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The Perils of Philanthrocapitalism

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THE PERILS OF PHILANTHROCAPITALISM

ERIC FRANKLIN AMARANTE*

ABSTRACT

For over a century, philosophers, politicians, and sociologists have bemoaned philanthropy's inherent antidemocratic, paternalistic, and amateuristic aspects. The antidemocratic nature of philanthropy is self-evident: When a wealthy person determines the best way to address a societal problem without the input of either society at large or the intended beneficiaries of the philanthropy, the result is a deficit of democracy. Philanthropy's amateurism stems from the illogical belief that wealthy individuals ought to address some of the world's most complex and intransigent problems simply because they successfully amassed a fortune in the private sector. The paternalism critique focuses on the assumption that many of society's problems are born out of the personality faults of charity beneficiaries.

Because most philanthropists formed private foundations to conduct their charitable work, the regime that regulates private foundations evolved to mitigate the three aforementioned negatives: antidemocracy, paternalism, and amateurism. More specifically, the law requires private foundations to avoid political activity, spend a certain percentage of funds in a charitable manner, and submit extensive annual reports. In this manner, the legal regime struck a palatable balance between philanthropy's inherent negative aspects and philanthropy's obvious positives.

However, the recent trend of philanthropists conducting charity through for-profit vehicles, such as limited liability companies ("LLCs"), effectively bypasses the restrictions placed upon private foundations. This Article will discuss each of the traditional critiques of philanthropy and explore how they are exacerbated when philanthropic efforts are shifted to LLCs. Ultimately, this Article

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* Assistant Professor of Law, University of Tennessee. A number of people have offered helpful comments and observations concerning this Article, but I would like to highlight the insights of Martha McCluskey, Dana Brakman Reiser, Lloyd Hitoshi Mayer, Paul Tremblay, Alicia Plerhoples, Lydia Nussbaum, Joan MacLeod Heminway, Mohsen Manesh, Patience Crowder, Lynnise Pantin, Bernice Grant, and Michael Higdon.

will argue that philanthropy conducted through LLCs will undoubtedly be less democratic, more amateuristic, and more paternalistic than philanthropy conducted through private foundations. This Article will conclude with some thoughts concerning several potential solutions to the problem, including the adjustment of incentives for private foundations and LLCs, imposing a regulatory regime over philanthropic activity, extending existing licensing regimes to apply to certain philanthropic activity, and the potential of a social license to conduct philanthropy.

INTRODUCTION

On December 1, 2015, in a Facebook post celebrating the birth of their daughter, Mark Zuckerberg and Dr. Priscilla Chan announced a pledge of Facebook stock worth \$45 billion to the Chan Zuckerberg Initiative (“CZI”), a new entity dedicated to “personalized learning, curing disease, connecting people[,] and building strong communities.”¹ In making this pledge, they followed in the footsteps of other tech billionaires, such as Laurene Powell Jobs² and Pierre Omidyar,³ who dedicated significant portions of their fortunes to charitable activity. However, many of these announcements were met with more skepticism than praise. Chan and Zuckerberg’s announcement, for example, drew accusations that the pledge was merely a tax-avoidance scheme⁴ and that it amounted to nothing more than the couple donating money to themselves.⁵

1. Mark Zuckerberg, *A Letter to Our Daughter*, FACEBOOK (Dec. 1, 2015), <https://www.facebook.com/notes/mark-zuckerberg/a-letter-to-our-daughter/10153375081581634> (“We will give 99% of our Facebook shares—currently about \$45 billion—during our lives to advance this mission.”).

2. Laurene Powell Jobs, widow of Steve Jobs, founded and leads the Emerson Collective. #20 *Laurene Powell Jobs & Family*, FORBES, <https://www.forbes.com/profile/laurene-powell-jobs/> (last updated Nov. 7, 2018). The Emerson Collective is “an organization dedicated to removing barriers to opportunity so people can live to their full potential.” *Our Mission*, EMERSON COLLECTIVE, www.emersoncollective.com/about-us (last visited Sept. 17, 2018).

3. Pierre Omidyar, the founder of eBay, runs the Omidyar Network, a “philanthropic investment firm” driven by the belief that “if we invest in people, through opportunity, they will create positive returns for themselves, their families, and the world at large.” *Who We Are*, OMIDYAR NETWORK, www.omidyar.com/who-we-are (last visited Sept. 13, 2018).

4. Mahita Gajanan, *Mark Zuckerberg Defends Philanthropic Venture Against Tax Avoidance Claims*, GUARDIAN (Dec. 4, 2015), <https://www.theguardian.com/technology/2015/dec/05/mark-zuckerberg-defends-philanthropic-venture-tax-avoidance-claims> (“Critics have said the company structure could allow Zuckerberg to avoid paying tax on his sale of the shares. By donating stock, Zuckerberg gets a charitable contribution deduction based on the fair market value of the shares, according to Forbes.”).

5. Jeremy C. Owens, *Zuckerberg Answers Critics with Details on LLC*, MARKETWATCH (Dec. 3, 2015, 6:14 PM), <https://www.marketwatch.com/story/zuckerberg-answers-critics-with-details-on-llc-2015-12-03> (noting that “Zuckerberg . . . responded to several commenters . . . [including] one Facebook user who wrote, ‘So you’ll donate money to yourself’”).

At first blush, this negative response is surprising. The couple promised to dedicate their considerable financial resources to charity;⁶ what could possibly be objectionable about a wealthy couple dedicating their fortune to the greater good?

The crux of the discomfort lies in the couple's decision to organize the CZI as a for-profit LLC, rather than as a more traditional tax-exempt private foundation.⁷ Although philanthropists increasingly use novel and innovative means of engaging in charity,⁸ philanthropy is traditionally conducted through private foundations because of the entity's generous tax savings.⁹ In fact, until recently, the working assumption was that a rational wealthy person would choose the private foundation over other options precisely for the attendant tax benefits.¹⁰

Despite the potential tax savings, Chan and Zuckerberg decided to eschew the private foundation form and instead establish the CZI as a for-profit vehicle. Perhaps anticipating the criticism this decision might inspire, Zuckerberg defended the decision by pointing to the limitations of the private foundation form,¹¹ highlighting the LLC's ability to not only fund nonprofit

6. See Zuckerberg, *supra* note 1 (explaining that the CZI hopes to make investments designed to "eliminate poverty and hunger," "provide everyone with basic healthcare," "build inclusive and welcoming communities," "nurture peaceful and understanding relationships between people of all nations," and "truly empower everyone—women, children, underrepresented minorities, immigrants and the unconnected").

7. Natasha Singer & Mike Issac, *Mark Zuckerberg's Philanthropy Uses L.L.C. for More Control*, N.Y. TIMES (Dec. 2, 2015), www.nytimes.com/2015/12/03/technology/zuckerbergs-philanthropy-uses-llc-for-more-control.html.

8. See Stephanie Strom, *What's Wrong With Profit?*, N.Y. TIMES (Nov. 13, 2006), <https://www.nytimes.com/2006/11/13/us/13strom.html> ("This year, as never before, the line between philanthropy and business is blurring. A new generation of philanthropists has stepped forward, for the most part young billionaires who have reaped the benefits of capitalism and believe that it can be applied in the service of charity. They are 'philanthropreneurs,' driven to do good and have their profit, too."). For example, the Omidyar Network is a joint effort between a tax-exempt entity (sometimes referred to as charitable organizations or 501(c)(3)s) and an LLC. See *Financials*, OMIDYAR NETWORK, <https://www.omidyar.com/financials> (last visited May 19, 2018). A 501(c)(3) organization is a nonprofit entity that has obtained tax-exempt status from the Internal Revenue Service ("IRS") by proving that it is organized and operated for a charitable purpose. Generally speaking, donations to 501(c)(3) organizations are tax-deductible. See *Exemption Requirements - 501(c)(3) Organizations*, I.R.S. <https://www.irs.gov/charities-non-profits/charitable-organizations/exemption-requirements-section-501c3-organizations> (last updated Dec. 28, 2017). The Emerson Collective is formed as an LLC. See *Privacy Policy*, EMERSON COLLECTIVE, <http://www.emersoncollective.com/privacy-policy> (last visited May 19, 2018).

9. This Article will discuss the private foundation form and the form's tax benefits in more detail. See *infra* notes 320–324 and accompanying text.

10. Robert Frank, *Mark Zuckerberg's Unusual Method of Charitable Giving*, CNBC: INSIDE WEALTH (Dec. 2, 2015, 9:44 AM), www.cnbc.com/2015/12/02/mark-zuckerbergs-unusual-method-of-charitable-giving.html ("When most billionaires give money to charity, they create a foundation or give directly to a not-for-profit company or charitable trust.").

11. See *supra* note 4 and accompanying text.

organizations (the traditional recipients of private foundation grants),¹² but also to make investments in private enterprises.¹³ Zuckerberg emphasized the “flexibility” of an LLC, arguing it will help the founders “execute [the CZI’s] mission more effectively” by allowing the CZI “to give to the organizations that will do the best work—regardless of how they’re structured.”¹⁴ Further, Zuckerberg expressed some concern over the political limitations of private foundations by noting, “We must participate in policy and advocacy to shape debates” to “advance human potential and promote equality.”¹⁵ The CZI might, for example, lobby for more permissive state laws governing charter schools or advocate for more federal spending on public health.¹⁶ Zuckerberg feared that the private foundation rules against lobbying and political activity would limit the CZI’s effectiveness in such debates.

Such concerns have merit. Generally speaking, philanthropists who start private foundations sacrifice some flexibility to enjoy the form’s tax benefits.¹⁷ Although Zuckerberg’s stated justifications for choosing an LLC might undersell the flexibility of private foundations,¹⁸ he is certainly correct that private foundations are virtually prohibited from engaging in policy debates through either lobbying or political activity.¹⁹ In stark contrast to private foundations, LLCs have absolutely no limitation on the investments they may make or the amount of lobbying activities in which they might engage. And, while private foundations enjoy considerable tax benefits, LLCs do not.²⁰ Thus, it appears that Chan and Zuckerberg valued the ability of LLCs

12. See BRUCE R. HOPKINS, *THE LAW OF TAX-EXEMPT ORGANIZATIONS* 25–27 (10th ed. 2011); see also *supra* note 7 and accompanying text.

13. See Mark Zuckerberg, FACEBOOK (Dec. 3, 2015), www.facebook.com/zuck/posts/10102507695055801 (“[Structuring the CZI as an LLC] enables us to pursue our mission by funding non-profit organizations, making private investments and participating in policy debates . . .”).

14. *Id.*

15. Zuckerberg, *supra* note 1; see Zuckerberg, *supra* note 13.

16. Zuckerberg, *supra* note 1; see Zuckerberg, *supra* note 13.

17. This Article will discuss the private foundation form and the form’s tax benefits in more detail. See *infra* notes 320–324 and accompanying text.

18. For example, despite Zuckerberg’s implication otherwise, private foundations may make investments in private enterprises in the form of program related investments. This Article will discuss program related investments in more detail. See *infra* notes 292–303 and accompanying text.

19. Although private foundations are technically permitted to engage in lobbying activities, the excise tax on lobbying efforts “is so significant that it generally acts as a lobbying prohibition.” See *Lobbying Activity of Section 501(c)(3) Private Foundations*, I.R.S., <https://www.irs.gov/charities-non-profits/private-foundations/lobbying-activity-of-section-501c3-private-foundations> (last updated Apr. 3, 2018).

20. But see Dana Brakman Reiser, *Disruptive Philanthropy: Zuckerberg, the Limited Liability Company, and the Millionaire Next Door* 26 (Brooklyn Law Sch., Legal Studies Research Paper No. 536, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3049021 (arguing that the tax benefits of private foundations might be overstated in this context).

to engage in political discussions and influence policy much more than the potential tax savings of a private foundation.

This inquiry begs the question: Why should we care how Chan and Zuckerberg engage in philanthropic activity? The couple decided to forgo tax savings in the interest of flexibility; so what? The \$45 billion is, after all, *their* money. Does the public have any legitimate interest in how they spend it?²¹ If the couple decided the tax savings were not attractive enough to justify the extra administrative and regulatory burden associated with a private foundation, why should the public care?

The reason the public does (and should very much) care is that Chan and Zuckerberg's decision presents troubling questions about the role of philanthropy in our society and the consequences of philanthropists using for-profit vehicles to engage in charitable work.

The traditional critiques of philanthropy, broadly summarized, are that philanthropy is antidemocratic by definition, paternalistic by tradition, and amateuristic by design.²² The antidemocratic nature of philanthropy is self-evident: When a wealthy person determines the best way to address a societal problem without the input of either society at large or the philanthropist's beneficiaries, the result is a deficit of democracy.²³ The paternalism critique focuses on the assumption that many of society's problems are born out of the personality faults of charity beneficiaries.²⁴ This type of thinking leads one to believe a person is not poor due to, for example, America's informal

21. MEGAN E. TOMPKINS-STANGE, *POLICY PATRONS: PHILANTHROPY, EDUCATION REFORM, AND THE POLITICS OF INFLUENCE* 140 (2016) (noting that some supporters of private foundation work "rejected the suggestion that foundations should be more democratically operated or inclusive of the public, citing a distinctively American value: the rights of individuals to exercise their personal private property according to their legally protected preferences," and that any regulations "will be fought like crazy because it will be seen as an unwarranted intervention by the feds and [people will say], 'It's my money and I do what I want with it'" (alteration in original)).

22. Lester Salamon, *Of Market Failure, Voluntary Failure, and Third-Party Government: Toward a Theory of Government-Nonprofit Relations in the Modern Welfare State*, 16 *NONPROFIT & VOLUNTARY SECTOR* Q. 29, 39–42 (1987). Salamon describes four "voluntary failures" of philanthropy: "philanthropic insufficiency" (pointing out "[o]nly when contributions are made involuntary, as they are through taxation, are they therefore likely to be sufficient and consistent"), "philanthropic particularism" (noting "the tendency of voluntary organizations and the benefactors to focus on particular subgroups of the population"), "philanthropic paternalism" ("the voluntary system . . . vests most of the influence over the definition of community needs in the hands of those in command of the greatest resources"), and "philanthropic amateurism." *Id.*

23. *See infra* Section II.A.

24. *See infra* Section II.B.

caste system,²⁵ but rather because the person is lazy or lacks imagination.²⁶ Finally, philanthropy's amateurism stems from the illogical belief that wealthy individuals are equipped to address some of the world's most complex and intransigent problems simply because they successfully amassed a fortune in the private sector.²⁷

To date, the only answer to these critiques is the regulatory regime that governs the traditional vehicle for philanthropic activity: the private foundation. Private foundations are, for example, prohibited from engaging in political activity. In this manner, the wealth invested in private foundations cannot be used to influence democratic institutions, resulting in some protection against the antidemocratic aspects of philanthropy.²⁸ Further, private foundations must engage in a minimum amount of charitable spending, so the general public has some assurance that the tax benefits bestowed will result in some charitable activity. This requirement protects against both the antidemocratic and paternalistic aspects of philanthropy.²⁹ Finally, private foundations are required to provide extensive disclosures,³⁰ which protects against both the antidemocratic and paternalistic tendencies of philanthropists.³¹

This Article will argue that the legal regime governing private foundations has struck a palatable balance between philanthropy's inherent negative consequences and philanthropy's obviously positive aspects. In other words, the public is willing to suffer limited amounts of antidemocracy, paternalism, and amateurism in exchange for the positive aspects of philanthropy. However, the recent trend of philanthropists using for-profit vehicles to conduct charity effectively bypasses the regime's restrictions, leaving philanthropists free to indulge in their worst instincts. Without the protections of the private foundation regime, the CZI may use its considerable financial leverage to sway elections, dictate how American children are educated, and unilaterally determine the priority of public health initiatives, all behind the LLC's shroud

25. Subramanian Shankar, *Does America Have a Caste System?*, SALON (Jan. 27, 2018, 6:30 PM), https://www.salon.com/2018/01/27/does-america-have-a-caste-system_partner/ ("At bottom, caste's most defining feature is its ability to render inevitable a rigid and pervasive hierarchical system of inclusion and exclusion. What working-class Americans and people of color have viscerally recognized, in my experience, is that casteist ideologies—theories that produce a social hierarchy and then freeze it for time immemorial—also permeate their world.").

26. Maia Szalavitz, *Why Do We Think Poor People Are Poor Because of Their Own Bad Choices?*, GUARDIAN (July 5, 2017), <https://www.theguardian.com/us-news/2017/jul/05/us-inequality-poor-people-bad-choices-wealthy-bias> ("Among the wealthy, those biases allow society's winners to believe that they got where they are by hard work alone and so they deserve what they have—while seeing those who didn't make it as having failed due to lack of grit and merit.").

27. See *infra* Section II.C.

28. See *infra* Section III.C (discussing prohibition against political activity and the limitation on lobbying).

29. See *infra* Section III.B (discussing mandatory payout rules).

30. See *infra* Section III.D.1 (discussing Form 990PF).

31. See *infra* Section III.D.

of secrecy and lack of disclosure.³² Although scholars have discussed the benefits of using for-profit vehicles to engage in philanthropy,³³ and several have discussed the tax treatment of this practice,³⁴ few legal scholars have addressed the negative social consequences of such decisions³⁵ or proposed possible solutions to this emerging problem.

This Article will discuss each of the traditional critiques of philanthropy and explore how they are exacerbated when philanthropic efforts are conducted through for-profit vehicles. Part I of this Article will outline recent trends in American philanthropy, including a brief exploration of the distinctly American practice of relying upon our wealthiest individuals to provide basic social needs and the rise of “philanthrocapitalism,” a term that describes the belief that business philosophies will improve the effectiveness of traditional philanthropy.³⁶ Part II will set forth the traditional critiques of philanthropy, discussing the antidemocratic, paternalistic, and amateuristic aspects of traditional philanthropy. Part III will explore why many philanthropists are drawn to use LLCs rather than the more traditional private foundation, ultimately arguing that they are attracted to the relative lack of regulation, scrutiny, and oversight of LLCs, which exacerbate the antidemocratic, paternalistic, and amateuristic aspects of philanthropy. Part IV will detail some potential solutions to the problems, including an adjustment of incentives for both private foundations and LLCs, a regulatory regime over philanthropic activity, a licensing regime for certain philanthropic activity, and

32. See, e.g., Steve Reilly & Trevor Hughes, *Tiny Wyoming Office at Heart of Panama Papers Empire*, USA TODAY (Apr. 7, 2016), <https://www.usatoday.com/story/news/2016/04/06/panama-papers-why-wyoming-hub-for-shell-companies/82697186/> (reporting that M.F. Corporate Services Wyoming LLC, an entity associated with the Panama Papers scandal, “helped register more than a dozen other [LLCs] in [Wyoming] behind the cloak of Wyoming’s corporate secrecy protections”).

33. See Brakman Reiser, *supra* note 20, at 4 (“For-profit vehicles for philanthropy, and particularly the philanthropy LLC model, provide founders substantial operational flexibility. . . . [A]n LLC is free to combine traditional grantmaking with strategic investments and political advocacy.”); Dana Brakman Reiser, *For-Profit Philanthropy*, 77 FORDHAM L. REV. 2437, 2452 (2009) [hereinafter Brakman Reiser, *For-Profit Philanthropy*] (discussing the advantages of Google’s for-profit philanthropic entity).

34. See, e.g., Ellen P. Aprill, *Section 501(c)(3) Organizations, Single Member Limited Liability Companies, and Fiduciary Duties*, 52 A.B.A. REAL PROP., TR. & EST. J. 153, 190–92 (2017).

35. *But see* Brakman Reiser, *supra* note 20, at 43 (noting that using LLCs for philanthropy “magnif[ies] the most negative aspect of traditional nonprofit giving: essentially, that it is elitist”); Garry W. Jenkins, *Who’s Afraid of Philanthrocapitalism*, 61 CASE W. RES. L. REV. 753, 786–87 (2011). However, Professor Dana Brakman Reiser largely limits her discussion of the negatives of for-profit philanthropy to a section toward the end of the article, and Professor Garry Jenkins focuses primarily on philanthrocapitalism’s fondness for business techniques, not the use of for-profit vehicles to engage in charitable activity.

36. “Philanthrocapitalism” is a term with an evolving meaning. Many credit Michael Green and Matthew Bishop’s *Philanthrocapitalism: How Giving Can Save the World* with coining this term. MATTHEW BISHOP & MICHAEL GREEN, PHILANTHROCAPITALISM: HOW GIVING CAN SAVE THE WORLD (2008). However, the term appeared a few years earlier in an article in *The Economist*. See *The Birth of Philanthrocapitalism*, ECONOMIST (Feb. 23, 2006), <https://www.economist.com/special-report/2006/02/23/the-birth-of-philanthrocapitalism>.

the potential for a social license to engage in philanthropy. Part V will conclude.

I. THE RISE OF THE PHILANTHROCAPITALIST

A. *Traditional Philanthropy*

The wealthy elite of the early twentieth century—a group that includes Andrew Carnegie,³⁷ John Rockefeller,³⁸ and Edsel Ford, the son of Henry Ford³⁹—created foundations that funded charitable activities across the globe since the early 1900s. The philanthropic ideologies of these fathers⁴⁰ of modern American philanthropy represent the traditional approach to charitable activity that, until recently, characterized the consensus philanthropic approach in the United States. More to the point, much of traditional philanthropic behavior is relatively passive.⁴¹ Rather than instructing grantees on precisely how to spend a particular donation, the traditional philanthropist donates money and allows recipients latitude to determine how to spend the donation.⁴² For example, if a traditional philanthropist were concerned about child malnutrition, they might simply give money to an organization that provides food to hungry children. The traditional philanthropist would not, for example, dictate to the recipient organization what type of food to provide,

37. *Foundation History*, CARNEGIE FOUND. FOR THE ADVANCEMENT OF TEACHING, <https://www.carnegiefoundation.org/who-we-are/foundation-history/> (last visited May 4, 2018).

38. *Our History*, ROCKEFELLER FOUND., <https://www.rockefellerfoundation.org/about-us/our-history/> (last visited May 4, 2018).

39. *Our Origins*, FORD FOUND., <https://www.fordfoundation.org/about-us/our-origins/> (last visited May 4, 2018).

40. The gendered term is very much intentional, as the traditional philanthropists of the Gilded Age were almost exclusively men. There were, however, a number of very active female heirs of these men, including Brooke Astor, Abby Aldrich Rockefeller, Jane Lathrop Stanford, and Gertrude Vanderbilt Whitney. Jill Silos-Rooney, *Gilded Age Wives Set Philanthropy's Gold Standard*, PHILANTHROPY WOMEN (Sept. 12, 2017), <https://philanthropywomen.org/feminist-foundations/gilded-age-wives-set-philanthropys-gold-standard/>.

41. It is important to note that even these venerated institutions are not completely immune from the allure of philanthrocapitalism. See, e.g., Jon Pratt & Ruth McCambridge, *The Ford Foundation's Bold Move: A Cool \$1B from Endowment for Mission-Related Investments*, NONPROFIT Q. (Apr. 5, 2017), <https://nonprofitquarterly.org/2017/04/05/ford-foundation-endowment-mission-philanthropy/> (noting the Ford Foundation's recent expansion of its program-related investment activity).

42. See Jenkins, *supra* note 35, at 758–59 (noting that philanthrocapitalism's “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. 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 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.”).

which children to feed, and how often to provide food. The traditional philanthropist simply provides money to a charitable organization and trusts it will spend the money well.⁴³ This traditional approach is losing favor to a new approach: philanthrocapitalism.

B. *“Philanthrocapitalism: How the Rich Can Save the World and Why We Should Let Them”*⁴⁴

In stark contrast to the traditional model of philanthropy, modern philanthropists have shown interest in a more active role, applying business philosophies to their charitable efforts in the hope of increasing the efficiency or effectiveness of their philanthropic activity. This general trend is known as philanthrocapitalism.⁴⁵ The conceit of philanthrocapitalism is that the entrepreneurial spirit and successful business strategies of the for-profit world might be used to make philanthropy more effective and efficient.⁴⁶ Unlike the traditional philanthropist, the posture of the philanthrocapitalist is one of hands-on proactivity.⁴⁷ According to Professor Janie Chuang, “Unlike the old breed of philanthropist who, in considering which proposals to fund, weighed various stories told by others to determine which vision to fund, [the philanthrocapitalist] *is* the storyteller.”⁴⁸ In increasingly novel ways, philanthrocapitalists dictate the narrative and demand more involvement in the decisions of how and where to spend philanthropic dollars.⁴⁹

Philanthrocapitalism, in various forms, is quite popular and is rapidly overtaking traditional philanthropy as the preferred method of charitable intervention.⁵⁰ While the definition of philanthrocapitalism continues to

43. This trust, of course, has its limits, as many private foundations require extensive reporting from their grantees to track how the money is spent. Jessica Bearman & Elizabeth Myrick, *Time to Revisit Reporting*, CTR. FOR EFFECTIVE PHILANTHROPY (Sept. 29, 2017), <https://cep.org/time-revisit-reporting/>.

44. This was the original title of Michael Green and Matthew Bishop’s book about philanthrocapitalism. Later editions of the book changed the subtitle to “How Giving Can Save the World.” Compare BISHOP & GREEN, *supra* note 36, with MATTHEW BISHOP & MICHAEL GREEN, PHILANTHROCAPITALISM: HOW THE RICH CAN SAVE THE WORLD AND WHY WE SHOULD LET THEM (2008).

45. *See id.*

46. *See id.*

47. *See The Birth of Philanthrocapitalism*, *supra* note 36 (describing the new “hands-on” philanthropic approach as “venture philanthropy”).

48. Janie A. Chuang, *Giving as Governance? Philanthrocapitalism and Modern-Day Slavery Abolitionism*, 62 UCLA L. REV. 1516, 1526 (2015).

49. According to philanthrocapitalist cheerleaders, this is because these philanthropists cannot shake their entrepreneurial essence. *See FAQ*, PHILANTHROCAPITALISM, <http://philanthrocapitalism.net/about/faq/> (last visited May 4, 2018) (“Entrepreneurs are . . . by nature, problem-solvers and relish the challenge of taking on tough issues: [F]or Bill Gates, it is malaria and other infectious diseases, for George Soros it is political change.”).

50. *See infra* notes 51–54 and accompanying text. Professor Brakman Reiser may have predicted this trend when she noted, “Blending philanthropy and business has long been in fashion and entities have pursued it in a variety of ways. In fact, calls for capitalism to spearhead solutions to

evolve, one might confidently use it to refer to both the application of for-profit business strategies to charitable giving and the use of for-profit vehicles, such as LLCs, to engage in charity.

With respect to the latter category of philanthrocapitalism, Chan and Zuckerberg's decision to use an LLC to conduct philanthropy is only the latest incarnation of this practice. For example, Pierre Omidyar, the founder of eBay, operates his philanthropic endeavor, the Omidyar Network, through both a 501(c)(3) nonprofit organization and an LLC.⁵¹ Of the \$1.1 billion committed to the Omidyar Network, about \$581 million was granted to nonprofits and \$523 million was invested in for-profit endeavors.⁵² Tony Hsieh, the founder of Zappos, invested \$350 million in an LLC to transform downtown Las Vegas into "a place of [i]nspiration, [e]ntrepreneurial [e]nergy, [c]reativity, [i]nnovation, [u]pward [m]obility, and [d]iscovery."⁵³ Laurene Powell Jobs formed the Emerson Collective, an entity dedicated to supporting "education, immigration reform, the environment, health, and other social justice initiatives," as an LLC.⁵⁴ Thus, the CZI joins a rapidly growing family of for-profit vehicles engaging in activity that, until recently, was largely limited to private foundations.

C. *Philanthropy's Unique Role in the United States*

The trend of conducting philanthropic efforts through for-profit entities is particularly concerning in the United States because of the extent to which this country relies upon private philanthropists to provide general social welfare. This is very different from how philanthropy is conducted—and how social welfare is provided—in other countries. While most developed countries rely upon their government for matters of general social welfare, the United States depends upon the private market to provide a large portion of basic services. In contrast to Europe, where countries "devote 25[%] or more of their [gross domestic product ("GDP")] to government-funded social welfare activities," the United States dedicates only 16% of its GDP to such activities.⁵⁵ Further, countries in the Organization for Economic Cooperation

society's greatest problems are mounting all the time." Brakman Reiser, *For-Profit Philanthropy*, *supra* note 33, at 2452.

51. See OMIDYAR NETWORK, BUILDING A PHILANTHROPIC INVESTMENT FIRM 3 (n.d.), https://www.omidyar.com/sites/default/files/file_archive/Omidyar%20Network%20Approach.pdf.

52. *Id.*

53. See *Mission*, DOWNTOWN PROJECT, <https://downtownproject.com/mission/> (last visited May 4, 2018). The philanthrocapitalist roots of this project might be most evident in the fact that Hsieh was forced to emphasize that his project was "not a charity" and would not endeavor to "solve every single problem that exists [in the] city." Joe Schoenmann, *Joe Downtown: Hsieh Says Downtown Project Not a Charity, Can't Solve Every Community Problem*, VEGAS INC (Feb. 7, 2014, 2:00 AM), <https://vegasincl.asvegassun.com/business/2014/feb/07/joe-downtown-hsieh-says-downtown-project-not-chari/>.

54. *Our Mission*, *supra* note 2.

55. LESTER M. SALAMON, AMERICA'S NONPROFIT SECTOR: A PRIMER 72 (3d ed. 2012).

and Development (“OECD”) spend an average of about 20.5% of their GDP on social welfare spending, or about 4.5% more than the United States.⁵⁶

If the lag in public spending on social welfare (as compared to other countries) is made up by philanthropy, that might explain why the United States is viewed as the world leader in terms of individual philanthropic giving.⁵⁷ Indeed, it is often stated that Americans are some of the most generous people on Earth.⁵⁸ This claim, although questionable,⁵⁹ is based on the amount of money Americans donate to charitable causes, which represents a “significantly higher rate of private charitable giving as a share of GDP than most other developed countries.”⁶⁰

The generosity of Americans is impressive, with roots in the distinctively American notions of individuality and self-sufficiency that date as far back as the founding of the country, when Alexis de Tocqueville noted the peculiarly American penchant for creating private associations to address public issues.⁶¹ Noting that he “admired the infinite art with which the inhabitants of the United States managed to fix a common goal to the efforts of many men and to get them to advance to it freely,” de Tocqueville concluded that “[t]he health of a democratic society may be measured by the quality of functions performed by private citizens.”⁶²

The American proclivity for private associations is certainly admirable, but one wonders if it is practical. The combination of this “deep-seated tradition of individualism” with another peculiar American tradition, the “ingrained hostility to centralized institutions,” results in a predictable distaste for government spending on public welfare.⁶³ This aversion has persisted throughout American history,⁶⁴ perhaps cresting with President Ronald Reagan’s observation that “we’ve let government take away many things we

56. *Id.* at 73.

57. *Id.*

58. See Jeff Jacoby, *The Extraordinary Generosity of Ordinary Americans*, BOSTON GLOBE (Jan. 28, 2016), <https://www.bostonglobe.com/opinion/editorials/2016/01/28/the-extraordinary-generosity-ordinary-americans/sSYhKTwl2mJxSZp8PN7csM/story.html> (“The scope of American philanthropy is unparalleled anywhere on Earth. In 2014, Americans gave nearly \$360 billion to charity, the highest total ever recorded.”).

59. The Charities Aid Foundation’s *World Giving Index 2016* ranks Myanmar first, with “more than nine in ten people in Myanmar donat[ing] money in the month prior to interview,” with the United States coming in second. CHARITIES AID FOUND., CAF WORLD GIVING INDEX 2016: THE WORLD’S LEADING STUDY OF GENEROSITY 5, 8 (2016), https://www.cafonline.org/docs/default-source/about-us-publications/1950a_wgi_2016_report_web_v2_241016.pdf.

60. SALAMON, *supra* note 55, at 73.

61. See Rob Atkinson, *Tax Favors for Philanthropy: Should Our Republic Underwrite de Tocqueville’s Democracy?*, 6 WM. & MARY POL’Y REV. 1, 88 (2014).

62. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 489 (Univ. of Chi. Press 2000) (1835).

63. SALAMON, *supra* note 55, at 1.

64. *Id.* at 1–2.

once considered were really ours to do voluntarily.”⁶⁵ In this spirit, for better or worse, the United States “resisted the worldwide movement toward predominantly governmental approaches to social welfare provision, adding new governmental protections only with great reluctance and then structuring them in ways that preserve a substantial private role.”⁶⁶

Defenders of the status quo might suggest that we have struck a workable, if imperfect, balance between government-provided welfare and private philanthropy. The American people prefer those more well-off to provide a social safety net. However, this preference only makes sense if the amount of charitable giving is sufficient to meet public needs. Unfortunately, American charitable giving does not make up for the difference in governmental spending compared to other countries. As noted by Dr. Lester Salamon, private charitable giving in the United States “amounts to only 0.7 to 1.8[%] of GDP.”⁶⁷ Given that the United States, in terms of government social welfare spending as a percent of GDP, trails most European countries by 9%⁶⁸ and OECD countries by 4.5%,⁶⁹ the generosity of Americans comes up short with respect to comparable countries.

Critics of a government-run welfare system point out that America’s diverse populace makes democracy an inept tool to find agreement on how to address a particular societal ill.⁷⁰ That is, “religious, ethnic, [and] racial diversity make[] it difficult for citizens to come to agreement on the range of collective goods they want, thus making it impossible to generate the majority support needed to trigger a governmental response in a democracy.”⁷¹ As explained by Rob Reich:

[S]tandard models of political behavior in a democracy predict that politicians will fund the public goods preferred by majorities at a level that satisfies the median voter. Public good production by the state is subject to a so-called majoritarian constraint and limited by preference of the median voter, who sits in the middle of the political spectrum. Public goods preferred only by a minority . . . democratically elected politicians will not support.⁷²

65. Address to the Nation on the Program for Economic Recovery, 1 PUB. PAPERS 836 (Sept. 24, 1981).

66. SALAMON, *supra* note 55, at 1–2.

67. *Id.* at 73. Estimates differ, but at least one study suggests that the United States would need to provide private giving of at least 5.4% to 13.3% of GDP to bridge the gap between U.S. governmental spending on public welfare and the spending of other developed countries. *Id.*

68. *Id.* at 72.

69. *Id.* at 72, 73.

70. See TOMPKINS-STANGE, *supra* note 21, at 130 (“[E]ven in a well-functioning democracy, the state is constrained by the median voter and often fails to serve minority preferences that fall outside of majority interests.”).

71. SALAMON, *supra* note 55, at 18.

72. PHILANTHROPY IN DEMOCRATIC SOCIETIES 74 (Rob Reich et al. eds., 2016).

To the extent the critics are correct, any social welfare program blessed by the majority of Americans might overlook the specific needs of minority populations.⁷³ Thus, even in the face of a funding shortfall, some might justifiably argue that our democratic society demands a robust private role in the provision of social welfare.⁷⁴

The problem with this argument, as set out in Part II, is that any social welfare regime that lacks democracy, similar to the current American philanthropic regime, will bring unintended consequences and aggravate other inherent negatives of philanthropy. As Part II illustrates, the antidemocratic nature of philanthropy exacerbates both the paternalistic nature of philanthropy and the amateuristic impulses of philanthropists. The result of this mixture threatens to undermine the good intentions of philanthropists and calls into question any undue reliance upon philanthropy to provide effective social welfare.

II. CRITIQUING PHILANTHROPY: HATING APPLE PIE AND KICKING PUPPIES

There is a long-held and healthy suspicion of philanthropy in America. Many critiques suggest the philanthropic largesse of the wealthy is, counter-intuitively, driven by selfishness. For example, some charge that philanthropy is simply a way for the wealthy to mollify the less fortunate.⁷⁵ As noted by Professor Deborah Weissman, the apparent generosity of a wealthy person engaging in philanthropy is actually a self-serving attempt to maintain power and wealth.⁷⁶ Weissman argued that philanthropy is simply “a means to blunt the protests of the poor and to deter efforts to seek redistribution of wealth and power.”⁷⁷ Thus, philanthropy’s veneer of altruism cloaks the wealthy’s true intent: to maintain status quo. Elaborating on this argument, Weissman noted:

Private philanthropy is a poor alternative to progressive taxation schemes and redistributive transfer payments. Philanthropy celebrates the virtues of private giving as altruistic and patriotic, even as it acts to foreclose taxation and the development of adequate public policies which would establish humanitarian relief based on a firm set of institutional principles.⁷⁸

73. *Id.*

74. SALAMON, *supra* note 55, at 18 (charitable “organizations allow groups of individuals to pool their resources voluntarily to produce collective goods they mutually desire or find it important to provide but cannot convince a sufficient majority of their countrymen, or those in positions of power, to support”).

75. Deborah M. Weissman, *Law as Largess: Shifting Paradigms of Law for the Poor*, 44 WM. & MARY L. REV. 737, 803 (2002).

76. *Id.* at 804. This phenomenon, Weissman noted, “has been chronicled by both scholars and ethicists.” *Id.*

77. *Id.*

78. *Id.* at 805.

According to this argument, philanthropy's very existence relies upon a system of taxation and wealth distribution that rewards the wealthy and fails to provide funds necessary for an adequate social welfare system. Under this view, philanthropy is nothing more than a self-serving attempt to maintain an inherently unfair system.

This Article does not quibble with such critiques—Weissman's observations are both compelling and troubling. However, even if we do not assume selfish motivations for philanthropic activities, philanthropy has fundamental negative aspects that deserve examination. Thus, this Article focuses on those critiques of philanthropy that do not impugn the motivations of the philanthropist. In this manner, this Article offers critiques of philanthropy that explain why we should be wary of even well-intentioned philanthropy.

However, before delving into these critiques, it is important to state what might no longer be obvious: Philanthropy is largely a positive force in the world. This Article is not intended to serve as a manifesto against the subjective benevolence of the wealthy.⁷⁹ Whether driven by an altruistic instinct to address intractable problems, the sense of joy felt when personal wealth can be leveraged to ameliorate social ills, or a feeling of responsibility born from having enjoyed financial success while so many people struggle, the instinct to spend one's wealth in a socially productive manner is an admirable reaction—one that should be fostered. Because of this, criticizing the charitable efforts of the wealthy is strikingly counterintuitive. Or as Professor Robin Rogers more colorfully stated, critics of philanthropy might be labeled “lunatics who oppose goodness and reason, probably hate apple pie, and maybe kick puppies.”⁸⁰ One assumes we would prefer a wealthy person to donate money to address general societal ills rather than spend it on private and selfish ends.⁸¹ In defending the activities of modern philanthropists, Bernard Marcus, the founder of Home Depot, argued, “All this money is going for charity to help people—what kind of numbskull would find something

79. The distrust of subjective benevolence has deep roots, but was perhaps best encapsulated by Theodore Roosevelt's observation that “[n]o amount of charities in spending such fortunes . . . can compensate in any way for the misconduct in acquiring them.” PHILANTHROPY IN DEMOCRATIC SOCIETIES, *supra* note 72, at 64. If one is looking for a manifesto, there is little shortage of such works, but if the reader has time for only one, the Author recommends Oscar Wilde's *The Soul of Man Under Socialism*, which argued “[i]t is immoral to use private property in order to alleviate the horrible evils that result from the institution of private property. It is both immoral and unfair.” OSCAR WILDE, *THE SOUL OF MAN UNDER SOCIALISM* 10 (London, Porcupine Press 1948) (1891).

80. Robin Rogers, *Why Philanthro-Policymaking Matters*, 48 *SOC'Y* 376, 379 (2011); *see also* TOMPKINS-STANGE, *supra* note 21, at 147 (“[C]ritiques of philanthropic involvement in policy have often been expressed using hyperbole, and even the remarks of leading thinkers sometimes tend toward rhetoric of a sensational nature and may be dismissed as partisan or radical as opposed to constructive.”).

81. PHILANTHROPY IN DEMOCRATIC SOCIETIES, *supra* note 72, at 67 (“Conspicuous consumption by the wealthy is hard to see as preferable to the establishment of a foundation.”).

wrong with that?”⁸² So, are philanthropy’s critics numbskulls that hate apple pie and kick puppies?

The answer is not as obvious as Marcus suggests. Indeed, it is a complex problem that demands a nuanced approach. Unfortunately, the philanthropy debate currently enjoys a severe deficit of nuance. As David Callahan noted, “Cheerleaders for philanthropy see nearly everything the givers do as positive, while critics can be just as myopic and, at times, paranoid.”⁸³ Suffice it to say that however credible the criticisms of philanthropy may be,⁸⁴ there is little doubt that philanthropy has many successes. Philanthropy has significantly helped ameliorate the effects of global disease,⁸⁵ poverty,⁸⁶ and natural disasters.⁸⁷ And while it also resulted in a number of spectacular failures, it would be disingenuous to identify particular areas where philanthropy failed as evidence of philanthropy’s folly,⁸⁸ as such criticisms often ignore the many victories of philanthropy.⁸⁹ Obviously, evidence of particular philanthropic failures is not proof that all such endeavors are destined to fail, just as pointing to success stories does not serve as a vindication of the entire philanthropic field. Therefore, rather than focusing on outcomes, it behooves critics to examine the process by which philanthropy arrives at both its victories and its failures.

82. Stephanie Strom, *Pledge to Give Away Fortunes Stirs Debate*, N.Y. TIMES (Nov. 10, 2010), <https://www.nytimes.com/2010/11/11/giving/11PLEDGE.html>. Marcus continued to ask if critics “[w]ould rather we bought yachts and built mansions?” *Id.*; see also TOMPKINS-STANGE, *supra* note 21, at 148 (“There’s [sic] worse ways for rich people to spend their money than trying to improve public education; we’re lucky that Bill Gates thinks education is important.”).

83. DAVID CALLAHAN, *THE GIVERS: WEALTH, POWER, AND PHILANTHROPY IN A NEW GILDED AGE* 33 (2017).

84. One must be careful not to overstate the amount of criticism. Indeed, philanthropy is often conducted without much critical comment. See TOMPKINS-STANGE, *supra* note 21, at 7 (noting that Warren Buffett’s \$31 billion gift to the Gates Foundation “was described in the press using almost exclusively celebratory terms . . . with limited analysis of the implications of concentrating an unprecedented amount of philanthropic wealth in a single foundation”).

85. Kate Kelland, *Malaria Eradication No Vague Aspiration, Says Gates*, REUTERS (Oct. 18, 2011, 8:50 PM), <http://www.reuters.com/article/us-malaria-gates-eradication-idUSTRE79I06620111019> (discussing the bold claim by Mr. Gates that eradicating malaria is “a tough, ambitious goal that can be reached within the next few decades”).

86. Jane Wales, *Philanthropists Can’t Eradicate Global Poverty, but We Can Make a Start*, GUARDIAN (May 12, 2016), <https://www.theguardian.com/global-development-professionals-network/2016/may/12/philanthropy-global-poverty-development-finance-sdgs> (“Philanthropies and those they support can play a catalytic role by seeding, testing and proving new models for development financing. By accessing capital markets, the funding mechanisms they invent can provide for efficiency and scale—and, perhaps, even the promise of sustainability.”).

87. Megan O’Neil, *A Decade Later, New Orleans Nonprofits Cite Gains, Yet Worry over the Future*, CHRON. PHILANTHROPY (Aug. 20, 2015), <https://www.philanthropy.com/article/A-Decade-Later-New-Orleans/232509> (describing a “burst of philanthropic dollars in New Orleans in the years after Hurricane Katrina and Rita”).

88. David Bosworth, *The Cultural Contradictions of Philanthrocapitalism*, 48 SOC’Y 382, 386 (2011) (noting that, with respect to education reform, “rarely has so much influence been granted to an institution whose actual track record has been so dismal”).

89. See *supra* notes 85–87.

This Part discusses the antidemocratic, paternalistic, and amateuristic aspects of philanthropy. To illustrate the antidemocratic aspects of philanthropy, Section A examines two case studies: public education reform in the United States and anti-malarial efforts in Africa. Section B discusses the historical roots of the paternalistic aspects of philanthropic efforts, highlighting the reticence of traditional philanthropy to engage in direct cash transfers as evidence of lingering paternalistic impulses. Finally, Section C highlights the amateuristic aspects of philanthropy by again discussing the philanthropic efforts to reform U.S. public education.

A. Philanthropy Is Antidemocratic

At its core, philanthropy is the unilateral decision of a wealthy person to spend money or resources to address a particular issue. Philanthropy is therefore, by definition, undemocratic.⁹⁰ Perhaps a couple dedicates \$113 million to build a park and performance space on a pier in the Hudson River.⁹¹ Or maybe a wealthy couple donates \$40 million to a public university to institute a nursing program⁹² or donates \$50 million to help construct a new home for a museum in Los Angeles.⁹³ These are all examples of philanthropy, and they all represent examples of laudable beneficence. These are inarguably positive acts, but it is hard to ignore the lack of input from other voices. Parks, nursing schools, and museums are worthy investments, but would the public make the same spending choices? More to the point, if New York City were to happen upon \$113 million, would the democratically elected representatives decide to build an extravagant floating park, as was championed by the Diller-von Furstenberg Family Foundation, or are there more pressing public needs?⁹⁴

90. DALE RUSSAKOFF, *THE PRIZE: WHO'S IN CHARGE OF AMERICA'S SCHOOLS?* 65 (2015) ("Almost all philanthropy is by definition undemocratic, its priorities set by wealthy donors and boards of trustees, who by extension can shape the direction of public policy in faraway communities.").

91. This example loosely describes the Diller-von Furstenberg Family Foundation's donation of \$113 million to the Hudson River Park Trust to create a new greenway and performance space in New York City. See Lisa W. Foderaro, *How Diller and von Furstenberg Got Their Island in Hudson River Park*, N.Y. TIMES (Apr. 3, 2015), <https://www.nytimes.com/2015/04/05/nyregion/how-diller-and-von-furstenberg-got-their-island-in-hudson-river-park.html>.

92. This example refers to Sue and Bill Gross's donation to the University of California Irvine nursing school. See Rebecca Plevin, *UC Irvine Lands \$40m Gift to Open Nursing School*, S. CAL. PUB. RADIO (Jan. 14, 2016), www.scpr.org/news/2016/01/14/56861/uc-irvine-lands-40m-gift-to-open-nursing-school/.

93. This example refers to Elaine Wynn's donation to the Los Angeles County Museum of Art. See David Ng, *LACMA Receives a Historic \$75-Million Windfall, Creating an Energetic and Hope-Filled Momentum*, L.A. TIMES (Apr. 27, 2016), www.latimes.com/entertainment/arts/la-et-cmlacma-donation-20160428-story.html.

94. Foderaro, *supra* note 91. Even if the funds were limited to park development, there is a question about whether this is the best use of the funds. As the executive director of the Greenwich Village Society for Historic Preservation noted, "[I]t does seem a little curious that there's this vast

The natural response to such concerns is to remind critics that the money is the property of the wealthy individuals. They are, therefore, justified in spending it however they like. After we extract taxes, the public has no right to tell anyone how to spend their money. Imagine, for example, there was a public consensus in the belief that luxury cars were a waste of money. Even if this were true, the public does not have the right to force a wealthy person to buy a used Volvo rather than a brand new Mercedes. This is the uncontroversial and necessary result of enforcing private property rights. Given the strong public interest in private property rights, there is no obvious, justifiable reason for the general public to tell the wealthy how to spend their money. A wealthy person's decision that some amount of money is expendable does not automatically give the public a voice in how that money ought to be spent.

This deference to a person's freedom to spend money how they please has intuitive appeal and is based in America's "deep-seated" reverence for "individualism."⁹⁵ Such deference is only justified, however, if the consequences of the wealthy person's spending are limited. The combination of such far-reaching influence and the lack of public input is why philanthropy's inherent lack of democracy is troubling.⁹⁶

This is not a new argument. Over a century ago, Jane Addams lambasted the practice of philanthropy as incongruent with a democratic society.⁹⁷ Addams's critique, forcefully argued in *Democracy and Social Ethics*, was not with the targets and means of philanthropy, but its very existence.⁹⁸ Regardless of the outcome of a philanthropic endeavor (for example, housing the homeless, feeding the hungry, or curing the sick), Addams objected to any institution in which an elite cadre of rich people wielded its wealth without the input of the beneficiaries.⁹⁹ Addams is not alone in this view. Lawmakers in the early 1900s echoed this concern, perhaps best exemplified by the following statement of Congressman Frank Walsh:

Even if the great charitable and philanthropic trusts should confine their work to the field of science, where temperament, point of

pool of largely private—but also public—money for this addition to the park How can we claim that there is not private or public money for completing the parts of the park that need to be done?" *Id.*

95. SALAMON, *supra* note 55, at 1.

96. PHILANTHROPY IN DEMOCRATIC SOCIETIES, *supra* note 72, at 72 ("[W]hy, in a democracy, should the size of one's wallet give a person a greater say in the public good").

97. JANE ADDAMS, *DEMOCRACY AND SOCIAL ETHICS* 14 (1905) ("[T]he very need and existence of charity[] denies us the consolation and freedom which democracy will at last give."); see also TOMPKINS-STANGE, *supra* note 21, at 10 ("Historically, Americans have been wary of foundations' use of private wealth to advance ideas that impact the broader public, without the accountability provided by formal democratic processes.").

98. See ADDAMS, *supra* note 97, at 12.

99. See *id.* at 19–22.

view, and economic theory cannot enter,¹⁰⁰ many of us should still feel that this was work for the state, and that, even in the power to do good, no one man, or group of men, should hold the monopoly.¹⁰¹

More recently, Dr. Susan Ostrander bemoaned the emergence of donor-centered philanthropy for similar reasons, noting that a focus on the pet interests or hobbies of a specific donor makes it less likely philanthropic efforts are consistent with public needs.¹⁰²

These concerns derive from the fact that philanthropic spending on public matters is not the same as spending money on private matters. Philanthropic spending often involves matters of public interest. A wealthy person spending millions of dollars on luxury goods does not directly affect the general public, but the same thing cannot be said when a wealthy person spends millions of dollars to reform public education.¹⁰³ This type of spending has a palpable effect on the general public. To comprehend the problem, consider the decisions made by such a philanthropist. In what state, city, or neighborhood will the money be spent? Should the money go to teacher salaries or infrastructure? Should it buy computers or improve school meals? Should it bolster STEM education or the arts? These questions make it clear that spending money on public education touches on a number of issues that reasonably fall in the public realm. When the wealthy wield their dollars in an effort to transform the public realm, the absence of the public's voice rings loudly.¹⁰⁴

100. One does not often have the occasion to romanticize politics of the early twentieth century, but given the current debates surrounding climate change, one longs for a time when a member of Congress could conclusively state that science is a realm where neither "temperament" nor "point of view" is relevant.

101. Frank P. Walsh, *Perilous Philanthropy*, 83 INDEP. 262, 262 (1915).

102. Susan A. Ostrander, *The Growth of Donor Control: Revisiting the Social Relations of Philanthropy*, 36 NONPROFIT & VOLUNTARY SECTOR Q. 356, 358 (2007).

103. See *infra* notes 205–214 and accompanying text.

104. PHILANTHROPY IN DEMOCRATIC SOCIETIES, *supra* note 72, at 70 ("[F]oundations are not simply exercises in personal liberty.")

1. *Philanthropy-Driven Education Reform*

Examining philanthropy-driven education reform is informative because public education is a particularly attractive target for philanthropic efforts.¹⁰⁵ Many of the largest and most influential philanthropic entities, including the Bill and Melinda Gates Foundation (“Gates Foundation”),¹⁰⁶ the Eli and Edythe Broad Foundation (“Broad Foundation”),¹⁰⁷ and the Walton Family Foundation,¹⁰⁸ spend great amounts of time and money attempting to reform our public education system. Thus, it is no surprise one of the CZI’s first targets also involves reforming public education by focusing on personalized learning.¹⁰⁹

To the extent philanthropic attention is a reflection of societal importance, the focus on public education makes sense. As the primary means by which we nurture future generations, our continued economic growth and future cultural contributions depend upon a robust public education system. For these reasons, public education is a quintessential public concern.¹¹⁰ Vir-

105. Dale Russakoff recounted some of philanthropy’s contributions to public education in the late nineteenth and early twentieth centuries:

The education of the poorest Americans has been a cause of the wealthiest since Reconstruction, when Northern industrialists built schools of varying caliber across the South for former slaves. Henry Ford created the Ford English School in 1913 to teach “basic reading and speaking comprehension skills” to mostly foreign-born factory workers. Early in the twentieth century, Andrew Carnegie’s foundation developed the “Carnegie unit,” or the credit hour, which became the currency of learning: [T]o graduate from high school, students still must earn a certain number of credits, based not on what they have learned, but on time spent in classes.

RUSSAKOFF, *supra* note 90, at 7. Public education remains a primary focus of philanthropic efforts to this day. See TOMPKINS-STANGE, *supra* note 21, at 17 (“Arguably, no social sector in the United States is more heavily impacted by foundations than K–12 education. Foundation funding to education has nearly quadrupled during the last three decades, representing a significant infusion of capital.”).

106. See *What We Do: K–12 Education Strategy Overview*, BILL & MELINDA GATES FOUND., www.gatesfoundation.org/What-We-Do/US-Program/K-12-Education (last visited Dec. 11, 2017).

107. See *Education*, ELI & EDYTHE BROAD FOUND., <https://broadfoundation.org/education/> (last visited May 3, 2018) (highlighting over \$589 million invested in education efforts since 1999).

108. See WALTON FAMILY FOUND., 2020 K–12 EDUCATION STRATEGIC PLAN 3, <https://www.waltonfamilyfoundation.org/our-work/k-12-education>.

109. See *Initiatives*, CHAN ZUCKERBERG INITIATIVE, <https://www.chanzuckerberg.com/initiatives> (last visited May 3, 2018) (“The Chan Zuckerberg Initiative believes that every child should enter adulthood able to recognize and realize their full potential. This means that by age 21, everyone should be able to earn a living wage, build independence, and identify and pursue their passions. We believe a whole child approach to personalized learning—focused on and led by the learner—is the most promising way to achieve this vision.”); see also *College Board, CZI Announce Partnership on Personalized Learning*, PHILANTHROPY NEWS DIG. (May 17, 2017), <https://philanthropynewsdigest.org/news/college-board-czi-announce-partnership-on-personalized-learning>.

110. Jeffrey A. Raffel, *Why Has Public Administration Ignored Public Education, and Does it Matter?*, 67 PUB. ADMIN. REV. 135, 135 (2007) (noting that public education “accounts for one-quarter of state and local governmental spending in the United States, represents one-third of total

tually every aspect of modern American life is touched by our public education system. Even if one were to set aside the staggering number of people employed by public education systems across the country¹¹¹ and ignore parents of children in public schools, one certainly employs a product of the public school system or has a consumer base substantially made up of public school system graduates.¹¹² It is one of the rare institutions that manages to infiltrate virtually every aspect of our society. Despite this ubiquity, the United States' public education system is below average and is lagging behind the public school systems of many other nations.¹¹³ The combination of the importance of our public school system and its intolerably mediocre state makes it a popular target for philanthropic efforts.¹¹⁴

Piquing the interest of the wealthy should not automatically raise alarms. The problem is not that a few civic-minded individuals are interested in addressing the problems plaguing America's public education system. Rather, the problem is that these philanthropists are not interested in small gestures. If they were simply providing school supplies or funding field trips, there would be little cause for concern. But these philanthropists aim to redefine the very nature of public education, and their collective financial clout has resulted in an outsized influence. Indeed, the influence is so large that almost all voices are drowned out by the message of the philanthropists and, as a result, a small number of voices have dictated the discussion and implementation of education reform.¹¹⁵

Take, for example, the Gates Foundation's effort to break up larger high schools.¹¹⁶ This was the Gates Foundation's "first major education effort,"

government employment in the nation, and is consistently rated by citizens as their highest priority").

111. The number is difficult to obtain, but the National Center for Education Statistics projected 3,141,000 teachers in public elementary and secondary schools in 2017. NAT'L CTR. FOR EDUC. STATS., DIGEST OF EDUCATION STATISTICS, tbl. 105.40 (2016), https://nces.ed.gov/programs/digest/d15/tables/dt15_105.40.asp.

112. The vast majority of children attend public schools. See *Fast Facts, Public and Private School Comparison*, NAT'L CTR. FOR EDUC. STATISTICS, <https://nces.ed.gov/fastfacts/display.asp?id=55> ("In 2015, private school students made up 10.3 [%] of all elementary and secondary school students.").

113. The United States ranks below average in math (thirty-ninth) and slightly above average in reading (twenty-third) and science (twenty-fifth) in the OECD's global rankings on student performance in mathematics, reading, and science through the Program for International Student Assessment. Abby Jackson & Andy Kiersz, *The Latest Ranking of Top Countries in Math, Reading, and Science Is Out—and the U.S. Didn't Crack the Top 10*, BUS. INSIDER (Dec. 6, 2016), <http://www.businessinsider.com/pisa-worldwide-ranking-of-math-science-reading-skills-2016-12>.

114. See *supra* note 105.

115. Michael Klonsky, *Power Philanthropy: Taking the Public Out of Public Education*, in THE GATES FOUNDATION AND THE FUTURE OF U.S. "PUBLIC" SCHOOLS 21, 21 (Philip E. Kovacs ed., 2011).

116. Edward Skloot, *The Gated Community*, ALLIANCE MAG. (Sept. 1, 2011), https://www.hudson.org/content/researchattachments/attachment/1197/alliance_magazine_edward_skloot.pdf; see

where it “granted \$1.3 billion to redesign large comprehensive high schools and create smaller learning communities.”¹¹⁷ Without any definitive evidence that this effort would result in better student outcomes, and without soliciting input from administrators, teachers, or students in the targeted schools, the Gates Foundation leveraged its investment to position its small schools initiative as “a cornerstone of thinking in the minds of many educational reformers, planners and administrators.”¹¹⁸ The result of this investment was “the establishment of more than 2,600 schools in 45 states and the District of Columbia, reaching well over 750,000 students.”¹¹⁹

Unfortunately, the effort did not result in much success, with Mr. Gates admitting the program “did not improve students’ achievement in any significant way.”¹²⁰ Faced with this lack of progress, the Gates Foundation abandoned the project, leaving “school districts . . . with costlier-to-run small schools.”¹²¹ Thus, a philanthropist conceived and implemented an ineffective education reform effort that affected three-quarters of a million students without the input, blessing, or counsel of the affected population. This disruption of student lives is troubling, but the powerlessness of the affected population may be more disturbing. Ignore, for a moment, the ineffectiveness of the initiative, and instead recognize the disconcerting lack of democracy in an endeavor that affected 750,000 children.

Perhaps this antidemocratic process would be more palatable if the influence were more limited. If the Gates Foundation founded and completely funded a private school for the wealthy, for example, the cries for public involvement would not carry much weight. This would be, to continue the metaphor, analogous to a wealthy person’s decision to purchase a Mercedes rather than a used Volvo. When a person purchases a vehicle for their own use, the public has no justified right to exert influence over the decision. The unilateral nature of this decision is not problematic because it does not directly implicate the public interest. The philanthropic impact on public education is not, however, the same as a rich person buying a Mercedes, and this is not akin to the wealthy creating a school for their children. Rather, it is an attempt to transform *all* schools. Thus, a more accurate metaphor would be a rich person telling every less wealthy person to buy a Mercedes rather than a used Volvo because the wealthy person has contributed \$1,000 toward the

also Gara LaMarche, *Is Philanthropy Bad for Democracy?*, ATLANTIC (Oct. 30, 2014), www.theatlantic.com/politics/archive/2014/10/is-philanthropy-good-for-democracy/381996/.

117. TOMPKINS-STANGE, *supra* note 21, at 21.

118. Skloot, *supra* note 116.

119. *Id.*

120. *Annual Letter 2009*, BILL & MELINDA GATES FOUND. (Jan. 2009), www.gatesfoundation.org/Who-We-Are/Resources-and-Media/Annual-Letters-List/Annual-Letter-2009.

121. *Gates Foundation Failures Show Philanthropists Shouldn’t Be Setting America’s Public School Agenda*, L.A. TIMES (June 1, 2016), <http://www.latimes.com/opinion/editorials/la-ed-gates-education-20160601-snap-story.html> [hereinafter *Gates Foundation Failures*].

purchase price. The problem is not the fact that a rich person is providing \$1,000. Rather, the issue is that the rich person believes this minor investment gives them the right to dictate which car is bought.

Make no mistake, the investment is minor. The philanthropic domination of the educational reform effort has come at a relatively low cost to the philanthropists involved.¹²² When compared to public contributions to public education, philanthropists have invested a remarkably small amount.¹²³ By one measure, the collective investment of the Gates Foundation, the Broad Foundation, and the Walton Family Foundation in education reform amounts to “less than [1%] of the monies spent each year on public education.”¹²⁴ The balance, of course, is from tax revenue. Even though the philanthropic contribution to public education is a “relatively tiny investment,” it drives the bulk of public education reform discussions and represents an unnaturally outsized influence on the education of our children.¹²⁵ As Professor David Bosworth bemoaned, “The practical effect [of philanthropy’s influence on public education] will be the technocratic elimination of local control over public schools . . . without any real concern as to the impact on democratic initiative.”¹²⁶ While “[t]he public . . . pays most of the bills,” Bosworth pointed out that “the philanthrocapitalist . . . sets the agenda.”¹²⁷ Bosworth is not alone in his criticisms. The modern philanthropic efforts to reform education “have been routinely criticized for their top-down approach and outsize influence in advancing specific reform agendas.”¹²⁸ This “top-down approach” often ignores the desires or voices of the population most affected by the philanthropic policymaking.¹²⁹ The result is a troubling deficit of democracy.

The success of this influence is evident in the fact that philanthropists have convinced “federal and state policymakers to adopt many elements of

122. See PHILANTHROPY IN DEMOCRATIC SOCIETIES, *supra* note 72, at 233 (“The amount of money contributed by philanthropists to public goods—scientific research, K-12 education, or social services, for example—is small in comparison to the money provided by the state.”).

123. TOMPKINS-STANGE, *supra* note 21, at 60 (noting that the Gates Foundation’s “funding accounted for one-third of the \$1.5 billion annual education philanthropy in the United States, which in turn paled in contrast to the \$500 billion public education budget”).

124. Bosworth, *supra* note 88, at 384–85.

125. *Id.*; see also TOMPKINS-STANGE, *supra* note 21, at 82 (quoting a Gates Foundation official who noted that the Foundation’s investment in public education “greatly affected how some of the early Obama education initiatives were formulated and implemented”).

126. Bosworth, *supra* note 88, at 385.

127. *Id.*

128. Kyoko Uchida, *Policy Patrons: Philanthropy, Education Reform, and the Politics of Influence*, PHILANTHROPY NEWS DIG. (June 16, 2016), <http://philanthropynewsdigest.org/off-the-shelf/policy-patrons-philanthropy-education-reform-and-the-politics-of-influence>.

129. See *id.* (“Unfortunately, the [philanthropic approach to education reform], despite its emphasis on metrics and accountability, is often seen as not being accountable to low-income families of color who are directly affected by the education reforms championed by the foundations . . .”).

their reform agenda”¹³⁰ with a push for “charter schools, standardized testing, national curricula, merit pay for teachers, reorganizing or closing underperforming schools, developing accurate data in and across funding sites, and improved management.”¹³¹ Some of these efforts may prove fruitful, while others may prove to be misfires. For purposes of this discussion, the outcome is not important. Rather, it is important to note that the targets of this philanthropic policymaking—administrators, teachers, students, and students’ families—do not have any meaningful input on these “philanthropically driven educational experiments.”¹³²

The lack of democracy in the modern philanthropic approach to public education is different from previous endeavors only in its intensity. As Professor Stanley N. Katz argued, “Foundations have always been accused of arrogance, but this generation of funders carries arrogance to new levels, promoting policy objectives that in many cases clearly oppose local public opinion.”¹³³ Even in the face of such clear opposition, there is no recourse for the public. Unlike with public institutions, the general public has no mechanism for registering complaints, and the leaders of private foundations are not subject to election.¹³⁴ Foundation leaders “don’t have to run for office, or satisfy shareholders, or attract customers, or win popularity contests,”¹³⁵ and funders of foundations cannot be fired.¹³⁶ This dynamic means that many members of the public who are negatively affected by philanthropic efforts have little choice other than to suffer quietly.¹³⁷

There is a chance that the philanthropically driven reforms may prove to be the elusive solution to our public education woes. There is no reason to doubt that the Gates Foundation, the Broad Foundation, and the Walton Family Foundation earnestly believe they have identified ways to improve

130. Stanley N. Katz, *Does Philanthropy Threaten Democracy?*, STAN. SOC. INNOVATION REV. (2016), https://ssir.org/book_reviews/entry/does_philanthropy_threaten_democracy (reviewing Tompkins-Stange’s book *Policy Patrons*).

131. Skloot, *supra* note 116 (noting that these are the “new silver bullets” for philanthropists).

132. *Id.*

133. Katz, *supra* note 130.

134. TOMPKINS-STANGE, *supra* note 21, at 12 (“Since their earliest origins, foundations have been consistently criticized for their involvement in policy matters and viewed with suspicion as potential sites of dissident power wielded by unelected elites.”).

135. LaMarche, *supra* note 116.

136. See CALLAHAN, *supra* note 83, at 133 (“Eli Broad put the point this way: ‘Neither Bill Gates nor I have to worry about getting fired. We take big risks in pursuit of big rewards.’”).

137. It is important to note, however, that when philanthropists enlist public officials to further a philanthropic agenda, there is an opportunity for the public to voice objections at the next election. However, this meager amount of political power cannot serve as a check against philanthropic influence for three reasons: first, an election can only retrospectively punish political officials from engaging in antidemocratic activity (as opposed to voicing concerns before the philanthropic agenda is implemented); second, it is politically difficult to reject philanthropic investment in underinvested areas of concern; and third, election results may be influenced by any number of additional factors, and it is, therefore, nearly impossible for voters to send a message on a single issue.

our public education system. The problem is not that philanthropists are wrong (or may one day be proven wrong), but rather that the philanthropists become the only meaningful voice in the debate. Again, this Article is less concerned with outcomes and more focused on process. A small group of wealthy individuals dominated the public education reform discussion, determined the appropriate solutions, and started implementation. Regardless of the results, this is a profoundly antidemocratic means of addressing a social problem.¹³⁸

2. *Philanthropy-Driven Antimalarial Efforts*

If philanthropic influence were limited to public education, perhaps our society could prepare a proper response. Indeed, one can point to a number of dissenting voices to the philanthropy-driven public education reform.¹³⁹ In addition to the scholars and critics cited in the previous Section, some politicians,¹⁴⁰ teachers' unions,¹⁴¹ and parents¹⁴² have expressed displeasure at many public education reform proposals. Although they have yet to stem the influence of philanthropists in education reforms, they have been instrumental in publicizing some of the negative effects of philanthropy-driven measures.¹⁴³ However, this is not a war fought on a single front. Similar antidemocratic approaches are repeated in virtually every area in which philanthropic dollars are spent.

Take, for example, antimalarial efforts. Like public education, malaria captured the attention of many philanthropic efforts. Most notably, the Gates Foundation targeted malaria as one of its first priorities, and the results are impressive. According to a joint report by the World Health Organization ("WHO") and the United Nations International Children's Emergency Fund ("UNICEF"), "Malaria death rates have plunged by 60% since 2000, translating into 6.2 million lives saved."¹⁴⁴

138. See *Gates Foundation Failures*, *supra* note 121 ("Philanthropists are not generally education experts, and even if they hire scholars and experts, public officials shouldn't be allowing them to set the policy agenda for the nation's public schools.").

139. See generally RUSSAKOFF, *supra* note 90.

140. *Id.* at 207 (noting that Shavar Jeffries, a candidate for mayor of Newark, "was harshly critical of [the reformers'] approach").

141. *Id.* at 178 (noting that union efforts fiercely opposed reform-led school closings).

142. *Id.* (noting that parents spoke out against school closings out of a fear "that children whose schools were closing would have to walk through gang-ruled territory or cross highly trafficked thoroughfares to reach their reassigned schools").

143. *Id.*

144. Press Release, WHO/UNICEF, WHO/UNICEF Report: Malaria MDG Target Achieved Amid Sharp Drop in Cases and Mortality, but 3 Billion People Remain at Risk (Sept. 17, 2015), <http://www.who.int/mediacentre/news/releases/2015/malaria-mdg-target/en/>.

We can attribute this success largely to the Gates Foundation. Prior to its efforts, very little was spent on malaria research.¹⁴⁵ Malaria is a disease that largely affects the global poor, and there was, therefore, little market incentive for drug companies to engage in antimalarial research.¹⁴⁶ As Mr. Gates noted at the Global Grand Challenges Summit in 2013, malaria research “gets virtually no funding” because the for-profit nature of most medical research emphasizes an incentive structure that prioritizes male baldness treatments and erectile dysfunction medication over life-saving medicines.¹⁴⁷ Recognizing this market failure, the Gates Foundation identified malaria as a focus of its philanthropic efforts.¹⁴⁸ Since that decision, there has been a dramatic shift in funding from governments and other private foundations.¹⁴⁹ Thanks largely to the Gates Foundation’s focus on malaria, researchers can credibly claim that malaria might be completely eradicated by 2040.¹⁵⁰

This is a stunning accomplishment. The effect of the Gates Foundation’s focus on malaria is difficult to overstate and is rightfully lauded. There is no meaningful way to calculate the positive effect of saving 6.2 million lives. By stepping in when the market failed to act, the Gates Foundation might credibly claim to eradicate a deadly disease that has ravaged poor countries and killed millions.

Yet, if one focuses on the process as opposed to the results (however praiseworthy and commendable), the philanthropy-driven antimalarial effort smacks of antidemocracy and may have resulted in some unintended negative

145. Kirstin RW Matthews & Vivian Ho, *The Grand Impact of the Gates Foundation. Sixty Billion Dollars and One Famous Person Can Affect the Spending and Research Focus of Public Agencies*, 9 EMBO REP. 409, 411 (2008), www.ncbi.nlm.nih.gov/pmc/articles/PMC2373372/ (noting that “research on vaccines against malaria and tuberculosis increased by 96% and 62%” between 2003 and 2008, and that “this sudden interest and financial support for global health research at the NIH was largely due to the [Gates Foundation], and its strong outreach to both the scientific community and the public”).

146. To state the obvious, the global poor are not a viable market for any pharmaceutical company’s research and development investment. See ADVANCES IN MALARIA RESEARCH 357 (Deepak Gaur et al. eds., 2017) (“The discovery and development of new medicines against malaria represents a formidable challenge. The lack of an obvious financial return on investment (the profits made by selling new medicines will not repay the development costs) is a good example of market failure.”).

147. Olivia Solon, *Bill Gates: Capitalism Means Male Baldness Research Gets More Funding Than Malaria*, WIRED (Mar. 14, 2013), <http://www.wired.co.uk/article/bill-gates-capitalism>. Mr. Gates bemoaned that “if you are working on male baldness . . . you get an order of magnitude more research funding because of the voice in the marketplace.” *Id.*

148. See *What We Do: Malaria Strategy Overview*, BILL & MELINDA GATES FOUND., <https://www.gatesfoundation.org/What-We-Do/Global-Health/Malaria> (last visited July 22, 2018) (“Malaria is a top priority of the Bill & Melinda Gates Foundation.”)

149. See Matthews & Ho, *supra* note 145.

150. See *From Aspiration to Action: What Will It Take to End Malaria?*, BILL & MELINDA GATES FOUND. & OFF. UN SEC’Y-GEN.’S SPECIAL ENVOY FOR FINANCING HEALTH MILLENNIUM DEV. GOALS & FOR MALARIA, <http://endmalaria2040.org/> (last visited July 18, 2018).

consequences. The immense influence of the philanthropists in public education reform pales in comparison to the power wielded by the Gates Foundation in antimalarial efforts. The Gates Foundation is one of the largest contributors to the WHO.¹⁵¹ In fact, in 2014, the Gates Foundation contributed more than the United Kingdom, Canada, or the European Commission.¹⁵² As a major funder of the WHO, the primary policymaker in global health,¹⁵³ the Gates Foundation has outsized influence on global health policymaking.

This is more than a theoretical concern. As a result of this influence, the Gates Foundation has dominated the malaria research field so thoroughly that it may have stifled contrary scientific opinions¹⁵⁴ by disincentivizing independent assessments of Gates Foundation-funded research.¹⁵⁵ More alarmingly, there is evidence that the Gates Foundation's funding dominance convinces some countries to artificially prioritize malaria over other health-related issues.¹⁵⁶ This results in entire countries with deemphasized general public health systems in favor of the Gates Foundation's prescribed interventions for specific diseases, leaving communities vulnerable to a number of other threats.¹⁵⁷

151. Kate Kelland, *The World Health Organization's Critical Challenge: Healing Itself*, REUTERS (Feb. 8, 2016, 11:55 AM), www.reuters.com/investigates/special-report/health-who-future/ ("The largest of the non-government donors by a long way is the Bill & Melinda Gates Foundation. From a standing start a decade ago, it has been contributing between \$250 million and \$300 million a year. In one year—2013—it was the largest donor bar none, overtaking even total contributions from the U.S. government.").

152. *Id.*

153. *See About WHO*, WORLD HEALTH ORG., www.who.int/about-us (last visited June 28, 2018) ("Our primary role is to direct and coordinate international health within the United Nations system.").

154. *See* Donald G. McNeil Jr., *Gates Foundation's Influence Criticized*, N.Y. TIMES (Feb. 16, 2008), <https://www.nytimes.com/2008/02/16/science/16malaria.html> (noting that "[m]any of the world's leading malaria scientists are now 'locked up in a 'cartel' with their own research funding being linked to those of others within the group'" (quoting Dr. Arata Kochi, the WHO's head of malaria research)).

155. *Id.* ("Because 'each has a vested interest to safeguard the work of the others' . . . getting independent reviews of research proposals 'is becoming increasingly difficult.'" (quoting Dr. Kochi)).

156. *See What Has the Gates Foundation Done for Global Health?*, 373 LANCET 1577, 1577 (May 9, 2009), [https://www.thelancet.com/pdfs/journals/lancet/PIIS0140-6736\(09\)60885-0.pdf](https://www.thelancet.com/pdfs/journals/lancet/PIIS0140-6736(09)60885-0.pdf) ("In some countries, the valuable resources of the [Gates] Foundation are being wasted and diverted from more urgent needs.").

157. Dr. Margaret Chan, the head of the WHO, intimated that donor preferences might have contributed to the lack of an adequate response to the Ebola outbreak in West Africa, noting that the WHO's "budget [is] highly earmarked" and driven by "donor interests." Sheri Fink, *W.H.O. Leader Describes the Agency's Ebola Operations*, N.Y. TIMES (Sept. 4, 2014) (alteration in original), <https://www.nytimes.com/2014/09/04/world/africa/who-leader-describes-the-agencys-ebola-operations.html>. Donor preferences may also have played a role in raising the prices of vaccines. *See* Sarah Boseley, *Bill Gates Dismisses Criticism of High Prices for Vaccines*, GUARDIAN (Jan. 27, 2015), <https://www.theguardian.com/global-development/2015/jan/27/bill-gates-dismisses-criticism-of-high-prices-for-vaccines>. Médecins Sans Frontières noted the cost to "vaccinate a child

The negative consequences of a near myopic focus on malaria are evident in Liberia. Liberia, one of the world's poorest countries,¹⁵⁸ receives a significant amount of philanthropic support earmarked for antimalarial efforts. In 2012, for example, Liberia received as much as \$110 million from various philanthropic endeavors.¹⁵⁹ Of that \$110 million, 43% went to malaria efforts, resulting in a troubling underfunding of general health programs.¹⁶⁰ In one Liberian county, all residents could receive malaria treatment, while only one-third were within an hour's walk to a health clinic and just half had access to general health services.¹⁶¹

Is this a good result? Reasonable arguments can be made on both sides. On one hand, proponents of malaria treatment might point out that malaria eradication is within our grasp and the resulting prioritization over other health issues is justifiable. On the other hand, one might argue that a focus on a single disease to the exclusion of other health issues is short-sighted, leaving countries vulnerable to other outbreaks and public health crises.¹⁶²

is . . . [sixty-eight] times more expensive than it was in 2001, with many parts of the world unable to afford new high-priced vaccines like that against pneumococcal disease, which kills about one million children each year." *MSF Calls on GSK and Pfizer to Slash Pneumo Vaccine Price to \$5 Per Child for Poor Countries*, MÉDECINS SANS FRONTIÈRES (Jan. 20, 2015), <https://www.doctorswithoutborders.org/what-we-do/news-stories/news/msf-calls-gsk-and-pfizer-slash-pneumo-vaccine-price-5-child-poor>. Because a pharmaceutical company has little financial incentive to invest in developing a drug that will be used in a poor country, an artificial market must be manufactured. Thus, the Global Alliance for Vaccines and Immunization ("GAVI") collects funds from private foundations and governments to ensure a market for a particular vaccine. Proponents of this system view the advance market commitment as a rational response to a market failure. See Rachel Glennerster et al., *Creating Markets for Vaccines*, 1 INNOVATIONS 67 (2006). Skeptics view the scheme as little more than subsidizing private pharmaceutical companies with aid dollars, with protests ranging in severity from a complaint that the pharmaceutical companies' GAVI board seats represent a conflict of interest to charges that GAVI is overpricing vaccines. Max Lawson, *Vaccines Save Lives but Is GAVI Getting Value for Money?*, FROM POVERTY TO POWER (June 13, 2011), <https://oxfamblogs.org/fp2p/vaccines-save-lives-but-is-gavi-getting-value-for-money-guest-post-from-max-lawson/>. The Gates Foundation has a permanent board seat on the GAVI. *Board Composition*, GAVIS, <https://www.gavi.org/about/governance/gavi-board-composition/> (last visited Oct. 12, 2018).

158. With a per capita gross domestic product of \$882, Liberia ranks 186th on the list of the richest countries in the world. To put it a more poignant way, it is the fourth poorest country in the world, behind Burundi in third place, the Democratic Republic of Congo in second place, and the Central African Republic in first place. See Jonathan Gregson, *The World's Richest and Poorest Countries*, GLOBAL FIN. (Feb. 13, 2017), www.gfmag.com/global-data/economic-data/worlds-richest-and-poorest-countries.

159. Simeon Bennett et al., *Ebola Lessons Show Gates Should Widen Focus, Critics Say*, BLOOMBERG (Dec. 22, 2014), www.bloomberg.com/news/articles/2014-12-22/gates-left-ebola-door-open-with-aids-focus-critics-say.

160. See *id.* ("[T]he country . . . had only eight hospital beds for every 10,000 people in 2012, versus 29 in the [United States] and [United Kingdom].").

161. *Id.*

162. Officials made such an argument with specific reference to many countries' poor preparedness to confront the recent Ebola crisis. See *id.* ("[M]any officials say spending billions of dollars to fight ailments such as AIDS, malaria, and polio rather than supporting basic health services has left nations unprepared for epidemics like Ebola.").

Both sides have valid arguments, and these are not easy decisions. However, if the decision is not a foregone conclusion—that is, if both sides have credible arguments—it seems inappropriate to make the decision without the input of the people most affected. The absurdity of philanthropy is that the people of Liberia have less input regarding the medical priorities of their country than a handful of wealthy individuals living in the United States.¹⁶³

The costs of such a monopolizing influence over public health policy-making must be considered. If there is any credence to the criticisms discussed above, there appears to be a practical trade-off between eradicating malaria and shoring up systemic and institutional resilience to address a broad swath of health issues. One wonders if the beneficiaries of the Gates Foundation's efforts would have chosen to address malaria over, for example, Ebola. And this begs the question: How much influence should the beneficiaries have? Or, as Robin Rogers rhetorically asked, "Should the global rich have more power to determine social policy for the poor if they agree to pay for it?"¹⁶⁴

This is not a straightforward decision. Again, this Article does not argue that philanthropic antimalarial efforts are causing more harm than good. Such a claim would be patently absurd (although, it was argued).¹⁶⁵ Admittedly, it is hard to muster outrage about the antidemocratic aspects of philanthropy when the result is the eradication of malaria. However, there are more controversial goals of some philanthropists that might stir more concern. As Callahan noted:

Who doesn't want to extinguish Alzheimer's or malaria? But others are more controversial. If you don't favor same-sex marriage or charter schools or shutting down coal plants, you might not be too thrilled with how some billionaires have been deploying their money In many ways, today's new philanthropy is exciting and inspiring. In other ways, it's scary and feels profoundly undemocratic.¹⁶⁶

Rather than litigate the pros and cons of malaria-focused philanthropy, it is important to simply recognize the inherent value in self-determination and democracy, and identify any current philanthropic practices that run contrary to those ideals. In the current philanthropic system, a small group of

163. Liberia is not alone. Rogers, *supra* note 80, at 378 ("Alex Larsen, Haiti's Minister of Health, noted that NGOs were functioning in his country as a kind of shadow government without accountability.").

164. *Id.*

165. See MARK CURTIS, GATED DEVELOPMENT: IS THE GATES FOUNDATION ALWAYS A FORCE FOR GOOD? 13 (2016), www.globaljustice.org.uk/resources/gated-development-gates-foundation-always-force-good (recounting the concerns of Dr. Kochi that the Gates Foundation stifled diversity of scientific opinion and lacked accountability).

166. CALLAHAN, *supra* note 83, at 6.

wealthy individuals have the power to unilaterally determine the public education reform measures of American communities¹⁶⁷ and the public health priorities of foreign countries.¹⁶⁸ As individuals and private entities, philanthropists are not bound by the democratic process, and there is no meaningful way for the affected communities to determine how money is spent on their education or medical treatment.¹⁶⁹ Regardless of the outcome, the lack of public input is a problem that should not be ignored.

B. Philanthropy Is Paternalistic

One would hope we have evolved beyond the belief that wealth is evidence of virtue. This was a popular notion throughout history, particularly in nineteenth-century America when poverty was often viewed as nothing more than a symptom of vice or laziness.¹⁷⁰ A person's poverty was considered within their control; a person would be poor only if they suffered from a moral or spiritual deficiency.¹⁷¹ This belief suggested that by addressing a poor person's alleged depraved character, society would remove the burden of poverty.¹⁷²

This view is epitomized in Andrew Carnegie's article *Wealth*. Carnegie wrote this article to encourage his wealthy peers to engage in philanthropy during their lifetimes, rather than leaving money to their children¹⁷³ or dedicating it to public purposes in their wills.¹⁷⁴ Popularly known as *The Gospel of Wealth*, Carnegie's article ultimately argues that giving in one's lifetime is "the true antidote for the temporary unequal distribution of wealth, the reconciliation of the rich and the poor."¹⁷⁵ Carnegie's fervor for philanthropy bordered on the fanatical,¹⁷⁶ stating:

167. See *supra* Section II.A.1.

168. See *supra* Section II.A.2.

169. See *supra* note 134–136; see also Rogers, *supra* note 80, at 377 ("[A] functioning democracy . . . holds to the ideal that all people should have an equal voice. Philanthrocapitalism is based on a rather flat assumption that what matters are results rather than process.").

170. See generally Andrew Carnegie, *Wealth*, 148 N. AM. REV. 653 (1889).

171. *Id.* at 663.

172. See *id.*

173. See *id.* at 658 (arguing that "the thoughtful man must shortly say, 'I would as soon leave to my son a curse as the almighty dollar,' and admit to himself that it is not the welfare of the children, but family pride, which inspires these enormous legacies").

174. *Id.* at 659 ("Men who leave vast sums in this way may fairly be thought men who would not have left it at all, had they been able to take it with them. The memories of such cannot be held in grateful remembrance, for there is no grace in their gifts.").

175. *Id.* at 660.

176. *Id.* Perhaps the increased passion is due to his article doubling as an argument against communism, with Carnegie arguing:

The Socialist or Anarchist who seeks to overturn present conditions [of capitalism] is to be regarded as attacking the foundation upon which civilization itself rests, for civiliza-

Under [philanthropy's] sway we shall have an ideal state, in which the surplus wealth of the few will become, in the best sense, the property of the many, because administered for the common good, and this wealth, passing through the hands of the few, can be made a much more potent force for the elevation of our race than if it had been distributed in small sums to the people themselves.¹⁷⁷

However enthusiastic, Carnegie's influential article reeks of the paternalism that continues to infect philanthropy today. Carnegie was a true believer that poverty is evidence of immorality, asserting that "[t]hose worthy of assistance, except in rare cases, seldom require assistance."¹⁷⁸ Following this logic, the poor's unworthiness led Carnegie to believe they could not be trusted to make decisions on how charitable funds were spent. If the nation's wealthy were to give money to the poor, "[m]uch of this sum . . . would have been wasted in the indulgence of appetite, some of it in excess, and it may be doubted whether even the part put to the best use . . . would have yielded results."¹⁷⁹ As Carnegie dramatically concluded, "It were better for mankind that the millions of the rich were thrown into the sea than so spent as to encourage the slothful, the drunken, the unworthy."¹⁸⁰

Following this conviction, early American charities dedicated to ameliorating the plight of the poor focused more on the person's character than any direct efforts to change the person's financial situation. In this view, the problem was not a lack of jobs, but a deficit of spirituality; poverty was not caused by inadequate public education, but a shortage of civic responsibility.¹⁸¹ This line of thought was born out of the belief that a poor person would no longer suffer from poverty if the person would only address their lacking moral foundation.¹⁸²

tion took its start from the day that the capable, industrious workman said to his incompetent and lazy fellow, "If thou dost not sow, thou shalt not reap," and thus ended primitive Communism by separating the drones from the bees.

Id. at 656.

177. *Id.* at 660.

178. *Id.* at 663.

179. *Id.* at 660–61.

180. *Id.* at 662.

181. Weissman, *supra* note 75, at 789 ("The condition of those unable to maintain themselves through productive economic relations is explained as a function of their individual or idiosyncratic deficiencies. Those deemed as the able-bodied poor who do not work have historically been stigmatized as deviants and criminals, living on the margins of society, and a potential threat to social order.")

182. *Id.* ("Joblessness and idleness are coterminous, and about idleness the culture is clear: [I]t is the devil's workshop.")

This is a rather unpopular belief today,¹⁸³ and one would be hard-pressed to find many charities explicitly espousing such a principle. Although this conviction is no longer openly embraced, the philanthropic sector betrays a lingering belief that a person's poverty is related to their morality or work ethic. Current charitable approaches to poverty amelioration appear to be a simple evolution of language rather than a change in approach. Rather than referring to spiritual or moral deficiencies, "[t]he current discourse" uses "such terms as 'dysfunctional,' 'anti-social,' and 'dependent personality disorder' as new pathologies to implicate the poor in deviant behavior."¹⁸⁴

This leads to the incorrect (and, frankly, offensive) assumption that if not for these pathological deficiencies, poor people would be successful and productive community members. Thus, despite the assumed evolution in our collective understanding of the causes of poverty, there is little difference between the current approach and the historic belief that wealth is evidence of virtue and poverty an indication of moral failure. As a result, modern philanthropic efforts, similar to historical efforts, are largely structured to address the so-called pathologies, rather than the poverty itself.¹⁸⁵ This is why "[n]oncontroversial poverty programs, such as food banks," readily receive philanthropic support, where "grassroots organizations, advocacy initiatives, or public policy efforts" experience much more difficulty.¹⁸⁶

1. "Why not cash?"¹⁸⁷

Echoing Carnegie's warning that giving a "quarter-dollar" to a "beggar" results in the money being "spent improperly,"¹⁸⁸ most philanthropists prefer in-kind gifts (that is, food, clothing, etc.) rather than monetary gifts.¹⁸⁹ This preference is emblematic of the enduring paternalism of philanthropy. If a person is homeless and destitute, logic dictates that the most direct means of ameliorating their situation is to provide money. Would not the beneficiary be in the best position to select appropriate food and shelter?

183. As Addams optimistically asserted over a century ago (and about twenty years after Carnegie published *Wealth*), "We have learned to judge men by their social virtues as well as by their business capacity." ADDAMS, *supra* note 97, at 15.

184. Weissman, *supra* note 75, at 805–06.

185. *Id.* at 809 ("When charities do fund antipoverty efforts, their funding strategies are likely to reflect ideas about the pathology of the poor.")

186. *Id.*

187. Benjamin Soskis, *The Three-Word Question That's Changing What Charities Do With Their Resources*, ATLANTIC (Dec. 29, 2016), <https://www.theatlantic.com/business/archive/2016/12/why-not-cash/511799/> (citing a study by the Center for Global Development and the Overseas Development Institute that argued the effectiveness of cash transfers is well-established and, "[t]he question that should be asked is 'Why not cash?'").

188. Carnegie, *supra* note 170, at 662–63.

189. CTR. FOR GLOB. DEV., *DOING CASH DIFFERENTLY: HOW CASH TRANSFERS CAN TRANSFORM HUMANITARIAN AID 17* (2015) [hereinafter CENTER FOR GLOBAL DEVELOPMENT REPORT], <https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/9828.pdf>.

The intuitive preference for direct cash transfers is supported by convincing data.¹⁹⁰ In a study of the rural poor in Mexico comparing in-kind and cash transfers, researchers learned that there was no discernable difference between the two programs in terms of improvements in health, while direct cash transfers were markedly more efficient.¹⁹¹ The study noted that “households spend very little of the cash transfer on vices” and there was no evidence that less food was consumed when people in poverty received cash rather than food.¹⁹² Thus, contrary to Carnegie’s assumption, studies prove that recipients of direct cash transfers are quite responsible with the donations.¹⁹³ Perhaps more importantly, the cost of the cash transfer programs is significantly less expensive than in-kind programs,¹⁹⁴ with one study suggesting that a philanthropic shift from in-kind donations to cash transfers would help 18% more people.¹⁹⁵

Despite this evidence, direct cash transfers represent only 6% of humanitarian aid.¹⁹⁶ There is little reason for any loyalty to in-kind programs other than the tradition of paternalism and lingering distrust of those in poverty.¹⁹⁷ As one supporter of direct cash transfers noted, “The aid sector in general is bad at trusting people and reluctant to hand-over power and control. [Philanthropy is] fundamentally premised on the idea of the external experts deciding what is needed and providing it.”¹⁹⁸ The following anecdote might best encapsulate this distrust of beneficiaries to make responsible decisions. When Jacquelline Fuller, Director of Giving at Google, recommended giving direct cash transfers to people in extreme poverty in East Africa, one of her superiors responded, “You must be smoking crack.”¹⁹⁹

190. *Id.* at 8. One report noted, “Cash transfers are among the most well-researched and rigorously-evaluated humanitarian tools of the last decade.” *Id.*

191. Jesse M. Cunha et al., *The Price Effects of Cash Versus In-Kind Transfers* 27–28 (Nat’l Bureau of Econ. Research, Working Paper No. 17456, 2011).

192. Jesse M. Cunha, *Testing Paternalism: Cash Versus In-Kind Transfers*, 6 AM. ECON. J.: APPLIED ECON. 195, 229 (2014).

193. CENTER FOR GLOBAL DEVELOPMENT REPORT, *supra* note 189, at 8 (“People spend cash sensibly: [T]hey are not likely to spend it anti-socially (for example, on alcohol).”).

194. *Id.* (“It usually costs less to get cash transfers to people than in-kind assistance because aid agencies do not need to transport and store relief goods.”).

195. *Id.* (“A four-country study comparing cash transfers and food aid found that 18% more people could be assisted at no extra cost if everyone received cash instead of food.”).

196. *Id.* at 17.

197. See Paul Harvey, *Just Give Them the Money: Why Are Cash Transfers Only 6% of Humanitarian Aid?*, FROM POVERTY TO POWER (Mar. 3, 2016), <https://oxfamblogs.org/fp2p/just-give-them-the-money-why-are-cash-transfers-only-6-of-humanitarian-aid/> (discussing the international aid system’s persistence in providing primarily in-kind support despite the “strong case for cash transfers”).

198. *Id.*

199. Kerry A. Dolan, *Why Facebook Cofounder Chris Hughes and Google Are Giving Cash Directly to the Poorest*, FORBES (May 28, 2013), www.forbes.com/sites/kerryadolan/2013/05/28/why-google-and-facebook-cofounder-chris-hughes-are-giving-cash-directly-to-the-poorest/#208c5fa86d17 (noting the clear implication of this dismissive statement is that only a

The preference for in-kind assistance and the resistance to direct cash transfers is not only less efficient, it robs beneficiaries of their dignity and self-determination.²⁰⁰ It results in wealthy people choosing the type of food a poor person eats, the type of housing in which a poor person lives, and the type of jobs for which a poor person receives training. Alternatively, cash transfers give recipients both “greater choice and control over how best to meet their own needs, and a greater sense of dignity.”²⁰¹ Thus, philanthropists miss an opportunity to “align the humanitarian system better with what people need, rather than what humanitarian [organizations] are mandated and equipped to provide.”²⁰²

Despite the effectiveness of direct cash transfers and the attendant benefit of increasing the dignity of beneficiaries, the usual means of philanthropic efforts to address poverty reflect the persistent paternalistic nature of philanthropy. Rather than provide the financial means to remedy the person’s situation, philanthropy chooses which food, shelter, and job training to provide. The thinly veiled assumption is that the rich cannot trust the poor to spend money in a responsible manner. Philanthropists believe they know what is best for the poor and will therefore spend money on their behalf.

2. “We know what works”²⁰³

The reluctance of philanthropists to provide cash transfers is not the only instance of philanthropic paternalism. Take, for example, Zuckerberg’s much-publicized attempts to reform Newark’s public school system.²⁰⁴ Several years before forming the CZI, Zuckerberg joined then-Governor Chris Christie and then-Mayor Cory Booker on *The Oprah Winfrey Show* to announce a \$100 million matching gift to transform Newark’s troubled

person suffering from a debilitating drug addiction would suggest something as seemingly outlandish as direct cash transfers).

200. *Cash Assistance Gives Refugees the Power of Choice*, UNHCR: USA (Aug. 28, 2018), <http://www.unhcr.org/en-us/news/stories/2018/8/5b6c40f04/cash-assistance-gives-refugees-power-choice.html>

201. Harvey, *supra* note 197.

202. CENTER FOR GLOBAL DEVELOPMENT REPORT, *supra* note 189, at 8.

203. Dale Russakoff, *Schooled*, NEW YORKER (May 19, 2014), <https://www.newyorker.com/magazine/2014/05/19/schooled> (“[R]eformers argued that well-run schools with the flexibility to recruit the best teachers could overcome many of the effects of poverty, broken homes, and exposure to violence. That usually meant charter schools, which operated free of the district schools’ large bureaucracies and union rules. ‘We know what works,’ Booker and other reformers often said.”).

204. RUSSAKOFF, *supra* note 90, at 65.

schools.²⁰⁵ The idea, in the words of Booker, was to use the Newark experiment to “creat[e] a bold new paradigm for educational excellence.”²⁰⁶ Zuckerberg echoed this sentiment, hoping that the effort would “turn Newark into a symbol of educational excellence for the whole nation.”²⁰⁷ In essence, this experiment aspired to implement the shared goals of the philanthropically-driven public school reform movement (that is, expansion of charter schools, removing ineffective teachers, rewarding good teachers, and streamlining the management of school systems) in a manner that might be replicated across the country.

This effort, which may have received more criticism than it deserved,²⁰⁸ “generated strong community backlash and one of the nastiest fights over urban education in memory.”²⁰⁹ The community resistance was not due to the motivations and goals of Zuckerberg, Booker, and Christie. Indeed, many community members, including both residents and teachers, recognized the need to reform Newark’s school system.²¹⁰ But again, the results of philanthropic efforts are sometimes less important than the process. In this case, the Newark community took issue with the aggressively top-down approach to the endeavor.²¹¹ In one of the more galling examples, access to the endeavor was largely limited to donors who gave \$5 million or more on an annual basis, which effectively excluded not only individual community members with experience in Newark’s public education system, but also the local organizations which had been working in Newark public schools for decades.²¹² Dale Russakoff, author of *The Prize: Who’s in Charge of America’s Schools*, noted “there seems to be a sense that everybody knows as much about how to fix schools as teachers do and as educators do.”²¹³ As one critic of philanthropy-driven education reform stated, “Education reform

205. *The Oprah Winfrey Show* (CBS television broadcast Sept. 24, 2010), www.oprah.com/own-oprahshow/mark-zuckerbergs-big-announcement-video. The goal, according to Winfrey, was “to help turn around the failing public schools in Newark.” *Id.*

206. *Id.*

207. *Id.*

208. CALLAHAN, *supra* note 83, at 131 (“Between 2010 and 2015 . . . the graduation rate in [Newark] rose from 56[%] to 69[%]. The dramatic expansion of charters in the city has also given many students access to better schools than district choices.”).

209. *Id.* at 130.

210. *Fresh Air: Assessing the \$100 Million Upheavla of Newark’s Public Schools*, (NPR broadcast Sept. 21, 2015) [hereinafter *Fresh Air Interview*], <https://www.npr.org/2015/09/21/442183080/assessing-the-100-million-upheavel-of-newarks-public-schools> (interviewing Dale Russakoff who stated, “[T]here’s a very large consensus on the ground in Newark at this time that the schools really need change, that the schools are failing in unacceptable ways. And so there wasn’t really, you know, a roadmap for how to do that, but there were a lot of people, including some very skilled, experienced teachers, who deeply understood the needs of the children in Newark who would have been eager to be part of that conversation.”).

211. *Id.* See generally RUSSAKOFF, *supra* note 90, at 207.

212. See *Fresh Air Interview*, *supra* note 210.

213. *Id.*

comes across as colonial to people who've been here for decades" because reform is "done *to* people rather than in cooperation with people."²¹⁴ No matter how well-intentioned, the very structure of philanthropy promotes the desires of a select number of wealthy individuals, ignores the self-determination of the recipients, and represents a disrespect for the ability of beneficiaries to order their affairs and prioritize their needs.

C. *Philanthropy Is Amateuristic*

Oscar Wilde, in his screed against the evils of capitalism, asserted that philanthropists "seriously and very sentimentally set themselves to the task of remedying the evils that they see [in poverty]. But their remedies do not cure the disease: they merely prolong it."²¹⁵ In arguing for socialism, Mr. Wilde used the charitable instinct as evidence of something inherently immoral in capitalism.²¹⁶ However, Mr. Wilde might have been better suited arguing not that philanthropy exacerbates the problem, but rather that it often fails to address the targeted ills. This is because philanthropists, more often than not, have very little experience in their chosen areas of focus. More pointedly, why did Mark Zuckerberg believe success in launching a social media empire somehow provided him the knowledge necessary to fix public education?

Obviously, there is no logical reason to assume that Zuckerberg's particular genius in monetizing a social media website is transferable to other fields, but the conceit of philanthropy is that a wealthy person knows the best way to address a social ill for no reason other than the possession of wealth. This is blatantly irrational, but it is also the fundamental belief undergirding the philanthropic regime. It, therefore, bears stating the absurdly obvious: "[B]eing skillful at accumulating wealth and power does not necessarily mean one is good at creating social value."²¹⁷ In more frank terms, Callahan noted that philanthropists "often know little about the complex problems they aspire to solve—yet may have too much hubris to recognize it—which raises an obvious risk of screwups."²¹⁸

This amateurism takes many forms. For traditional philanthropists, it is often born out of simple lack of experience. For philanthrocapitalists, the amateurism is intensified by their inclination to import business strategies to philanthropic endeavors. The following Sections will discuss two business

214. RUSSAKOFF, *supra* note 90, at 207 (quoting Shavar Jeffries, Newark's former School Board President).

215. WILDE, *supra* note 79, at 10.

216. *Id.* ("It is immoral to use private property in order to alleviate the horrible evils that result from the institution of private property.")

217. Chuang, *supra* note 48, at 1529.

218. CALLAHAN, *supra* note 83, at 118. Callahan continued to note, "Making a bundle in software or short trading doesn't mean you'll know the first thing about, say, K-12 education, and it's easy for misguided philanthropists to do a lot of damage." *Id.*

strategies that are problematic in the philanthropic realm: the instinct to monopolize discussions²¹⁹ and the willingness to embrace trial-and-error approaches.²²⁰

1. "*Monopolizing the Market of Ideas*"²²¹

To address their lack of experience, many philanthropists turn to experts. For example, Bill Gates was no expert on malaria when the Gates Foundation undertook malaria research, so the Gates Foundation hired leading disease experts and funded pharmaceutical research by experienced scientists.²²² This is an admirable way to tackle a problem: Rather than rely upon your own instincts and suspicions, defer to expertise. In such cases, the problem is not the philanthropist's instinct to seek out experts. Rather, the problem is the tendency of philanthropists to ignore expert advice that contradicts the philanthropist's chosen path.²²³ Often, philanthropists seek out experts not to find a right answer, but rather to confirm their suspected answer.²²⁴

Once again, Zuckerberg's efforts to reform Newark's public education system is illustrative.²²⁵ In that case, the philanthropists sought out experts to determine if their goal of reforming Newark schools within five years was feasible.²²⁶ One of those experts was John King, the Deputy New York State Education Commissioner, whom the philanthropists hoped would serve as Newark's superintendent.²²⁷ King refused the offer, largely because he viewed the five-year reform plan as unrealistic.²²⁸ He thought "it could take almost that long to change the system's fundamental procedures and to raise expectations across the city for children and schools."²²⁹ Rather than heed King's advice and adjust the timeline, the philanthropists sought out an expert that would embrace their chosen approach.²³⁰

The phenomenon of ignoring expert advice when it does not comport with the philanthropist's preconceived solution often involves more than simply ignoring a single expert. More disturbingly, as philanthropists limit their consultations to those experts that agree with the philanthropist's chosen

219. See *infra* Section II.C.1.

220. See *infra* Section II.C.2.

221. Bosworth, *supra* note 88, at 384.

222. *Id.*

223. *Id.*

224. Chuang, *supra* note 48, at 1551 (noting that "[p]hilanthro-policymaking can all too readily take place in an echo chamber, impervious to scrutiny, much less criticism").

225. See *supra* notes 205–214 and accompanying text.

226. RUSSAKOFF, *supra* note 90, at 30.

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.*

approach, the result is a chorus of expert opinions that simply parrot the philanthropist's preconceived notions.²³¹ As philanthropists throw more money behind their now-bolstered preconceived notions, they quickly become the loudest voice in any given argument.²³² By monopolizing the field in this manner, there is little diversity of opinions and the philanthropist's chosen solution to a problem becomes the only solution considered.

This may be the natural result when philanthropists transfer the lessons learned from business to philanthropy, but when philanthropists use the mechanism that helped them amass their fortunes—monopolization of the market—on their philanthropic efforts, dissenting voices are overwhelmed and ignored.²³³ As Professor Bosworth asserts, Microsoft “has thrived financially not due to its ongoing prophetic excellence but its longstanding monopoly status.”²³⁴ Whether or not this is true, monopolization is unfortunately the approach many philanthropists adopted.²³⁵ The squelching of diverse opinions in the approach to malaria was briefly discussed in a previous Section of this Article,²³⁶ but it is not peculiar to malaria. It is, for example, also the process that resulted in the philanthropic approach to public education reform.²³⁷

It is not an exaggeration to state that a handful of private foundations have provided the dominant (if not the only) voice in public education reform. By leveraging the strength of their wealth and the implicit threat of defunding, the Gates Foundation, the Broad Foundation, and the Walton Family Foundation have practically dictated the public education reform discussions.²³⁸ Policymakers and educators, in order to avoid offending philanthropists and the resultant negative financial repercussions, engage in self-censorship.²³⁹ Friedrich Hess, Director of Education Policy at the American Enterprise Institute, described a “world where philanthropists are royalty” with the power to defund “academics, activists, and the policy community.”²⁴⁰ As one education advocate explained it, funding by the Gates Foundation in education reform “was so large and so widespread, it seemed for a

231. See generally Bosworth, *supra* note 88.

232. *Id.* at 384.

233. *Id.* at 385 (“Microsoft has monopolized the . . . industry. Gates made his enormous fortune less by product innovation than by cleverly and ruthlessly dominating his industry’s distribution system—that is, by eliminating the very competition that is supposed to spur technological improvement; and in the new era of hands-on giving, he has now been applying the same tactics to his second career as a philanthrocapitalist.”).

234. *Id.* at 386.

235. *Id.* at 385.

236. See *supra* Section II.A.2.

237. Bosworth, *supra* note 88, at 385.

238. *Id.* at 384–85.

239. *Id.* at 384.

240. *Id.* (quoting WITH THE BEST OF INTENTIONS: HOW PHILANTHROPY IS RESHAPING K–12 SCHOOLS 9 (Friedrich M. Hess ed., 2005)).

time as if every initiative in the small-schools and charter world was being underwritten by the [Gates F]oundation.”²⁴¹ This advocate claimed that “[i]f you wanted to start a school, hold a meeting, organize a conference, or write an article in an education journal, you first had to consider” the Gates Foundation.²⁴²

This market dominance resulted in a depressingly paltry intellectual debate due to philanthropists “[m]onopolizing the [m]arket of [i]deas.”²⁴³ By dominating the public conversation, the solutions proposed by private foundations became the only solutions available for policymakers. As described by Bosworth, the philanthropists used their donations to influence experts,²⁴⁴ journalists,²⁴⁵ and politicians.²⁴⁶ The result of the collective philanthropic investment in public education reform was a wholesale adoption of the philanthropists’ general prescription for America’s failing schools: “charter schools, performance-based pay for teachers, national testing standards, and the power to effect a ‘turnaround’ by firing the staff of low-performing schools.”²⁴⁷

Despite the difficulty in implementing these endeavors, the policy discussions did not stray far from the philanthropists’ agenda. As Bosworth argued,

241. KLONSKY, *supra* note 115, at 26.

242. *Id.*

243. Bosworth, *supra* note 88, at 384.

244. *Id.* (“Gates insists that the initiatives of the Bill and Melinda Gates Foundation . . . are rooted in the objective analysis of the best experts in each field, but in most cases, the evaluators of those initiatives have been hired by either the foundation itself or its subsidiaries.”).

245. *Id.* (“A recent (and rare) investigative report by the Seattle Times revealed that the foundation had contributed over 69 million dollars since 2002 to news organizations and journalism schools ‘to promote coverage of its central issues: global health, development, and education.’” (quoting Sandi Doughton & Kristi Heim, *Does Gates Funding of Media Taint Objectivity?*, SEATTLE TIMES (Feb. 23, 2011), <https://www.seattletimes.com/seattle-news/does-gates-funding-of-media-taint-objectivity/>)); *see also* RUSSAKOFF, *supra* note 90, at 55 (noting that following Zuckerberg’s announcement of an endeavor to reform public education in Newark, “NBC began a week of heavily promoted television programming called *Education Nation*, sponsored in large part by the Gates and Broad foundations—an arrangement that drew some criticism because the coverage dovetailed closely with the venture philanthropists’ views”).

246. Bosworth, *supra* note 88, at 384 (“On the political front, it is illegal for charitable organizations to contribute directly to individual candidates, but that did not stop Gates and Eli Broad of the Broad Foundation from spending 60 million dollars on a public information campaign before the 2008 election, with the aim of influencing both parties to adopt their shared agenda for education reform.”).

247. *Id.* at 385; *see also* TOMPKINS-STANGE, *supra* note 21, at 3 (describing the process by which private foundations dominated the policy discussion by “fund[ing] an initiative to influence education policy at the state level. The foundation carefully assembled a grant portfolio of about one hundred grantees, including organizations that varied from think tanks to grassroots advocacy groups. By funding this diverse group of grantees, the foundation sought to catalyze what one staff member called ‘a social movement towards a massive policy reform’—a social movement of the foundation’s own design.”).

The ideological presumption is that the donor's philanthropic projects, like the commercial products that made him wealthy, have been rigorously tested in a Darwinian marketplace where only the best ideas can survive. But whether or not this is even true of his corporate ventures . . . , it does not apply in practical fact to his philanthropic ones whose funding is dependent on the donor's will alone.²⁴⁸

The result is that an amateur's instinctive solutions are artificially elevated to dominate the public discourse simply because of the amateur's financial support. As the amateur's ideas gain momentum, they invest more money to find additional support for the particular solution. As more money is invested, the will for dissent is weakened.²⁴⁹

If the philanthropist happens to be right (or if the philanthropist happened upon the right expert in crafting the solution), then there is no harm other than the theoretical harm to democracy. If, however, the solution is ineffective, society not only wasted time and money (and in the case of education reform, precious years of a generation of children), but also allowed philanthropists to silence dissidents and disincentivize alternate proposals.

2. "MOVE FAST AND BREAK THINGS"²⁵⁰

Philanthrocapitalists' inclination to monopolize ideas is not the only problematic business practice they use. Another market-based strategy widely adopted in modern philanthropy is the entrepreneurial willingness to fail.²⁵¹ In defending his embrace of failure, Gates once noted, "Success is a lousy teacher. It seduces smart people into thinking they can't lose."²⁵² Many philanthropists imported this philosophy into their philanthropic activity. As Callahan stated, "Major donors gunning for disruptive change tend to shrug off the risk of failure. It's part of any process for solving problems."²⁵³ Callahan quoted Bill Ackman, a hedge fund investor and philanthropist, as being so "comfortable with failure" that he admitted "there is some new mistake we haven't yet made that we'll make in the future. But as long as we learn from it, it's fine."²⁵⁴

248. Bosworth, *supra* note 88, at 384.

249. *Id.* at 386 ("What proves disturbing . . . is not that experiments have been tried but the scope and pace of their institution, the rush to nationalize reforms that have either yet to be proven or have even been shown to be largely ineffective. Denying reality is not the hallmark of an entrepreneur committed to 'evidence-based solutions'; it is the sign of an ideologue who is cushioned from consequences by money, connections, and public acclaim.").

250. RUSSAKOFF, *supra* note 90, at 28.

251. CALLAHAN, *supra* note 83, at 59, 133.

252. *Id.*

253. *Id.* at 133.

254. *Id.*

But this trial-and-error approach has a more troubling effect when it applies to matters of public concern.²⁵⁵ Consider again the education reform movement and, specifically, the Zuckerberg-driven reform measures in Newark.²⁵⁶ Frustrated with Booker's difficulty in finding a qualified superintendent to oversee the reforms, Zuckerberg sent Booker one of Facebook's motivational posters to spur action.²⁵⁷ The poster said, "DONE IS BETTER THAN PERFECT."²⁵⁸

When testing a product on the market, this approach might make sense. There may not be a better way to determine if the public has an appetite for a particular good or service than letting the market speak.²⁵⁹ However, when dealing with the education of children, the trial-and-error approach has much greater consequences. As noted by Russakoff, the approach to education reform in Newark was "to launch multiple missions at once, assuming some would crash on takeoff, some would fall by the wayside, and some would go the distance."²⁶⁰ Again, if the subject matter at issue is a consumer product or service, this is a perfectly reasonable way to proceed.²⁶¹ However, one must ask: When a child is stuck in one of the school programs that "crash on takeoff," what happens to that child?²⁶² Further, this trial-and-error approach "happened not just in Newark, but in New York City and in many other places when the Gates Foundation poured \$2 billion into a national push to break up large high schools and shift students into small schools—only to later abandon this strategy."²⁶³

Zuckerberg admitted that one of his personal goals for the Newark public education reform experiment was to "learn from his experience and become a better philanthropist in the process."²⁶⁴ In a Facebook post, Zuckerberg noted the mistakes made in the Newark experiment and said, "It's very important to understand the desires of a community, to listen and learn from

255. *Id.* ("When a start-up fails, money is lost and people need to find new jobs. When an experiment in remaking urban education fails, it can cause major dislocation in the lives of families.")

256. *See supra* notes 204–207.

257. RUSSAKOFF, *supra* note 90, at 107.

258. *Id.* Other motivational posters included the following advice: "MOVE FAST AND BREAK THINGS." *Id.* at 28.

259. Roger Dooley, *Why So Much Market Research Sucks*, FORBES (Oct. 4, 2012), <https://www.forbes.com/sites/rogerdooley/2012/10/04/market-research/#63ba15777394> ("If you want to get the real story on the behavior of your customers, readers, etc., don't rely on self-reported data The solution is to measure your customers' actual behavior. Don't ask people if a 20% discount would make them buy a product right away—test it!")

260. RUSSAKOFF, *supra* note 90, at 101.

261. Thomas Oppong, *Why the Freedom to Experiment and Fail Is Important for Every Innovator*, INC. (July 12, 2016), <https://www.inc.com/thomas-oppong/why-the-freedom-to-experiment-and-fail-is-important-for-innovators.html>.

262. *Id.*

263. CALLAHAN, *supra* note 83, at 133–34.

264. RUSSAKOFF, *supra* note 90, at 25.

families, teachers, elected officials and other experts.”²⁶⁵ While this is a noble goal of self-betterment and an admirable expression of self-awareness, one wonders how the parents and children of Newark feel about being the test case for a rich person learning how to be a better philanthropist.²⁶⁶ Zuckerberg’s lesson in the value of democracy was learned at a great cost, as the Newark experiment disrupted the lives of thousands of Newark children.²⁶⁷

D. The Negatives of Philanthropy Are Interconnected

The antidemocratic, paternalistic, and amateuristic aspects of philanthropy are interconnected, and an increase in one aspect exacerbates the others.²⁶⁸ Philanthropy’s amateurism (for example, the belief that the ability to develop and monetize a social media website is somehow viewed as wisdom that can be applied to any intractable social problem)²⁶⁹ springs from a hubris that aggravates the antidemocratic nature of philanthropy, in that a strong certitude renders outside input unnecessary. The belief that corporate success is evidence of philosophical wisdom “helps explain the political authority that Gates and his allies are now gaining to direct public policy on his pet issues of global health and national education reform, absent the usual requirement of holding public office.”²⁷⁰ It is in this manner that philanthropy’s amateurism is tied to its antidemocratic nature.

Further, the antidemocratic nature of philanthropy directly feeds into and from philanthropy’s paternalistic roots. Dr. Salamon summed up the problem by noting, “The nature of the [charitable] sector . . . comes to be

265. Mark Zuckerberg, FACEBOOK (Nov. 6, 2015), <https://pt-br.facebook.com/zuck/posts/10102461248065941>.

266. RUSSAKOFF, *supra* note 90, at 6. When faced with evidence that “only one in five [charter schools] in the country outperformed their district counterparts on standardized tests, [then-Mayor Cory] Booker and other reformers said emphatically, ‘We know what works.’” *Id.*

267. *Id.* at 210; see also Tammy La Gorce, *Dale Russakoff: Test Case*, N.J. MONTHLY (Sept. 17, 2015), <https://njmonthly.com/articles/towns-schools/dale-russakoff-test-case-newark-education/> (“[T]he school closings and consolidations displaced thousands of students and caused chaos in district schools . . .”).

268. Indeed, the interconnectedness of these aspects is so great that it may seem that they overlap. However, the three aspects are distinguishable. The differences might be most obvious by way of example. Let us imagine that a small group of wealthy people believe the superiority of the safety features of luxury cars to those present in economy cars is beyond debate. This belief might be characterized as paternalism. If that group leverages its influence to force all people to buy luxury cars, that would represent antidemocracy. Finally, amateurism would be evident if non-wealthy people didn’t even want or need cars, but would rather benefit from better access to public transportation.

269. Bosworth, *supra* note 88, at 386 (“[I]t is a categorical error to presume, as quantiphilia does, that the techniques for boosting productivity in the corporate world can be successfully transferred to the public arena.”).

270. *Id.* at 383.

shaped by the preferences not of the community as a whole, but of its wealthiest members.”²⁷¹ There is, therefore, a direct connection between the paternalistic nature of philanthropy (the belief that philanthropists know what is best for beneficiaries) and the antidemocratic features of philanthropy (because philanthropists know best, they do not need outside input). Without meaningful input from the beneficiary community, philanthropy will reflect the distinct views of the wealthy, and this persistent failure to entertain either dissenting voices or the desires of the philanthropic targets (that is, the antidemocratic aspect of philanthropy) feeds philanthropy’s paternalism. The education reformer Howard Fuller concisely described the problem by labeling reformers “arrogant” and said,

It’s not even what you do sometimes, it’s the way you treat people in the process of doing it. If your approach is to get a lot of smart people in the room and figure out what ‘these people’ need and then we implement it, the first issue is who decided that you were smart? And why do you think you can just get in a room and make decisions for a community of people?²⁷²

This blunt assessment of top-down, philanthropic-driven education reform perfectly captures how the paternalistic nature of philanthropy leads to antidemocratic approaches to problems. Because the reformers assume they know how to best solve a problem (that is, because they are the “smart people in the room”), they convince themselves that they do not need to engage the beneficiary community or approach the problem with external input.

The interconnectivity of the three primary negative aspects of philanthropy results in an unfortunate momentum. The antidemocratic nature of philanthropy feeds the amateuristic aspects of philanthropy by dominating any given conversation about a social issue and stifling voices of dissent. Paternalism feeds amateurism, which may be sufferable if there was some democratic check on such risk-taking.

III. THE LIMITS OF PRIVATE FOUNDATIONS AND THE FREEDOM OF LLCs

Having established the inherent negatives of philanthropy, this Part discusses how private foundations represent a limited bulwark against these traditional criticisms and how the LLC’s relative freedom from regulation exacerbates these negatives. First, however, it is helpful to explore the purported reasons philanthropists have begun to use LLCs for their philanthropic endeavors.

271. Lester Salamon, *Of Market Failure, Voluntary Failure, and Third-Party Government: Toward a Theory of Government-Nonprofit Relations in the Modern Welfare State*, 16 *NONPROFIT & VOLUNTARY SECTOR* Q. 29, 41 (1987).

272. RUSSAKOFF, *supra* note 90, at 210.

Zuckerberg briefly discussed the reasons that motivated him and Chan to form an LLC rather than a private foundation in, unsurprisingly, a Facebook post.²⁷³ According to Zuckerberg, he and Chan opted to eschew the more traditional private foundation in favor of the LLC form because the LLC “enables [the CZI] to pursue [its] mission by funding non-profit organizations, making private investments and participating in policy debates.”²⁷⁴ Zuckerberg highlighted the LLC’s flexibility as the determining factor by saying,

What’s most important to us is the flexibility to give to the organizations that will do the best work—regardless of how they’re structured. For example, our education work has been funded through a non-profit organization, Startup:Education, the recently announced Breakthrough Energy Coalition will make private investments in clean energy, and we also fund public government efforts, like the CDC Ebola response and San Francisco General Hospital.²⁷⁵

In a single sentence, Zuckerberg identified three distinct families of potential grant recipients: nonprofit organizations, a consortium of for-profit businesses and nonprofit organizations,²⁷⁶ and government programs.²⁷⁷ By emphasizing the “flexibility” of the LLC, Zuckerberg implied that a private foundation would not be permitted to give money to support such projects. Whether or not this is true, Zuckerberg’s post suggests that the decision was driven by the flexibility of the form and the comparative inflexibility of private foundations.

Although flexibility is certainly an attractive feature of LLCs, this Article posits that other limitations of the private foundation form may also persuade philanthropists to use LLCs. Of course, it is dangerous to make assumptions regarding the private motivations of individuals, but there is reason to doubt that the inflexibility of the private foundation form is the sole factor drawing philanthropists to LLCs. There is, for example, no rule or regulation that would completely prevent a private foundation from investing in any of Zuckerberg’s identified projects.²⁷⁸ There are, however, a number

273. Zuckerberg, *supra* note 13.

274. *Id.*

275. *Id.* Note that the San Francisco General Hospital is now known as the Zuckerberg San Francisco General Hospital. Madeline Stone, *San Francisco General Hospital Will Be Named After Mark Zuckerberg After He and His Wife Donate \$75 Million*, BUS. INSIDER (Feb. 6, 2015), <http://www.businessinsider.com/san-francisco-general-hospital-will-be-named-after-mark-zuckerberg-2015-2>.

276. See *Coalition*, BREAKTHROUGH ENERGY, www.b-t.energy/coalition/ (last visited Sept. 19, 2018).

277. The “CDC” is the Centers for Disease Control and Prevention, a component of the Department of Health and Human Services. See *CDC Organization*, CTRS. FOR DISEASE CONTROL & PREVENTION, www.cdc.gov/about/organization/cio.htm (last updated Sept. 13, 2018).

278. See discussion *infra* Section III.B.2.

of other restrictions that limit the activities of private foundations, which likely contribute to philanthropists' recent decisions to form LLCs.²⁷⁹ More specifically, this Part argues that philanthropists are attracted to the LLC structure because private foundations are subject to mandatory payouts, reporting and disclosure requirements, and limitations on certain political and lobbying activities. The LLC is subject to none of these restrictions, and this Part argues that the lack of these restrictions results in an unacceptable freedom from regulation, oversight, and transparency.

A. Private Foundations: Not as Limited as Zuckerberg Suggests

Zuckerberg strongly hinted that the LLC form was necessary to facilitate distributions to not only nonprofit organizations, but also for-profit endeavors by stating that the CZI “is structured as an LLC rather than a traditional foundation” to, among other things, “mak[e] private investments” in entities “regardless of how they’re structured.”²⁸⁰ The ability of an LLC to make such investments was, therefore, a key factor in the entity choice decision. This justification echoes the decision by Omidyar to engage in philanthropy through an LLC, noting that “philanthropy is about improving the lives of others, independent of mechanism.”²⁸¹

Although Zuckerberg’s Facebook post suggests that private foundations are not permitted to invest in for-profit entities,²⁸² this is not entirely correct. While private foundations are limited in how much voting control they may have in certain entities,²⁸³ some investments in for-profit entities may count toward the minimum distribution requirement.

The minimum distribution requirement is discussed in more detail below,²⁸⁴ but a brief discussion is warranted to explain the limitation—not the complete restriction—of private foundation investments in for-profit entities.

279. It should be no surprise that once private foundations were eliminated as a potential option, the ultimate decision was to form an LLC. This is because LLCs are the most popular legal entity form in America for new endeavors. Eric H. Franklin, *A Rational Approach to Business Entity Choice*, 64 U. KAN. L. REV. 573, 586 (2016) (“LLCs are far and away the most popular legal entity form for new businesses.”); Daniel M. Häusermann, *For a Few Dollars Less: Explaining State to State Variation in Limited Liability Company Popularity*, 20 U. MIAMI BUS. L. REV. 1, 5–6 (2011) (“Forty-nine jurisdictions enacted LLC laws between 1990 and 1997, and virtually all state legislatures wanted the LLC to be a business-friendly entity that would attract business and revenue to the state. Indeed, since 2004, when LLC formations surpassed incorporations for the first time, the LLC is the most popular business entity in the United States. The numbers of LLC formations are impressive. From 2004 to 2007, the latest period for which complete data are available, 4.9 million LLCs were formed nationwide, compared to 3.3 million corporations and 0.2 million limited partnerships.” (footnotes omitted)).

280. See Zuckerberg, *supra* note 13.

281. OMIDYAR NETWORK, www.omidyar.com (last visited July 9, 2018).

282. See Zuckerberg, *supra* note 13.

283. See I.R.C. § 4943(a)(1) (2012) (restricting private foundations from owning a certain percentage in for-profit organizations).

284. See *infra* Section III.B.1.

A private foundation is required to make certain distributions to maintain its tax benefits, and such distributions must meet two main requirements.²⁸⁵ First, the distribution must be in support of a “religious, charitable, scientific, literary” or other public purpose.²⁸⁶ Second, the distribution may not be made to an entity controlled by the private foundation or owned by a disqualified person (which includes the foundation’s manager and substantial contributors).²⁸⁷ In other words, the distribution has to be charitable and the recipient must be an unrelated entity.

Note there is no blanket restriction against private foundations from investing in for-profit entities. Rather, the regulations focus on the purpose of the investment.²⁸⁸ If an investment will support a permissible charitable purpose and the private foundation or certain enumerated related parties do not own the beneficiary, then the distribution will qualify.²⁸⁹

If this appears to represent a surprisingly broad group of potential recipients, that is likely because of the popular misconception that private foundations are restricted to giving grants to nonprofit organizations.²⁹⁰ Although grants by private foundations to nonprofit organizations “comprise by far the majority of qualifying distributions,” there are a number of qualifying distributions to entities other than nonprofit organizations, including the program-related investment.²⁹¹

An investment is “program-related,” and, therefore, a qualifying distribution, if (1) the “primary purpose” of the investment is to further the foundation’s exempt purpose, (2) “no significant purpose” of the investment is producing income,²⁹² and (3) the investment is not designed to influence legislation or take part in political campaigns.²⁹³ A good example of a program-

285. I.R.C. § 4942(g) (2012).

286. *Id.* § 170(c)(2)(B).

287. *Id.* § 4942(g). Other disqualified people include (1) owners of entities that contribute to the private foundation and (2) corporations, partnerships, or trusts wherein a disqualified person owned more than 35%. *Id.* § 4946 (a)(1)(E)–(H). Additionally, any amounts spent to acquire an asset used for a charitable or other public purpose may be a qualifying distribution, and some set aside for future private foundation projects may qualify as a qualifying distribution. *Id.* § 4942(g)(1)–(2).

288. *Id.* § 4942(a) (stating the tax is imposed upon “the undistributed income of a private foundation for any taxable year, which has not been distributed” pursuant to the regulation).

289. *See supra* note 285–287.

290. Indeed, Zuckerberg appears to have suffered from this misconception, as he cited “the flexibility to give to the organizations that will do the best work—regardless of how they’re structured” as the primary reason he and Chan formed an LLC as opposed to a private foundation. Zuckerberg, *supra* note 13.

291. I.R.C. § 4944(c) (2012); BRUCE HOPKINS & JODY BLAZEK, PRIVATE FOUNDATIONS: TAX LAW AND COMPLIANCE (2008).

292. I.R.C. § 4944(c).

293. *See* 2012-21 I.R.B. 950 (“Section 4944(c) excepts program-related investments (‘PRIs’) from treatment as jeopardizing investments. The regulations under [S]ection 4944(c) define a PRI as an investment: (1) the primary purpose of which is to accomplish one or more of the purposes described in [S]ection 170(c)(2)(B); (2) no significant purpose of which is the production of income

related investment is the Gates Foundation's \$15 million investment in Owl Ventures.²⁹⁴ Owl Ventures is a for-profit venture capital fund that invests in education technology companies.²⁹⁵ While Owl Ventures is interested in investing in companies "that seek to meaningfully drive improvement in student achievement," it is also interested in making a profit.²⁹⁶ In describing a \$100 million education investment fund, Tory Patterson, Owl Ventures' managing partner, emphasized not only the positive effects on student achievement, but also the profit potential of education entrepreneurs, whose performance "rival[s] high-achievers in other industries."²⁹⁷ The Gates Foundation's investment is intended to ensure Owl Ventures' "investments will be in the service of those students most in need and that they will address clear gaps in the market."²⁹⁸ Despite the fact that Owl Ventures is a for-profit entity, the Gates Foundation's investment was not motivated to turn a profit. Rather, the Gates Foundation reacted to a perceived "funding gap that pose[d] a threat to the long-term scalability/sustainability of the industry" and invested in an organization doing good work in the field.²⁹⁹

In this manner, a private foundation (the Gates Foundation) may invest in a for-profit organization (Owl Ventures). Although the administrative burden of ensuring that any given investment would qualify as a program-related investment may have been enough to dissuade Chan and Zuckerberg to stay away from the private foundation form,³⁰⁰ the permissibility of program-related investments to count toward a private foundation's mandatory payout requirement makes Zuckerberg's stated reason for forming an LLC ring a bit hollow. With this in mind, the balance of this Part explores additional reasons that a philanthropist might choose an LLC over a private foundation, including regulations that subject private foundations to a mandatory distribution requirement,³⁰¹ prohibit private foundations from engaging in political

or the appreciation of property; and (3) no purpose of which is to accomplish one or more of the purposes described in [S]ection 170(c)(2)(D) (attempting to influence legislation or participating in or intervening in any political campaign).").

294. *Owl Ventures*, BILL & MELINDA GATES FOUND., <https://pri.gatesfoundation.org/investments/owl-ventures/> (last visited July 23, 2018); see *How We Work: Owl Ventures*, BILL & MELINDA GATES FOUND. (Oct. 24, 2017), <https://web.archive.org/web/20171024103031/https://www.gatesfoundation.org/How-We-Work/Quick-Links/Program-Related-Investments/Owl-Ventures>].

295. *About*, OWL VENTURES, <http://www.owlvc.com> (last visited July 9, 2018).

296. See *id.* (describing the venture capital fund's purpose).

297. Tony Wan, *Owl Ventures Launches \$100 Million Education Investment Fund*, EDSURGE (Aug. 24, 2015), <https://www.edsurge.com/news/2015-08-24-owl-ventures-launches-100-million-education-investment-fund>.

298. *How We Work: Owl Ventures*, *supra* note 294.

299. *Id.*

300. See Brakman Reiser, *For-Profit Philanthropy*, *supra* note 33, at 2457 ("[E]nsuring . . . investments fall within the PRI exception would entail both cost and inherent risk for a . . . private foundation.").

301. See *infra* Section III.B.

activity and substantial lobbying,³⁰² and impose extensive annual reporting requirements.³⁰³ Following the discussion of each regulation, this Part addresses how each restriction does not apply to LLCs. Ultimately, the remainder of this Part argues that the absence of such restrictions leaves LLCs free to engage in antidemocratic, paternalistic, and amateuristic practices without limitation.

B. The Mandatory Distribution Requirement

1. Private Foundations Must Engage in Some Charity

Perhaps the most well-known regulatory requirement for private foundations is the mandatory distribution requirement. Often cited in opinion pieces bemoaning the paltry charitable activity of some private foundations,³⁰⁴ the rule might be succinctly stated as an annual requirement for private foundations to spend at least 5% of the value of their assets, with certain permissible adjustments, in a charitable manner.³⁰⁵ This requirement ensures that private foundations dispose of some assets in a manner deemed charitable by statute.³⁰⁶ In other words, in order to maintain tax-exempt status, private foundations must make certain distributions in support of a religious, charitable, scientific, literary, or other public purpose.³⁰⁷

This was not always the case. Prior to 1969, when the mandatory payout rules were enacted, regulators relied upon a rule that prohibited tax-exempt organizations from an “unreasonable accumulation of income.”³⁰⁸ Under this rule, a private foundation was subject to loss of its tax-exempt status if it accumulated unreasonable amounts of income.³⁰⁹ The contours of this requirement proved to be difficult to discern, with little direction provided by

302. See *infra* Section III.C.

303. See *infra* Section III.D.

304. See, e.g., Ray D. Madoff, *A Better Way to Encourage Charity*, N.Y. TIMES (Oct. 5, 2014), <https://www.nytimes.com/2014/10/06/opinion/a-better-way-to-encourage-charity.html>.

305. I.R.C. § 4942(e) (2012).

306. *Id.*; see *id.* § 170(c)(2)(B) (defining “charitable contribution” as a contribution to “organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals”).

307. See *id.* § 170(c)(2)(B); see also *id.* § 4942(e).

308. See INTERNAL REVENUE MANUAL § 7.27.16 (I.R.S. 1999), www.irs.gov/irm/part7/irm_07-027-016.html (last updated Sept. 10, 2017) (“Prior law provided that a private foundation would lose its exemption if its aggregate accumulated income was unreasonable in amount or duration for carrying out its exempt purposes.”).

309. I.R.C. § 504(a)(1) (1964).

courts.³¹⁰ This uncertainty bred widespread noncompliance with the rule and resulted in a disappointing lack of giving by private foundations.³¹¹

The Internal Revenue Service (“IRS”) diagnosed the problem as one of enforcement, noting that “[s]ince reasonableness or unreasonableness is essentially a subjective determination, and since the only available sanction—loss of exempt status—was often viewed as unduly harsh,” the unreasonable accumulation of income rule “was rarely applied.”³¹² Further, because the unreasonable accumulation of income rule was poorly enforced, the result was the bestowal of favorable tax treatment on private foundations without any guarantee of a concomitant charitable effect.³¹³ Indeed, the IRS concluded that the rule “proved largely ineffective” and that “charity may have received no benefit whatever or very belated benefit.”³¹⁴ Thus, to the extent the federal government was looking for some return in the form of charitable spending, the unreasonable accumulation of income rule was a failure.³¹⁵

To address this, the statute was revised to force private foundations to make distributions of certain amounts toward charitable purposes³¹⁶ known as the “mandatory distribution requirement.”³¹⁷ In contrast to the unreasonable accumulation of income rule, the mandatory distribution requirement is rather successful in inspiring increased charitable spending by private foundations.³¹⁸

At this point, it is important to note that forcing a private entity to expend funds in a certain manner stands in stark contrast to America’s sacrosanct belief in property rights. Normally, after the government extracts taxes, a person or entity is free to spend (or not spend) their or its money in any legal manner. To justify this uncharacteristic limitation on private property rights, defenders of the mandatory distribution requirement cite that private foundations enjoy significant tax benefits.³¹⁹ These tax benefits include, of

310. See Joel H. Feld, *Unreasonable Accumulation of Income by Foundations*, 16 CLEV.-MARSHALL L. REV. 362, 368 (1967).

311. See INTERNAL REVENUE MANUAL, *supra* note 308, § 7.27.16 (“Before the Tax Reform Act of 1969, there was little legal pressure on private foundations to distribute income to charity.”).

312. *Id.*

313. *Id.*

314. *Id.*

315. See *id.*

316. Initially, the rule required a private foundation “to distribute the greater of . . . its adjusted net income or minimum investment return on assets held for production of income.” *Id.* The rule was later amended to require private foundations to “distribute only their minimum investment return[,] statutorily [sic] defined as 5%.” *Id.*

317. In addition to quantifying the amount required to be distributed, the rule change also addressed the inflexible sanction, imposing excise taxes on private foundations that failed to make mandatory distributions as opposed to revocation of favorable tax status. *Id.*

318. See Homer C. Wadsworth, *Private Foundations and the Tax Reform Act of 1969*, 39 L & CONTEMP. PROBS. 255, 260 (1975) (“It is not surprising that [the minimum pay-out requirement of the Revenue Act of 1969] led to an appreciable increase in the level of foundation giving.”).

319. See I.R.C. § 501(a) (2012).

course, the entity's exemption from federal taxes on income³²⁰ and the founders' ability to take a tax deduction for donations to their foundation.³²¹ Further, the foundation's investment income enjoys a low tax burden,³²² there is favorable treatment with respect to capital gain on donations of appreciated property,³²³ and donated assets are generally not subject to estate taxes.³²⁴ In effect, the minimum distribution requirement allows a wealthy person to reap these favorable tax benefits so long as the private foundation "pays" for the favorable tax status by spending a certain amount in a manner that Congress determined is in the public interest. In this way, the federal government can ensure that the favorable tax status is not simply a gift to a wealthy person.

When considering all of the generous tax benefits enjoyed by private foundations, one might reasonably conclude that the mandatory distribution requirement is not commensurate with the potential forgone tax revenue.³²⁵ A 5% payout is a relative pittance compared to the tax savings, and it must be viewed as absolutely miniscule when one considers the fact that *virtually all* of the expenditures of public charities must be spent in furtherance of a charitable purpose and public charities are restricted from maintaining excess reserves.³²⁶ Thus, perhaps the mandatory distribution requirement is a relatively minor obligation. It is, however, better than nothing. And with the LLC form, that is precisely what we have: nothing.

320. *Id.* However, as Professor Brakman Reiser noted, "[F]or philanthropic groups running at a loss, this exemption is not necessarily a great boon." Brakman Reiser, *For-Profit Philanthropy*, *supra* note 33, at 2453.

321. The amount of the deduction is limited to a percentage of the donor's adjusted gross income. I.R.C. § 170(b)(1)(A)(vii) (2012).

322. *Id.* § 4940(a) ("There is hereby imposed on each private foundation which is exempt from taxation under section 501(a) for the taxable year, with respect to the carrying on its activities, a tax equal to 2[%] of the net investment income of such foundation for the taxable year.").

323. *Id.* § 170(b)(1)(D)(i) ("In the case of charitable contributions . . . of capital gain property, the total amount of such contributions of such property . . . for any taxable year shall not exceed the lesser of—(I) 20[%] of the taxpayer's contribution base for the taxable year, or (II) the excess of 30[%] of the taxpayer's contribution base for the taxable year over the amount of the contributions of capital gain property to which [170(b)(1)(C)] applies.").

324. See Harvey P. Dale & Roger Colinaux, *The Charitable Contributions Deduction: Federal Tax Rules*, 68 TAX LAW 331, 357 n.185 (2015) ("The statutory chain is a bit tedious, but the result is fairly clear: [T]ransfers to charities do not trigger the tax." (citing I.R.C. §§ 2601, 2611(a), 2612, 2613(a), 2651(e)(3) (2012))).

325. See, e.g., Stephanie Strom, *How Long Should Gifts Just Grow?*, N.Y. TIMES (Nov. 12, 2007), <https://www.nytimes.com/2007/11/12/giving/12money.html>.

326. See 26 C.F.R. § 1.501(c)(3) (2017) (describing tax-exempt entities as those "organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes."); Ellen Aprill, *The IRS's Tea Party Tax Row: How "Exclusively" Became "Primarily,"* PAC. STANDARD (June 7, 2013), <https://psmag.com/news/the-irss-tea-party-tax-row-how-exclusively-became-primarily-59451> (noting that "[t]he UBIT rules acknowledged and accepted that exempt organizations could engage in activities that did not carry out their exempt purpose. Thus, the earlier statutory language requiring that [S]ection 501(c)(3) and 501(c)(4) organizations operate 'exclusively' for their exempt purposes no longer accurately described the applicable law. Treasury regulations then reinterpreted 'exclusively' as 'primarily.'").

2. LLCs: No Requirement to Engage in Charity

An LLC, by design, provides a great amount of freedom and independence to its owners.³²⁷ Practically speaking, an LLC may engage in any activity as long as the activity is legal.³²⁸ Of most relevance to this discussion, there is no mandatory payout rule for LLCs. For the CZI, the Omidyar Network, and the Emerson Collective, the consequence is the absence of a requirement to spend any money toward the organizations' respective stated charitable purposes.

Although Chan and Zuckerberg seem truly sincere in their hopes to pursue their promises to cure diseases and improve public education,³²⁹ there is no regulatory requirement to do so. If the CZI decided to sit on the contribution for the next fifty years, there would be no recourse available to anyone. There would, for example, be no grounds for the IRS to impose any penalties or to demand any charitable spending. Further, there is no duty to pursue charitable activity, even if the stated purpose of the LLC is to engage in philanthropic works. Indeed, even if a creative attorney could argue that there is such a duty, there are no realistic plaintiffs to bring the case. After all, it is highly unlikely that Chan and Zuckerberg would choose to sue themselves.

It is reasonable to assume that the philanthrocapitalistic affinity for LLCs is born in part from a wariness of the private foundation's minimum distribution requirement. Chan and Zuckerberg hinted at this concern in the CZI announcement, noting that the CZI's goal to cure disease "will take time."³³⁰ The founders preached patience with the CZI's promised progress, noting that "[o]ver short periods of five or ten years, it may not seem like we're making much of a difference. But over the long term, seeds planted

327. Indeed, in many states, the founders of LLCs may even opt out of traditional fiduciary duties. See generally Mohsen Manesh, *Legal Asymmetry and the End of Corporate Law*, 34 DEL. J. CORP. L. 465 (2009).

328. Most LLC statutes permit LLCs to engage in any lawful activity. See, e.g., MD. CODE ANN. CORPS. & ASS'NS § 4A-201 (2015) ("A limited liability company may be organized under this title and may conduct activities in any state related to any lawful business, purpose, investment, or activity, whether or not for profit, except the business of acting as an insurer."); DEL. CODE ANN. tit.6 § 18-106(a) (2018) ("A limited liability company may carry on any lawful business, purpose or activity, whether or not for profit, with the exception of the business of banking.").

329. Kurt Wagner, *Priscilla Chan is Running One of the Most Ambitious Philanthropies in the World*, RECODE (July 10, 2017, 8:00 AM), www.recode.net/2017/7/10/15771676/priscilla-chan-facebook-philanthropy-mark-zuckerberg-initiative-cure-diseases (noting some of CZI's "plans are so ambitious and grand as to seem almost fantastical. Last fall, CZI pledged \$3 billion over the next decade to try and 'cure all diseases' in their daughter's lifetime. Chan has been vocal about the organization's involvement in trying to map every cell in the human body, and CZI is spending \$50 million over the next five years to fund research by scientists and engineers it calls 'investigators,' like [a] Stanford professor developing a \$1 microscope. Chan is also working with Summit Public Schools in California to fundamentally change the education system—she wants students around the country to be taught differently.").

330. See Zuckerberg, *supra* note 1.

now will grow, and one day, you or your children will see what we can only imagine: a world without suffering from disease.”³³¹

Although this statement does not explicitly relate to a private foundation’s mandatory payout requirements (that is, it does not suggest that the CZI might want to avoid making distributions in any given year), it does hint that the CZI is adopting a long timeline for its philanthropic efforts. Perhaps Chan and Zuckerberg plan to make a number of large initial investments and wait (presumably a period longer than five or ten years) before engaging in more giving. The mandatory distribution requirement of the private foundation might not permit such patience, but an LLC has no such distribution requirements. Indeed, the CZI, as an LLC, could make absolutely no distributions and suffer no consequences.

3. *LLCs Lack of Mandatory Distribution Requirements Exacerbates the Antidemocratic Nature of Philanthropy*

The lack of a mandatory distribution requirement for LLCs has clear implications for the antidemocratic nature of philanthropy. Although some argue that the rule does not demand enough of our private foundations,³³² the mandatory distribution requirement provides some assurance that private foundations will engage in some publicly-approved charitable work. That is to say, private foundations will at least spend some amount in a manner that a democratically-elected legislature established as charitable. Although the universe of qualifying distributions is quite broad (for example, a wide breadth of activities might arguably fall within the “charitable” category),³³³ there is at least some limitation as to what constitutes permissible activity. This list of allowable distributions, however broad and ill-defined, was adopted by a democratically-elected government, and, therefore, represents a small limit on the antidemocratic aspect of philanthropy. While many private foundations may prove to be nothing more than vanity projects for their wealthy founders, the mandatory distribution requirement provides, in the very least, some comfort that a specified amount of the organization’s assets will be spent in a publicly-blessed manner. Even if the founder is determined to provide only the minimal charitable impact required to bolster his or her public profile, the private foundation form assures some charitable spending.

It is important to note that, even with the mandatory distribution requirement, private foundations are still free to engage in a number of antidemocratic activities. Indeed, the discussion above concerning the antidemocratic

331. *Id.*

332. Rob Reich, *Not Very Giving*, N.Y. TIMES (Sept. 4, 2013), www.nytimes.com/2013/09/05/opinion/not-very-giving.html; see also Strom, *supra* note 325.

333. See Eric Franklin Amarante, *Why Don't Some White Supremacist Groups Pay Taxes?*, 67 EMORY L.J. ONLINE 2045, 2054 (2018) (highlighting the absurdly broad definition of education that encompasses universities, museums, planetariums, and white supremacist groups).

philanthropic efforts to address public education and public health stands despite the fact that the philanthropists in those scenarios are subject to the mandatory distribution requirement. Clearly, the mandatory distribution requirement does not completely eliminate the antidemocratic aspects of philanthropy, and the regulatory regime reflects the belief that individualism and private property rights (that is, the ability of the wealthy to spend their dollars in areas concerning the public realm) are more important than beneficiary self-determination. However, the mandatory distribution requirement provides some protection. This is simply not the case with LLCs. An LLC has absolutely no duty to make any charitable expenditures and may act in a singularly selfish manner without upsetting any laws or regulations. It is a private entity in every way.

C. Restriction Against Lobbying and Political Activity

1. Private Foundations' Limits in the Political Arena

In addition to the mandatory distribution requirement, private foundations are subject to many of the restrictions that apply to all Section 501(c)(3) organizations. One of these restrictions is the prohibition against engaging in a significant amount of lobbying, with the Code stating that “no substantial part of the activities” of any Section 501(c)(3) organization may constitute the “carrying on [of] propaganda, or otherwise attempting, to influence legislation.”³³⁴ This limitation applies to other tax-exempt entities,³³⁵ but the restriction is more severe for private foundations.³³⁶ If a private foundation engages in any lobbying, significant or otherwise, it “will incur an excise tax on those expenditures [that] is so significant that it generally acts as a lobbying prohibition”³³⁷ and may result in revocation of tax-exempt status.³³⁸

Unlike the mandatory payout requirement, the genesis of the limitation on lobbying is found well before the 1969 amendments to the Code.³³⁹ The

334. I.R.C. § 501(c)(3) (2012).

335. *Id.*

336. See HOPKINS, *supra* note 12, at 591 (“If a charitable organization, otherwise tax-exempt . . . fails to meet the federal tax law requirements for exemption because of attempts to influence legislation, a tax in the amount of 5[%] of the lobbying expenditures may be imposed.”).

337. *Lobbying Activity of Section 501(c)(3) Private Foundations*, I.R.S. (Apr. 3, 2018), <https://www.irs.gov/charities-non-profits/private-foundations/lobbying-activity-of-section-501c3-private-foundations>; see I.R.C. § 4945(d)(1) (2012).

338. *The Restriction of Political Campaign Intervention by Section 501(c)(3) Tax-Exempt Organizations*, I.R.S. (Sept. 13, 2016), <https://www.irs.gov/charities-non-profits/charitable-organizations/the-restriction-of-political-campaign-intervention-by-section-501-c-3-tax-exempt-organizations> [hereinafter *Restriction of Political Campaign Intervention*].

339. Despite the persistence of the limitation over the years, there is no universally accepted justification for the limitation. See Elias Clark, *The Limitation on Political Activities: A Discordant Note in the Law of Charities*, 46 VA. L. REV. 439, 446 (1960) (“It is not clear from the early history of the restriction on political activities whether it evolved as a result of carefully considered policy,

constraint extends at least as far back as 1919, when the regulations specifically prohibited tax-exempt organizations from disseminating “controversial or partisan propaganda.”³⁴⁰ To the extent this prohibition was unclear, courts weighed in on the breadth of the restriction, with one early decision holding that it was not charitable to attempt to repeal anti-birth control laws.³⁴¹ In this decision, Judge Learned Hand wrote, “Political agitation . . . however innocent the aim . . . must be conducted without public subvention; the Treasury stands aside from them.”³⁴² This limitation was echoed in the Revenue Act of 1934,³⁴³ with the addition of the “substantial” qualifier, and the Supreme Court finally ruled it was constitutional in the 1983 decision of *Regan v. Taxation With Representation of Washington*.³⁴⁴ In *Regan*, Justice Rehnquist painted the prohibition as a Congressional decision, noting:

The system Congress has enacted provides [a] subsidy to nonprofit civic welfare organizations generally, and an additional subsidy to those charitable organizations that do not engage in substantial lobbying. In short, Congress chose not to subsidize lobbying as extensively as it chose to subsidize other activities that nonprofit organizations undertake to promote the public welfare.³⁴⁵

or of the Treasury’s understandable desire to place outer limits around any exemption, or on the assumption that established property law required it.”).

340. *Id.* at 446 n.32 (quoting Treas. Reg. 45, art. 517 (1919)).

341. *Slee v. Comm’r*, 42 F.2d 184 (2d Cir. 1930).

342. *Id.* at 185. Judge Hand continued to say targeted lobbying might be deemed appropriately charitable, such as “[a] state university . . . trying to get appropriations from the Legislature” or “a society of booklovers . . . [that] took part in agitation to relax the taboos upon works of dubious propriety.” *Id.*

343. See Clark, *supra* note 339, at 447–49; see also Todd Brower, *Whose Voice Shall Be Heard? Lobbying Limitations on Section 501(c)(3) Charitable Organizations Held Constitutional in Regan v. Taxation With Representation*, 28 ST. LOUIS U. L.J. 1017, 1018 (1984).

344. 461 U.S. 540 (1983); I.R.C. § 501(c)(3) (2012) (granting tax exemption to entities wherein “no substantial part of the activities of which is carrying on propaganda, or otherwise attempting to influence legislation”).

345. *Regan*, 461 U.S. at 544. There is some question as to the validity of the “subsidy theory” of charitable organizations to which Justice Rehnquist alludes. In examining the potential theoretical justifications for tax-exemption, Professor Henry Hansmann argued (in part) that the tax-exemption of charities was necessary to overcome the failure of the government to provide the charity’s services and a failure of the market to provide adequate funds to charitable organizations. See Henry Hansmann, *The Role of Nonprofit Enterprise*, 89 YALE L.J. 835 (1980). However, as Professors Mark Hall and John Colombo note, if government failure is the reason for the tax-exemption, then why shouldn’t for-profit organizations that engage in similar activities also receive favorable tax status? See Mark A. Hall & John D. Colombo, *The Donative Theory of the Charitable Tax Exemption*, 52 OHIO ST. L.J. 1379 (1991). There remains significant debate as to any theoretical justification for tax-exemption. See Nina Crimm, *An Explanation of the Federal Income Tax Exemption for Charitable Organizations: A Theory of Risk Compensation*, 50 FLA. L. REV. 419, 424 (1998) (“[I]t may appear remarkable that there is no universally-accepted theory to explain the fundamental reason underlying the deliberate and continued conferral of [tax] exemption on all qualifying charitable organizations.”).

Despite Justice Rehnquist's assertion, legislative history suggests that the limitation on lobbying may not have been the result of a congressional intent to provide a lower subsidy on lobbying activities.³⁴⁶ Rather, the limitation seems to be an attempt to curtail self-interest. As Professor Elias Clark noted, "It appears that the proponents wanted to restrict political agitation, selfishly motivated, to secure some personal interests of the donor."³⁴⁷ To support this claim, Clark cited the following statement by Senator David Reed: "There is no reason in the world why a contribution . . . should be deductible as if it were a charitable contribution if it is a selfish one made to advance the interests of the giver of the money."³⁴⁸ Thus, the reasons for the lobbying limitation are either to ensure that private foundations do not use tax subsidies to interfere with our democratic process or to keep private foundations from engaging in subsidized self-dealing.

In addition to the lobbying limitation, there is also a restriction against private foundations engaging in political campaign intervention. With respect to this restriction, the Code provides a refreshingly clear, bright-line rule: Section 501(c)(3) organizations may not engage in any activities that interfere with political campaigns.³⁴⁹ The definition of organizations eligible for Section 501(c)(3) status describes an organization "which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office."³⁵⁰ To the extent this is not clear enough, the IRS website states that campaign contributions and public statements for or against candidates constitute prohibited political activity.³⁵¹ Violation of this prohibition "may result in denial or revocation of tax-exempt status and the imposition of certain excise taxes."³⁵²

2. *The Political Freedom of LLCs*

The restrictions on lobbying and political activity would likely have been problematic for Chan and Zuckerberg, if they had not formed a LLC, because of the CZI's explicit goal to "participat[e] in policy debates . . . with the goal of generating a positive impact in areas of great need."³⁵³ It takes no great leap of logic to envision such participation as lobbying, and the not-

346. See Brower, *supra* note 343, at 1019 ("A review of the debates surrounding the enactment of the statute reveals that 'the legislation was narrowly conceived . . .'" (quoting Clark, *supra* note 339, at 446-49)).

347. See Clark, *supra* note 339, at 447.

348. *Id.* at 447 n.40 (quoting 78 CONG. REC. 5861 (1934)).

349. I.R.C. § 501(c)(3) (2012).

350. *Id.*

351. *Restriction of Political Campaign Intervention*, *supra* note 338.

352. *Id.*

353. Zuckerberg, *supra* note 13.

so-subtle implication of Zuckerberg's post is that the private foundation restrictions on lobbying and political activity were determinative factors in choosing the LLC form.

LLCs, unlike private foundations and other tax-exempt organizations, have absolutely no restriction on the amount of lobbying activity in which they might engage.³⁵⁴ Indeed, a number of the country's leading lobbying firms—entities that do little more than lobby and engage in political activity—are formed as LLCs.³⁵⁵ Imagine that after a decade of attempts to change the public education system, the CZI determined that investments in charter schools and personalized learning curricula were not effective without legislative changes. As an LLC, the CZI could completely suspend all funding activities and focus solely on lobbying elected officials; but, if it were a private foundation, the limitations on lobbying and political activity would make such a pivot impossible.

The particulars of the restrictions are not germane to this discussion simply because, from the perspective of Zuckerberg and Chan, such specifics were not likely determinative in the decision to form an LLC. More likely, the mere existence of any limitation on the ability for a private foundation to exert legislative influence, regardless of the amount, would convince the couple to seek a less restrictive form.³⁵⁶ Thus, this Article ignores the more technical aspects of how an organization would go about precisely complying with the restriction. Rather, it is sufficient to state that the private foundation form is subject to a limitation on the amount and type of legislative activity in which it may engage³⁵⁷ and, more importantly, LLCs are not subject to a similar limitation.

3. *LLCs Lack of Lobbying and Political Activity Restrictions Exacerbate the Antidemocratic Nature of Philanthropy*

The LLC's lack of restrictions on lobbying and political activity carries obvious antidemocratic implications. Officials imposed the restrictions to ensure that private foundations were not able to parlay a generous tax subsidy into political influence. More than the mandatory distribution requirement,

354. Other than, of course, laws restricting all actors from certain lobbying efforts. *See, e.g.*, Lobbying Disclosure Act of 1995, 2 U.S.C. §§ 1601–1612 (2012).

355. For instance, Republic Consulting, led by former Congressman Geoff Davis, is an LLC with a client list that includes Citigroup, Proctor & Gamble, and UPS. *See Our Clients*, REPUBLIC CONSULTING LLC, www.republicconsulting.com/clients.php (last visited Sept. 4, 2018). Additionally, Capitol Hill Strategies, led by former Assistant to President Clinton and Director of Legislative Affairs, is a lobbying group that is also an LLC. *See Charles M. Brain*, CAP. STRATEGIES, www.caphillstrat.com/staff-members/charles-m-brain/ (last visited Sept. 18, 2018).

356. Brakman Reiser, *For-Profit Philanthropy*, *supra* note 33, at 2459–60 (“Federal tax law creates more severe limitations on political activities by traditionally organized philanthropic entities, limitations of which nonprofits are aware and often worry over.”).

357. *See Lobbying*, I.R.S. (Jan. 3, 2018), <https://www.irs.gov/charities-non-profits/lobbying>.

the restrictions against political activity and lobbying operate to curtail philanthropic influence in the public realm.³⁵⁸ Although private foundations may still dominate a field in an antidemocratic manner by spending money in support of certain programs,³⁵⁹ philanthropists operating through private foundations may not directly interfere in the political process. To the extent we are concerned that philanthropists might leverage their power to influence policy decisions by, for example, dictating the reform of public education or prioritizing certain health initiatives without the input of the electorate,³⁶⁰ an ability to directly lobby elected officials or support candidates for office represents a galling instance of antidemocracy. Thus, so long as philanthropy is conducted through private foundations, these restrictions operate to provide some protection against the inherent antidemocratic instincts of philanthropists. However imperfect, these restrictions are better than the absolute lack of political and lobbying limitations on LLCs.

D. Transparency and Opacity

1. Private Foundation Annual Reporting Requirements

Private foundations, similar to public charities, are required to submit annual information returns to the IRS and make the returns public.³⁶¹ These returns are vital sources of information, serving as the public's "primary or sole source of information" about tax-exempt organizations.³⁶² The annual information returns are designed to "give both the IRS and the public an improved window into the way tax-exempt organizations go about their vital mission."³⁶³ As then-IRS Commissioner Doug Shulman said, "Tax-exempt organizations provide tremendous benefits to the people and communities they serve, but their ability to do good work hinges upon the public's trust. The [annual information returns] foster this trust by greatly improving transparency and compliance in the tax-exempt sector."³⁶⁴ Thus, the purpose of the annual information returns is clear: to not only give the IRS the raw data

358. *But see* Joanne Barkan, *Charitable Plutocracy: Bills Gates, Washington State, and the Nuisance of Democracy*, *NONPROFIT Q.* (Apr. 11, 2016), <https://nonprofitquarterly.org/2016/04/11/plutocracy-bill-gates-philanthropy-washington-state/> ("Multibillionaire philanthropists use their personal wealth, their tax-exempt private foundations, and their high-profile identities as philanthropists to mold public policy to a degree not possible for other citizens. They exert this excessive influence without public input or accountability.").

359. *Id.*

360. *See* Bosworth, *supra* note 88; Rogers, *supra* note 80.

361. BRUCE R. HOPKINS ET AL., *THE NEW FORM 990: LAW, POLICY, AND PREPARATION 4* (2009) ("In general, a tax-exempt organization must . . . [m]ake each annual information return available for a period of three years . . . without charge . . .").

362. I.R.S., *INSTRUCTIONS FOR FORM 990: RETURN OF ORGANIZATION EXEMPT FROM INCOME TAX 2* (2017) [hereinafter *FORM 990 INSTRUCTIONS*].

363. *See* HOPKINS ET AL., *supra* note 361, at 1.

364. *Id.*

it needs to ensure compliance,³⁶⁵ but also to give the public the ability to monitor and assess the activities of tax-exempt organizations.³⁶⁶ In discussing this feature of annual information returns, then-Commissioner Steven T. Miller emphasized the “need to ensure the public and other stakeholders have a sufficient line of sight into [tax-exempt organization] activities so they know what their contributions and our foregone taxes are paying for.”³⁶⁷

There are a number of different annual information returns for different tax-exempt entities, each with their own goal.³⁶⁸ Private foundations are required to submit a Form 990-PF in order to determine the tax owed on investment income, if any, and to provide details about the foundation’s charitable activities.³⁶⁹

Form 990-PF provides a treasure trove of information.³⁷⁰ The bulk of the disclosures are financial in nature, with the first four parts of the form requiring a detailed analysis of revenue and expenses (including specifics regarding all contributions, gifts, and grants received in the applicable year) as well as balance sheets and capital gains and losses.³⁷¹ In addition to financial details, Form 990-PF asks foundations to detail the activities conducted during the tax year, including specific questions regarding the foundation’s: (1) attempts to influence legislation; (2) engagement in political activity; (3) changes in organizational documents; and (4) compliance with the mandatory distribution requirement.³⁷² Private foundations must also provide information concerning substantial contributors and indicate whether the organization engaged in any self-dealing transactions.³⁷³ Another section of Form 990-PF requires the private foundation to provide compensation for: (1) all

365. *Id.* at 5 (noting that one goal of the annual information returns was “enabling the IRS to more efficiently assess the risk of any noncompliance by the organization”).

366. *Id.* (noting that one goal of the annual information returns was “[e]nhancing transparency by providing the IRS and the public with a realistic picture of the filing organization and its operations”).

367. Steven T. Miller, Comm’r Tax Exempt & Gov’t Entities, I.R.S., Remarks Before Independent Sector, L.A., Cal. (Oct. 22, 2007), https://www.irs.gov/pub/irs-tege/stm_isector_10_22_07.pdf.

368. For example, public charities are required to submit either the Form 990, Form 990-EZ, or Form 990-N depending on the organization’s gross receipts. FORM 990 INSTRUCTIONS, *supra* note 362, at 2. Organizations that normally receive less than \$50,000 in gross receipts use the Form 990-N, organizations that have between \$50,000 and \$200,000 in annual gross receipts use the Form 990-EZ, and organizations that have more than \$200,000 in annual gross receipts use the Form 990. *Id.* at 2–3.

369. See I.R.S., INSTRUCTIONS FOR FORM 990-PF: RETURN OF PRIVATE FOUNDATIONS OR SECTION 4947(A)(1) NONEXEMPT CHARITABLE TRUST TREATED AS A PRIVATE FOUNDATION 2 (2017) [hereinafter INSTRUCTIONS FOR FORM 990-PF].

370. *But see* PHILANTHROPY IN DEMOCRATIC SOCIETIES, *supra* note 72, at 69 (“[F]oundations are often black boxes, stewarding and distributing private assets for public purposes, as identified and defined by the donor, about which the public knows very little and can find out very little.”).

371. See INSTRUCTIONS FOR FORM 990-PF, *supra* note 369, at 13–21.

372. See *id.* at 23–27.

373. See *id.*

officers, directors, trustees, and managers of the private foundation; (2) the private foundation's five highest paid employees; and (3) the private foundation's five highest paid independent contractors.³⁷⁴ Finally, the Form 990-PF requires the private foundation to provide a narrative description of the organization's four largest charitable activities and the two largest program related investments.³⁷⁵ Thus, the Form 990-PF provides information about the organization's financial position, the salaries paid, the contributions received, and the activities conducted. It is, quite simply, an incredible amount of information.³⁷⁶

Perhaps the most valuable aspect of the annual information returns is that they are not merely submitted to the IRS, but they must also be made publicly available.³⁷⁷ Private foundations are required to provide copies of the three most recent annual information returns to any member of the public who asks.³⁷⁸ In this manner, the activities of tax-exempt entities are subject to both regulatory and public scrutiny.

2. *The Relative Privacy of LLCs*

Although not explicitly identified as a justification for forming the CZI as an LLC, it seems likely that the rather intense disclosure requirements imposed upon private foundations played an important role in the decision. The transparency required of private foundations is in stark contrast to a private for-profit entity like an LLC. Unlike tax-exempt organizations, LLCs can operate in almost complete privacy. LLCs do not have any public filing that resembles Form 990-PF, and an LLC's programs and activities may be conducted in complete secrecy.³⁷⁹ In many states, an LLC is required to provide no more than its registered agent's name and address.³⁸⁰ Some states require

374. *See id.* at 27.

375. *See id.* at 28–29.

376. Given the amount and detail of information required by the Form 990-PF, it should not be surprising that the form requires a significant investment of time and attention. The IRS estimates that private foundations completing Form 990-PF should anticipate over 140 hours of recordkeeping, more than 28 hours spent “[l]earning about the law or the form,” and nearly 34 hours of preparing the form. *See id.* at 36.

377. *See Public Disclosure and Availability of Exempt Organizations Returns and Applications: Documents Subject to Public Disclosure*, I.R.S., www.irs.gov/charities-non-profits/public-disclosure-and-availability-of-exempt-organizations-returns-and-applications-documents-subject-to-public-disclosure (last updated Apr. 17, 2018).

378. *Id.*

379. Patricia Cohen, *Need to Hide Some Income? You Don't Have to Go to Panama*, N.Y. TIMES (Apr. 7, 2016), <https://www.nytimes.com/2016/04/08/business/need-to-hide-some-income-you-dont-have-to-go-to-panama.html>.

380. *See* James S. Henry, *The World's Largest Tax Haven? Guess Who*, AM. INTEREST (June 18, 2018), https://www.the-american-interest.com/2018/06/18/the-worlds-largest-tax-haven-guess-who/#_ftnref24 (“For those with assets to hide, the U.S. LLCs’ greatest advantage is cheap anonymity. To date, no U.S. state offers a public registry of ‘ultimate beneficial owners’ (‘UBOs’) for

the names of the managers and owners, but setting up the managers or owners as other LLCs easily obscures even this minimal amount of information.³⁸¹ Unlike with private foundations, members of the public cannot demand access to LLC finances or activity reports.³⁸² LLC tax returns are private, and LLCs are not required to report on activities or programs' successes or failures.

The upshot of this lack of transparency is that if an LLC claims to engage in charity, there is no way for any person or regulating agency to meaningfully police such charitable activity. Without an equivalent of Form 990-PF, the only way for the public to learn of an LLC's charitable expenditures is through investigative journalism or if the owners of the LLC voluntarily decide to publicize such expenditures.

3. *The Opacity of LLCs Exacerbates the Paternalism and Amateurism of Philanthropy*

The requirement of publicly-available annual information returns increases IRS and public scrutiny of private foundation activities, which in turn reduces the potential for excessively paternalistic and amateuristic behavior. This is primarily because a philanthropist is forced to consider how the program will be received by the general public.³⁸³ However, the utter opacity of

LLCs, corporations, or trusts. And eight U.S. states, including Delaware, Wyoming, and New Mexico, don't even require LLC founders to disclose the identities of their managers or 'members' (UBOs). Others, like California, do require this information, but they also permit their own LLCs to be owned by 'foreign' LLCs, including those from these willfully blind eight states.”)

381. Cohen, *supra* note 379.

382. Rather, members of the public may demand all they like, but there is no legal requirement to provide any such disclosures. See Brakman Reiser, *supra* note 20, at 24 (“If founders opt for a philanthropy LLC, the entity may not file any return whatsoever. The member of a single member LLC must simply report income from it on her own (confidential) return.”).

383. There is some evidence to suggest that a reasonable amount of disclosure by an organization will reduce the risk-taking activities of the organization. See George Loewenstein et al., *Disclosure: Psychology Changes Everything*, 6 ANN. REV. ECON. 391, 396 (2014) (“In the domain of labor law, for example, one of the most significant applications of targeted transparency is the Occupational Safety and Health Administration’s Hazardous Communication Standard (HCS), which does not ban worker exposure to hazardous materials but seeks ‘to ensure that the hazards of all chemicals produced or imported are evaluated, and that information concerning their hazards is transmitted to employers and employees.’ As Estlund notes, ‘the HCS appears to have greater impact on employers’ than on employees’ decisions, and greater impact where there is a union that can interpret and act on the rather complex information involved.’ . . . Similarly, whether disclosure of conflicts of interest by doctors, accountants, or investment professionals mitigates or exacerbates the problems caused by these conflicts may well depend less on the reactions of recipients than on the reactions of disclosers, who might respond by scaling back those conflicts or might instead feel licensed by the disclosure to pursue their own interests at the expense of their clients. Likewise, on the basis of existing evidence, it is reasonable to predict that calorie labeling requirements will have a larger impact on producers than consumers. Thus, we argue, when disclosure requirements do have a beneficial effect, the cause is often not the changes in consumer behavior that many advocates of disclosure view as the primary causal mechanism, but rather changes in the behavior of

LLC operations renders any such public scrutiny impossible, thereby permitting paternalistic and amateuristic behavior.

This is unfortunate because the forced transparency of private foundations plays a significant role in combating the paternalism and amateurism of philanthropic activities. Due to the lack of any democratic check on the activities of philanthropists, the only meaningful way to combat a philanthropist's overly paternalistic or amateuristic activities is to publicize them. This is what happened, for example, in Zuckerberg's experiment to transform public education in Newark, which inspired a tremendous amount of criticism.³⁸⁴ The first two sentences of an op-ed in the *Wall Street Journal* adequately summed up much of the negative press: "What happened with the \$100 million that Newark's schools got from Facebook's Mark Zuckerberg? . . . Not much."³⁸⁵

Critics pointed to how the money was spent—or more accurately, how the money was wasted—bemoaning the lavish salaries paid to experts,³⁸⁶ the teacher raises that produced no measurable improvement,³⁸⁷ and payments to silence political objection.³⁸⁸ Critics also highlighted the complete lack of democratic involvement in the reform effort³⁸⁹ and the fact that the imposed reforms were largely untested.³⁹⁰ There is no reason to doubt that Zuckerberg would prefer to avoid such scrutiny in the future. Much of the information that provided the basis for criticisms came from the public filings of Zuckerberg's philanthropic organization. If it had been conducted through an LLC, there would have been no requirement to disclose salaries or any other payments. Much of the data that provided fodder for criticisms of the Newark public education reform experiment would be hidden from public view.

IV. WHAT SHOULD WE DO?

After such an extended discussion of the potential harms of private spending, it bears repeating: The general public does not have a right to dictate how individuals spend their money. A rich person may—and many

producers." (citation omitted) (quoting Cynthia Estlund, *Just the Facts: The Case for Workplace Transparency*, 63 STAN. L. REV. 351, 377 (2011)).

384. See *supra* notes 208–214.

385. James Piereson & Naomi Schaefer Riley, *Zuckerberg's \$100 Million Lesson*, WALL ST. J. (Oct. 5, 2015), <https://www.wsj.com/articles/zuckerbergs-100-million-lesson-1444087064>.

386. See RUSSAKOFF, *supra* note 90.

387. *Id.*

388. Jonathan A. Knee, *The Melting of Mark Zuckerberg's Donation to Newark Schools*, N.Y. TIMES (Aug. 26, 2015), <https://www.nytimes.com/2015/08/27/business/dealbook/the-melting-of-mark-zuckerbergs-donation-to-newark-schools.html> ("The union boss, Joe Del Grosso, demanded a ransom of \$31 million to compensate for what he felt members should have received in previous years—before agreeing to discuss any labor reforms.").

389. See *supra* notes 209–214 and accompanying text.

390. See *supra* notes 256–267 and accompanying text.

wealthy people often do—spend money in a manner that would offend the vast majority of Americans.³⁹¹ However, no matter how unanimous public opinion may be, we do not have the right to stop a rich person from spending their money in the manner they see fit. Sometimes it may be spent in a paternalistic way (buying, for example, a reliable and safe car for one's teenage child),³⁹² or it may be spent in an amateuristic manner (for example, investing in an ill-conceived business venture).³⁹³ In either case, the negative effects of the decisions are limited to the wealthy individual and the general public is not affected. On the other hand, when a wealthy person uses their wealth to address issues of public concern, the calculus is different. Philanthropy is not akin to a rich person buying a Mercedes; rather, it is a rich person telling America's children what they will learn in school and how they will learn it.³⁹⁴ In such matters, the public has a legitimate interest.

However flawed, traditional philanthropic efforts operate through a vehicle that curbs the potentially negative aspects of philanthropy.³⁹⁵ Any antidemocratic aspects of philanthropy are tempered by the existence of the mandatory payout requirement³⁹⁶ and the limitations on lobbying and political activity.³⁹⁷ Similarly, any paternalistic and amateuristic aspects are moderated by the transparency requirement.³⁹⁸

As illustrated, the recent trend of using for-profit vehicles to engage in philanthropic activity removes all of these tempering mechanisms.³⁹⁹ The regulatory bulwarks designed to encourage the positive aspects of philanthropy do not exist in the for-profit realm. Rather, philanthrocapitalism encourages entities to engage in matters of public concern free from meaningful regulation and limitations.⁴⁰⁰

However, what can we do? The Article's introduction proposed this question, but it bears repeating: How might a country control the way rich people spend their money? Needless to say, this is difficult to address. Our

391. Shawn M. Carter, *How People Who Grew up Rich Waste Money Compared to Everyone Else*, CNBC (Sept. 22, 2017, 10:47 AM), <https://www.cnbc.com/2017/09/22/how-people-who-grew-up-rich-waste-money-compared-to-everyone-else.html>.

392. *See supra* Section II.B.

393. *See supra* Section II.C.

394. *See supra* Section II.A.1.

395. *See supra* Sections III.B–D.

396. *See supra* Section III.B.

397. *See supra* Section III.C.

398. *See supra* Section III.D.

399. *See supra* Sections III.B.3, III.C.3, III.D.3.

400. *See supra* Sections III.B.2, III.C.2, III.D.2.

strident belief in individual property rights inspires suspicion over any regulation over philanthropy. Additionally, it is important to recall that the LLC does not enjoy the generous tax benefits of private foundations.⁴⁰¹

The limits and reporting requirements of private foundation are justified because they are given tax-favorable status. In other words, if we are comfortable with bestowing a tax subsidy on private foundations in exchange for slightly more democracy and transparency in the activities of our philanthropists, might we also be comfortable with less democracy and transparency if the philanthropist does not take advantage of any tax-benefits? If the preceding Sections were convincing, the potential negatives of philanthropy are too great to permit under the secrecy of LLCs. However, reasonable arguments can be made that the LLC's lack of favorable tax treatment justifies any light regulatory approach to the activities of such entities, be they philanthropic, for-profit, or otherwise. However, if the current balance is unacceptable (that is, the potential dangers of philanthrocapitalism are too great), the following sections explore some potential solutions.

A. *Adjust Incentives*

One of the most obvious solutions is to adjust the incentives of the entities to either make the private foundation more attractive for philanthropists or to make the LLC less attractive. If we alter the incentives of LLCs and private foundations, we might be able to convince philanthropists to choose the favored entity (that is, a private foundation) over the disfavored entity (that is, an LLC). We could, for example, increase the financial incentive to donate to private foundations by making donations to private foundations tax deductible in the same manner as donations to public charities.⁴⁰² Alternatively, we might consider lightening the regulatory burden on private foundations by, for example, decreasing the mandatory payout,⁴⁰³ loosening the political activity prohibition,⁴⁰⁴ lowering the restriction on lobbying activities,⁴⁰⁵ or reducing the administrative burden associated with transparency.⁴⁰⁶

401. However, the Tax Cuts and Jobs Act of 2017 does provide a lower tax-burden for certain pass-through entities, for which certain LLCs may qualify. Pub. L. No. 115-97, 131 Stat. 2054 (codified as amended in scattered sections of 26 U.S.C.).

402. See *Foundation Basics*, COUNCIL ON FOUNDS., www.cof.org/content/foundation-basics#what_is_public_charity (“Generally, gifts to public charities receive more favorable tax treatment than gifts to private foundations. For example, charitable cash donations are deductible at up to 50[%] of the taxpayer’s adjusted gross income (AGI) when given to public charities, but the same gift to a private foundation is deductible at a rate of only 30[%] of AGI.”). See generally I.R.C. § 170(b)(1)(vii) (2012).

403. See *supra* note 310.

404. See *supra* Section III.C.

405. See *supra* Section III.C.

406. See *supra* Section III.D.

Similarly, if the LLC form was less attractive to philanthrocapitalists, the private foundation form might resume its place as the preferred entity for philanthropy. If we either increase the costs of operating as an LLC or require more transparency from LLCs, the private foundation regulatory regime might become more attractive to philanthropists.

These options, however, are a bit extreme. While the concerns of operating philanthropy through for-profit vehicles are troubling, the LLC is the preferred form for entrepreneurs for the very reasons it is becoming the favored form for philanthrocapitalists: simplicity, ease, and flexibility.⁴⁰⁷ LLC formations outpace the formation of all other for-profit entity forms, serving as the primary vehicle for small business development and entrepreneurship.⁴⁰⁸ If additional disclosure requirements or taxes were imposed on the LLC form, the negative impact on small business formation would be devastating.

Rather than changing long-standing rules and regulations regarding private foundations and LLCs, there might be a more direct approach. If the concern is the haphazard and ineffective programs forced upon the public by the wealthy, then perhaps the solution should focus on the activities rather than the perpetrators of the activities. In other words, there might be a regulatory solution.

B. Regulating and Licensing Philanthropy

In many ways, it is intuitive to regulate and license philanthropy in the same manner that occupations are regulated and licensed. Consider some of the traditional areas in which philanthropy operates: public education,⁴⁰⁹ health,⁴¹⁰ legal services,⁴¹¹ and social work.⁴¹² The professionals in each of

407. See Franklin, *supra* note 279, at 586.

408. *Id.*

409. Valerie Strauss, *How Private Money is Driving Public Education Policy*, WASH. POST (Apr. 24, 2013), https://www.washingtonpost.com/news/answer-sheet/wp/2013/04/24/how-private-money-is-driving-public-education-policy/?noredirect=on&utm_term=.9a72b7cc6bd8.

410. David Callahan, Opinion, *As Government Retrenches, Philanthropy Booms*, N.Y. TIMES (June 20, 2017), <https://www.nytimes.com/2017/06/20/opinion/jeff-bezos-bill-gates-philanthropy.html?login=email&auth=login-email>.

411. *Natural Allies: Philanthropy and Civil Legal Aid*, KRESGE FOUND. (Apr. 23, 2013), <https://kresge.org/sites/default/files/Philanthropy-and-civil-legal-aid.pdf>.

412. Yoko Crume & Edgar Villanueva, *Exposing Real World Philanthropy to the Next Generation of Social Work Leaders*, 3 FOUND. REV. 59, 60 (2011).

these areas require some type of occupational license.⁴¹³ In many states, public school teachers must obtain state licenses or certifications,⁴¹⁴ health professionals are licensed and regulated by medical boards,⁴¹⁵ lawyers are subject to oversight by state bar associations and state licensing requirements,⁴¹⁶ and social workers are subject to state oversight.⁴¹⁷ In light of this, it seems reasonable to require philanthropists with similar aims to prove some level of professional competency before engaging in these areas.

Take, for example, the license to practice law. In most states, before an individual may represent another person in court, the individual must first graduate from law school,⁴¹⁸ take and pass a state bar exam,⁴¹⁹ submit to a character and fitness inquiry to determine the person's fitness for the profession,⁴²⁰ and abide by continuing legal education requirements.⁴²¹ Setting aside any questions as to the effectiveness of these mechanisms,⁴²² the fact

413. Occupational licenses are not without criticism. They are often derided as nothing more than unnecessary bureaucratic hurdles that do little more than generate income for licensing organizations or act as protectionist bulwarks against competition. See Edward Timmons, *More and More Jobs Today Require a License. That's Good for Some Workers, but Not Always for Consumers*, HARV. BUS. REV. (Apr. 26, 2018), <https://hbr.org/2018/04/more-and-more-jobs-today-require-a-license-thats-good-for-some-workers-but-not-always-for-consumers> ("Critics of licensing, however, note that professional associations lobby for occupational licensing out of self-interest, to restrict competition and increase earnings. They say that, instead of serving the public good, licensing harms consumers by restricting access to professional services.")

414. See, e.g., MD. CODE ANN., EDUC. § 6-121 (West 2012) (establishing teacher certification for career professionals); *Educator Licensure*, TENN. DEP'T OF EDUC., www.tn.gov/education/licensing.html (last visited Oct. 13, 2018).

415. See, e.g., MD. CODE ANN., HEALTH OCC. § 14-101 (West 2017 & Supp. 2018); *Board of Medical Examiners*, TENN. DEP'T OF HEALTH, www.tn.gov/health/health-program-areas/health-professional-boards/me-board/me-board/applications.html (last visited Oct. 13, 2018).

416. See, e.g., MD. R. 19-101; TENN. SUP. CT. R. 7.

417. See, e.g., Maryland Social Workers Act, MD CODE ANN., HEALTH OCC. §§ 19-101–502 (West 2017); *Board of Social Workers*, TENN. DEP'T OF HEALTH, www.tn.gov/health/health-program-areas/health-professional-boards/sw-board.html (last visited Oct. 13, 2018).

418. See, e.g., TENN. SUP. CT. R. 7, § 2.02(a) ("An applicant seeking admission by examination, by transferred UBE score or without examination must have completed a course of instruction in and graduated with a J.D. Degree from a law school accredited by the ABA at the time of applicant's graduation, or a Tennessee law school approved by the Board pursuant to section 2.03 of this Rule at the time of the applicant's graduation.")

419. See, e.g., *Admission by Exam*, TENN. BD. OF LAW EXAM'RS, www.tnble.org/ (last visited Oct. 13, 2018).

420. See, e.g., MD. R. 19-202.

421. See, e.g., TENN. SUP. CT. R. 21, § 3.01 ("Unless otherwise exempted, each attorney admitted to practice law in the State of Tennessee shall obtain by December 31 of that calendar year a minimum of fifteen (15) hours of continuing legal education.")

422. Lindsey Ruta Lusk, *The Poison of Propensity: How Character and Fitness Sacrifices the "Others" in the Name of "Protection"*, 2018 ILL. L. REV. 345, 347 (2018); Elizabeth Olson, *Bar Exam, the Standard to Become a Lawyer, Comes Under Fire*, N.Y. TIMES (Mar. 19, 2015), <https://www.nytimes.com/2015/03/20/business/dealbook/bar-exam-the-standard-to-become-a-lawyer-comes-under-fire.html> ("[T]he exam 'is an unpredictable and unacceptable impediment for accessibility to the legal profession.'" (quoting Stephen C. Ferruolo, Dean of the University of San Diego School of Law)).

remains that a person goes through significant vetting procedures before gaining the right to practice law.

An analogous regime could be imposed upon philanthropy. Imagine that a philanthropist sets their sights on reforming public education. This hypothetical philanthropist has ideas about teacher qualifications, content of standardized testing, and adding incentive pay for teachers. In such a case, where the philanthropist intends to upend the nature of public education, it is not absurd to require some vetting process. Rather than giving the philanthropist access to children to either engage in trial-and-error reform efforts⁴²³ or to impose untested curricular changes, why not impose some level of scrutiny on the proposed measures before unleashing them on children?

With this licensing regime in place, the form of the entity no longer matters. The regulatory entity could impose, for example, certain governing standards, conflict of interest principles, public input requirements, and minimum standards for certain reform efforts. The philanthropist may engage in their chosen philanthropy with a private foundation or an LLC. So long as the entity meets the regulatory requirements, the form of the entity does not matter.

This proposal raises many questions and concerns. There remains a legitimate question as to whether all philanthropy would require such a licensing regime. Or, more precisely, which specific forms of philanthropy should be subject to licensure? If a wealthy person wants to promote the arts and invest money in operas, ballets, and theater, it might not be appropriate (or desirable) to require a vetting procedure, as any state involvement would give rise to concerns of censorship or favoritism.⁴²⁴ It also seems absurd to impose upon a ballet club or an art museum the same scrutiny as a national public education reform movement. Museums and ballets do not intrude upon the public's life in the same manner as closing public schools. Further, a licensing regime would likely encompass more than just the intended philanthropic activity. For example, many for-profit entities engage in activities that affect great numbers of people. The task of finely defining a class of activities to fall within the licensure regime may be a task too difficult to achieve. Finally, any attempt to rigorously license philanthropy might result in disincentivizing all philanthropic efforts.

These questions and concerns are legitimate and require careful thought. They are not, however, insurmountable. Similar questions were raised concerning the formation of the Securities and Exchange Commission ("SEC").

423. Recall that both Bill Gates (with respect to the small school initiative) and Mark Zuckerberg (with respect to the Newark experiment) admitted that initial forays into public education reform were failures. *See supra* notes 120, 264–267 and accompanying text.

424. *See PHILANTHROPY IN DEMOCRATIC SOCIETIES, supra* note 72, at 233 (noting that "it is especially important for the state to avoid making judgments about the relative value of different traditions with regard to the questions of religion, art, and culture"). Additionally, some limitations on expressive spending might be considered a violation of the freedom of speech.

For example, concerns that the proposed regulatory regime might stifle philanthropic giving echo predictions that the SEC would “‘seriously retard economic recovery[,] result in unemployment . . . ,’ make it difficult for ‘new and speculative corporations [to obtain] long-term capital,’” and would ultimately force “‘American corporations to go abroad for capital.’”⁴²⁵ Additionally, concerns that philanthropic activity is too large to police are reminiscent of worries that “it was not feasible to regulate ‘unorganized’ or over-the-counter securities markets, because this would entail ‘building up a Federal policing agency on such a scale as to be impracticable.’”⁴²⁶ Certainly, the SEC has not eradicated all securities fraud or misconduct by public companies, but the SEC oversees a regulatory regime that protects consumers and investors and instills some level of confidence in the public. It is not outlandish to imagine a similar regime for philanthropic matters of public interest.

Admittedly, the possibility of establishing such a regime is very low. A formal licensing regime requires considerable investment to create an infrastructure to implement and govern the regime, not to mention the political will to create such a scheme. Given these obstacles, a more realistic option might be to foster public pressure for philanthropists to engage with intended beneficiaries in order to ensure community support for the project or activity. In other words, philanthropic activity might require a social license to operate.

C. *A Social License to Operate*

Although it has ancient roots,⁴²⁷ the idea of a social license to operate has become more popular in the past two decades.⁴²⁸ A social license to operate is defined variously as: an endeavor having “the broad acceptance of society to conduct its activities”,⁴²⁹ an operation’s “ongoing approval within the local community and other stakeholders”,⁴³⁰ and “a socially constructed

425. JOEL SELIGMAN, *TRANSFORMATION OF WALL STREET 77* (2003) (third alteration in original) (quoting Arthur Dean).

426. *Id.* at 84 (quoting the Dickinson Report).

427. Geert Demuijnck & Björn Fasterling, *The Social License to Operate*, 136 J. BUS. ETHICS 675, 675 (2016) (noting that “[t]he link between unanimous consent and legitimacy has been explored for centuries in political philosophy under the heading ‘social contract theory’ or contractarianism”).

428. Joel Gehman et al., *Social License to Operate: Legitimacy by Another Name?*, 60 CAN. PUB. ADMIN. 293, 293 (2017) (“[A]fter mentioning the concept of social license in less than 10 articles a year from 1997 through 2002, new media mentioned social license more than 1,000 articles a year from 2013 to 2015, and more than 2,000 articles in 2016.”).

429. Susan Joyce & Ian Thomson, *Earning a Social License to Operate: Social Acceptability and Resource Development in Latin America*, 93 CAN. MINING & METALLURGICAL BULL., Feb. 2000, at 49–52.

430. Ian Thomson & Robert Boutilier, *Social License to Operate*, in 2 SME MINING ENGINEERING HANDBOOK 1779, 1779–96 (Peter Darling ed., 3d ed. 2011).

perception that [an activity] has a legitimate place in the community.”⁴³¹ A fair synthesis of these definitions is that a social license to operate represents a particular community’s acceptance and approval of an endeavor to proceed.

1. *Roots in the Extractive Industry*

The modern social license to operate finds its genesis in the mining industry.⁴³² In many ways, this is not surprising. While mining companies bring tremendous economic potential, they come with similarly great costs. These costs are usually born by neighboring communities in the form of environmental harm or health concerns.⁴³³ While these communities may reap some of the benefits of the extractive activities, the bulk of the wealth produced by mining companies is enjoyed by the owners of the companies and the purchasers of the extracted product. Faced with this reality, communities resisted mining operations, picketed mining sites, and pressed local political officials to refuse licenses.⁴³⁴

Mining companies, aware that “[e]xploration and extraction activities typically take a heavy toll on the environment and on the lives of people in the vicinity,” quickly recognized the potential costs of limited community support for a particular project.⁴³⁵ Many such companies now go to great lengths to obtain the affected community’s blessing before engaging in mining operations.⁴³⁶ The World Bank recognized “a growing interest by government policymakers, civil society, communities, and mining companies on

431. LEEORA BLACK, *THE SOCIAL LICENSE TO OPERATE: YOUR MANAGEMENT FRAMEWORK FOR COMPLEX TIMES* (2013).

432. John Morrison, *THE SOCIAL LICENSE: HOW TO KEEP YOUR ORGANIZATION LEGITIMATE* 14 (2014) (“The term ‘social license to operate’ seems to have arisen in its current form from the mining industry, and, in particular, in relation to operations in Australia and Canada since the 1990s.”).

433. Aboka Yaw Emmanuel et al., *Review of Environmental and Health Impacts of Mining in Ghana*, 8 *J. HEALTH & POLLUTION* 43, 50 (2018) (“The health impacts of mining on surrounding communities include increased risk of malaria, skin diseases, diarrhea, fever, colds and catarrh. . . . The environmental impacts include noise pollution caused by heavy trucks from mining centers, pollution of water bodies by chemicals such as arsenic, mercury and cadmium from refining of mined minerals, contamination of agricultural soils by heavy metals and other pollutants, resulting in the depletion of agriculture land, reduction in food productivity due to infertile land and depletion of wildlife due to clearing of forests that serve as habitat for many animal species.”).

434. Kieren Moffat & Airon Zhang, *The Paths to Social Licence to Operate: An Integrative Model Explaining Community Acceptance of Mining*, 39 *RESOURCES POL’Y* 61, 61 (2014) (“For mining companies, it is increasingly evident that obtaining a formal [license] to operate from governments and meeting regulatory requirements is no longer enough. Instances of mining developments being delayed, interrupted, and even shut down due to public opposition have been extensively documented.”).

435. See Demuijnck & Fasterling, *supra* note 427, at 675.

436. *Id.*

the sustained development of mine-impacted communities as part of the debate around the costs and benefits of mineral development.”⁴³⁷ This interest gave rise to the social license to operate. The license, which is analytically distinct from a regulatory license administered by a governmental agency,

generally refers to a local community’s acceptance or approval of a project or a company’s ongoing presence. It is usually informal and intangible, and is granted by a community based on the opinions and views of stakeholders, including local populations, aboriginal groups, and other interested parties.⁴³⁸

Because of this “informal and intangible” nature, social licenses to operate are not required by any governing body with policing powers.⁴³⁹ However, in the mining industry, social licenses to operate are “increasingly regarded as a practical necessity before a project or activity—regulated or not—can proceed.”⁴⁴⁰ Even if a project is compliant with the law, the mining company might obtain a social license to operate because the license functions, in essence, as the moral authority to continue a particular operation, providing a legitimizing cloak for any given endeavor.⁴⁴¹

2. *Establishing Philanthropy’s Social License to Operate*

Because the social license to operate “refers to mainly tacit consent on the part of society towards [certain] activities,” there is little reason to limit its application to mining companies.⁴⁴² Indeed, some scholars have already noted potential application of social licenses to operate “beyond the extractive industries” to reach “virtually any kind of business activity that might stir up controversy.”⁴⁴³ It was applied to other industries in which community approval might be sought (or even required), including “wind, solar, biomass, wave, geothermal, and other renewable energy technologies” where although there may be broad political support, individual community approval might be withheld.⁴⁴⁴

Unlike mining companies, philanthropists enjoy near-unanimous support in popular opinion. The complaints of philanthropy outlined in this Article have persisted over centuries, but they come from a small minority of

437. THE WORLD BANK, *MINING COMMUNITY DEVELOPMENT AGREEMENTS: SOURCE BOOK*, at ix (2012), <https://openknowledge.worldbank.org/bitstream/handle/10986/12641/712990WP0minin00Box370065B00PUBLIC0.pdf?sequence=1&isAllowed=y>.

438. Brian F. Yates & Celesa L. Horvath, *Social License to Operate: How to Get It, and How to Keep It 2* (2013) (unpublished manuscript) (on file with Pacific Energy Summit).

439. *Id.*

440. *Id.* at 3.

441. *But see* Gehman et al., *supra* note 428, at 301–05 (noting that although legitimacy and the social license to operate are similar, they are distinct).

442. *See* Demuijnck & Fasterling, *supra* note 427, at 675.

443. *See id.*

444. Gehman et al., *supra* note 428, at 299–300.

critics and have little influence in the activities of philanthropists. This is because philanthropy's overwhelming feedback is positive.⁴⁴⁵ Given the widespread support for philanthropy, it might be said that philanthropy enjoys a social license to operate. But the use of for-profit vehicles for philanthropic activity changes the calculus. Because philanthropy through for-profit vehicles exacerbates the inherent negatives of philanthropy, the atmosphere in which the social license to operate was granted no longer exists.

There is some evidence that philanthropists recognize that their social license to operate is in jeopardy. With the rise of philanthrocapitalist activities, where untested charitable ideals are imposed upon individual communities in the hope of finding something that might work on a larger scale, philanthropists, like extracting companies, have begun seeking permission from the beneficiary community before engaging in specific endeavors. For example, in the Gates Foundation's most recent endeavor to reshape American public education—a promise to “invest more than \$1.7 billion in public education” to “develop[] and test[] new approaches to teaching”—the Gates Foundation decided to take a new approach.⁴⁴⁶ Rather than determine the solution without asking the beneficiary class (that is, paternalism), teachers and schools administrators (that is, amateurism), or the general public (that is, antidemocracy), the Gates Foundation issued a “[r]equest for [i]nformation” to learn “how intermediaries and secondary school teams have successfully used continuous improvement methods to improve postsecondary outcomes for Black, Latino and/or low-income students, as well as how to build the capacity of organizations to do this work in the future.”⁴⁴⁷ To justify the decision, the Gates Foundation said it “hope[s] to hear from practitioners, particularly those we have never worked with before, who can help us better understand” how certain networks of schools might work to improve outcomes.⁴⁴⁸ This is a welcome change from the usual top-down approach of philanthropy. It appears that the Gates Foundation learned the value in community approval of their projects, and this might be the first step by the Gates Foundation to establish (or re-establish) a social license to operate in the area of public education.

445. See *supra* Section I.C.

446. Moriah Balingit, *Billionaire Bill Gates Announces a \$1.7 Billion Investment in U.S. Schools*, WASH. POST (Oct. 17, 2017), https://www.washingtonpost.com/local/education/billionaire-bill-gates-announces-a-17-billion-investment-in-us-schools/2017/10/19/9938f11c-b4eb-11e7-a908-a3470754bbb9_story.html?utm_term=.021ad926d16b.

447. *FAQ: Request for Information on Networks for School Improvement*, BILL & MELINDA GATES FOUND., <http://k12education.gatesfoundation.org/school-network-rfi-faq/#whyrfi> (last visited Sept. 13, 2018).

448. *Id.*

3. *Identifying the Licensor*

An argument that a social license to conduct philanthropy exists begs the question: Who is the licensor? When a philanthropist sets sights upon reshaping the American public education system, it might seem difficult, if not impossible, to determine who has the authority to grant or revoke the license. In the still-budding literature on social licenses to operate, the answer is found in stakeholder theory.⁴⁴⁹

To identify stakeholders, one should identify “any group or individual who can affect or is affected by the achievement of the organization’s objectives.”⁴⁵⁰ In the context of public education, this involves teachers, parents of students, students, and school administrators. In other words, the very populations who often feel ignored by philanthropic efforts to reshape public education.

While defenders of education reformers might note that philanthropists often seek input from administrators, and usually seek input from politicians (who were, at least theoretically, elected by the parents and teachers referenced above), this represents a persistent problem of stakeholder theory: the strategic identification of stakeholders to obtain the appearance of legitimacy.⁴⁵¹ In this practice, the philanthropist might try to obtain a social license through the most efficient means possible by focusing on those “stakeholders who, in a given situation, can effectively influence the outcome of a [philanthropist’s] actions.”⁴⁵² The obvious problem with this approach is that the philanthropist “might prioritize stakeholders in proportion to the power they have over its operations,”⁴⁵³ resulting in “marginalized stakeholders, [that is], those, who are affected negatively by a business enterprise’s actions but have no persuasive means of redress,” being “ignored and excluded from the social licensing process.”⁴⁵⁴ If this happens (that is, if we ignore the needs and interests of marginalized stakeholders), some scholars argue that “we cannot say that there is explicit or tacit consent, which is required for a social contract justification of business activity.”⁴⁵⁵

449. Demuijnck & Fasterling, *supra* note 427, at 680 (“[T]he practical question of who, in a given situation, the ‘social licensors’ are and how to earn their support could be answered from the perspective of stakeholder theory.”). Normative stakeholder theory suggests that managers of organizations ought to consider the effects of organizational decisions on anyone who might be affected. See generally R. EDWARD FREEMAN ET AL., *STAKEHOLDER THEORY: THE STATE OF THE ART* (2010).

450. Demuijnck & Fasterling, *supra* note 427, at 680.

451. *Id.*

452. *Id.* at 680.

453. *Id.* at 681.

454. *Id.*

455. *Id.*

The more honest and effective option is a normative approach to stakeholder identification. That is, identification that honestly assesses the interests of the entire community to determine who is affected by a particular action. But we cannot reasonably rely upon philanthropists to engage in this costly and inefficient option. Rather, this is where law can step in to fill “[g]aps between stakeholder power and the quality of their moral claim.”⁴⁵⁶

The law’s role might involve granting certain populations standing to challenge certain activities, bestowing approval rights over certain projects, or even providing certain populations veto power over certain philanthropic activities. Although this might sound extreme (or in the very least, overly idealistic), this is akin to the regulatory requirement of “fair prior informed consent” in the licensing process for exploration of certain lands owned by indigenous people in Norwegian Finnmark.⁴⁵⁷ Although the indigenous people do not have the legal authority to stop the license, they have the ability to “oppose a governmental licensing decision in a court of law, which suspends the effectiveness of the license.”⁴⁵⁸ In such a manner, “the law transformed ‘dormant’ stakeholders into ‘salient’ stakeholders to be reckoned with.”⁴⁵⁹

V. CONCLUSION

As philanthropist Uday Khemka foresaw in 2006, “[r]elative to the corporate environment, [philanthropists] are in the 1870s. But philanthropy will increasingly come to resemble the capitalist economy.”⁴⁶⁰ This prediction was prescient, and the CZI will not be an outlier. Rather, we should view the CZI founders’ decision to form the entity as an LLC as a harbinger of the future of philanthropic activity.

To prepare for this trend, it is vital to consider the current philanthropic regime and how we might improve it. Rather than viewing philanthropy as individual spending, beyond reasonable control due to American notions of individuality, we should instead identify philanthropy in certain areas of public concern as private policymaking with an unnatural influence on the public sphere. Because we rely upon the wealthy to, for example, reform public education or provide basic health services, we should strive to craft a regulatory regime that operates to limit the potential negative effects of philanthropic antidemocracy, paternalism, and amateurism.

Absent a dramatic reconfiguring of the tax structure, the ultra-wealthy will continue to have a tremendous amount of influence in matters of public concern. Given this influence, it is only reasonable to consider how it might

456. *Id.*

457. *Id.*

458. *Id.*

459. *Id.*

460. *The Birth of Philanthrocapitalism*, *supra* note 36.

be better regulated, especially when matters of public concern are the targets of the philanthropic activity. As this Article illustrated, crafting an appropriate regulation is difficult. Adjusting the incentives inherent in the private foundation and LLC forms would be unwise, and striking the right balance in a licensing regime would be extremely difficult. However, there is reason to be optimistic about the potential of a social license to engage in philanthropy. As long as philanthropists honestly engage in obtaining stakeholder approval for philanthropic endeavors, the negative aspects of philanthropy will be curbed, regardless of the philanthropic vehicle's legal form.