

# Philanthropy, the Nonprofit Sector & the Democratic Dilemma

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*Abstract: The central dilemma of American democracy is the tension between “voice” and “equality”: between the Constitution’s unconditional guarantees of citizens’ expressive, associational, and property rights and the legal and political equality that is the foundation of majoritarian decision-making. Philanthropy and nonprofit organizations – which enable citizens to give money and time to support causes in which they believe – have posed this dilemma with unusual force, allowing moneyed minorities to oppose and sometimes overwhelm the popular will. In the past, these assertions of private power have inevitably aroused popular opposition producing legislative and regulatory outcomes that have maintained a balance between voice and equality. Today, with unprecedented accumulations of wealth and legal changes permitting the unrestricted use of wealth in politics, the unchallenged exercise of private power through philanthropy and the nonprofit sector poses grave threats to the democratic process.*

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The components of the nonprofit sector – philanthropy, voluntary associations, charity, and nonprofit organizations – are often regarded as quintessentially civic institutions: avatars of the common good that stand above self-interest and eschew partisanship.

But despite their proclaimed high purposes, at no time in American history – not even now, when private wealth and its creators are so effusively celebrated – have these nonprofit institutions been unshadowed by public skepticism and distrust. Inevitably, private initiatives in the public interest, whether promoted by wealthy individuals or by groups of citizens in support of causes that do not command majority support, are – and always have been – problematic among a people with a foundational commitment to democratic governance and principles of equality.

Tensions between political and legal *equality* (with its corollary, majority rule) and the *voice* provided citizens by the Constitution’s First Amendment – which guaranteed our expressive (freedom

of speech, worship, and the press), associational (assembly and petition), and property rights (including giving and volunteering) – have been both endemic and persistent since colonial days.

In its purest form, eighteenth-century democratic theory envisioned the state as the instrumentality through which citizens exercised their rights. It frowned on private associations and activities that weakened or challenged elected governments. Not only were political parties and factions regarded with suspicion, any and all kinds of private associations were viewed as instruments for advancing private interests at the expense of the people, the common good, and the state.

James Madison's famous Federalist No. 10 (1787) addressed the hazards that "factions," as associations representing special interests, posed to democratic government. George Washington himself warned in his 1796 Farewell Address against "all combinations and Associations, under whatever plausible character, with the real design to direct, controul, counteract, or awe the regular deliberation and action of the Constituted authorities." These, he asserted, "serve to organize faction, to give it an artificial and extraordinary force; to put in the place of the delegated will of the Nation, the will of a party; often a small but artful and enterprising minority of the Community." They are likely, he declared, "in the course of time and things, to become potent engines, by which cunning, ambitious and unprincipled men will be enabled to subvert the Power of the People, and to usurp for themselves the reins of Government; destroying afterwards the very engines which have lifted them to unjust domination."<sup>1</sup>

Practical necessity compelled Americans to accept – and ultimately to embrace – philanthropy and voluntary associations

as indispensable to democratic politics and market capitalism. Standing alone among an unconditionally equal citizenry, as De Tocqueville noted, an individual was powerless.<sup>2</sup> Only by combining with others could individuals influence government and, failing that, join together to do what government could or would not do. It was not long before groups like the conservative Society of the Cincinnati, representing the views of the "wealthy, learned, and respectable," and the radical democratic societies, which assembled more humble citizens, matured into political parties – the Federalists and the Democratic Republicans – which have, in one form or another, dominated American politics ever since.

Because it can be wielded only periodically, the vote is, at best, a blunt instrument for influencing government.<sup>3</sup> There are other more effective ways of influencing the state – demonstrating, lobbying, letter-writing, editorializing, participation in public meetings, litigation, political contributions, and organizing – that can empower vocal minorities not only to influence the actions of political bodies, candidates, and officeholders, but also to shape opinion and mobilize the public.

But explicit political action is not the only means of shaping and influencing public policy. Even before the Revolution and the ratification of the federal Constitution, Americans had begun to learn that crafting fellow citizens' values and beliefs could have powerful political consequences.<sup>4</sup> As early as the mid-eighteenth century, churches, schools, and colleges were all being used to promote ideas and practices that often ran counter both to ecclesiastical and political establishments and to popular opinion.

The ratification of the Constitution effectively nationalized politics and empowered a new mass of citizens. As a result, the cultural, economic, and social

leaders who once could count on deference to maintain their influence found themselves increasingly excluded from power. In the early nineteenth century, these disempowered elites increasingly turned to philanthropy and voluntary associations to promote views and causes that could neither muster popular support nor enlist the resources of government.<sup>5</sup>

This is not to suggest that the agendas of these disenfranchised elites were necessarily malign. In the antebellum period, when few states were willing to tax their citizens to support education, the willingness of committed citizens of means to establish private academies and support private higher education was no doubt admirable and, more often than not, produced cohorts of educated citizens essential to the new republic. At the same time, the plurality of religious and political views that flourished ensured that these private cultural enterprises produced a widening variety of perspectives and skills.

Still, the fields in which eleemosynary corporations were becoming most active – higher education, health care, religion, and social welfare – were likely to be led by the institutions that commanded the greatest material support. In higher education, Harvard, which could elicit the generosity of Boston’s increasingly wealthy elite, and Yale, which drew on smaller but more numerous contributions from the nation’s evangelical Protestant network, emerged as America’s leading colleges by the middle of the nineteenth century.<sup>6</sup>

While Harvard and Yale attracted their share of striving young men of humble origins, they also increasingly served the elites whose generosity enriched them – by educating their sons and sending them off into careers as corporate executives and leaders of the learned professions. Harvard helped Boston, as Oliver Wendell Holmes put it, “drain a large water-

shed of intellect” and attracted to the city the “promising young author and rising lawyer and large capitalist” – and “the prettiest girl.” In doing so, Harvard made Boston one of the nation’s chief producers of human and intellectual capital.<sup>7</sup>

Although Boston’s growing wealth produced a virtual tidal wave of philanthropic giving by the mid-nineteenth century, such generosity could not dispel public suspicion of donors’ motives. Giving an overview of Boston’s charities in 1845, Harvard Treasurer Samuel Atkins Eliot complained that

persons who are farmers or mechanics in this country often use a language and exhibit a tone of feeling which are inconsistent with the state of things here, and are applicable only to what is found in Europe. They talk of oppression of the rich; when there is not a rich man in America that can, and perhaps not one that wishes, to oppress them.

“Riches alone do not enable a man to be much of an oppressor anywhere,” Eliot continued,

and in this country the rich man can cut no figure at all in that line. There must be position and privilege superadded to wealth to make it possible to oppress, and in New England neither that position nor that privilege can be attained by any body. So far is the rich man from having attained them, that he is, in truth, farther from them than other persons. He is jealously watched, constantly suspected.<sup>8</sup>

While suspicion of the “voluntary system” was unable to prevent the emergence of powerful private institutions in New England, it was far more effective elsewhere in the country.<sup>9</sup> Both New York and Pennsylvania annulled British charities laws that had been retained in Massachusetts and Connecticut, substituting their own indigenous legal codes.

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In 1784, New York created an oversight body, the Regents of the University of the State of New York, which exercised broad authority over all charitable, educational, and religious institutions. In the 1820s, New York's legislature passed laws that gave the state authority to regulate the size of institutional endowments and to limit the proportion of estates that could be bequeathed for charitable purposes. Pennsylvania not only delayed giving its courts equity jurisdiction (and with it the power to enforce charitable and other trusts) until the 1870s, it also embraced highly restrictive criteria – the purely public charities standard – for what qualified legally as a charity. Philadelphia may have been the “city of brotherly love,” but its solicitude did not extend to organized charities. And despite their wealth, until the last decades of the nineteenth century, both New York and Pennsylvania lagged far behind New England in charitable giving and in the establishment of eleemosynary corporations.

In the South, hostility toward private giving and voluntary associations was even more overt. Some states forbade the establishment of charitable corporations. Others permitted them, but with charters that limited their life spans and mandated the presence of public officials on their governing boards. An 1832 Virginia Supreme Court decision regarding the property holdings of charities captured Southern attitudes toward private philanthropy, warning of “the whole property of society” being “swallowed up in the insatiable gulph of public charities.”<sup>10</sup>

This hostility toward private charity also manifested on the federal level. In 1835, the U.S. government was informed that James Smithson, a wealthy British amateur scientist, left the bulk of his substantial estate – a half-million dollars –

“to the United States of America, to found at Washington, under the name of the Smithsonian Institution, an establishment for the increase and diffusion of knowledge among men.”<sup>11</sup>

President Andrew Jackson – as a Southerner with a deep-seated hostility to private philanthropy – curtly notified Congress of the bequest, noting that the Executive had no authority to take any steps for accepting the trust nor for obtaining the funds, and that it was Congress' responsibility to take such measures as it deemed necessary.<sup>12</sup> When the Senate moved to approve the Judiciary Committee's report that confirmed the Smithson trust, an acrimonious debate broke out. Senator William C. Preston of South Carolina led off the opposition, mixing traditional Jeffersonian opposition to private endowments with aggressive nationalism. On the one hand, Preston questioned both the propriety of the government's accepting the legacy and whether its powers extended to executing the purposes of the trust; on the other, he argued that if the bequest were to be accepted, it should be applied to national purposes, not merely to the benefit of the citizens of the District of Columbia. Denying that the government had the authority to receive and administer such a trust, Preston declared that the “donation had been partly made with a view to immortalize the donor, and that it was too cheap a way of conferring immortality . . . and he had no idea of this District being used as a fulcrum to raise foreigners to immortality by getting Congress as the *parens patriæ* of the District of Columbia to accept donations from them.”<sup>13</sup>

Beyond questioning the legality of the nation's receiving the bequest, the congressmen began to fight among themselves about what sort of institution could best increase and diffuse knowledge. Each congressman had his pet scheme,

ranging from a national university and a public lecture series through experimental farms and factories. It took until 1839 for the Senate to resolve to create a public corporation, the Smithsonian Institution, which, at its outset, would establish and operate an astronomical observatory and sponsor public lectures on natural, moral, and political sciences.

Congress continued to debate how best to realize Smithson's vision when finally, in 1846, it was revealed that the Smithson bequest had been invested in bonds issued by the states of Arkansas, Illinois, and Michigan – all of which had defaulted on their obligations, wiping out the fund. After weeks of wrangling, much of it still about the legality of the government's accepting the bequest, a phalanx of representatives, led by former President John Quincy Adams, voted to restore the Smithsonian fund and to entrust it to a corporation whose trustees (the Regents) would be elected and appointed federal officials serving *ex officio*. All told, it took more than a decade to overcome opposition to what would eventually become a great national institution.

Northern intellectuals expressed a parallel suspicion of private philanthropic and associational initiatives. In an 1829 essay in the *Christian Examiner*, a leading New England journal of opinion, William Ellery Channing, the "pope" of Boston Unitarianism, warned against the power of voluntary associations: "Let Associations devoted to any objects which excite the passions, be everywhere spread and leagued together for mutual support, and nothing is easier than to establish a control over newspaper." Channing continued:

We are persuaded that by an artful multiplication of societies, devoted apparently to different objects, but all swayed by the same leaders, and all intended to bear against a hated party, as cruel a persecution may be carried on in a free country as in a

despotism. Public opinion may be so combined, and inflamed, and brought to bear on odious individuals or opinions, that it will be as perilous to think and speak with manly freedom, as if an Inquisition were open before us. It is now discovered that the way to rule in this country, is by an array of numbers, which a prudent man will not like to face. Of consequence, all Associations aiming or tending to establish sway by numbers, ought to be opposed. They create tyrants as effectually as standing armies. Let them be withstood from the beginning.

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"They are perilous instruments," he cautioned.

They ought to be suspected. They are a kind of irregular government created within our Constitutional government. Let them be watched closely. As soon as we find them resolved or even disposed to bear down on a respectable man or set of men, or to force on the community measures about which wise and good men differ, let us feel that a dangerous engine is at work among us, and oppose to it our steady and stern disapprobation.<sup>14</sup>

Channing was not alone in his apprehensions. In 1838, Brown University President Francis Wayland, a political economist and the nation's leading Baptist intellectual, wrote a passionate denunciation of associations, published under the title *The Limitations of Human Responsibility*.

Wayland first outlined the moral hazards that associations pose by encouraging citizens to sacrifice their own conscience to that of the group. "When men are thus associated," he wrote,

it is well known that their feeling of moral responsibility is vastly less acute than when they act as individuals. Associations will perpetrate acts, at which every member of the association would individually

revolt. Hence, the common proverb that “corporate bodies have no consciences.” The leaders throw the responsibility upon the members, and the members throw it back again upon the leaders, and between the two, we find that although the thing has been done, yet who is to be blamed for it, it is by no means easy to ascertain.<sup>15</sup>

“What were the *French Jacobin clubs* but *voluntary associations*?” Wayland asked, connecting seemingly innocuous voluntary associations to the emergence of tyranny.

At first, they were mere societies for the harmless purpose of discussing theoretical questions of civil politics. Soon they were changed into associations, for the purpose of carrying into practice those truths which they supposed themselves to have demonstrated. They were next multiplied, by the establishment of affiliated branches in every town of France, (each one, however, governed and directed by the central association in Paris,) until they were able to control the public sentiment of the nation. They then boldly assumed the government of the empire. The throne and the legislative assemblies were prostrate at their feet. The right of franchise, that palladium of liberty, was valueless; for elect whom you would to be a legislator, he dared not disobey the mandate of the club. Legislative proceedings were regularly decided upon, in the meetings of these voluntary associations, before they were brought forward in the assembly; and the representatives of the people did nothing but record the mandates of a sanguinary mob. Thus was a tyranny enacted, to which the history of the world affords no parallel; and all this was done by men, who, at first, were associated to discuss abstract principles of right, and who were merely pledged to carry into effect some truly salutary measures of reform.<sup>16</sup>

Severely limiting the powers of associations, in Wayland’s view, would only

protect and empower the individual. “Responsibility, instead of being thrown upon masses,” he concluded,

would be thrown more distinctly upon individuals. Every man, instead of inquiring for the decision of the majority, would be obliged to decide for himself. Instead of following thoughtlessly the movement of public opinion, every man would learn to act from the promptings of individual conscience and duty. Public opinion would thus be formed by the deliberate reflection of every individual acting in the fear of God, instead of being formed by the clamor of men who “make a trade of philanthropy.”<sup>17</sup>

Despite restrictive charities laws in most states outside of New England, private philanthropy and voluntary associations continued to grow and spread throughout the United States. Just as the Civil War stimulated the growth of enormous corporate business enterprises as components of an emergent national economy, so it also fueled the burgeoning of associational and philanthropic activities.<sup>18</sup>

A key element in the Union cause was the U.S. Sanitary Commission, a federally chartered but privately funded relief agency that took charge of the medical and public health tasks associated with the war effort. After the war, a host of voluntary organizations played key roles in the reconstruction of the South, building churches, schools, and social welfare agencies to help millions of emancipated slaves adjust to their freedom. These initiatives excited as much hostility as admiration. Called “Gideonites” (after the Old Testament hero) by their admirers, these reformers were known as “carpetbaggers” by their detractors. As the failure of Reconstruction and the disenfranchisement of African Americans in the decades following the war suggests, the currents of racism ran deep on both sides of the

Mason-Dixon line and doubtless shaped the attitudes of many Americans. Nonetheless, Reconstruction had a major impact on philanthropy, encouraging a number of wealthy Americans – among them, international banker George Peabody – to establish the forerunners of modern grant-making foundations to support educational activities in the South.<sup>19</sup>

The increasingly national character of economic, social, and cultural life helped foster other ambitious associational and philanthropic initiatives. In the decades following the war, virtually every major profession came to be organized as a national association. Millions of Americans joined fraternal, sororal, veterans, patriotic, and advocacy organizations.<sup>20</sup> As institutions like Harvard and Yale aspired to become national universities, they began to tap the generosity of the enormous fortunes accumulated during and after the war, fundraising not only locally, but also regionally and nationally.

The scale of the fortunes of the post-Civil War “robber barons” challenged their creators to devise entirely new forms of philanthropy – and in doing so rekindled public skepticism about the motives of the extremely rich. In his 1889 essay, “Wealth” (better known as “The Gospel of Wealth”), Andrew Carnegie harshly criticized the passing of large fortunes to descendants and urged his fellow millionaires to use their surplus wealth “to place within the reach of the community ladders upon which the aspiring can rise.”<sup>21</sup> The progress of the human race, Carnegie argued, required that millionaires use the same “genius for affairs” that had enabled them to earn great fortunes in redistributing their wealth. Over the course of the next three decades, Carnegie launched increasingly bold philanthropic initiatives, beginning with fairly conventional charities like the Hero’s Fund and concluding with broadly

purposed grant-making entities like the Carnegie Corporation.<sup>22</sup>

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As a devout Christian, John D. Rockefeller tried conscientiously to tithe his earnings, reading and responding to thousands of “begging letters” from individuals and organizations. “Your fortune is rolling up, rolling up like an avalanche,” Frederick Gates, Rockefeller’s philanthropic advisor, is said to have shouted one day early in the century. “You must keep up with it! You must distribute it faster than it grows! If you do not, it will crush you and your children and your children’s children.”<sup>23</sup> Like Carnegie, Rockefeller’s philanthropy moved from giving that targeted specific problems toward ever more open-ended objectives: the mission of his \$100 million Rockefeller Foundation, established in 1913, was simply the “benefit of mankind.”

The effort to establish the Rockefeller Foundation ignited a firestorm of criticism. Already regarded as “the most hated man in America” because of monopolistic business practices and bloody suppression of labor unions, Rockefeller’s grand philanthropic gesture was widely perceived as a transparent attempt to buy public favor. Most disturbing to the Foundation’s critics was not only its extraordinary size, but also the generality of its mandate:

To promote the well-being and to advance the civilization of the peoples of the United States and its Territories and possessions and of foreign lands in the acquisition and dissemination of knowledge; in the prevention and relief of suffering; and in the promotion of any and all of the elements of human progress.<sup>24</sup>

According to Rockefeller’s spokesman, his experience with his earlier philanthropies had led him to push the principle of an “elastic charter,” which would give

the Foundation a “freedom of scope” that would “not be limited in any way”: “wherever arises a human need this board may be in position to meet it, if that shall seem wise.”<sup>25</sup>

“Of course no amount of charities in spending such fortunes can compensate in any way for the misconduct in acquiring them,” remarked former President Theodore Roosevelt. President William Taft opposed the Foundation, calling it a “bill to incorporate Mr. Rockefeller.” American Federation of Labor President Samuel Gompers growled, “The one thing that the world would gratefully accept from Mr. Rockefeller now would be the establishment of a great endowment of research and education to help other people see in time how they can keep from being like him.”<sup>26</sup>

If Rockefeller expected that Congress would grant the Foundation complete freedom to select the causes it would support, to co-opt as trustees whomever it wished, and to increase its endowment without limit, he was disappointed. After nearly three years of debate, Congress proposed major limitations on the Foundation’s charter. It passed a series of amendments that allowed Congress to “impose such limitations upon the objects of the corporation as the public interests should demand, and that all gifts or property received by the corporation should be held subject to this provision.” One amendment “specifically limited” the total amount of property to \$100 million and forbade the Foundation from accumulating additional property. Another amendment gave Congress the power to require the dissolution of the Foundation after a century. Another made appointments to its board subject to review by a committee consisting of the President of the United States, the Chief Justice of the Supreme Court, the President of the Senate, the Speaker of the House, and the

presidents of Harvard, Yale, Columbia, Johns Hopkins, and the University of Chicago. Among the amendments to the motives of the Foundation was one “to make this munificent gift directly to the whole American people, and forever subject to the control of their elected representatives.”<sup>27</sup> Rockefeller representatives agreed to all the amendments, but in the end, even these concessions were insufficient to overcome congressional opposition to the Foundation’s proposal. It was eventually submitted to the more pliant New York State legislature, which approved it without any of the congressional reservations.

The resistance to large-scale philanthropy was not based solely on hostility toward the rich. Rather, it rested on deep historical foundations, particularly the long legacy of legal efforts to restrict private giving. The front line of this battle was New York, which had become the nation’s economic center after the Civil War and, in consequence, home to the country’s wealthiest men – including Carnegie and Rockefeller. As noted, the state’s efforts to limit private philanthropy dated back to the eighteenth century and were renewed periodically by legislative enactments and court decisions. These legal obstacles began to capture public attention in the 1880s, as the wealthy attempted to make large charitable gifts and bequests. The first of these collisions between wealth and the law occurred in 1886, when the impecunious nephews of corporate lawyer and former presidential candidate Samuel Tilden challenged his will, which had left the multimillion dollar remainder of his estate to his trustees, with a recommendation that it be used “for such charitable, educational, and scientific purposes” as they might deem “beneficial to the interests of mankind.”<sup>28</sup> Given Tilden’s influence as a Democratic political leader and the



prominence of his trustees, it seemed unlikely that the challenge would be taken seriously. However, Governor David Hill, one of Tilden's political rivals, had stacked the court that would consider the case – and Hill harbored a deep hostility toward private charity. The will was, in due course, declared invalid on a number of grounds including “vagueness” (the failure to specify a particular charitable purpose), improper delegation of powers to Tilden's trustees, and violation of a law forbidding gifts and bequests to charities not yet in being.

The decision in favor of Tilden's “laughing heirs” provoked dismay among the friends of private philanthropy – as well as among those who worried that limiting the ability of the rich to leave money to charity would further isolate the already alarming concentration of wealth. “Melancholy the spectacle must always be,” intoned Harvard Law professor James Barr Ames,

when covetous relatives seek to convert to their own use the fortune which a testator has plainly devoted to a great public benefaction. But society is powerless, in a given case, so long as the forms of law are observed. When, however, charitable bequests have been repeatedly defeated, under cover of law, and that, too, although the beneficent purpose of the testator was unmistakably expressed in a will executed with all due formalities, and although the trustees were ready and anxious to perform the trust reposed on them, one cannot help wondering if there is not something wrong in a system of law which permits this deplorable disappointment of the testator's will and the consequent loss to the community.<sup>29</sup>

The ruling against the Tilden Trust was followed in 1887 by the decision to invalidate a million-dollar bequest to Cornell University on grounds that the university

could not legally receive a gift that increased its endowment beyond the amount authorized by the state's legislature. (Like the Tilden case, *Fisk v. Cornell* had been brought by a covetous relative of the testator – in this instance her widower – who also happened to be the university's librarian!)

Ames and others concerned about the future of American philanthropy, as well as the fate of American society should such barriers continue to obstruct the flow of benevolence, launched a stealth campaign of legal reform intended to recraft charities laws in the major industrial states akin to New England's charity-friendly regime. In 1893, New York adopted the Tilden Act, which began with this ringing affirmation of the legality of broad-purpose, open-ended bequests like Tilden's:

No gift, grant, bequest or devise to religious, educational, charitable, or benevolent uses, which shall, in other respects be valid under the laws of this state, shall be deemed invalid by reason of the indefiniteness or uncertainty or the persons designated as the beneficiaries thereunder in the instrument creating the same.<sup>30</sup>

By the turn of the century, similar statutes had been passed in Pennsylvania, Illinois, and Ohio, in effect “Bostonizing” charities law in those states and, more important, permitting the kind of open-ended giving that made possible the modern charitable foundation.

The establishment of the Rockefeller Foundation sparked the first congressional investigation of the big philanthropy that was emerging from the great Gilded Age fortunes. Congress worried that these vast accumulations of wealth, devoted to shaping public institutions and public opinion, would be the mechanisms through which the wealthy could

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exert control beyond the economy. The Senate Commission on Industrial Relations (generally known as the Walsh Commission, after its chair, Senator Frank Walsh) was impaneled at the peak of violent conflict between big corporations and organized labor.<sup>31</sup> The commission had a broad agenda, including the handling of major labor disputes and the Rockefeller's influence on the policies and personnel of the New York Bureau of Municipal Research. But because the debate over the establishment of the Rockefeller Foundation came in the wake of the extraordinarily violent open warfare in the Rockefeller-controlled Colorado coal fields, a significant part of the investigation focused on the Foundation and its own proposed investigation of industrial relations.

The testimony of American Federation of Labor President Samuel Gompers offered a view of what many Americans thought of the social desirability of foundations controlled by the corporate interests investigating labor conditions. "I believe," Gompers stated,

that such foundations as the Rockefeller Foundation cannot impartially investigate a problem in the field of industry. The whole basic principle upon which that foundation is instituted – the guiding spirit behind it all precludes the possibility of impartial investigation as to the relations between employers and employees.<sup>32</sup>

"As to the desirability of such foundations as the Russell Sage and Carnegie," Gompers continued,

that may be open to question but there is no dissention among thoughtful and liberty-loving persons as to the position, the object, and the scope and spirit of the Rockefeller Foundation.<sup>33</sup>

"Granting you do not consider that the activities of the foundations named above

are socially desirable, please outline," Chairman Walsh asked, "the course of action or character of legislation which you would consider desirable?"

"Insofar as these foundations would devote their activities to the sciences, medical, surgical; to the laboratory, to the contributions toward history; for the arts, the sciences, they would be helpful," Gompers replied.

But the effort to undertake to be an all-pervading machinery for the molding of the minds of the people for their relations between each other in the constant industrial struggle for human betterment – in so far they should be prohibited from exercising their functions either by law or by regulation. ...I think one of the worst features, one of the most dangerous features of these foundations is where they undertake to mold the opinion and judgment of the people. I do not think that the Government of our country or that the people of our country are ready to surrender the function of teaching to a private institution such as the Rockefeller Foundation with the history behind that foundation – the means by which their moneys were first made and later accumulated.<sup>34</sup>

But the resistance of Congress to chartering foundations did not prevent the states from doing so. In the years immediately preceding and following World War I, major foundations established themselves and steadily expanded their influence despite episodic public opposition. Their greatest impact was on higher education, where foundation-supported research and reforms in graduate and professional education helped produce enthusiastic cadres of experts who moved easily between the worlds of academic teaching and research and of public policy. Despite political differences between the pro-business Hoover administration and Franklin Roosevelt's New Deal, both de-

pendent on the university-based expertise nurtured by the foundations. It was only natural, for example, that Roosevelt turned to the operating foundation, the Brookings Institution, to plan Social Security and that the Hoover Institution became one of the nation's early and leading conservative think tanks. By the end of World War II, foundations were involved in virtually every aspect of American life on both the national and local levels.

World War II, with its high taxes on individual and corporate incomes and excess profits, produced a second massive wave of foundation formation – and, perhaps not surprisingly, revived the Progressive Era suspicions of private philanthropy. Resentment of the ways in which philanthropy was being used as a mechanism of tax avoidance certainly contributed to its negative public image. Another key factor, as the political right began to regroup its forces in the postwar years, was the ways in which foundations had become part of the liberal machinery of government.

The Ford Foundation exemplified both of these characteristics of philanthropy.<sup>35</sup> Because the Ford Motor Company was privately held, the death of its aged founder, Henry Ford, was likely to carry tax liabilities that would exceed the family's ability to continue to control the company. Accordingly, the Ford's estate plan proposed the company's reorganization as a joint-stock company based on two classes of securities, one of which (retained by the family) would carry voting rights, while the other would be donated to a charitable foundation to produce major tax savings for the family. When Henry Ford died in 1947, the estate plan was enacted – creating the largest charitable foundation in the world and enabling the family to pass control of the company from one generation to another without significant tax liabilities.

It took the Foundation several years to define its purposes, but they generally followed a liberal and internationalist bent, much to the annoyance of congressional conservatives, who were already vexed about the profound influence that earlier foundations – particularly those associated with the Rockefellers – had demonstrated during the New Deal. The tax aspects of the Ford Foundation did not provoke a congressional inquiry, since the Internal Revenue Code was in the midst of a long-term revisal that would take nearly a decade to complete. But because conservative outrage over the liberal biases of philanthropy coincided with the emergence of Senator Joseph McCarthy as a public figure, the politics of the foundations became a matter of investigatory interest.<sup>36</sup>

The Cox Committee (1952–1953) and the Reece Committee (1953–1954), impaneled in the House “to investigate tax-exempt foundations and comparable organizations,” launched protracted and widely publicized inquiries into the motives for establishing foundations and their influence on public life. Areas of committee interest included the use of foundations as mechanisms of tax avoidance and corporate control, their influence on the social sciences, their capacity to influence public opinion and policy through their patronage of academic research, their influence on the press and broadcasting, and their role in promoting internationalist foreign policy and supporting subversive activities and institutions.

While the committees determined that the foundations were not supporters of Communism, they criticized their role in empowering donors and administrators who used their power to control research, education, and the media to promote internationalism and moral relativism, which they regarded as threats to demo-

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cratic governance.<sup>37</sup> Because publication of the findings of the Reece Committee coincided with the censure of Senator McCarthy, its activities produced no legislative outcomes. Nonetheless, the world of philanthropy was put on notice that, as its influence increased, it was likely to be the target of further attacks. Within months, the largest foundations – led by Ford, Rockefeller, Carnegie, and Sage – began organizing what would become a decades-long defense of the public record of foundations, working through new organizations like the Foundation Center Library, which worked to underwrite scholarly research that portrayed American philanthropy in a favorable light.

The political activism of foundations like the Ford Foundation, which contributed to the civil rights movement and other liberal initiatives of the era, set off a new wave of congressional inquiry in the late 1960s, this time in connection with major tax reform legislation. Thanks to a relentless decade of hearings and reports by conservative populist Democrat Wright Patman, and books on the power of the wealthy and privileged by academics such as C. Wright Mills and journalists such as Ferdinand Lundberg, the House Ways and Means Committee and Senate Finance Committee were primed to take on the foundations and the abuses associated with them.<sup>38</sup> Their bitter and angry hearings led to the passage of the Tax Reform Act of 1969, the first serious effort to regulate philanthropy. The bill included limitations on excess business holdings, donor control, and political activity, as well as payout requirements and taxes on the investments of private grant-making foundations.

The legislation so alarmed philanthropic leaders like John D. Rockefeller III and John Gardner that they were moved to create a national body to defend their philanthropic interests, the Commission

on Private Philanthropy and Public Needs (better known as the Filer Commission, after its chair, Aetna Life Insurance CEO John Filer).<sup>39</sup> The blue ribbon commission produced a set of recommendations and sponsored the first concerted research initiative on America's charitable tax-exempt domain (which came, as a result, to be known as the "nonprofit sector"). The commission hoped to persuade Congress to shift oversight of philanthropy and nonprofits from the Internal Revenue Service, a tax collecting agency, to a new body, modeled on the British Charity Commission. But this effort died with the election of Jimmy Carter to the presidency. Accordingly, the group refocused its efforts on creating a national trade association to represent nonprofits – Independent Sector – and sponsoring continued university and think tank research and advocacy for philanthropy and related activities.

The third great wave of foundation establishment coincided with the IT revolution and the enormous new fortunes to which it gave rise, as well as with the ideological revolution that discredited government and elevated the market as the source of public good. Unlike its predecessors, this period of growth did not kindle public outrage or congressional indignation, a shift chiefly due to the conservatives' rapid embrace of philanthropy in politics.

For much of the twentieth century, conservatives had been among the leading critics of philanthropy and nonprofits. But this changed after the crushing defeat of Barry Goldwater in 1964, when conservative intellectuals such as Lewis Powell (later to serve on the U.S. Supreme Court) and Irving Kristol began urging the right to create the kind of institutional infrastructure that had enabled the liberals to dominate public life for decades.<sup>40</sup>

Within a decade, policy think tanks like the Heritage Foundation and the American Enterprise Institute and a host of new right-wing foundations became pillars of the new Republican establishment, laying the groundwork for the Reagan victory of 1980 and the conservative revolution that followed. Once the darlings of the left, foundations and other nonprofits quickly became ubiquitous across the political spectrum as sources of policy and shapers of public opinion.<sup>41</sup>

Curiously, modes of activity that had originated as “politics by other means” for disenfranchised elites in the early nineteenth century had become instrumentalities of politics by the early twenty-first century. And the powers of foundations and nonprofits were enhanced by a series of federal court decisions, beginning with *Buckley v. Valeo* in 1976, which equated money with speech and began the process of dismantling campaign finance regulations, first enacted in the Progressive Era to limit the power of wealth in the democratic process.<sup>42</sup>

Supreme Court Justice Lewis Powell played a key role in reshaping charities law in ways that would supply a powerful rationale for the argument that money is speech. In *Bob Jones University v. United States*, a 1983 Supreme Court case regarding the government’s efforts to strip racially segregated institutions of their tax exemptions, the court’s majority ruled that institutions “seeking tax-exempt status must serve a public purpose and not be contrary to established public policy.”<sup>43</sup> Although concurring with the majority decision, Powell questioned the court’s assertion that the exemption of charitable organizations required that they be in harmony with established public policy. “I am unconvinced,” he declared,

that the critical question in determining tax-exempt status is whether an individual organization provides a “clear public

benefit” as defined by the Court. Over 106,000 organizations filed Section 501(c)(3) returns in 1981. . . . I find it impossible to believe that all or even most of those organizations could prove that they “demonstrably serve and [are] in harmony with the public interest,” or that they are “beneficial and stabilizing influences in community life.”<sup>44</sup>

“Even more troubling,” he continued,

is the element of conformity that appears to inform the Court’s analysis. The Court asserts that an exempt organization must “demonstrably serve and be in harmony with the public interest,” must have a purpose that comports with “the common community conscience,” and must not act in a manner “affirmatively at odds with [the] declared position of the whole Government.” Taken together, these passages suggest that the primary function of a tax-exempt organization is to act on behalf of the Government in carrying out governmentally approved policies. In my opinion, such a view . . . ignores the important role played by tax exemptions in encouraging diverse, indeed often sharply conflicting, activities and viewpoints. As Justice Brennan has observed, private, nonprofit groups receive tax exemptions because “each group contributes to the diversity of association, viewpoint, and enterprise essential to a vigorous, pluralistic society.” . . . Far from representing an effort to reinforce any perceived “common community conscience,” the provision of tax exemptions to nonprofit groups is one indispensable means of limiting the influence of governmental orthodoxy on important areas of community life.<sup>45</sup>

“It would be difficult indeed,” Powell expanded,

to argue that each of these organizations reflects the views of the “common community conscience” or “demonstrably . . .

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[is] in harmony with the public interest.” . . . They illustrate the commendable tolerance by our Government of even the most strongly held divergent views, including views that at least from time to time are “at odds” with the position of our Government. We have consistently recognized that such disparate groups are entitled to share the privilege of tax exemption.

Given the importance of our tradition of pluralism, Powell concluded, “[the] interest in preserving an area of untrammelled choice for private philanthropy is very great.”<sup>46</sup>

Powell argued that tax exemption, rather than serving as a subsidy for organizations supporting government policies, was a subsidy for pluralism and freedom of speech and belief – a view entirely compatible with the notion of money as speech endorsed in *Buckley v. Valeo*.

The process of monetizing politics was completed in 2010, with the U.S. Supreme Court’s ruling in *Citizens United v. Federal Election Commission*, which opened the electoral process to unlimited contributions by corporations and individuals.<sup>47</sup> Following that decision, nonprofits began to serve as important conduits of campaign contributions by wealthy individuals, corporations, and trade associations.

In the meantime, the distinctions between nonprofit and for-profit forms were breaking down. Through the 1960s, charitable tax-exempt status had been restricted to organizations engaged in a limited range of charitable, educational, and religious activities. By the end of the century, these enumerated purposes had largely been replaced by a far more expansive nondistribution rule, under which the only criteria for exempt status were that an organization’s activities not be illegal, impossible, or impracticable and that financial surpluses, if any, not be distributed to organizational principals.<sup>48</sup> This meant that virtually any organization,

regardless of its purposes, could apply for and receive charitable tax-exempt status from the Internal Revenue Service.<sup>49</sup>

At the same time, traditional membership organizations, which had once commanded the loyalty and engagement of millions of Americans, virtually disappeared – to be replaced by nationally headquartered “checkbook membership” entities, in which members had no roles save as financial contributors.<sup>50</sup>

Accompanying this development was a major shift in the sources of nonprofit financing from donations to earned income – which included not only sales of goods and services, but also government contracts. By the early twenty-first century, nearly 90 percent of nonprofit revenues came from earned income and little more than 10 percent from donations. As the distinctions between for-profit and nonprofit enterprises became less clear, the tax privileges accorded the latter became increasingly difficult to justify.<sup>51</sup> More seriously, as nonprofits became increasingly market-driven, their ties to historic missions like social justice diminished.

The erosion of clear boundaries between business and charity was accompanied by a similar erosion of distinctions between nonprofits and government. This was primarily due to conservative policies that promoted the outsourcing of activities that had once been the province of government to contractors, both for-profit and nonprofit.

A few jurisdictions resisted these trends. Pennsylvania court decisions, later codified in statute, made tax exemption contingent on a five-prong test: a) that the entity advance a charitable purpose; b) that it donate or render gratuitously a substantial portion of its services; c) that it benefit a substantial and indefinite class of persons who are legitimate subjects of charity; d) that it relieve government of some of its burden; and e) that it operate

entirely free from private profit motive. But Pennsylvania was exceptional in its fidelity to a genuinely charitable standard.<sup>52</sup>

Writing in the late 1980s, political scientist Lester Salamon argued that the partnership that had evolved between government and the nonprofit sector had produced the modern welfare state. Salamon pointed out that while the federal government played a crucial role as a provider of funds and direction, for the actual delivery of services it had depended on other institutions – “states, cities, counties, universities, hospitals, banks, industrial corporations,” and, of course, nonprofits. “Far from the bureaucratic monolith pictured in conventional theories, the welfare state in the American context makes use of a wide variety of third parties to carry out government functions.”<sup>53</sup>

These third parties, particularly the nonprofit sector, in turn relied on the government to fulfill its own purposes because of a number of key “voluntary failures” in efforts to privately provide for public needs. These included: “philanthropic insufficiency,” the inability of the voluntary system to generate resources on a scale both sufficiently adequate and reliable to cope with the human services problems of an advanced industrial society; “philanthropic particularism,” the inability of private organizations and their benefactors to identify and focus on the groups most in need of services; “philanthropic paternalism,” the undue influence of the wealthy in determining which groups receive services; and “philanthropic amateurism,” the tendency to offer moral and religious remedies to problems that demanded more pragmatic solutions.<sup>54</sup>

Significantly, Salamon notes,

the voluntary sector’s weaknesses correspond well with the government’s strengths,

and vice-versa. Potentially, at least, government is in a position to generate a more reliable stream of resources, to set priorities on the basis of a democratic political process instead of the wishes of the wealthy, to offset part of the paternalism of the charitable system by making access to care a right instead of a privilege, and to improve the quality of care by instituting quality-control standards. By the same token, however, voluntary organizations are in a better position than government to personalize the provision of services, to operate on a smaller scale, to adjust care to the needs of clients rather than to the structure of government agencies, and to permit a degree of competition among service providers.<sup>55</sup>

Unfortunately, the fortuitous complementarities between the private sector and the state described by Salamon three decades ago have largely disappeared and have been replaced by an extraordinary concentration of wealth and power in the hands of a few hundred individuals and corporations. Government no longer has either the resources to compensate for the insufficiency of philanthropic resources, or the authority to counteract the particularism, paternalism, or amateurism of the wealthy who now control not only the major sources of policy (particularly the universities), but also the political process itself.

With the extraordinary growth in wealth inequality over the past quarter century and the increasing laxity of the laws regulating charity, it is hardly surprising that rich – especially the newly rich – have turned enthusiastically to philanthropy. The most recent *Forbes* magazine annual billionaires issue, under the title “making it big, giving it big,” was devoted to the ways that the wealthiest Americans, led by Bill Gates and Warren Buffett, were dispensing their charitable dollars.<sup>56</sup> The magazine included profiles of major phi-

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lanthropists and panel discussions on topics of common interest, giving particular attention to Bill and Melinda Gates, whose foundation, with its \$36 billion endowment, is the largest in the world. The Gates Foundation, while notable for the breadth of its interests, which include major efforts to address global health and poverty, is surprising in the shallowness of its understanding of the causes of these problems. An essay by Bill Gates titled “The Power of Catalytic Philanthropy” begins with a paean to the economic system that gave him his wealth. “I am a true believer,” Gates declares, “in the power of capitalism to improve lives. Where the free market is allowed to operate, it is agile and creative. It can meet demand the world over and plays a central role in increasing living standards.”<sup>57</sup> At no point, either in the essay or in his and Melinda’s contributions to the Forbes 400 Philanthropy Summit, did they – or any of their fellow billionaires – address questions of power, powerlessness, or democratic process.

Whatever good they may do in their giving, the Gateses and their fellow megadonors exemplify Salamon’s critique of the shortcomings of private philanthropy unconstrained (and evidently uninformed) by the core political and ethical values of the society that produced them. They see no need for fundamental change in the world order. Rather, they remain committed, as one recent critic put it, to “high-tech expert-led solutions, free-market and ‘comparative advantage’ economics, and to American/western power and global leadership,” which soar above “the oft-expressed and lofty interest in feeding the hungry and poor of this world. . . . The foundations remain primordially attached to the American state, a broadly neo-liberal order with a safety net, and a global rules-based system as the basis of continued American global hegemony.”<sup>58</sup>

The ongoing legislative struggle over the national budget reflects this constricted vision. Among the “loopholes” Congress and interested policy-makers are considering eliminating is the charitable deduction. Almost uniformly, the deduction is defended – in the face of obvious facts – both in scholarly journals and in the daily press as essential to sustaining American philanthropy. The reality is that large-scale philanthropy existed long before the charitable deduction, which is less than a century old.<sup>59</sup> Analyses of charitable giving show that lower income Americans, who receive no tax incentives for giving, give as much – or, some scholars argue – greater proportions of household income than the wealthy. (This is called the “U-shaped curve.”)<sup>60</sup> Since fewer than half of American taxpayers itemize their deductions – which is necessary to qualify for tax benefits – the deduction is clearly a subsidy for the well-to-do rather than the average taxpayer. In addition, the poorest states in the union – those with the lowest reported household incomes – are the most generous in terms of charitable giving; the most wealthy states are among the least generous.<sup>61</sup> Finally, the overall decline since the 1930s in the proportion of annual income donated to charity suggests that the deduction’s impact is far less powerful than we conventionally assume.<sup>62</sup>

Ironically, the larger the scope and scale of philanthropy and the nonprofit sector, the more evident their shortcomings have become. Economic inequality created the very system that made big philanthropy possible. Under the circumstances, it is hardly surprising that contemporary philanthropy is largely unconcerned about growing economic inequality domestically and globally, nor is it surprising that philanthropy has made so little effort to be more publicly accountable or more democratic in its decision-making.



The central dilemmas of private initiatives in democratic contexts, viewed as unsolvable two centuries ago, remain insoluble today: unrestricted expressive and property rights are fundamentally incompatible with legal and political equality so long as government lacks the capacity to counterbalance the power of special interests. For most of our history, government had this capacity, though that is no longer the case.

More worrisome, the extraordinary accumulation of philanthropic resources in the last thirty years and the steadily

growing power of nonprofit institutions have not been matched by an expansion of our moral imagination. Huge donations from the titans of technology and finance have not produced any great new institutions (comparable to the modern research university) or initiatives (like the anti-slavery movement) that would make the world more just. Rather, they have served primarily to burnish the public reputations of donors, to promote market triumphalism, and to remove regulations that historically limited the public influence of private wealth.

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#### ENDNOTES

- <sup>1</sup> George Washington, "Farewell Address," in *Basic Writings of George Washington*, ed. Saxe Commins (New York: Random House, 1948), 608 – 616.
- <sup>2</sup> "Among democratic nations," Tocqueville writes, "all the citizens are independent and feeble; they can hardly do anything by themselves, and none of them can oblige his fellow men to lend him their assistance. They all, therefore, become powerless if they do not learn voluntarily to help one another. If men living in democratic countries had no right and no inclination to associate for political purposes, their independence would be in great jeopardy . . . whereas if they never acquired the habit of forming associations in ordinary life, civilization itself would be endangered"; Alexis de Tocqueville, *Democracy in America*, vol. 2 (New York: Vintage Books, 1945), 115.
- <sup>3</sup> "In contrast to other forms of participation which can be multiplied in volume and which are capable of communicating detailed messages about citizen concerns, the vote is the single mode of participation for which the maximum input is equalized across actors, and it is a singularly blunt instrument for the communication of information"; Sidney Verba, Kay Lehman Schlozman, and Henry E. Brady, *Voice and Equality: Civic Voluntarism in American Politics* (Cambridge, Mass.: Harvard University Press, 1995), 23 – 24.
- <sup>4</sup> See Charles I. Foster, *An Errand of Mercy: The Evangelical United Front, 1790 – 1837* (Chapel Hill: University of North Carolina Press, 1960); and Clifford S. Griffin, *The Brothers' Keepers: Moral Stewardship in the United States, 1800 – 1865* (New Brunswick, N.J.: Rutgers University Press, 1960).
- <sup>5</sup> In describing the "remains of the aristocratic party in the United States," Tocqueville writes: "When the democratic party got the upper hand, it took exclusive possession of the conduct of affairs, and from that time the laws and the customs of society have been adapted to its caprices. At the present day, the more affluent classes of society have no influence in political affairs; and wealth, far from conferring a right, is rather a cause of unpopularity than a means of attaining power. . . . As they cannot occupy in public a position equivalent to what they hold in private life, they abandon the former and give themselves up to the latter; and they constitute a private society in the state which has its own tastes and pleasures"; Alexis de Tocqueville, *Democracy in America*, vol. 1 (New York: Vintage Books, 1945), 186 – 187. In an uncharacteristic lapse, Tocqueville failed to note the extent to which "private society" included private philanthropy and the elite-controlled institutions it supported. On this, see

- Ronald Story, *The Forging of an Aristocracy: Harvard and the Boston Upper Class, 1800 – 1870* (Middletown, Conn.: Wesleyan University Press, 1980).
- <sup>6</sup> See Peter Dobkin Hall, *The Organization of American Culture, 1700 – 1900: Institutions, Elites, and the Origins of American Nationality* (New York: New York University Press, 1982).
- <sup>7</sup> Oliver Wendell Holmes, *Autocrat of the Breakfast Table* (New York: Sagamore Press, 1957), 119 – 120.
- <sup>8</sup> Samuel Atkins Eliot, “Public and Private Charities of Boston,” *North American Review* 56 (July 1845): 135 – 159.
- <sup>9</sup> On legal hostility to charities, see Howard S. Miller, *The Legal Foundations of American Philanthropy, 1776 – 1844* (Madison: State Historical Society of Wisconsin, 1961). See also, Peter Dobkin Hall, “Inventing the Nonprofit Sector,” in *Inventing the Nonprofit Sector and Other Essays on Philanthropy, Voluntarism, and Nonprofit Organizations* (Baltimore: Johns Hopkins University Press, 1992), 25 – 36.
- <sup>10</sup> *Gallego’s Executors v. The Attorney-General* (3 Leigh (Va.), 450).
- <sup>11</sup> William J. Rhees, ed., *The Smithsonian Institution: Documents Relative to Its Origin and History*, Smithsonian Miscellaneous Collections, vol. 17, publ. no. 328 (Washington, D.C.: Smithsonian Institution, 1879), 1 – 2.
- <sup>12</sup> *Ibid.*, 135.
- <sup>13</sup> *Ibid.*
- <sup>14</sup> William Ellery Channing, “Associations,” *Christian Examiner and General Review* 7 (1829): 1, 105.
- <sup>15</sup> Francis Wayland, *The Limitations of Human Responsibility* (New York: D. Appleton & Co., 1838), 109 – 110.
- <sup>16</sup> *Ibid.*, 111 – 112.
- <sup>17</sup> *Ibid.*, 125.
- <sup>18</sup> Gerald Gamm and Robert D. Putnam, “The Growth of Voluntary Associations in America, 1840 – 1940,” *Journal of Interdisciplinary History* 29 (4) (Spring 1999): 511 – 557.
- <sup>19</sup> Franklin Parker, *George Peabody: A Biography* (Nashville: Vanderbilt University Press, 1995), 160 – 167.
- <sup>20</sup> Theda Skocpol, “How Americans Became Civic,” in *Civic Engagement in American Democracy*, ed. Theda Skocpol and Morris P. Fiorina (Washington, D.C.: Brookings Institution Press, 1998), 27 – 80.
- <sup>21</sup> Andrew Carnegie, “Wealth,” *North American Review* 148 (June 1889): 653 – 654; Andrew Carnegie, “Wealth,” *North American Review* 149 (December 1889): 682 – 698.
- <sup>22</sup> On Carnegie, see Joseph Frazier Wall, *Andrew Carnegie* (Pittsburgh: University of Pittsburgh Press, 1970); and David Nasaw, *Andrew Carnegie* (New York: Penguin Press, 2006).
- <sup>23</sup> Raymond Fosdick, *The Story of the Rockefeller Foundation* (New York: Harper & Row, 1952), 3.
- <sup>24</sup> “Hearing before Committee on the District of Columbia on the Bill to Incorporate the Rockefeller Foundation,” Bill S. 6888, 61st Cong., 2nd sess., March 11, 1910, 2.
- <sup>25</sup> *Ibid.*, 8.
- <sup>26</sup> Peter Collier and David Horowitz, *The Rockefellers: An American Dynasty* (New York: Holt, Rinehart and Winston, 1976), 64.
- <sup>27</sup> The Rockefeller Foundation, “Report of the Committee on the Judiciary to Accompany H.R. 21532,” Report No. 529, 62nd Cong., 2nd sess., April 11, 1912, 5 – 6.
- <sup>28</sup> Alexander Clarence Flick, *Samuel Jones Tilden: A Study in Political Sagacity* (New York: Dodd, Mead & Company, 1939), 510 – 518. Another notorious New York case in this period was the suit against Cornell University based on the fact that a bequest had enlarged the institution’s

endowment beyond the limit set by the state legislature. See “Decided against Cornell,” *New York Tribune*, November 28, 1893.

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- <sup>29</sup> James Barr Ames, “The Failure of the Tilden Trust,” (1893) in *Essays in Legal History and Miscellaneous Legal Essays* (Cambridge, Mass.: Harvard University Press, 1913), 285–297.
- <sup>30</sup> *Laws of the State of New York Passed at the One Hundred and Sixteenth Session of the Legislature, Begun January Third, 1893, and Ended April Twentieth, 1893, in the City of Albany*, vol. 2 (Albany, N.Y.: James B. Lyon, Printer, 1893), 1748.
- <sup>31</sup> On the Commission, see Graham Adams, Jr., *The Age of Industrial Violence, 1910–1915: The Activities and Findings of the Commission on Industrial Relations* (New York: Columbia University Press, 1966).
- <sup>32</sup> Senate Commission on Industrial Relations, vol. 7, “Centralization of Industrial Control and Operation of Philanthropic Foundations” (1916), 7646.
- <sup>33</sup> *Ibid.*
- <sup>34</sup> *Ibid.*, 7647.
- <sup>35</sup> On the beginnings of the Ford Foundation, see William Greenleaf, *From These Beginnings: The Early Philanthropies of Henry and Edsel Ford, 1911–1936* (Detroit: Wayne State University Press, 1964); and Dwight MacDonald, *The Ford Foundation: The Men and the Millions* (New York: Reynal and Company, 1956).
- <sup>36</sup> For overviews of these investigations, see F. Emerson Andrews, *Foundation Watcher* (Lancaster, Pa.: Franklin and Marshall College, 1973), 131–147; and Hall, “Inventing the Nonprofit Sector,” in *Inventing the Nonprofit Sector*, 66–69.
- <sup>37</sup> On the congressional investigations of the early 1950s, see U.S. House of Representatives, “Hearings before the Select Committee to Investigate Tax-Exempt Foundations and Comparable Organizations,” H. Res. 561, 82nd Cong., 2nd sess. (Washington, D.C.: Government Printing Office, 1952); U.S. House of Representatives, “Final Report of the Select Committee to Investigate Foundations and Other Organizations,” pursuant to H. Res 561, 32nd Cong., 2nd sess. (Washington, D.C.: Government Printing Office, 1853); House of Representatives, “Tax Exempt Foundations: Report of the Special Committee to Investigate Tax-Exempt Foundations and Comparable Organizations,” H. Res. 217, 83rd Cong., 2nd sess. (Washington, D.C.: Government Printing Office, 1954).
- <sup>38</sup> On Patman, see Frank Emerson Andrews, *Patman and Foundations: Review and Assessment* (New York: Foundation Center, 1968). Critiques of foundations include Ferdinand Lundberg, *The Rich and the Super-Rich: A Study in the Power of Money Today* (New York: Lyle Stuart, 1968); and C. Wright Mills, *The Power Elite* (New York: Oxford University Press, 1959).
- <sup>39</sup> On the Filer Commission, see Eleanor L. Brilliant, *Private Charity and Public Inquiry: A History of the Filer and Peterson Commissions* (Bloomington: Indiana University Press, 2000); and Hall, “Inventing the Nonprofit Sector,” in *Inventing the Nonprofit Sector*, 70–80.
- <sup>40</sup> See especially “The Powell Memo” (a.k.a. the “Powell Manifesto”), August 23, 1971, [http://reclaimdemocracy.org/powell\\_memo\\_lewis/](http://reclaimdemocracy.org/powell_memo_lewis/).
- <sup>41</sup> On the right’s embrace of philanthropy and nonprofits, see Andrew Rich, *Think Tanks and the Politics of Expertise* (New York: Cambridge University Press, 2004).
- <sup>42</sup> *Buckley v. Valeo*, 424 U.S. 1 (1976).
- <sup>43</sup> *Bob Jones University v. United States*, 461 U.S. 574 (1983).
- <sup>44</sup> *Ibid.*, 608.
- <sup>45</sup> *Ibid.* The quote from Justice Brennan is from his concurring opinion in *Walz v. Tax Commission* (1970).
- <sup>46</sup> *Ibid.*, 609–610.

- 47 *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010).
- 48 Evelyn Brody, "The Legal Framework for Nonprofit Organizations," in *The Nonprofit Sector: A Research Handbook*, 2nd ed., ed. Walter W. Powell and Richard Steinberg (New Haven, Conn.: Yale University Press, 2006), 246, 253.
- 49 See Stephanie Strom, "Grab Bag of Charities Grows, Along With U.S. Tax Breaks," *The New York Times*, December 6, 2009. As Strom notes, "[N]onprofits are skillfully exploiting the tax code's broad and elastic definition of what constitutes a charity, making it difficult for the Internal Revenue Service, which must bless them, to say no."
- 50 See Theda Skocpol, *Diminished Democracy: From Membership to Management in American Civic Life* (Norman: University of Oklahoma Press, 2003).
- 51 See Stephanie Strom, "Tax Exemptions of Charities Face New Challenges," *The New York Times*, May 26, 2008.
- 52 *Hospital Utilization Project v. Commonwealth of Pennsylvania*, 507 Pa. 1; 487 A.2d 1306 (1984).
- 53 Lester M. Salamon, "Of Market Failure, Voluntary Failure, and Third Party Government: Toward a Theory of Government-Nonprofit Relations in the Modern Welfare State," in *Shifting the Debate: Public/Private Sector Relations in the Modern Welfare State*, ed. Susan A. Ostrander, Stuart Langton, and Jon Van Til (New Brunswick, N.J.: Transaction Press, 1987), 37.
- 54 *Ibid.*, 36 – 42.
- 55 *Ibid.*, 42.
- 56 On the origins of the philanthropic enthusiasm of the new rich, see Nicholas D. Kristof, "How Giving Became Cool," *The New York Times*, December 26, 2012.
- 57 Bill Gates, "The Power of Catalytic Philanthropy," *Forbes*, October 8, 2012, 50 – 51.
- 58 Inderjeet Parmar, *The Foundations of the American Century: The Ford, Carnegie, and Rockefeller Foundations in the Rise of American Power* (New York: Columbia University Press, 2012), 264 – 265.
- 59 Notably, the greatest philanthropic gifts of John D. Rockefeller, Andrew Carnegie, and Olivia (Mrs. Russell) Sage were made before the enactment of the charitable deduction.
- 60 On the U-shaped curve, see Christopher Jencks, "Who Gives to What?" in *The Nonprofit Sector: A Research Handbook*, ed. Walter Powell and Richard Steinberg (New Haven, Conn.: Yale University Press, 1987), 322 – 323. For arguments against this interpretation of the data, see John J. Havens, Mary A. O'Herlihy, and Paul G. Schervish, "Charitable Giving: How Much, by Whom, and How?" in *The Nonprofit Sector*, 2nd ed., 545.
- 61 See Peter Dobkin Hall, "Religion, Philanthropy, Service, and Civic Engagement in Twentieth Century America," in *Gifts of Money and Time: The Role of Charity in America's Communities*, ed. Arthur C. Brooks (Lanham, Md.: Rowman & Littlefield, 2005), 167 – 170.
- 62 Colin B. Burke, "Nonprofit History's New Numbers (and the Need for More)," *Nonprofit and Voluntary Sector Quarterly* 30 (2001): 174, 186.