Philanthrocapitalism and the Separation of Powers

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Abstract

This article discusses the rise of an approach to philanthropic giving known as philanthrocapitalism. I relate it to a new paradigm in management theory that has claimed that private profit-making naturally aligns with improved public welfare. I show how growing belief in the inherent 'compatibility' of corporate missions and public benefits has led to new laws and contributed to major shifts in how giving practices are structured and legitimated. The original point made in this article is that the philanthrocapitalist turn is more than simply an organizational change in the structure of different philanthropic institutions. Rather, the belief that profit-making and public welfare are naturally aligned also has significant, undertheorized implications for different principles in European-American legal traditions. The ascendancy of the philanthrocapitalist approach represents a subtle but profound displacement of belief in the need for democratic checks and balances on the use of public funds for private enrichment.

INTRODUCTION

Philanthrocapitalism is a term and a practice that encapsulates important recent legal precedents within organized philanthropy. First coined 15 years ago, philanthrocapitalism is one of many

new neologisms applied to hybrid investment and giving initiatives that seek to marry the aims of the for-profit sector with the goals of nonprofit organizations. Other terms include venture philanthropy, impact investment, and triple-bottom line, to name a few (Barman 2016, Nicholls 2009). These related terms and practices share an underlying belief in the value of applying tools and methods from business management to nonprofits, in theory to improve the performance of the latter. It has influenced a wide range of development and health programs at organizations such as the World Bank, the World Health Organization (WHO), and the European Commission (Adams 2016, Al Dahdah 2019, Crane et al. 2014, McGoey 2015, Moeller 2018, Natile 2020, Richey & Ponte 2011).

In some ways, philanthrocapitalism has longstanding origins in the rise of scientific philanthropy in the era of influential donors such as John D. Rockefeller and Andrew Carnegie (Soskis 2014, Zunz 2011). What is new today is the pervasiveness of harmony attitudes to the relationship between business and society, one that contrasts with previous classical liberal attitudes, in the eighteenth and nineteenth centuries, to the concentration of power. Despite how they are understood by some economists today, classical liberals such as Adam Smith were conflict theorists. A core aspect of their thought is recognition of a fundamental, intractable conflict between private power and public welfare. This belief contributed to the well-known, foundational focus in both jurisprudence and political theory on achieving a balance of power through deliberate checks, divisions, and legislated divisions in authority (Boucoyannis 2007; McGoey 2019; Weingast 1997, 2017).

Balance of power theorists' recognition of an inherent, intractable conflict between private interests and larger society has been obscured by later shared-value practitioners, leading to an ideological shift that has enabled today's equivalents to Rockefeller and Carnegie—well-known donors such as Bill and Melinda Gates, Mark Zuckerberg, and Priscilla Chan—to champion private forms of governance and rich-to-rich giving in a manner that is significantly different from earlier eras. Today's approach also differs from policy principles that underpinned earlier corporate social responsibility (CSR) movements, which emerged from nongovernmental organization and activist concerns over corporate externalities such as environmental degradation and human rights abuses in global corporate supply chains. Although corporations quickly grew adept at turning CSR critique into advantage by successfully mobilizing CSR rhetoric to advocate for and implement self-regulation (Bartley 2018, Shamir 2010), at its core the CSR

movement emphasized the need to curb corporate predation through regulation and a fairer redistribution of profits. Today's philanthrocapitalism is different. Proponents emphasize not corporate restraint but rather corporate expansion in the realms of public education, global health, and development (Akugizibwe 2020, Birn 2014, Edwards 2010). This shift has neglected importance for doctrines of the separation of powers in law and governance.

The structure is as follows. First, I introduce philanthrocapitalism and its history, with a focus on new actors who encompass a philanthrocapitalist approach, including the Gates Foundation and newer organizations such as the Chan Zuckerberg Initiative, which was established not as a traditional foundation but rather as a for-profit limited-liability company (LLC). The establishment of LLCs as purported giving vehicles marks a major departure from earlier approaches to charitable distribution and investment, with important new legal ramifications when it comes to transparency and disclosure requirements. In short, LLCs are subject to far fewer disclosure stipulations than earlier philanthropic foundations, which makes it harder to follow the money and empirically study grant disbursements (Reckhow 2017, 2020).

The rise of for-profit LLCs is simply one example of how earlier belief in an inherent conflict between private gains and public goods has shifted. Surveying and building upon the growing field of critical philanthropy research, I describe other legal examples [such as the Supreme Court decision in *Burwell v. Hobby Lobby Stores* (2014) that help to illustrate the legal and governance ramifications of new gifting practices (Morey 2014). Over the last section, I contrast new harmony assumptions with earlier classical liberal attitudes to inherent conflicts and the importance of a separation of powers.

ORIGINS OF PHILANTHROCAPITALISM

The term philanthrocapitalism emerged in the mid-2000s, coined by a business journalist at *The Economist* who later coauthored an influential book, *Philanthrocapitalism: How the Rich Can Save the World* (Bishop & Green 2008). The notion is driven by the belief that private corporations and investors can and should embrace the notions of "doing good by doing well" by partnering with governments in development and health initiatives in ways that enable corporate actors to deliver public services more efficiently, while simultaneously increasingly private profits for a handful of actors (Porter & Kramer 1999, 2002).

The suggestion that investors and wealthy donors can "do social good" through seeking

"profit in unprofitable pursuits" (Elkington & Hartigan 2008, p. 15) hails from the success of a thought alliance of promarket economists and management scholars stretching back decades. This broad-based epistemic community cleared conceptual ground for what was eventually termed philanthrocapitalism through dozens of articles published in outlets such as the *Harvard Business Review* over the 1980s and 1990s.

Their influential article, "The Competitive Advantage of Corporate Philanthropy" (Porter & Kramer 1999), argued that corporations should pursue philanthropic strategies that generated greater financial returns, thus "creating shared value" for both shareholders and the wider community. Perhaps unsurprisingly, this idea gained wide traction at corporations and across the finance sector. As one critical article on the phenomenon noted wryly, given that the concept was created "for and with senior leaders in large corporations, it is little surprise that it has succeeded in gaining a substantial and positive practitioner audience" (Crane et al. 2014: 132; see also Haydon et al 2021). The World Economic Forum at Davos has hosted numerous roundtables on the notion. The EU Commission's 2011–2014 strategy on CSR adopted shared value as an official strategy. A later article by Kramer & Porter (2011) in the *Harvard Business Review* titled "Creating Shared Value" has been cited more than 10,000 times and was awarded the McKinsey article of the year award in 2011. Related trends and terms, including instrumental philanthropy (see Mitchell & Calabrese 2020 for a review; strategic philanthropy (Brest 2012), and effective altruism (MacAskill 2016), largely accept the central premise of creating-shared-value theory, that aligning charitable efforts with business opportunities can generate financial returns while producing social benefits, thus in theory enlarging the financial resources available to do even more good socially.

This logic, rooted in the idea of using finance to expand economic wealth that will benefit wider society, appears like a seductive win-win scenario for both investors and marginalized beneficiaries. The belief is influential outside management schools, underpinning, for example, the psychologist Steven Pinker's concept of shared prosperity, popularized in bestsellers like *Enlightenment Now*, in which he argues that the eighteenth-century classical economist Adam Smith originated the idea that private profits inevitably confer public gains. Pinker (2018, p. 102) claims that Smith pioneered the belief that "whatever tendency people have to care for their families and themselves can work to the good of all." Gates (2008) reiterated this, stating that Smith's theories are a bedrock of Gates's personal philosophy of "creative capitalism": his belief

that the "fortunes of others" could be tied to "our fortunes—in ways that help advance both."

Established in 2000, the Bill and Melinda Gates Foundation is hailed as a touchstone exemplar of the promarket, procorporate shift in philanthropy and development circles. Bishop & Green (2008) points to the Foundation as heralding a new, golden age, similar to the turn of the twentieth century, when Carnegie and Rockefeller ramped up their charitable giving. In some ways, however, this claim of a new high period of organized philanthropy is exaggerated. For one thing, overall philanthropic giving in the United States has actually stayed level at about 2% of the overall gross domestic product (GDP) since the 1970s, after rising to that proportionate level over the 1950–1970s (Duquette 2019, Soskis 2017).

Individual foundations have proliferated since the 1990s, both in the United States and globally, but in the United States, the number of new foundations has not led to a proportionate increase in foundation giving in relation to GDP growth. Bishop & Green (2008) also downplayed the importance of individual bequests from low- and middle-income families, who proportionately give more of their incomes to philanthropy that the rich do (Callahan 2017), often with less tax incentive to do so. As Reich (2018) points out, poorer, individual families receive fewer tax advantages from charity than the rich do because of how US tax returns are structured.

Just as US philanthropic giving has stayed flat at approximately 2% of the GDP since the 1970s, giving by US foundations, such as the Gates Foundation, toward domestic and global health programs overseas is dwarfed, as the United States–based Institute for Health Metrics and Evaluation has detailed, by the amount that developing countries spend on health out of their own revenue (Inst. Health Metr. Eval. 2010; see McGoey et al. 2018). Giving by private philanthropies is also considerably smaller than overseas development aid from governments. The Gates Foundation, for example, disburses approximately $1 and $2 billion each year toward global health initiatives. Approximately $500 million of this overall funding is granted to the WHO, which places the Gates Foundation on par with governments such as the United Kingdom and the United States as one of the WHO's top donors. Although this is a significant outlay, one that has positioned the Foundation to influence WHO decision making (Garrett 2012, Youde 2012), the Gates Foundation's grants toward global health and development are still far less than cumulative governmental development aid earmarked for global health, which amounts to $38 billion annually. What is really new about the role and disbursements of new philanthropic actors

such as the Gates Foundation is not the scale in relation to the size of the US economy, or relative to either overseas government aid or domestic governmental spending on health. The main difference with the recent philanthrocapitalist shift is the hands-on involvement of activist foundation leaders, such as Bill and Melinda Gates personally, in championing a new, business-oriented approach, including giving nonrepayable grants directly to for-profit corporate recipients in an unprecedented manner (McGoey 2015, Schwab 2020).

THE PRO-PROFIT TURN: ORGANIZATIONAL EFFECTS

Putting scholarly notions of shared value into practice, over the noughties, the Gates Foundation began to promote the practice of partnering with the business sector in novel ways. In a speech at the World Economic Forum, Bill Gates (2008) labeled this approach creative capitalism, which he defined as "an approach where governments, business, and nonprofits work together to stretch the reach of market forces so that more people can make a profit, or gain recognition, doing work that eases the world's inequities."

This stated goal—to stretch market forces globally and to combine profit with the pursuit of social welfare—is at the core of the Gates Foundation's practices, from public education, where its grants have been focused on funding charter schools, many of which operate on competitive, for-profit principles (Barkan 2016, Ravitch 2010, Tompkins-Stange 2016a) to its emphasis in its work in global health and global development on funding the entry of corporate actors into new markets, such as contributing $7.5 million in 2010 to a partnership with Coca-Cola in Uganda and Kenya than enabled "mango and passion fruit farmers to participate in Coca-Cola's supply chain for the first time" (TechnoServe 2010).

This effort is both ideational—in the sense of ideological framings that champion a promarket, procorporate ethos—and practical, through grants that improve corporate opportunities for multinational companies (Birn 2014; Harman 2016; McGoey 215). For example, Melinda Gates (2010) gave a TED talk in 2010 on "What Nonprofits Can Learn from Coca-Cola," at a time when the Gates Foundation had one-tenth of the Foundation's endowment invested in Coca-Cola. This praise fueled concern and criticism among public health experts (Stuckler et al. 2011), who argued that such promotion made it harder for other public health actors to press home an alternative message, that governments needed to better regulate and deter Coca-Cola's aggressive marketing of sugary drinks linked to obesity (O'Connor 2015, Stuckler

et al. 2011).

The championing of Coca-Cola speaks to an important reality:creating reputational advantages and market opportunities for Coca-Cola and other companies was never a surreptitious goal of the Foundation's work. Rather, it isa clearly stated objective, resonating with Bill Gates's (2008) explicitly stated aim two years earlier "to stretch the reach of market forces globally." In other words, the openness of the alignment of profit and philanthropy is both the novelty of philanthrocapitalism and the key conundrum for scholars (McGoey 2015). What is the "mode of development" [Durkheim 2004 (1893), p. 60] of this new collective consciousness? And why does it thrive despite, as I detail below, damning evidence showing that poor groups are not winning from this purported win-win (Beaumont 2020, Crane et al. 2014).

As part of its procorporate orientation, the Gates Foundation has offered an unprecedented number of large, nonrepayable grants to large corporate recipients, including Scholastic, Vodacom, and Mastercard, which received an $11 million grant in 2014 to establish a center for financial inclusion in Nairobi (see McGoey 2015, Schwab 2020). The Gates Foundation treated these corporate gifts as part of its minimum-payment obligation, the legal requirement to disburse at least 5% of the size of its endowment to charitable ends each year.1 Offering large grants to for-profit corporations is unusual because the Internal Revenue Service has laws against private inurement, the use of tax-privileged gifts for personal or investor gains rather than public benefit. US federal charity laws are guided by several long-standing principles, rooted ultimately in the late-Enlightenment enshrinement of the belief that private profit seeking can be a source of governmental corruption, undermining democratic governance (Cordelli 2016, 2020; Reich 2018). The laws prevent foundations from using gifts (*a*) as a form of political lobbying, (*b*) in ways that personally benefits a benefactor or a small circle of her or his friends, and (*c*) in a manner that stores wealth indefinitely without gifting it (the reasons for minimum-payment obligations compelling distributions of at least 5% of endowments each year) (cf Madoff 2010, Mitchell & Calabrese 2020).

In general, this means that foundations should and do make the majority of their grants to nonprofit organizations, in particular 501(c)3 organizations, the designation for nonprofits that

[1] For an overall of qualifying disbursements to corporate entities, see https://www.icnl.org/resources/research/ijnl/determining-whether-to-make-an-equivalency-determination-or-to-exercise-expenditure-responsibility.

have a religious, charitable, scientific, literary, or educational purpose. Philanthropic foundations can offer grants to profit-making groups but must comply with additional procedures known as expenditure responsibility rules, ensuring through due diligence that any gifts are strictly for charitable purposes. The Gates Foundation maintains that its gifts to corporations are of this nature. As a Foundation representative explained to me via email, "In the case of Scholastic, we have treated it exactly as we would any grant to a for-profit entity, which is to say that we have followed all of the expenditure responsibility rules."2

This practice, however, has begun to attract critical media scrutiny, as observers have queried the unprecedent scale and legality of the Gates Foundation's gifts to for-profit corporate recipients (Schwab 2020). Scholars such as Piketty (2014) have observed that excessive financial returns to the private sector in comparison to stagnating overall national growth levels are one of the prime drivers of widening economic inequality today. By gifting nonrepayable grants to wealthy corporations, the Gates Foundation is exacerbating this imbalance in returns to the private and public sectors. As well as moral and economic questions about whether gifts to corporations contribute to worsening economic inequality, such gifts raise a legal question: Are they in line with the legal onus to ensure all grants are used for strictly charitable purposes?

In the case of Mastercard, the response seems no, given that Mastercard (2014) itself issued a press release that underscored the commercial purposes of the grant, stating, "The grant enables MasterCard to reach into these new markets that may otherwise be commercially unviable." The grant, in short, is a nonrepayable donation to shareholders and executives at Mastercard, subsidized by US taxpayers. Since making the grant, the Gates Foundation teamed up with the Mastercard Foundation to fund market research at trade bodies that represent the financial interests of companies such as Mastercard. For example, both the Gates and Mastercard foundations have offered millions in grants to GSMA, a trade organization that "represents the interests of mobile operators worldwide." The gifts are made for the purpose of carrying out market research that "evaluates the profitability of mobile money by estimating profit margins for three different scenarios" (Almazán & Vonthron 2014, p. 4).

This use of philanthropic foundations to bankroll market research at corporate trade organizations that lobby on behalf of a parent company highlights what is new about the

[2] Email from C. Williams, Gates Foundation, to L. McGoey, on Sept. 2, 2015.

philanthrocapitalist turn. In short, what is new is not the practice but rather the unprecedented scale of gifts to corporations, and with it growing questions about the legality of new blurred boundaries between profit and public purpose. The Gates Foundation is not unique in collaborating with the private sector. Like other philanthropic organizations, such as the Rockefeller Foundation, it makes program-related investments to for-profit recipients, a practice with a 40-year history. They can be offered to for-profit recipients in a way that can be legally treated as qualifying disbursements that enjoy tax privileges, as long as (*a*) production of income or appreciation of property is not a significant purpose of the grants; (*b*) the grants are not used for political lobbying; and (*c*) expenditure responsibility rules are followed, ensuring any gifts are strictly charitable. These regulations are intended to limit the problem of inurement and private benefit, which is "generally understood as providing unjust enrichment from the organization's gross or net earnings to another party" (Chan 2012). This emphasis on "strictly charitable" is the conundrum. Do grants to carry out market research on behalf of multinational companies qualify as strictly charitable?

Importantly, inurement refers not simply to private benefit for a benefactor but also to third parties who are positioned to exploit foundation resources for private gain. The Internal Revenue Code defines it as follow: "No part of the net earnings [of a nonprofit may inure] to the benefit of any private shareholder or individual" (quoted in Mitchell & Calabrese 2020). The Gates Foundation insists that it meets the strictly charitable standard because a gift to Mastercard aids financial inclusion of unbanked groups who lack access to sufficient credit opportunities, thus purportedly improving poverty. But evidence for this assertion is mixed as best, and damning in many respects, as the outgoing UN rapporteur on extreme poverty stated in a final report to the UN Human Rights Council in 2020 (Alston 2020).

In this report, the outgoing rapporteur, Philip Alston (2020, p. 19), castigated private-sector solutions to poverty as "a blind alley…this trend represents an abdication of responsibility by governments and international organizations." He was particularly critical of the Gates Foundation's promotion of "win-win" promises,' which he described as "fairy tales" that enabled "companies and investors to draw guaranteed profits from public coffers, while poor communities are neglected and underserved" (quoted in Beaumont 2020). When it comes to the Gates Foundation's belief that mobile banking and other forms of financial inclusion can alleviate poverty, some evidence supports this claim, showing positive, but fairly negligible,

benefits in poverty alleviation by improving savings by 10 cents a day in some households, for example (Piper 2020).

More worrying, however, is growing evidence of rising household debt as mobile banking has facilitated predatory lending in Kenya and other nations, leading recently to regulatory efforts to crack down on usurious lending. As *Quartz Africa* reports, traditional banking requires collateral and credit checks, whereas the mobile banking arena has, to date, been "largely unregulated" and has increased household debt (Kazeem 2020).

Terming the problem perpetual debt, anthropologists Donovan & Park (2019) note that Kenya's poor and middle-class users, who "were among the first to benefit from digital lending apps"—now refer to mobile lending apps as "slavery" (see also Natile 2020). Odundo Owuor (2019) points out that mobile "services have improved access to loans, but there are questions about whether the poor are being abused in the process," as studies show that 1 in 5 recipients struggle to repay loans, double the rate of standard bank loans. Surveys show that in Kenya, "35% of borrowing is for consumption, including ordinary household needs," rather than "emergencies," as salaries fail to rise with living costs, and as using mobile banking apps for gambling expands, especially among young users (Odundo Owuor 2019). In 2020, the Kenyan Central Bank proposed new laws to fight predatory lending through mobile apps, requiring lenders to apply for permission to increase lending rates and offer new products (Kazeem 2020).

Meanwhile, for credit companies such as Mastercard, gifted millions by the Gates Foundation, the upside is much clearer. A 2019 McKinsey report noted the global payments sector reached "$1.9 trillion in 2018, reflecting 6% growth," following "a year of unprecedented, double-digit growth in 2017" (McKinsey 2019). In a pattern that closely mirrors the earlier practice of microcredit and microlending, which also saw a rise in indebtedness with negligible gains when it came to global poverty alleviation, mobile banking has produced lightly regulated gains for investors, many based in the West, while benefits for African households are so far marginal—at the same time that the problem of growing household indebtedness expands (Cull et al. 2016, Gabor & Brooks 2017, Ghosh 2013, Toyama 2011).

Aside from facilitating predatory lending, the unusual precedent set by enriching lucrative corporations such as Mastercard has worrying slippery-slope implications when it comes to other corporate beneficiaries. If the Gates Foundation can offer tax-privileged gifts to Mastercard and Scholastic, while maintaining that such gifts are strictly charitable, then any

private foundation could gift millions to any corporation, including Exxon, Blackrock, Amazon, or Facebook, even when the chief outcome is enhanced revenue for the rich and rising household indebtedness among the poor (Ghosh 2013). Twenty years ago, it was widely viewed as outlandish that Mastercard could successfully lobby for nonrepayable gifts from a philanthropic foundation to expand its mobile payment operations in lucrative markets such as Kenya. Today, such rich-to-rich gifting practices are becoming more commonplace, legitimated by a mantra of "doing good by doing well." In a way, the mantra is half right. Many investors and corporations, such as Mastercard, are financially benefiting from new global development opportunities furnished by US philanthropic foundations (McGoey 2015). But many impoverished and increasingly indebted groups are losing out in the process (Gabor & Brooks 2017, Natile 2020).

The belief that doing good and doing well can and do go hand-in-hand has culminated in one of the most extreme changes in philanthropy recently, which is the decision by Mark Zuckerberg and other donors, including Laurene Powell Jobs, to establish for-profit LLCs to ostensibly gift their wealth—instead of more traditional philanthropic foundations. LLCs confers significant regulatory benefits on investors. For example, there is no legal duty for the the tax filings for the Zuckerberg Chan Initiative to be made public or to provide a public list of the grants disbursed (Carter 2015, McGoey et al. 2018) This marks an antidemocratic organizational shift that makes it impossible for academics to carry out external academic investigation (Reckhow 2017). Whether or not one is critical of the Gates Foundation's disbursements, at least their giving is transparent, in that every grant by law must be listed on publicly accessible 990 forms. This is not case for LLCs set up by Zuckerberg or Powell Jobs, which are not beholden to publicly share all disbursements, leaving benefactors free to broadcast success stories while veiling failed or self-serving disbursements (Carter 2015, Reckhow 2017).

The same problem of nontransparency plagues efforts to measure grants made by another distinctive but related organizational shift over recent decades, which is the explosive growth of donor-advised funds (DAFs)**,** charitable entities operated by investment fund managers on behalf of donors. Donors who make a gift, such as stock, to a DAF receive a tax benefit for that contribution, while relinquishing control over how and when that gift is disbursed for charitable purposes. Importantly, DAFs are not subject to the same minimum pay-out rules as foundations, nor must they publicly disclose the specific type or scale of their grants. As reporter Jane Mayer (2020) writes, "Donor-advised funds have become increasingly controversial, in part because

they impede transparency." Law scholars such as Ray Madoff argue that this secrecy undermines the onus to ensure public benefit from gestures that have considerable tax advantages, and which, perhaps even more importantly than tax advantages, generate reputational gains for donors. As Madoff has emphasized, large-scale gifts attract headline praise in the media, while in reality the money is often warehoused indefinitely (Cullen & Madoff 2016). Even wealthy individuals are querying the self-serving nature of such gifting vehicles. Billionaire philanthropist John Arnold and with Madoff have campaigned together for new federal legislation holding DAFs to some of the same regulations that private foundations are beholden to,(Gunther 2020), leading to a senate bill introduced in 2021.

Although DAFs claim to give away far higher percentages annually than the 5% minimum payment that foundations must make, there is little way to externally vet this claim, or to legally enforce the standardization of large annual payouts, because legally, the money can sit dormant for decades without being distributed. In 2020, the California Association of Nonprofits and dozens of other individual nongovernmental organizations backed a proposed law that would have compelled all large DAFs based in California to report the asset size and grant distributions that each disaggregated fund within a larger umbrella group makes each year. After lobbying by industry groups such as Fidelity Investments, who argued that such a bill might discourage charitable giving, the California bill was withdrawn (Kavate 2020).

The fact that offshoots of large investment services companies such as Fidelity are now influential players in the world of charity is simply one of the many ways that boundaries between private advantage and public interest have shifted and blurred over the past 20 years, and, importantly, these shifts have not passed unremarked. There has been a remarkable flowering of critical philanthropy scholarship in recent years, as well as more critical journalism (e.g., Giridharadas 2018, Schwab 2020) than was visible over the noughties. In 2006, as Tompkins-Stange (2016b) notes, a study of media reporting found that 98% of press coverage on philanthropy was either positive or neutral. There were important exceptions (notably Dowie 2001), but not nearly the same growing media attention as today, thanks partly to the influence of critical academic scholarship that I turn to next.

PHILANTHROCAPITALISM MEETS ITS CRITICS

The financial crisis of 2007–2008 onward has been a key catalyst for the recent flowering of

critical philanthropy scholarship, and particularly to the rise of a more critical attitude to shared-value rhetoric and practices. Scholars such as Hacker, Pierson, Keister, Piketty, and others had long been calling attention to widening inequality, but it took the crisis to sharpen focus on the specific role of finance-led wealth concentration and corporate governance failures in compounding inequality (Hacker & Pierson 2010). Since then, scholarship on philanthropy and the power of gifts has also been re-centered at the heart of the social sciences (c.f. Barman 2016, 2017; Bekkers 2010; Depecker et al. 2018; Eikenberry & Mirabella 2018; Goss 2016; Harvey et al 2020, Lefevre 2018, Madoff 2010, Mahajan 2019, Mears 2020; Mediavilla & Garcia-Ari 2018, Mitchell & Sparke 2015; Morey 2021, Villaneuva 2018), revitalizing attention to the role that intersecting elites play in legitimating concentrations of power (Hay & Muller 2014, Kuldova 2017, Littler 2017, McGoey 2015, Savage & Williams 2008, Sayer 2012).

Recent scholarship has challenged Bishop & Green's claim (2008) that today's large donors are uniquely interested in more effective philanthropy, underscoring that Rockefeller and Carnegie were also explicit about applying tools of scientific management to improving outcomes (Soskis 2014). The reality is not that earlier practitioners had little interest in measurement but rather, as scholars such as Barman, Buchanan, and Katz emphasize, that social change cannot be reduced to key metrics of business success, such as financial bottom lines (Barman 2016, Buchanan 2019, Katz 2005). The recent furor for measuring success not only is simplistic and ahistorical but can be counterproductive, leading to short-termism and the diversion of funds from important social movements that deserve support but where change might be so gradual that no outcomes appear for decades. Another focus of recent critical scholarship is the relationship between philanthropy and different types of inequality. At the global level, research shows that US philanthropic foundations historically and today have used their influence to bolster US political supremacy and resource extraction benefiting Europe- and North America–based investors and corporations (McGoey 2015, Parmar 2012, Vogel 2006). At the national level, research on the United States has shown how private giving can exacerbate inequality through the discretionary strengthening of schools in wealthy areas and tax breaks that disproportionately benefit the rich (Reich 2018) and through movement capture, whereby the structural aim to rebalance predatory aspects of capitalism and to narrow wealth gaps, including the growing racial wealth gap, is neutralized through tactical, pro-establishment grant making (Kohl-Arenas 2015, Ming Francis 2019). There is growing concern that large university

endowments also reinforce inequality, such as through driving up local real estate costs while qualifying for non-profit tax privileges (Burns & Douglas 2021). Over 2018 to 2019, the head of Harvard University's endowment of $41 billion was paid between 6-8 million per year in remuneration, while one year later, in 2020, Harvard moved to lay off subcontracted dining workers and custodial stuff without pay during the coronavirus pandemic, only reversing course after facing public backlash. 'The joke that Harvard is a hedge fund with an educational arm is not so far off,' Haselby & Stoller (2021) write in the *Chronicle of Higher Education.* Many academics today work at institutions that have become model paragons of the philanthrocapitalist 'ideal,' perhaps creating a structural disincentive to scrutinize negative ramifications, including inside the halls of the world's wealthiest universities, where the proportionate of precarious, untenured staffs on short-term contracts is rising compared to tenured positions.

Initiatives like the Giving Pledge, where billionaires pledge to give at least half of their fortunes away, have no enforcement mechanism. Such pledges perpetuate a facade of sacrifice. They foster undeserved reputational advantages, diverting attention from the known problems of corporate and personal tax avoidance, corporate reliance on draconian intellectual property protections that punish poor nations, and the exploitation of laborers in ways that are not alleviated but rather perpetuated despite claims of redressing inequality (Aschoff 2015, Edwards 2010, 5, McGoey 2015).

That philanthropy can deepen wealth concentration and inequality rather than alleviate it is, as many of the scholars above have emphasized, not a new concern. It is central to early liberal theories of the social contract. Thinkers such as Kant were explicit about the ways that noble claims of benevolence curtained the self-interest of the rich, entrenching privilege and power (Reich 2018). Kant's contemporaries, such as Mary Wollstonecraft and Thomas Paine, called for the language and practice of natural rights to supplant the language of charity (McGoey 2019). Today, there is an important push from political theorists to revisit early-modern liberal thought to strengthen the political philosophy of philanthropy (Cordelli 2020; Reich 2018). But even this compelling scholarship, as well as a small but growing counter-literature that has challenged key claims within the shared-value framework, has some empirical lacunas and theoretical limits. My final section explores these limits. Drawing on classical liberal studies of the balance of power,, I point out why even this counter-literature has yet to fully appreciate the legal and democratic implications of the new ethos of market saviorism.

THE INHERENT COMPATIBILITY DOCTRINE AND ITS LIMITS

An important counter-literature has begun to challenge Kramer and Porter's claim that doing good financially can be neatly aligned with doing good socially (Crane et al. 2014, King & Pucker 2021). Crane et al. (2014), for example, argue that shared-value assumptions ignore the conflict between social goals and economic ones. They suggest that Kramer and Porter have tried to move beyond the language of a trade-off between profit seeking and public welfare largely by ignoring that any conflict exists. They point to microfinance as a good example, noting that Kramer and Porter continue to point to it as a touchstone success story of 'shared-value,' despite damning evidence of increased indebtedness among many recipients. A similar problem surrounds financing mechanisms that purport to find innovative financial solutions to challenges like disaster response, including natural pandemics such as coronavirus disease 2019 (COVID-19). In 2016, on the heels of the Ebola outbreak, the World Bank established a pandemic bond, a mechanism offering interest-paying bonds to investors, purportedly to build a store of funds to be released when poor nations face outbreaks. But the rules for releasing funds depended on private-sector stipulations for determining when a disease outbreak was severe enough to trigger the release of funds. The economist Lawrence Summers called the bond an "embarrassing mistake.' Pointing out that it has been more financially advantageous to investors than to nations facing virus outbreaks, he stressed a conflict that should have been obvious at the outset: that private-sector investors in the bond "will always be averse to such a trigger declaration because it removes their profits' (both quotes in Garrett 2019; see also Brim & Wenham 2019). Summers hits upon a simple but oddly neglected flaw with win-win frameworks: the fact that parties often win more financially the more that other parties lose out. In the Democratic Republic of the Congo, Garrett (2019) writes, "thousands of people have died due to a misguided finance-driven approach to fighting pandemics that puts investors before victims." The examples of microfinance, mobile lending apps, and the World Bank's first pandemic bond share a common problem: They work for investors but not for weaker parties in the transaction, for either indebted personal borrowers or indebted poor nations. And yet, despite some exceptions (Buchanan 2019, Crane et al. 2014, Edwards 2010, King & Pucker 2021, McGoey 2015, Morey 2014), many scholars of philanthropy still shy from a close examination of either the theoretical roots of win-win mantras or their empirical effects. For example, Horvath & Powell (2020: 122) recently acknowledged in a chapter in *The Nonprofit Handbook* that philanthropic efforts to

leverage more business involvement in public services delivery has compounded creeping privatization but then conclude, “This chapter is not the venue for us to comment at length on whether we think such efforts are plausible or salutary.” If a widely read and consulted volume is not the place for two leading philanthropy scholars to consider the empirical effects of win-win frameworks, then where?

The need to better scrutinize win-win rhetoric is particularly pressing given, as Morey (2014) is the first to note, observable legislative effects at the Supreme Court level. In a recent Supreme Court case, *Burwell v. Hobby Lobby* (2014), the court reached a 5–4 decision that, in sum, allowed certain for-profit corporations to refuse contraceptive health care coverage to employees because of religious objections. The relevance of this case for my discussion here is that, as Morey points out, Justice Alito’s majority opinion built on earlier social enterprise legislation passed by many US states to justify the court’s decision. This legislation stemmed from a seemingly innocuous, even auspicious, effort, partly financed by the Rockefeller Foundation, to allow the incorporation of benefit corporations. And yet the secondary ramifications of this push are sweeping. In licensing the existence of benefit corporations, state law has compounded a regulatory and legislative ethos that, as I emphasize below, jars aggressively with bedrock assumptions within democratic theories of law and governance. This ethos is legible in the wording of Justice Alito in his majority opinion. He wrote that social enterprise legislation has made clear the “*inherent compatibility* between establishing a for-profit corporation and pursuing nonprofit goals” (emphasis added). This recognition of ‘inherent compatibility’ between for-profit organization and nonprofit goal legitimated, in his view, the righteousness of offering for-profit corporations the same entitlement to religious objection that a nonprofit religious entity had: the right to deny contraceptive provision. As Morey points out, Justice Ginsburg, in a dissenting opinion, recognized the converse argument. She pointed out that courts had traditionally respected the distinction between for-profits and nonprofits and upheld it, in part because “for-profit corporations are different from religious nonprofits in that they use labor to make a profit” (quoted in Morey 2014). Morey’s important point is that the blending of a divide between for-profit and nonprofit entities can have unintended effects when it extends power vested in nonprofits to for-profit employers In this situation, it created a precedent enabling for-profit entities, which employ far more US workers than the nonprofit sector does, to limit the reproductive freedoms of women through permitting the refusal of insurance.

As Morey notes, th**is** case also has even more troubling and sweeping ramifications than the limiting of reproductive flexibility, as worrying as that precedent is. In insisting on the inherent compatibility of for-profit corporations and nonprofit goals, Alito confers legal sanction on a precivil tenet: that belief that private enrichment is fundamentally harmonious with public welfare. As McGoey (2012, 2019) points out, the idea of natural compatibility between personal enrichment and a larger demos is more akin to feudal notions of monarchical divine right and feudal benevolence than to post-Enlightenment governance tenets that recognized the inherent conflict between private enrichment and public welfare (see McGoey 2012, 2019, Weingast 2017). Although conflict between personal gain and public welfare has, of course, been acknowledged at least since antiquity (cf Meiksins Wood 2008), it has largely been modern constitutions, including the US Constitution, that have sought to enshrine efforts to mitigate this intractable conflict. The establishment of modern notions of rule of law, the subjection of rulers to the same standards and restrictions that a polity must face, is built upon the bedrock of making visible public–private conflicts and finding ways to restrain ruling entities from abusing a public for its own private gain, an imperative that Smith and his peers wrote about extensively (Weingast 2017).

Today, superficial and misleading interpretations of the writing of thinkers such as Smith are pervasive, ignoring Smith's fundamental identification of a conflict between profit seeking and public welfare. This myopia is clear in Pinker's (2018) bestselling book *Enlightenment Now*. As mentioned above, Pinker sees Smith as the originator of the belief that "whatever tendency people have to care for their families and themselves can work to the good of all." It is important to stress that this is Pinker's wording, not Smith's, who never claimed anything quite so breezy. Clearly, caring for one's family does not necessarily **'**work**'** for a wider public. Does a dictator appointing his children to positions of authority work for the benefit of all? Or a billionaire's effort to avail herself of tax havens? Or a president's ability to pay negligible federal tax?

Indeed, Smith's [1997 (1776)] point in *Wealth of Nations* was that concentrations of family wealth often come at the expense of public wealth. Flawed readings of Smith owe more to twentieth-century theorists such as Hayek and von Mises than to Smith's actual writing (McGoey 2019). Hayek famously argued that market mechanisms could overcome the epistemological limits of central planners, leading to efficiency gains that deliberate design could never effect. As Hayek's influence grew, a close reading of earlier classical theory declined

(Harcourt 2011). Later generations of economists either forget or deliberately obscured a key message of Smith, and before him Mandeville, who influenced Smith's thought. As Hirschman (1997, p. 18) writes, although both Mandeville and Smith did hail the economic effects of self-interest, they also stressed that such interests needed to be tamed through a strong state (Weingast 2017) and through regulatory powers, calling for the "Skilful Management of the Dextrous Politician" (Mandeville's wording) to turn "private vices" into "public benefit."

Smith [1997 (1776), p. 156] is deeply critical of extending too much power to business merchants, particularly given their tendency to militate against the interest of workers: "Masters are always and every where in a sort of tacit, but constant and uniform combination, not to raise the wages of labor." This recognition of conflict between "masters" and "workers" was fundamental to Smith's call, in *Wealth of Nations*, for different forms of regulation to offset predatory practices, including his demand for governments to set limits on usury (McGoey 2019). Today, any undergraduate economics student learns about Smith's identification of the value of division of labor, but fewer learn about his discussion, inherited from earlier thinkers such as Montesquieu, of the importance of "mutual monitors" to act as checks on power (Boucoyannis 2007, Weingast 2017) and the need to separate judicial decision making from business interests (Harcourt 2011, McGoey 2019).

The obvious concern of Smith and his contemporaries was to avoid a concentration of power, whether that power rested with monarchies or with monopoly business interests. Paine (1995, p. 191), for example, argued that insufficient separation between monarchs and merchants fueled a "rotary motion," which led merchants to seek favor from government and vice versa in a corrupt manner that undermined public interest, enabling different branches to "cover each other until responsibility is lost." Each of these thinkers stressed the reality of intractable conflict, rather than harmony, between private interests and public welfare, leading to the cornerstone principles of the need for a separation of powers to restrain the use of public funds for private benefit.

The win-win narrative celebrated by Pinker, Gates, Kramer, and Porter assumes a harmony of interests in a way that Smith actually scoffed at, pointing out that merchants often present their interest as the general interest even when it is not and advising legislators to be on guard against this trick by maintaining "suspicious attention" to merchant claims. Friedman acknowledged this aspect of Smith in his own writing and drew on it to set boundaries around

the remit of corporate actors, which leads to an irony with how scholars such as Kramer and Porter perceive the work of scholars like Friedman and Hayek.

In their writing on shared value, Kramer and Porter criticize Friedman's infamous earlier call for businesses to focus exclusively on maximizing profits. Contra Friedman, they suggest that engaging in philanthropy can give businesses a better competitive edge while doing social good (Kramer & Porter 2002). Bill Gates (2008) agrees, suggesting that that corporations should be subsidized to do "work that eases the world's inequities." But somewhat ironically, this enabled a shift to private authority that even someone as probusiness as Friedman had shied from. Not because Friedman (1970) could not see the capacity for greater corporate profits but because, as he writes in neglected sections of his influential essay, "The Social Responsibility of Business Is to Increase Its Profits," he was concerned that doing so would open the door to more corporate regulation and stronger democratic oversight, a prospect that he found worrying. want. He states explicitly that emboldening corporations to fulfill social needs would entail too much intrusive public oversight over how corporations are run (Friedman 1970). Even Friedman did not imagine what has ensued: a transfer of power to corporations without a parallel growth in democratic checks and balances that he assumed such a transfer would inevitably entail.

Offsetting their own approach against Friedman's cold business logic, today's philanthrocapitalists claim to advance a more humane creative capitalism in which corporations partner harmoniously with governments to advance general social welfare. Yet, importantly, they also insist that businesses should be incentivized to do so through subsidies and contractual guarantees of profits (Gates 2008), while, with some isolated exceptions, rarely offering any financial or rhetorical support for strengthening corporate regulation. Stated intentions to soften the power of business have thus resulted in the opposite outcome: a transfer of power to private entities without any concomitant strengthening of democratic oversight or mandatory compliance with human rights laws, thereby compounding corporate harms against the public (Alston 2020, Amengual & Kuruvilla 2020, Baars 2020)

CONCLUSION: CONFLICT REALISM AND THE ANTIDEMOCRATIC ILLUSION OF HARMONY

Throughout this article, I have argued that despite the auspiciousness of words like shared value, win-win, and partnership, the philanthrocapitalist shift has led to unintended harms for different publics, facilitating the capture of public resources for private ends (Alston 2020, McGoey

2015). Philanthrocapitalism is a notion and practice that continues to entrench itself ever deeper within management teaching and public-sector procurement policies, even as damning evidence surrounding its harms grows (Alston 2020). Hype is triumphing over a sober assessment of social harms. In an ironic outcome, even the 2008 financial crisis, which illuminated various failings of finance, has in the end simply legitimated demands for greater social responsibility, thus enabling predatory partnerships and different forms of predatory inclusion to flourish (Kish & Leroy 2015, Seamster & Charron-Chénier 2017, Taylor 2019).

The reality and scale of this corporate capture and its negative ramifications are not widely acknowledged, even in the vibrant, growing critical philanthropy literature. At the same time, there is extensive scholarship on the predatory nature of corporate partnerships in allied academic fields, such as international law (Alston 2020, Amengual & Kuruvilla 2020, Baars 2020) and economic sociology (Taylor 2019). To fully understand the implications of the philanthrocapitalist turn, closer engagement between international law, economic sociology, and nonprofit scholarship is needed, helping to place what I term 'conflict realism' at the heart of studies of philanthrocapitalism and philanthropy more broadly today.

A rich body of recent work has taken strides in furthering understanding of the negative democratic implications of philanthropic power, in part by returning to classic eighteenth- and nineteenth-century texts (c.f. Cordelli 2020, Reich 2018). But to fully grasp the ramifications of the philanthrocapitalist turn today, more attention is needed not simply to classical liberal political philosophy but also to classical political economy, and particularly to the classical thinkers' emphasis on rentier self-seeking and rentier power in ways that later schools, in particular Austrian economists such as Hayek and Friedman, ignored or distorted (McGoey 2017, 2019). For example, de Tocqueville's *Democracy in America* is regarding in philanthropy studies as a touchstone text for theorizing the importance of civil society and voluntary associations, but his concerns in the second volume of *Democracy* about corporate power and his calls for greater government regulation of business collectives are generally ignored (McGoey 2019). There is similar neglect of Smith's writing on usury regulation, the separation of powers, and the need for legislators to balance the interests of the poor against those of the rich.

Another blind-spot in critical philanthropy literature is comparable neglect of the pernicious influence of centrist or left-leaning philanthropic foundations in entrenching anti-democratic forms of corporate power today. While a rich body of recent scholarship has explored

how foundations seek to influence the law to enhance corporate power and private forms of authority, the focus tends to be on right-wing foundations, like the Koch Family Foundations, and their financial support of the Chicago and Virginia schools of economics, which in turn bolstered conservative legal movements (MacLean 2017; Mayer 2016). With some notable exceptions, such as Morey's criticism (2014) of the Rockefeller Foundation's championing of benefit corporations, there has not been similar scrutiny of a separate assault on democratic checks and balances rooted in shared-value theories of business responsibility hailing from management theories at leading business school such as Harvard.

This assault might well have been unwitting and unintended. It might well be that today's win-win philanthrocapitalists esteem democratic governance and have not grasped the ways that claims of a natural harmony of interests can and does distort judicial and public understanding of the importance of a separation of private and public powers. But an assault on democratic checks has nonetheless transpired. Today, spurious assumptions of natural compatibility between private enrichment and public welfare are helping to legitimate an unprecedented transfer of greater power to corporate authorities in a manner that earlier democratic theorists saw as the duty of courts to keep in check.

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