnold Foundation (Houston, Texas), the Robertson Foundation (New York, New York), the Walton Family Foundation (Bentonville, Arkansas), and the Broad Foundation (Los Angeles, California).

[274] Section 501(c)(3) of the *Internal Revenue Code* prevents private foundations and public charities from "participat[ing] in, or interven[ing] in . . . any political campaign on behalf of (or in opposition to) any candidate for public office." I.R.C. § 501(c)(3) (2006). Moreover, in addition to putting the tax-exemption at risk, private foundations and their managers are subject to certain excise taxes on expenditures to influence public elections. *Id.* § 4945(a)–(b), (c)(2). This activity as described in media reports, however, would likely not rise to the level of constituting political intervention. Although the Internal Revenue Service has contended that a

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the substantial grant dollars directed to their community, a third of which had been earmarked for teacher pay raises negotiated between the union and the jurisdiction.[275] In this instance, however, the voters did not re-elect the incumbent mayor who supported the school system chancellor. As a result, the foundation-supported public official resigned and the grant dollars are at risk. Regardless of the outcome or the actual motives of the foundations, we should be concerned when private individuals use philanthropy to exert pressure on significant public matters, especially when they use private foundations, which are separate legal entities organized for public benefit. Yet many philanthrocapitalists are determining that "one of the most effective ways to leverage their money . . . is to use it to shape how political power is exercised."[276] As such, models of philanthropy and actions like this are extolled as effective and strategic grantmaking, we are likely to see increases in such troubling behavior, slowly chipping away at important democratic values.

CONCLUSION

Philanthrocapitalism is purposefully ambitious. In this Article, I argue that this emerging model has already proved itself powerful; its potential to spread and become, as its proponents envision, a "revolution"[277] makes it worthy of consideration and debate among scholars and lawyers. Calls for the increased accountability of private foundations have created a climate in which philanthrocapitalism has gained currency. Accountability "law talk," combined with the rise of the philanthrocapitalism model, has already begun to affect the ways in which philanthropy is conducted. Other foundations, even those without a billionaire benefactor, are adapting the techniques of philanthrocapitalism in an attempt to mimic the state-of-the-art practices of the "strategic" givers. Remember philanthrocapitalism

nonprofit organization may be deemed to have intervened without an explicit candidate endorsement, the prototypical cases in this area involve significantly more direct communication appeals. For a detailed description of the political campaign ban, see FRANCES R. HILL & DOUGLAS M. MANCINO, TAXATION OF EXEMPT ORGANIZATIONS ¶¶ 6.04–.05 (2002 & Supp. 2009); Lloyd Hitoshi Mayer, *Politics at the Pulpit: Tax Benefits, Substantial Burdens, and Institutional Free Exercise*, 89 B.U. L. REV. 1137, 1144–1149 (2009) (discussing the history and enforcement of the prohibition on the political activities of 501(c)(3) organizations); Donald B. Tobin, *Political Campaigning by Churches and Charities: Hazardous for 501(c)(3)s, Dangerous for Democracy*, 95 GEO. L.J. 1313, 1317, 1349–55 (2007) (describing the restrictions on 501(c)(3) organizations' political activities).

[275] *See* Turque, *supra* note 268 (describing the grants to the D.C. school system).

[276] BISHOP & GREEN, *supra* note 5, at 240.

[277] *See id.* at 259.

aims to reach beyond the small world of wealthy grantmaking foundations—ultimately it seeks to change wide swaths of nonprofit institutions (both foundations and grant-receiving public charities) and even to influence government spending and decision making.

The goal of this Article is to interject a note of caution and balance the overly optimistic views of philanthrocapitalism that have accompanied its rise. Like supporters of philanthrocapitalism, I hope that the superwealthy will continue to donate to nonprofit organizations or form private foundations. I want them, however, to do so in ways that promote strong civil society, strengthen nonprofit institutions, and respect and listen to the voices of communities in need. Results and impact are important, but so are values such as participation, empowerment, democracy, relationship building, and community building. In the end, I doubt that analogizing charitable work to that of capitalist entrepreneurs and Wall Street investors will enrich the way nonprofits are governed and the way they carry out their activities—particularly to the extent that nonprofit work disproportionately affects non-elites in society, i.e., poor, disadvantaged, and middle-class people. Instead, the growth of philanthrocapitalism threatens to erode the fragile but significant partnership that has evolved between public charities and private foundations, a partnership that respects the expertise and contributions of both entities. Muscular philanthropy reduces notions of effective grantmaking to grand-knowing and taskmastering. Such a perspective reveals a basic misperception about the way nonprofits succeed in addressing social challenges.

We should not permit our excitement about new financial resources to blind ourselves to the strings that may be attached to the new money, strings that may diminish the creative work of public charities, undermine important philanthropic values, and discourage individual donors and governments from giving. This is not a debate that lawyers and other advocates for the nonprofit sector can afford to sit out or ignore.