

PATRIOTIC PHILANTHROPY? FINANCING THE STATE WITH GIFTS TO GOVERNMENT

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ABSTRACT

Federal and state law prohibit government officials from accepting gifts or “emoluments” from outside sources. The purpose of gift bans, like restrictions on more explicit forms of bribery, is to protect the integrity of political processes and to ensure that decisions about public policy are made in the public interest—not to advance a private agenda. Similar considerations animate regulations on campaign funding and lobbying. Yet private entities remain free to offer gifts to government itself, to foot the bill for particular public projects they would like to see government pursue. Such gifts—dubbed “patriotic philanthropy” by one prominent donor—raise fundamental questions about the private role in public policymaking, questions that are central to debates over campaign finance, private philanthropy, and the privatization of government functions. Nevertheless, they have received virtually no attention in the legal literature. This Article offers a positive and normative account of gifts to government. Although we do not question the enormous good that patriotic philanthropy can do, we argue that gifts raise significant concerns about democratic process, equality, and state capacity.

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INTRODUCTION

On June 18, 2015, the public radio program *Radiolab* aired a segment called “Eye in the Sky,” which focused on a new brand of surveillance that relies on a single plane-mounted camera array to watch an entire city, for as long as the plane is in the air.¹ The technology was developed during the Iraq war by an Air Force engineer named Ross McNutt, to help the military figure out who was planting roadside bombs.² The idea was tantalizingly simple, as was the pitch: “Imagine Google Earth with TiVo capacity.”³ In short, the cameras would serve as an eye in the sky that never blinked, and that recorded everything it saw. Because the cameras captured such a wide area, the images were tiny; pedestrians, for example, would appear as mere dots. But the point was tracking, not recognition. Using the recorded images, analysts could work backward from an event—such as a roadside explosion—to pinpoint any vehicle that stopped at the target location, and then trace the movements of that vehicle to identify any addresses it visited before and after the explosion.

After retiring from the military in 2007, McNutt began to focus on commercial applications for the technology. He started a company called Persistent Surveillance and started attending

¹ <http://www.radiolab.org/story/eye-sky/>

² Monte Reel, *Secret Cameras Record Baltimore’s Every Move from Above*, BLOOMBERG BUSINESSWEEK (Aug. 23, 2016).

³ *Id.*

security trade expos to market his product.⁴ His first client was the mayor of Ciudad Juarez, Mexico, which—thanks to warring drug cartels—had earned the title of most dangerous city on earth. The technology was a great success, helping the city secure dozens of arrests and confessions in a few months’ time. Soon, however, the mayor ran out of money to pay for the service, and McNutt returned to the United States and the search for clients.⁵

As it happened, the *Radiolab* program proved to be providential. Shortly after the “Eye in the Sky” segment aired, McNutt received an email from Texas billionaires John and Laura Arnold. John had been a trader at Enron and later ran a successful hedge fund; the Arnolds now manage an eponymous foundation with \$1.8 billion in assets.⁶ The Arnolds told McNutt that if he could find a U.S. city willing to try out the surveillance technology for several months, they would pick up the tab. “We settled on Baltimore,” McNutt later told reporters, “because it was ready, it was willing, and it was just post-Freddy Gray.”⁷

Starting sometime in 2016, McNutt began conducting aerial surveillance for the Baltimore Police Department. Persistent Surveillance’s plane circled high above the city for as many as ten hours a day, capturing and storing images that the police used to investigate all manner of crimes.⁸ True to their word, the Arnolds donated \$360,000 of their own money to foot the bill.⁹ Had taxpayer dollars been involved, the transaction would have required approval by the city’s five-member Board of Estimates.¹⁰ The private funding arrangement allowed McNutt and the police department to forego the formal approval process, and the program remained a secret until it was exposed in a Bloomberg article in August of 2016.¹¹

The Arnolds’ gift to Baltimore is but one example of a growing phenomenon that features wealthy benefactors donating money to government to support particular policies and projects. This Article explores such “patriotic philanthropy,”¹² situating it at the intersection of private philanthropy, political participation, and the privatization of government. Each of these subjects concerns the private role in public policy, and each has spawned a vast literature (much of it critical). To date, however, most of the relevant commentary has proceeded on separate tracks. Attention to gifts helps illuminate the connections that run from one area to the next, offering a

⁴ *Id.*

⁵ *Id.*

⁶ Doug Donovan, *Billionaire donors Laura and John Arnold support far more in Maryland than police surveillance*, BALTIMORE SUN (Aug. 26, 2016).

⁷ Reel, *supra* note 2.

⁸ *Id.*

⁹ Scott Calvert, *Crime-Fighting Planes in Baltimore Funded by Houston Philanthropists*, WALL ST. JOURNAL (Aug. 25, 2016).

¹⁰ Justin Fenton & Doug Donovan, *Use of Local Foundation Allowed Baltimore Police Surveillance Project to Remain Secret*, BALTIMORE SUN (Aug. 24, 2016).

¹¹ Reel, *supra* note 2. As it turns out, McNutt also convinced the city of Compton, California to use his surveillance technology. See Connor Friedersdorf, *Eyes over Compton: How Police Spied on a Whole City*, THE ATLANTIC (Apr. 21, 2014).

¹² E.g., Sophie Gilbert, *David Rubenstein’s Patriotic Philanthropy*, THE ATLANTIC (Oct. 29, 2014).

glimpse at the larger system of private influence over governance.

Consider, first, the connections between philanthropy and political participation. The literature on philanthropy rarely engages with the equally vast literature on campaign finance and lobbying, though the two forms of influence raise similar concerns about equality and fidelity to democratic norms. Philanthropy, critics worry, enables wealthy individuals and foundations to decide for themselves what is good for others, without the sort of democratic checks—and accountability—that apply to government actors.¹³ As one critic writes, “[d]on’t like what the Gates Foundation did with its \$3.4 billion in 2011 grants (\$9.3 million each day of the year), or what it has done with \$25 billion in grants since its inception in 1994? Tough, there’s no way to vote out the Gateses.”¹⁴ Similarly, critics of prevailing campaign-finance law argue that wealthy donors are able to exert outsize influence over electoral results, and ultimately over public policy.¹⁵ Both lines of critique emphasize anxieties about creeping plutocracy—about a shift from collective, democratic modes of decisionmaking to policymaking dominated by the moneyed few.

Gifts to government, we argue, raise these concerns in particularly stark form.¹⁶ At first blush, such gifts may seem to avoid the pitfalls of private philanthropy. Rather than going outside of government, patriotic philanthropy brings new resources into the public sector, with all its checks and balances. The difficulty is that government may be all too eager to accept the deal. To be sure, a public entity like the City of Baltimore has no shortage of alternative revenue sources. Governments can borrow; they can charge fees; and they can tax. Yet, from the government’s perspective, each of those funding alternatives has significant political and practical downsides.¹⁷ Gifts avoid those problems, offering an immediate and seemingly costless source of funds. As a result, offers like the Arnolds’ may be difficult for the government to refuse. Much like looking a gift horse in the mouth, second-guessing generous endowments, or quibbling about their terms, will often seem like bad manners at best and “political malpractice” at worst.¹⁸

Gifts, therefore, are likely to exert a gravitational force on public policy, pulling government officials into projects they would not otherwise pursue. That form of influence—powered by money—is analogous to, but likely stronger than, the influence of campaign contributions,

¹³ See *infra* Part II.B.

¹⁴ Rob Reich, *What are Foundations For?*, BOSTON REVIEW (March 1, 2013). Some of those critiques focus on the favorable tax treatment of charitable donations, which amounts to a government subsidy for donors’ chosen projects and “functions as an increasingly greater subsidy and incentive with every higher step in the income tax bracket.” Rob Reich, *Philanthropy and its Uneasy Relation to Equality*, in BEYOND GOOD INTENTIONS: LEARNING TO DO GOOD, NOT HARM, IN PHILANTHROPY 13 (William Damon & Susan Verducci eds., 2006). The same tax deduction applies to gifts to government. See I.R.C. § 170(3)(c)(1) (2012) (providing that gifts to state and federal government are tax deductible, so long as they are made for “exclusively public purposes”).

¹⁵ See, e.g., LAWRENCE LESSIG, REPUBLIC LOST: HOW MONEY CORRUPTS CONGRESS—AND A PLAN TO STOP IT (2012); *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014) (Breyer, J., dissenting).

¹⁶ Gifts to government institutions must be distinguished from gifts to government employees or officials, which are prohibited. See, e.g., Richard Rifkin, *Gift Giving in the Public Sector*, in ETHICAL STANDARDS IN THE PUBLIC SECTOR 249, 249–55 (Patricia E. Salkin ed., 2008).

¹⁷ See *infra* Part I.

¹⁸ David Morton, *Miss Manor*, CITY PAPER (Feb. 13, 2014).

expenditures, and lobbying. Like the government’s alternative funding sources, those traditional avenues of political influence have considerable shortcomings.¹⁹ Voters, campaign supporters, and lobbyists cannot control government officials. If they do, they will enter the forbidden territory of bribery, extortion, and what the Supreme Court has called “quid pro quo corruption.”²⁰ Campaign expenditures and lobbying are widely permitted precisely because they operate as nudges (perhaps quite vigorous nudges, but nudges nonetheless) rather than commands. From the perspective of individuals like the Arnolds, then, those options may seem unsatisfactory: They might induce the relevant officials to experiment with new investigative technology, but they might not. Again, gifts avoid those problems. A gift does not simply generate gratitude and indebtedness on the part of the recipient.²¹ When targeted at a particular policy initiative, a gift is *explicitly* a quid pro quo: I will donate this money if you do this thing. Such influence is powerful indeed, and it runs counter to our democratic commitment to collective, deliberative decisionmaking.

Gifts also raise a second set of concerns that lacks an analogue in the debates on campaign finance, but that will be familiar to students of privatization.²² Although gifts and other forms of private financing expand the reach of the state in the short term, in the longer term they may have a hollowing effect. Gifts allow government to accomplish goals it cannot actually afford. That consequence may seem good or bad, depending on one’s views about the optimal size and scope of government. The key point for our purposes is that private money papers over the government’s weaknesses. Combine private financing with more conventional forms of privatization—whereby government enlists private actors to perform tasks previously performed by government employees—and we create the potential for a balloon state: a public sector seemingly vast in reach, but in fact remarkably thin.²³

To highlight these concerns is not to deny the manifold benefits of patriotic philanthropy, nor to impugn the intentions of those who give their money to government. Indeed, we focus on gifts in part because they seem so desirable. Gifts like the Arnolds are hardly the only means by which private actors finance the modern state. In so-called public-private partnerships, for example, private investors finance government projects in the expectation of healthy financial returns, either via interest payments from the government or revenue from public facilities such as parking meters or toll roads. As critics have recognized, such arrangements raise serious concerns about the mismatch between the private profit motive and the public interest.²⁴

¹⁹ See *infra* Part II.A.

²⁰ *McCutcheon v. FEC*, 134 S. Ct. 1434, 1441 (2014).

²¹ For seminal work on the power of gifts, see MARCEL MAUSS, *THE GIFT: FORMS AND FUNCTIONS OF EXCHANGE IN ARCHAIC SOCIETIES* (1954 American Edition).

²² For more on privatization, see *infra* Part I.E.

²³ Cf. Jody Freeman & Martha Minow, *Introduction: Reframing the Outsourcing Debates*, in *GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY* 1, 4-5 (Jody Freeman & Martha Minow eds., 2009) (identifying “diminished government capacity” as one of the “most prevalent and provocative objections” to privatization).

²⁴ See *infra* Part I.E.

Patriotic philanthropy seems to avoid the profit-motive pitfall, which may explain why it has attracted virtually no critical attention.²⁵ We seek to show, however, that private financing of government ought to be cause for concern even where it is unselfish—where well-meaning citizens are contributing their fortunes to support a vision of the public good—and where the immediate consequences seem, at worst, innocuous. If our analysis is correct, it suggests the need for far more attention to the role of private money in government more generally. Perhaps private financing is indispensable; perhaps modern government cannot survive without it. But if that’s the case, We the People should make sure we appreciate the terms of today’s new deal.

The argument unfolds in three parts. Parts I and II explain the incentives behind gifts to government. Part I canvasses the options available to government officials looking to raise money, and the limitations of each alternative. Part II shifts to the private perspective to show why patriotic philanthropy may be attractive to individuals and entities seeking to influence public policy. We develop our critique of gifts in Part III.

I. MONEY FOR GOVERNMENT: PUBLIC AND PRIVATE SOURCES OF FINANCING

Crumbling roads, sagging overpasses, derelict school buildings. Across the United States, aging infrastructure has become a particularly visible illustration of the fiscal challenges of modern government. Still reeling from the recession of 2007-2009, state and local governments lack the funds to make needed repairs and upgrades.²⁶ The problem is not limited to infrastructure, of course, but extends to the various services governments supply—or would supply, if they could afford to. While revenues dropped during the recession, needs went up: With more people living below the poverty line, demands for public services have increased, as have public safety costs.²⁷ But, rather than ramping up services, states and local governments have had to make painful cuts, targeting everything from police to fire and sanitation to public schools and libraries.²⁸

Nor is the problem confined to states and municipalities. At the federal level, soaring deficits have brought terms like “the fiscal cliff” into everyday lingo.²⁹ And, though infrastructure improvement was a major plank in President Trump’s campaign platform, federal lawmakers have not exactly jumped at the chance to pass a major spending bill.³⁰ Nevertheless, financing woes are

²⁵ The exception here is private funding for public education, which has provoked debate in both popular and academic presses—though most of it has been focused on the substance of philanthropic interventions (particularly by the Gates Foundation) rather than the fact of private financing as such. *See infra* Part II.C.

²⁶ Ellen Dannin, *Crumbling Infrastructure, Crumbling Democracy: Infrastructure Privatization Contracts and Their Effects on State and Local Governance*, 6 NW. J.L. & SOC. POL’Y 47, 50 (2011).

²⁷ PEW CHARITABLE TRUSTS, *THE LOCAL SQUEEZE* 14-16 (June 2012).

²⁸ Michelle Wilde Anderson, *The New Minimal Cities*, 123 YALE L.J. 1118, 1160-67 (2014) (describing recent budget cuts).

²⁹ Jackie Calmes, *Demystifying the Fiscal Impasse that is Vexing Washington*, N.Y. TIMES (Nov. 15, 2012) (explaining the “fiscal cliff”).

³⁰ Editorial, *Missing: Donald Trump’s Trillion Dollar Infrastructure Plan*, N.Y. TIMES (Feb. 27, 2017) (noting that congressional leaders “seem decidedly unenthusiastic about the idea of a huge infrastructure spending proposal”).

significantly more pressing at the state and local levels, where balanced-budget requirements and restrictions on allowable debt and taxes constrain governments' ability to raise needed funds.³¹

This Part explores the various funding options available to government officials. The goal is not to catalogue every possible source of money for government, but to sketch some of the alternatives. Tracing out these alternatives reveals a funnel-like shape, with some options drawing money from a broad range of sources and others tapping into a narrower band of financiers. The discussion here follows the contours of the funnel, proceeding in rough order from more collective to more individualized—or more public to more private—means of financing the state.

A. Taxes

The most obvious source of funding for government programs and services is general tax revenue. Taxes provide the bedrock for most public financing. They may take various forms, and different tax-types are more common at different levels of government. The federal government today relies heavily on income taxes; state governments use a mix of sales, excise, and income taxes; and local governments derive most of their revenue from property taxes.³²

What unites these diverse instruments is their generality. Tax revenues are drawn from a broad base of payers, and they are typically deposited in a general fund from which sums may be appropriated to support various government initiatives. Taxes apply to everyone within the authority of the relevant governmental unit, regardless of whether each taxpayer will take advantage of particular government services.³³ We pay property taxes even if our children do not attend local public schools; we pay federal income taxes even if we oppose, or derive no benefit from, the programs they fund.³⁴

In these ways, taxes *collectivize* the support of government programs, spreading the costs across the citizenry.³⁵ To the extent that individuals can control the amount or use of their tax payments, they do so not as consumers—making self-interested determinations about what services they want and how much they are willing to pay—but by voting as citizens. As such, broad-based taxes both reflect and reinforce a form of “fiscal citizenship,” which one performs “by contributing one’s appropriate share—however modest—toward the financing of the political community of which one is a member,” and then “by becoming informed about government taxing and spending policies, and by becoming involved (at least as a voter, and perhaps more deeply) in the determination of those policies.”³⁶

³¹ See *infra* notes ___ - ___ and accompanying text; see also David A. Super, *Rethinking Fiscal Federalism*, 118 HARV. L. REV. 2544, 2555 (2004) (emphasizing state budgets’ sensitivity to business cycles).

³² RICHARD BRIFFAULT & LAURIE REYNOLDS, *STATE AND LOCAL GOVERNMENT LAW* 649 (7th ed. 2009).

³³ DAVID J. MCCARTHY, JR. & LAURIE REYNOLDS, *LOCAL GOVERNMENT LAW* 382 (2003) (“Taxes are imposed without consideration of whether the individual taxpayer will benefit from the services to be funded by the tax.”).

³⁴ *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 559 (2005) (“‘Compelled support of government’—even those programs of government one does not approve—is of course perfectly constitutional, as every taxpayer must attest.”).

³⁵ MCCARTHY & REYNOLDS, *supra* note 33.

³⁶ LAWRENCE ZELENAK, *LEARNING TO LOVE FORM 1040: TWO CHEERS FOR THE RETURN-BASED MASS INCOME TAX* 17 (2013).

The broad reach of taxes can be an advantage to government fund-raisers, as it reduces the financial hit per person. But taxes also have important limitations. Even modest tax hikes can be extraordinarily unpopular, and therefore difficult to enact as a political matter. The political hurdles are made higher still by state constitutional provisions requiring voter approval and/or legislative supermajorities for tax increases at both the state and local levels.³⁷ Many states also impose substantive caps on the permissible level of taxation.³⁸

As a practical matter, moreover, a modest tax hike will be little use for capital projects and other initiatives that call for large sums of money up front. For example, New York officials recently announced an ambitious redevelopment plan for LaGuardia Airport—with an anticipated price tag of approximately \$4 billion.³⁹ To finance such a project out of general funds, the state and/or local government would have to raise taxes sharply in the short term, slash funding for other programs and projects, or both.⁴⁰ Even if those approaches were politically feasible, it may seem unfair to make today’s citizens bear the entire burden of a project that will benefit residents for decades to come.

B. Inter-Governmental Grants

Governments also can share revenue with each other via inter-governmental grants, such as federal grants to the states or state grants to localities.⁴¹ Grants may be particularly attractive funding options from the perspective of the recipient government, because they sometimes masquerade to voters as free money. Grants are not actually free, of course: State citizens are also federal taxpayers, and as such they contribute to any grants to their own states, as well as to federal largesse bestowed on other states. But that reality may be easy for voters to ignore, creating what economists call a “fiscal illusion” that can cause state (or local) voters to support a higher level of spending—and taxes—than they otherwise would.⁴²

Despite their immediate appeal, grants can have significant downsides for recipients. To the extent that voters do realize that they are paying for federal grants, they may have less tolerance for state or local taxes.⁴³ And many grants require the recipient to contribute matching funds,

³⁷ BRIFFAULT & REYNOLDS, *supra* note 32, at 700 (“The constitutions of sixteen states now require a legislative supermajority (ranging from 60% to 75%) to approve some or all new taxes or tax increases, and eight states (including seven with legislative supermajority requirements) require voter approval for some or all new or increased state taxes.”).

³⁸ *Id.* at 699-701.

³⁹ Andrew Tangel, *Team Selected for La Guardia Redevelopment*, WALL ST. JOURNAL (May 28, 2015).

⁴⁰ BRIFFAULT & REYNOLDS, *supra* note 32, at 791 (“New capital infrastructure can be very costly. It might not be possible to finance a big project out of ordinary tax revenues without either a massive tax increase or severe cuts in expenditures for ordinary and necessary services.”).

⁴¹ In 2014, the most recent year for which comprehensive data are available, intergovernmental revenues accounted for approximately \$550 billion in state revenues, out of a total of about 2.3 trillion. U.S. CENSUS BUREAU, STATE GOVERNMENT FINANCES: 2014.

⁴² Philip J. Grossman, *The Impact of Federal and State Grants on Local Spending: A Test of the Fiscal Illusion Hypothesis* 18 PUB. FINANCE QUARTERLY 313 (1988).

⁴³ Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2622 & n.13 (Scalia, J., dissenting) (“When a heavy federal tax is levied to support a federal program that offers large grants to the States, States may, as a practical matter, be unable to refuse to participate in the federal program and to substitute a state alternative. . . . [H]eavy federal taxation

drawing in state or local revenues to support another sovereign's priorities.⁴⁴ Worse still, grants can be undependable, leaving recipients holding the bag when the outside money runs out, unable to terminate programs that have cultivated dependent constituencies.⁴⁵

Perhaps most importantly, grants tend to come with strings attached.⁴⁶ In order to get money for highways, for example, states may have to accede to federal policy demands, such as requiring motorcyclists to wear helmets⁴⁷ or raising the legal drinking age to twenty-one.⁴⁸ In addition to the short-term hit to policy autonomy, inter-governmental grants might also have more subtle costs to state independence—costs that today's state officials and citizens may fail to internalize fully.⁴⁹ For these reasons, some federalism scholars would outlaw or restrict federal-state grants.⁵⁰

C. Fees

As an alternative or supplement to taxes and inter-governmental grants, government could require citizens who use government services to pay for them directly, via user fees and the like. For example, rather than (or in addition to) financing a public museum with tax dollars,

diminishes the practical ability for States to collect their own taxes.”). For a critique of this line of reasoning, see Brian Galle, *Does Federal Spending ‘Coerce’ States? Evidence from State Budgets*, 108 NW. U. L. REV. 989 (2013).

⁴⁴ See, e.g., Super, *supra* note 31, at 2586 (“The largest federal-state cooperative funding program, Medicaid, in theory requires states to supply about forty-three percent of total program funding. Other important programs, from cash welfare and child care subsidies to transportation, require state or local matches as well.”). Even when grants are not matching grants, they may effectively skew state or local priorities by virtue of the so-called “flypaper effect.” James R. Hines, Jr. & Richard H. Thaler, *Anomalies: The Flypaper Effect*, 9 J. ECON. PERSPECTIVES 217 (Autumn 1995). Simply put, grant recipients are unlikely to compensate for the influx of money by moving their own funds to other projects; instead, money tends to “stick where it hits.” *Id.* at 218; see E.M. Gramlich, *Intergovernmental Grants: A Review of the Empirical Literature*, in *THE POLITICAL ECONOMY OF FISCAL FEDERALISM* 219-39 (W.E. Oates, ed. 1977). Thus, studies show that “[g]rants designated for, say, public schooling, were largely spent on (extra) public schooling even when the grants were clearly inframarginal.” G. Brennan & J.J. Pincus, *A minimalist model of federal grants and flypaper effects*, 66 J. PUBLIC ECON. 229, 230 (1996).

⁴⁵ Super, *supra* note 31, at 2591 (“Because of the share of states’ budgets that the federal government provides, the periodic efforts to reduce the federal budget deficit have profound impacts upon states.”); Brian Galle, *Federal Grants, State Decisions*, 88 B.U. L. REV. 875, 893 (2008) (noting that “over time, a constituency might develop that depends on the grant revenues and form a powerful lobbying coalition to retain them”).

⁴⁶ Galle, *supra* note 45, at 882 (“When Congress distributes money to other persons or entities, it typically does so subject to conditions.”).

⁴⁷ Highway Safety Act of 1966, Pub. L. No. 89-564, 80 Stat. 731 (1966); 23 C.F.R. § 204.4 (1969).

⁴⁸ *South Dakota v. Dole*, 483 U.S. 203 (1987) (upholding a federal spending program that directs the Secretary of Transportation to withhold a percentage of otherwise allocable federal highway funds from States “in which the purchase or public possession . . . of any alcoholic beverage by a person who is less than twenty-one years of age is lawful.” (quoting 23 U.S.C. § 158 (1982 ed., Supp. III)).

⁴⁹ See, e.g., Lynn A. Baker, *Conditional Federal Spending After Lopez*, 95 COLUM. L. REV. 1911, 1936-39 (1995); Thomas R. McCoy & Barry Friedman, *Conditional Spending: Federalism's Trojan Horse*, 1988 SUP. CT. REV. 85, 124.

⁵⁰ E.g., Baker, *supra* note 49, at 1988-89.

governments could charge museum-goers an admission fee.⁵¹ Such voluntary user fees are common at all levels of government.⁵²

Voluntary user fees are different from taxes in both form and concept. Unlike taxes, user fees cast citizens and governments into the roles of consumers and sellers.⁵³ Fees and similar devices “depend crucially on the relationship between the payer and the purpose for which the revenue raised will be spent.”⁵⁴ Individuals pay only for the services they use. In theory, at least, such fees match benefits to burdens, ensuring that those who enjoy the fruits of government services also bear the costs.⁵⁵ And, like private-sector pricing mechanisms, user fees can promote efficiency by generating useful signals about the value of government-supplied goods and services. If users aren’t willing to pay the full cost of a service—so the theory goes—then perhaps the government should scale back or eliminate the service entirely.⁵⁶ In this sense, user fees can be understood as part of broader trends toward privatization,⁵⁷ or “running government like a business.”⁵⁸

From the perspective of government revenue-raisers, user fees are a mixed bag. On the plus side, fees change the payment base, imposing the cost of government services on those who take advantage of them, even if they are not local residents. Better yet, fees and the like are typically

⁵¹ For a description of various kinds of governmental fees and charges, see BRIFFAULT & REYNOLDS, *supra* note 32, at 725-26.

⁵² See Peter A. Pfohl, *Who Should Pay for Agency Adjudication? A Study of \$200,000 Filing Fees at the Surface Transportation Board*, 25 *TRANSP. L.J.* 57, 71 (1997) (“Almost two hundred billion in user fees is collected annually by [federal] agencies.”); Laurie Reynolds, *Taxes, Fees, Assessments, Dues, and the “Get What You Pay for” Model of Local Government*, 56 *FLA. L. REV.* 373, 376 (2004) (describing “how special assessments, fees, and the formation of business improvement districts have overtaken general taxation as the preeminent revenue raising device” in local government).

⁵³ Reynolds, *supra* note 52, at 376-77 (criticizing user fees and similar funding mechanisms that link public benefits to private payments and so “exacerbate[] and cement[] [a] dues mentality in the minds of the citizenry”); see also GERALD E. FRUG ET AL., *LOCAL GOVERNMENT LAW* 705 (6th ed. 2015) (“In California, where fees have played a large role for years, an increased reliance on fees has generated a fee-for-service mentality, and it, in turn, has transformed what a city government is—what it provides, and whom it exists to serve. In the place of a general service government providing public goods to all residents, local governments increasingly function as a retailer of services purchased and consumed by individual users.”).

⁵⁴ MCCARTHY & REYNOLDS, *supra* note 33, at 382-83. A close cousin to the user fee is the special assessment, which “require[s] landowners who have receive a special benefit from a local government expenditure to reimburse the local government.” BRIFFAULT & REYNOLDS, *supra* note 32, at 716. Common examples are street paving and curb-installation. *Id.* at 717. Like user fees, “[s]pecial assessments convert government from a social and political community into a kind of business, more responsive to major customers than to a broader community.” Super, *supra* note ___, at 2619.

⁵⁵ Clayton P. Gillette & Thomas D. Hopkins, *Federal User Fees: A Legal and Economic Analysis*, 67 *B.U. L. REV.* 795, 814 (1987) (noting that user fees can “lessen burdens that otherwise would be borne by taxpayers who derive little or no benefit from the service”).

⁵⁶ Milton Kafoglis, *User Fees as a Regulatory Tool*, in *ADMINISTRATIVE CONFERENCE OF THE UNITED STATES: FEDERAL USER FEES, PROCEEDINGS OF A SYMPOSIUM* 13, 17 (Thomas D. Hopkins ed., 1988) (arguing that user fees “generate incentives on the part of payees to monitor the efficiency of the operation of agencies”) [hereafter ACUS SYMPOSIUM].

⁵⁷ Thomas Gale Moore, *User Fees and Privatization*, in *ACUS SYMPOSIUM*, *supra* note 56, at 7 (“[U]ser fees facilitate privatization, which I believe is generally a good idea.”).

⁵⁸ Jon Michaels, *Running Government Like a Business... Then and Now*, 128 *HARV. L. REV.* 1152 (2015).

exempt from the substantive and procedural limitations that apply to state and local taxes.⁵⁹ But fewer payers also means less money, or means that each user has to pay an exorbitant fee.

A more fundamental limitation on voluntary user fees is that they will not work for every kind of project. They will not be much help for projects, like the LaGuardia redevelopment described above, that need substantial up-front financing. Nor will fees work well for projects that generate diffuse benefits, extending to the general public and not just those individuals who directly use the services in question.⁶⁰ Suppose, for example, that a municipality charges residents a fee for each garbage pick-up; it's up to residents to decide how often to schedule pick-ups and pay the fee. Frequent garbage collection benefits users individually, but it also benefits the neighborhood collectively—or at least those neighbors who care about cleanliness. Residents are unlikely to take account of such third-party effects when deciding how often to use (and pay for) the service. The probable consequence of user fees, then, is that citizens will underuse valuable services.⁶¹

D. Bonds

For governments in need of ready money, borrowing offers an attractive alternative to taxes and fees. Governments at all levels of the U.S. borrow billions of dollars each year, typically by issuing bonds that can be purchased by individuals and institutions worldwide.⁶² State and federal law encourage bond ownership by making interest tax-exempt. Sometimes the inducements are more personal, appealing to citizens' sense of shared responsibility for public welfare. During WWII, for example, the government used patriotic inducements to advertise war bonds, describing the bonds as “a chance to buy our boys back.”⁶³

Borrowing offers some obvious advantages over more incremental, or coercive, forms of financing. Just as the average family uses a mortgage to finance the purchase of a new home, governments often use bonds to generate the money needed for large projects and programs.⁶⁴ In addition to producing a more immediate payday, borrowing avoids the problems of inter-temporal equity that afflict both taxes and user fees: Rather than forcing current citizens to bear the full cost of long-term improvements, it spreads the cost of government programs over many years and many

⁵⁹ BRIFFAULT & REYNOLDS, *supra* note 32, at 726.

⁶⁰ Gillette & Hopkins, *supra* note 55, at 808 (cautioning against user fees for services that have the qualities of public goods).

⁶¹ *Id.* at 809. In areas ill-suited to voluntary fees, *involuntary* fees may still be an option for government. For example, some cities charge all arrestees a fee. *Chapter One Policing and Profit*, 128 HARV. L. REV. 1723, 1727–28 (2015). Others charge defendants for the costs of prosecution and/or incarceration. Speeding tickets and other fines can also be understood as part of this revenue-raising strategy, as can forfeitures. Whereas voluntary user fees attach a price to the benefits citizens derive from various government services, involuntary fees seek to recover the costs that citizens impose on government. Involuntary fees are controversial for various reasons, including the incentives they create for law enforcement, and for targeting those least able to pay. *See id.*

⁶² BRIFFAULT & REYNOLDS, *supra* note 32 789-90 (“State and local governments borrow literally billions of dollars every year. . . . Indeed, bonds finance roughly two-thirds of the capital expenditures of state and local governments.”).

⁶³ James T. Sparrow, “*Buying Our Boys Back*”: *The Mass Foundations of Fiscal Citizenship in World War II*, 20 J. POL’Y HISTORY 263, 263 (2008).

⁶⁴ BRIFFAULT & REYNOLDS, *supra* note 32, at 790 (“[B]onds finance roughly two-thirds of the capital expenditures of state and local governments.”).

taxpayers.⁶⁵ Because a bond issue draws funds from willing creditors, borrowing also allows government to avoid the political pitfalls of a hike in taxes or fees.

But if the appeal of borrowing is clear, so too are the risks. Like families, governments may borrow too much, taking on obligations they can't fulfill. That possibility is hardly hypothetical. The financial crises of the mid-1800s—when several states were thrust into insolvency by an economic downturn that came on the heels of massive borrowing to finance canals, railroads, and turnpikes⁶⁶—are being repeated in today's municipal bankruptcies.⁶⁷

Even if governments are able to keep up with payments, the lure of ready cash may create a moral hazard, inducing officials to undertake projects that are not cost-justified. After all, borrowing allows today's government to take credit for valuable initiatives while leaving tomorrow's citizens (and their representatives) to deal with onerous interest payments. And when hard choices must be made about how to allocate limited funds, extensive debt raises uncomfortable questions about where government's loyalties lie: with citizens, or with creditors?

These risks have led most states to adopt strict limitations on allowable debt. As with restrictions on taxes, debt limitations may be substantive or procedural. Substantive limitations impose caps on debt; procedural rules require government to clear special democratic hurdles—such as voter approval, approval by a legislative supermajority, or both—before taking on new debt.⁶⁸

Such barriers to debt are important, but they tend to be flimsier than they appear on first inspection. Most limitations apply only to “general obligation” debt—that is, bonds that are serviced from the general treasury and backed by the full faith and credit of the issuing government. So-called “revenue bonds”—which are backed only by specified revenue sources—typically are exempt.⁶⁹ The same is true of bonds that are issued by entities other than the state or municipal governments themselves, including so-called “public authorities.” (Indeed, that is one of the reasons why governments create such entities in the first place.⁷⁰)

What this means in practice is that governments can often work around debt limitations. As always, though, there are tradeoffs. Loans that are not guaranteed by the full faith and credit of

⁶⁵ See *Dept of Revenue of Kentucky v. Davis*, 128 S.Ct. 1801, 1810 (2008) (“Bonds place the cost of a project on the citizens who benefit from it over the years . . . and they allow for public work beyond what current revenues can support.”).

⁶⁶ See BRIFFAULT & REYNOLDS, *supra* note 32, at 639-40; see also ALBERTA M. SBRAGIA, *DEBT WISH: ENTREPRENEURIAL CITIES, U.S. FEDERALISM, AND ECONOMIC DEVELOPMENT* (1996).

⁶⁷ When the City of Detroit filed for bankruptcy in July of 2013, it was the twenty-eighth city to declare municipal bankruptcy or to enter a receivership since the economic recession of 2008. Anderson, *supra* note __, at 1120.

⁶⁸ BRIFFAULT & REYNOLDS, *supra* note 32, at 790.

⁶⁹ *Id.* at 792 (noting that nonguaranteed debt via revenue bonds “has become the principal form of state and local borrowing in recent decades”).

⁷⁰ See JONATHAN RODDEN, *HAMILTON'S PARADOX: THE PROMISE AND PERIL OF FISCAL FEDERALISM* __ (2005) (noting the “proliferation of state and municipal bodies that have been created solely to issue debt in efforts to circumvent balanced budget requirements”); see also BRIFFAULT & REYNOLDS, *supra* note 32, at 872-73 (discussing public authorities).

the state tend to be riskier for creditors, and therefore significantly more expensive than conventional general-obligation bonds.⁷¹ Paradoxically, then, the primary effect of legal debt limitations may not be to limit borrowing so much as to raise its cost.⁷²

E. Public-Private Partnerships

An additional possibility—becoming more common in recent years—is to solicit help from the private sector by forming what is known as a “public-private partnership,” or P3.⁷³ For example, the LaGuardia Airport redevelopment project described above has been called “the country’s largest . . . public-private partnership.”⁷⁴ Roughly half the funding for the \$4 billion project will come from a private consortium (made up of several investment banks and funds, together with an airport management group and construction and design joint ventures), which will “be responsible for designing, building, financing, operating, and maintaining the new [LaGuardia] terminal as part of a 35-year lease.”⁷⁵

Public-private partnerships tend to take one of two forms. In the first type, known as a “demand-risk” P3, a private developer fronts the money for a government project in exchange for the right to collect user fees that would otherwise have gone to the government. Demand-risk P3s bear some resemblance to revenue bonds, in that they rely on revenue from the projects in question—tolls for a new highway, for example—to pay for improvements. As the name suggests, however, a public-private partnership transfers more responsibility to private-sector “partners,” who may be responsible for construction, maintenance, and/or operations as well as financing.⁷⁶

The second type of partnership is known as an availability-payment P3. Under the availability model, the government commits to paying the private partner(s) a set amount contingent on the project’s meeting certain quality benchmarks. Initial financing may come in whole or in part from the private entity, often derived from bonds that the government issues on the private entity’s behalf. The private entity then handles the work, while the government makes regular payments to cover operating and maintenance costs and to service any debt.⁷⁷ The contingent nature of the

⁷¹ BRIFFAULT & REYNOLDS, *supra* note 32, at 792.

⁷² State governments are well aware of this dynamic, and “the need to keep debt burdens under control to keep borrowing costs down is an important part of the political discourse in the states.” RODDEN, *supra* note 70, at 133.

⁷³ Ryan Holeywell, *The Indiana Toll Road: A Model for Privatization?*, GOVERNING MAGAZINE (Oct. 2011) (“[G]overnments’ desire for P3s is on the rise. With state and federal highway budgets stretched, lawmakers are reluctant to supplement them with higher gas taxes or general fund revenue. That makes P3s an attractive option, and in some circles they have been portrayed as a miracle cure for the country’s crumbling infrastructure.”).

⁷⁴ Andrew Tangel, *Team Announced For LaGuardia Redevelopment*, WALL ST. JOURNAL (May 8, 2015).

⁷⁵ Press Release, *Governor Cuomo Unveils Vision for Transformative Redesign of La Guardia Airport* (July 27, 2015), available at <https://www.governor.ny.gov/news/governor-cuomo-unveils-vision-transformative-redesign-laguardia-airport>.

⁷⁶ MOODY’S INVESTORS SERVICE, PUBLIC-PRIVATE PARTNERSHIPS: GLOBAL P3 LANDSCAPE (Sept. 8, 2014) (describing demand-risk P3s).

⁷⁷ *Id.* (describing availability-payment P3s).

government's obligation takes the arrangement outside the reach of state-law limitations on allowable debt: In the argot of public finance, a contingent obligation does not count as "debt."⁷⁸

In part because P3s are relatively new, the terms of the relevant contracts are highly variable. As compared to conventional forms of borrowing, therefore, P3s leave more room for the government and the private sector to jostle for advantage—mutual or otherwise. For government, the trick is to make P3s attractive to private investment without giving away the store.⁷⁹ Chicago's parking meter lease illustrates the challenge. Facing a budget crisis in late 2008, then-Mayor Richard M. Daley agreed to lease the city's parking meters to a private company for 75 years. In exchange, the company paid the City roughly \$1.2 billion.⁸⁰ The City's website trumpeted the lease and other similar deals as "prudent[]" and "responsib[le]" investments that would "eliminate[] long-term risks of increased operating and capital expenditures, while mitigating the risk of future changes in driver behaviors."⁸¹ But things didn't go quite as expected for the City. The private company raised parking rates, prompting a cascade of citizen complaints. Not long after, the city's inspector general concluded that the City had vastly undersold the lease—by at least \$1 billion.⁸²

Chicago's experience now stands as a cautionary tale,⁸³ and has fueled a movement away from the demand-risk model and toward availability-payment P3s.⁸⁴ But even availability-payment arrangements involve a delicate balance of risk and reward. Such arrangements place the risk of cost-overruns on the private sector, while allowing the government to reap any profits that follow from higher-than-expected revenue streams. But if revenues are *lower* than expected—if, for example, decreased driving means that fewer individuals are paying for parking—the government will be left holding the bag.

P3s also trigger an additional set of concerns, familiar to debates about privatization more generally. Most privatization in the U.S. takes the form of contracting-out: The government enlists private entities to perform tasks—building roads, collecting trash, running prisons, etc.—that previously had been performed by government employees.⁸⁵ Advocates of privatization argue that

⁷⁸ BRIFFAULT & REYNOLDS, *supra* note 32, at 836.

⁷⁹ See Paul Landow & Carol Ebdon, *Public-Private Partnerships, Public Authorities, and Democratic Governance*, 35 PUB. PERFORMANCE & MGMT. REV. 727, 729 (2012) ("Studies have shown that governments often end up bearing most of the risk [in P3s], despite appearances to the contrary, as private firms find ways to protect themselves.")

⁸⁰ Hillary Russ, *States and Cities are Increasingly Turning to Private Money To Fund Public Projects*, BUSINESS INSIDER (Apr. 14, 2014).

⁸¹ http://www.cityofchicago.org/city/en/depts/fin/supp_info/public_private_partnerships.html

⁸² Russ, *supra* note 80.

⁸³ *Id.* (citing Chicago's parking meter lease as the "most-often-told cautionary tale" about the first generation of P3s in the U.S.).

⁸⁴ See MOODY'S INVESTORS SERVICE, CERTAIN US P3 OBLIGATIONS WILL BE TREATED AS GOVERNMENT DEBT (Feb. 2, 2015) (describing trend toward availability-payment P3s).

⁸⁵ Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1370 (2003) (describing the prevalent model of privatization in the United States as "government use of private entities to implement government programs or to provide services to others on government's behalf"). For a small taste of the vast literature on privatization, see JOHN D. DONAHUE, THE PRIVATIZATION DECISION: PUBLIC ENDS, PRIVATE MEANS (1989); GOVERNMENT BY CONTRACT, *supra* note 23; PAUL R. VERKUIL, OUTSOURCING SOVEREIGNTY: WHY PRIVATIZATION OF GOVERNMENT

market discipline can make private-sector providers more efficient than government.⁸⁶ For critics, the differences between market and government cut the other way. Detractors worry that privatization will disserve the public interest by substituting profit-seeking private entities for public servants—making profit, rather than public welfare, the driving force behind public policy.⁸⁷

P3s represent yet another step down the road to privatization, combining private performance with private financing. As such, they magnify concerns about profit motivation. Consider again the Chicago parking meter lease. Hiking up parking rates is good for the bottom line; not so good, perhaps, for public welfare. The quest for profits also may skew which projects get funded in the first place, as governments intent on finding partnership opportunities may tend to focus on areas that are capable of generating revenue for their would-be corporate backers.⁸⁸

Notwithstanding these drawbacks, P3s are on the rise in the U.S. Thirty-three states and the District of Columbia now have legislation that enables P3s—up from 23 in 2006.⁸⁹ Meanwhile, government officials of various stripes are singing the praises of P3s. For example, private investment is central to President Trump’s ambitious plan to revitalize the country’s infrastructure, with proposals ranging from \$500 million to \$1 trillion.⁹⁰ Chicago’s current mayor, Rahm Emanuel, has embraced P3s (even as he seeks to distance himself from the notorious parking meter

FUNCTIONS THREATENS DEMOCRACY AND WHAT WE CAN DO ABOUT IT (2007); Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543 (2000); Jon D. Michaels, *Privatization’s Progeny*, 101 GEO. L.J. 1023 (2013); Symposium, *Public Values in an Era of Privatization*, 116 HARV. L. REV. 1211 (2003).

⁸⁶ See Michaels, *supra* note 85, at 1034 (“Rank-and-file government workers are viewed [by privatization’s proponents] as receiving higher base pay and more generous benefits than their private sector counterparts.” (footnote omitted)).

⁸⁷ See Freeman & Minow, *supra* note 23, at 4–5 (summarizing the major critiques of privatization).

⁸⁸ Christopher Weber, *The Problem with Public-Private Partnerships*, NextCity.org (May 7, 2012) (<https://nextcity.org/daily/entry/the-problem-with-public-private-partnerships>) (criticizing P3s for “let[ting] corporate interests drive public investments”). A related investment tool, still in its infancy in the U.S., is the social impact bond (SIB)—also known as “pay for success” or “social innovation bonds.” SIBs ameliorate some of the concerns about subject-matter skew associated with P3s, because they tend to focus on public policies that lack any clear profit component. They work as follows: “Money from private donors and philanthropic dollars are invested upfront to help get the program off the ground. If the program meets the predetermined requirements over a specified time, the money is returned [by the government, with interest].” Bill Bradley, *Social Impact Bonds: Beneficial or Bureaucracy-Bloating?*, NEXT CITY (May 8, 2014), available at <https://nextcity.org/daily/entry/senate-hearing-social-impact-bonds-helpful-harmful>; see also Matthew Bishop & Michael Green, *Philanthrocapitalism Rising*, 52 SOCIETY 541, 542 (2015) (“This is a way to transfer the risk of innovative public policy initiatives to the private sector, tapping non-profit operational expertise and for profit risk appetite.”); Social Finance, *How Pay For Success Works*, available at <http://socialfinance.org/how-pay-for-success-works/> (describing how SIBs are funded). SIBs have been used in the United States to develop programs designed at reducing recidivism, improving early-childhood education, and facilitating reentry by formerly incarcerated citizens. Bradley, *supra*.

⁸⁹ Kevin Pula, *Public-Private Partnerships for Transportation: Categorization and Analysis of State Statutes*, NATIONAL CONFERENCE OF STATE LEGISLATURES (Jan. 2016), available at http://www.ncsl.org/Portals/1/Documents/transportation/P3_State_Statutes.pdf.

⁹⁰ Melanie Zanona, *Trump’s Infrastructure Plan: What We Know*, THE HILL (Jan. 13, 2017), available at <http://thehill.com/policy/transportation/314095-trumps-infrastructure-plan-what-we-know> (“[E]ven if the package requires the government to chip in some public funding for infrastructure, Trump is almost certain to rely heavily on private financing—especially since that funding mechanism is far more likely to garner the support of Capitol Hill Republicans.”).

lease).⁹¹ “We have great corporations in Chicago who are, in my view, the best of corporate citizens,” Emanuel said recently. “I couldn’t achieve anything I’m trying to do without their participation.”⁹² Mayor Alvin Brown of Jacksonville was even more explicit: “[P3s] are the wave of the future. Government can’t do it alone.”⁹³

* * *

As this discussion suggests, governments have various options for financing programs and services. Each funding alternative raises a different set of tradeoffs, and the source of funding has important consequences both for government behavior and for the relationship between government and citizens. As we move from more collective to more individualized sources of financing, moreover, a common theme emerges: a recurring concern about the possible gulf between private incentives and the public interest. Funding strategies that rely on individuals and entities to buy into government programs raise the possibility that public services will be biased in favor of citizens with the most spending power, and toward initiatives with the most concentrated benefits. Programs that have the characteristics of public goods may be underfunded as a result.

Against this backdrop, the appeal of an outright gift should be obvious. From the government’s perspective, patriotic philanthropy must rate somewhere just below manna from heaven. Not only do gifts avoid many of the difficult legal and logistical tradeoffs sketched above, but they also seem to rest on public-spirited altruism rather than the selfish pursuit of individual benefits. What’s not to like?

In Part III below, we will argue that gifts are not as costless as they first appear. First, though, we need to confront a seeming puzzle. For all Americans grouse about taxes, it may be difficult to imagine citizens voluntarily handing over their hard-earned cash to public officials. It’s easy to understand why governments would welcome gifts, but why would anyone want to donate money to government? The next Part takes up that question, shifting from the governmental to the private perspective, and from the challenge of raising money to the challenge of deploying it effectively.

II. MONEY AS INFLUENCE: SPENDING OPTIONS FOR POLICY ENTREPRENEURS

A. *Campaign Spending and Lobbying*

Suppose you would like to see your government (federal, state, or local) adopt a particular public policy. For example, maybe you are unhappy with the fact that your city does not have enough bike lanes, or you want more sidewalks, or you believe the police should be using aerial

⁹¹ John Schwartz, *\$7 Billion Public-Private Plan in Chicago Aims to Fix Transit, Schools, and Parks*, N.Y. TIMES (March 29, 2012).

⁹² Weber, *supra* note 88.

⁹³ *Id.*; see also Carol Ebdon & Paul Landow, *The Balancing Act: Using Private Money for Public Projects*, PUBLIC BUDGETING & FINANCE 59 (Spring 2012) (noting that “[t]he estimated investment needs [for infrastructure] over the next five years are \$2.2 trillion, which is beyond the collective ability of government to fund”); Stacia A. Wells & Robert M. Siegel, *Fixing US Infrastructure: New Model P3 Law A Good Start*, LAW 360 (Jan. 27, 2016) (“[T]he United States is facing an infrastructure crisis and our needs are far greater than the government can provide on its own. Private capital and innovation are available to help.”).

surveillance to better combat crime. How can you convince public officials to adopt your policy of choice?

If you are a person of modest means, you will discover quite early on that your options are limited. You can, of course, find a candidate or politician who shares your views, and you can vote for that person. Even that will not always be easy—the more idiosyncratic your aims, the more quixotic your quest for a suitable candidate will be. But even if you can find the right candidate, simply voting for her will be insufficient: You have to convince others to vote for your candidate as well. Although voting is an individual right, it is also a collective endeavor.⁹⁴ And, like all collective endeavors, there are costs to collective action.⁹⁵ You will need to identify like-minded others and convince them to support your candidate.

If you can spare the time—a limited resource—you can certainly volunteer for your candidate's campaign. If you have the money, you can also make a small contribution to your would-be champion. Here, though, you will run into the same collective action problem you encountered with voting. Your contribution will not be enough to make a dent on its own; it must be pooled with contributions from like-minded others. This is particularly so in a world in which most polities have enacted limits on how much a single individual or organization can contribute to a political candidate.⁹⁶ Even in the absence of contribution limits, only a very small handful of individuals are capable of funding a candidate or campaign by themselves. For a person of limited means, supporting your candidate includes convincing your fellow citizens to contribute as well.

The need for collective action persists even if you are able to surmount these challenges and elect or reelect your preferred candidate. Few, if any, legislators are positioned to affect change unilaterally. Thus, it is not sufficient to elect a champion: You will need to convince other lawmakers and other institutions (your political party, for example) to support your cause. To get the attention and support of those other actors, you will likely need to contribute to them as well. This requires even more money and perhaps more time. And still, there are no guarantees. Even if you can persuade a group of lawmakers to support your cause, the project may run into insurmountable roadblocks. To name just a few possibilities, your preferred public policy objective may not be politically palatable; the government may not have the money to fund it; there may be competing priorities; or your lawmakers may be more responsive to the preferences of someone else, perhaps a major contributor, than they are in responding to you.⁹⁷

As a person of modest means, therefore, your options of effecting change are more or less limited to voting, volunteering your time to persuade others to your cause, and perhaps a small

⁹⁴ Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663 (2001).

⁹⁵ See, e.g., Jon Elster, *Rationality, Morality, and Collective Action*, 96 ETHICS, 136, 139 (1985).

⁹⁶ David Primo and Jeffrey Milyo, *Campaign Finance Laws and Political Efficacy: Evidence from the States*, 5 ELEC. L.J. 23, 29 (2006) (noting that “most states have some restrictions on contributions”).

⁹⁷ Jack Citrin, *Do People Want Something for Nothing: Public Opinion on Taxes and Government Spending*, 32 NAT. TAX J. 113 (1979)

contribution to your preferred candidate. For the vast majority of Americans, this is the extent of their political participation.⁹⁸

Suppose now that you are rich—very very rich.⁹⁹ You have four mutually inclusive options available to you. You can make political contributions to your favorite candidates; you can spend money to promote the candidates or policy outcomes that you prefer; you can bribe public officials to enact your public policy preferences; and you can lobby public officials to enact your policy preferences.¹⁰⁰ Each option has different agency and collective-action costs, as we describe below. If your goal as a wealthy policy entrepreneur is to purchase public policy outcomes, political participation proves to be relatively inefficient.¹⁰¹

As before, your first option is to identify a politician who will support your cause, and support her candidacy. Unlike your less affluent counterpart, however, you have vast resources to offer. As a result, candidates and politicians will be much more likely to come to you and will be much more likely to bend their will to yours.¹⁰² They will gladly solicit and accept your contributions.

You might contribute directly to a candidate’s political committee or PAC; you might start a PAC yourself. But you will soon find yourself dissatisfied with simply handing over your money in this way. There is a passivity associated with making a contribution that is inconsistent with the agency and control you might expect to exercise as a consequential political agent. Once you turn over the money to the candidate, you have very little control over how the candidate will use it. There is no effective mechanism to “earmark” your political contribution. Thus, in making a contribution, you subordinate your views on how to spend the money, or the content of the political message, or even how best to achieve an ostensibly shared purpose, to the recipient of the contribution.

⁹⁸ See, e.g., KAY LEHMAN SCHLOZMAN, SIDNEY VERBA, AND HENRY BRADY, *THE UNHEAVENLY CHORUS: UNEQUAL POLITICAL VOICE AND THE BROKEN PROMISE OF AMERICAN DEMOCRACY* (2012); SIDNEY VERBA, KAY LEHMAN SCHLOZMAN, AND HENRY BRADY, *VOICE AND EQUALITY: CIVIC VOLUNTEERISM IN AMERICAN POLITICS* (1995).

⁹⁹ There is a growing literature on the relationship between the political activity of the extremely wealthy and public policy. The research has generally found that the extremely wealthy exert significantly more political influence than less wealthy citizens. See, in particular, MARTIN GILENS, *AFFLUENCE AND INFLUENCE: ECONOMIC INEQUALITY AND POLITICAL POWER IN AMERICA* (2012); JACOB S. HACKER AND PAUL PIERSON, *WINNER-TAKE-ALL POLITICS: HOW WASHINGTON MADE THE RICH RICHER AND TURNED ITS BACK ON THE MIDDLE CLASS* (2010); LARRY M. BARTELS, *UNEQUAL DEMOCRACY: THE POLITICAL ECONOMY OF THE NEW GILDED AGE* (2008).

¹⁰⁰ Our approach to these issues is more consonant with the approach taken by economists and political scientists than with the prevailing approach in the legal academy. The campaign finance literature generally treats these as separate options. We think that this is a mistake. If we leave aside the expressive dimension of each option, the reason for their exercise is instrumental—the funder is interested in policy change. A funder interested in policy change has to decide how to allocate her funds among those four options. Each option is conducive to policy change, but at different costs. See e.g., Matthew D. Hill et. al., *Determinants and Effects of Corporate Lobbying*, 42 *FIN. MGMT.* 931 (2013); Bard Harstard and Jakob Svensson, *Bribes, Lobbying, and Development*, 105 *AM. POL. SCI. REV.* 46 (2011).

¹⁰¹ This inefficiency, we will suggest, is baked into our democratic system. That is, representative democracy is a collective enterprise, and collective-action and agency costs are compelled by the nature of the enterprise. We will return to this point in Part III, where we argue that we ought to be suspicious of any scheme that attempts to eliminate those costs. The goal of the present discussion is simply to highlight the limitations of conventional means of financial influence.

¹⁰² See, e.g., LESSIG, *supra* note 15.

We can frame this issue with political contributions as a principal-agent problem.¹⁰³ Ordinarily we might think of the contributor as the principal and the recipient candidate as the agent. On this account, the contributor-principal makes the contribution to the recipient-agent pursuant to an objective defined and directed by the principal-contributor. In reality, however, it is often the recipient of the contribution that directs and defines the objective. As contributor, more often than not, you are confirming your assent to a predefined goal; by contributing, you are simply indicating a willingness to help the recipient achieve that goal.¹⁰⁴

Making matters worse, the politician-agent is faced with a conflict of interest that runs counter to your preferences as the contributor-principal. The candidate's preference for being elected or reelected *uber alles* conflicts with your specific preferences of the principal-contributor. Where those interests coincide, the agent is likely to carry out your wishes, but only as a matter of incidental interest convergence.

The principal-agent problem is not limited to campaigns but persists at the level of governance. Assuming that your candidate in fact gets elected, you will prefer that she spends as much time as possible on promoting your preferred policy. But there are significant monitoring costs here as well. You cannot control how your agent spends her time and you have no effective mechanism to account for the time spent on your issue. Because of the information asymmetry between you and your agent, you are vulnerable to “cheap talk” and subject to your agent's ever-present potential conflict of interest—which is to do, say, or prioritize anything that will get her reelected.

In short, political contributions are subject to significant agency costs, and often are suboptimal where the contributor's goal is to achieve a specified predetermined end.¹⁰⁵ If you want to maintain your agency as a policy entrepreneur, the better approach is to make independent expenditures. Independent expenditures minimize the type of monitoring costs associated with political contributions and enable the principal to advocate directly—though not always explicitly—in support of the politicians or public policy outcomes that she favors.¹⁰⁶

¹⁰³ For a similar analysis, see Daryl Levinson, *Market Failures and Failures of Markets*, 85 VA. L. REV. 1745 (1999).

¹⁰⁴ The Supreme Court has recognized this voluntary loss of agency in its campaign finance cases. For example, in *Buckley v. Valeo*, 424 U.S. 1 (1976), the Court stated that contributions do not express the contributor's own views but the views of the recipient. 424 U.S. at 21 (“While contributions may result in political expression if spent by a candidate or an association to present views to the voters, the transformation of contributions into political debate involves speech by someone other than the contributor.”) At most, the contributor is expressing support for or associating herself with the speech or views of the political candidate, who is effectively the principal. *Id.* at 22 (“Making a contribution, like joining a political party, serves to affiliate a person with a candidate.”).

¹⁰⁵ Of course, not all contributors are interested in defining their public policy ends. Many contributors do not have the knowledge, or resources such as time, or perhaps even the interest to specify particular ends. Thus, they are more than willing to join the recipient of the contribution to accomplish ends specified by the end user. However, sophisticated political actors often desire to define and control their public policy objectives. For such actors, political contributions are second-best solutions, though sometimes necessary alternatives. For research consonant with this view see Sanford C. Gordon, Catherine Hafer, and Dimitri Landa, *Consumption or Investment? On Motivations for Political Giving*, 69 J. POL. 1057 (2007).

¹⁰⁶ An independent expenditure is an expenditure for a communication that expressly advocates the election or defeat of a clearly identified candidate and is not made in coordination with or at the request the candidate or a candidate's

At the federal level, there are a number of vehicles that you can use for independent expenditures. You can create a 501(c)(4),¹⁰⁷ a 501(c)(3), or a 527 organization¹⁰⁸ to support your favorite candidate and your issue. Each entity has its own benefits and drawbacks. But each entity will allow you to support candidates and causes of your choosing.

In addition to these entities, you can create an expenditure-only PAC, more popularly known as a super PAC. A super PAC is simply a political committee that can raise and spend an unlimited amount of money, as long as it does not make any direct contributions to political candidates. A super PAC will allow you to spend however much money you want to advocate in favor—again not always explicitly—of your preferred public policy solution as well as your favorite politicians or political candidates.

As attractive as these options may at first appear, you will in short order find yourself frustrated with independent expenditures as your primary vehicle for effecting change. Independent expenditures undoubtedly facilitate your ability to advocate for your favorite public policies, but they do not actually change public policy. Advocacy is not implementation. And, to the extent that policy implementation is a desired goal,¹⁰⁹ advocacy does not and cannot avoid the costs of collective action.

Perhaps the most significant problem with independent expenditures, however, is that—by definition and design—such expenditures attempt to create a barrier between the individuals who are advocating for a particular political outcome and the individuals who are capable of implementing that outcome. To qualify as independent, an expenditure cannot be directed by, controlled by, or coordinated with a candidate. Thus, where the purpose of an expenditure is to encourage legislative action, independent expenditures are suboptimal because the money is not going to the individuals—the politicians—who are most capable of implementing political change.

How can you, as wealthy policy entrepreneur, get your money directly to lawmakers (or at least close to them), without relinquishing all control? You might try to minimize the agency costs by offering certain politicians an extra incentive to devote the resources and the time to working

authorized committee. 2 U.S.C. § 431(17) (2006); 11 CFR 100.16(a). Additionally, in *Buckley v. Valeo*, the Supreme Court stated that an independent expenditure can only be regulated when it uses “express words of advocacy.” 424 U.S. 44 n.52. Examples of express advocacy are words such as “vote for” or “vote against”; “elect” or “defeat”; “support or oppose”.

¹⁰⁷ A 501(c)(4) entity is a social welfare organization that is primarily engaged in social welfare activity. A 501(c)(4) organization can engage in political activity as long as the political activity is not the organization’s primary activity. A 501(c)(4) organization may not make a direct political contribution to a federal candidate, federal PAC, or political party. A 501(c)(4) may make contributions to an expenditure-only PAC. See generally, Gregg D. Polsky and Guy-Uriel E. Charles, *Regulating Section 527 Organizations*, 73 GEO. WASH. L. REV. 1000 (2005).

¹⁰⁸ A 527 group is a type of political organization, such as parties, candidates, committees, that is organized for the primary purpose of influencing elections. The organization is so-called because the tax status of this type of an organization is governed by section 27 of the tax code. A 527 organization is not subject to federal contribution limits. But it is subject to disclosure requirements of both contributions and expenditures. Provided that an organization is registered with the IRS under section 527, it is exempt from federal income taxes. For a full treatment of the subject see Gregg D. Polsky, *A Tax Lawyer’s Perspective on Section 527 Organizations*, 28 CARDOZO L. REV. 1773 (2007).

¹⁰⁹ See, e.g., Hall and Reynolds, *Targeted Issue Advertising and Legislative Strategy: The Inside Ends of Outside Lobbying*, 74 J. POL. 888 (2012) (finding that purpose of independent expenditures is to mobilize legislative allies).

on the issues that you have identified as your priorities. In particular, you might offer a bribe as a way of reducing the agency costs associated with contributions, and exerting some control over politicians' behavior. That is what we do in many other contexts, after all: We purchase the services of our agents and we sometimes offer to pay them a bonus for effort or results that go above and beyond an agreed baseline.

Alas, this exercise of control over public officials is expressly prohibited by bribery laws, which forbid a citizen from purchasing personal political representation in the same way that one would purchase other kinds of services.¹¹⁰ The fact that the principal has made a contribution does not entitle her to complete control. On the contrary, by making bribery illegal, our law arguably *requires* agency costs. The state has a monopoly on the lawmaking function that it guards jealously, and that function cannot be bought or sold. One justification for bribery laws is precisely to protect this monopoly on lawmaking.¹¹¹

Additionally, because bribery is illegal, enforcing the bargain is also a problem. Consequently, bribery is likely a negative-sum game: You may not get the public policy outcome that you are seeking because of the difficulty of enforcing the bargain and everyone involved is likely to end up in jail.

This brings us to your final option: lobbying.¹¹² As one scholar put it, lobbying “is the natural means of seeking political influence.”¹¹³ Theoretically, lobbying is a mechanism with fewer agency costs as compared to campaign contributions and independent expenditures.¹¹⁴ Because lobbying puts the lobbyist in close proximity to the lawmaker, it creates better opportunities to monitor public officials and influence their preferences. Some scholars have argued that lobbying is the best legal means available for persuading legislators and government officials on policy issues.¹¹⁵

The literature on lobbying generally identifies two methods of persuasion. Lobbyists can educate lawmakers by providing information that may not be available to them.¹¹⁶ Additionally, or in the alternative, lobbyists can make political contributions to lawmakers, which can serve to

¹¹⁰ On anti-bribery laws, see Beth Nolan, *Public Interest, Private Income: Conflicts and Control Limits on the Outside Income of Government Officials*, 87 NW. U. L. REV. 57, 71-80 (1992); Nicholas Jarcho & Neal Shechter, *Public Corruption*, 49 AM. CRIM. L. REV. 1107 (2012).

¹¹¹ See ESKRIDGE & FRICKEY, *supra* note __, at 264 (noting that prohibitions on bribery serve “to protect the integrity of the public servant’s decisionmaking process, so that decisions are made to advance the public interest and not the decisionmaker’s private agenda” and “to assure equal access of all citizens to the services of public servants”).

¹¹² For some social scientists lobbying and bribery are substitute goods reflecting a choice made by interest groups on how they want to influence policy. See, e.g., Bard Harstad and Jakob Svenson, *Bribes, Lobbying, and Development*, 105 AM. POL. SCI. REV. 46 (2011); Nauro F. Campos and Francesco Giovannoni, *Lobbying, Corruption, and Political Influence*, 131 PUB. CHOICE 1 (2007).

¹¹³ Heather Gerken, *Lobbying as the New Campaign Finance*, 27 GA. ST. U. L. REV. 1155, 1162 (2011)

¹¹⁴ For an analysis of how contributors address those agency costs see James Snyder, *Long-Term Investing in Politicians: or, Give Early, Give Often*, 35 J. L. ECON. 15 (1995).

¹¹⁵ See e.g., JOHN MARK HANSEN, *GAINING ACCESS: CONGRESS AND THE FARM LOBBY 1919-1981* (1991).

¹¹⁶ See, e.g., Brian Kelleher Richter et. al., *Lobbying and Taxes*, 53 AM. J. POL. SCI. 893, 895 (2009).

persuade lawmakers to support their policy preferences, reward those that do, and implicitly threaten those that don't.¹¹⁷

Lobbying does not simply entail persuasion and access. It might involve a special kind of access, the opportunity to be directly involved in lawmaking. Few, if any, major pieces of legislation get passed without the involvement of lobbyists, who are sometimes directly involved in drafting legislation. This further reduces monitoring costs by reducing the need to rely on the agent, the government official, to enforce implicit or explicit bargains. All of this helps explain why lobbying, for good or ill, has long been regarded as a strategic and indispensable strategy for influencing policy.

But lobbying, like independent expenditures and contributions, is also suboptimal.¹¹⁸ Lobbying is very costly. At least one study has concluded that interest groups spend far less on lobbying when it takes the form of making political contributions to lawmakers than when it takes the form of attempting to influence policymaking by providing information to political officials.¹¹⁹ Additionally, the returns on investment are uncertain.¹²⁰ This is because lobbying on one side of an issue is often accompanied by counter-lobbying on the other side.¹²¹ Lobbying also suffers from significant agency costs,¹²² and lawmakers are sometimes constrained by electoral considerations, partisanship, ideology, and other limitations. The lobbying literature, although vast and robust, is still trying to figure out precisely what interest groups get out of lobbying.¹²³

In sum, if you are a wealthy policy entrepreneur looking to purchase a public policy outcome, your traditional political process options are rather inefficient. Political contributions to public officials raise agency costs and collective-action problems. Independent expenditures and advocacy are inefficient because the funds are not going to the individuals—the lawmakers—who are best positioned to implement the policy change. Collective-action problems persist here too, because you will need to convince a large group of people to agree to the public policies you prefer. Bribery is an option but it may be the least attractive one: It is illegal and is subject to holdup problems. Lobbying seems to be the most promising path. It might reduce collective-action

¹¹⁷ There are many other theories in addition to the two major theories. Hall & Deardorff's lobbying as legislative subsidy.

¹¹⁸ See, e.g., Marcel Fafchamps, Alain de Janvery, and Elisabeth Sadoulet, *Social Heterogeneity and Wasteful Lobbying*, 98 PUB. CHOICE 5 (1999) (noting that "economists and political scientists have long recognized that lobbying activities can be an important source of wastage").

¹¹⁹ See, e.g., Morten Bennesen and Sven E. Feldmann, *Lobbying Legislatures*, 110 J. POL. ECON. 919 (2002) ("For most interest groups the dissemination of information in one form or another absorbs a far greater share of groups' resources than political contributions do.").

¹²⁰ See, e.g., Hall and Deardorff, *Lobbying as Legislative Subsidy*, 100 AM. POL. SCI. REV. 69 (2006) ("Empirical research on interest group influence has accumulated for decades, but this literature is noteworthy for the noncumulative, frequently inconsistent nature of its findings.")

¹²¹ See, e.g., Marie Hojnacki, *Interest Groups' Decisions to Join Alliances or Work Alone*, 41 AM. J. POL. SCI. 61 (1997); Virginia Gray and David Lowery, *A Niche Theory of Interest Representation*, 59 J. POL. 91 (1996); and David Austen-Smith and John R. Wright, *Counteractive Lobbying*, 38 AM. J. POL. SCI. 25 (1994)

¹²² For a review see Hall and Deardorff, *Lobbying as Legislative Subsidy*, 100 AM. POL. SCI. REV. 69 (2006).

¹²³ See, e.g., David Lowery, *Why Do Organized Interests Lobby? A Multi-Goal, Multi-Context Theory of Lobbying*, 39 POLITY 29 (2007).

problems by identifying the key decisionmakers and vetogates, incentivizing them to act in your favor, and providing you an opportunity to influence lawmaking directly. Lobbying also reduces agency costs by enabling you to monitor the lawmaker; through proximity, it might reduce the information asymmetry between you as principal and politicians as agents. But lobbying is very costly and the benefits are speculative. It is not clear that lobbying buys policy.

All of this helps explain why a rational wealthy policy entrepreneur interested in purchasing policy outcomes might attempt to develop options other than the traditional ones provided by democratic politics. The remainder of this Part considers two such options: traditional private philanthropy, and “patriotic” philanthropy directed at government.

B. Private Philanthropy

Critics of big government and taxes sometimes suggest that we should “cut out the middleman.”¹²⁴ Rather than paying taxes to government and then relying on government to select and provide beneficial services, why not keep all that money in the private and philanthropic sectors and focus on private solutions? This vision suggests an alternate set of strategies available to our wealthy policy entrepreneur. Instead of (or in addition to) straining to influence government behavior, she can simply pursue her chosen initiatives herself through private investments and philanthropy.¹²⁵

The philanthropic approach holds the potential of erasing the agency costs associated with the political strategies discussed above. Private giving today buzzes with terms like “strategic giving,”¹²⁶ “venture philanthropy,”¹²⁷ and “philanthrocapitalism.”¹²⁸ The idea is straightforward: Instead of simply handing over their money to other organizations (nonprofits, typically) and hoping for the best, donors increasingly are focusing on ways to maximize the impact of their gifts. Strategies include insisting on performance benchmarks and other ways of measuring

¹²⁴ ZELENAK, *supra* note 36, at 36.

¹²⁵ Bishop & Green, *supra* note 88, at 542 (“[A]s the 21st century unfolds it has become accepted, and even expected, that wealthy philanthropists, businesses, charities and social entrepreneurs, rather than governments alone, will take part in and even lead efforts to solve big problems.”).

¹²⁶ PETER FRUMKIN, *STRATEGIC GIVING: THE ART AND SCIENCE OF PHILANTHROPY* (2006).

¹²⁷ *E.g.*, KENNETH SALTMAN, *THE GIFT OF EDUCATION: PUBLIC EDUCATION AND VENTURE PHILANTHROPY* (2010); Janelle Scott, *The Politics of Venture Philanthropy in Charter School Policy and Advocacy*, 23 *EDUCATIONAL POLICY* 106 (2009). Kevin Kumashiro explains: “As the United States neared the end of the twentieth century, the globalizing economy provided fertile ground for an unprecedented accumulation of wealth by the corporate elite. Taking this new wealth and the lessons learned about leveraging wealth for both increased profits and political influence, several millionaires and billionaires transformed the landscape of philanthropy, developing new organizations that operate much more like the conservative foundations than traditional philanthropies. These are the venture philanthropies.” Kevin K. Kumashiro, *When Billionaires Become Educational Experts*, *ACADEME* (May–June 2012), available at <https://www.aaup.org/article/when-billionaires-become-educational-experts#note1>.

¹²⁸ Bishop & Green, *supra* note 88, at 541-42 (“At its broadest, the term [philanthrocapitalism] refers to the growing role for private sector actors in addressing the biggest social and environmental challenges facing the planet. . . . As the 21st Century has unfolded, it has become increasingly accepted, and even expected, that wealthy philanthropists, businesses, charities and social entrepreneurs will take part in and even lead efforts to solve big problems, especially when those solutions require innovation and entrepreneurship.”); Robin Rogers, *Why Philanthro-Policymaking Matters*, 48 *SOCIETY* 376, 378 (2011) (“If you want to understand philanthrocapitalism, start with the three M’s: Money, Markets, and Measurement. Some might add a fourth, Management.”).

effectiveness, “making fewer, larger grants to smaller circles of organizations,”¹²⁹ and developing and running initiatives themselves rather than funding unsolicited proposals from nonprofits.¹³⁰ The upshot is that contemporary philanthropy tends more toward top-down policymaking—with philanthropists and foundations setting priorities and managing performance—and away from passive support for bottom-up efforts by nonprofits and the communities they serve.¹³¹

Philanthropy today is not only more “strategic” than it once was; it is booming. Americans donated \$373.25 billion in 2015—the highest total ever.¹³² As one insider put it, we are in the midst of a “period of tremendous growth in the philanthropic sector—particularly the rise of a mega-foundation like Gates, which can by itself steer policy on education reform or global health.”¹³³ Soaring gifts amounts are underwritten, in part, by the growing concentration of wealth at the top of the economic ladder.¹³⁴ According to *Forbes Magazine*, the number of billionaires worldwide more than quadrupled between 2000 and 2015.¹³⁵ The new-billionaire club includes a cohort of relatively young donors, flush from hedge-fund and Silicon Valley profits, who are committed to giving away most of their fortunes during their lifetimes.¹³⁶ That commitment is reflected in the Giving Pledge, a promise “by the world’s wealthiest individuals and families to dedicate the majority of their wealth to philanthropy.”¹³⁷ The Giving Pledge has attracted 157 signatories since its inception in 2010, all of them “billionaires or those who would be billionaires

¹²⁹ Rick Cohen, *Co-opting Nonprofits*, BOSTON REVIEW (Mar. 1, 2013); see also Garry W. Jenkins, *Who’s Afraid of Philanthrocapitalism?*, 61 CASE W. RES. L. REV. 753, 775 figs. 1-2 (2011) (showing an increase in the number of large grants and the percentage of overall dollars allocated to such grants, from 1997 to 2008).

¹³⁰ See, e.g., Kumashiro, *supra* note 127 (“[P]hilanthropists themselves are now getting significantly involved in goal setting, decision making, and evaluating progress and outcomes to ensure that their priorities are met. This hands-on role allows venture capitalists to affect public policy more directly and substantially . . .”). One study of large foundations’ openness to unsolicited grant applications found that “today’s large foundations are substantially more likely to have a ‘don’t call us, we’ll find you’ approach when it comes to application practices and interaction with potential grantees.” Jenkins, *supra* note 129, at 781. Specifically, the percentage of large foundations with “invitation only” grant policies increased fivefold between 1994 and 2008. *Id.* fig. 5.

¹³¹ Cohen, *supra* note 129 (“Increasingly, [foundations] are playing a public-policy role themselves rather than equipping nonprofits to speak with and for the communities about their needs. . . . This is top-down policy advocacy.”)

¹³² GIVING USA: 2015 WAS AMERICA’S MOST-GENEROUS YEAR EVER (June 13, 2016), <https://givingusa.org/giving-usa-2016/>. Most gifts were from individuals (71%); the remainder came from foundations (16%), bequests (9%), and corporations (5%). *Id.*

¹³³ Gara LaMarche, *Democracy and the Donor Class*, 34 DEMOCRACY JOURNAL, at 14 (Fall 2014).

¹³⁴ Kristin A. Goss, *Policy Plutocrats: How America’s Wealthy Seek to Influence Governance*, 49 PS: POLITICAL SCIENCE & POLICY 442, 442 (July 2016); see also Reich, *supra* note 14 (“Record wealth inequalities might be a foe to civic comity, but they are good for philanthropy. The boom in millionaires has fueled unprecedented growth in the number and assets of small foundations as well.”).

¹³⁵ Bishop & Green, *supra* note 88, at 542 (“*Forbes* counted 1826 billionaires worldwide in 2015, up from 1125 in 2008 and a mere 470 in 2000.”).

¹³⁶ See Goss, *supra* note 134, at 443 (“Booms in the technology and hedge-fund sectors—combined with a favorable tax system—have created a generation of youthful entrepreneurs and financiers with more money than they could possibly spend on themselves. Scores of leading donors are using moral suasion to establish a norm that wealthy people’s “excess” money should go toward public purposes.”).

¹³⁷ <https://givingpledge.org>

but for their giving.”¹³⁸

For all the good it does, philanthropy has its critics. Critiques tend to focus on three themes. One has to do with the favorable tax treatment of charitable donations, which amounts to a government subsidy for donors’ chosen projects. Some critics argue that current tax law reflects a “plutocratic bias,” because “the favored beneficiaries of the wealthy receive the lion’s share of the subsidy.”¹³⁹ Others emphasize that the charitable deduction “is a form of privatization. Money that would otherwise be available for tax revenue that could be democratically directed is shielded from public control for private use.”¹⁴⁰

A second and related set of critiques focuses on concerns about transparency and accountability. Philanthropy, so the argument goes, can have profound consequences for many people—and yet those people have no means of influencing (much less controlling) the behavior of the philanthropists. As one skeptic put it, “[o]ur functioning democracy, as imperfect as it is, holds to the ideal that all people should have an equal voice. Philanthrocapitalism is based on a rather flat assumption that what matters are results rather than process.”¹⁴¹ The Gates Foundation is often used to illustrate the point. The Foundation made \$36.7 billion in grants between 2007 and 2015; it has a current endowment of \$39.6 billion. Those funds reflect the combined donations of the Foundation’s three trustees: Bill and Melinda Gates, and Berkshire Hathaway CEO Warren Buffett. For detractors, the small number of trustees and the enormous sums of money they control trigger something of a “who died and made *you* king?” reaction.¹⁴²

Third, critics worry that “philanthropy, by channeling private funds towards public services, erodes support for government spending on health and education.”¹⁴³ The idea here is that, to the extent that private giving can fill in gaps in the government’s own provision of services, citizens become less willing to contribute tax dollars toward initiatives that primarily benefit others. For example, public support for welfare programs might turn, in part, on the existence of a private safety net for low-income or unemployed citizens. If so, one might worry about what happens if the private money suddenly runs out; or one might ask, “[i]s this the kind of public good that we, as democratic citizens, have the right to offload to a private entity, however reliable and

¹³⁸ *See id.*

¹³⁹ Rob Reich, *Toward a Political Theory of Philanthropy*, in *GIVING WELL: THE ETHICS OF PHILANTHROPY* 177, 184 (Patricial Illingworth et al., eds. 2011).

¹⁴⁰ LaMarche, *supra* note 133, at 3-4.

¹⁴¹ Rogers, *supra* note 128, at 377.

¹⁴² *See, e.g.*, Reich, *supra* note 14; DIANE RAVITCH, *THE DEATH AND LIFE OF THE GREAT AMERICAN SCHOOL SYSTEM: HOW TESTING AND CHOICE ARE UNDERMINING EDUCATION*, ___ (2010) (arguing that philanthropists are “bastions of unaccountable power”); Kumashiro, *supra* note 127 (arguing that current trends in philanthropy “signal[] a transition from public deliberation by an elected government to decisions of self-appointed individuals with no accountability to the public”); Michael Edwards, *Impact, Accountability, and Philanthrocapitalism*, 48 *SOCIETY* 389–90 (2011) (emphasizing lack of transparency and public deliberation around philanthropic decisions); Angela M. Eikenberry, *Philanthropy and Governance*, 28 *ADMINISTRATIVE THEORY & PRAXIS* 586–92 (2006) (arguing that big donors can function as “mini-governments that can . . . make policy decisions on their own, without input from other citizens or elected representatives”).

¹⁴³ LINSEY MCGOEY, *NO SUCH THING AS A FREE GIFT: THE GATES FOUNDATION AND THE PRICE OF PHILANTHROPY* 8 (2015).

trustworthy?”¹⁴⁴

For those who harbor anxieties about private philanthropy, gifts *to government* may offer some reprieve. Although gifts to government qualify for the same tax deduction as gifts to private charitable causes, it’s hard to muster much of an argument against government subsidizing itself. And, if one is concerned about accountability, transparency, and abdication of government’s obligations, so-called patriotic philanthropy may well look like a cure-all.

Importantly for present purposes, gifts to government also are likely to appeal to would-be philanthropists themselves. If the goal is changing public policy, it will sometimes be necessary to team up with government. Even when government participation is not strictly necessary, the government is a uniquely powerful partner. Suppose, for example, that you want to make a donation to help low-income families in New York with back-to-school costs. You could certainly collaborate with a local nonprofit to try to publicize and distribute the available funds. But working directly with state government offers significant advantages. Among other things, the state already has in place a system for distributing public-assistance and food-stamp benefits, and your donation can simply be added to the funds already available through the state.¹⁴⁵

This example is not a hypothetical; it describes a \$35 million gift from George Soros to the State of New York—a gift that then-Governor Paterson described as “an example of how the public and private sectors can work together to foster a brighter future for the low-income families of our state.”¹⁴⁶ Nor, as the next section shows, is the back-to-school example *sui generis*. In the discussion that follows, we offer a descriptive account of gifts to government. In Part III, we turn to normative analysis.

C. Gifts to Government

Gifts to government come in various shapes and sizes. Some may be solicited by government actors.¹⁴⁷ Others, such as the Arnolds’ gift to the Baltimore Police Department, are made at the initiative of the donor. Some are open-ended, to be used by the recipient however it sees fit.¹⁴⁸ Others, like Soros’ and the Arnolds’, are earmarked for specific purposes.

While giving to government is not new,¹⁴⁹ there is reason to think that the phenomenon is on

¹⁴⁴ Eric Beerbohm, *Perpetual Giving Machines*, BOSTON REVIEW (Mar. 1, 2013).

¹⁴⁵ Open Society Foundations Press Release, *George Soros Gives \$35 Million to Children in New York for Back-to-School Supplies* (Aug. 11, 2009), available at <https://www.opensocietyfoundations.org/press-releases/george-soros-gives-35-million-children-new-york-back-school-supplies>.

¹⁴⁶ *Id.*

¹⁴⁷ Jim Edwards, *Why BP Is Getting Fed Up With Florida Milking It for Advertising Money*, MONEYWATCH (July 15, 2010) (describing requests from Florida’s Governor Charlie Crist to BP for \$75 million to support cleanup and tourism advertising in the wake of the BP oil spill).

¹⁴⁸ The Holmes Devise is an example. See David Margolick, *Justice Holmes’ 1935 Bequest Remains Unfulfilled*, N.Y. TIMES (May 3, 1983) (“When Oliver Wendell Holmes died in 1935, he left the bulk of his estate, more than \$260,000, to the United States Government. It was the largest unrestricted gift ever made to the American people . . .”).

¹⁴⁹ See, e.g., David Strong et al., *Leveraging the State: Private Money and the Development of Public Education for Blacks*, 65 AM. SOC. REV. 658 (2000) (describing how private financing by the Rosenwald Fund and other nonprofit organizations drove the creation of public schools for African-American children in the South in the late nineteenth

the rise.¹⁵⁰ At the very least, complementary trends in the philanthropic and public sectors have created an atmosphere conducive to patriotic philanthropy. As the previous section explained, philanthropy is becoming more top-heavy and donor-driven, with mega-rich “policy plutocrats” “directing not only their money but also their time, ideas, and political leverage toward influencing public policy.”¹⁵¹ Meanwhile, governments are increasingly embracing privatization and public-private partnerships to address the growing strain on public capacity—the felt reality that “government can’t do it alone.”¹⁵² Although the story of privatization tends to focus on harnessing the private profit motive to finance and deliver public services, partnering with government promises benefits beyond profit. In Mike Bloomberg’s words,

[i]n so many areas, governments represent our best hope for making the broad-based societal changes that philanthropic organizations are devoted to bringing about. Governments have the authority to drive change in ways that philanthropic organizations cannot. By leveraging our resources, and forming partnerships with government, philanthropic organizations can help push those changes forward.¹⁵³

It should come as no surprise, then, that philanthropy has a significant role to play in today’s blending of public and private. Indeed, “arguably the clearest indicator of how philanthrocapitalism has moved into the mainstream is the way that governments are starting to engage with these new actors in solving society’s toughest problems.”¹⁵⁴

and early twentieth centuries). For more on the history of private gifts to government, see Peter Dobkin Hall, *A Historical Overview of the Private Nonprofit Sector*, in *THE NONPROFIT SECTOR: A RESEARCH HANDBOOK* (W. Powell ed. 1987); see also Susan Stamberg, *How Andrew Carnegie Turned His Fortune Into A Library Legacy*, NPR: KEYS TO THE WHOLE WORLD: AMERICAN PUBLIC LIBRARIES (Aug. 1, 2013 3:00 AM), <http://www.npr.org/2013/08/01/207272849/how-andrew-carnegie-turned-his-fortune-into-a-library-legacy> (describing Andrew Carnegie’s gifts to fund the public library system).

¹⁵⁰ Beth Gazley, *How Philanthropy Props Up Public Services and Why We Should Care*, NONPROFIT QUARTERLY (March 27, 2015) (“We know that philanthropic support for public services is growing rapidly, outpacing the growth of the charitable sector overall.”).

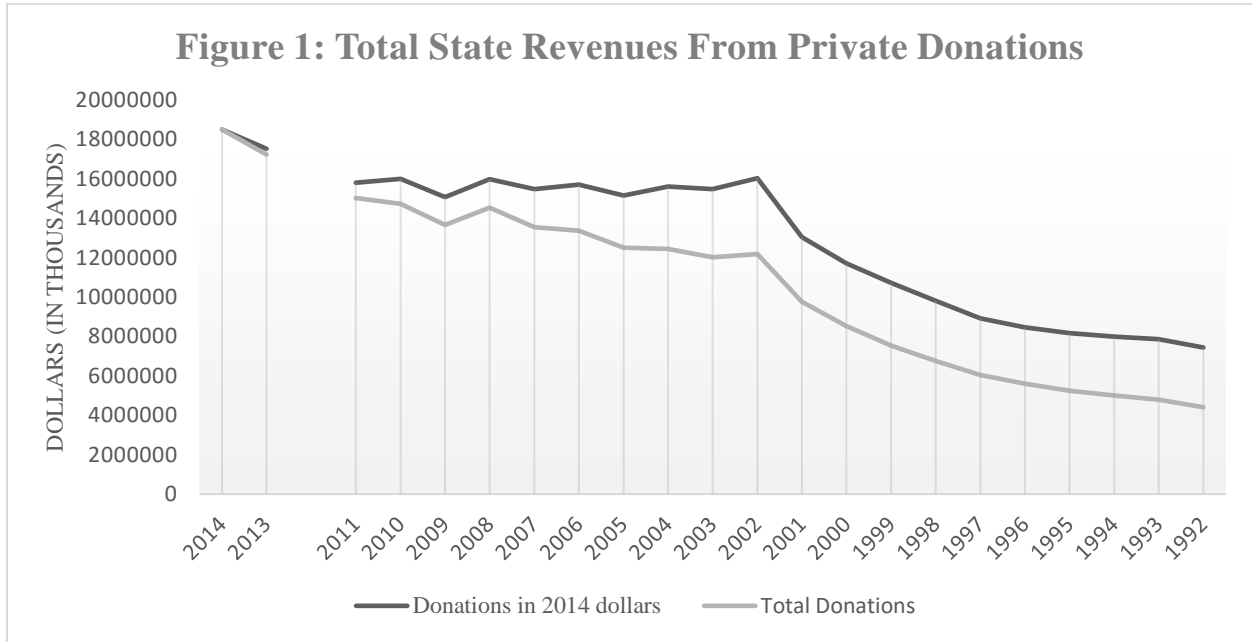
¹⁵¹ Goss, *supra* note 134, at 442.

¹⁵² *Supra* note 93; see also David Amsden, *Who Runs the Streets of New Orleans?*, N.Y. TIMES (July 30, 2015) (quoting New Orleans mayor Mitch Landrieu, who reportedly “has accepted on his city’s behalf more private grants than any mayor in the nation,” as describing partnerships with the private sector as “a new government model that’s emblematic of what the rest of the country should be doing”).

¹⁵³ Bloomberg Philanthropies, *Mike Bloomberg’s Letter on Philanthropy*, available at <https://www.bloomberg.org/about/annual-update/mike-bloombergs-annual-letter-philanthropy/mike-bloombergs-letter-philanthropy/> [hereafter *Bloomberg Letter*]. In many cases, philanthropic engagement with government will entail the political strategies described above—campaign contributions, independent expenditures, and lobbying. See Goss, *supra* note 134, at 445. But sometimes it means more direct forms of investment in public programs. Bloomberg explains: “Advocacy is not the only way to spur public sector change. In many cases, government leaders are eager to test out new policies and programs but cannot justify spending scarce resources on unproven ideas. Citizens rightly expect their representatives to be careful stewards of their tax dollars, which is one reason why risk-taking is harder in the public sector than it is in the private sector.” *Bloomberg Letter, supra*.

¹⁵⁴ Bishop & Green, *supra* note 88, at 542; see also Landow & Ebdon, *supra* note 79, at 727-28 (linking giving to government with the rise of strategic philanthropy); Paul Ylvisaker, *Community and Community Foundations in the Next Century*, in *AN AGILE SERVANT: COMMUNITY LEADERSHIP BY COMMUNITY FOUNDATIONS* 58 (R. Magat, ed. 1989) (“Mayors, long diffident toward the world of private giving, are now explicit in their rhetoric, and in their planning, about the essential role of private donations if city halls are to achieve any progress and partnership in their

The available data, while limited, are consistent with an upward trend in gifts to government. The U.S. Census Bureau collects annual data from state governments on state revenue from various sources, including gifts from private sources. That category is limited to gifts of cash or securities from private individuals or corporations; it does not include “noncash gifts and donations, such as food, property, buildings, land, commodities, etc.”¹⁵⁵ Figure 1 shows nationwide totals from 1992 to 2014 (excepting 2012, for which data are not available): the grey line represents total private donations in current-year dollars; the black line shows inflation-adjusted totals, reflecting each year’s gifts in 2014 dollars.



Source: U.S. Census Bureau Annual Survey of State Government Finances, <https://www.census.gov/govs/state/>

It is difficult to develop a comprehensive sense of the substance of patriotic philanthropy, but gifts appear to cluster around certain types of initiatives. Public facilities, for example, are recurring subjects of gifts. In recent years, private donations have helped finance community

efforts at civic improvement and unity.”).

¹⁵⁵ U.S. CENSUS BUREAU, GOVERNMENT FINANCE CLASSIFICATION MANUAL (2006), available at http://www2.census.gov/govs/pubs/classification/2006_classification_manual.pdf. According to the census bureau, donations from foundations may or may not be included in the tally, depending on reporting practices by the states and—in the case of donations for higher education—the recipient institutions. Telephone interview with Steven Owens, U.S. Census Bureau, February 28, 2017.

centers,¹⁵⁶ libraries,¹⁵⁷ convention centers,¹⁵⁸ sports arenas,¹⁵⁹ and more. Outdoor public spaces—parks,¹⁶⁰ nature conservancies,¹⁶¹ etc.—likewise have drawn substantial gifts from the private sector. One researcher reports that “roughly half of all state parks across the United States now have an associated nonprofit ‘Friends of the Parks’ group.”¹⁶² The equivalent at the federal level is the National Park Foundation, which supports the National Park Service through private gifts. The Foundation reported \$73.5 million in gifts in 2015—up from \$16.5 million in 2011, the earliest year for which aggregate data are reported.¹⁶³

Relatedly, private gifts frequently support public exhibitions, both inside museums and outside in the form of monuments. For example, several years ago David Rubenstein, a private equity financier who is responsible for coining the term “patriotic philanthropy,”¹⁶⁴ donated \$7.5 million to the national Park Service to cover the cost of sealing a crack in the Washington Monument.¹⁶⁵ Rubenstein has made other donations to the Park Service, including \$18.5 million to restore the Lincoln Memorial and \$12.35 million to repair the Robert E. Lee memorial in the Arlington Cemetery.¹⁶⁶ He also paid \$21.3 million for a copy of the Magna Carta, which is on display in the National Archives in a new Rubenstein-funded \$13.5-million gallery.¹⁶⁷

¹⁵⁶ For example, in 2008 alone, the Donald W. Reynolds Foundation donated a total of \$32.4 million to four Oklahoma cities for construction of eponymous community and recreation centers. <http://www.dwreynolds.org/Grants/Web%20-%20CC.pdf>.

¹⁵⁷ See, e.g., Tim Eberly, *Battens’ generosity helped provide Norfolk library*, THE VIRGINIAN-PILOT (Jan. 8, 2015) (describing \$40 million gift, contingent on more than \$20 million of public matching funds, for construction of a new public library in Norfolk, VA).

¹⁵⁸ See Landow & Ebdon, *supra* note __ (describing donations from local businesses to fund a convention center in Omaha, Nebraska).

¹⁵⁹ See *infra* notes __-__ and accompanying text (describing donation to University of North Dakota).

¹⁶⁰ See, e.g., Kelly Kleiman, *Open Access vs. Donors’ Influence*, CHRISTIAN SCIENCE MONITOR (Sept. 29, 2004) (<http://www.csmonitor.com/2004/0929/p14s02-lihc.html>) (describing how philanthropic donations transformed Chicago’s Millennium Park from a “garage with grass over it”—as planned in the City’s initial \$150 million budget—to a “\$475 million space includ[ing] numerous amenities—a bicycle transportation center and a densely landscaped garden as well as [a] theater, bandshell, sculpture, and fountain—each made largely to the donors’ order”).

¹⁶¹ For example, the Nature Conservancy gave \$1.4m to Stafford County, VA, to help fund the acquisition and development of tracts of land to create the Crow’s Nest Natural Area Preserve. See Vanessa Remmers, *Money lacking to open Crow’s Nest in Stafford County to the public*, THE FREE LANCE-STAR (May 24, 2014); <http://www.nature.org/about-us/irs-form990-2009-1.pdf>, at 22 (tax document showing \$1.4 million grant to the Stafford County Board of Supervisors). In another recent example, the Lilly Endowment gave \$10 million to Indiana’s Bicentennial Nature Trust to support the acquisition of more wilderness land. *Lilly Endowment gives Indiana nature trust \$10M grant*, INDIANA BUSINESS JOURNAL (Nov. 14, 2012).

¹⁶² Gazley, *supra* note 150.

¹⁶³ NATIONAL PARK FOUNDATION, 2015 ANNUAL REPORT, available at https://prod.nationalparks.org/sites/default/files/Annual_Report_FY15.pdf.

¹⁶⁴ Alec MacGillis, *The Billionaires’ Loophole*, NEW YORKER (March 14, 2016).

¹⁶⁵ National Park Service, *David Rubenstein Donates Funds to Modernize Washington Monument Elevator* (Dec. 2, 2016).

¹⁶⁶ *Id.* (listing Rubenstein’s gifts that have made “him a leader in the incredible legacy of private support for national parks”).

¹⁶⁷ MacGillis, *supra* note 164.

Detroit’s “Grand Bargain” represents a similar dynamic on a much larger scale. In 2014, as the city teetered on the brink of insolvency, a group of nine foundations put together an ambitious plan to save the Detroit Institute for the Arts, which was at risk of seeing its renowned collection auctioned off to help cover the city’s almost \$18 billion in debts, including a \$3.5 billion shortfall in money needed to cover pension obligations to city retirees. In exchange for about \$800 million—including \$330 million from the foundations, as well as contributions from other private donors and the State of Michigan—the city agreed to transfer ownership of the Institute to a nonprofit, and to put the money into the retiree pension system.¹⁶⁸

Public schools also continue to be common—and controversial—targets of philanthropic giving. Public education was one of the earliest social services offered widely by government,¹⁶⁹ and one of the few public services that state governments are constitutionally obligated to provide.¹⁷⁰ Private dollars have been part of the public-education equation from the outset, particularly in the South, where Reconstruction governments struggled to fund their newly created state-supported school systems.¹⁷¹ Today, in addition to booster clubs and fundraising parent-teacher organizations, many school districts have their own “local education foundations” devoted to raising and distributing private contributions for public schools.¹⁷² In 2010, school-supporting charities reported more than \$880 million in revenues.¹⁷³

It bears emphasis that gifts to public schools do not merely seek to support schools as they are, but to change them.¹⁷⁴ As Rob Reich has explained, “[v]ery frequently these donations are earmarked for particular activities—for extracurricular materials, for additional schools supplies, for field trips—giving the donors a nontrivial amount of input or leverage on how the school or district operates.”¹⁷⁵ Some gifts are earmarked for specific kinds of instruction. For example, BB&T’s “Moral Foundations of Capitalism” program—which has made grants ranging from \$150,000 to \$5 million to more than 60 colleges and universities—includes required readings in

¹⁶⁸ See, e.g., Randy Kennedy et al., *Foundations Aim to Save Pensions in Detroit Crisis*, N.Y. TIMES (Jan. 13, 2014); Randy Kennedy, ‘Grand Bargain’ Saves the Detroit Institute of Arts, N.Y. TIMES (Nov. 7, 2014).

¹⁶⁹ Strong et al., *supra* note 149, at 659 (“Publicly funded and controlled systems of education were one of the earliest social benefits extended to the masses . . .”).

¹⁷⁰ Anderson, *supra* note __ (“While laws provide an entitlement to a public education, and we have long struggled to interpret what constitutes a legally adequate education, there is little to nothing to indicate what other services the local public sector must provide.”).

¹⁷¹ See Strong et al., *supra* note 149, at 662-63 (describing the need for private donations to support public schools for both White and Black children in the South during Reconstruction, and how private financing continued to fill the void for many southern African-Americans after states started channeling public money exclusively into White schools).

¹⁷² Gazley, *supra* note 150; Ashlyn Aiko Nelson & Beth Gazley, *The Rise of School-Supporting Nonprofits*, 9 EDUC. FIN. & POLICY 541, 552 (2014).

¹⁷³ Gazley, *supra* note 150.

¹⁷⁴ See Susan Reckhow, *More than Patrons: How Foundations Fuel Policy Change and Backlash*, 49 PS: POLITICAL SCIENCE & POLICY 449, 449 (July 2016) (reporting that philanthropic funding for K-12 education grew by 73% from 2000 to 2010 and that foundations “have stepped well beyond the role of patrons” and are increasingly “are involved throughout the policy process”).

¹⁷⁵ Reich *Equality*, *supra* note 14, at 24.

Ayn Rand.¹⁷⁶ Although neither BB&T nor its charitable foundations has identified the participating schools, research suggests that recipients include a host of public universities.¹⁷⁷ Notably, legislation in three of the recipient states—Florida, Kentucky, and North Carolina—mandates that the state government match corporate contributions to colleges and universities, meaning that taxpayers are footing half the bill for BB&T’s agenda.¹⁷⁸

Other gifts seek to change school performance more broadly. Indeed, this is one area where patriotic philanthropy has drawn meaningful critical attention, thanks in part to the high-profile work of the Gates Foundation. “[T]he Gates Foundation, with its \$3 billion-a-year spend rate that is at least four times as big as the next largest philanthropy” is hard to ignore; “[n]ot only does what it does make a difference to others in the fields it engages in—it can virtually define the fields and set the policy agenda for government as well as philanthropy.”¹⁷⁹ One of the Gates initiatives, for example, was to break up large public high schools into a series of smaller schools. On critic describes the project as follows:

From 2000 to 2009, [Gates] spent \$2 billion and disrupted 8 percent of the nation’s public high schools before acknowledging that his experiment was a flop. The size of a high school proved to have little or no effect on the achievement of its students. At the same time, fewer students made it more difficult to field athletic teams. Extracurricular activities withered. And the number of electives offered dwindled.¹⁸⁰

It is important to recognize that, while Gates is the biggest player, it is hardly alone in its efforts to influence public education. To take just one other example, the Wallace Foundation recently gave a total of \$7 million to five states for “school accountability measures,” including “train[ing] teachers, principals, and administrators [in public elementary and secondary schools] to use accountability data, such as test scores, so that it benefits students in the classroom.”¹⁸¹ Some of the money was also to be used to support “legislative and regulatory changes aimed at ensuring that districts throughout [the recipient] states can develop, prepare and retain leaders capable of improving student performance.”¹⁸² As a result of the initiative, at least one state

¹⁷⁶ S. Douglas Beets, *BB&T, Atlas Shrugged, and the Ethics of Corporation Influence on College Curricula*, 13 J. ACAD. ETHICS 311 (2015).

¹⁷⁷ *Capitalism Resources: BB&T Academic Programs*, CLEMSON INSTITUTE FOR THE STUDY OF CAPITALISM, <http://www.clemson.edu/capitalism/bbt.html>. For sample course syllabi, see <http://www.clemson.edu/capitalism/materials.html>.

¹⁷⁸ Beets, *supra* note 176, at 325.

¹⁷⁹ See LaMarche, *supra* note __, at 5-6 (noting that “the emerging critique of the Gates Foundation” is “[t]he closest we come today” to raising fundamental concerns about philanthropy).

¹⁸⁰ Bob Herbert, *The Plot Against Public Education: How Millionaires and Billionaires are Ruining Our Schools*, POLITICO (Oct. 6, 2014). For a sampling of other commentary critical of the Gates Foundation’s initiatives in education and elsewhere, see ANTHONY CODY, *THE EDUCATOR AND THE OLIGARCH: A TEACHER CHALLENGES THE GATES FOUNDATION* (2014); MCGOEY, *supra* note 143; RAVITCH, *supra* note 142.

¹⁸¹ WALLACE FOUNDATION, *ANNUAL REPORT: APPRAISING A DECADE 10* (2009), available at <http://www.wallacefoundation.org/knowledge-center/Documents/Wallace-Report-2009-Appraising-a-Decade.pdf>.

¹⁸² *Id.*

enacted a new law that changed statewide principal preparation programs.¹⁸³ The Wallace Foundation also notes, without making claims about causation, that since the beginning of its project, fourteen states adopted updated standards for school principals and administrators, more than half of the participating states began requiring principal mentoring programs, twelve states “enacted laws creating statewide data warehouses, student data management systems and ‘balanced scorecards,’” and nine states passed new principal evaluation laws.¹⁸⁴

Generalizations become more difficult when we move beyond these recurring categories. Some gifts, like the Arnolds’, offer financial support for law enforcement.¹⁸⁵ For example, Facebook recently paid the \$194,000 salary of a local police officer whose job was going to be cut.¹⁸⁶ Similarly, a recent \$2.5 million grant from the New Orleans Convention and Visitors Bureau (a consortium of local businesses) allowed the mayor of New Orleans to bring as many as 60 new State Police troopers into the city. “Frankly,” said the Bureau’s president, “it’s a gigantic paradigm shift in terms of how this city has approached public safety.”¹⁸⁷

Other gifts promote improvements at the other end of the criminal-justice spectrum. Take two recent examples: In 2008, the Kellogg Foundation gave \$1.05 million to a Michigan circuit court in order to “reduce alcohol abuse dependency among criminal offenders by expanding the Drug Treatment Court Capacity Building Program.”¹⁸⁸ And in 2005, the California Endowment donated \$6.5 million to assist certain California probation departments in “strengthen[ing] the capacity of county juvenile justice systems to improve health and mental health services and ensure continuity of care as youth transition back to the community.”¹⁸⁹

Community and economic development projects also tend to attract philanthropic gifts. Again, Detroit offers a striking example. Philanthropic organizations have played a leading role in the city’s revitalization, in part to compensate for the sorry state of Detroit’s public and private sectors during the worst years of recession and bankruptcy. When the Great Recession hit, Detroit was under the leadership of now-disgraced mayor Kwame Kilpatrick. Kilpatrick resigned in 2008 after pleading guilty to charges of obstruction of justice; he is currently serving time in federal prison after being convicted (along with various members of his administration) of multiple corruption offenses.¹⁹⁰ Making matters worse, just as the Kilpatrick administration was cratering,

¹⁸³ See PAUL MANNA, DEVELOPING EXCELLENT SCHOOL PRINCIPALS TO ADVANCE TEACHING AND LEARNING: CONSIDERATIONS FOR STATE POLICY 72–73 (2015), available at <http://www.wallacefoundation.org/knowledge-center/Documents/Developing-Excellent-School-Principals.pdf> (describing Illinois S.B. 226 (2010) (enacted as Public Act 096-0903)).

¹⁸⁴ WALLACE FOUNDATION, *supra* note 181, at 12-13.

¹⁸⁵ See *supra* notes 1-11 and accompanying text.

¹⁸⁶ Amsden, *supra* note 152.

¹⁸⁷ *Id.*

¹⁸⁸ W.K. KELLOGG FOUNDATION—2008 ANNUAL REPORT: FACING UP TO THE FUTURE (Jan. 22, 2009), available at http://www.issuelab.org/resource/w_k_kellogg_foundation_2008_annual_report_facing_up_to_the_future.

¹⁸⁹ THE CALIFORNIA ENDOWMENT, PROMISING PRACTICES FROM THE HEALTHY RETURNS INITIATIVE (May 2010), available at http://www.healthyreturnsinitiative.org/pdf/HRI_Full_Report.pdf.

¹⁹⁰ Steven Yaccino, *Kwame M. Kilpatrick, Former Detroit Mayor, Sentenced to 28 Years in Corruption Case*, N.Y. TIMES (Oct. 10, 2013).

the Big Three of the automobile industry—mainstays of Motor City’s private sector—faced their own economic crisis.¹⁹¹ Philanthropists stepped in to fill the void, and have been instrumental in a variety of significant initiatives, not least of which is the M-1 rail—the country’s first public transit system planned by private and philanthropic actors, and funded largely by private money. Some of the funding is in the form of investments similar to the P3s described in Part One. Those investments are buttressed by philanthropic donations, including \$15 million from the Kresge Foundation¹⁹² and \$4 million from the Ford Foundation.¹⁹³

Bloomberg Philanthropies’ “Innovation Teams program” likewise seeks to foster public-sector improvements at the city level, consistent with Bloomberg’s vision of philanthropy “as a way to embolden government.”¹⁹⁴ Bloomberg describes the program as follows

The program helps City Halls drive bold innovation, change culture, and tackle big problems to deliver better results for residents. Multi-year grants will be awarded to help cities create better results for a range of pressing problems – from tackling poverty and neighborhood revitalization to recruiting and retaining public employees. . . . Now in the third round of funding, the Innovation Teams program allows mayors to fund in-house innovation teams—or “i-teams”—which investigate complex local challenges, design solutions with clear goals, and rigorously measure progress to better improve citizens’ lives.¹⁹⁵

I-Teams are currently operating in 20 cities, with seven more recently announced. Each city is eligible for up to \$500,000 in annual funding for up to three years.¹⁹⁶

Gifts are less common at the federal level than in states and municipalities, in large part because the default rule under federal law requires that all gifts go to the general treasury.¹⁹⁷ (In other words, federal law prohibits donors from earmarking gifts for particular purposes.) But that prohibition is only a default; it can be superseded by more targeted statutes allowing particular agencies or actors to receive private gifts. For example, the Department of Justice has statutory authority to receive gifts,¹⁹⁸ as does the Federal Communications Commission¹⁹⁹ and the Library

¹⁹¹ See, e.g., Caroline Rampell, *A ‘Big Three’ Failure and U.S. Auto Making*, N.Y. TIMES (Nov. 19, 2008).

¹⁹² THE KRESGE FOUNDATION, GRANTS AWARDED, <http://kresge.org/grant/m-1-rail-0>.

¹⁹³ FORD FOUNDATION GRANTS DATABASE, <http://www.fordfoundation.org/work/our-grants/grants-database/grants-all?search=%26SearchText%3Dm-1&page=0&minyear=2013&maxyear=2016>. Other donors include Bank of American and the Hudson-Webber Foundation. See <http://m-1rail.com/about-m-1-rail/m-1-funders-partners/>.

¹⁹⁴ *Bloomberg Letter*, *supra* note 153.

¹⁹⁵ Press Release, *Bloomberg Philanthropies Expands Innovation Teams Program to Seven New Cities Across the Globe* (Jan. 12, 2017), <https://www.bloomberg.org/press/releases/innovation-teams-program-expands-seven-new-cities/>.

¹⁹⁶ *Id.*

¹⁹⁷ The Miscellaneous Receipts Act requires federal agencies to turn over any funds to the general treasury, 31 U.S.C. § 3302(b) (2016), and the Anti-Deficiency Act prohibits agencies from expending funds in excess of their legislative appropriations, 31 U.S.C. § 1341(a)(1)(A) (2016). Close cousins to gifts to the general treasury, the Bureau of Fiscal Service may accept gifts to reduce the national debt. Over the last decade, totals have ranged from \$2 to \$7 million. See <https://www.treasurydirect.gov/govt/reports/pd/gift/gift.htm>.

¹⁹⁸ 28 U.S.C. § 524(d) (2016).

¹⁹⁹ 47 U.S.C. § 154(g)(3) (2016).

of Congress.²⁰⁰ And some federal agencies have their own foundations devoted to raising private donations; examples include the Centers for Disease Control & Prevention, the Food and Drug Administration, and the National Air and Space Administration.²⁰¹

Even if the federal environment were more conducive to targeted gift-giving, we suspect that the majority of gifts would still be aimed at state and local governments. Not only do state and local governments have greater needs for funds (given the restrictions on revenue-raising described in the previous Part), but the smaller scale of local government creates more opportunities for gifts with meaningful impact. Perhaps not coincidentally, state and local law on gifts ranges from broadly permissive to silent, with only scattered restrictions.²⁰²

III. THE TROUBLE WITH GIFTS

Our account thus far has been positive rather than normative: we have sought to explain what patriotic philanthropy is and why it happens. The advantages of gifts should be obvious, and we will not belabor them. Without a doubt, gifts to government can do enormous good. But gifts are not as costless as they first might seem, and the rest of this Article is devoted to exploring their downsides. Our goal is not to condemn patriotic philanthropy; we are by no means abolitionists. Rather, our aim is to persuade the reader that gifts are not entirely benign, and in some cases may be downright bad. If we are right about that, it follows that far more attention is due the role of private money in the public sphere—including not only philanthropic donations but also for-profit investments.

Our critique of patriotic philanthropy is organized into three sets of objections. The first two

²⁰⁰ 2 U.S.C. § 156 (2016).

²⁰¹ Rick Cohen, *Philanthropy Funding Government Work? There's a Foundation for That—Several, Actually*, NONPROFIT QUARTERLY (Apr. 13, 2012), available at <http://nonprofitquarterly.org/2012/04/13/philanthropy-funding-government-work-theres-a-foundation-for-thatseveral-actually/>. The CIA also has a foundation, In-Q-Tel, but it is more of an investment arm than a source of philanthropic donations. See <https://www.iqt.org/about-iqt/> (“IQT is the non-profit strategic investor that accelerates the development and delivery of cutting-edge technologies to U.S. government agencies that keep our nation safe.”).

²⁰² To take just a few examples of gift authority at the state level, see CAL. WELF. & INST. CODE § 19007 (providing that, with the approval of the Director of Finance, the director of Rehabilitation may accept on behalf of the state gifts and donations “made to the department or to any school or other institution administered by the director or the department which in his judgment would be of benefit to the state and, if made to a school or other institution, would be of benefit to the school or other institution”); KAN. STAT. ANN. § 72-7518 (“The state board of education may receive and expend, or supervise the expenditure of, any donation, gift, grant or bequest made to the state board of education for furthering any phase of education.”); WASH. REC. CODE ANN. § 43.43.013 (providing that Washington State patrol can accept all gifts and donations, conditional or otherwise, to be held, used, and applied for the purpose of fulfilling its mission). For restrictions, see, e.g., Tex. Govt. Code Ann. § 472.114 (providing that certain semi-independent agencies cannot accept gifts from parties to enforcement actions or in order to pursue a specific investigation or enforcement action); TEX. FIN. CODE ANN. § 16.012 (same, for financial regulatory agencies). Note that it’s not unheard of for state law to change in response to promised gifts. Recently, for example, California changed its law so as to permit the Department of Health Care Services to accept private gifts, after a CA-based foundation pledged to spend a minimum of \$225 million to “support the successful implementation of the ACA in California.” The California Endowment, Press Release, *Department of Health Care Services and The California Endowment Announce \$23 Million in Grants to Boost County-Based Medi-Cal Enrollment Efforts*, available at <http://tcenews.calendow.org/releases/department-of-health-care-services-and-the-california-endowment-announce-23-million-in-grants-to-boost-county-based-medi-cal-enrollment-efforts>.

are procedural in nature and democratic in register; we call them the “benevolent dictator objection” and the “equality objection,” respectively. Simply put, gifts to government may undermine norms of collective self-government by enabling certain individuals—and not just any individuals, but especially wealthy ones—to exert outsized influence on public policy. The third objection focuses on the size and shape of government, highlighting the potential for gifts to create a “hollow state,” inflated beyond the capacity of the public fisc and ultimately perilously thin.

As we will explain, these objections do not apply with the same force to all gifts. Rather, each depends on a set of considerations that will vary from one donation to the next. And all of the objections stem from the idea that gifts *matter*—that they affect public processes and policies. Before outlining the objections, therefore, we begin by exploring the likely impact of gifts, both in the short term, as public officials assess offers and contemplate acceptance; and over the longer term, as officials make ongoing decisions about budgeting, priority-setting, and programming.

A. *The Almighty Dollar*

Gifts may create obligations, but they are not obligatory; no one *has* to accept a gift. A gift begins as an offer, and the intended recipient must decide whether to say thanks or no thanks. At first blush, then, one might imagine that patriotic philanthropy does nothing more than expand the range of possibilities available to government, while leaving the basic contours of public decisionmaking unchanged. On that view, the scales weighing the benefits of acceptance against the costs of refusal are essentially level—it is just as easy to say thanks as no thanks.

Public entities do sometimes decline gifts; we discuss one extraordinary example below. In many instances, however, it will be difficult for government to refuse a gift, especially when revenue is in short supply. Gifts look like *gifts*, and public officials may be hard-pressed to explain to their constituents why they have turned down free money. The debacle of the D.C. mayor’s mansion is a useful illustration:

The mayor of D.C. doesn’t have an official residence. In the early 2000s, then-mayor Anthony Williams rented an apartment in Foggy Bottom.²⁰³ (According to the Washington Post, the current mayor, Muriel Bowser, “shares a duplex wall with Colombian refugees.”²⁰⁴) To Betty Brown Casey, a Maryland philanthropist, this was a travesty; she thought the chief executive of the nation’s capital city deserved better digs. In 2001, without consulting Mayor Williams or any other city officials, Casey spent about \$16.5 million to purchase a secluded 16.5-acre spread on which she would build a mansion for the mayor. Factoring in the design and construction costs, and the creation of an endowment to fund maintenance of the house and property, Casey planned to spend upwards of \$50 million. Although Mayor Williams was not terribly excited about the gift, he reasoned that it would be “political malpractice” to refuse it. Prior to Casey’s gift, District officials had been contemplating other sites for a possible official residence, and a mayoral residence commission had been formed and charged with recommending a site. But Casey’s gift

²⁰³ Except where otherwise noted, the details of this and the next two paragraphs are drawn from Morton, *supra* note 18.

²⁰⁴ Aaron C. Davis, *The mayor of Washington shares a duplex wall with Colombian refugees*, WASH. POST (Aug. 8, 2015).

mooted the commission's work. When her chosen property came on the market, she made it clear to the city that her money would go to that property, or nothing. "It was not the mayor's decision," Casey's attorney later explained. "I believe the mayor would have preferred the property be located somewhere else in the city, because of the implication that the mayor was moving into a tony neighborhood. Mrs. Casey's decision, made free from politics, was focused on where was the best site. And it was her belief that it was the last great piece of property in Washington, D.C." D.C. Councilmember Phil Mendelson echoed the sentiment: "The thing that got me was that the site she chose was not one that any elected official in the District would have chosen. It was much too isolated. But the difference for us is that it's not polite to second-guess a \$50 million gift."

After accepting Mrs. Casey's pledge for the D.C. mayor's house, District officials then went through various contortions to make the plan work. For example, Casey decided that a 4-acre swath of largely unkempt federal parkland adjacent to the mansion site should be included as part of the mayor's property. She proposed trading the parkland for some waterfront land that Casey would buy in Georgetown. The federal Park Service was willing to accept the trade, but a group of local residents opposed it; they didn't buy District officials' claim that annexing the parkland was necessary in order to construct a second entranceway for the new mayoral residence. "We felt the justification that was given was not genuine," said one community member. "All of it was driven by absolute fear that [Casey's] impatience would lead her to withdraw," said another. The mayor did not exactly disagree: "I think it was the opinion of many people, not just inside government but outside, that this extra property wasn't really necessary," his spokesman reported.

Two years passed in rancorous debate over the fate of the parkland. Finally, in the spring of 2003, Casey told the Park Service and the District that she would withdraw her gift unless a deal was finalized within 60 days. Scrambling, District officials devised a new plan: The Park Service would transfer jurisdiction over the parkland to the city, which would then lease it to the foundation that had been created to oversee and maintain the would-be mansion. The D.C. Council approved the transfer in November. Nevertheless, in mid-December 2003, Casey pulled out of the deal, having decided to deed the property to the Salvation Army instead. "It just consumed a lot of time and energy of people at very high pay grades," said one disgruntled member of the D.C. Council. "All these people have better things to do with their time. This thing took on a life of its own." Said another: "She [Casey] has embarrassed the city, she has wasted a lot of people's time, and she has presented the community with development as a *fait accompli*."

The saga of the mayoral residence veers toward satire, but it highlights several features of gifts that contribute to their impact on public policy. To begin with, gifts may be difficult to refuse, even when they are for relatively low-priority initiatives. Public officials, no less than the rest of us, are familiar with maxims about looking gift horses in the mouth. As Councilman Mendelson put it, "it's not polite to second-guess" a large gift. Anxieties about (im)politeness—or "political suicide," in the mayor's words—likely reflect two overlapping concerns. First, officials may worry about the public-relations consequences of turning down what appears to be free money. Particularly at a time when many government units are struggling to make ends meet, news that officials have foregone an opportunity to pad the public coffers may not sit well with voters.

Second, and perhaps more significantly, officials may be concerned about the likely reactions

of donors and would-be donors. In many cases, the proffer of a gift is not an isolated event but one moment in an ongoing and potentially beneficial relationship. Today's gift, if handled well, may produce additional gifts down the road. Research suggests that "nonprofits have traditionally been averse to challenging their foundation funders . . . for fear of losing not only current funders but scaring off other foundations."²⁰⁵ If anything, the incentives are stronger for public officials, because the people who are capable of making large donations to government programs also are people who are likely to provide other kinds of political support, including campaign contributions and independent expenditures.²⁰⁶ The upshot, as journalist Bob Herbert suggested in an opinion piece bemoaning private influence on public education, is that "[w]hen a multibillionaire gets an idea . . . [about] matters of important public policy and the billionaire is willing to back it up with hard cash, public officials tend to reach for the money with one hand and their marching orders with the other."²⁰⁷

These dynamics not only help explain why governments accept private gifts; they also make sense of instances in which gifts are refused. For example, President Obama reportedly declined a jaw-droppingly large gift offered by casino magnate and GOP-booster Sheldon Adelson. Adelson's offer came shortly after Congress had approved additional appropriations for the Iron Dome system, a missile defense system funded jointly by the U.S. and Israel and used to protect Israel from incoming rockets. Adelson called Harry Reid, then-Senate Majority Leader, and offered to "personally finance \$1 billion for Iron Dome batteries, paid through the federal government, so committed was he to safeguarding the Jewish state."²⁰⁸ Reid, in turn, called the President to relay the offer. "Obama was thrown off his guard momentarily—'What?!' he asked Reid. When the president regained his footing, he told the leader to thank Adelson but that he didn't think private financing of munitions would set a good precedent"²⁰⁹

There are, of course, many reasons why the President would decline such an offer, including the one suggested in the quote above: private financing of weapons systems is a rather troubling prospect. Yet one wonders if the process would have looked *quite* the same if the politics were different. Adelson is a multi-billionaire and political "mega-donor"; he has spent record amounts on political campaigns.²¹⁰ None of that, however, has been to the benefit of Obama and his allies. On the contrary, Adelson's record-setting political spending—reportedly in the range of \$150 million dollars²¹¹—occurred in the 2012 election cycle, in an effort to unseat President Obama.²¹² Obama also had little reason to hope that Adelson would be forthcoming with additional gifts on

²⁰⁵ Cohen, *supra* note 129.

²⁰⁶ Goss, *supra* note 134, at 443 ("Donors also carry the promise of campaign cash, necessary to compete in the campaign finance arms race.").

²⁰⁷ Herbert, *supra* note 180.

²⁰⁸ Glenn Thrush, *Obama's Obama*, POLITICO (Jan/Feb 2016).

²⁰⁹ *Id.*

²¹⁰ Mike Allen, *Sheldon Adelson: Inside the mind of the mega-donor*, POLITICO (Sept. 23, 2012).

²¹¹ Theodor Meyer, *How Much Did Sheldon Adelson Really Spend on Campaign 2012?*, PROPUBLICA (Dec. 20, 2012), available at <https://www.propublica.org/article/how-much-did-sheldon-adelson-really-spend-on-campaign-2012>.

²¹² Allen, *supra* note 210.

initiatives closer to Obama’s own heart if the Iron Dome offer were accepted. That’s not to suggest that he declined the gift out of spite. Rather, the point is that the immediate financial costs of declining the gift were not, in this case, combined with a complicated and necessarily conjectural mix of political considerations.²¹³

The discussion so far has focused on initial offer and acceptance, but the power of gifts may extend well beyond the original bargain. Once the money is there—or promised—it starts exerting a force of its own. Through some unholy alchemy of political atmospherics and endowment effects, losing private funding may seem even worse than refusing a gift to begin with. Thus, the same incentives that push government officials to “reach for the money” may also encourage them to hold tightly to funding already secured—even if doing so means compromising other objectives.²¹⁴

We can see this latter dynamic at play in the story of the D.C. mayor’s mansion, as District officials found themselves embroiled in ongoing efforts to save a deal they never really wanted in the first place. Two additional examples illustrate different variations on the same theme.

Consider, first, the controversy over the “Fighting Sioux” nickname and logo long used by the University of North Dakota (UND). Critics charged that the nickname was a racial stereotype, and toward the end of the 1990s efforts began in the North Dakota legislature and at UND to eliminate it. Meanwhile, the University accepted a \$100 million gift from wealthy alumnus and former hockey player Ralph Engelstad.²¹⁵ The Engelstad money would pay for the construction of a new, eponymous, hockey arena—but it came with a catch. One of Engelstad’s conditions was that the University keep the Fighting Sioux name indefinitely. And, to ensure that removal of the logo would be inconveniently—if not prohibitively—expensive, he arranged for thousands of Fighting Sioux logos to be placed throughout the arena.²¹⁶

Matters came to a head in 2000, when University President Charles Kupchella, under pressure from various student and faculty groups to eliminate the nickname and logo, formed a Names Commission to study the name and suggest future courses of action. On December 20 of that year, Engelstad sent Kupchella a letter expressing his displeasure:

Dear Chuck:

I am sorry to have to write this letter, but as a businessman, I have no choice.

Commitments were made to me by others and yourself, regarding the Sioux logo and the Sioux slogan, before I started the arena and after it had been started.

These promises have not been kept, and I, as a businessman, cannot proceed while

²¹³ Similar explanations are available for gifts that are declined or returned under a cloud of scandal. See Paul Dunn, *When a Donor Becomes Tainted*, NONPROFIT QUARTERLY (Mar. 21, 2010).

²¹⁴ See, e.g., Landow & Ebdon, *supra* note 79, at 737-46 (describing how city leaders in Omaha, Nebraska, acceded to the demands of private donors who had funded a new convention center and arena and then used the threat of withdrawing private funding to gain continuing leverage in negotiations over related projects).

²¹⁵ *Engelstad Gives UND \$100 Million, Will Build New Hockey Arena* (Dec. 18, 1999), available at <http://www.uscho.com/1999/12/18/engelstad-gives-und-100-million-will-build-new-hockey-arena/>.

²¹⁶ Joe Barrett, *University Loses Sioux Mascot War*, WALL ST. JOURNAL (Apr. 10, 2010).

this cloud is still hanging above me. . . .

I understand that you are to make a decision sometime in the future, but I do not understand where one person gets the authority to make this kind of a decision on behalf of all alumni, students, the city of Grand Forks and the state of North Dakota.

. . .

Please be advised that if this logo and slogan are not approved by you no later than Friday, December 29, 2000, then you will leave me with no alternative to take the action which I think is necessary.

If the logo and slogan are not approved by the above-mentioned date, I will then write a letter on December 30, 2000, to all contractors and to everybody associated with the arena, canceling their construction contracts for the completion of the arena. . . . It would then be left up to you if you want to complete it, with money from wherever you may be able to find it. . . .

As I am sure you realize, the commitment I made to the university of North Dakota was, I believe, one of the 10 largest ever made to a school of higher education, but if it is not completed, I am sure it will be the number one building never brought to completion at a school of higher education, due to your changing the logo and the slogan. . . .

If I walk away and abandon the project, please be advised that we will shut off all temporary heat going to this building, and I am sure that nature, through its cold weather, will completely destroy any portion of the building through frost that you might be able to salvage. I surely hoped that it would never come to this, but I guess it has. . . .

Please do not consider this letter a threat in any manner, as it is not intended to be. It is only notification to you of exactly what I am going to do if you change this logo and this slogan.

In the event it is necessary to cancel the completion of the arena, I will then send notification to anyone who is interested, informing them of the same, and laying out to them all of the facts and all of the figures from all of the meetings that led me to make this decision. . . .

I might also add that while I was dictating this letter, I received a call from Dean Blais (UND's hockey coach), who is completely fed up, and he informed me that he is possibly going to tender his resignation if the logo and the slogan are changed.

Yours truly, Ralph Engelstad²¹⁷

Engelstad arranged for copies of the letter to be sent to the state Board of Higher Education. The next day, the Board voted unanimously to keep the nickname and a newly designed logo,

²¹⁷ A copy of the letter is available at <https://web.archive.org/web/20120206094004/http://www.und.edu/org/bridges/dearchuck.html>

featuring the profile of an American Indian with feathers and war paint.²¹⁸ But matters were far from over. The controversy continued for another decade and a half before being resolved by a statewide voter referendum, and finally—in 2015—a new name.²¹⁹

Our final example comes from the other end of the political spectrum, and dates back to the early twentieth century. As the previous section explained, states in the post-Reconstruction South struggled to fund their newly established public school systems. When public money became available, it was funneled into schools for White children.²²⁰ African-Americans, who had lost the right to vote thanks to disenfranchising legislation in most southern states, had little political recourse.²²¹ They found support, instead, from the philanthropic sector. Northern philanthropic organizations—most prominently the Rosenwald Fund—devoted substantial resources to establishing schools for Black children in the South. Though private dollars covered the initial outlays associated with building schools and getting them up and running, the schools were part of the state systems of public education, and the state eventually took over their maintenance.²²² Philanthropy therefore allowed southern African-Americans and their northern allies to achieve a result—state support for effective public schools—that would have been all but impossible if pursued through conventional political means. “The ‘gift’ . . . was a Trojan horse, allowing blacks to ‘sneak past’ the normal barriers erected to their political influence and use the state itself to help achieve their goals.”²²³

Together, these examples offer a sense of the gravitational pull that private money can exert on public policy. Not only does the proffer of a gift make the initial policy proposal more tempting—whether it is the construction of a mayor’s mansion, a new sports arena, or public schools. Gifts also can shape government behavior going forward, as officials bend to accommodate donors’ conditions or to prevent a lucrative deal from falling through. Importantly, those ongoing effects often will spill over into other policy spheres, as gifts draw money and other resources toward donor-supported initiatives and away from alternative uses.

Gifts, it turns out, are not entirely free. It is the rare gift that doesn’t require some effort and expenditure by the government, either at the outset (in the form of matching funds and the like),

²¹⁸ Dale Wetzel, *Engelstad vowed to pull arena funding if controversial Indian name dropped*, LAS VEGAS SUN (Jan. 15, 2011).

²¹⁹ See Andy Thomason, *The Long, Strange Demise of North Dakota’s ‘Fighting Sioux,’* CHRONICLE OF HIGHER ED. (Oct. 22, 2015).

²²⁰ Strong et al., *supra* note 149, at 663.

²²¹ See *id.* at 659 (“Many scholars attribute the vast increase in racial inequality in education in the American South in the early twentieth century to blacks’ loss of the vote” (citing sources)).

²²² *Id.* at 672-75.

²²³ *Id.* at 662. Strong et al. call this strategy “leveraging the state”: “Instead of relying on state decisionmakers to use public funds to provide a service, the aggrieved community first established the service themselves, in whole or in part, and used this as leverage to engage the state in increased and sustained support.” *Id.* They note that this strategy “has been all but ignored in the literature on policy development.” *Id.* at 660.

or down the line when the gift runs out.²²⁴ More fundamentally, every gift creates indebtedness, which can be leveraged into influence. Indeed, such influence lies at the very heart of today’s “philanthrocapitalism,” which—as described in the previous Part—features donors as hands-on supervisors of the projects they fund. Influence is not necessarily a bad thing, of course; it need not be sinister. But the question remains whether this particular form of influence is good for our democracy. The remainder of this Part takes up that question.

B. Objections

1. The Benevolent Dictator Objection

In a world marked by widespread disagreement about the public good, process matters. American democracy is built around the idea that decisions that affect the collective ought to be determined by the collective, typically via representatives who are authorized to act on behalf of citizens and accountable to those citizens in some meaningful way. These features of our democracy—the need for collective action and for citizens to govern through their representatives—make it difficult for any one individual (even an exceptionally wealthy one) to prescribe public policy outcomes on her own. As Part II explained, the consequence is that conventional forms of political influence are inefficient from the individual perspective. From the systemic perspective, however, that inefficiency is a feature, not a bug: it is inherent in the notion of *collective* self-government.

The democratic vision is hard to square with that of a wealthy benefactor who decides, by his or her own lights, what is good for public policy, and then uses a targeted donation to purchase that policy from government. We will call this the “benevolent dictator” objection to patriotic philanthropy. Our use of the word “benevolent” is intentional, because gifts will often be used to underwrite valuable policies—policies we, as citizens, would endorse. This objection is not about substance, but procedure. It is about the risk that gifts will circumvent or skew the normal processes of democratic decisionmaking.

Baltimore’s privately financed aerial surveillance program, described in the Introduction, illustrates the potential for circumvention. The Arnolds’ gift allowed the city to forego review by the Board of Estimates, which consists of the Mayor, the President of the City Council, the Comptroller, the City Solicitor, and the Director of Public Works,²²⁵ and which must approve any taxpayer-funded financial transactions over \$25,000.²²⁶ Board of Estimates meetings are open to the public, and minutes of the meetings are available online.²²⁷ Thus, eschewing the requirement of Board approval not only shifted decisionmaking power from the Board to the police department—allowing certain officials to make unilateral decisions where collective action is

²²⁴ As we saw in Part I, it can be particularly difficult for state and local governments to cobble together public funds to cover high up-front costs such as capital expenditures; ongoing annual maintenance is easier to absorb via taxes and other regular sources of revenue. “Easier,” however, is not the same as “free.”

²²⁵ <http://comptroller.baltimorecity.gov/boe>. The Mayor, Comptroller, and City Council President are elected officials. <http://boe.baltimorecity.gov/boe-officials>

²²⁶ Fenton & Donovan, *supra* note 10.

²²⁷ <http://comptroller.baltimorecity.gov/boe/meetings>

usually required—but also made it possible for the surveillance program to remain secret.

Even if the formal decisionmaking structures are unchanged (i.e., gifts are run through the normal procedures for appropriations), the lure of seemingly free money may skew the way public officials view proposals. As the previous section explained, gifts may be difficult to turn down, and donor-supported projects may be difficult to abandon. At the very least, policy proposals that come with their own readymade funding sources—requiring reduced or delayed public outlays—will be more attractive to policymakers than initiatives that must be fully funded from the public fisc. And, going forward, sunk costs and reliance interests are likely to bias public decisionmaking in favor of maintaining programs already in effect—even if the private money runs out.

These points are well-known in the literature on intergovernmental grants, described in Part I.²²⁸ But such grants are different from private gifts in at least one critical respect. To the extent that federal grants skew state policy or spending (for example), the influence does not come from outside the political process—state voters are federal voters, too.²²⁹ Intergovernmental grants move agenda-setting authority from one government unit to another. Gifts, by contrast, outsource agenda-setting to private actors.

As is true of the other objections described in this Part, the weight of the benevolent-dictator objection will vary with context. First, it matters how much influence the donor exercises over policy- and agenda-setting. The objection is muted, for example, when gifts are solicited by government to support government-initiated programs rather than offered up by donors to support their own ideas about the public good.²³⁰ Competitive grants, like Bloomberg Philanthropies' Innovation Team program and Mayors' Challenge, may be less worrisome in this regard.²³¹ Recipient cities define their own priorities and articulate their own plans; the funders decide which plans are most deserving. To be sure, such funding decisions are contestable and value-laden—the philanthropic role is by no means neutral—but the power of agenda-setting remains with the public sector.

Relatedly, gifts may be more or less specific, and the benevolent-dictator objection more or less strong as a result. The donor who gives a large gift to a school district's local education fund is affecting public education—her gift has a direct impact on the level of funding available for a particular school district—but decisions about how to allocate the funds will still be made in the conventional manner. The donor who earmarks her gift for a particular type of programming, by

²²⁸ See *supra* Part I.B.

²²⁹ Cf. Brian Knight, *Endogenous Federal Grants and Crowd-Out of State Government Spending: Theory and Evidence from the Federal Highway Program*, 92 AM. ECON. REV. 71, 72 (2002) (advancing an “endogenous grants” hypothesis whereby both federal grants and state government spending are determined through a political process and . . . grant receipts, the outcome of a bargaining game at the federal level, may reflect underlying constituent preferences through their elected representatives”).

²³⁰ We might worry about government-solicited gifts for a different reason, associated with fears of extortion or something close to it. See, e.g., *supra* note 147 (describing Florida Governor's demands for donations from BP); cf. Federal Communications Commission Record FCC 94-177 (prohibiting the Commission from soliciting gifts from regulated entities).

²³¹ See *supra* notes ___-___ and accompanying text (describing the Innovation Team program); *Bloomberg Letter*, *supra* note 153 (describing the Mayors' Challenge).

contrast, is playing a far more active role in educational policy-setting.

Finally, it matters a great deal what sort of procedures are used to assess gifts. Circumvention is different from skew, and not all gifts will hold the same attractive power. In some cases, moreover, gifts may change the decisionmaking process—transferring control from one body to another, for example—in ways that seem worthy of celebration rather than concern.

Once again, Detroit offers a useful illustration. The philanthropic interventions into Detroit’s governance described in previous Parts—the M-1 rail and the Grand Bargain to save the Arts Institute—are small fry compared to the Detroit Future City Strategic Framework. As the name suggests, the Framework is a comprehensive blueprint for “[t]ransforming the [c]ity and its [n]eighborhoods,” focusing on areas of “economic growth,” “land use,” “city systems,” “neighborhoods,” “land and building assets,” and “civic capacity.”²³² The project was launched in the wake of Mayor Dave Bing’s ill-fated plan to shrink Detroit by one third, moving homes and businesses from sparsely populated parts of the city to higher-density neighborhoods so as to streamline service delivery.²³³ (Bing was the successor to Kwame Kilpatrick.) Not surprisingly, the Mayor’s plan met with “roaring public backlash,”²³⁴ both on substance and in reaction to the opaque and seemingly top-down nature of the planning process. The Future City project emerged as an alternative, and though its long-term steering committee initially was formed by Mayor Bing, it is now managed by the Detroit Economic Growth Corporation, a non-profit supported by private donations. Philanthropists played a significant role in spearheading the Future City initiative, as well as funding it.²³⁵ The Kresge Foundation alone pledged \$150 million to support the Framework,²³⁶ and six other philanthropies—Ford Foundation, W.K. Kellogg Foundation, John S. and James L. Knight Foundation, Hudson Webber Foundation and the Community Foundation for Southeast Michigan—have been intimately involved in both planning and funding.²³⁷

The Future City initiative moved the city-planning conversation outside of City Hall, deemphasizing the role of elected officials in favor of “technical” and “community” experts.²³⁸

²³² <https://detroitfuturecity.com/framework/>.

²³³ See David Sands, *Kresge Foundation Pledges \$150 Million To Implement Detroit Future City Framework*, HUFFINGTON POST (Jan. 9, 2013), available at http://www.huffingtonpost.com/2013/01/09/kresge-foundation-150-million-detroit-future-city_n_2440887.html; see also Anna Clark, *Detroit Works’ Long-Term Strategic Vision for Motor City*, ARCHITECT MAGAZINE (Nov. 27, 2012) (“The project’s initial launch was inept and acrimonious, with Mayor Bing telling a reporter, “We will depopulate some neighborhoods.” The comment confirmed residents’ fears that the real plan was to force them out of their homes.”).

²³⁴ Anna Clark, *Dave Bing’s Detroit*, THE AMERICAN PROSPECT (Oct. 2, 2013), available at <http://prospect.org/article/dave-bing’s-detroit>.

²³⁵ See Clark, *supra* note __ (noting that the planning process was “resuscitated largely because of the efforts of the Kresge Foundation”); Bill McGraw, *Redesigning Detroit: Mayor Mike Duggan’s blueprint unveiled*, BRIDGE MAGAZINE (Aug. 18, 2015), available at http://www.mlive.com/news/detroit/index.ssf/2015/08/redesigning_detroit_the_mayors.html (describing Kresge’s role in Future City).

²³⁶ See Sands, *supra* note 233.

²³⁷ See Mathew Dolan, *Revival Bid Pits Detroit vs. Donor*, WALL ST. JOURNAL (July 2, 2011) (reporting that foundations “are now on track to spend more than \$1 billion over seven years on a range of urban-renewal projects”).

²³⁸ <https://detroitfuturecity.com/framework/>

Yet the resulting process was, if anything, more inclusive than the Mayor’s initial plan would have been. The Framework, in the words of its stewards, “is grounded in robust community engagement that included hundreds of meetings and 30,000 conversations and 163,000 touchpoints and . . . more than 70,000 surveyed responses and comments from participants.”²³⁹ Reasonable minds may differ on whether the normative criteria for public policymaking should focus on the level of citizen participation and engagement, or on the presence or absence of formal democratic structures of accountability and authorization, such as elections. One thing is clear, however: Kresge and the other foundations are not simply handing over their money to fill the coffers of the Detroit city government; they are *changing* the city’s governance in important ways. The results may well be desirable; they may even be “democratic.” But the argument for democratic legitimacy must grapple with difficult questions concerning the “privatization of political representation,” including whether and under what circumstances philanthropists, nonprofits, and other private policy entrepreneurs can function effectively as “nonelected [community] representatives.”²⁴⁰

2. The Equality Objection

A second objection to patriotic philanthropy sounds in equality. To the extent that gifts shape government policy, donors are able to exert a form of influence that is not available to all, or even most, citizens. In this sense, gifts—like other forms of financial influence—undermine norms of equal political citizenship.²⁴¹

The equality objection builds on the concerns sketched above. One might object to a benevolent dictator chosen at random. One might object *more* to a benevolent dictator chosen according to wealth. In the latter case, one might worry not only about inequality of inputs—because most citizens will not be eligible to play this role—but also about inequality of outputs. Wealthy benefactors might use gifts to support policies that benefit everyone equally or that focus on the needs of the less fortunate, but then again they might not. Instead, private donations might focus on initiatives that serve the interests of the donors themselves—e.g., more amenities for tony neighborhoods.²⁴²

Redistributive concerns are central, for example, in debates over private funding for public

²³⁹ <https://detroitfuturecity.com/framework/framework-faq/>; see also David Sands, *Detroit Works Longterm Planning Calls On Residents To Help Shape Strategic Plan*, HUFFINGTON POST (Apr. 4, 2012), available at http://www.huffingtonpost.com/2012/04/04/detroit-works-longterm-planning_n_1401448.html (describing plans for “community conversations”).

²⁴⁰ Jeremy Levine, *The Privatization of Political Representation: Community-Based Organizations as Nonelected Neighborhood Representatives* (unpublished ms on file with authors).

²⁴¹ Cf. ZELENAK, *supra* note 36, at 19 (noting that “[t]he widespread [tax] filing requirement promotes the goal of political equality (under which ‘all individuals . . . have access to the political process’ and ‘large disparities in political influence are disfavored’), by recognizing and formalizing the status of each tax return filer as a taxpayer—whether her tax liability happens to be \$1 or \$1 million” (quoting Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1567 (1988))).

²⁴² Private donations for public parks are one example. See, e.g., Gazley, *supra* note 150 (“A wealthy donor is more likely to support the park in her neighborhood than she is the pocket park across town.”); Kleiman, *supra* note 160 (“Donors tend to support parks in high-profile locations.”).

school systems. Most states (many of them prompted by litigation) have taken pains to equalize funding for public schools statewide, so that property-rich districts do not enjoy vastly better schools than districts in poorer neighborhoods.²⁴³ In some states, state-level funding caps preclude municipalities from raising their own taxes so as to increase the public resources available to local schools.²⁴⁴ Yet the same states permit local school districts to accept unlimited *voluntary* private donations.²⁴⁵ Meanwhile, as one would expect, the available evidence suggests that private donations to public schools tend to be concentrated in wealthy districts—thereby exacerbating the inequalities that equalization litigation and legislation seek to address.²⁴⁶

Again, concerns about equality will not apply uniformly to all gifts. Consider, first, concerns about equality of inputs. Such concerns turn, at least in part, on the size and source of the relevant gift. A huge gift from a single donor, such as Sheldon Adelson’s proposal to spend \$1 billion in support of the Iron Dome, provokes a unique set of anxieties. Indeed, one reason why gifts of *money* might be particularly worrisome—more so, that is, than in-kind gifts of labor and the like—is that it is possible for one person to accumulate far more money than, say, spare time. Sheldon Adelson has finite time and energy. His \$21 billion fortune technically is finite too, but its enormity allows him to make waves that the rest of us could not possibly match, even if we pooled our resources.

Contrast a series of small gifts from diverse sources—something like a crowdsourcing approach to patriotic philanthropy. There are good reasons to doubt that collective private financing of public goods will materialize repeatedly or reliably,²⁴⁷ but broad-based donations do happen from time to time. For example, in the wake of the terrorist attacks of 9/11, many taxpayers

²⁴³ Property taxes account for 81% of local funding for public education, or 37% of total funding (when state and federal funds are added to the mix). U.S. Dept. Educ., Nat’l Center Educ. Statistics, *Table 235.10*, DIG. EDUC. STAT. (August 2015), https://nces.ed.gov/programs/digest/d16/tables/dt16_235.20.asp?current=yes. States have been battling for many years to “weaken the link between local property wealth and school spending.” Therese J. McGuire et al., *Local Funding of Schools: The Property Tax and Its Alternatives*, in HANDBOOK OF RESEARCH IN EDUCATION FINANCE AND POLICY 376, 380 (Helen F. Ladd & Margaret E. Goertz, eds., 2d ed. 2015). As of 2014, forty-five states had faced school-funding litigation aimed at (among other things) equalizing funding for school districts statewide. *Id.* at 355, 367.

²⁴⁴ See *Petrella v. Brownback*, 787 F.3d 1242 (10th Cir. 2015) (rejecting parents’ challenge to state law prohibiting localities from increasing their tax contributions to local schools above a statewide cap).

²⁴⁵ See *id.* (noting that parents are free to make voluntary donations to public schools); Abigail Frisch, *Note, The Grass is Greener on the Other Side: How Private Donations to Public Schools Play into Fair Funding*, 67 DUKE L.J. ___ (forthcoming 2017) (ms. at 28 & Tbl. 1) (canvassing state legislation on private funding for public education and reporting that “most states have broadly authorized private donations to public schools” and that “there is not any state-level legislation addressing how private donations . . . might implicate fair funding”).

²⁴⁶ See Nelson & Gazley, *supra* note 172, at [ms. at 25] (finding “no evidence that voluntary contributions offset reductions in the public financing of public schools” but rather that “voluntary contributions . . . serve to enhance spending in school districts that already receive significantly larger per-pupil revenues”); Reich *Equality*, *supra* note 14, at 27 (studying California LEFs and finding that “[s]uburban schools enjoy a massive fund raising advantage over urban schools, and the top performing suburban districts in private fund raising have an exponential advantage”); Rob Reich *Not Very Giving*, N.Y. TIMES (Sept. 5, 2013), at A25 (“Private giving to public schools widens the gap between rich and poor. It exacerbates inequalities in funding.”).

²⁴⁷ See, e.g., Ian Ayers, *Voluntary Taxation and Beyond: The Promise of Social-Contracting Voting Mechanisms* (unpublished ms. on file with authors, at 3) (describing how free-riding can impede collective private financing for public goods, and various mechanisms scholars have proposed as curatives (citing sources)).

sent small gifts to the federal government intended to support the war effort. One letter read, “[w]e feel [this money] is now needed to fight the enemy that has ruthlessly taken mothers, fathers and children from us. Use the money wisely in this difficult endeavor and let’s send a clear message to those who seek to take away our freedom: We are one Nation under God. You can destroy our buildings but you will never destroy our spirit! Semper Fidelis!”²⁴⁸ In another case, people from all over the country sent modest donations to help defray the costs of prosecuting Susan Smith for the murder of her two young sons after media reports suggested that the relevant county might not be able to afford a death penalty prosecution.²⁴⁹ Such gifts may be problematic for various reasons, but inequality of inputs is unlikely to rank high on that list.

As for equality of outputs, concerns will turn, first and foremost, on the redistributive impacts of gifts. Research on philanthropic giving suggests that a relatively small segment of private donations is redistributive in purpose or effect.²⁵⁰ That research is not focused on gifts to government, however, and it’s possible that patriotic philanthropy will—on the whole—tend to be more redistributive than philanthropy directed at private causes. If nothing else, gifts to government will not be dominated by donations to religion, which account for the overwhelming majority of charitable gifts by individuals and drive down the percentage of such gifts that register as redistributive.²⁵¹ And, perhaps, patriotic philanthropy will tend to be more widely beneficial simply by virtue of supporting *public* programs. Even if sited in an exclusive neighborhood, for example, a public park is still open to the public.

Somewhat less obviously, the force of the equality objection also might depend on the link between a given gift and the donor’s own self-interest. Some theorists question whether *any* giving is truly altruistic, or whether all philanthropy can be explained by the benefits—the “warm glow,” for example—it imparts to donors.²⁵² We have something more prosaic in mind here. Some gifts benefit donors in immediate, tangible ways. For example, in July 2008, the Cherokee Nation announced that it was donating millions of dollars to help fund a highway expansion project just

²⁴⁸ Brendan Minter, *To Uncle Sam With Love*, WALL ST. JOURNAL (Apr. 15, 2002), available at <http://online.wsj.com/news/articles/SB122694694812234207>.

²⁴⁹ Rebecca A. Pinto, *Note, The Public Interest and Private Financing of Criminal Prosecutions*, 77 WASH. U. L.Q. 1343, 1346 n.11 (1999).

²⁵⁰ See, e.g., Reich *Equality*, *supra* note 14, at 18-19 (expressing skepticism about the redistributive impacts of philanthropic giving by individuals and foundations, and citing studies); Julian Wolpert, *The Redistributive Effects of America’s Private Foundations*, in PHILANTHROPIC FOUNDATIONS AND LEGITIMACY: U.S. AND EUROPEAN PERSPECTIVES (Kenneth Prewitt et al., eds. 2005) (concluding that foundation giving is, at best, “modestly redistributive”). A somewhat different concern is that gifts may be targeted at sentimental or splashy projects, ignoring more pressing areas of need. Cf. concern that gifts may tend to be for warm and fuzzy stuff that may not be the most important. Renee A. Irvin & Patrick Carr, *The Role of Philanthropy in Local Government Finance*, PUBLIC BUDGETING AND FINANCE, at 38 (Fall 2005) (“It would be presumptuous to speak for the tastes of donors, but the probability of a donor experiencing much warm glow from donating to a sewage treatment plant upgrade or new software for the accounting department is low.”).

²⁵¹ Reich *Equality*, *supra* note 14, at 17-18.

²⁵² See, e.g., James Andreoni, *Impure Altruism and Donations to Public Goods: A Theory of Warm-Glow Giving*, 100 ECON. J. 464 (1990).

outside of Tulsa, Oklahoma.²⁵³ The project, which broke ground the next summer,²⁵⁴ aimed to reduce rush-hour gridlock on the portion of Interstate 44 that passes through the Tulsa suburb of Catoosa.²⁵⁵ Perhaps not coincidentally, when the tribe announced the donation, it was in the midst of a major, \$150 million expansion of Cherokee Nation Entertainment’s newly branded Hard Rock Hotel and Casino, which was located along the very stretch of interstate to be improved.²⁵⁶ The tribe’s donations ultimately accounted for nearly \$12 million of the \$45 million price tag, and appeared to have played a significant role in getting the project underway.²⁵⁷ The director of the Oklahoma Department of Transportation later told reporters that “[t]his project, I can assure you, would [otherwise] have been put way on the back burner because we could never gather enough money to do the project to get it done.”²⁵⁸

Such gifts might trigger a particular kind of equality objection—a sense that it is unfair for well-heeled individuals or groups to leverage public policy, or public facilities, for personal gain. Gifts that come with naming rights—such as Ralph Engelstad’s financing for the UND hockey arena colloquially known as “the Ralph”²⁵⁹—might raise a more modest variation on that theme, whereas gifts like the Rosenwald Fund’s donations to support Black schoolchildren in the South would seem largely unobjectionable from the equality perspective.²⁶⁰

3. The Hollow State Objection

Students of philanthropy long have struggled to identify the relationship between philanthropy and the state. On one view, philanthropy competes with the state in the provision of public goods; at the extreme, it replaces the state.²⁶¹ For those who think that the private and non-profit sectors are likely to be more effective than government, that is a happy result. For others, it suggests both an abdication of the government’s obligations to its citizens and a worrisome shift away from democratic principles.²⁶² From the latter perspective, gifts to government may seem like a move in the right direction. Gifts expand the capacity of government; they enable government to

²⁵³ *Cherokee Nation Gives to Road Project*, INDIAN COUNTRY (July 22, 2008), <http://indiancountrytodaymedianetwork.com/2008/07/22/cherokee-nation-gives-road-project-93289>.

²⁵⁴ *Cherokee Nation and ODOT Officially Break Ground on I-44 Widening Project*, CHEROKEE NATION (Aug. 08, 2009), <http://www.cherokee.org/News/Stories/24035.aspx>.

²⁵⁵ *Cherokee Nation Gives to Road Project*, INDIAN COUNTRY (July 22, 2008), <http://indiancountrytodaymedianetwork.com/2008/07/22/cherokee-nation-gives-road-project-93289>.

²⁵⁶ *Cherokee Nation Gives to Road Project*, INDIAN COUNTRY (July 22, 2008), <http://indiancountrytodaymedianetwork.com/2008/07/22/cherokee-nation-gives-road-project-93289>.

²⁵⁷ *Cherokee Nation and ODOT Officially Break Ground on I-44 Widening Project*, CHEROKEE NATION (Aug. 08, 2009), <http://www.cherokee.org/News/Stories/24035.aspx>.

²⁵⁸ *Cherokee Nation Gives to Road Project*, INDIAN COUNTRY (July 22, 2008), <http://indiancountrytodaymedianetwork.com/2008/07/22/cherokee-nation-gives-road-project-93289>.

²⁵⁹ <http://www.theralph.com>.

²⁶⁰ See *supra* notes ___ and accompanying text. But cf. Kumashiro, *supra* note 127 (suggesting that philanthropic giving for Black schools “reinforced segregated and differentiated learning”).

²⁶¹ See generally Dennis R. Young, *Complementary, Supplementary, or Adversarial? A Theoretical and Historical Examination of Nonprofit-Government Relations in the United States*, in GOVERNMENT AND NONPROFIT ORGANIZATIONS: THE CHALLENGES OF CIVIL SOCIETY (E.T. Boris & C.E. Steurele, eds. 1999).

²⁶² See *supra* notes ___ and accompanying text.

discharge its various obligations.

There are at least two problems with this perspective on gifts. The first is the obvious objection to big government: Expanding the reach of government is not necessarily a good thing. If there is not political will to pay for a given initiative out of public funds—to do it the hard way, as it were—perhaps it should not be done at all. This objection might have particular force in states and localities that have adopted legal restrictions on taxes and debt. Such restrictions are a sort of Ulysses pact, a way of tying government to the mast so that it cannot (without significant difficulty, at least) succumb to the temptation of attractive but costly policies. But they are also limitations on the size of government²⁶³—limitations that gifts evade.

The big-government objection is worthy of attention, but we're more interested in the other side of the coin: Gifts may *shrink* the state in the long term by hiding the government's inadequacies and/or reducing the public's appetite for taxes. To see the problem, it helps to consider patriotic philanthropy in comparison to more conventional forms of private philanthropy. Philanthropy's critics worry that citizens will be less willing to fund valuable redistributive policies as taxpayers if they get used to the idea that the social safety net will be propped up by private donors. A related critique is that private philanthropy absolves government of responsibility for needed services.²⁶⁴ At first blush, those arguments might seem inapplicable to gifts to government, because the government still is providing the service in question. Yet, depending on the particular arrangement, the government's role may be nominal at best. That is, services that *appear* to be publicly funded and delivered may in fact be handled primarily by the philanthropic sector.

The upshot is something of a Catch-22 for patriotic philanthropy. If the private role is transparent, it triggers familiar concerns about philanthropy supplanting the role of the state.²⁶⁵ But if the private role is hidden from view, a different set of worries comes to the fore. Citizens might believe that public monies are sufficient to cover services that, in fact, government lacks capacity to provide. And the delusion that government is capable of paying for the various public goods it appears to supply might, in turn, affect citizens' perceptions of taxes and their preferences for public policy. Some citizens might think (mistakenly) that government is doing too much and want to roll back programs or reduce taxes. Others, buoyed by an inflated sense of the buying power of their taxes, may push for public services that they would not support if they knew the real cost.

As this discussion suggests, the "hollow state" objection turns, in large part, on the visibility

²⁶³ See BRIFFAULT & REYNOLDS, *supra* note 32, at 700-701 (describing state limitations on both taxes and overall revenues). Michigan's Headlee Amendment, for example, both limits local taxes and establishes a state revenue limit (based on a ratio to personal income in the state). *Id.* at 701.

²⁶⁴ See *supra* Part II.B.

²⁶⁵ Cf. Dolan, *supra* note 237 (quoting Baltimore mayor complaining about perceptions of the role played by the Kresge Foundation in Detroit's revitalization: "Everyone talks about Kresge, Kresge, Kresge," the mayor said in an interview. "We're pleased with the support we're getting from them, but . . . Kresge is not doing this in a vacuum by themselves.").

and transparency of gifts to government.²⁶⁶ Transparency is not a panacea—it creates its own problems of perception, described above—but at least it is honest. If government cannot muster public funds to pay for public policy, we think citizens should know about it. And, perhaps, the public should feel it. It least in some circumstances, it might be useful for the people to experience the consequences of inadequate public resources—to live with that crack in the Washington Monument, for example—so that we can decide, collectively, whether the problem is worth solving. Gifts allow us to avoid those unpleasant consequences in the short term.²⁶⁷ But, like using a Band-Aid to cover a serious wound, we should recognize that resorting to a temporary fix could make things worse in the long term.²⁶⁸

The force of the objection also depends on the scale of private giving. A few gifts here and there are unlikely to bias public perceptions about the capacity of government, or to cause government to develop a dependency on private largesse. Though it is difficult to specify the scale of patriotic philanthropy today, it is unlikely that private giving currently is voluminous enough to pose a clear and present danger to government capacity.

Nevertheless, we think it would be a mistake to ignore the risks sketched here. As Part II explained, there is good reason to believe that gifts to government will continue to expand. Perhaps more importantly, gifts are only one way that private entities finance the modern state. Most private financing for government (including the P3 arrangements described in Part I) takes the form of for-profit investment, and such investments also appear to be proliferating.²⁶⁹ Gifts and investments differ in various ways, but they share a common core: both reflect—and reinforce—the notion that public revenues are insufficient to satisfy the public’s needs.

Zooming out still further, gifts must be considered alongside broader trends toward privatization. Government increasingly outsources public work, relying on private contractors to perform jobs and deliver services that would otherwise be accomplished by government employees. There is a vast literature on privatization, much of it critical. But that literature rarely acknowledges the link between private *performance* of government functions and private *financing* of those same functions—whether via gifts or public-private partnerships and other forms of investment. Although gifts and partnerships sound nice, the environment, considered as a whole, raises fundamental questions about the nature of government. If private actors are financing government programs, and private actors are then doing the work to advance those

²⁶⁶ Some government entities have adopted rules to address this concern. *See, e.g.*, <https://www.fcc.gov/news-events/blog/2010/02/18/fcc-ethics-program> (describing FCC ethics rule requiring that any gifts to the agency must be listed in a semi-annual report to Congress and available for public review upon request).

²⁶⁷ To be sure, sometimes a short-term fix will be imperative. For example, the people of Flint, Michigan, needed safe drinking water, regardless of who was paying for it. *See, e.g.*, Jiquanda Johnson, *Statewide donations of clean water pour in for Flint students, residents*, available at http://www.mlive.com/news/flint/index.ssf/2015/10/post_444.html. In other cases, however, the calculation will not be so clear.

²⁶⁸ As Angela Eikenberry has noted, “what is given by donors is fragmented and typically short-term in nature. Several scholars have warned against a heavy reliance on philanthropy to improve social conditions because it will never be sufficient to make up for government cutbacks or be adequately distributed to those most in need.” Eikenberry, *supra* note 142 (citing sources).

²⁶⁹ *See supra* Part I.E.

programs, one wonders what—exactly—is left of the state.

C. Implications

American representative democracy envisions a government elected by the people that sets public priorities in the public interest. That vision assumes a working electoral process where political participation is consequential, for it is ratification through the political process that legitimates policy outputs as *public* outputs. Not surprisingly, therefore, commentators and policymakers have paid close attention to laws and practices that undermine or unbalance political participation. Scholars have focused, for example, on laws that deprive individuals of the right to vote, that configure electoral structures so as to minimize the effects of political participation, or that facilitate political entrenchment and the like.

In short, the lesson of modern democratic theory is that the democratic process matters. Obsessing over it is not fetishizing, but reflects the conviction that a robust political process is the best way of ensuring that decisions about public policy are made in the interest of the public. A well-functioning electoral process is, in this sense, a fundamental aspect of individual liberty.²⁷⁰

Consider in this vein the debate about constitutionality of laws regulating campaign financing, which generally has focused on whether elected officials are capable of acting in the public interest when they depend upon private funders to finance their campaigns. One side of the debate is animated by the central concern that private campaign financing distorts or corrupts public priorities by inducing political candidates to deliver goods to private interests in exchange for much-needed campaign support.²⁷¹ Instead of being dependent upon the people and working to advance the public interest, public officials become dependent upon private funders and pursue sectional interests.²⁷² The other side of the debate is concerned with the fact that contributions, expenditures, and lobbying are necessary devices for getting one's preferences ratified through the political process. Thus, both sides of the campaign finance debate understand the importance of the political process to legitimating democratic outcomes. Both sides are making arguments about the distortion of public policy—those in favor of campaign finance reform argue that private money induces political actors to bend policy away from the public interest and in favor of private interests, while those in favor of private money argue that it is impossible for government to act in the public interest if members of the public cannot spend money to inform political actors of their preferences.

Similar considerations animate laws governing gifts to government officials. Federal and state law prohibit most such gifts. Gifts from private entities are subject to gift bans, which vary in stringency from one jurisdiction to the next; some states, for example, have zero-tolerance or “no

²⁷⁰ See e.g., DON HERZOG, HAPPY SLAVES.

²⁷¹ Samuel Issacharoff, *On Political Corruption*, 124 HARV. L. REV. 118, 128-29 (“[A]n outputs focus on the effects on public policy looks to alterations in the use of public office resulting from the incentive structures of the electoral process”).

²⁷² LESSIG, *supra* note ____.

cup of coffee” rules regarding gifts.²⁷³ Meanwhile, gifts from public entities may run into limitations such as those in the Constitution’s Emoluments Clause, which prohibits federal officers from accepting “present[s]” or “[e]molument[s]” “from any King, Prince, or foreign State.”²⁷⁴

The purpose of gift bans is not difficult to discern. Like the prohibitions on bribery described in Part II, restrictions on gifts protect the integrity of the democratic process. Such restrictions, together with other rules policing conflicts of interest, “reflect a commitment to a government that operates in the interests of the general public, as defined by independent and impartial officials, rather than in the interests of private persons, or at the direction of persons with private benefit or gain in mind.”²⁷⁵

Patriotic philanthropy triggers similar anxieties about private giving distorting public priorities. Gifts *to government* are not covered by regulations on gifts to government *officials*; public officials do not get to deposit patriotic philanthropists’ checks in their personal accounts. Nevertheless, as we have sought to show in this Part, donations targeted at particular initiatives may at best bias public decisionmaking in favor of those initiatives, and at worst allow particular government officials to circumvent the normal processes of collective deliberation.

What this suggests is that our current debates about campaign finance, conflicts of interest, and the like, are too narrow: They are missing an analogous, and arguably even more subversive, threat to the political process. That threat is not necessarily limited to outright gifts, but extends to other forms of private financing for public programs.

Thinking about private financing as a form of influence, in turn, suggests a still deeper point about democratic theory. Modern democratic theory and practice tend to assume that the government will be financed by “public” money, such as the taxes, fees, and intergovernmental grants described in Part I.²⁷⁶ But, as we have seen in the examples throughout that Article, that assumption is belied by the fiscal realities of the modern state.

The increasingly common refrain that government needs help from the private and philanthropic sectors in order to satisfy its obligations to the public hints at a gaping hole in existing theory. We, as a society, lack a coherent account of the relationship between how the government is financed and the government’s legitimacy. Does it matter for the legitimacy of representative democracy that the government is broadly financed by its citizens? Is “public” financing like voting, which modern democratic theory expects—both as a matter of the citizen’s standing and

²⁷³ National Conference of State Legislatures, *Gift Restrictions*, available at <http://www.ncsl.org/research/ethics/gift-restrictions.aspx>.

²⁷⁴ U.S. CONST. ART. I.

²⁷⁵ Nolan, *supra* note , at 71.

²⁷⁶ This assumption is evident in some critiques of privatization, or the outsourcing of government functions. *See, e.g.,* FRUG & BARRON, *supra* note __, at 738 (“Once you begin to take the idea of privatization seriously, you can quickly come to the view that government could be reduced to the performance of three tasks: the collection of revenue by taxation, the choice of services this revenue should buy, and the negotiation and drafting (and, perhaps, the monitoring) of contracts with private businesses for the delivery of the chosen services. . . . Taken to its limits, then, privatization could transform government simply into a revenue-generating mechanism run by a few people whose job would be to begin the process of contracting out . . .”).

as a matter of the legitimacy of the state—will be exercised by the vast majority of the state’s citizens? What does it mean for political citizenship if our public priorities are financed by small group of well-off and well-meaning oligarchs?²⁷⁷ The answers to those questions lie well outside the scope of this project, but we hope the discussion in this Part has suggested some of the reasons why they might matter.

CONCLUSION

This Article has offered both a positive and a normative account of gifts to government, showing where and why such gifts happen, and why they might be cause for concern. Our critique of patriotic philanthropy should not be understood as outright condemnation; we do not deny the value of private giving for the public good. Nevertheless, we have sought to highlight the risks of a phenomenon that—thus far—appears to have been ignored, applauded, or simply shrugged off.

Although patriotic philanthropy is important in its own right, we also have emphasized that gifts to government must be understood as part of a larger ecosystem of public-private convergence. Gifts operate alongside other means of private influence over the public policy, and other forms of private financing of government, including for-profit investment. And private financing often is combined with more conventional modes of privatization, such as outsourcing government functions to private actors. Even a glimpse at this ecosystem suggests the need for far more research, and theorizing, about the line between public and private and the contours of the modern state.

²⁷⁷ Cf. ZELENAK, *supra* note __, at 21 (“Taxpayer status is usually asserted as a reason why the speaker’s opinion on some question of government policy deserves to be taken seriously.”).