

Philanthropy, the Nonprofit Sector & the Democratic Dilemma

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Abstract: The central dilemma of American democracy is the tension between •voiceŽ and •equalityŽ: 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.

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.

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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

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of speech, worship, and the press), as indispensable to democratic politics and market capitalism. Standing alone among an unconditionally equal citizenry, property rights (including giving and volunteering)...have been both endemic and persistent since colonial days. De Tocqueville noted, an individual was powerless. 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, weakened or challenged elected governments. Not only were political parties learned, and respectable, and the radical and factions regarded with suspicion, any democratic societies, which assembled and all kinds of private associations were more humble citizens, matured into viewed as instruments for advancing political parties...the Federalists and the Democratic Republicans...which have, in the common good, and the state. one form or another, dominated American politics ever since.

James Madison's famous Federalist No. 10 (1787) addressed the hazards that factions, as associations representing special interests, posed to government. 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, 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. As early as the mid-eighteenth century, churches, schools, and colleges were all being used to promote ideas and practices that often ran counter 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

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."¹⁰

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...

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 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 in 1846, it was revealed that the 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 officials.

They are perilous instruments, he cautioned. They ought to be suspected. They are a kind of irregular government created within

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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

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.

•What were the French Jacobin clubs
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 as-

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.¹⁹

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.²⁰

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

the Foundation a •freedom of scopeŽ
that would •not be limited in any wayŽ:
•wherever arises a human need this
board may be in position to meet it, if
that shall seem wise.²⁵
•Of course no amount of charities in

exert control beyond the economy. The Senate Commission on Industrial Relations (generally known as the Walsh Commission, after its chair, Senator

cratic governance.³⁷ Because publication on Private Philanthropy and Public Needs (better known as the Filer Commission) coincided with the censure of Senator Aetna Life Insurance Company CEO John Filer,³⁹ its activities produced no legislative outcomes. Nonetheless, the world commission produced a set of recommendations and sponsored the first concerted research initiative on America's charitable tax-exempt domain (which became, as a result, to be known as the Ford, Rockefeller, Carnegie, and Sage non-profit sector). The commission began organizing what would become a coalition of philanthropy and non-profits, working through new organizations like the Foundation Center, 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 non-profits... Independent Sector... and sponsoring continued university and think tank research and advocacy for philanthropy and related activities.

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.³⁸ 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

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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

[is] in harmony with the public interest. Regardless of its purposes, could apply for . . . They illustrate the commendable tolerance and receive charitable tax-exempt status from the Internal Revenue Service.⁴⁹ At the same time, traditional membership organizations, which had once comports with the position of our Government-mandated the loyalty and engagement of ment. We have consistently recognized millions of Americans, virtually disappeared...to be replaced by nationally headquartered membership entities, in which members had no roles save as financial contributors.⁵⁰

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."⁴⁶ Accompanying this development was a major shift in the sources of nonproft 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 nonproft revenues came from earned income and little more than 10 percent from donations. As the distinctions between for-proft and nonproft enterprises became less clear, the tax privileges accorded the latter became increasingly difficult to justify.⁵¹ More seriously, as nonprofts became increasingly market-driven, their ties to historic missions like social justice diminished.

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.⁴⁷

Following that decision, nonprofts began to serve as important conduits of campaign contributions by wealthy individuals, corporations, and trade associations. The erosion of clear boundaries between business and charity was accompanied by a similar erosion of distinctions between nonprofts and government. This

In the meantime, the distinctions between nonproft and for-proft 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.⁴⁸

This meant that virtually any organization,

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anthropists and panel discussions on The ongoing legislative struggle over the national budget reflects this con-
stricted vision. Among the •loopholesŽ
whose foundation, with its \$36 billion
Congress and interested policy-makers
are considering eliminating is the chari-
table deduction. Almost uniformly, the
breadth of its interests, which included
deduction is defended...in the face of
major efforts to address global health and
obvious facts...both in scholarly journals
poverty, is surprising in the shallowness
and in the daily press as essential to sus-
taining American philanthropy. The reality
of these problems. An essay by Bill Gates
that large-scale philanthropy existed
long before the charitable deduction,
begins with a paean to the economic
system that gave him his wealth⁵⁹
of charitable giving show that lower
income Americans, who receive no tax
incentives for giving, give as much...or,
Where the free market is allowed to oper-
ate, it is agile and creative. It can meet
the demand the world over and plays a cen-
tral role in increasing living standards.⁶⁰ Since fewer than half of Ameri-
can taxpayers itemize their deductions...
and Melinda's contributions to the
Forbes 400 Philanthropy Summit, did
they...or any of their fellow billionaires...
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 gener-
ous in terms of charitable giving; the
donors exemplify Salomon's critique of the
most wealthy states are among the least
generous.⁶¹ Finally, the overall decline
of income donated to charity suggests that
the society that produced them. They see
no need for fundamental change in the
world order. Rather, they remain commit-
ted, as one recent critic put it, to •high-
tech expert-led solutions, free-market
economic have become. Economic inequality created
and to American/western power and the very system that made big philan-
thropy possible. Under the circumstances,
it is hardly surprising that contemporary
philanthropy is largely unconcerned
with the hungry and poor of this world...
The foundations remain primordial about growing economic inequality do-
mestically and globally, nor is it surpris-
ing that philanthropy has made so little
effort to be more publicly accountable or
more democratic in its decision-making.⁵⁸

The central dilemmas of private initiative and the growing power of non-profit institutions in democratic contexts, viewed as unsolvable two centuries ago, remain of our moral imagination. Huge donations from the titans of technology and property rights are fundamentally incompatible with legal and political 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 extraordinary market triumphalism, and to remove regulations that historically limited the public accumulation of philanthropic resources in the last thirty years and the steady influence of private wealth.

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Ronald Story, *The Forging of an Aristocracy: Harvard and the Boston Upper Class, 1800...1870* (Middletown, Conn.: Wesleyan University Press, 1980).

⁶ See Peter Dobkin Hall, *The Organization of American Culture, 1700...1900: Institutions, Elites, and the Origins of American Nationality*

- endowment beyond the limit set by the state legislature. See *Decided against Cornell*, *New York Tribune* November 28, 1893.
- 29 James Barr Ames, *The Failure of the Tilden Trust*, *Essays in Legal History and Miscellaneous Legal Essays* (Cambridge, Mass.: Harvard University Press, 1913), 285...297.
- 30 *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*, N.Y.: James B. Lyon, Printer, 1893), 1748.
- 31 On the Commission, see Graham Adams, *The Age of Industrial Violence, 1910...1915: The Activities and Findings of the Commission on Industrial Relations* (New York: Columbia University Press, 1966).
- 32 Senate Commission on Industrial Relations, vol. 7, *Centralization of Industrial Control and Operation of Philanthropic Foundations* (1916), 7646.
- 33 *Ibid.*
- 34 *Ibid.*, 7647.
- 35 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 Mill* (New York: Reynal and Company, 1956).
- 36 For overviews of these investigations, see F. Emerson Andrew, *Foundation Watcher* (Lancaster, Pa.: Franklin and Marshall College, 1973), 131...147; and Hall, *Inventing the Nonprofit Sector*, *Inventing the Nonprofit Sector*...69.
- 37 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).
- 38 On Patman, see Frank Emerson Andrew, *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* (New York: Lyle Stuart, 1968); and C. Wright Mills, *The Power Elite* (New York: Oxford University Press, 1959).
- 39 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*, *Inventing the Nonprofit Sector*...80.
- 40 See especially *The Powell Memo* (a.k.a. the *Powell Manifesto*), August 23, 1971, http://reclaimdemocracy.org/powell_memo_lewis/.
- 41 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).
- 42 *Buckley v. Valeo*, 424 U.S. 1 (1976).
- 43 *Bob Jones University v. United States*, 461 U.S. 574 (1983).

