Patriotic Philanthropy? Financing the State with Gifts to Government

Margaret H. Lemos* & Guy-Uriel Charles**

ABSTRACT

This Article offers a positive and normative account of an important and growing trend: wealthy individuals are increasingly giving their money to the government to encourage the government to fund particular projects that these individuals want the government to pursue. Such gifts—dubbed “patriotic philanthropy” by one prominent donor—raise fundamental questions about the role that private money plays and ought to play in public policy-making. Legal academics have addressed these types of questions in other contexts, such as campaign financing, privatization of government, and private philanthropy. However, patriotic philanthropy, which presents a new and perhaps more effective way for wealthy individuals to influence the government, has generally escaped the attention of the legal literature. We aim to remedy that lacuna with this Article. Although we do not question the enormous good that patriotic philanthropy can do, this Article argues that gifts to government raise significant concerns about democratic process, equality, and state capacity.

DOI: https://doi.org/10.15779/Z38N87303D
Copyright © 2018 California Law Review, Inc. California Law Review, Inc. (CLR) is a California nonprofit corporation. CLR and the authors are solely responsible for the content of their publications.

* Robert G. Seaks LL.B. ’34 Professor of Law, Duke University.
** Edward and Ellen Marie Schwarzman Professor of Law, Duke University. Thanks to Matt Adler, Joseph Blocher, Curtis Bradley, Charlie Clofelter, Cary Coglianese, Deborah DeMott, Ofer Eldar, Joel Fleischman, Barry Friedman, Peter Frumkin, Kristin Goss, Mitu Gulati, Kim Krawiec, Rich Schmaiteck, and Larry Zelenak, as well as workshop and colloquium participants at Duke University School of Law, New York University School of Law, and William & Mary Law School, for helpful conversations and comments on earlier drafts. We are grateful to Miata Eggerly, Carly Penner, Brandon Rice, and the Duke Law Library for invaluable research assistance.
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 watches over an entire city by continuously collecting images from a plane-mounted camera array. An Air Force engineer named Ross McNutt developed the technology during the Iraq War to help the military figure out who was planting roadside bombs. The idea was tantalizingly simple, as was the pitch: “Imagine Google Earth with TiVo capacity.” In short, the cameras would serve as unblinking eyes in the sky that recorded everything they 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

3. Id.
4. See id.
5. See id.
target location, and then trace the movements of that vehicle to identify any addresses it visited before and after the explosion.6

After retiring from the military in 2007, McNutt began to focus on commercial applications for the technology.7 He started a company called Persistent Surveillance and started attending security trade expos to market his product.8 His first client was the mayor of Ciudad Juárez, Mexico, which had earned the title of most dangerous city on earth thanks to warring drug cartels.9 The technology was a great success, helping the city secure dozens of arrests and confessions in a few months’ time.10 Soon, however, the city ran out of money to pay for the service, and McNutt returned to the United States and the search for clients.11

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.12 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.13 The Arnolds told McNutt that if he could find a US city willing to try out the surveillance technology for several months, they would pick up the tab.14 “We settled in on Baltimore,” McNutt later told reporters, “because it was ready, it was willing, and it was just post-Freddie Gray.”15

Starting sometime in 2016, McNutt began conducting aerial surveillance for the Baltimore Police Department.16 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.17 True to their word, the Arnolds donated $360,000 of their own money to foot the bill.18 Had taxpayer dollars been involved, the transaction would have required approval by the city’s five-member Board of Estimates.19 The private funding arrangement allowed

6. See id.
7. Id.
8. See id.
9. Id.
10. Id.
11. See id.
12. Id.
15. Id.
16. Id.
17. Id.
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 2016.20

The Arnolds’ gift to Baltimore is but one example of a growing phenomenon that features wealthy benefactors donating money to government, as opposed to private charities, to support particular governmental policies and projects.21 This Article explores this phenomenon, which one prominent philanthropist has dubbed “patriotic philanthropy,”22 situating gifts to government at the intersection of private philanthropy, political participation, and the privatization of government. Each of these subjects concerns the private actor’s role in public policy, and each has spawned a vast literature (much of it critical).23 To date, however, most of the relevant commentary has proceeded on


separate tracks. Attention to patriotic philanthropy helps illuminate the connections that run from one area to the next, offering a glimpse at the larger system of private influence over governance.

Consider the connections between private 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 that apply to government actors. As one commentator put it, “[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.” Similarly, critics of prevailing campaign-finance law argue that wealthy donors are able to exert outsized influence over electoral results, and ultimately over public policy. Both lines of critique emphasize anxieties about creeping plutocracy—about a shift from collective, democratic modes of decision-making to policy-making dominated by the moneyed few.

Gifts to government, we argue, raise these concerns in particularly stark form. 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 revenue sources. Governments can borrow, charge fees, and tax. Yet, from the government’s perspective, each of those funding alternatives has significant political and practical downsides.

Gifts avoid such problems, offering an immediate and seemingly costless source of funds. As a result, offers like the Arnolds’ may be

---

24. See infra Part II.B.
27. 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).
28. See infra Part I.
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. Gifts, therefore, are likely to exert a gravitational force on public policy, pulling government officials into projects they would not otherwise pursue.

Gifts to government might also seem at first blush to be preferable to other traditional avenues of political influence, such as campaign contributions, campaign expenditures, and lobbying. However, patriotic donations offer benefits to government officials that cannot be matched by the more traditional avenues of political influence. Like the government’s alternative funding sources, those traditional avenues of political influence have considerable shortcomings. Voters, campaign supporters, and lobbyists cannot directly 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.” 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 then again they might not. Again, gifts avoid that problem. A gift does not simply generate gratitude and indebtedness on the part of the recipient. 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 decision-making.

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. 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. Because they allow government to accomplish goals it cannot actually afford, gifts paper over the government’s weaknesses. As a result, citizens are unable to make informed choices based upon the actual, as opposed to perceived, capacities of their government. Combine private financing with more

30. See infra Part II.A.
33. For seminal work on the power of gifts, see MARCEL MAUSS, THE GIFT: FORMS AND FUNCTIONS OF EXCHANGE IN ARCHAIK SOZETIES (1954 American ed.).
34. For more on privatization, see infra Part I.E.
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 remarkably thin in fact.35

To highlight these concerns is neither 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.36 As critics have recognized, such arrangements raise serious concerns about the mismatch between the private profit motive and the public interest.37

Patriotic philanthropy seems to avoid the profit-motive pitfall, which may explain why it has attracted virtually no critical attention.38 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 contribute 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.

35. 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).
36. See infra Part I.E.
37. See infra Part I.E.
38. 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 private financing as such. See infra Part II.C.
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 Great Recession of 2008, state and local governments lack the funds to make needed repairs and upgrades. 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. But rather than ramping up services, states and local governments have had to make painful cuts, targeting everything from police to firefighters and sanitation to public schools and libraries.

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. Nevertheless, financing woes are 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.

This Section 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.

43. See infra notes 50–51, 80–81 and accompanying text; see also David A. Super, Rethinking Fiscal Federalism, 118 HARV. L. REV. 2544, 2555 (2005) (emphasizing state budgets’ sensitivity to business cycles).
They may take various forms, and different types of taxes are 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.\footnote{Richard Briffault & Laurie Reynolds, Cases and Materials on State and Local Government Law 649 (7th ed. 2009); Harvey S. Rosen, Public Finance 15 (7th ed. 2005); see also Tax Pol’y Ctr. Briefing Book, http://www.taxpolicycenter.org/briefing-book/what-are-sources-revenues-federal-government [https://perma.cc/5PDS-4S8S] (last visited July 8, 2018) (“The individual income tax has been the largest single source of federal revenue since 1950, amounting to 47.3 percent of the total and 8.4 percent of gross domestic product (GDP) in 2016.”).}

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.\footnote{David J. McCarthy, Jr. & Laurie Reynolds, Local Government Law 382 (2003) (“[T]axes are general charges assessed against all who are within the scope of the government’s taxing authority. . . . Taxes are imposed without consideration of whether the individual taxpayer will benefit from the services to be funded by the tax.”).}

In these ways, taxes collectivize the support of government programs by spreading the costs across the citizenry.\footnote{See Johnn 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.”).} 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.\footnote{McCarty & Reynolds, supra note 45.} 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.”\footnote{Lawrence Zeleznak, 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 revenue-raisers, as it reduces each individual’s financial burden. 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.\footnote{\cite{BrieffaultReynolds:2007} (“The constitutions of sixteen states now require a legislative supermajority (ranging from 60 percent to 75 percent) 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.”).} Many states also impose substantive caps on the permissible level of taxation.\footnote{\cite{BrieffaultReynolds:2007} at 700–701.}

As a practical matter, moreover, a modest tax hike will be of 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.\footnote{\cite{Tangel:2015} at 699–701.} To finance such a project out of general funds, the state and/or local government would have had to raise taxes sharply in the short term, slash funding for other programs and projects, or both.\footnote{\cite{BrieffaultReynolds:2007} at 791–92 (“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.”).} 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.

\section*{B. Intergovernmental Grants}

Governments also can share revenue with each other via intergovernmental grants, such as federal grants to the states or state grants to localities.\footnote{In 2015, the most recent year for which comprehensive data are available, intergovernmental revenues accounted for approximately $605 billion in state revenues, out of a total of about $2.2 trillion. \cite{USCB:2015} at 52.} 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. Because state citizens are also federal taxpayers, 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,” which can cause state (or local) voters to support a higher level of spending—and taxes—than they otherwise would.\footnote{See Philip J. Grossman, \textit{The Impact of Federal and State Grants on Local Spending: A Test of the Fiscal Illusion Hypothesis} 18 \textit{Pub. Finance Quarterly} 313, 313–14 (1988).}

Despite their immediate appeal, grants can have significant downsides for recipients. To the extent that voters do realize that they are paying for federal

\begin{itemize}
\item \footnote{\cite{BrieffaultReynolds:2007} at 700 (“The constitutions of sixteen states now require a legislative supermajority (ranging from 60 percent to 75 percent) 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.”).}
\item \footnote{\cite{Tangel:2015} at 699–701.}
\item \footnote{\cite{BrieffaultReynolds:2007} at 791–92 (“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.”).}
\item \footnote{In 2015, the most recent year for which comprehensive data are available, intergovernmental revenues accounted for approximately $605 billion in state revenues, out of a total of about $2.2 trillion. \cite{USCB:2015} at 52.}
\end{itemize}
grants, they may have less tolerance for state or local taxes.\textsuperscript{56} And many grants require the recipient to contribute matching funds, drawing in state or local revenues in support of priorities set by another sovereign: the federal government.\textsuperscript{57} Worse still, grants can be undependable. If the outside money runs out, recipients may be left scrambling to find other sources of revenue to support programs that have cultivated dependent constituencies.\textsuperscript{58}

Perhaps most importantly, grants tend to come with strings attached.\textsuperscript{59} To get money for highways, for example, states may have to accede to federal policy demands, such as requiring motorcyclists to wear helmets\textsuperscript{60} or raising the legal drinking age to twenty-one.\textsuperscript{61} In addition to the short-term hit to policy autonomy, intergovernmental grants might also have more subtle costs to state independence—costs that today’s state officials and citizens may fail to

\textsuperscript{56} See Nat’l Fed’n of Indep. Bus. v. Sebelius, 567 U.S. 519, 680 & n.13 (2012) (Scalia, J., dissenting) (discussing how “[w]hen 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” and “heavy federal taxation diminishes the practical ability of States to collect their own taxes”). Contra Brian Galle, \textit{Does Federal Spending “Coerce” States? Evidence from State Budgets}, 108 NW. U. L. REV. 989 (2014).

\textsuperscript{57} See, e.g., Super, supra note 43, 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, \textit{Anomalies: The Flypaper Effect}, 9 J. ECON. PERSP. 217, 218 (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.” \textit{Id.}; see Edward M. Gramlich, \textit{Intergovernmental Grants: A Review of the Empirical Literature, in THE POLITICAL ECONOMY OF FISCAL FEDERALISM 219, 219–39} (Wallace 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, \textit{A Minimalist Model of Federal Grants and Flypaper Effects}, 61 J. PUB. ECON. 229, 230 (1996).

\textsuperscript{58} See Super, supra note 43, 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, \textit{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”).

\textsuperscript{59} Galle, supra note 58, at 882 (“When Congress distributes money to other persons or entities, it typically does so subject to conditions.”).


\textsuperscript{61} South Dakota v. Dole, 483 U.S. 203, 205 (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. § 138 (1982 ed., Supp. III)).
internalize fully. For these reasons, some federalism scholars would outlaw or restrict federal-state grants.

C. Fees

As an alternative or supplement to taxes and intergovernmental grants, governments 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, governments could charge museum-goers an admission fee. Such voluntary user fees are common at all levels of government.

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. Fees and similar devices allow citizens to get their government à la carte: 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. And, like private-sector pricing mechanisms, user fees can promote efficiency by generating useful signals about

62. That is, states may not realize how accepting an intergovernmental grant now might make them even more dependent on the grantor, the federal government, later. This is especially so given structural and political limits on the ability of states to raise revenue through taxation. For some scholars making this point, 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.


64. For a description of various kinds of governmental fees and charges, see BRIFFAULT & REYNOLDS, supra note 44, at 725–26.


66. See Reynolds, supra note 65, 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 GERARD E. FRUG ET AL., LOCAL GOVERNMENT LAW 705 (6th ed. 2015) describing how:

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.

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. In this sense, user fees can be understood as part of a broader trend toward privatization, or “running government like a business.”

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 exempt from the substantive and procedural limitations that apply to state and local taxes. But fewer payers also means less money, or means that each user has to pay a larger 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 where the benefits extend to the general public and not just to those individuals who directly use the services in question. Suppose that a municipality charges residents a fee for each garbage pick-up, meaning that residents decide how often to schedule pick-ups and pay the fee. Frequent garbage collection benefits users individually, but it also benefits the neighborhood collectively. 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.

68. See 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”) [hereinafter ACUS SYMPOSIUM].

69. See Thomas Gale Moore, User Fees and Privatization, in ACUS SYMPOSIUM, supra note 68, at 7 (“[U]ser fees facilitate privatization, which I believe is generally a good idea.”).


71. See BRIFFAULT & REYNOLDS, supra note 44, at 726.

72. For more on the details of that project, see supra notes 52–53 and accompanying text.

73. See Gillette & Hopkins, supra note 67, at 808 (cautioning against user fees for services that have the qualities of public goods).

74. 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. 1706, 1727–28 (2015). Others charge defendants for the costs of prosecution and/or incarceration. Chapter One: Policing and Profit, at 1727. 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. See Gillette & Hopkins, supra note 67, at 855–56. Involuntary fees are controversial for various reasons, including the incentives they create for law enforcement and their targeting of those least able to pay. See Chapter One Policing and Profit, at 1724–36.
D. Bonds

For governments in need of ready money, borrowing offers an attractive alternative to taxes, grants, and fees. Governments at all levels in the United States borrow billions of dollars each year, typically by issuing bonds that can be purchased by individuals and institutions worldwide.\textsuperscript{75} 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, so governments often use bonds to generate the money needed for large projects and programs.\textsuperscript{76} In addition to producing a more immediate payday, borrowing avoids the problems of intertemporal 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 taxpayers.\textsuperscript{77} 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.\textsuperscript{78}

But if the appeal of borrowing is clear, so too are the risks. Like families, governments may borrow too much, taking on obligations they cannot fulfill.\textsuperscript{79} 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.\textsuperscript{80} As with restrictions on taxes, debt limitations may be substantive or procedural. Substantive limitations impose caps on debt; procedural rules require

\begin{itemize}
  \item \textsuperscript{75} BRIFFAULT \& REYNOLDS, supra note 44, at 789–91 (“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.”).
  \item \textsuperscript{76} \textit{Id.}
  \item \textsuperscript{77} \textit{See Dep’t of Revenue of Ky. v. Davis, 553 U.S. 328, 342 (2007) (“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.”).}
  \item \textsuperscript{78} \textit{See generally Julie A. Roin, Privatization and the Sale of Tax Revenues, 95 MINN. L. REV. 1965, 1970–74 (2011) (“Debt . . . allows politicians to finance new, politically popular projects without imposing the corresponding costs on their current constituency.”)
  \item \textsuperscript{79} 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 turnpikes—are being repeated in today’s municipal bankruptcies. \textit{See BRIFFAULT \& REYNOLDS, supra note 44, at 639–40; see also ALBERTA M. SBRAGIA, DEBT WISH: ENTREPRENEURIAL CITIES, U.S. FEDERALISM, AND ECONOMIC DEVELOPMENT (1996). For a discussion of municipal bankruptcies today, see Anderson, supra note 41, at 1120.}
  \item \textsuperscript{80} For an assessment of the history and the arguments on limiting allowable debt, see Nadav Shoked, Debt Limits’ End, 102 IOWA L. REV. 1239 (2017).
\end{itemize}
government to clear special democratic hurdles—such as voter approval, approval by a legislative supermajority, or both—before taking on new debt.81

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.82 So-called “revenue bonds”—which are backed only by specified revenue sources—typically are exempt.83 The same is true of bonds that are issued by entities other than the state or municipal governments themselves, including so-called “public authorities.”84 (Indeed, that is one of the reasons why governments create such entities in the first place.85)

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 the state tend to be riskier for creditors, and therefore significantly more expensive than conventional general-obligation bonds.86 Paradoxically, then, the primary effect of legal debt limitations may not be to limit borrowing so much as to raise its cost.87

E. Public-Private Partnerships

An additional possibility—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.”88 For example, the LaGuardia Airport redevelopment

81. BRIFFAULT & REYNOLDS, supra note 44, at 790; see also Roin, supra note 80, at 1975–78.
83. BRIFFAULT & REYNOLDS, supra note 44, at 792 (noting that nonguaranteed debt via revenue bonds “has become the principal form of state and local borrowing” in recent decades); see also Briffault, supra note 82, at 76 (observing that revenue bonds are exempt from the debt limits imposed by state constitutions on local government borrowing).
84. See generally Steven L. Schwarz, The Use and Abuse of Special-Purpose Entities in Public Finance, 97 MINN. L. REV. 369, 375 (2012) (stating that bonds issued by special-purpose entities are exempt from debt limits); see also C. Robert Morris, Jr., Evading Debt Limitations with Public Building Authorities: The Costly Subversion of State Constitutions, 68 Yale L.J. 234 (1958) (arguing that public authorities raise state constitutional problems because they enable state governments to evade debt limits imposed by their state constitutions).
85. See Jonathan Rodden, Market Discipline and U.S. Federalism, in WHEN STATES GO BROKE: THE ORIGINS, CONTEXT, AND SOLUTIONS FOR THE AMERICAN STATES IN FISCAL CRISIS 123, 140 (Peter Conti-Brown & David A. Skeel, Jr. eds., 2012) (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 44, at 872–73 (discussing public authorities).
86. BRIFFAULT & REYNOLDS, supra note 44, at 792.
87. 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 85, at 133.
88. Ryan Holeywell, The Indiana Toll Road: A Model for Privatization?, GOVERNING MAGAZINE (Oct. 2011) (describing how “governments’ desire for P3s is on the rise” and “[w]ith state and federal highway budgets stretched, lawmakers are reluctant to supplement them with higher gas
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.

The second type of public-private 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 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 as well as to service any debt. The contingent nature of the 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.”

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. 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 seventy-five years. In exchange, the company paid the City roughly $1.2 billion. 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.” 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.

Chicago’s experience now stands as a cautionary tale, and it has fueled a movement away from the demand-risk model and toward availability-payment P3s. 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 an y 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 additional concerns, familiar to debates about privatization more generally. Most privatization in the United States takes the form of contracting out: the government enlists private entities to perform tasks—building roads, collecting trash, running prisons, etc.—that would otherwise be

whatpublicprocurementspecialistsneednowfinal.pdf?sfvrsn=af15cd40_4
[https://perma.cc/EJ3S-G2KU] (describing P3s as “highly complex structures that are quite unique on a case-by-case basis”).

97. 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.”)


99. Id.


101. Russ, supra note 98.

102. Id. (citing Chicago’s parking-meter lease as the “most-often-told cautionary tale” about the first generation of P3s in the United States).

103. See MOODY’S INV. SERV., CERTAIN US P3 OBLIGATIONS WILL BE TREATED AS GOVERNMENT DEBT 3 (Feb. 2, 2015) (describing the trend toward availability-payment P3s).
performed by government employees. Advocates of privatization argue that market discipline can make private-sector providers more efficient than government. 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.

P3s represent yet another step down the road to privatization, combining private performance with private financing. They therefore 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.

Notwithstanding these drawbacks, P3s are on the rise in the United States. As of 2016, thirty-three states, the District of Columbia, and Puerto Rico had legislation that enables P3s for transportation projects—up from twenty-three in


106. See Michaels, supra note 105, 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)).

107. See Freeman & Minow, supra note 35, at 4–5 (summarizing the major critiques of privatization); Paul Starr, The Meaning of Privatization, 6 Yale L. & Pol’y Rev. 6, 38–41 (1988) (discussing the tension between “public” and “private” priorities).

108. See Christopher Weber, The Problem with Public-Private Partnerships, Next City (May 7, 2012), https://nextcity.org/daily/entry/the-problem-with-public-private-partnerships [https://perma.cc/BFL4-VJZQ] (criticizing P3s for “let[ting] corporate interests drive public investment”). A related investment tool, still in its infancy in the United States, 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 a 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), https://nextcity.org/daily/entry/senate-hearing-social-impact-bonds-helpful-harmful [https://perma.cc/7S87-FCKT]; see also Matthew Bishop & Michael Green, Philanthropic Capitalism Rising, 52 Soc’y 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, http://socialfinance.org/how-pay-for-success-works/ [https://perma.cc/9F7Z-549A] (last visited July 8, 2018) (describing how SIBs are funded). SIBs have been used in the United States to develop programs aimed at reducing recidivism, improving early-childhood education, and facilitating reentry by formerly incarcerated citizens. Bradley, supra.
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 billion to $1 trillion. Chicago’s current mayor, Rahm Emanuel, has embraced P3s (even as he seeks to distance himself from the notorious parking-meter lease). “We have great corporations in Chicago who are, in my view, the best of corporate citizens,” Emanuel said. “I couldn’t achieve anything I’m trying to do without their participation.” Mayor Alvin Brown of Jacksonville was even more explicit: “[P3s] are the wave of the future. Government can’t do it alone.”

As this discussion demonstrates, 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 its 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


113. Id.; see also Carol Ebdon & Paul Landow, THE BALANCING ACT: USING PRIVATE MONEY FOR PUBLIC PROJECTS, PUB. BUDGETING & FIN. 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), https://www.law360.com/articles/751657/fixing-us-infrastructure-new-model-p3-law-a-good-start [https://perma.cc/JVZ9-GWBC] (“[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.”).
legal and political 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 Section 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 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 have little effect: you have to convince others to vote for your candidate as well. Although voting is an individual right, it is also a collective endeavor.114 And, like all such endeavors, there are costs to collective action.115

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; you must pool your donation with contributions from like-minded others. That is particularly so in the United States, where most polities have enacted limits on how much a single individual or organization can contribute to a political candidate.116 Even in the absence of contribution limits,

114. See Heather K. Gerken, Understanding the Right to an Undiluted Vote, 114 HARV. L. REV. 1663, 1677 (2001) (“[A]n individual’s ability to aggregate her vote with others matters in a representative democracy.”).


only a very small handful of individuals are capable of funding a candidate or campaign by themselves.¹¹⁷ For most of us, effectively supporting a candidate includes convincing our 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. That 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 more substantial contributor) than they are to you.¹¹⁸

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 contribution to your preferred candidate. For the vast majority of Americans, that is the extent of their political participation.¹¹⁹

Suppose now that you are rich—very, very rich.¹²⁰ In addition to voting and volunteering, you have four mutually inclusive options available to you. You can make direct political contributions to your favorite candidates; you can independently spend money to promote the candidates or policy outcomes that

---

¹¹⁷ The average cost of a winning Senate campaign in the 2016 election cycle was over $10 million, including only money spent by the winning candidate and not by outside groups. For the House, the average cost of a winning campaign for the same cycle was $1.3 million, again including only money spent by the winning candidate. See Soo Rin Kim, The Price of Winning Just Got Higher, Especially in the Senate, OPENSECRETS (Nov. 9, 2016), https://www.opensecrets.org/news/2016/11/the-price-of-winning-just-got-higher-especially-in-the-senate/ [https://perma.cc/ZM7T-8S7Q].

¹¹⁸ For an early and general overview, see HAROLD D. LASSELL, POLITICS: WHO GETS WHAT, WHEN, HOW (1936).


¹²⁰ 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, LARRY M. BARTELS, UNEQUAL DEMOCRACY: THE POLITICAL ECONOMY OF THE NEW GILDED AGE (2008); MARTIN GILENS, AFFLUENCE AND INFLUENCE: ECONOMIC INEQUALITY AND POLITICAL POWER IN AMERICA (2012); JACOB S. HACKER & PAUL PIERSON, WINNER-TAKE-ALL POLITICS: HOW WASHINGTON MADE THE RICH RICHER—AND TURNED ITS BACK ON THE MIDDLE CLASS (2010).
you prefer; you can bribe public officials to enact your public policy preferences; and you can lobby public officials to enact your policy preferences.\footnote{121} 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, traditional avenues of political participation prove to be relatively inefficient.\footnote{122}

As before, your first option is to identify a politician who will champion your cause and support her candidacy directly. 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 bend their will to yours.\footnote{123} They will gladly solicit and accept your contributions.

You might contribute directly to a candidate’s political committee or political action committee (PAC); you might start a traditional PAC yourself. But you will soon find yourself dissatisfied with simply handing over your money in this way. Making a contribution is a passive endeavor that is inconsistent with the power and control you might expect to exercise as a consequential policy entrepreneur.\footnote{124} 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 compel a candidate to use your political contribution in a specific way. Thus, in making a contribution, you subordinate your views on how to spend the money, how to convey the political message, or even how best to achieve an ostensibly shared purpose, to the recipient of the contribution.

\footnote{121} 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. See, e.g., Bård Harstad & Jakob Svensson, \textit{Bribes, Lobbying, and Development}, 105 \textit{Am. Pol. Sci. Rev.} 46 (2011); Matthew D. Hill et al., \textit{Determinants and Effects of Corporate Lobbying}, 42 \textit{Fin. Mgmt.} 931 (2013). The campaign finance literature generally treats these as separate options. Like the political science literature, we view these as related policy options. 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.

\footnote{122} This inefficiency, we will suggest, is baked into our democratic system. That is, representative democracy is a collective enterprise, and the nature of the enterprise compels collective-action and agency costs. We will return to this point in \textit{infra} 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.

\footnote{123} See, e.g., \textit{Lessig, supra note 26}.

\footnote{124} Of course, not all contributors are interested in defining their public-policy ends. Many contributors do not have the knowledge, 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 & Dimitri Landa, \textit{Consumption or Investment? On Motivations for Political Giving}, 69 \textit{J. Pol.} 1057, 1070 (2007) ("[D]onors have instrumental motivations, but returns on their contributions are unlikely to be systematic . . . ").
We can frame this issue with political contributions as a principal-agent problem. At first blush, one might think of the contributor as the principal and the recipient candidate as the agent. On this account, the principal-contributor makes the contribution to the agent-recipient pursuant to an objective defined and directed by the principal-contributor. In reality, however, it is often the recipient of the contribution who directs and defines the objective. By contributing, you are simply indicating a willingness to help the recipient achieve that goal.

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 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 effort devoted to your issue. Because of the information asymmetry between you and your agent, you are vulnerable to “cheap talk.” You are also 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 end.

As perhaps the better alternative, you might consider making independent expenditures to amplify your impact as a policy entrepreneur. Independent expenditures minimize the type of monitoring costs associated with political contributions and enable the principal to advocate directly—though not always


127. The Supreme Court has recognized this voluntary loss of agency in its campaign finance cases. For example, in Buckley v. Valeo, the Court stated that a political contribution “serves as a general expression of support” and is “symbolic.” 424 U.S. 1, 21 (1976) (per curiam). Notably, “[w]hile 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.” Id. 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.”).


130. “Cheap talk” is shorthand for commitments or statements that impose very little obligation on the party making the commitment. See Joseph Farrell & Matthew Rabin, Cheap Talk, 10 J. ECON. PERSP. 103 (1996).
explicitly—in support of the politicians or public policy outcomes that she favors.\textsuperscript{131}

At the federal level, there are a number of vehicles that you can use for independent expenditures. You can create a 501(c)(4),\textsuperscript{132} a 501(c)(3), or a 527 organization\textsuperscript{133} to support your favorite candidates and issues. 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, so long as it does not make any direct contributions to political candidates.\textsuperscript{134} A super PAC will allow you to spend however much money you want to advocate—again not always explicitly—in favor of your preferred public policies as well as your favorite politicians or political candidates.\textsuperscript{135}

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 do not change public policy directly. Advocacy is not implementation. And to the extent that policy

\begin{itemize}
\item \textsuperscript{131} 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 of the candidate or a candidate’s authorized committee. 2 U.S.C. § 431(17) (2006); 11 CFR 100.16(a) (2008). Additionally, in \textit{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. 1, 44 n.52 (1976) (per curiam). Examples of express advocacy are words such as “vote for” or “vote against,” “elect” or “defeat,” “support” or “reject.” \textit{Id.}
\item \textsuperscript{132} 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 expenditures-only PAC. See generally JAMES A. GARDNER & GUY-URIEL CHARLES, ELECTION LAW IN THE AMERICAN POLITICAL SYSTEM 724–28 (2d ed. 2018) (describing 501(c)(4) organizations); Gregg D. Polsky & Guy-Uriel E. Charles, \textit{Regulating Section 527 Organizations}, 73 GEO. WASH. L. REV. 1000 (2005) (defining 501(c)(4) organizations).
\item \textsuperscript{133} A 527 group is a type of political organization—such as parties, candidates, or 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 527 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, \textit{A Tax Lawyer’s Perspective on Section 527 Organizations}, 28 CARDOZO L. REV. 1773 (2007); GARDNER & CHARLES, \textit{supra} note 132, at 727–28.
\item \textsuperscript{134} See Richard Briffault, \textit{Super PACs}, 96 MINN. L. REV. 1644, 1651–65 (2012) (defining super PACs).
\item \textsuperscript{135} \textit{Id.}
\end{itemize}
implementation is a desired goal, 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 effecting political change.

How can you, a 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 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 to discourage shirking and to encourage efforts 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. 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 jealously guards its monopoly on the

136. See, e.g., Richard L. Hall & Molly E. Reynolds, Targeted Issue Advertising and Legislative Strategy: The Inside Ends of Outside Lobbying, 74 J. Pol. 888 (2012) (finding that the purpose of targeted issue advertising, which is a form of independent expenditures, is to mobilize legislative allies).


139. See, e.g., Peter Cappelli & Keith Chauvin, An Interplant Test of Efficiency Wage Hypothesis, 106 Q.J. Econ. 769, 769 (1991) (“Greater wage premiums are associated with lower levels of shirking . . . .”); Nathaniel Vargas Gallegos, The Solo Lawyer Proportion: Explanations with the “Push and Pull” Factors Endemic in Legal Firm Organization, 37 J. Legal Prof. 25, 59 (2012) (“A firm will try to attenuate the agency costs of shirking and opportunism with either monitoring or transfer payments in the form of wage premiums.”); Michel A. Habib & D. Bruce Johnsen, The Quality-Assuring Role of Mutual Fund Advisory Fees, 46 Int’l Rev. L. & Econ. 1, 3 (2016) (noting that one solution to shirking by fund managers is to pay them a premium fee).

lawmaking function, and that function cannot be bought or sold. One justification for bribery laws is precisely to protect this monopoly on lawmaking.141

This brings us to your final option: lobbying.142 As one scholar put it, lobbying is a “natural means of seeking political influence.”143 Theoretically, lobbying is a mechanism with fewer agency costs than campaign contributions and independent expenditures.144 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.145

The literature on lobbying generally identifies a number of ways that lobbyists interact with legislators. Like most citizens, lobbyists can make political contributions to lawmakers, which can serve to persuade lawmakers to support their policy preferences, reward those who do, and implicitly threaten those who don’t.146 But unlike most citizens, lobbyists have unusual access to elected officials, which lobbyists can use to educate lawmakers by providing information that may not otherwise be available.147 Additionally, lobbyists might use their access to involve themselves directly in lawmaking. Few, if any, major pieces of legislation get passed without the involvement of lobbyists, who are sometimes intimately involved in drafting proposed bills.148

141. See William N. Eskridge, Jr. et al., Cases and Materials on Legislation and Regulation: Statutes and the Creation of Public Policy 264 (5th ed. 2014) (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”). 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.

142. 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., Nauro F. Campos & Francesco Giovannoni, Lobbying, Corruption, and Political Influence, 131 PUB. CHOICE I (2007); Harstad, supra note 121, at 46.


144. For an analysis of how contributors address those agency costs, see James M. Snyder, Jr., Long-Term Investing in Politicians; or, Give Early, Give Often, 35 J. L. & ECON. 15 (1992).


146. See, e.g., Richard L. Hall & Alan V. Deardorff, Lobbying as Legislative Subsidy, 100 AM. POL. SCI. REV. 69 (2006).


148. See, e.g., Richard L. Hasen, Lobbying, Rent-Seeking, and the Constitution, 64 STAN. L. REV. 191, 194 (2012) (“Every piece of federal legislation has been influenced by (and sometimes portions even written by) lobbyists.”).
But lobbying, like independent expenditures and contributions, is also suboptimal.\textsuperscript{149} Lobbying is very expensive, and the returns on investment are uncertain.\textsuperscript{150} Lobbying on one side of an issue is often accompanied by counter-lobbying on the other side.\textsuperscript{151} Lobbying also suffers from significant agency costs,\textsuperscript{152} and electoral considerations, partisanship, ideology, and other limitations sometimes constrain lawmakers. Remarkably, although the lobbying literature is vast and robust, scholars are still trying to figure out precisely what interest groups get out of lobbying.\textsuperscript{153}

In sum, if you are a wealthy policy entrepreneur looking to purchase a public policy outcome, your traditional political process options are rather inefficient. Consequently, a rational individual interested in purchasing policy outcomes might attempt to employ other more optimal options. The remainder of this Section considers two such options: traditional private philanthropy and “patriotic” philanthropy directed at government.

\section*{B. Private Philanthropy}

Critics of big government and taxes sometimes suggest that we should “cut out the middleman.”\textsuperscript{154} 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 donations.\textsuperscript{155}

The philanthropic approach holds the potential of erasing the agency costs associated with the political strategies discussed above. Private giving today

\begin{flushright}
\textsuperscript{149} See, e.g., Marcel Fafchamps, Alain de Janvery & Elisabeth Sadoulet, \textit{Social Heterogeneity and Wasteful Lobbying}, 98 PUB. CHOICE 5, 5 (1999) (noting that “economists and political scientists have long recognized that lobbying activities can be an important source of resource wastage”).
\end{flushright}

\begin{flushright}
\textsuperscript{150} See, e.g., Hall & Deardorff, supra note 146, at 69 (“Empirical research on interest group influence has accumulated for decades, but this literature is noteworthy for the noncumulative, frequently inconsistent nature of its findings.”).
\end{flushright}

\begin{flushright}
\end{flushright}

\begin{flushright}
\textsuperscript{152} For a critical discussion of these issues, see, e.g., Matthew C. Stephenson & Howell E. Jackson, \textit{Lobbyists as Imperfect Agents: Implications for Public Policy in a Pluralist System}, 47 HARV. J. LEGIS. 1 (2010); see also Hall & Deardorff, supra note 146 (reconceptualizing the function of lobbying to reduce the agency costs concerns).
\end{flushright}

\begin{flushright}
\end{flushright}

\begin{flushright}
\textsuperscript{154} \textit{ZELENAK}, supra note 49, at 36.
\end{flushright}

\begin{flushright}
\textsuperscript{155} See Bishop & Green, supra note 108, at 541 (“As 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.”).
\end{flushright}
buzzes with terms like “strategic giving,” “venture philanthropy,” and “philanthrocapitalism.” 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 effectiveness, “making fewer, larger grants to smaller circles of organizations,” and developing and running initiatives themselves rather than funding unsolicited proposals from nonprofits.

The upshot is that contemporary philanthropy tends more toward top-down policy-making—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.

---

157. See, e.g., Kenneth J. 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 EDUC. POL’Y 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.


158. Bishop & Green, supra note 108, at 541–42, explaining that: [a]t 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.

Id.; Robin Rogers, Why Philanthro-Policymaking Matters, 48 SOC’Y 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.”).

159. Rick Cohen, What Are Foundations For?, BOS. REV. (Mar. 1, 2013), http://bostonreview.net/forum-foundations-philanthropy-democracy [https://perma.cc/FA6M-P9F8]; see also Garry W. Jenkins, Who’s Afraid of Philanthrocapitalism?, 61 CASE W. RES. L. REV. 753, 775 figs. 1–2 (2011) (showing that from 1997 to 2008 there was an increase in the number of large grants and the percentage of overall dollars allocated to such grants).

160. See, e.g., Kumashiro, supra note 157 (“[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 159, at 781. Specifically, the percentage of large foundations with “invitation only” grant policies increased almost fivefold between 1994 and 2008. Jenkins, supra, at 781 fig. 5.

161. Cohen, supra note 159 (“Increasingly, . . . [foundations] are playing a public-policy role themselves rather than equipping nonprofits to speak with and for communities about their needs. . . . This is top-down policy advocacy.”)
Philanthropy today is not only “strategic” than it once was but also is booming. Americans donated $390.05 billion in 2016—the highest total ever. As one insider put it, we are in 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.” Soaring gift amounts are underwritten, in part, by the growing concentration of wealth at the top of the economic ladder. According to Forbes Magazine, the number of billionaires worldwide more than quadrupled between 2000 and 2015. 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. The Giving Pledge, a promise by “the world’s wealthiest individuals and families to commit to giving more than half of their wealth to philanthropy,” reflects that commitment. The Giving Pledge has attracted 170 signatories since its inception in 2010, all of them “billionaires, or those who would be if not for their giving.”

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.” 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.”

162. Press Release, Giving USA, Giving USA 2017: Total Charitable Donations Rise to New High of $390.05 Billion (June 12, 2017), https://givingusa.org/giving-usa-2017-total-charitable-donations-rise-to-new-high-of-390-05-billion/3 [https://perma.cc/LD44-Q6CV]. Most gifts were from individuals (72 percent); the remainder came from foundations (15 percent), bequests (8 percent), and corporations (5 percent). Id.


164. See Kristin A. Goss, Policy Plutocrats: How America’s Wealthy Seek to Influence Governance, 49 PS. POL. SCI. & POL’Y 442, 442 (July 2016); see also Reich, What are Foundations For?, supra note 25 (“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.”).

165. See Goss, supra note 164, at 443 (discussing how “[b]ooms 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” and that “[s]cores of leading donors are using moral suasion to establish a norm that wealthy people’s ‘excess’ money should go toward public purposes”).

166. REICH, supra note 23, at 184.

167. LaMarche, supra note 163, at 3–4.
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.”

The Gates Foundation is often used to illustrate the point. The Foundation made $41.3 billion in grants between 2007 and 2016. It has a current endowment of $40.3 billion. Those funds reflect the combined donations of the Foundation’s three trustees: Bill Gates, 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.

Third, critics worry that “philanthropy, by channeling [sic] private funds towards public services, erodes support for governmental spending on health and education.” The idea 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 wonder whether “this [is] the kind of public good that we, as democratic

172. Rogers, supra note 158, at 377.
174. Id.
176. See, e.g., DIANE RAVITCH, THE DEATH AND LIFE OF THE GREAT AMERICAN SCHOOL SYSTEM: HOW TESTING AND CHOICE ARE UNDERMINING EDUCATION 201 (2010) (arguing that philanthropists are “bastions of unaccountable power”); Michael Edwards, Impact, Accountability, and Philanthrocapitalism, 48 SOC’Y 389, 389–90 (2011) (emphasizing the lack of public deliberation around philanthropic decisions); Angela M. Eikenberry, Philanthropy and Governance, 28 ADMIN. THEORY & PRAXIS 586, 589 (2006) (arguing that big donors can function as “‘mini-governments’ that can . . . make public policy decisions on their own, without input from other citizens or elected representatives”); Kumashiro, supra note 157 (arguing that current trends in philanthropy “signal[] the transition from public deliberation by an elected government to decisions of self-appointed individuals with no accountability to the public”); Reich, What Are Foundations For?, supra note 25.
citizens, have the right to offload to a private entity, however reliable and trustworthy.\footnote{179}

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,\footnote{180} 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 you can simply add your donation to the funds already available through the state.\footnote{181}

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.”\footnote{182} 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.\footnote{183} Others, such as the Arnolds’ gift to the


\footnotesize{182. \textit{Id.}}}


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.\(^{184}\) Others, like Soros’s and the Arnolds’, are earmarked for specific purposes.

While giving to government is not new,\(^{185}\) there is reason to think that the phenomenon is on the rise.\(^{186}\) 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.”\(^{187}\) 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.”\(^{188}\)

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,

In 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

\(^{184}\) The Holmes Devise is an example. See David Margoliach, Justice Holmes’s 1935 Bequest Remains Unfulfilled, N.Y. TIMES (May 3, 1983), https://www.nytimes.com/1983/05/03/us/justice-holmes-s-1935-bequest-remains-unfulfilled.html ("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.").


\(^{186}\) Beth Gazley, How Philanthropy Props Up Public Services and Why We Should Care, NONPROFIT Q. (Mar. 27, 2015), https://nonprofitquarterly.org/2015/03/27/how-philanthropy-props-up-public-services-and-why-we-should-care/ ("We know that philanthropic support for public services is growing rapidly, outpacing the growth of the charitable sector overall.").

\(^{187}\) Goss, supra note 164, at 442.

\(^{188}\) Weber, supra note 108; see also David Amsden, Who Runs the Streets of New Orleans?, N.Y. TIMES (July 30, 2015), https://www.nytimes.com/2015/08/02/magazine/who-runs-the-streets-of-new-orleans.html (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”.")
our resources, and forming partnerships with government, philanthropic organizations can help push those changes forward.\textsuperscript{189} 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 in which governments are starting to engage with these new actors in solving society’s toughest problems.”\textsuperscript{190}

The available data, while limited, are consistent with an upward trend in gifts to government. The US Census Bureau collects annual data from state governments on state revenue from various sources, including gifts from private sources.\textsuperscript{191} That category is limited to gifts of cash or securities from private individuals or corporations; it does not include “[n]oncash gifts and donations, such as food, property, buildings, land, commodities, etc.”\textsuperscript{192} 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;

\begin{itemize}
\item \textsuperscript{190} Bishop & Green, \textit{supra} note 108, at 542; see also Landow & Ebdon, \textit{supra} note 97, at 727–28 (linking giving to government with the rise of a new form of philanthropy where investors supply advice and strategic assistance); Paul Ylvisaker, \textit{Community and Community Foundations in the Next Century, in AN AGILE SERVANT: COMMUNITY LEADERSHIP BY COMMUNITY FOUNDATIONS} 51, 58 (Richard 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 efforts at civic improvement and unity.”).
\item \textsuperscript{192} \textit{Id.} 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).
\end{itemize}
the black line shows inflation-adjusted totals, reflecting each year’s gifts in 2014 dollars.


The upward trend is likely to accelerate in the wake of the new tax bill, which caps federal deductions for state and local income and property taxes at $10,000.193 Some states are developing “workaround[s]” that take advantage of the fact that deductions for charitable donations—including donations to government—are not similarly capped.194 The strategy is simple: under the proposed plans, citizens who make financial contributions to state government would receive a corresponding credit that they could apply against their state taxes.195 Thus, money that once would have flowed to the state via taxes would instead come in the form of gifts, meaning higher deductions for state citizens and fewer federal taxes to be paid. If widely adopted, such provisions could vastly increase the volume of philanthropic donations to government, particularly from wealthy citizens who would otherwise be subject to the new limits on deductions for state taxes.

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

---

194. Id.
195. Id.
donations have helped finance community centers, libraries, convention centers, sports arenas, and more. Outdoor public spaces—parks, nature conservancies, 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.”

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.

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

---


198. See, e.g., Landow & Ebdon, supra note 97, at 733–34 (describing private donations to fund a convention center in Omaha, Nebraska).

199. See infra notes 265–273 and accompanying text (describing a donation to the University of North Dakota).

200. See, e.g., Kelly Kleiman, Open Access vs. Donors’ Influence, CHRISTIAN SCIENCE MONITOR (Sep. 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 including 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”.


202. See, e.g., supra note 97.

203. See, e.g., Gazley, supra note 186.

204. See, e.g., supra note 186.
term “patriotic philanthropy.” 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. 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.

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 put the money into its retiree pension system.

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 and one of the few public services that state governments are constitutionally obligated to provide. 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.\textsuperscript{214} Today, in addition to booster clubs and fundraising parent-teacher organizations, many school districts have their own “local education foundations” (LEFs) devoted to raising and distributing private contributions for public schools.\textsuperscript{215} In 2010, school-supporting charities reported more than $880 million in revenues.\textsuperscript{216}

It bears emphasis that gifts to public schools seek not merely to support schools as they are but to change them.\textsuperscript{217} As Rob Reich has explained, “Very frequently these donations are earmarked for particular activities—for extracurricular events or materials, for additional school supplies, for field trips—giving the donors a nontrivial amount of input or leverage on how the school or district operates.”\textsuperscript{218} 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 nearly $5 million to more than 60 colleges and universities, includes required readings in Ayn Rand.\textsuperscript{219} Although neither BB&T nor its charitable foundations have identified the participating schools, research suggests that recipients include a host of public universities.\textsuperscript{220} 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 of the bill for BB&T’s agenda.\textsuperscript{221}

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.\textsuperscript{222} “Not only does what it does make a difference to others in the fields it engages in—it can virtually define the

\begin{thebibliography}{222}
\bibitem{214} See Strong et al., \textit{supra} note 185, 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).
\bibitem{215} Gazley, supra note 186; see also Ashlyn Alko Nelson & Beth Gazley, \textit{The Rise of School-Supporting Nonprofits}, 9 \textit{EDUC. FIN. & POL’Y} 541, 552 (2014) (depicting a 485 percent increase in revenues from school foundations from 1995 to 2010).
\bibitem{216} Gazley, supra note 186.
\bibitem{217} See Reckhow, \textit{supra} note 23, at 449 (reporting that philanthropic funding for K–12 education grew by 73 percent from 2000 to 2010, and that foundations “have stepped well beyond the role of patrons” and increasingly “are involved throughout the policy process”).
\bibitem{218} Reich, \textit{Philanthropy and Its Uneasy Relation to Equality}, \textit{supra} note 25, at 40.
\bibitem{221} Beets, \textit{supra} note 219, at 325.
\bibitem{222} LaMarche, \textit{supra} note 163.
\end{thebibliography}
fields and set the policy agenda for government as well as philanthropy.”223 One of the Gates initiatives, for example, was to break up large public high schools into a series of smaller schools. One 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.224

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 efforts,” 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.”225 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.”226 As a result of the initiative, at least one state enacted a new law that changed statewide principal-preparation programs.227 The Wallace Foundation also notes, without making claims about causation, that since the beginning of its project, fourteen states have adopted updated standards for school principals and administrators, more than half of the participating states have begun requiring principal mentoring programs, twelve states have “enacted laws creating statewide data warehouses, student data management systems and

223. Id. (noting that “the emerging critique of the Gates Foundation” is “[t]he closest we come today” to raising fundamental concerns about philanthropy).


225. Press Release, Governor Bill Richardson Announces $1.2 Million Grant to Increase Accountability in Schools (Nov. 29, 2004) (describing New Mexico’s plans for the Wallace funds).


‘balanced scorecards,’” and nine states have passed new principal-evaluation laws.228

Generalizations become more difficult when we move beyond these recurring categories. Some gifts, like the Arnolds’, offer financial support for law enforcement.229 For example, Facebook recently paid the $194,000 salary of a local police officer whose job was going to be cut.230 Similarly, a $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 sixty new State Police troopers into the city.231 “Frankly,” said the Bureau’s president, “it’s a gigantic paradigm shift in terms of how this city has approached public safety.”

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 to “reduce alcohol abuse dependency among criminal offenders by expanding the Drug Treatment Court Capacity Building Program.”232 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.”233

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

---


229. See supra notes 1–20 and accompanying text.

230. See Amsden, supra note 188.

231. Id.

232. Id.


members of his administration) of multiple corruption offenses.235 Just as the Kilpatrick administration was cratering, the Big Three of the automobile industry—mainstays of Motor City’s private sector—faced their own economic crisis.236 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.237 Some of the funding is in the form of investments similar to the P3s described in Part I.238 Those investments are buttressed by philanthropic donations, including $15 million from the Kresge Foundation239 and $4 million from the Ford Foundation.240

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.”241 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.242

---

241. See Bloomberg Letter, supra note 189.
I-Teams are currently operating in 20 cities, with seven more recently announced.\textsuperscript{243} Each city is eligible for up to $500,000 in annual funding for up to three years.\textsuperscript{244}

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.\textsuperscript{245} (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,\textsuperscript{246} as does the Federal Communications Commission\textsuperscript{247} and the Library of Congress.\textsuperscript{248} And some federal agencies—including the Centers for Disease Control & Prevention, the Food and Drug Administration, and the National Air and Space Administration—have their own foundations devoted to raising private donations.\textsuperscript{249}

Even if the federal environment were more conducive to targeted 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 Section), 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.\textsuperscript{250}

\textsuperscript{243} Id.

\textsuperscript{244} Id.

\textsuperscript{245} The Miscellaneous Receipts Act requires federal agencies to turn over any funds to the general treasury, see 31 U.S.C. § 3302(b) (2016), and the Anti-Deficiency Act prohibits agencies from expending funds in excess of their legislative appropriations, see 31 U.S.C. § 1341(a)(1)(A) (2016). Close cousins to gifts to the general treasury are gifts to reduce the national debt, which the Bureau of Fiscal Service may accept. See Gift Contributions to Reduce Debt Held by the Public, TREASURY DIRECT, https://www.treasurydirect.gov/govt/reports/pdf/gift/gift.htm [https://perma.cc/S5NV-JSD7] (last visited July 8, 2018). Over the last decade, totals have ranged from $1.7 to $7.7 million. See id.


\textsuperscript{249} See Rick Cohen, Philanthropy Funding Government Work? There’s a Foundation for That—Several, Actually, NONPROFIT Q. (Apr. 13, 2012), http://nonprofitquarterly.org/2012/04/13/philanthropy-funding-government-work-there’s-a-foundationfor-thatseveral-actually [https://perma.cc/9347-TBJN]. The CIA also has a foundation, In-Q-Tel, but it is more of an investment arm than a source of philanthropic donations. See id.; IQT, https://www.iqt.org/about-iqt/ [https://perma.cc/6LMY-2DCW] (last visited July 8, 2018) (“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.”).

\textsuperscript{250} See supra notes 193–195 and accompanying text (describing proposed new state laws that encourage gifts to government by promising donors credits against state and local taxes). To explore just a few examples of gift authority at the state level, see Cal. Welf. & Inst. Code § 19007 (1970) (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-
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 be paid to 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 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—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” that is 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...

7518 (2015) ("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. Rev. Code Ann. § 43.43.013 (2009) (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 (2013) (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 (2009) (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 California-based foundation pledged to spend a minimum of $225 million to “support the successful implementation of the ACA in California.” Ford Kuramoto, The Affordable Care Act and Integrated Care, 13 J. SOC. WORK IN DISABILITY & REHABILITATION 44, 81 (2014); Press Release, The Cal. Endowment, Department of Health Care Services and The California Endowment Announce $23 Million in Grants to Boost County-Based Medi-Cal Enrollment Efforts (Jan. 28, 2014), http://www.dhcs.ca.gov/formsandpubs/publications/opa/Documents/2014NewsReleases/14-01Medi-CalGrant1-28-31.pdf [https://perma.cc/T73A-RDKU]; see also David Gorn, Governor Agrees To Take $6M California Endowment Grant, Signs Many Health Bills, CAL. HEALTHLINE (Sep. 29, 2014), https://californiahealthline.org/news/governor-agrees-to-take-endowment-grant-money-signs-many-health-bills [https://perma.cc/7Q6Y-ZYEU] (noting the Governor’s decision to take the money).
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 expands the range of possibilities available to
government while leaving the basic contours of public decision-making
unchanged. On that view, the scales weighing the benefits of acceptance against
the costs of refusal are essentially level—it is equally easy to say “yes” or “no.”

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 District of Columbia mayor’s
mansion is a useful illustration.

The mayor of D.C. doesn’t have an official residence.251 In the early 2000s,
then-Mayor Anthony Williams rented an apartment in Foggy Bottom.
(According to the Washington Post, the current mayor, Muriel Bowser, “shares
a duplex wall with Colombian refugees.”252) 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 district 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 design and construction costs, and the creation of an endowment to
fund maintenance of the house and property, Casey planned to spend a total 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 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

251. Except where otherwise noted, the details of this and the next three paragraphs are drawn
from Morton, supra note 29.
252. Aaron C. Davis, The Mayor of Washington Shares a Duplex Wall with Colombian Refugees,
washington SHARES A DUPLEX WALL WITH COLOMBIAN REFUGEES/2015/08/08/7ff92006-3a1c-11e5-8e98-115a3e7d7ae_story.html?utm_term=.b09219591477 [https://perma.cc/37W6-NFWU].
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 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 four-acre swath of largely unkempt federal parkland adjacent to the mansion site should be included as part of the mayor’s property. Complex rules prohibited the federal government from giving up the parkland without receiving parkland of equal value, so Casey proposed trading the four acres for waterfront land that she would buy in Georgetown. The National 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 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 sixty 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 2003. Nevertheless, in mid-December, Casey pulled out of the deal and instead deeded the property to the Salvation Army. “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: “[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, like the rest of us, are familiar with the maxim about looking a gift horse in the mouth. As Councilman Mendelson put it, “it’s not polite to second-guess [a large gift].” Anxieties about
(im)politeness—or “political malpractice,” in the then-Mayor’s words—likely reflect two overlapping concerns.

First, officials may worry about the public-relations consequences of declining sizeable donations. 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 of scaring off other foundations.”253 If anything, the incentives are stronger for public officials, because the people who are capable of making large donations to government programs are also the people who are likely to provide other kinds of political support, including campaign contributions and independent expenditures.254 The upshot, as journalist Bob Herbert suggests in an opinion piece bemoaning private influence on public education, is that “[w]hen a multibillionaire gets an idea . . . [on] 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.”255

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.256 Adelson’s offer came shortly after Congress had approved additional appropriations for the Iron Dome, a missile defense system used to protect Israel from incoming rockets and funded jointly by the United States and Israel.257 Adelson called then-Senate Majority Leader Harry Reid 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.”258 Reid, in turn, called the President to relay the offer.259 “Obama was thrown off his guard momentarily—‘What?!’ he asked Reid. When the president regained his footing, he told the leader to thank

253. Cohen, supra note 159.
254. Goss, supra note 164, at 443 (“Donors also carry the promise of campaign cash, necessary to compete in the campaign-finance arms race.”).
255. Herbert, supra note 224.
257. Id.
258. Id.
259. Id.
Adelson but that he didn’t think private financing of munitions would set a good precedent . . . .

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 multibillionaire and political “mega-donor” who has spent record amounts on political campaigns.

None of that, however, has been to the benefit of Obama and his allies. On the contrary, in the 2012 election cycle, Adelson reportedly spent in the range of $150 million in an effort to unseat President Obama. Obama also had little reason to hope that Adelson would be forthcoming with additional gifts for initiatives closer to Obama’s own heart if he accepted the Iron Dome offer. 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.

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.

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

---

260. Thrush, supra note 256.
263. Allen, supra note 261.
264. See, e.g., Landow & Ebdon, supra note 97, at 739–46 (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).
began in the North Dakota legislature and at UND to eliminate it. Meanwhile, UND had accepted a $100 million gift from wealthy alumnus and former hockey player Ralph Engelstad. 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 UND keep the “Fighting Sioux” name. 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.

Matters came to a head in 2000, when UND 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 this cloud is still hanging above me.

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 [but] 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

---


267. See Engelstad letter, infra note 270 and accompanying text; see also Dale Wetzel, Engelstad Vowed to Pull Arena Funding If Controversial Indian Name Dropped, LAS VEGAS SUN (Jan. 15, 2011) (noting that although Engelstad’s letter implies that commitments were made regarding retention of the Sioux name, University officials later denied making any such promises).


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. . . .

Yours truly, Ralph Engelstad

Engelstad arranged for copies of the letter to be sent to the state’s Board of Higher Education. The next day, the Board voted unanimously to keep the nickname and a newly designed logo, still featuring the profile of an American Indian with feathers and war paint. But matters were far from over. The controversy continued for another decade and a half before being resolved by a 2015 statewide voter referendum, and finally a new name.

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. African Americans, who had lost the right to vote thanks to disenfranchising legislation in most southern states, had little political recourse. 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 construction and getting the schools up and running, the schools were part of the state system of public education, and the state eventually took over their maintenance. Philanthropy therefore allowed southern African Americans and their northern allies to achieve a result—state support for effective public

---

271. Wetzel, supra note 267.
272. Id.
273. See Thomason, supra note 265.
274. See Strong et al., supra note 185, at 663.
275. 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 . . . .”)
276. Id. at 672 (describing the work of the Rosenwald Fund).
277. See id. at 672–75.
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.”

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—but 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) or down the line when the gift runs out. 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 Section—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 Section 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 are accountable to those citizens in some meaningful way. Those 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 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. This objection is not about substance but procedure. It is about the risk that gifts will circumvent or skew the normal processes of democratic decision-making.

Baltimore’s privately financed aerial surveillance program, described in the Introduction, illustrates the potential for circumvention. The Arnolds’ gift to the police department 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, and which must approve any taxpayer-funded financial transaction over $25,000. Board of Estimates meetings are open to the public, and minutes of the meetings are available online. Thus, bypassing the requirement of Board approval not only shifted decision-making power from the Board to the police department—allowing certain officials to make unilateral decisions where collective action is usually required—but also made it possible for the surveillance program to remain a secret.

Even if the formal decision-making 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 ready-made funding sources—requiring reduced or delayed public outlays—will be more attractive to policy makers than initiatives that must be fully funded from the public fisc. And going forward, sunk costs and

282. Fenton & Donovan, supra note 19.
283. BALTIMORE CITY COMPTROLLER, supra note 281.
284. See supra note 20 and accompanying text.
reliance interests are likely to bias public decision-making 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. 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. 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 later in this Section, 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. Competitive grants, like Bloomberg Philanthropies’ Innovation Teams program and Mayors Challenge, may be less worrisome in this regard. In both programs, recipient cities define their own priorities and articulate their own plans; the funders then 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, the strength of the benevolent dictator objection depends on the specificity of the gift. The donor who gives a large gift to a school district’s local education fund is affecting public education in that her gift has a direct impact on the level of funding available for a particular school district. Yet the decisions about how to allocate the funds will still be made in the conventional manner. By contrast, the donor who earmarks her gift for a particular type of programming 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 decision-making

285. See supra Part I.B.


287. We might worry about government-solicited gifts for a different reason, associated with fears of extortion or something close to it. See, e.g., Edwards, supra note 183 (describing demands by Florida’s governor for donations from BP); cf. Federal Communications Commission Record FCC 94-177 3429, 3430-31 (prohibiting the Commission from soliciting gifts from regulated entities).

288. See supra notes 241–243 and accompanying text (describing the Innovation Teams program); Bloomberg Letter, supra note 189 (describing the Mayors Challenge).
process—transferring control from one body to another, for example—in ways that seem worthy of celebration rather than concern.

Once again, the city of Detroit offers a useful illustration. The philanthropic interventions into Detroit’s governance described in previous Sections—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.”\(^ {289}\)

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 to streamline service delivery.\(^ {290}\) Not surprisingly, the Mayor’s plan met with “roaring public backlash.”\(^ {291}\) The Future City Framework emerged as an alternative\(^ {292}\) and though its long-term steering committee initially was formed by Mayor Bing, it is now managed by the Detroit Economic Growth Corporation, a nonprofit supported by private donations.\(^ {293}\) Philanthropists played a significant role in spearheading management of the Future City initiative, as well as funding it.\(^ {294}\) The Kresge Foundation alone pledged $150 million to support the Framework,\(^ {295}\) and six other philanthropies have been intimately involved in both planning and funding.\(^ {296}\)

---

290. See David Sands, Kresge Foundation Pledges $150 Million to Implement Detroit Future City Framework, HUFFINGTON POST (Jan. 9, 2013), http://www.huffingtonpost.com/2013/01/09/kresge-foundation-150-million-detroit-future-city_n_2440887.html [http://perma.cc/9Q6R-QMJY]; see also Anna Clark, Detroit Works’ Long-Term Strategic Vision for Motor City, ARCHITECT MAG. (Nov. 27, 2012), http://www.architectmagazine.com/design/urbanism-planning/detroit-works-long-term-strategic-vision-for-the-motor-city_o [https://perma.cc/CS3L-ZZTE] (“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.”). Mayor Bing was the successor to Kwame Kilpatrick.
292. Id.
295. Sands, supra note 290.
The Future City initiative moved the city-planning conversation outside City Hall, deemphasizing the role of elected officials in favor of “technical” and “community” experts. 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, “[i]s 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.”

Reasonable minds may differ on whether the normative criteria for public policy-making 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.”

We cannot hope to resolve such fundamental questions here. We do want to flag them, though, as unavoidable in a world of patriotic philanthropy.

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.

---

297. DETROIT FUTURE CITY, supra note 289.
300. Contra ZELENAK, supra note 49, 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.
Id. (quoting Cass R. Sunstein, Beyond the Republican Revival, 97 YALE L.J. 1539, 1552 (1988)).
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.\footnote{Private donations for public parks are one example. See, e.g., Gazley, supra note 186 (“A wealthy donor is more likely to support the park in her neighborhood than she is the pocket park across town.”); Kleiman, supra note 200 (“Donors tend to support parks in high-profile locations.”).}

Redistributive concerns are central, for example, in debates over private funding for public 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.\footnote{Property taxes account for 81 percent of local funding for public education, or 37 percent 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/d15/tables/dt15_235.20.asp?current=yes [https://perma.cc/8J64-3377]. 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. McGuire et al., supra at 355, 367.}

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.\footnote{See Petrella v. Brownback, 787 F.3d 1242 (10th Cir. 2015) (rejecting parents’ challenge to Kansas state law prohibiting localities from increasing their tax contributions to local schools above a statewide cap).} Yet the same states permit local school districts to accept unlimited voluntary private donations.\footnote{See id. (noting that parents are free to make voluntary donations to public schools); Abigail Margaret Frisch, Note, The Class is Greener on the Other Side: How Private Donations to Public Schools Play into Fair Funding, 67 DUKE L.J. 427, 455 & Appendix A (2016) (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”).} 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.\footnote{See Nelson & Gazley, supra note 215, at 562 (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, Philanthropy and Its Uneasy Relation to Equality, supra note 25, at 42 (studying California LEFs and finding that “[s]uburban schools enjoy a massive private fund-raising advantage over urban schools, and the top performing suburban districts in private fund-raising have an exponential advantage”); Rob Reich, Opinion, Not Very Giving, N.Y. TIMES (Sep. 4, 2013), https://www.nytimes.com/2013/09/05/opinion/not-very-giving.html?_r=0.}
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 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,306 but broad-based donations do happen from time to time. For example, in the wake of the terrorist attacks of 9/11, many taxpayers sent small gifts to the federal government intended to support the war effort. One letter read:

We 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!307

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.308 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.309 That research is not focused on gifts to government, however, and it’s

---

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


309. See generally Reich, Philanthropy and Its Uneasy Relation to Equality, supra note 25 (expressing skepticism about the redistributive impacts of philanthropic giving by individuals and
possible that patriotic philanthropy will—on the whole—tend to be more redistributive than philanthropy directed at private causes. If nothing else, patriotic philanthropy 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. And, perhaps, patriotic philanthropy will tend to be more widely beneficial simply by virtue of supporting public programs. Even if located 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 donation 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. 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 outside of Tulsa, Oklahoma. The project, which broke ground the next summer, aimed to reduce rush-hour gridlock on the portion of Interstate 44 that passes through the Tulsa suburb of Catoosa. Perhaps not coincidentally, when the tribe announced the donation, it was in the midst of a major $125 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. The tribe’s donations ultimately accounted for nearly $12 million of the estimated $48 million price tag and appeared to have played a significant role in getting the project underway.

foundations, and citing studies); see also Julian Wolpert, Redistributional Effects of America’s Private Foundations, in THE LEGITIMACY OF PHILANTHROPIC FOUNDATIONS: UNITED STATES AND EUROPEAN PERSPECTIVES 123, 144 (Kenneth Prewitt et al. eds., 2006) (concluding that foundation giving “cannot have an instrumental role in reducing even the most prominent [income and wealth] disparities, at least in the short run”). A somewhat different concern is that gifts may be targeted at sentimental or splashy projects, ignoring more pressing areas of need. Cf. Renée A. Irvin & Patrick Carr, The Role of Philanthropy in Local Government Finance, 25 PUB. BUDGETING & FIN. 33, 38 (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.”).

310. See Reich, Philanthropy and Its Uneasy Relation to Equality, supra note 25, at 34–36 (illustrating with a chart that in 1998, 60 percent of charitable dollars were given to religious organizations, and noting that the pattern “appears hard to reconcile with redistributive outcomes”).


314. See Cherokee Nation Gives to Road Project, supra note 312.

315. See id.; Break Ground on I-44, supra note 313.

316. See id.
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.”317

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”318—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.319

3. The Hollow State Objection

Students of philanthropy long have struggled to identify the relationship between philanthropy and the state. In one view, philanthropy competes with the state in the provision of public goods; at the extreme, it replaces the state.320 For those who think that the private and nonprofit 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.321 From the latter perspective, gifts to government may seem like a move in the right direction because they expand the public sector and enable government to 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. That 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

317. See Cherokee Nation Gives to Road Project, supra note 312.
321. See supra notes 170–179 and accompanying text.
but costly policies. But they are also limitations on the size of government\textsuperscript{322}—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 compare patriotic philanthropy with more conventional forms of private philanthropy. Critics of private philanthropy worry that citizens will be less willing to fund valuable redistributive policies as taxpayers if they get used to the idea that private donors will prop up the social safety net.\textsuperscript{323} A related critique is that private philanthropy absolves government of responsibility for needed services.\textsuperscript{324} 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.\textsuperscript{325} 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 the 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 and transparency of gifts to government.\textsuperscript{326} Transparency is not a panacea—it creates its own problems of perception, described above. But at

\textsuperscript{322} See Brieffault & Reynolds, supra note 44, at 700–01 (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.

\textsuperscript{323} See supra notes 177–179 and accompanying text.

\textsuperscript{324} See id.

\textsuperscript{325} Cf. Dolan, supra note 296 (quoting Baltimore’s 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.’

\textsuperscript{326} Some government entities have adopted rules to address this concern. See, e.g., Patrick Carney, FCC Ethics Program, FCC (Feb. 18, 2010), https://www.fcc.gov/news-events/blog/2010/02/18/fcc-ethics-program [https://perma.cc/5F7P-ENW4] (describing FCC ethics rule requiring that any gifts to the agency must be listed in a semiannual report to Congress and made available for public review upon request).
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. At 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.327 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.328

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.329 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.330 There is a vast literature on privatization, much of it critical.331 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.

327. 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, M L I V E (Oct. 6, 2015), http://www.mlive.com/news/flint/index.ssf/2015/10/post_444.html [https://perma.cc/8V3F-A7G4]. In other cases, however, the calculation will not be so clear.
328. As Angela Eikenberry has noted, “[W]hat 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 176, at 589 (citing sources).
329. See supra Part I.E.
330. See, e.g., Metzger, supra note 23, at 1378 & n.17 (2003) (“Contracting out is the dominant form of privatization in the United States.”).
331. See, e.g., GOVERNMENT BY CONTRACT supra note 35; Metzger, supra note 23; Michaels, supra note 105; Symposium, supra note 105.
other forms of investment. Although gifts and partnerships sound nice, the environment 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 programs, one wonders what—exactly—is left of the state.

C. Implications

We have sought to highlight some of the risks of a phenomenon that, we suspect, strikes most observers as benign, if not downright beneficial. We do not deny the many benefits that gifts to government can bring. Our focus is on the costs of patriotic philanthropy, both because the costs are less obvious than the benefits, and because—as the previous Section suggested—we think they hint at a larger threat to American democracy.

The skeptical reader may respond that our analysis runs into a serious baseline question: gifts compared to what? If gifts result in better public policies and programs than we would otherwise get, isn’t that what matters? We have suggested some reasons to worry that gifts might produce suboptimal public policies—policies that are ill-considered, given the lure of seemingly free money, or that exacerbate distributive inequalities. But we are happy to acknowledge that reasonable minds will differ on whether any given donation has resulted in “good” public policy, whether gifts in general tend to produce desirable policies, and—especially—whether privately financed policies are (individually or in the aggregate) substantively “better” or “worse” than publicly funded initiatives.

Indeed, that sort of disagreement over policy is precisely why democracies like ours stress the importance of process, and our argument about patriotic philanthropy is, at its core, about procedure rather than substance. 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 policy makers have paid close attention to laws and practices that undermine or unbalance political participation.332 Scholars have focused, for example, on laws that deprive individuals of the right to vote, configure electoral structures so as to minimize the effects of political participation, or facilitate political entrenchment and the like.333


In short, the lesson of modern democratic theory is that the democratic process matters. Obsessing over process is not fetishizing, but reflects the conviction that a robust, inclusive political process is the best way of ensuring that decisions about public policy are made in the interest of the public. A well-functioning democratic process is, in this sense, a fundamental aspect of individual liberty.334

Consider in this vein the debate about the constitutionality of laws regulating campaign financing. The debate 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.335 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.336 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.337 The other side is concerned with the fact that contributions, expenditures, and lobbying are necessary devices for getting one’s preferences ratified through the political process.338 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 laws 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 cup of coffee”


334. See e.g., DON HERZOG, HAPPY SLAVES: A CRITIQUE OF CONSENT THEORY (1989) (offering a critique of consent theory and a vision of democratic legitimacy that turns on government’s responsiveness to the people).

335. See, e.g., LESSIG, supra note 26; see also ZEPHYR TEACHOUT, CORRUPTION IN AMERICA (2016).

336. Samuel Issacharoff, On Political Corruption, 124 Harv. L. Rev. 118, 127 (“[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.”).

337. See generally LESSIG, supra note 26.

338. See, e.g., Buckley v. Valeo, 424 U.S. 1, 235–57 (1976) (Burger, C.J., concurring in part and dissenting in part) (arguing that money, in the form of contributions and expenditures, is necessary to enable the speaker to engage in effective political activity) (per curiam).
rules regarding gifts.\textsuperscript{339} 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.”\textsuperscript{340}

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.”\textsuperscript{341}

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, donations targeted at particular initiatives may at best bias public decision-making in favor of those initiatives, and at worst allow particular government officials to circumvent the normal processes of collective deliberation.

Circumvention is not itself a bad thing, of course; it depends on the nature of the thing being circumvented. To the extent that our existing democratic processes are themselves corrupt or otherwise undesirable, one might celebrate innovations that allow public policy to be developed through more inclusive and collective means. The argument here is not grounded in a nirvana fallacy in which we compare a jaundiced view of patriotic philanthropy with an unrealistic and idealized vision of “normal” government decision-making. On the contrary, our claim is that gifts hold the potential to exacerbate the pathologies that already exist in government today—the problems of unequal access, conflicts of interest, and creeping plutocracy that campaign-finance and lobbying reform, gift bans, and the like are designed to address.

As we have emphasized, the strength of those process-based objections will vary from one gift to the next, depending on the nature of the offer and the circumstances of acceptance. To see how the relevant considerations fit together, one might imagine the processes for public policy-making running along a spectrum. At one end, a small group of individuals controls public policy; at the extreme, there might be a single dictator (benevolent or otherwise). At the other end of the spectrum, public policies are developed through collective, democratic processes. The various factors that we have flagged throughout this Section help place gifts on that spectrum. First, what is the impetus or source of the gift? Was

\footnotesize
\textsuperscript{340} U.S. CONST. art. I.
\textsuperscript{341} Nolan, supra note 140, at 71.
the gift proposed by the donor, or solicited by the government to support a policy that public decision makers had devised? Is it financed by a single donor, or a combination of many smaller contributions? Next, how—and how much—does the gift affect the processes of public decision-making? Is it earmarked for a particular policy initiative, or is it a general donation to a government unit or to the general treasury to use as other sources of funding are used? How much pull is the donor likely to have with public decision makers? Is the donor a repeat player (or contributor), or is this a one-time gift? Will the decision to accept the gift be made by a small or unusual subset of government decision makers, or will the gift be run through the usual processes for appropriations? If the prospect of a gift moves decision-making “outside City Hall,” as it were—as in the Detroit Future City example described above—are the alternative decision-making processes collective and inclusive? What is the magnitude of the gift’s effect on public policy? Is the privately funded program self-contained, or are other government programs affected? To what extent is public money required to supplement the gift? Finally, to what extent are citizens able to assess the gift and hold accountable the officials who decided on it? Are the fact of the gift and the processes of offer and acceptance hidden from view, or are they visible to the public?

The following table offers a summary:

<table>
<thead>
<tr>
<th></th>
<th>Individualized</th>
<th>Collective</th>
</tr>
</thead>
<tbody>
<tr>
<td>Impetus</td>
<td>Gift is offered by donor to support a pet policy</td>
<td>Gift is solicited by government to support an existing or proposed policy</td>
</tr>
<tr>
<td>Source</td>
<td>Gift is backed by the money of a single donor</td>
<td>Gift is crowdsourced</td>
</tr>
</tbody>
</table>

342. See supra notes 287–288 and accompanying text (discussing the difference between donor-initiated gifts, like the Arnolds’ gift to the Baltimore Police Department, and gifts that the government solicits or applies for itself, as in the Bloomberg Innovation Teams example).
343. See supra notes 306–308 and accompanying text (discussing how “crowd-sourced” gifts ameliorate concerns about outsized influence by the moneyed few).
344. See supra note 184 and accompanying text.
345. See supra notes 256–263 and accompanying text (discussing Sheldon Adelson’s offer to fund the Iron Dome and emphasizing the difference between one-time offers like Adelson’s and offers that are made by donors with whom the recipient government officials hope to have ongoing, mutually beneficial relationships).
346. See supra notes 19–20 and accompanying text (describing how the Arnolds’ offer to the Baltimore Police Department shifted decision-making from the public processes of the Board of Estimates to the police department).
347. See supra notes 297–298 and accompanying text (describing community involvement in planning for the Detroit Future City program).
348. See supra notes 264-279 and accompanying text (emphasizing the potential for ripple effects on public policy).
<table>
<thead>
<tr>
<th>Targeting</th>
<th>Gift is earmarked for a particular policy</th>
<th>Gift is a general donation to a government unit, or to the general treasury</th>
</tr>
</thead>
<tbody>
<tr>
<td>Pressure to accept</td>
<td>Gift is from a repeat-player donor or contributor</td>
<td>Gift is a one-time event</td>
</tr>
<tr>
<td>Process of acceptance</td>
<td>Decision to accept gift is made by a small or unusual subset of government officials</td>
<td>Gift is run through the normal processes for appropriations—or, if not, through an alternate decision-making process that is collective and inclusive</td>
</tr>
<tr>
<td>Spillover effect on other programs</td>
<td>Gift requires no public money for start-up or operation; private support exists in perpetuity</td>
<td>Gift requires matching funds at the outset and/or public funds are required to maintain the program</td>
</tr>
<tr>
<td>Transparency</td>
<td>Fact of gift and processes of offer and acceptance are hidden from public view</td>
<td>Fact of gift and processes of offer and acceptance are transparent to the public</td>
</tr>
</tbody>
</table>

Thinking about gifts in this way allows us to gauge where the costs of patriotic philanthropy are highest, and where they are lowest. Whether those costs outweigh the benefits of any particular gift will, inevitably, lie in the eye of the beholder. It bears emphasis, however, that the process-based concerns that we have outlined in this Section should be considered not only at the retail level but also at wholesale—for their *cumulative* effect on government and on democratic processes.

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, such as the P3s described in Part I.

Understanding 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. But,

---

349. This assumption is evident in some critiques of privatization, or the outsourcing of government functions. See, for example, Frug et al., supra note 66, at 738 explaining how:

> 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
as we have seen in the examples throughout this 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 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—something that democratic theory expects will be exercised by the vast majority of the state’s citizens, both as a matter of the citizen’s standing and as a matter of the government’s legitimacy? What does it mean for political citizenship if our public priorities are financed by small groups of well-off and well-meaning oligarchs? We also lack a coherent account of government capacity. Should the prospect of a hollow state be a concern for law or democratic theory? Should we expect government to have a base-level capacity to meet predictable obligations? The answers to those questions lie well outside the scope of this project, but we hope the discussion in this Section has suggested some of the reasons why they might matter for theorists and for legal academics.

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.

---

350. Cf. ZELENAK, supra note 49, 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.”).