

PHILANTHROPIC INNOVATION AND CREATIVE CAPITALISM:  
A HISTORICAL AND COMPARATIVE PERSPECTIVE ON SOCIAL  
ENTREPRENEURSHIP AND CORPORATE SOCIAL  
RESPONSIBILITY

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ABSTRACT

*Each generation creates its own philanthropic bodies, with novel structures promising both increased sustainability and efficiency. From the seventeenth-century financial imperialists to today's internet entrepreneurs, innovation, wealth, and philanthropy have moved in tandem, shaping one another and resulting in new philanthropic forms.*

*The most recent of these emerging entities is the "for-profit charity," which relies on market profits and market principles to replace donations and to maximize its impact. Current philanthropic literature praises these market-based structures as revolutionary innovations that enhance long-term sustainability, and the focus of legal reforms falls along these lines. Yet the legal literature fails to fully appreciate the lessons of history. Although state after state is authorizing or fostering the growth of such hybrid entities, and although these entities do have the potential to contribute to philanthropy in novel ways, without a broader set of legal and regulatory reforms, the new philanthropic entities now emerging will be unable to meaningfully harness market forces to enhance their philanthropic endeavors.*

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*This Article argues that the key philanthropic innovation transforming society today is not the public–private hybrid model. An examination of the history of philanthropic innovation in the U.S. and in other nations exposes what the current legal literature largely overlooks. That is, historical and comparative case studies reveal that meaningful and lasting philanthropic change arises when philanthropic entities are able to capture and utilize the market innovations that are transforming society and leading to bursts of industrial or technological progress. Thus, groundbreaking philanthropic change comes when charitable entities can harness such transformative commercial and technological developments towards charitable ends.*

*In this light, the most critical philanthropic innovation transforming society today is not the public–private hybrid idea, but rather the little-studied phenomenon of firms applying to philanthropy the ideas that made them successful in the marketplace. Understanding this underappreciated nexus between business and philanthropy is vital for harnessing the larger potential of new philanthropy, as well as for promoting regulatory action that can enhance both business and philanthropic innovation. Recognizing philanthropic entrepreneurialism as a reflection of, and reaction to, commercial innovations such as the development of capital-pooling models or internet social networks, is imperative for the design of a more proactive and efficient regulatory regime.*

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## INTRODUCTION

Bill Gates, Sergey Brin, and Mark Zuckerberg<sup>1</sup> each have at least one particular aspect in common besides their immense wealth—each of them has been able to parlay novel entrepreneurial and commercial success into cutting-edge philanthropic endeavors.<sup>2</sup>

In doing so, each has sought to change not just the marketplace but the law itself, to create novel legal structures that would foster their philanthropic and entrepreneurial goals.<sup>3</sup> But the law’s response to philanthropic entrepreneurship has been uneven, sometimes lagging behind

1. Each has achieved considerable wealth through founding and running innovative companies and is often counted among a new group of “philanthrocapitalists.” The term “philanthrocapitalists” refers to “a fast-growing army of new philanthropists” who believe they can and are improving philanthropy by “equipping it to tackle the new set of problems facing today’s changing world . . . . They think they can do a better job than their predecessors . . . [by] trying to apply the secrets behind that money-making success to their giving.” See MATTHEW BISHOP & MICHAEL GREEN, PHILANTHROCAPITALISM: HOW THE RICH CAN SAVE THE WORLD 2–3 (2008). For a more in-depth description of their cutting-edge philanthropic work, see *infra* Part II.A.2.

2. See, e.g., THE BILL AND MELINDA GATES FOUNDATION, <http://www.gatesfoundation.org/Pages/home.aspx> (last visited Mar. 6, 2013). For examples of the foundation’s activities, see *What Does IVCC Do?*, IVCC, [http://www.ivcc.com/about/what\\_is\\_ivcc.htm](http://www.ivcc.com/about/what_is_ivcc.htm) (last visited Mar. 6, 2013) (describing the “Innovative Vector Control Consortium” established by investment from the Gates Foundation); Andy Beckett, *Inside the Bill and Melinda Gates Foundation*, GUARDIAN (July 12, 2010, 4:49 PM), [www.guardian.co.uk/world/2010/jul/12/bill-and-melinda-gates-foundation](http://www.guardian.co.uk/world/2010/jul/12/bill-and-melinda-gates-foundation). For an example of Sergey Brin’s philanthropic endeavors, see Suzie Boss, *Do No Evil*, STAN. SOC. INNOVATION REV., Fall 2010, at 66. For examples of Mark Zuckerberg’s philanthropic endeavors, see Nicholas Confessore, *Policy-Making Billionaires*, N.Y. TIMES (Nov. 26, 2011), <http://www.nytimes.com/2011/11/27/sunday-review/policy-making-billionaires.html>.

3. Each of these entrepreneurs has tried, in different ways, to meld the boundaries between for-profit and non-profit enterprises in terms of their corporate goals. The founders of Google provide a good example:

When Google went public in 2004, the Internet search company’s wunderkind founders, Larry Page and Sergey Brin, penned a letter to prospective shareholders that has become the Internet industry’s version of the Magna Carta. In it, they pledged that Google was “not a conventional company” but one focused on “making the world a better place.”

. . . In the prospectus for what could be a record . . . public offering, Facebook founder Mark Zuckerberg promises that a similar philosophy will guide the social network. “Simply put: we don’t build services to make money; we make money to build better services.”

Rob Cox, *The Ruthless Overlords of Silicon Valley*, NEWSWEEK, Mar. 19, 2012, at 36. See also Shruti Rana, *From Making Money Without Doing Evil to Doing Good Without Handouts: The Google.org Experiment in Philanthropy*, 3 J. BUS. & TECH. L. 87 (2008).

change and sometimes regulating “doing good” in a manner that hinders rather than fosters creativity.<sup>4</sup>

This Article argues that for-profit charities (also sometimes referred to as “for-profit/non-profit” hybrids or as just “hybrids”),<sup>5</sup> the newest form of emerging philanthropic structures, are better understood not as the groundbreaking philanthropic innovation of our time but rather as part of a recurring theme throughout the history of philanthropy. Each generation, new philanthropic entities arise, heralded by the advent of novel structural mechanisms that promise both (1) to lead to greater sustainability of philanthropic endeavors (by reducing dependence on “traditional” donative or grant-based models) and (2) to capture market forces in innovative ways to ameliorate the common criticisms of inefficiency and the perceived excesses of philanthropic entities designed by prior generations.<sup>6</sup>

Yet an examination of case studies in the historical record suggests that these novel forms of philanthropy are often built and funded by individuals with deep pockets of new wealth and that these vast fortunes have in turn been generated by new and transformative technological and commercial innovations.<sup>7</sup> Thus, this Article further argues that the link between technological or commercial change and philanthropic entrepreneurship may be a critical and largely missing part of the philanthropic story, and

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4. The law regulating philanthropic entities is in flux both at the federal and state levels. *See* Press Release, Grassley Urges Attention to Charitable Loophole Subsidized by Taxpayers (Oct. 18, 2011), [http://www.grassley.senate.gov/news/Article.cfm?customel\\_dataPageID\\_1502=37495](http://www.grassley.senate.gov/news/Article.cfm?customel_dataPageID_1502=37495); *see also* Letter from P. Russell Hardin, President, Lettie Pate Whitehead Foundation, to Emily McMahon, Acting Assistant Sec’y of Tax Policy (Oct. 28, 2011), *available at* <http://www.pgdc.com/pgdc/foundation-takes-exception-grassleys-characterization-supporting-organizations>. *See also* Robert Lang & Elizabeth Carrott Minnigh, *The L<sup>3</sup>C, History, Basic Construct, and Legal Framework*, 35 VT. L. REV. 15 (2010) (outlining the history of the L3C and explaining that the L3C was first conceived of in 2005, but was formed to solve a problem that has been around since 1969). For a rich, historical review of the failure of the law to keep pace with philanthropic endeavors, *see generally* David Villar Patton, *The Queen, the Attorney General, and the Modern Charitable Fiduciary: A Historical Perspective on Charitable Enforcement Reform*, 11 U. FLA. J.L. & PUB. POL’Y 131 (2000).

5. *See, e.g.*, Robin Rogers, *Why Philanthro-Policymaking Matters*, 48 SOC’Y 376, 380 (2011), *available at* <http://link.springer.com/content/pdf/10.1007%2Fs12115-011-9456-1> (using the term “for-profit-nonprofit hybrids” to describe one type of philanthropic structure, a structure that will be described in more detail *infra*).

6. *See* MARK DOWIE, *AMERICAN FOUNDATIONS: AN INVESTIGATIVE HISTORY* 8–11 (2002) (describing recurring phases within philanthropic entities, and noting that this pattern has repeated throughout American philanthropic history). *See also* BISHOP & GREEN, *supra* note 1, at 2 (describing several golden ages of modern philanthropy, and noting that “[t]he new philanthropists believe they are improving philanthropy, equipping it to tackle the new set of problems facing today’s changing world; and to be blunt, it needs improvement—much philanthropy over the centuries has been ineffective. They think they can do a better job than their predecessors”).

7. *See* BISHOP & GREEN, *supra* note 1, at 21 (“[I]t seems to be a feature of capitalism that golden ages of wealth creation give rise to golden ages of giving. . . . Each past boom in giving was associated with massive wealth creation linked to innovation in business, and also to social upheaval that left big problems to solve.”).

that this link could be the key to understanding the past, present and future of philanthropic innovation.

Though our history suggests that such leaps of progress and innovation are recurring—not isolated—phenomena, the link between technological and commercial progress and philanthropic innovation has to date been little studied.<sup>8</sup> This neglect is particularly striking given the amount of debate over the tax status and corporate structure of philanthropic entities.<sup>9</sup> The lack of research in this area is even more remarkable given that the field of philanthropy itself is richly grounded in dialogues over religion, philosophy, and social justice, among other deeply divisive and meaningful societal debates—issues that are largely left out of current regulatory dialogues over tax and corporate structures for philanthropic entities.<sup>10</sup>

In this light, this Article argues that the tax and corporate structure lenses most often used in the legal literature on philanthropy<sup>11</sup> are too narrow to capture critical aspects of current philanthropic innovation. Moreover, much of the history and comparative underpinnings of philanthropy have gone largely unrecognized by the legal literature.<sup>12</sup> Accordingly, this Article attempts to fill some of these gaps in the existing

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8. See Zoltan J. Acs & Ronnie J. Phillips, *Entrepreneurship and Philanthropy in American Capitalism*, 19 *SMALL BUS. ECON.* 189, 189 (2002) (“Th[e] entrepreneurship–philanthropy nexus has not been fully explored by either economists or the general public.”). Some experts explain the lack of research on foundations as a result of the lack of independent funding for such research:

Despite their material resources and multiple activities there has been comparatively little independent research on foundations in the United States. This neglect is understandable. Since foundations are a frequent source of financial support for research, scholars are somewhat reluctant to subject them to scrutiny; foundations for their part, with a few notable exceptions, have been inhibited about funding independent examinations of their roles and impact. Yet fresh analysis is needed because foundations as a group constitute a significant institution in the United States and, as such, cannot claim immunity from public interest and scrutiny. It also is needed because without adequate knowledge and understanding, there is a danger that criticism will be uninformed and that governmental action to control or regulate foundations could be inappropriate or counterproductive.

M.J. Rossant, *Foreword* to WALDEMAR E. NIELSEN, *THE BIG FOUNDATIONS*, at vi, vii (1972). See MICHAEL EDWARDS, *SMALL CHANGE: WHY BUSINESS WON’T SAVE THE WORLD* 35 (2010) (“Anyone looking for scientific proof that philanthrocapitalism does or does not work is sure to be disappointed. . . . [A]lthough some serious studies of social enterprise and venture philanthropy exist, by and large the literature is anecdotal or written by evangelists more interested in publicity than rigor.”).

9. See *infra* Part II.B for a description of these debates.

10. See, e.g., Helmut K. Anheier & Lester M. Salamon, *The Nonprofit Sector in Comparative Perspective*, in *THE NON-PROFIT SECTOR: A RESEARCH HANDBOOK*, 89, 89–91 (Walter W. Powell & Richard Steinberg eds., 2006) (surveying the national, religious, ethical, and civic sources of charitable and non-profit organizations); see also Julie Battilana, Matthew Lee, John Walker, & Cheryl Dorsey, *In Search of the Hybrid Ideal*, *STAN. SOC. INNOVATION REV.*, Summer 2012, at 51, 53 (noting that “[a]reas of corporate law, such as the tax code, were not built for organizations that pursue social and financial value” such as for-profit/non-profit hybrids).

11. See Battilana et al., *supra* note 10; see also *infra* Part II.B.

12. See *infra* notes 96–98 and accompanying text.

literature by identifying and analyzing some of the forces that drive philanthropic innovation, and by pointing the way toward legal and regulatory reforms that can help support innovation. Ultimately, this Article aims to add to the efforts supporting “companies that believe in something beyond simply maximizing profits”<sup>13</sup> and seeks to do so by looking beyond the for-profit/non-profit debate currently in vogue.<sup>14</sup>

To move beyond these debates, this analysis looks both to the present and the past. Since the rise of modern philanthropy in the United States, there have been numerous calls to reform philanthropic entities based on tax and corporate governance reforms or to restructure philanthropic bodies to better harness market profit mechanisms.<sup>15</sup> But history shows that merely unleashing the profit motive is not enough to foster lasting innovation. Rather, the focus of legal reform should be broadened to foster the application of technological and commercial structural innovations to philanthropic endeavors.

Finally, this Article seeks to draw lessons for today from its analysis of the past. It argues that the dominant legal paradigm has largely failed to account for the key factor transforming philanthropy today.

It is not bridging the for-profit/non-profit divide that has transformed philanthropy, but rather is the merging of information technology and philanthropy—the efforts of philanthropies to engage with the “disruptive technology” (the internet and social media) of our time. However, the dominant paradigm’s focus on hybrid entities is too limited to adequately promote and support such philanthropic entrepreneurship, particularly since it does not address recent developments in securities laws and other regulatory regimes affecting innovation.

This is significant because if we recognize philanthropic entrepreneurialism as a reflection of, and parallel to, technological and commercial innovations such as the development of capital pooling models or internet social networks, we can create a better path forward for proactive regulation of philanthropic innovation. To foster philanthropic entrepreneurship, then, we cannot just focus on tax or corporate structures,

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13. See Cox, *supra* note 3, at 36.

14. See James R. Hines, Jr., Jill R. Horwitz & Austin Nichols, *The Attack on Nonprofit Status: A Charitable Assessment*, 108 MICH. L. REV. 1179 (2010); Klaus Schwab, *Global Corporate Citizenship: Working with Governments and Civil Society*, 87 FOREIGN AFF. 107, 113 (2008) (“Corporate social responsibility means addressing the wider financial, environmental, and social impact of all that a company does. It entails minimizing the negative effects of the actions of a company and maximizing the positive ones on stakeholders as well as on the communities in which the enterprise operates and the governments with which it must work.”). See generally BISHOP & GREEN, *supra* note 1.

15. See, e.g., M. Todd Henderson & Anup Malani, *Corporate Philanthropy and the Market for Altruism*, 109 COLUM. L. REV. 571, 577 (2009) (“[R]eforms are needed to level the playing field in the market so that altruism is delivered efficiently to individuals demanding it and benefits are delivered efficiently to recipients of charity.”).

but must also look at reforms to securities and investor protection laws, consumer protection laws, and anti-fraud rules, among other areas of law.

This Article proceeds as follows. First, in Part I, this Article traces the history of philanthropy in the United States, using key examples to show that philanthropic innovation has consistently paralleled technological or market innovations. The analysis in Part I shows that many of the most successful philanthropists of their day were able to draw upon their commercial inventions, technological discoveries, or synergies with their business successes in their philanthropic endeavors—sometimes, and significantly, directly applying their commercial innovations to the philanthropic realm. It also discusses the emergence of “American Exceptionalism”<sup>16</sup> in the philanthropic realm.

This Article then proceeds in Part II to analyze how philanthropies have been regulated under U.S. law. Part II first explains how philanthropies obtained “favored tax status” and discusses the current debate over for-profit and for-profit/non-profit hybrid philanthropies. It then describes the new corporate structures states have created to accommodate “for-profit” philanthropies and sets out a typology of these new public-private entities. This typology of new corporate structures emphasizes the common goals or purposes behind each structure despite the different structural approaches legislators and their founders have taken. This Part analyzes how, like many of today’s philanthropists and legislators, the dominant paradigm in current philanthropic literature praises these hybrid structures as offering a revolutionary solution to the problems facing philanthropy and long-term philanthropic sustainability.<sup>17</sup>

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16. The term “American Exceptionalism” is itself highly debated, but is often used to refer to “ideas ranging from an empirical observation of difference to a normative assertion of the right to be different.” Judith Resnik, *Law’s Migration: American Exceptionalism, Silent Dialogues, and Federalism’s Multiple Ports of Entry*, 115 YALE L.J. 1564, 1582 (2006). In this Article, the term will be used to refer to historical, legal, and societal differences between the ways in which American policymakers, philanthropists, and donors approach philanthropy as compared to other nations.

17. See Elizabeth Schmidt, *Vermont’s Social Hybrid Pioneers: Early Observations and Questions to Ponder*, 35 VT. L. REV. 163, 179 (2010) (“The entrepreneurs were delighted to find a business entity that allowed them to pursue their dual values of improving the community and operating a sustainable market-responsive enterprise.”); Robert Katz & Antony Page, *The Role of Social Enterprise*, 35 VT. L. REV. 59, 85 (2010) (“For-profit social enterprises can address some of the real or perceived shortcomings associated with commercial and donative nonprofits. With the right organizational form, a social enterprise can have both greater access to equity capital and a deeply embedded, sustainable commitment to social purposes.”); see, e.g., Jay Milbrandt, *A New Form of Business Entity Is Needed to Promote Social Entrepreneurship: The Not-For-Loss Corporation*, 1 J. BUS. ENTREPRENEURSHIP & L. 421 (2008); Anup Malani & Eric A. Posner, *The Case for For-Profit Charities*, 93 VA. L. REV. 2017 (2007) (arguing in favor of for-profit charities); see also Dana Brakman Reiser, *For-Profit Philanthropy*, 77 FORDHAM L. REV. 2437, 2437 (2009); Michelle Scholastica Paul, *Bridging the Gap to the Microfinance Promise: A Proposal for a Tax-Exempt Microfinance Hybrid Entity*, 42 N.Y.U. J. INT’L L. & POL. 1383 (2010).

This Part also identifies some of the tensions and gaps in the current legal typology or framework supporting philanthropic innovation.

Building on this framework, in Part III this Article seeks to identify some of the transformative philanthropic innovations of our time. It argues that currently the critical innovation is not the “for-profit” hybrid philanthropy or related corporate structures. Rather, while lawmakers and scholars have been focusing on the hybrid entity as the new philanthropic innovation, the most important new innovation is the application of market and technological innovations to the philanthropic realm. Viewed in this light, many of the most successful philanthropies now and historically are those that are able to identify, utilize, and develop key commercial or market innovations in their philanthropic endeavors. To underscore this point, this Part analyzes some of the failures of the for-profit philanthropy model, and uses these failures to highlight why broader legal reform is needed.

To put these changes into broader context, this Part also argues that the blurring of lines between public and private in the philanthropic realm now taking place can be viewed as part of the massive changes now occurring in capitalism itself. Current forms of philanthropic innovation reflect the dynamism within the larger force of creative capitalism<sup>18</sup>—in essence, we may be in the midst of a new wave of philanthropic change in the United States focused on information technology, where once again capitalism and philanthropy are inextricably intertwined.

Finally, Part III discusses ways to foster philanthropic innovation through regulatory flexibility, arguing that U.S. legislation should permit greater flexibility in the structural form of philanthropies, allowing the formation of creative structures while still seeking to regulate these new forms (for example, by imposing mission, transparency, accountability, and consumer and financial protection requirements). In these ways, this Article seeks to draw from the lessons of history and from comparative perspectives, and seeks to start a new dialogue exploring how to harness the potential of market forces, while still preserving the goals of philanthropy.

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18. Bill Gates has defined creative capitalism as a two-way process where at the same time individual philanthropists are “catching the philanthrocapitalism bug and getting into giving—or at least trying to do good. Gates sees this as potentially the start of a ‘system innovation’ in how business operates . . . .” BISHOP & GREEN, *supra* note 1, at 7. In this Article, creative capitalism will be used more broadly to cover philanthropic entrepreneurialism as a form of capitalistic dynamism, while also recognizing that in modern American philanthropy, capitalism and philanthropy are inextricably intertwined and shape and influence one another.



## I. WAVES OF PROGRESS: UNDERSTANDING THE HISTORY OF PHILANTHROPY IN THE UNITED STATES

Progress comes in waves.<sup>19</sup> Technological or commercial innovation often occurs in leaps and bounds,<sup>20</sup> and such innovation in turn can lead to far-reaching, rapid change in the field of philanthropy. In many ways, the history of philanthropy in the United States is the story of how sudden surges in technological or commercial progress have led to the accumulation of great wealth in the hands of a few, and how some of those few have creatively chosen to channel part of their commercial gains into philanthropy.<sup>21</sup>

Many scholars have focused on the idea that “technological innovation comes in bursts of change” and applied this insight to economic and political theory, among other fields.<sup>22</sup> Within these analyses, and in the legal literature, however, the link between commercial innovation and

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19. See generally TIM WU, *THE MASTER SWITCH: THE RISE AND FALL OF INFORMATION EMPIRES* 10 (2010) (arguing that information technology follows a “distinctive pattern” of development, in which “[e]very few decades, a new communications technology appears, bright with promise and possibility” and “inspires a generation to dream of a better society”); *id.* at 20 (“The Cycle is powered by disruptive innovations that upend once thriving industries, bankrupt the dominant powers, and change the world.”); Harold Demsetz, *Toward a Theory of Property Rights*, 57 *AM. ECON. REV.* 347, 350 (1967) (“New techniques, new ways of doing the same things, and doing new things—all invoke harmful and beneficial effects to which society has not been accustomed. It is my thesis . . . that the emergence of new property rights takes place in response to the desires of the interacting persons for adjustment to new benefit–cost possibilities [as opposed to a search for just rules.]”).

20. See WU, *supra* note 19, at 10, 20–21.

21. See BISHOP & GREEN, *supra* note 1, at 13–17.

22. See generally MICHAEL LIND, *A LAND OF PROMISE: AN ECONOMIC HISTORY OF THE UNITED STATES* 5–6 (2012) (“Beginning with the Austrian American economist Joseph Schumpeter in the 1920s and 1930s, many students of economic history have argued that technological innovation comes in bursts of change, followed by long periods in which the implications of the latest innovations are worked out. Some economic historians have distinguished as many as five major waves of technological change since the industrial era began. Many identify three, based on radically new ‘general purpose technologies’: the first industrial revolution of the late 1700s, based on the steam engine; the second industrial revolution of the late nineteenth century, based on electricity, automobiles, and science-based chemical industries; and the third industrial revolution of the mid- and late twentieth century, based on the computer.”). Lind also goes on to discuss theories of American political history that view the United States as having gone through two or three regimes or informal republics. For a similar argument focusing on the organization of American foundations, rather than its links to commercial activity, see DOWIE, *supra* note 6, at 2 (“We can conceive of that first century of American foundation history as three, somewhat indistinct waves or periods of development, each with its own overriding purpose[.] The waves overlap and are only imprecisely bounded by particular historical events. Although many common themes endure through all three periods, they are differentiated by significant shifts in emphasis and in the priority placed on particular initiatives.”).

22. See BISHOP & GREEN, *supra* note 1, at 21 (“Since the birth of modern capitalism in Europe during the Middle Ages, rich businesspeople have consistently played a leading role in solving the big social problems of their day, often adapting the innovations of capitalism to make their philanthropy more effective.”).

philanthropic innovation has gone largely unrecognized or studied.<sup>23</sup> Indeed, it is only recently that legal scholarship has begun to recognize the related idea that information technologies themselves go through cycles of development.<sup>24</sup> This Article goes a step further and links the latest information technology cycle to philanthropic change, as discussed *infra*.

A close reading of the history of charitable endeavors discussed here shows that philanthropic innovation in the United States is both spawned and shaped by commercial and technological innovation. Specifically, technological and commercial innovation plays two roles. First, bursts of innovation enable business success, generating large accumulations of wealth, some of which is channeled into philanthropy.<sup>25</sup> In particular, the appearance or creation of large mobile funds—generally created as a byproduct of commercial or technological leaps of progress—in turn “made possible fundamental changes in philanthropy, [from] the rise of foundations” to other forms of philanthropic change.<sup>26</sup> Second, it provides the new corporate forms or invention-based architecture around which the new philanthropic entities are structured.

The far-reaching impacts of commercial transformations, and the links between these business inventions and successes and philanthropic innovation, have been little studied.<sup>27</sup> The lack of scholarship and analysis

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23. After an extensive search, I was only able to find two authors, both non-legal academics, who discuss the link between commercial innovation and philanthropy in a manner related to the ideas set forth in this paper. See Acs & Phillips, *supra* note 8, at 189–90.

24. See WU, *supra* note 19 and discussion therein.

25. See *supra* note 7; see, e.g., David J. Teece, *Business Models, Business Strategy and Innovation*, 43 LONG RANGE PLAN. 172, 173 (2010) (“To profit from innovation, business pioneers need to excel not only at product innovation but also at business model design, understanding business design options as well as customer needs and technological trajectories.”); see also Michael E. Porter & Mark R. Kramer, *The Competitive Advantage of Corporate Philanthropy*, HARV. BUS. REV., Dec. 2002, at 56, 57 (indicating the broad definition of philanthropy and noting that “[i]ncreasingly, philanthropy is used as a form of public relations or advertising, promoting a company’s image or brand through cause-related marketing or other high-profile sponsorships,” which may be beneficial to the company).

26. See REPORT OF THE PRINCETON CONFERENCE ON THE HISTORY OF PHILANTHROPY IN THE UNITED STATES 14 (1956) [hereinafter PRINCETON CONFERENCE]. See also BISHOP & GREEN, *supra* note 1, at 21 (“[T]o go further, it seems to be a feature of capitalism that golden ages of wealth creation give rise to golden ages of giving.”).

27. While a number of scholars and commentators have noted that philanthropic change appears to occur in bursts or cycles, see PRINCETON CONFERENCE, *supra* note 26, at 13-16 (“An obvious pattern for studying the history of philanthropy is by periods—colonial, nineteenth century, and so forth. . . . It was the consensus, however, that period studies would be fruitful only if the period selected corresponded with developments within philanthropy itself. Much research does no more than collect empirical data; results are disappointing because the significant variables have not been emphasized.”), few appear to have studied philanthropic development from this perspective, nor suggested the patterns observed by this author. Indeed, even the related idea that information technologies themselves go through cycles of development, WU, *supra* note 19, is considered new to the legal literature. See also *supra* note 23 (discussing the scarcity of research on the topics discussed in this paper). This Article goes a step further and links the latest information technology cycle to philanthropic change, as discussed *infra*.

on this subject is even more significant since this area of study is a rich source of ideas and guidance for future innovation and regulation.<sup>28</sup> To begin addressing this gap in the scholarly literature, the next sections begin an examination of these historical waves of progress, linking them to key philanthropic developments.

As noted above, philanthropic evolution can be viewed as occurring through leaps or waves of progress.<sup>29</sup> The first of these waves of American philanthropic progress actually began in England and then moved to the United States.<sup>30</sup> As American law draws its foundation and much of its force from British history and common law,<sup>31</sup> it is fitting that the story of American philanthropic entrepreneurialism has its roots in the Britain of the seventeenth and eighteenth centuries.

### A. *The Joint Stock Company*

While American philanthropy has borrowed from Britain in many ways, this Subpart focuses a historical lens on this Article's first key example of the link between commercial and philanthropic progress. In seventeenth and eighteenth century England, a major commercial innovation was the creation of a joint stock company.<sup>32</sup> Joint stock companies were a critical new commercial model that allowed companies for the first time to pool large amounts of capital which could then be

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28. See Battilana et al., *supra* note 10, at 55 (“In the aftermath of the 2007–08 economic crisis, the global economic system is still regarded as broken. Calls for reform have been particularly strong among youth. Vast unemployment, ballooning debt, and entrenched inequality have left a generation of young people frustrated with modern capitalism and motivated to change it. Among the voices for reform, hybrid entrepreneurs are opening the way for a reformulation of the current economic order, combining the principles, practices, and logics of modern capitalism with more inclusive humanitarian ideals.”). While this example focuses on hybrid entities, philanthropic historians have also remarked upon the rich of philanthropic history and the largely untapped lessons that can be learned from further study. See, e.g., Acs & Phillips, *supra* note 8, at 189–90 (analyzing the unique relationship between entrepreneurship and philanthropy in the United States and noting that “much of the new wealth created historically has been given back to the community to build up the great social institutions that have a positive feedback on future economic growth” (emphasis omitted)). See also DOWIE, *supra* note 6, at xxvii (“History does reveal that foundations can be creators of a better world.” (emphasis omitted)).

29. See DOWIE, *supra* note 6, at xx to xxvii, 2–21.

30. See also Acs & Phillips, *supra* note 8, at 192 (“The roots of American philanthropy can be found in England in the period from 1480–1660.”).

31. See DAVID G. EPSTEIN, BRUCE A. MARKELL & LAWRENCE PONOROFF, CASES AND MATERIALS ON CONTRACTS, MAKING AND DOING DEALS 6 (3rd ed. 2011) (“English contract law . . . influenced the development of American contract law.”).

32. Joint stock companies are considered to be antecedents of the modern corporation. The innovations underlying joint stock companies include their fundraising structure, whereby the founders raised capital by selling shares in the proposed profit-making venture, and a risk management structure whereby individual shareholders were only liable up to the amount of their original investment. See *Joint Stock Companies*, ENCYC. BRITANNICA, <http://www.britannica.com/EBchecked/topic/305668/joint-stock-company> (last visited March 7, 2013).

invested.<sup>33</sup> Crucially, this new structure allowed investors to seek profits on their investments while minimizing risk exposure.<sup>34</sup> This capital-pooling method was soon directly applied to the charitable realm.<sup>35</sup> The inventors of the joint stock companies applied commercial innovation to philanthropy in two ways: first, they applied the excess profits they had earned towards charitable endeavors.<sup>36</sup> Second, they also directly applied the joint stock capital-pooling model towards philanthropic ends.<sup>37</sup> Specifically, they sought subscriptions from the general public, pooled this capital, and used it to fund charitable endeavors such as St. Guy's hospital in London<sup>38</sup>—projects which were more far-reaching than the government at that time was inclined, or able, to provide.<sup>39</sup> These new pooling structures also multiplied the effect of charitable giving, greatly enhancing the impact of the smaller-scale individual or community giving that had come before, and providing risk management assurance for individuals who desired to engage in larger scale charitable endeavors.<sup>40</sup> Similar capital-pooling philanthropic projects were soon started in the United States,<sup>41</sup> and this new

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33. *Id.*

34. *Id.*

35. BISHOP & GREEN, *supra* note 1, at 2; B. KIRKMAN GRAY, A HISTORY OF ENGLISH PHILANTHROPY 105 (1905) (“It is impossible to overrate their importance as the first concerted effort to provide an elementary education for all the children of the country. They were also the first considerable achievement of the new joint-stock principle in philanthropy.” (footnote omitted)).

36. BISHOP & GREEN, *supra* note 1, at 2.

37. *Id.*; see also Roger Jones, *Richard Mead, Thomas Guy, the South Sea Bubble and the Founding of Guy's Hospital*, 103 J. ROYAL SOC'Y MED. 87 (2010).

38. See Jones, *supra* note 37, at 87.

39. See also GILLIAN WAGNER, THOMAS CORAM, GENT., 1668–1751, at 136 (2004) (including a discussion on the founding of the Foundling Hospital, for example how letters were written to foundling hospitals in the major cities of Europe asking how they were managed).

40. The significance of this multiplier effect cannot be overstated. See GRAY, *supra* note 35, at 81 (“The early efforts of the associated philanthropy are based on the fact that while many were willing to subscribe guineas, some were prepared to co-operate in persistent work for the relief of distress. At the outset the two classes were not so sharply defined as they rapidly tended to become. The new impulse was not the only one, and before describing it in fuller detail it is necessary to pause over the reminder that the old tradition of charity showed no signs of falling into desuetude. The endowed charities, deriving mainly from the familiar bequest did not cease; on the contrary they continued to become more numerous. They were still administered, exactly as in earlier periods, with more or less efficiency. But they showed little of that capacity possessed by the new methods of adapting themselves to the changing perception on the part of the well-to-do of the mischances that befell the poor.”).

41. Samuel A. Johnson, *The Genesis of the New England Emigrant Aid Company*, 3 NEW ENG. Q. 1, 95 (1930) (giving an account of the formation of an Emigrant Aid company by Eli Thayer—Thayer himself established an abolitionist colony in what is now West Virginia and was a quite successful, though not strictly, joint stock tycoon). See also Oscar Sherwin, *Thomas Firmin: Puritan Precursor of WPA*, 22 J. MODERN HIST. 38 (1950) (discussing the schools Firmin created); *Joint Stock Companies*, ENCYC. BRITANNICA, *supra* note 32 (noting that one of the earliest joint stock companies was the Virginia Company, which was founded in 1606 with the aim of colonizing North America). See also Acs & Phillips, *supra* note 8, at 192 (“The real founders of American philanthropy were the English men and women who crossed the Atlantic to establish communities that would be better than the ones they had known at home.”).

philanthropic model became a great driving force for societal change in both the United States and England.<sup>42</sup> In fact, this new philanthropic structure actually increased large-scale charity, as the risk management assurances and high-flying goals of these ventures led many individuals to participate in these philanthropic endeavors in cases where they might have been hesitant to do so before for fear of losing their money or contributing to failing projects.<sup>43</sup> For example, one commentator has noted, “[i]t is impossible to overrate” the importance of the joint-stock structure in American philanthropy, as the philanthropists using this model formed “the first concerted effort to provide an elementary education for all the children of the country.”<sup>44</sup>

Thus, the legal and financial innovation of joint stock companies led in turn to philanthropic change, as the fortunes of the day could be moved towards charitable ends, with more impact than ever before, by the application of the legal and financial capital-pooling innovation to philanthropy.

Soon, however, the United States and England diverged in their philanthropic approaches. American philanthropists began investing “their resources in the greater American fight over the definition of the common good”<sup>45</sup> in the private marketplace, while in England the role of government in philanthropy waxed and the role of private giving waned in charitable endeavors, with the result that private giving began to play a shrinking role in philanthropy in England.<sup>46</sup> Indeed, it soon became clear that in contrast to its English relatives, “American philanthropy would be a capitalist venture in social betterment, not an act of kindness as understood in Christianity.”<sup>47</sup>

### *B. The Roots of American Philanthropic Exceptionalism*

For many years thereafter, American philanthropy was smaller in scale than during the age of the flowering of the joint stock companies. American philanthropic endeavors were generally structured as community-based enterprises rather than as corporate or government-based philanthropies.<sup>48</sup>

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42. See GRAY, *supra* note 35, at 105.

43. *Id.* at 107.

44. *Id.* at 105.

45. OLIVER ZUNZ, PHILANTHROPY IN AMERICA: A HISTORY 5 (2012).

46. *Id.* at 4.

47. *Id.* at 2.

48. See PRINCETON CONFERENCE, *supra* note 26, at 9 (noting that in the United States “colleges, foundations, hospitals, health agencies, welfare societies, and many other institutions have originated almost universally out of individual beneficence,” while in other countries “the state or the church, and sometimes a combination of the two, takes the initiative in these directions”).

Initially, the “embryonic culture of an evolving philanthropy took root in a fertile American soil where ‘communities existed before governments were there to care for public needs.’”<sup>49</sup> However, American philanthropy soon became marked by its “unique encounter between charity and the state.”<sup>50</sup> For instance, one example of the divergence noted above is that in European countries (including the United Kingdom) where tax burdens are higher, there has historically been less private philanthropy; in contrast, in the U.S. the opposite has historically been true.<sup>51</sup> The United States has become somewhat “unique in the modern world for the encouragement it still accords to private philanthropy.”<sup>52</sup>

It may be said, then, that American philanthropy has always wrestled with the public-private divide and the nature of capitalism and entrepreneurship, adding greater weight to the links between commercial and philanthropic innovation.<sup>53</sup> In describing this recurring theme, one scholar described the entrepreneurial spirit embedded in the American philanthropic realm as follows:

The unique culture that resulted from America’s principles of free association and pluralism shaped a fresh new spirit of philanthropy markedly different than that of other contemporary single-sector societies dominated by Crown or Church. Philanthropy has continued to play a vigorous role as change-agent and risk-taker in American society. Because it is neither beholden to an electorate nor driven by shareholders, the American philanthropic sector has

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49. Penina Kessler Lieber, *1601–2001: An Anniversary of Note*, 62 U. PITT. L. REV. 731, 734–35 (2001).

50. ZUNZ, *supra* note 45, at 4.

51. Emma Rees, *Charity Crosses the Divide*, CNBC BUSINESS (Dec. 2007), <http://web.archive.org/web/20101222235734/http://www.cnbc.com/story/charity-crosses-the-divide/313/1/> (last visited Feb. 24, 2013) (citing Mark Evans for the belief that “Americans have an apparent preference for supporting social services by giving to charity rather than the state” and citing figures from the Charities Aid Foundation finding that individual giving in the U.S is at 1.7% of GDP, while in the U.K., it is 0.73% of GDP in 2007). *See also* Acs & Phillips, *supra* note 8, at 194 (“Both our entrepreneurial economic system and our philanthropic tradition spring from the same root: American individualism. Other countries may be content to let the government run most of their schools and universities, pay for their hospitals, subsidize their museums and orchestras, even in some cases support religious sects. Americans tend to think most of these institutions are best kept in private hands, and they have been willing to cough up the money to pay for them.”).

52. NIELSON, *supra* note 8, at 5. Some have taken this idea even further. *See* DOWIE, *supra* note 6, at xxii (stating that “the art of philanthropy is an indisputably American invention. No other civilization has been designed by the imagination of its organized philanthropists to quite the same degree as the United States.”).

53. *See* DOWIE, *supra* note 6, at xxi.

been free to experiment and innovate in ways that government and business dare not.<sup>54</sup>

Moreover, as another scholar put it, “because most of America’s original philanthropists were capitalists or heirs of capitalists, the culture of capitalism has quite naturally permeated the philanthropic imagination.”<sup>55</sup> American exceptionalism in the philanthropic realm continues to this day. As one commentator stated, “[c]ommerce and philanthropy are considered to be polar opposites. They’re not; they are two sides of the same coin. Both are about meeting the needs of people. To succeed in either sector requires entrepreneurial innovation and energy. Hence, the seeming paradox of the U.S.: The most commercial nation ever birthed is also the most philanthropic.”<sup>56</sup>

In this sense, philanthropy in the United States is an example of “American exceptionalism”<sup>57</sup>—philanthropy has developed and transformed as capitalism itself in the United States has evolved, and has done so in a way that is uniquely entrepreneurial and influenced by markets as opposed to government action. It is also significant that, in contrast to the United Kingdom and other modern European economies, “[i]n the U.S., much of the new wealth created historically has been given back to the community; to build up the great social institutions that have a positive feedback on future economic growth.”<sup>58</sup> Thus, it can be said that “[t]he ‘science,’ if not the art of philanthropy is an indisputably American invention. No other civilization has been designed by the imagination of its organized philanthropists to quite the same degree as the United States.”<sup>59</sup>

### *C. The Rise of the Great American Foundations and Trusts and a New Form of Leverage*

It is fitting then that the next key example of the commercial–philanthropic nexus focuses on the “uniquely American institutions” of massive foundations and trusts.<sup>60</sup> The next significant wave of progress for

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54. Lieber, *supra* note 49, at 735.

55. DOWIE, *supra* note 6, at xxxvii.

56. Steve Forbes, *Why Philanthropy Must Have These 400-Type Entrepreneurs*, FORBES (Sept. 9, 2012, 1:45 PM), <http://www.forbes.com/sites/steveforbes/2012/09/19/why-philanthropy-must-have-these-400-type-entrepreneurs/2/>.

57. See generally Jerome Karabel, *American Exceptionalism and the Battle for the Presidency*, HUFFINGTON POST (Dec. 22, 2011), [http://www.huffingtonpost.com/jerome-karabel/american-exceptionalism-obama-gingrich\\_b\\_1161800.html](http://www.huffingtonpost.com/jerome-karabel/american-exceptionalism-obama-gingrich_b_1161800.html) (referencing descriptions of American exceptionalism, referring both to the uniqueness and singularity of American development).

58. Acs & Phillips, *supra* note 8, at 193 (emphasis omitted).

59. DOWIE, *supra* note 6, at xxii.

60. *Id.* at 1.

philanthropy in the U.S. came during the age of the robber barons. Once again, “[t]he appearance of large, mobile funds in America made possible fundamental changes in philanthropy,” this time in the form of “the rise of foundations.”<sup>61</sup> Great commercial innovators of the era, such as Andrew Carnegie, accumulated vast wealth by inventing novel business methods and ideas.<sup>62</sup> They then “began casting about for a means to avoid taxes and put their wealth to use in new and imaginative ways.”<sup>63</sup>

For example, after achieving great business and financial success, Carnegie turned to philanthropy and “[o]ver the course of the next century, philanthropists and their advisers followed in Carnegie’s footsteps, perfecting the art of spending money for the common good.”<sup>64</sup>

Carnegie, for example, thought his philanthropy followed his own “gospel of wealth”<sup>65</sup> which he felt obligated him to return some of his riches to society. In addition, he was “determined to do so by following the same intelligent managerial principles that had made him a rich man.”<sup>66</sup> Many other robber barons or recipients of great wealth followed the same path.<sup>67</sup> Indeed, it has been said that “it was largely through his ideas and example that American philanthropy got off to such a bold and brilliant start at the beginning of the twentieth century.”<sup>68</sup>

Carnegie introduced two key commercial innovations into the world of philanthropy. First, he created a charitable trust to maintain his philanthropic activities, designing a structure that retained a charitable purpose while requiring the trustees to restrict the disposal of the trust’s income and to keep the trust’s capital intact.<sup>69</sup> He also applied the concept

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61. PRINCETON CONFERENCE, *supra* note 26, at 14; Acs & Phillips, *supra* note 8, at 190.

62. See generally NIELSON, *supra* note 8, at Part 2.

63. See DOWIE, *supra* note 6, at 1–2.

64. ZUNZ, *supra* note 45, at 1.

65. In 1889 Carnegie published the *Gospel of Wealth*, where he wrote of “the ‘disgrace’ of dying rich” and his view that “the chief problem of his era was the proper administration of wealth so that ‘the ties of brotherhood may still bind the rich and poor in harmonious relationships.’” NIELSON, *supra* note 8, at 32–33.

66. ZUNZ, *supra* note 45, at 1.

67. *Id.*

68. NIELSON, *supra* note 8, at 31.

69. See Acs & Phillips, *supra* note 8, at 193. (“Andrew Carnegie exemplified the ideal Calvinist. Carnegie put philanthropy at the heart of his ‘gospel of wealth.’ For Carnegie, the question was not only, ‘How to gain wealth?’ but, importantly, ‘What to do with it?’ The *Gospel of Wealth* suggested that millionaires, instead of bequeathing vast fortunes to heirs or making benevolent grants by will, should administer their wealth as a public trust during life.” (internal citations omitted)). Carnegie was probably influenced by the structure and foundations of the Peabody Education Fund Trustees. This fund, created by George Peabody, who chose to devote his fortune to philanthropy, “paved the way for subsequent foundation aid to the South after the Civil War but also influenced the operational patterns of subsequent major foundations including John D. Rockefeller’s Education Board, the Russell Sage Foundation, and the Carnegie foundation.” Zoltan J. Acs, ‘Schumpeterian Capitalism’ in *Capitalist Development: Toward a Synthesis of Capitalist Development and the ‘Economy as a Whole,’* in ELGAR



of leverage to his philanthropic endeavors. That is, rather than simply fully funding an organization, such as a library, he created “the infrastructure (the bricks and mortar) in return for which each community would commit its full faith and credit to the stocking, staffing, and running of a library.”<sup>70</sup> In this manner, “with the philanthropic outlay of a few million dollars, Carnegie created a public institution—one that has since spent many, many billions more than that making books available to the public free of charge—[through the concept of] leverage.”<sup>71</sup> Thus, Carnegie applied another aspect of creative entrepreneurship (a financial leverage mechanism) to his philanthropy.

Together with John Rockefeller, the first American billionaire,<sup>72</sup> Carnegie helped create the largest wave of organized philanthropy to have emerged up to that point in American history—the wave of the great American foundations.<sup>73</sup> The founders of this wave of philanthropy “shared a conviction that society was advanced by the generation and sharing of knowledge. They believed that new learning would create progress, expand wealth, and advance civilization and human welfare.”<sup>74</sup> In essence, then, as one author put it, the American innovation with respect to the creation of the big foundations was to “conceive of philanthropic funding as yet another financial investment and to use the skills they had acquired in business to minimize the risk of their speculations, and to vastly enlarge the scope of their charitable giving.”<sup>75</sup>

The most important developments in the history of American philanthropy thus all appear to be examples of a repeating cycle—a cycle wherein commercial innovation leads to great concentrations of wealth, which then leads the people who have accumulated great wealth from their business success to apply similar skills and inventions into the philanthropic realm.<sup>76</sup> In this manner, transformative commercial or

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COMPANION TO NEO-SCHUMPETERIAN ECONOMICS 97, 100 (Horst Hanusch & Andreas Pyka eds., 2007).

70. DOWIE, *supra* note 6, at 3.

71. *Id.*

72. *Id.* See also *The Centenarians Square Up*, THE ECONOMIST (June 9, 2011), <http://www.economist.com/node/18802844> (drawing comparisons between IBM and the Carnegie Corporation in terms of their charitable work). See also *John D. Rockefeller, 1839–1937*, THE ROCKEFELLER ARCHIVE CENTER, <http://www.rockarch.org/bio/jdrs.php> (last visited May 9, 2013) (referencing J.D. Rockefeller as a proponent of conditional giving, where a charity grants money on the condition that additional funds or resources are put up by someone else, general the wider public, and in turn the public is supposed to watch over the progress of the grant project.).

73. See DOWIE, *supra* note 6, at 4.

74. *Id.*

75. ZUNZ, *supra* note 45, at 2.

76. PRINCETON CONFERENCE, *supra* note 26, at 14; see generally *A Chronological History of Philanthropy in America*, THE NATIONAL PHILANTHROPIC TRUST, <http://www.nptrust.org/history-of->

technological change, when combined with charitable motives, can lead to further transformative change in the realm of philanthropy.

*D. Philanthropy Adopting Commercial Innovations to Address Social Upheaval*

Consider the (somewhat lesser known) example of Edward Filene. This example, coming after the age of the robber barons and great foundations, but during a period of great social unrest,<sup>77</sup> provides an example of philanthropic creativity as a response and possible solution to social upheaval. With his relatives in the late nineteenth and early twentieth century, Filene “introduced novel retailing techniques” to merchandise stores.<sup>78</sup> Filene “introduced the bargain basement concept” (hence the name “Filene’s Basement”) as well as other retailing innovations. After achieving financial success, he then turned to the field of philanthropy, eventually founding credit unions (i.e., lending institutions organized as worker cooperatives, often funded by members and providing “consumer and mortgage credit to them”).<sup>79</sup> In this manner, Filene used the notion of cooperative associations to innovate the credit union. The creation and development of the credit union has become “a critical source of lending for low-income workers” with little or no recourse for credit.<sup>80</sup> Again, following the pattern repeated throughout the history of philanthropic development, Filene applied a new capital-pooling and managerial method that he had developed in the commercial realm to the philanthropic realm (and thereby also helped foment significant societal change).<sup>81</sup> This example further shows how commercial and charitable innovations can be inextricably intertwined.

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giving (last visited Jan. 29, 2013) (website run by the National Philanthropic Trust devoted to the history of philanthropy in the United States).

77. See, e.g., DOWIE, *supra* note 6, at 4 (noting that the “founders of that first wave of American foundations shared a conviction that society was advanced by the generation and sharing of knowledge. They believed that new learning would create progress, expand wealth, and advance civilization and human welfare. And it would prevent reoccurrence of the enormous social unrest that had marked the late nineteenth century and brought the specter of socialism to the attention of America’s capitalists.”).

78. Yankl Stillman, *Edward Filene: Pioneer of Social Responsibility*, JEWISH CURRENTS, Sept. 2004, available at <http://www.jewishcurrents.org/2004-sept-stillman.htm>.

79. *Id.*

80. *Id.*

81. *Id.* For example, Filene also introduced the commercial concept of the “automatic basement,” where unsold goods were reduced in price by 25% the first week, 50% over two weeks, and after four weeks, were donated to charity. He also formed the Filene Cooperative Association, which allowed workers a role in collective bargaining, and initiated profit-sharing, health clinics, paid vacations, and welfare and insurance programs. Interestingly, like the “philanthrocapitalists” of our time and the creators of the big foundations, Filene “had a deep social conscience” but “little use for charity, [instead carrying a] deep faith in the capacity of people to improve themselves as long as they had good information and the discipline to use it effectively.” *Id.*

The next two Parts will discuss two other significant examples of the commercial-philanthropic nexus. Part II.A. examines the ways in which philanthropy and philanthropic structures underwent significant change with the advent of corporate and individual income taxation in the U.S. Part II.B. analyzes the regulatory regime which now governs American philanthropy. It also discusses critiques of this system, which led to calls for change, and the creation of new hybrid for-profit philanthropic entities. Following this background, Part III will then discuss the emergence of what this Article argues is the key philanthropic innovation of our time—the transformation of social media and other internet-related technologies for philanthropic ends.

## II. THE EVOLUTION OF PHILANTHROPIC REGULATION IN THE U.S.

### A. *The Origins of Philanthropic Regulation*

Prior to the creation of the federal individual income tax in 1913, philanthropic endeavors in the United States were either governed by state law, or perceived as community self-help initiatives below the scope of the law.<sup>82</sup> After the ratification of the Sixteenth Amendment allowed for the creation of a federal individual income tax, the Revenue Act of 1913 was enacted, including tax exemptions for “any corporation or association organized and operated exclusively for religious, charitable, scientific, or educational purposes.”<sup>83</sup> In 1917, Congress made tax deductions available to individuals “for their donations to these statutorily-defined nonprofit organizations.”<sup>84</sup> An organization obtains tax-exempt status allowing it to receive tax-deductible charitable contributions from donors if the organization fulfills the requirements of Section 501(c)(3) of the Internal Revenue Code.<sup>85</sup> These requirements include that “no part of the net

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82. Matthew F. Doeringer, *Fostering Social Enterprise: A Historical and International Analysis*, 20 DUKE J. COMP. & INT’L L. 291, 296 (2010). See also PRINCETON CONFERENCE, *supra* note 26, at 9 (noting that in the United States “colleges, foundations, hospitals, health agencies, welfare societies, and many other institutions have originated almost universally out of individual beneficence” while in other countries “the state or the church, and sometimes a combination of the two, takes the initiative in these directions.”); Rees, *supra* note 51 (citing Mark Evans for the belief that “Americans have an apparent preference for supporting social services by giving to charity rather than the state” and citing figures from the Charities Aid Foundation finding that individual giving in the U.S. is at 1.7% of GDP, while in the U.K. it is 0.73% of GDP in 2007).

83. Doeringer, *supra* note 82, at 297. One interesting American philanthropic innovation that is beyond the scope of this Article is that of the community trust. See generally Mark Sidel, *Law, Philanthropy and Social Class: Variance Power and the Battle for American Giving*, 36 U.C. DAVIS L. REV. 1145 (2003) (describing the origins and development of the modern variance power and the community trust).

84. Doeringer, *supra* note 82, at 297.

85. *Id.*

earnings of [the organization] inures to the benefit of any private shareholder or individual.”<sup>86</sup> In addition to this no-private-inurement restriction, a non-profit organization must also “be operated exclusively for an exempt purpose,” in addition to satisfying other requirements.<sup>87</sup>

Significantly, the development of this regulatory structure meant that while “other western societies sought to solve such social problems [as working conditions and race relations] through their central governments, American foundations and nonprofit institutions created privately supported and directed systems of social reform and welfare.”<sup>88</sup> In this manner, American exceptionalism in the field of philanthropy continued.

For many years the law regarding philanthropies remained largely tax-related, and the debates over philanthropies were generally tied to their corporate form or tax status.<sup>89</sup> However, the rise of ideas such as corporate social responsibility and greater attention to the failures of capitalism also led to renewed emphasis on philanthropies,<sup>90</sup> this time focusing on their form. The corporate or non-profit structure to which American philanthropy has been tied for the last century or longer is no longer sufficient; our regulatory structure is lagging behind innovation, and must evolve if philanthropic change is to be adequately supported or promoted.

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86. *Id.* at 298 (citing I.R.C. § 501(e)(3) (2007)).

87. *Id.*

88. DOWIE, *supra* note 6, at 5.

89. *Id.* at 298–300. *See also* PRINCETON CONFERENCE, *supra* note 26, at 14 (“Taxation has had a radical influence upon philanthropic giving.”). For an overview of this literature, *see generally* Malani & Posner, *supra* note 17 (considering theoretical justifications for the negative tax treatment of for-profit charities); *id.* at 2020 (“The problem for for-profit charities is that they forfeit all the state and federal tax benefits available to nonprofit charities”); Reiser, *supra* note 17, at 2473 (“For-profit philanthropy, though, differs from these familiar techniques in both structure and scale. Likewise, for-profit philanthropy stands in stark contrast to the nonprofit, tax-exempt form of organization typically used by those pursuing exclusively philanthropic endeavors. This Essay investigates the for-profit philanthropy model, drawing out these distinctions . . .”). In addition, even arguments against for-profit charities tend to focus on tax issues. *See, e.g.*, Hines et al., *supra* note 14, at 1179 (“Recent efforts to extend some or all of these tax benefits to for-profit companies making social investments, including the creation of the new hybrid nonprofit/for-profit company form known as the Low-Profit Limited Liability Company, threaten to undermine the vitality of the nonprofit sector and the integrity of the tax system.”). Comparatively few articles deal with new technology’s impact on philanthropy. *See* Kevin E. Davis & Anna Gelpert, *Peer-To-Peer Financing for Development: Regulating the Intermediaries*, 42 N.Y.U. J. INT’L L. & POL. 1209, 1212 (2010) (“Mapping the space occupied by these new ‘peer-to-peer’ intermediaries is difficult: it spans multiple jurisdictions and governance regimes and embraces a vast and growing variety of legal forms.”) (discussing microfinancing intermediary websites such as Kiva.org); *see also* Rana, *supra* note 3. Other papers note the rise of new technology only in passing: e.g., Jenkins, *supra* note 132, at 754 (“Lately, however, private foundations have become the target of those seeking to harness the power of ‘market-based’ innovation, as a sort of new technology, to contribute to the project of smarter philanthropy.”); Milbrandt, *supra* note 16. However, each of these articles, while contributing valuable data and ideas to help understand the current wave of philanthropic change, does not go as far as this Article in drawing explicit causal links between business or commercial innovation and groundbreaking change in the philanthropic world.

90. BISHOP & GREEN, *supra* note 1, at 2.

Again, current philanthropic transformation contains echoes of the past. “[D]uring the Great Depression, the federal government was finally forced by market disruptions and poverty beyond the reach of private charity to accept roles it had previously rejected, it embraced systems that had been designed, tested, and promoted by private philanthropy.”<sup>91</sup> Similarly, American philanthropy is undergoing another transformation against a backdrop of great financial and global turmoil. As one scholar has suggested, and as this Article argues, that while “American philanthropy continued to evolve . . . throughout the twentieth century, the shift it is currently undergoing is more fundamental.”<sup>92</sup>

The next Subpart seeks to identify portions of this fundamental shift, a shift which has gone largely unrecognized or identified in the legal literature surrounding philanthropic structures and transformation. This Subpart discusses current entrepreneurial innovation, and how that is being applied in the philanthropic realm. It seeks to shift the focus of current debate from the non-profit/for-profit hybrids to what this Article argues is the contemporary example of the commercial-philanthropic nexus—the transformation of social media for philanthropic ends.

### 1. *Background*

Before delving more deeply into the nature of philanthropic change, it is important to define some of the terms and entities that have played significant roles in this history, and to clarify how they will be used in this Article. This Subpart sets out a framework for philanthropic endeavors from public to private, for-profit to non-profit. It illustrates how for-profit/non-profit hybrids fit into the spectrum of philanthropic endeavors in the United States. It also seeks to identify where gaps in the literature on philanthropy and corporate social responsibility and social entrepreneurship exist. In doing so, this Subpart seeks to set the stage for the historical and comparative argument about the key philanthropic changes occurring today in Part III.

First, the term “philanthropy”—which can be literally translated from its Latin roots as the “love of humanity”—will be used to refer to “the process of using money to create change,”<sup>93</sup> which “encompasses all those activities of giving and volunteering by which an individual responds directly to those moral signals that communicate need.”<sup>94</sup> While the

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91. DOWIE, *supra* note 6, at 5.

92. *Id.* at xx.

93. *Id.* at xvi.

94. Richard Steinberg & Walter W. Powell, *Introduction* to THE NON-PROFIT SECTOR: A RESEARCH HANDBOOK, *supra* note 10, at 1, 4.

definition of philanthropy includes both the act of philanthropy and the institutions that facilitate that act,<sup>95</sup> this Article will focus on the second category, that is, institutions that facilitate philanthropy.

Philanthropic organizations come in both public (government or non-market)<sup>96</sup> and private (market-based or voluntarily funded)<sup>97</sup> forms. These forms can be viewed as falling across a spectrum of sectors of society.<sup>98</sup> At one end of this spectrum is the public or government sector. This sector includes government-funded social service agencies, that is, organizations operating under the control of public government agencies.<sup>99</sup> In the United States, government agencies are viewed as beholden to an electorate and its chosen representatives.<sup>100</sup>

In the middle of the spectrum is the non-profit sector, which includes the collection of private (as opposed to governmental) entities defined as non-profits.<sup>101</sup> Non-profit organizations are organizations “precluded, by external regulation or [their] own governance structure[s], from distributing [their] financial surplus to those who control the use of organizational assets.”<sup>102</sup> As embodied in the non-profit statutes in each of the fifty U.S. states, non-profit “boards have some ownership rights, such as the right to direct the use of [the organization’s] resources, but [do not have the right] to profit from [the] use of [the organization’s] resources [or] to sell these rights to others for a profit.”<sup>103</sup> These organizations are also generally tax-exempt under the U.S. federal tax code.<sup>104</sup>

At the far end of the economic spectrum are for-profit organizations. The for-profit sector includes both for-profit/non-profit hybrids as well as traditional for-profit companies. For-profit firms, whether philanthropic in their aims or not, provide full ownership rights to those in control of

95. *See id.* at 3.

96. *See Knowledge Base*, GRANTSPACE, <http://grantspace.org/Tools/Knowledge-Base/Funding-Research/Definitions-and-Clarification/Private-foundations-vs-public-charities> (last visited Mar. 6, 2013) (“Public charities generally derive their funding or support primarily from the general public, receiving grants from individuals, government, and private foundations.”).

97. *See id.* (“A private foundation . . . usually derives its principal fund from a single source, such as an individual, family, or corporation, and more often than not is a grantmaker. A private foundation does not solicit funds from the public.”).

98. *See Steinberg & Powell, supra* note 94, at 2 (“Most leading theories of . . . the nonprofit sector adopt this concept of a trichotomy of sectors—nonprofit, for-profit, and government.”).

99. *Id.*

100. *Id.*

101. *Id.* at 1–2.

102. *Id.* at 1.

103. *Id.* The U.S Internal Revenue Code categorizes independent sector organizations as Section 501(c)(3) or 501(c)(4) organizations, which includes charitable organizations and some mutual benefit corporations. Tax-exempt entities include a variety of profit-distributing and nondistributing organizations that are exempt from the U.S. Federal Corporate Income Tax. *Id.* at 3. Tax-exempt entities will be discussed further *infra*.

104. *Id.* *See* I.R.C. § 501(c)(3)–(4).

organizational assets. This includes rights to direct, profit from, and sell ownership.<sup>105</sup> In general, for-profit organizations “focus . . . on shareholder value maximization and are permitted to distribute returns to investors.”<sup>106</sup>

For-profit businesses, or what are viewed as traditional corporations, also participate in philanthropic endeavors. Every corporation is subject to corporate governance laws imposing regulatory accountability, transparency and other legal requirements and may choose to abide by social codes of conduct which set forth a company’s socially beneficial aims.<sup>107</sup> Corporate philanthropy involves cash contributions, grants, donations, or investments in philanthropic organizations, which only sometimes includes engagement beyond simply handing out money in the forms described above.<sup>108</sup>

Corporate social responsibility and social entrepreneurship, on the other hand, include far greater engagement with philanthropy. Corporate social responsibility refers to the acts of corporations

addressing the wider financial, environmental, and social impact of all that a company does. It entails minimizing the negative effects of the actions of a company and maximizing the positive ones on stakeholders as well as on the communities in which the enterprise operates and the governments with which it must work.<sup>109</sup>

It involves how a corporation responds to the expectations of all of its *stakeholders*, as opposed to just *shareholders*,<sup>110</sup> that is, how it responds to and recognizes the needs of all of the organizations and individuals that are in any way affected by its actions, including shareholders, owners,

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105. See Steinberg & Powell, *supra* note 94, at 1.

106. See Battilana et al., *supra* note 10, at 52.

107. See Schwab, *supra* note 14, at 110. See also NETWORK FOR BUS. INNOVATION AND SUSTAINABILITY, B RESOURCE GUIDE: CREATING A CODE OF ETHICS 2 (2007), available at [http://nbis.org/nbisresources/human\\_resources/howto\\_create\\_employee\\_code\\_ethics\\_corp.pdf](http://nbis.org/nbisresources/human_resources/howto_create_employee_code_ethics_corp.pdf) (defining a corporate code of ethics as “a formal document that establishes behavioral expectations for the company and the people who work there”); Mark Schwartz, *The Nature of the Relationship Between Corporate Codes of Ethics and Behaviour*, 32 J. BUS. ETHICS 247, 248 (2001) (stating that corporate codes of ethics can be used for a variety of reasons, “including the provision of consistent normative standards for employees, avoidance of legal consequences, and promotion of public image”). See also Lisa Fairfax, *Easier Said than Done? A Corporate Law Theory for Actualizing Social Responsibility Rhetoric*, 59 FLA. L. REV. 771, 773–78 (2007) (discussing the ubiquity and utility of corporate codes of conduct).

108. See Schwab, *supra* note 14, at 112.

109. See *id.* at 112–13.

110. Amy J. Hillman & Gerald D. Keim, *Shareholder Value, Stakeholder Management, and Social Issues: What’s the Bottom Line?*, 22 STRATEGIC MGMT. J. 125, 126 (2001) (explaining that capital suppliers are shareholders, and that stakeholders include shareholders as well as employees, customers, and community residents, among others). For an overview of the history and development of the field, see Douglas M. Branson, *Corporate Social Responsibility Redux*, 76 TUL. L. REV. 1207 (2002).

employees, investors, suppliers, clients and consumers. It is measured by “triple bottom-line accountability”<sup>111</sup> whereby “a company reports not only on its financial results but also on what it is doing and what it is not doing in meeting stakeholder expectations” of its obligations to society.<sup>112</sup>

Social entrepreneurship refers to firms or organizations that “integrate philanthropy into their business models at a more basic [or fundamental] level than companies” that focus on corporate contributions or act in accordance with corporate social responsibility norms.<sup>113</sup> By contrast, “[s]ocial entrepreneurs pursue social and business goals together, viewing them as synergistic and mutually reinforcing . . . . This deep and particular commitment to philanthropic endeavor is the thrust of the social enterprise ideal.”<sup>114</sup> Moreover, ideally social entrepreneurs do not simply redeploy

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111. For more in-depth definitions and discussions of triple bottom-line accountability, see Nancy J. King & Brian J. King, *Creating Incentives for Sustainable Buildings: A Comparative Law Approach Featuring the United States and European Union*, 23 VA. ENVTL. L.J. 397, 400–01 n.6 (2005) (“The ‘triple bottom line’ definition of sustainability creates measures of an organization’s sustainable performance and reports on how the organization impacts economic, environmental and social issues” (citing JOHN ELKINGTON, *THE CHRYSALIS ECONOMY* 11–12 (2001))). See also Paulette L. Stenzel, *Free Trade and Sustainability Through the Lens of Nicaragua: How CAFTA-DR Should Be Amended to Promote the Triple Bottom Line*, 34 WM. & MARY. ENVTL. L. REV. 653, 664–66 (2010) (“In recent years, business managers, business professors, and environmentalists have begun to label this pursuit the ‘Triple Bottom Line.’ This concept, coined by John Elkington, ‘challenges companies to look not merely at the economic or profit aspect of their business but also at the environmental and social costs: ‘At its narrowest, the term ‘[T]riple [B]ottom [L]ine’ is used as a framework for measuring and reporting corporate performance against economic, social and environmental parameters. At its broadest, the term is used to capture the whole set of values, issues and processes that companies must address in order to minimize any harm resulting from their activities and to create economic, social and environmental value.’” The Triple Bottom Line gives businesses a tool to help measure whether their actions promote sustainable development. . . . Although businesspeople like to enumerate benefits of their efforts, it is not possible to quantify all facets of the Triple Bottom Line. Nevertheless, businesses can use a variety of tools to analyze whether they are addressing and balancing all three legs of the Triple Bottom Line.” (internal citations omitted)).

112. Schwab, *supra* note 14, at 113. See James A. Phills Jr., Kriss Deiglmeier, & Dale T. Miller, *Rediscovering Social Innovation*, STAN. SOC. INNOVATION REV., Fall 2008, at 35, 36 (discussing the concept of social innovation as being larger than just the pursuit of profits, and defining social innovation as “[a] novel solution to a social problem that is more effective, efficient, sustainable, or just than existing solutions and for which the value created accrues primarily to society as a whole rather than private individuals” (emphasis omitted)); see also Antony Page & Robert A. Katz, *Is Social Enterprise the New Corporate Social Responsibility?*, 34 SEATTLE U. L. REV. 1351, 1351–52 (2011) (noting that there is no widely accepted definition for corporate social responsibility, but that fair wages and service to the public are generally included).

113. See Reiser, *supra* note 17, at 2450.

114. *Id.* See also LAURA MICHELINI, CORPORATE SOCIAL ENTREPRENEURSHIP AND NEW BUSINESS MODELS CREATING SHARED VALUE IN LOW-INCOME MARKETS 21 (2012) (“The definition of a social enterprise refers to the tangible outcome of social entrepreneurship. Hence, when we talk about social entrepreneurship, we refer to the process that invests in private people who are oriented to pursue opportunity and are satisfying unmet [sic] social needs. If this same process is applied to the business sector, we should refer to it as corporate social entrepreneurship . . . . The fundamental purpose of CSE is to accelerate companies’ organizational transformations into more powerful generators of societal betterment. CSE is not another form of CSR but rather is a process for invigorating and advancing the development of CSR.”); WAYNE VISSER ET AL., THE A TO Z OF CORPORATE SOCIAL



business skills and tools to build enterprises to solve social problems; their greatest strengths are not necessarily found in the way they build ventures to deliver products or services, but “in the way they connect people in new configurations and, in so doing, help people work together more effectively, influencing their career or life pathways.”<sup>115</sup> Viewed from this perspective, hybrids cannot fully support or define the range of social entrepreneurship now emerging, as will be discussed *infra*. Consequently, the above discussion is meant to show that simply concentrating on or creating hybrid forms is not sufficient to allow for the full range of social entrepreneurship now occurring; that is, we must create a broader regulatory environment to fully capture both the philanthropic innovations now emerging and the potential for more creative forms to emerge in the United States.

For-profit/non-profit hybrids (again, also called for-profit philanthropies) seek to go even further than corporate social philanthropy. They seek to create for-profit companies “tasked solely with pursuing philanthropy . . . [while their] core business remains primarily devoted to profit maximization.”<sup>116</sup> In their ideal form, managers do not face conflicts or choices between mission and profit, as these are supposed to be fully integrated into the organization’s primary strategy. In addition, the integration of social and commercial value creation is supposed to create “a virtuous cycle of profit and reinvestment in the social mission” of the organization.<sup>117</sup> In essence, then, the term “for-profit social enterprise” (or simply “social enterprise”) refers to businesses with shareholder-owners that seek to address social problems by combining the dynamism of capitalized for-profit enterprise with the intentionally pro-social orientation of non-profit organizations.<sup>118</sup> These hybrids seek to exploit the regulatory benefits of both for-profit and non-profit forms by giving up the traditional tax benefits for non-profit organizations in exchange for the control over profits for-profit firms maintain. As I have argued before in my previous work, hybrid organizations are also freed from the legal restrictions on commercial activity and accountability that apply to non-profit entities,

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RESPONSIBILITY: A COMPLETE REFERENCE GUIDE TO CONCEPTS, CODES AND ORGANISATIONS 118 (2008) (“A corporate social entrepreneur is a person who innovatively employs market forces, including new business ventures, to address or solve social or environmental problems.”); David Bornstein, *The Rise of the Social Entrepreneur*, N.Y. TIMES OPINIONATOR BLOG (Nov. 13, 2012, 9:30 PM), <http://opinionator.blogs.nytimes.com/2012/11/13/the-rise-of-social-entrepreneur/> (noting that social entrepreneurs are not just “businesspeople solving social ills, but people spreading new approaches—through nonprofits and businesses, or within government—to address problems more successfully than in the past”).

115. Bornstein, *supra* note 114.

116. See Reiser, *supra* note 17, at 2452.

117. Battilana et al., *supra* note 10, at 52.

118. Page & Katz, *supra* note 112, at 1353.

while at the same time, unlike most for-profit firms, they are also freed to focus on social returns over economic returns.<sup>119</sup>

Hybrid entities thus “combine social mission with commercial activities” in innovative ways, but also “create unfamiliar combinations of activities for which a supportive [legal or regulatory] ecosystem may not yet exist.”<sup>120</sup> This means that currently hybrid structures are operating in a conceptual and regulatory no-man’s-land where the constraints and accountability mechanisms that apply to both non-profit and for-profit entities do not apply, and where their activities may be regulated only by the good intentions of their founders and managers, or in extreme cases, by resort to fraud claims or criminal penalties.<sup>121</sup>

These gaps in the regulatory structures applicable to hybrid entities constitute a significant legal void that is both under-theorized<sup>122</sup> and, this Article argues, under-appreciated. This Article seeks to demonstrate why legal action is urgently needed to fill this void.

The boundaries between each of these sectors and entities are now blurring in a variety of ways that are little-understood.<sup>123</sup> Moreover, much of the regulatory and scholarly attempts to address this legal void have been conducted in a piecemeal fashion, suggesting incremental legislative changes or focusing on defining what hybrid entities are and how they operate.<sup>124</sup>

For instance, founders of hybrid entities currently have two options in the United States. First, they can choose to either structure themselves

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119. Rana, *supra* note 3, at 93.

120. Battilana et al., *supra* note 10, at 51.

121. See Rana, *supra* note 3, at 95.

122. See Reiser, *supra* note 17, at 2473.

123. *Id.*; see also Stephanie Strom, *A Quest for Hybrid Companies that Profit, but Can Tap Charity*, N.Y. TIMES (Oct. 12, 2012), [http://www.nytimes.com/2011/10/13/business/a-quest-for-hybrid-companies-part-money-maker-part-nonprofit.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2011/10/13/business/a-quest-for-hybrid-companies-part-money-maker-part-nonprofit.html?pagewanted=all&_r=0) (“Unlike a straight nonprofit group, these businesses can tap into conventional capital markets as well as philanthropy. And unlike a for-profit corporation, the structure allows investors to emphasize the social mission over making money, and to be supported by money from foundations.”). See also Dana Brakman Reiser, *Governing and Financing Blended Enterprise*, 85 CHI.-KENT. L. REV. 619, 619 (2010) (the “blurring of the boundary between for-profit and nonprofit has gone on for years and appears only to be gaining steam.”).

124. See Strom, *supra* note 123 (indicating that much of the legislation on these hybrid companies is being done at the state level). See generally Dana Brakman Reiser, *The Next Big Thing: Flexible Purpose Corporations*, 2 AM. U. BUS. L. REV. 55, 83 (2012) (“We do not yet know if the FPC [flexible purpose corporation], or any other specialized form for social enterprise, will break out of the pack and become ‘the next big thing.’ All of these forms are novel, and it will be some time before many of their provisions are interpreted and their usefulness is determined.”). This article also presents an informative description of the legal structures underlying flexible purpose corporations and their implications. See also Steven Munch, Note, *Improving the Benefit Corporation: How Traditional Governance Mechanisms Can Enhance the Innovative New Business Form*, 7 NW. J.L. & SOC. POL’Y 170 (2012) (suggesting ways policymakers and entrepreneurs may improve the new benefit corporation model).

legally as a non-profit or for-profit organization. This forces founders to claim the organizational benefits of only one of these forms. As an example,

a hybrid that registers as a nonprofit cannot access equity capital markets because it cannot legally sell ownership stakes to investors. But if a hybrid incorporates as a for-profit, it cannot offer the same tax benefits to [its] donors as registered nonprofits can, even if these approaches lead to the most effective social solution.<sup>125</sup>

Thus, traditional legal barriers have compelled organizations seeking both profits and social good to nurture one purpose at the expense of the other.<sup>126</sup> Furthermore, legal barriers have forced organizations to either conform to the rigid for-profit organizational structure, where the financial and fiduciary duties owed to shareholders effectively subverted the organization's goal of promoting social good,<sup>127</sup> or force the organization to adopt a non-profit structure, in which case the restrictions imposed upon the organization from distributing profits undermine their profit-seeking purpose.<sup>128</sup> "Further complicating the choice is the reality that entrepreneurs cannot fully anticipate their future resource needs at the time legal registration choices are made, and thus risk being prematurely locked in to one sector or the other."<sup>129</sup>

Alternatively, founders of hybrid entities can choose to legally structure their organizations through some of the new regulatory structures that are emerging around the hybrid hype. These structures also contain both strengths and limitations, as will be discussed below.

It is also important to note here that the lines between for-profit, government, and non-profit firms often blur as these entities compete in the marketplace. For example, there are many markets in which non-profit service providers operate alongside for-profit and government providers.<sup>130</sup> The market for childcare centers in the United States illustrates this blurring of sectors; for instance, day-care centers in the United States are divided so that approximately 60% are organized as non-profits, with the

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125. Battilana et al., *supra* note 10, at 52.

126. Dana Brakman Reiser, *Blended Enterprise and the Dual Mission Dilemma*, 35 VT. L. REV. 105, 106 (2010).

127. J. Haskell Murray & Edward I. Hwang, *Purpose with Profit: Governance, Enforcement, Capital-Raising and Capital-Locking in Low-Profit Limited Liability Companies*, 66 U. MIAMI L. REV. 1, 14 (2011).

128. *Id.* at 9.

129. See Battilana et al., *supra* note 10, at 52.

130. See THE NON-PROFIT SECTOR: A RESEARCH HANDBOOK, *supra* note 10, at 151.

remaining 40% operating as for-profit organizations, and some of the non-profits operating with government entities in pursuit of common goals.<sup>131</sup>

## 2. *Hybrids: Hype or Hope for Future Reform?*

Recent social and financial pressures have increased attention on the potential of hybrid entities. Over the last few decades, and sharpened by the recent financial crisis, there has been considerable debate over how businesses can “do better”—that is, better in a social or charitable sense.<sup>132</sup> Considerable debate has also centered on the sustainability of philanthropic enterprises—that is, how can philanthropic entities become largely or fully self-sufficient, or render their causes or aims self-sustaining?<sup>133</sup> Recently, some of this debate has centered on the idea of the social enterprise—an enterprise operated for socially beneficial ends.<sup>134</sup> From these debates

131. *Id.* at 151–52. This market for competition between forms of charitable operations has been often studied, to determine the optimal mix of these models in a given market. *See id.* at 151–56. A closer look at this debate, while richly illuminating, is beyond the scope of this paper.

132. *See generally* Garry W. Jenkins, *Who’s Afraid of Philanthrocapitalism?*, 61 CASE W. RES. L. REV. 753, 755 (2011) (“Lately, however, private foundations have become the target of those seeking to harness the power of ‘market-based’ innovation, as a sort of new technology, to contribute to the project of smarter philanthropy.”).

133. The U.K. Charity Commission has included “financial sustainability” and “diversification” of sources of income as hallmark of effective charities. U.K. CHARITY COMM’N, *THE HALLMARKS OF AN EFFECTIVE CHARITY* (July 2008), available at <http://www.charity-commission.gov.uk/Library/guidance/cc10text.pdf> [hereinafter U.K. CHARITY COMM’N] (“Hallmark 5 . . . ensures financial sustainability by managing cash flow and monitoring and reviewing financial performance during the year, taking timely corrective action where needed; considers the sources of its income and has a strategy in place to raise the funds it needs—diversifying its sources of income as far as possible . . . .”); *see also* Marilyn Struthers, *Supporting Financial Vibrancy in the Quest for Sustainability in the Not-For-Profit Sector*, 19 THE PHILANTHROPIST 241, 241 (2004) (“The quest for sustainability in voluntary sector organizations is a quest for sense in a rapidly changing funding world and a turbulent economic environment. Interest in the concept of sustainability by both funders and leaders of nonprofit organizations is mounting as the sector moves more deeply into what may be termed a funding crisis . . . .”); *But see* Brian D. Galle, *Keep Charity Charitable*, 88 TEX. L. REV. 1213 (2010) (arguing against the Eric Posner article about for-profit charities and promoting the traditional position of charities); Robert C. DeGaudenzi, *Tax-Exempt Public Charities: Increasing Accountability and Compliance*, 36 CATH. LAW. 203 (1995–1996) (noting criticism of charity misconduct and proposing increased IRS disclosure of financial information where abuse is detected).

134. *See generally* Matthew F. Doeringer, *Fostering Social Enterprise: A Historical and International Analysis*, 20 DUKE J. COMP. & INT’L L. 291 (2010); Katz & Page, *supra* note 17; Janet E. Kerr, *Sustainability Meets Profitability: The Convenient Truth of How the Business Judgment Rule Protects a Board’s Decision to Engage in Social Entrepreneurship*, 29 CARDOZO L. REV. 623 (2007); Malani & Posner, *supra* note 17; Page & Katz, *supra* note 112; Linda O. Smiddy, *Corporate Creativity: The Vermont L3C & Other Developments in Social Entrepreneurship*, 35 VT. L. REV. 3 (2010); Astrid Coates & Wim Van Opstal, *The Joys and Burdens of Multiple Legal Frameworks for Social Entrepreneurship—Lessons from the Belgian Case* (Soc. Sci. Research Network, Working Paper No. WP-SCE 09-03, 2009), available at <http://ssrn.com/abstract=1432427>; Levinus Timmerman, Matthijs De Jongh & Alexander Schild, *The Rise of the Social Enterprise: How Social Enterprises Are Changing Company Law Worldwide*, in *THE LAW OF THE FUTURE AND THE FUTURE OF LAW* 305 (S. Muller et al. eds., 2011), available at [http://www.ficfl.org/fileadmin/ficfl/documents/FICHL\\_11\\_Web.pdf](http://www.ficfl.org/fileadmin/ficfl/documents/FICHL_11_Web.pdf).

another theme has emerged—that philanthropy itself could be improved. Hence, “philanthrocapitalists,” among the richest technology elite of our time:<sup>135</sup>

believe they are improving philanthropy, equipping it to tackle the new set of problems facing today’s changing world; and to be blunt, it needs improvement—much philanthropy over the centuries has been ineffective. They think they can do a better job than their predecessors. The past couple of decades have been a golden age for capitalism, and today’s new philanthropists are trying to apply the secrets behind that money-making success to their giving.<sup>136</sup>

It is in this atmosphere that hybrid entities have come to be the focus of regulatory and scholarly attention. Arguably, the philanthropic structure garnering the most attention today is the “for-profit charity”<sup>137</sup>—which seeks to merge market profit motives that purportedly promote innovation and market discipline with the donative and philanthropic aims of traditional charities. Such entities have proliferated in the wake of the recent financial crisis; for example, one study analyzing grant requests to a large grantor showed that grant requests based on the hybrid model rose from 37% in 2006 to 50 % in 2010 and 2011.<sup>138</sup>

Proponents of these hybrid entities argue (and unintentionally echo a central part of the argument set forth here that commercial entrepreneurship and philanthropic change are inextricably linked) that “the past couple of decades have been a golden age for capitalism” and that today’s new

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135. For a description of Bill Gates’s market and philanthropic work, see Brendan Coffee, *Gates Beats Ellison in Daily Ranking of Tech Billionaires*, BLOOMBERG NEWS (Mar. 7, 2012), <http://www.bloomberg.com/news/2012-03-07/gates-beats-ellison-in-bloomberg-daily-ranking-of-technology-billionaires.html>, and Beckett, *supra* note 135. For Sergey Brin’s market and philanthropic work, see Mark Malseed, *The Story of Sergey Brin*, MOMENT MAGAZINE, Feb. 2007, at 39. For a description of Mark Zuckerberg’s work and philanthropic aims, see Robert Peston, *Facebook Unveils \$5bn Stock Market Flotation Plans*, BBC NEWS (Feb. 2, 2012), <http://www.bbc.co.uk/news/business-16830664>.

136. See BISHOP & GREEN, *supra* note 1, at 2–3. The U.K. Charity Commission has included “financial sustainability” and “diversification” of sources of income as hallmarks of effective charities. U.K. CHARITY COMM’N, *supra* note 133.

137. See Page & Katz, *supra* note 112, at 1353 (“‘Social enterprise’ is a loose term for businesses that aim to generate profits while advancing social goals. Proponents of social enterprise believe that such businesses can combine the dynamism of for-profit firms with the mission-driven zeal more typical of nonprofit organizations.” (footnote omitted)). See also Reiser, *supra* note 17, at 2472 (“Google.org’s for-profit philanthropy model is the most recent in a long line of phenomena blending nonprofit and for-profit endeavor. The persistence of corporate charitable contributions and corporate social responsibility initiatives, as well as the advent of social enterprise and the new advocates of philanthrocapitalism, suggest innovation may well continue in this direction.” (footnote omitted)).

138. See Battilana et al., *supra* note 10, at 2.

philanthropists are creatively “trying to apply the secrets behind [their] money-making success to their giving.”<sup>139</sup> The media is awash with commentators making claims such as “we may even be going through a new Enlightenment” and basing this high-flying rhetoric on “[t]he [r]ise of the Social Entrepreneur[s]” and their novel ideas.<sup>140</sup> Legislatures and businesses have bought into the hype over the transformative nature of the public-private hybrid structure, to the extent that state after state has created special structures for the formation of hybrid for-profit entities.<sup>141</sup>

Several new regulatory and corporate structures have been proposed and implemented to foster hybrid entities. These structures, focused on similar aims, are discussed and categorized below.

### 3. *Hybrid Structures Emerging Across the United States*

One hybrid form is the Low-Profit Limited Liability Corporation (L3C), which is a variant of the traditional LLC, with three additional requirements. First, an L3C must have been established to carry out a charitable or educational purpose.<sup>142</sup> Second, income or property appreciation cannot be significant goals of the L3C.<sup>143</sup> Third, the L3C is prohibited from engaging in most political activities in the same manner as are conventional non-profit organizations.<sup>144</sup>

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139. BISHOP & GREEN, *supra* note 1, at 2–3. Most philanthrocapitalists focus on the profit motive or management skills as the driver behind their money-making success. *Id.* However, this Article argues that the most successful philanthropic entrepreneurship relies on harnessing technological and commercial innovations beyond that of the profit motive and business management skills.

140. See Bornstein, *supra* note 114. Bornstein is also the author of HOW TO CHANGE THE WORLD: SOCIAL ENTREPRENEURS AND THE POWER OF NEW IDEAS (2007) and a co-author of SOCIAL ENTREPRENEURSHIP: WHAT EVERYONE NEEDS TO KNOW (2010).

141. Many states are in the process of creating corporate structures to support for-profit/philanthropy hybrids. See Carter G. Bishop, *Fifty State Series: L3C & B Corporation Legislation Table*, (Suffolk Univ. Law Sch., Research Paper No. 10-11, 2013), available at <http://ssrn.com/abstract=1561783>.

142. Reiser, *supra* note 123, at 621 (“An L3C must ‘significantly further the accomplishment of one or more charitable or educational purposes’ under the federal tax code. The enabling legislation typically also issues a kind of negative command, requiring that a company ‘would not have been formed but for the company’s relationship to the accomplishment of’ those purposes.” (footnote omitted)). Vermont first introduced the L3C in 2008, with Rhode Island, Louisiana, Illinois, North Carolina, Maine, Michigan, Utah and Wyoming rapidly following suit. See Dana Brakman Reiser, *Benefit Corporations—A Sustainable Form of Organization?*, 46 WAKE FOREST L. REV. 591, 593 (2011).

143. Reiser, *supra* note 123, at 621 (“Next, the statutes require that neither income production nor property appreciation may be a significant purpose of an L3C, and some require this to be stated in the L3C’s formative documents.”).

144. *Id.* (“Finally, each statute specifically disallows L3Cs from pursuing purposes that would disqualify an entity from exemption under I.R.C. § 501(c)(3)’s limitations on lobbying and political campaign activity.”).

Another hybrid form is the For-Benefit Corporation (B Corporation), a private regulatory model self-imposed by a conventional corporation.<sup>145</sup> This model produces no tax advantages.<sup>146</sup> Existing B Corporation standards impose particularly high obligations on directors to consider the social purposes of the corporation.<sup>147</sup> Some states have adopted legislation establishing B Corporations into their state corporate laws, most significantly California,<sup>148</sup> Maryland<sup>149</sup> and Hawaii.<sup>150</sup> As we have seen in corporate law generally, those wishing to take advantage of a particular corporate structure will flock to a state or states that allows it, potentially rendering the laws of other states almost superfluous.<sup>151</sup>

Thus, individuals seeking to blend philanthropy with market mechanisms have a variety of structural choices available, choices that appear to be only increasing over time, as will be discussed below.

## *B. The Current Status of Hybrid Legislation and the Debates over Hybrid Entities*

### *1. American States*

The law of philanthropic structures, and the ways in which public-private entities can be created, is in a state of flux. As of July 10, 2012,

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145. *Id.* at 637 (“A B corporation . . . uses the traditional, state-law-governed corporate form as its base. This base is then varied through statements amending an individual corporation’s organic documents to commit it to ‘use[] the power of business to solve social and environmental problems.’” (footnotes omitted)).

146. *Id.* at 637–38 (“As a private certification system, the B corporation designation offers no special tax treatment for corporations that obtain it. Ordinary federal and state income and property taxes will apply regardless of B certification . . .”). Maryland pioneered the B Corporation in 2010, and was quickly followed by California, Hawaii, New Jersey, New York, Virginia, and Vermont. *See* B CORPORATION, 2012 ANNUAL REPORT 8 (2012), *available at* [http://www.bcorporation.net/storage/documents/BcorpAP2012\\_Web-Version.pdf](http://www.bcorporation.net/storage/documents/BcorpAP2012_Web-Version.pdf) [hereinafter B CORPORATION].

147. Reiser, *supra* note 123, at 640 (“[U]nder the required charter amendments, a New York B Corporation director would be obliged to go further . . . [and] be commanded to consider these outside interests. Moreover, the range of outside interests she must consider is even broader than that described by the statute, including abstract social and environmental concerns.” (footnote omitted)).

148. *See* B CORPORATION, *supra* note 146.

149. *Id.*

150. *Id.*

151. J. Robert Brown, Jr. & Sandeep Gopalan, *Opting Only In: Contractarians, Waiver of Liability Provisions, and the Race to the Bottom*, 42 IND. L. REV. 285, 314 (2009) (“The evidence is consistent with a race to the bottom. The waiver of liability provisions were not designed to solve a corporate governance problem, but were intended to benefit management. Because management controls the reincorporation process, they could move the company to Delaware to take advantage of reduced liability.”). *See also* Frank H. Easterbrook, *The Race for the Bottom in Corporate Governance*, 95 VA. L. REV. 685, 686 (2009) (“The dominant academic view was that Delaware had waged and won a ‘race for the bottom’ in corporate law by offering ever-more-favorable terms to managers, who then moved their corporations to that lax jurisdiction.”).

nine states had adopted L3C statutes: Illinois, Louisiana, Maine, Michigan, North Carolina, Rhode Island, Utah, Vermont, and Wyoming.<sup>152</sup> Nine states—California, Hawaii, Louisiana, Maryland, New Jersey, New York, South Carolina, Vermont, and Virginia—have adopted B-Corporations, with Maryland adopting two forms—the B-Corp and the BLLC.<sup>153</sup>

In addition, L3C legislation is pending in Alabama, Arizona, California, Georgia, Hawaii, Iowa, Indiana, Kentucky, Maryland, Massachusetts, Minnesota, Missouri, New Hampshire, New York, Oklahoma, and Virginia.<sup>154</sup> Also, Florida, Illinois, Iowa, Michigan, Minnesota, North Carolina, and Pennsylvania are currently considering the formation of B Corporations.<sup>155</sup>

Only time will tell how useful or successful these legislative changes will be, though they clearly reflect the transformation taking place today regarding corporate structures and philanthropy.

## 2. *International Comparisons*

Tellingly, these sweeping corporate and philanthropic changes are occurring on an international level as well. In the United Kingdom, the Community Interest Company (CIC) is a new special status within UK

152. 805 ILL. COMP. STAT. ANN. 180/1-5 (West 2010); LA. REV. STAT. ANN. § 12:1301(West 2010); ME. REV. STAT. ANN. tit. 31 § 1502 (2011); MICH. COMP. LAWS ANN. § 450.4102(2)(m)(West 2010); N.C. GEN. STAT. ANN. § 57C-2-21(West 2011); R.I. GEN. LAWS ANN. § 7-16-2 (West 2012); UTAH CODE ANN. § 48-2c-102 (West 2009); VT. STAT. ANN. tit. 11 § 3001 (West 2010); WYO. STAT. ANN. § 17-29-102 (West 2011). *See* Bishop, *supra* note 141.

153. CAL. CORP. CODE § 14601 (West 2011); HAW. REV. STAT. § 420D-2 (West 2011); LA. REV. STAT. ANN. § 12:1803 (2012); MD. CODE ANN. CORPS. & ASS'NS § 5-6C-01 (West 2012); MD. CODE ANN. CORPS & ASS'NS § 4A-1101 (West 2011); N.J. STAT. ANN. § 14A:18-1 (West 2011); N.Y. BUS. CORP. § 1702 (McKinney 2012); S.C. CODE ANN. § 33-38-120 (2012) ; VT. STAT. ANN. tit. 11A § 21.03 (West 2012); VA. CODE ANN. § 13.1-782 (West 2011). *See* Bishop, *supra* note 141.

154. Alabama (S.B. 517, 2011 Reg. Sess. (Ala. 2011)); Arizona (S.B. 1503, 50th Leg., 1st Reg. Sess. (Ariz. 2011)); California (S.B. 323, 2011-2012 Reg. Sess. (Cal. 2011)); Connecticut (S.B. 403, 2012 Feb. Sess.(Conn. 2012); Georgia (H.B. 594, 151st Gen. Assemb. (Ga. 2011)); Hawaii (S.B. 674 & H.B. 2082, 26th Leg., Reg. Sess. (Haw. 2011)); Iowa (S.F. 158, 85th Gen. Assemb. (Iowa 2011)); Indiana (S.B. 501, 117th Gen. Assemb., 1st Reg. Sess. (Ind. 2011)); Kentucky (H.B. 110, 2011 Leg., Reg. Sess. (Ky. 2011)); Maryland (H.B. 552 & S.B. 209, 428th Gen. Assemb., Reg. Sess. (Md. 2011)); Massachusetts (H.B. 1868, 187th Gen Ct. (Mass. 2011)); Minnesota (S.B. 2063, 87th Leg. Sess., 2d Reg. Sess. (Minn. 2012)); Missouri (H.B. 1561, 96th Gen. Assemb., 2d Reg. Sess. (Mo.2012)); New Hampshire (S.B. 352, 162d Leg. Sess. (N.H. 2012)); New York (S.B. 3011& A.B. 6116, 234th Leg. Sess. (N.Y. 2011)); Oklahoma (H.B. 1088, 53d Leg., Reg. Sess. (Okla. 2011)); Virginia (S.B. 351, 2012 Reg. Sess. (Va. 2012)). *See* Bishop, *supra* note 141.

155. Colorado (S.B. 182, 68th General Assemb. 2d Reg. Sess. (Co. 2012)); Florida (H.B. 757, 114th Reg. Sess. (Fla. 2012)); Illinois (S.B. 2897, 97th Gen. Assemb. (Illinois 2011)); Iowa (H.F. 2154, 84th Gen. Assemb., 2d Sess. (Iowa 2011)); Michigan (S.B. 359, S.B. 360, H.B. 4616, and H.B. 4615, 96th Leg. Sess. (Mich. 2011)); Minnesota (S.F. 1572, 87th Leg. Sess., 2d Reg. Sess. (Minn. 2011)); New York (S.B. 79, 234th Leg. Sess. (N.Y. 2011)); North Carolina (S.B. 26, 2011 Gen. Assemb., Reg. Sess. (N.C. 2011)); Pennsylvania (H.B. 1578 and S.B. 433, 159th Gen. Assemb. (Pa. 2011)); South Carolina (S.B. 1405, 119th Session General Assemb. (S.C. 2011)). *See* Bishop, *supra* note 141.



company law, having the structure of a conventional limited company, but regulated by the CIC Regulator.<sup>156</sup> CICs receive no automatic tax benefits.<sup>157</sup> CICs are subject to restrictions on their disposal of assets.<sup>158</sup>

Other European countries are also developing their own versions of social entrepreneurship or socially beneficial companies, generally following the lead of the United States. One author characterized this trend by noting that “[w]hile Americans now tend to stress the ‘blurred boundaries’ among institutional and legal forms as well as the ‘blended value creation’ (profits alongside social value) that characterizes social entrepreneurship, Europeans rather stress the fact that social entrepreneurship most often takes place within the ‘third sector’ (i.e., the private, not-for-profit sector).”<sup>159</sup> While taking different approaches, many European countries have begun developing legal structures and statutory support for social enterprises.<sup>160</sup>

This contrasts with the situation in the United States, where much of the debate over philanthropic innovation has focused on the tax status of philanthropic entities.<sup>161</sup> For example, in one area of current debate, Anup Malani and Eric Posner have identified entrepreneurs’ desire to take or give a share of profit to employees, instead of a wage, as the motivation for a move from non-profit to for-profit organizations.<sup>162</sup> Thomas Kelley identifies the legal issues facing traditionally formed non-profits engaging

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156. Reiser, *supra* note 123, at 630–31 (“The actual content of the CIC enactment is relatively thin, relying on company law as the basic framework for the new form, though supplying more details than do the L3C statutes. This enactment delegates continuing rulemaking and supervision for CICs to a light touch, dedicated CIC Regulator.”).

157. *Id.* at 631 (“In the area of taxation, CIC status does not confer any benefits beyond those available to other UK companies.”).

158. *Id.* at 634–35 (“A CIC’s assets are subject to an ‘asset lock.’ This asset lock prohibits a CIC from disposing of assets for consideration of less than their fair market value, except in pursuit of the community benefits the CIC is designed to pursue or in a transfer to a charity or another CIC.” (footnote omitted)).

159. *Social Enterprise in Europe: Recent Trends and Developments* 5 (Jacques Defourny & Marthe Nyssens eds.) (European Research Network WP no. 08/01).

160. *Id.*

161. See generally DAN PALLOTTA, UNCHARITABLE: HOW RESTRAINTS ON NONPROFITS UNDERMINE THEIR POTENTIAL 116–25 (2010) (arguing that charities should be allowed access to institutional for-profit investment and that reform will help charities raise crucial funding, beyond what donations, loans, and fees for services can provide.); see also Malani & Posner, *supra* note 17 (arguing that charities should be permitted to raise capital by promising investors a financial return.). Cf. Galle, *supra* note 133 (arguing against the Eric Posner article about for-profit charities and promoting the traditional view of charities).

162. Malani & Posner, *supra* note 17, at 2019 (“Perhaps the entrepreneur is very talented and could make a great deal of money at a noncharitable start-up company. She would have to turn that income down to form a charity, and while the entrepreneur is kind-hearted, she also cares about maintaining a comfortable lifestyle. Or perhaps the entrepreneur and donors believe she cannot motivate her employees to work hard unless she can offer them a share of the firm’s profits.”).

in innovative approaches to funding.<sup>163</sup> In essence, the debate has been largely cast as one based on a set of tax questions or corporate form questions.<sup>164</sup>

As one group of scholars put it, due to the spaces left by a relatively weak charities law<sup>165</sup> and the public and private failures of many non-profits that are “far from perfect, at times deploying their resources in ways that fail to advance the public good,” there is room to debate a radical policy reform in which charitable operations alone would define which organizations might receive the benefits of favorable policy treatment. With such a reform, or with an enabling policy of regulatory flexibility along these lines, the provision of charitable services would be the sole criterion for tax and other benefits regardless of organizational status. Such a reform, therefore, would permit for-profit firms to receive tax deductions to the extent that they used these funds for specified charitable purposes, and would deny tax deductions to nonprofit organizations to the extent that they did not use the funds for charitable purposes.<sup>166</sup>

These same issues are often cast as a different set of policy questions—whether nonprofit organizations merit their special tax status and, if they do, whether specific charitable acts should be required of organizations that enjoy these tax benefits. Once tax benefits are contingent on specific acts, it is a short step to contemplate permitting entities that do not qualify as nonprofit organizations to enjoy the benefits available to non-profits, at least insofar as they engage in charitable activities.<sup>167</sup>

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163. Thomas Kelley, *Law and Choice of Entity on the Social Enterprise Frontier*, 84 TUL. L. REV. 337, 343 n.20 (2009) [hereinafter Kelly, *Law and Choice of Entity*] (“The two topics—legal problems faced by nonprofits that engage in entrepreneurial, profit-generating activity and the growing phenomenon of for-profit organizations forming to pursue essentially social benefit missions—are closely and even causally linked.”). See generally Thomas Kelley, *Rediscovering Vulgar Charity: A Historical Analysis of America’s Tangled Nonprofit Law*, 73 FORDHAM L. REV. 2437 (2005) [hereinafter Kelley, *Rediscovering Vulgar Charity*].

164. See Hines et al., *supra* note 14, at 1181.

165. See Acs & Phillips, *supra* note 8, at 190 (“The founders of modern American philanthropy tried to provide answers to problems that were national in scope, at a time when national governments were weak. Today’s philanthropists have a chance to address problems that are global in scope, at a time when global institutions are even weaker.” (internal citations omitted)).

166. See Hines et al., *supra* note 14, at 1181.

167. *Id.* (footnote omitted). See also Steven J. Haymore, *Public(ly oriented) Companies: B Corporations and the Delaware Stakeholder Provision Dilemma*, 64 VAND. L. REV. 1311 (2011); Kelley, *Law and Choice of Entity*, *supra* note 163; Murray & Hwang, *supra* note 127. Again, while providing valuable insights, these articles fail to recognize the links and nexus between purely commercial entrepreneurial entities and charitable endeavors.

### 3. *Hybrid Failures*

In addition to this scholarly debate on the forms and possibilities of hybrids, it is also worth noting that many, even some of the most heralded, for-profit/non-profit hybrid entities have failed. This Article argues that these failures arose in part because they placed form over innovation, and failed to focus on the structural financial or commercial innovations that had already proven successful in the for-profit market.

Perhaps the most widely discussed failure is that of Google.org. Its parent company Google.com, has itself has been described as a game-changer, a revolutionary firm that has changed the landscape of the internet and society, one that has repeatedly reinvented businesses for a new information age.<sup>168</sup> When Google.com first announced these plans, in my prior writings I predicted that its philanthropic endeavors were unlikely to succeed unless they focused on the technologies that made Google.com uniquely successful and revolutionized the search-engine market.<sup>169</sup>

Interestingly, this appears to be exactly what happened. When Google.com went public, it did so with a philanthropic twist: Google's founders' announced that they were establishing a foundation that would be funded by approximately one percent of Google's profits and equity.<sup>170</sup> After the highly successful IPO, Google chose to create not a traditional foundation, but a foundation with a for-profit philanthropy, a hybrid entity with charitable aims but for-profit status.<sup>171</sup>

In this manner, Google took on philanthropy, intending to once again be a revolutionizing game-changer. In the years immediately following its IPO, Google began to heavily publicize its great ambitions to reshape the philanthropic landscape by creating Google.org, an arm of the for-profit public company whose shareholders would expect a financial return.<sup>172</sup>

After great initial hype, Google.org suffered several notable failures (such as a failed attempt to accelerate the adoption of electric vehicles—

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168. James Fallows, *How to Save the News*, THE ATLANTIC, June 2010, at 45 (also discussing how Google intends to reshape the news media).

169. See Rana, *supra* note 3 (predicting Google.org's demise).

170. See *id.*; see also Google Inc., Registration Statement (Form S-1), at 27 (Aug. 18, 2004) ("Google is not a conventional company. We do not intend to become one. Throughout Google's evolution as a privately held company, we have managed Google differently. We have also emphasized an atmosphere of creativity and challenge, which has helped us provide unbiased, accurate and free access to information for those who rely on us around the world.")

171. See Katie Hafner, *Philanthropy Google's Way: Not the Usual*, N.Y. TIMES, Sept. 14, 2006, at A1; see also Rana, *supra* note 3, at 87–88 n.6 ("Google.org is the philanthropic arm of Google and is the umbrella which includes the work of the Google Foundation, some of Google's own projects, as well as partnerships and contributions to for-profit and non-profit entities" (quoting the 2007 "About Us" page for Google.org)). See also Robin Rogers-Dillon, *Nonprofit Stock Markets and Social Citizenship*, SOCIETY, Mar./Apr. 2007, at 35 (citing Google.org as a for-profit model of philanthropy).

172. See BISHOP & GREEN, *supra* note 1, at 174.

this is an example of philanthropically aimed projects Google.org began experimenting with, but ones that increasingly moved further and further away from Google.com's core technologies and the technologies underlying both Google.com's successes and its unique contributions to search engine technologies).<sup>173</sup> Not surprisingly, after these failures, Google recently revamped its philanthropic arm and limited its work to applying Google's search engines to charitable endeavors.<sup>174</sup> Its other attempts at for-profit philanthropic endeavors either failed or have been abandoned.<sup>175</sup> While Google once hoped the novel form of Google.org would allow it to "play on the entire keyboard," including starting companies, building industries, paying consultants, give money to individuals and make a profit,<sup>176</sup> Google.org was eventually forced to sharply narrow its ambitions and projects. That is, "DotOrg has narrowed to just one octave on the piano: engineering-related projects that often are the outgrowth of existing Google products."<sup>177</sup>

Significantly, Google's most successful philanthropic project has been the one where it applied the innovations underlying its commercial success to its philanthropy—in essence, applying its data search and analysis techniques towards philanthropic ends, specifically to promote public health or emergency response projects. This success is actually the result of a crossroads Google.org faced as many of its hyped philanthropic attempts failed to deliver (such as an initiative to support more efficient cars).<sup>178</sup>

The story behind its shift also offers significant lessons for hybrid entities. When faced with problems in its DotOrg entity, Google was forced to confront two competing ideas:

The first was a Googley idea that DotOrg would completely reinvent philanthropy and, in doing so, reinvent the world and address a hugely important set of problems with solutions only Google with its immense intellectual talent and resources could find.

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173. *Id.*

174. See Stephanie Strom & Miguel Helft, *Google Finds It Hard to Reinvent Philanthropy*, N.Y. TIMES (Jan. 29, 2011), <http://www.nytimes.com/2011/01/30/business/30charity.html>.

175. *Id.*

176. See Hafner, *supra* note 171 (explaining that Google's founders "believe for-profit status will greatly increase their philanthropy's range and flexibility" and also citing Google.org's Executive Director, Dr. Larry Brilliant, who notes that unlike corporate foundations with a traditional non-profit structure, "Google.org can play on the entire keyboard" and "can start companies, build industries, pay consultants, lobby, give money to individuals and make a profit").

177. Strom & Helft, *supra* note 174; see also Milbrandt, *supra* note 17 (discussing the Google.org project at some length).

178. Strom & Helft, *supra* note 174.

. . . The second idea . . . was more modest: “that DotOrg could make some headway, maybe a little, maybe a lot, in addressing these really big problems by doing what Google as a company is really good at doing, which is to say, aggregating information.”<sup>179</sup>

Significantly, the “second idea . . . won out.”<sup>180</sup> This meant that Google.org turned to philanthropic efforts which drew upon and implemented its searching and data gathering capabilities. Google.org now concedes this on its current website, which in contrast to its earlier, more ambitious stated goals, now states that “[w]e focus on problems where Google’s assets and core capabilities—technology innovation, global presence, making massive amounts information universally accessible and useful—play strongest and where the solutions we create have the most potential to scale.”<sup>181</sup>

Thus, the projects Google.org now successfully promotes are those that explicitly harness its core business and unique technology. For example, Google.org developed a tool called Google Flu Trends, which used data collected from searches about flu symptoms to predict the location of flu outbreaks and provide early warning systems.

Hurricane Sandy provides another interesting and key example of Google’s philanthropic shift. When Hurricane Sandy hit the eastern United States at the end of October 2012, Google introduced a program called Public Alerts, intended to publicize warnings about natural disasters and emergencies based on information from government agencies and the National Weather Service.<sup>182</sup> The alerts show up, among other places, in response to searches on Google.com and Google Maps.<sup>183</sup> These examples offer some evidence that new philanthropic entities can achieve more impact by harnessing key technological developments for philanthropic ends rather than moving towards utilizing a for-profit/non-profit hybrid structure (or even moving to new structures without seeking to harness the technologies that led to the original company’s success).

Other hybrid entities have simply failed because of structural problems or problems merging for-profit and non-profit ideologies, structures, and

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179. *Id.*

180. *Id.*

181. *See About Us*, GOOGLE.ORG, <http://www.google.org/about.html> (last visited May 9, 2013); *cf.* the earlier website described *supra* note 171.

182. Claire Cain Miller, *Google Introduces New Emergency Resources in Response to Sandy*, N.Y. TIMES BITS BLOG (Oct. 30, 2012, 4:15 PM), <http://bits.blogs.nytimes.com/2012/10/30/google-introduces-new-emergency-resources-in-response-to-sandy/?ref=business>.

183. *Id.*

goals. One notable failure of a hybrid project was that of Shorebank.<sup>184</sup> Another failed hybrid is the microfinance organization created by BancoSol for microfinance provision to non-traditional users. This organization switched from a traditional non-profit form to a hybrid organization, but was unable to achieve its goals because its employees from non-profit backgrounds and its employees with for-profit backgrounds were unable to integrate their missions or work together—a failure of melding organizational cultures.<sup>185</sup> Another notable failure is that of Aspire—a British social franchise that ultimately collapsed because “it paired a weak business model with ambitious social objectives.”<sup>186</sup>

Such failures have spawned calls for reform and greater sustainability and accountability mechanisms for the new hybrid entities.<sup>187</sup> “Philanthrocapitalists” and hybrid entities have been further criticized for their failure to deliver real results and a failure to produce “hard evidence that these new approaches are any better at reducing poverty and injustice than the governments, foundations, and civil society groups that have been working away more quietly in the background.”<sup>188</sup> These calls for reform and evidence have taken on a greater urgency as global financial crises intensify:

The quest for sustainability in voluntary sector organizations is a quest for sense in a rapidly changing funding world and a turbulent economic environment. Interest in the concept of sustainability by both funders and leaders of nonprofit organizations is mounting as the sector moves more deeply into what may be termed a funding crisis . . . .<sup>189</sup>

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184. See generally James Post & Fiona Wilson, *Too Good to Fail*, STAN. SOC. INNOVATION REV., Fall 2011, at 66. For a discussion of other failures, see generally Duncan Scott, *Black Boxes in the Wreckage? Making Sense of Failure in the Third Sector Social Enterprise* (Third Sector Research Ctr., Working Paper No. 31, Feb. 2010), available at <http://www.tsrc.ac.uk/Research/SocialEnterprise/BlackBoxesmakingenseoffailure/tabid/644/Default.aspx> (discussing a case study of the failure of a social enterprise in the U.K. and citing studies of five further examples globally).

185. Battilana et al., *supra* note 10, at 54.

186. WILLIE CHENG, *DOING GOOD WELL* 190 (2009).

187. See generally John Tyler, *Negating the Legal Problem of Having “Two Masters”: A Framework for L3C Fiduciary Duties and Accountability* 35 VT. L. REV. 117, 141 (2010) (“Seemingly, then, the L3C as a hybrid of both forms can be construed as espousing ultimate theories, purposes, and fiduciary duties of both for-profit and exempt organizations, thereby appearing to engender conflict among irreconcilable interests. Such conflict could paralyze decision-making or be so permissive as to render manager accountability almost meaningless. However, the L3C statutes clearly impose an unambiguous ordering of fiduciary priorities . . . .”).

188. EDWARDS, *supra* note 8, at xii.

189. Struthers, *supra* note 133, at 241 (internal citations omitted). For an interesting discussion of how the United Kingdom has tried to increase sustainability and accountability for socially responsible businesses, see U.K. CHARITY COMM’N, *supra* note 133 (explaining that the U.K. Charity Commission

These critiques and calls for reform are occurring against a backdrop of great transformations in the nature of capitalism itself.<sup>190</sup> In summary:

[T]he business-is-best philosophy remains a powerful and seductive hook. It promises to supply a new magic bullet that removes the messiness of social change, and a route to doing good for others while doing well for yourself without any of the sacrifices that have been necessary for progress in the past. That's an attractive proposition, and also a dangerous mirage.<sup>191</sup>

For these reasons, it is important to consider alternatives to the dominant paradigm in the philanthropic literature. This Article seeks to move beyond the hype around these hybrid entities, arguing that while hybrids have achieved some successes, creating greater legal and regulatory space for hybrid entities is simply not broad enough to encompass all of the ways that philanthropy is changing, especially philanthropic entities that are trying to harness the “disruptive” change of our time—social media and e-philanthropy. It is thus not surprising that many hybrid entities have thus far failed in achieving their goals, and significantly, are not able to adequately harness market forces to truly enhance philanthropic endeavors.<sup>192</sup> The existing legal literature has generally tried to address these failures in a piecemeal fashion, either by pointing to discrete, supposedly correctable failures in the hybrid endeavors or by claiming that incremental legislative changes or more regulatory innovation are needed to enhance organization structures.<sup>193</sup>

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has included “financial sustainability” and “diversification” of sources of income as hallmarks of effective charities: “Hallmark 5 . . . ensures financial sustainability by managing cash flow and monitoring and reviewing financial performance during the year, taking timely corrective action where needed; considers the sources of its income and has a strategy in place to raise the funds it needs—diversifying its sources of income as far as possible . . .”).

190. See DOWIE, *supra* note 6, at xx (“The ambiguous public/private nature of their existence, which confuses people on both sides of the veil, has prompted more than one observer to describe foundations as ‘privately organized public institutions.’”). See also Fareed Zakaria, *The Capitalist Manifesto: Greed Is Good*, NEWSWEEK (Jun. 12, 2009, 8:00 PM), <http://www.thedailybeast.com/newsweek/2009/06/12/the-capitalist-manifesto-greed-is-good.html> (“A specter is haunting the world—the return of capitalism. Over the past six months, politicians, businessmen and pundits have been convinced that we are in the midst of a crisis of capitalism that will require a massive transformation and years of pain to fix. Nothing will ever be the same again.” Zakaria also quotes Treasury Secretary Timothy Geithner as saying “Capitalism will be different.” He later concludes that “American capitalism is being rebalanced, reregulated and thus restored. In doing so it will have to face up to long-neglected problems, if this is to lead to a true recovery, not just a brief reprieve.”).

191. EDWARDS, *supra* note 8, at xi.

192. See *supra* Part II.B.3.

193. See BISHOP & GREEN, *supra* note 1, at 3; see also Hines et al., *supra* note 14. See generally Battilana et al., *supra* note 10, at 52–54.

In light of these critiques, this Article seeks to add to the dominant legal paradigm by proposing a new lens with which to view philanthropic innovation. It argues that the new corporate structures states are developing, discussed above, and the debates over the tax status of non-profits above, are missing the point by failing to view philanthropic change from a larger perspective. This Article argues that the most critical philanthropic innovation of our time does not rest on the typically-framed and hyped public-private divide, but rather on the firms and entities that are able to apply the commercial or technological innovations which underlie their commercial success to the non-profit world. That is, the hype over hybrids is emblematic of larger changes at play in philanthropy. In other words, the current hype is not wrong, but is simply too narrowly focused. Regulatory reform, then, would be most helpful if it centered not on the hybrid form, but on ways to more broadly harness the technological or business innovations of our time towards philanthropic ends. As discussed above, ideally, the new “social entrepreneurs” or philanthrocapitalists are not merely “redeploy[ing] business skills and tools . . . to solve social problems,” and their “greatest strength . . . isn’t in the way they build ventures to deliver products or services,” but their strength lies in the way they are innovating by, for instance, “connect[ing] people in new configurations.”<sup>194</sup> New regulations, therefore, should be aimed at supporting these new philanthropic innovations, not just hybrid structures.

### III. IDENTIFYING THE KEY PHILANTHROPIC TRANSFORMATIONS

“The word philanthropy literally means ‘love of mankind.’ Philanthropic acts manifest the generosity of the giver.”<sup>195</sup>

“Billions are wasted on ineffective philanthropy.”<sup>196</sup>

These quotes, representing two ends of a spectrum, highlight one of the biggest debates today on the nature, purpose, and efficacy of philanthropy. Both sides of this spectrum seek change, albeit in different ways—one side emphasizes the charitable purpose and impact of philanthropic endeavors, while the other side calls for “fresh thinking” in the form of applying market and business principles to revitalize the world of philanthropy.<sup>197</sup>

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194. Bornstein, *supra* note 114.

195. Acs & Phillips, *supra* note 8, at 190; *see also* PRINCETON CONFERENCE, *supra* note 26, at 9.

196. EDWARDS, *supra* note 8, at 3 (quoting Michael Porter). While Porter chose particularly dramatic phrases to express his views, he is not alone in espousing those views. *Id.*

197. *Id.* at 3–4 (citing Kurt Hoffman, director of the Shell Foundation, and other business leaders).



This Part argues that each side has gotten it wrong. While the current debate over the purpose and impact of philanthropic endeavors is a useful one, both sides fail to recognize the essential nature of the transformations that are occurring in the realm of philanthropy. This Part proposes that the critical and most significant transformations and developments in this realm are twofold—First, philanthropic change is directly and historically linked to business innovation—a link that has so far gone largely unrecognized.<sup>198</sup> Second, the current debates over improving charitable entities mask the novel philanthropic innovation of our time, that is, that information technology from the business realm is transforming philanthropy by being directly applied to and in support of charitable endeavors.

Again, in doing so, this Article enters the debate over new forms of philanthropy by offering a new way of understanding the current revolution in philanthropy. After applying this relatively unrecognized lens based on the nexus between capitalistic and philanthropic entrepreneurialism, this Part proposes some alternative paths to change, arguing that current legislative and private responses and constructions are inadequately addressing this revolution. It further analyzes how legislative and public-private approaches can support rather than subvert positive change in the field of philanthropy.

This Part then moves to a discussion of the financial crisis, which has led to calls for a more “creative” and healthy capitalism,<sup>199</sup> and the emergence of vast wealth and innovation in technology companies which has in turn led to the development of a new dynamic environment for philanthropy.

#### A. *Creative Capitalism and Its Impact on Philanthropy*

This Subpart describes some of the currently developing philanthropic innovations, providing examples of how information technology has been merged with philanthropic aims, creating a new era of charitable entrepreneurialism.

The concept of “disruptive strategic innovation” has been used to describe a new method of competition and entrepreneurship, one that

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198. See *supra*, Introduction; see also Acs & Phillips, *supra* note 8, at 189 (“This entrepreneurship–philanthropy nexus has not been fully explored by either economists or the general public. . . . [Furthermore] [i]f we do not analyze philanthropy we can understand neither how economic development occurred nor what accounts for American economic dominance.”).

199. See *New Masters of the Universe, How State Enterprise Is Spreading*, THE ECONOMIST (Jan. 21, 2012), <http://www.economist.com/node/21542925> (discussing alternatives to current forms of capitalism such as state capitalism and noting that new varieties of “state capitalism” all have something in common—politicians have far more power than they do under liberal capitalism).

emerges as “a new way of competing in the industry that is both different from and in conflict with the traditional way.”<sup>200</sup>

The critical transformative technology of our time can be termed “e-philanthropy.” “[E]-philanthropy provides a new architecture to an existing service. It emphasizes different product or service attributes. With the increase in options for both organizations and users, along with the flexibility, speed, and fee [sic] alternatives, it also brings to market a very different value proposition than had been available.”<sup>201</sup> Today, new online platforms are emerging and changing the nature of philanthropy; some, for example, are using technology to “put[] the power of setting charitable priorities and targeted giving into the hands of individuals instead of large institutions. The fundraising goals that participants set tend to be relatively small and tightly focused—a few hundred dollars to finance a job search here, a few thousand to start a neighborhood garden there—but technology is expanding the reach of both donors and recipients”<sup>202</sup> in a way many philanthropists believe is changing the way philanthropy has traditionally been conducted.<sup>203</sup> These new entities have been called or characterized as many capitalistic forms, such as venture philanthropy or philanthropy relying on a stock market for philanthropy.<sup>204</sup> Other examples include the Omidyar Network, where the founder of eBay is trying to develop an entity that makes for-profit investments, but has as its ultimate goal to give all of its funds away.<sup>205</sup>

200. Chung-Shing Lee, Eli Berniker, Glenn Van Wyhe & Kenneth J. Johnson, *E-Commerce Disruptive Innovations in Charity and Non-Profit Fund Raising*, 5 J. STRATEGIC E-COMMERCE 39, at 44 (2005).

201. *Id.* (citation omitted).

202. Katie Morrell, *How the Internet is Reshaping Philanthropy*, CRAIN'S CHI. BUS. (Mar. 19, 2012), <http://www.chicagobusiness.com/article/20120317/ISSUE02/303179996/how-crowdfunding-is-reshaping-philanthropy>.

203. Matt Petronzio, *Viral Philanthropy: The Impact of Crowdsourced Compassion*, MASHABLE.COM (July 11, 2012), <http://mashable.com/2012/07/11/viral-philanthropy/>; Carla Rivera, *Charities Plug into the Internet in Quest for Donations and Volunteers*, L.A. TIMES, Dec. 27, 1999, at B11; COUNCIL OF ECONOMIC ADVISERS, *PHILANTHROPY IN THE AMERICAN ECONOMY* (2000), available at <http://clinton4.nara.gov/media/pdf/philanthropy.pdf>.

204. DAVID BONBRIGHT, NATALIA KIRYTOPOULOU & LINDSAY IVERSEN, *ONLINE PHILANTHROPY MARKETS: FROM 'FEEL-GOOD' GIVING TO EFFECTIVE SOCIAL INVESTING?* (2008), available at [http://www.aspeninstitute.org/sites/default/files/content/docs/psi/nspp\\_Keystone\\_OnlinePhilanthropyMarkets.pdf](http://www.aspeninstitute.org/sites/default/files/content/docs/psi/nspp_Keystone_OnlinePhilanthropyMarkets.pdf) (describing corporate philanthropist's goal to create an ecosystem like the stock market for philanthropic purposes); Geoffrey Colvin, *The Gift of Arrogance: It's Blessed to Give—But It's a Lot Harder than Nethead Philanthropists Thought*, FORTUNE (Dec. 24, 2001), [http://money.cnn.com/magazines/fortune/fortune\\_archive/2001/12/24/315343/index.htm](http://money.cnn.com/magazines/fortune/fortune_archive/2001/12/24/315343/index.htm); Naren Karunakaran, *High Net-Worth Individuals Turning to Philanthropy*, THE ECONOMIC TIMES (Feb. 24, 2011, 6:07 AM), [http://articles.economicstimes.indiatimes.com/2011-02-24/news/28627950\\_1\\_new-role-models-spiritual-experience-high-net-worth-individuals](http://articles.economicstimes.indiatimes.com/2011-02-24/news/28627950_1_new-role-models-spiritual-experience-high-net-worth-individuals) (describing online philanthropy markets as websites connecting individual donors with charitable organizations internationally).

205. BISHOP & GREEN, *supra* note 1, at 174. See also *About Us*, OMDYAR NETWORK, [http://www.omidyar.com/about\\_us](http://www.omidyar.com/about_us) (last visited Mar. 7, 2013) (stating that the “Omidyar Network is a philanthropic investment firm dedicated to harnessing the power of markets to create opportunity for

Perhaps the most significant example is that of social networking and how it has been applied in the philanthropic realm. Social networking, while commercially successful, is increasingly being exploited as a tool for philanthropy. Some examples are discussed below.

One notable example is that of Crowdrise.com. This site provides a tool to enable individuals to promote particular charitable causes through their social network.<sup>206</sup> Thus far, the site appears to have been successful; one campaign using Crowdrise exceeded its \$2 million fund raising target.<sup>207</sup> Crowdrise takes advantage of social networks to “market” charitable causes in an effective way. Significantly, under U.S. law, Crowdrise can only raise money through deductions; it cannot offer investors a return on investments.<sup>208</sup> It is thus stifled in its attempts to raise money for charitable causes, unable to make use of investments that may be leveraged into larger philanthropic endeavors—restrictions that must be changed for such entities to achieve their full potential.

Social networking sites and many others rely principally on advertising revenue. Philanthropic ventures have also found ways to tap advertising for charitable purposes. Social network campaigns such as Crowdrise call on users to donate their money, but cannot accept investments. Sites such as Freerice.com do not ask for money donations; instead the sites themselves donate advertising revenue.<sup>209</sup> Advertising revenue is dependent on the presence of users on the site. The user’s donation is in effect their time.

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people to improve their lives. We invest in and help scale innovative organizations to catalyze economic and social change. . . . The formation of Omidyar Network was inspired by Pierre’s experience at eBay, which he founded in 1995 based on his beliefs in the potential of individuals and the power of markets. Starting from the premise that people are basically good, Pierre created a platform that gave everyone equal access to information, opportunity, and the tools to pursue their goals. eBay allowed people to connect with others over shared interests and provided them incentives, like public feedback, to engage constructively with trading partners, thereby owning their marketplace reputation and ultimate success. Those principles of access, connection, and ownership influenced the Omidyars’ approach to philanthropy. While eBay was still a young company, Pierre and Pam co-founded The Omidyar Foundation to support nonprofits. Watching eBay scale in size and social impact solidified their understanding that business could also be an effective tool for making the world a better place. In response, they broadened their scope to form Omidyar Network, which makes investments in for-profit companies as well as grants to nonprofit organizations, with social impact being the unifying criterion for investment. . . . We support organizations whose market-based approach has the capacity for large-scale, catalytic impact.”)

206. Bruce Trachtenberg, *Nonprofit Newswire: Crowdrise—Online Fundraising with a Few Twists*, NON-PROFIT Q., (May 14, 2010, 11:54 AM), <http://www.nonprofitquarterly.org/updates/2367-nonprofit-newswire-crowdrise-online-fundraising-with-a-few-twists.html>.

207. Press Release, Amelia Gingold, Water for People Surpasses \$2 Million Goal for Campaign (Nov. 16, 2011), <http://www.waterforpeople.org/media-center/press-release/donate-to-drink-surpassed-goal.html>.

208. See *supra* note 200.

209. *Web Game Provides Rice for the Hungry*, BBC NEWS (Nov. 10, 2007, 10:29 GMT) <http://news.bbc.co.uk/2/hi/europe/7088447.stm>.

Through the site (and more generally through the commercial model of internet advertising) the donor's time becomes money for charity.<sup>210</sup>

Another creative and emblematic example is that of Goodsearch, LLC. Goodsearch refers to a "family of websites" that raises funds for nonprofits and schools without cost to these entities from common online activities such as searching and shopping.<sup>211</sup> Significantly, Goodsearch seeks to apply search algorithms developed for sites such as Yahoo! into its philanthropic projects,<sup>212</sup> thus providing a model of how current transformative business innovation can be directly applied into the philanthropic realm. It further is a strong example of applying "disruptive technology" in the form of e-philanthropy. It provides evidence for the proposition that "[t]here are a number of compelling reasons over and above pure altruism for individuals to be charitable."<sup>213</sup>

There are a host of other fascinating examples, including GiveForward,<sup>214</sup> Kickstarter,<sup>215</sup> and everyoneives.org.<sup>216</sup> Each is considered to be part of a philanthropic wave "that's changing the shape of philanthropy."<sup>217</sup> Again, however, in the United States, these entities are hampered by their inability to seek investors along with donations.

Thus, the world of current philanthropic innovations includes not only hybrid entities, but a full range of entities operating at different points on the for-profit/non-profit and entrepreneurial spectrum.

210. For additional examples, see generally Davis & Gelpert, *supra* note 89, at 1212 ("Mapping the space occupied by these new 'peer-to-peer' intermediaries is difficult: it spans multiple jurisdictions and governance regimes and embraces a vast and growing variety of legal forms.") (also discussing microfinancing intermediary websites such as Kiva).

211. See *Goodsearch Announces Scott Garell Joins As CEO*, BUS. WIRE (Mar. 2, 2011, 8:05 AM), <http://www.businesswire.com/news/home/20110302005839/en/GoodSearch-Announces-Scott-Garell-Joins-CEO>.

212. *Id.*

213. Rees, *supra* note 51.

214. "GiveForward is one of a handful of online philanthropic platforms sprouting up around Chicago. They're part of a broader crowdfunding wave that's changing the shape of philanthropy . . ." Morrell, *supra* note 202.

215. Kickstarter (a crowdfunding site) made a stir last year "when a co-founder noted that the New York-based arts microfunding site was on track to distribute more than \$150 million this year—more than the National Endowment for the Arts' fiscal year 2012 budget." *Id.*

216. Everyone Gives uses Facebook, Twitter, LinkedIn and Youtube to raise money in an annual fundraising drive for multiple charities. A recent press release notes:

"Everyone Gives," the world's first social giving campaign of its kind, raised \$741,213 USD in just 17 days. From February 22 to March 9, 2012, more than 12,000 individuals in 474 cities donated to 1,479 charities. During this time period, participants in 64 countries made donations of every size to charities of their choice and were encouraged to use their social networks to invite friends, families and colleagues to give.

Press Release, Everyone Gives, First Global Social Giving Campaign "Everyone Gives" Makes Its Mark (Apr. 2, 2012), <http://www.prnewswire.com/news-releases/first-global-social-giving-campaign-everyone-gives-makes-its-mark-145797215.html>.

217. Morrell, *supra* note 202.

In this light, the questions we must seek to answer in achieving proactive regulatory reform and improvement should be aimed at the new forms of philanthropic entrepreneurialism now emerging. As one commentator put it:

Today, as problems have grown increasingly complex, a big question is how can we reorganize the problem-solving work of society so it is more responsive to needs. Three generations ago, the federal government could address many forms of injustice through legislation—mandating a 40-hour workweek, instituting a minimum wage, establishing housing codes. Today, our societal challenges—in education, health, or the environment—demand innovation from many directions.

We don't know where the best ideas will come from any more than we know where the next Google will arise. The emergence of social entrepreneurship reflects this uncertainty—as well as a major new opportunity: the fact that the capacity and motivation needed to solve problems is now widely dispersed. The question is, how do we find, elicit, nurture and harness the talents of millions of potential change-makers for the greatest good? It's not just a question for would-be social entrepreneurs. It's relevant for policy makers, managers, educators, parents—and ourselves.<sup>218</sup>

Yet the innovative philanthropic social media entities described above are operating in a legal vacuum, one that must be filled for such innovation to survive and thrive.<sup>219</sup> To the above questions that must be answered, I would add that our regulatory framework must attempt to address the needs of philanthropy that crosses national borders, whether they operate transnationally through technology or by virtue of their goals.<sup>220</sup> The next Subpart conducts a preliminary evaluation of the current regulatory framework and gaps, and calls for lawmakers to address these gaps in a manner that will support philanthropic innovation.

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218. Bornstein, *supra* note 114.

219. See generally Morrell, *supra* note 202.

220. See Peter Dobkin Hall, *A Historical Overview of Philanthropy, Voluntary Associations, and Nonprofit Organizations in the United States, 1600-2000*, in THE NON-PROFIT SECTOR: A RESEARCH HANDBOOK, *supra* note 10, at 32, 58 (noting that the “forces shaping the future of American nonprofits do not originate solely in the United States. In recent years, a variety of new kinds of nongovernmental organizations have emerged which operate globally. Some of these are domestically based entities that provide services abroad. Others are genuinely transnational, involving cooperative and collaborative relationships among advocates, funders, and service providers operating across national borders. Many of these pursue broad humanitarian agendas, promoting sustainable development, human rights, economic and environmental justice, and other causes that seek to advance the well-being of humanity in general rather than that of particular nations.”).

*B. The Need for Regulatory Flexibility*

We appear to be entering an era of regulatory lag, where the legal frameworks surrounding philanthropies are not only in great flux, but also contain significant gaps. While piecemeal attempts have been made to accommodate for-profit/non-profit hybrids, the legal structures necessary to support the transformation of social media and related technologies for philanthropic ends simply does not exist in the United States. Thus, in order for new and transformative philanthropic entities to flourish, we need to create greater regulatory flexibility to keep up with, rather than lag behind market and philanthropic innovation.

One specific area of regulatory lag concerns currently crowdfunding enterprises,<sup>221</sup> which have already been legalized and are growing in the U.K.<sup>222</sup> Crowdfunding organizations represent a new innovation in that they seek to use the power of social media to fundraise, yet are limited by current law to donative, as opposed to investment, enterprises. In contrast to the U.K., in the United States crowdfunding enterprises are currently operating in a murky gray area. Just last year, crowdfunding enterprises were not even legally able to operate in the United States.<sup>223</sup>

However, on April 5, 2012, Congress passed the Jumpstart Our Business Startups (JOBS) Act.<sup>224</sup> This Act was intended to ease the Securities and Exchange Commission's restrictions regarding "how new stock offerings in start-ups are publicized and sold to individuals, including over the internet."<sup>225</sup> These restrictions, contained in the Securities Act of 1933, were intended to protect individual investors, but effectively barred crowdfunding in the United States by prohibiting general solicitation and

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221. The term crowdfunding generally refers to the use of the internet by small businesses to raise capital through limited investments from a large number of investors. See C. Steven Bradford, *Crowdfunding and the Federal Securities Laws*, 1 COLUM. BUS. L. REV. 1, 10 (2012) (stating that "[t]he basic idea of crowdfunding is to raise money through relatively small contributions from a large number of people," frequently using the internet). It is important to note that charitable entities seeking donations, as opposed to investments, are currently legal. See Edan Burkett, *A Crowdfunding Exemption? Online Investment Crowdfunding and U.S. Securities Regulation*, 13 TENN. J. BUS. L. 63, 64 & 79–83 (2011).

222. See Adrienne Jeffries, *The U.K. Already Has Equity-Based Crowdfunding, and This Startup Just Set a Record*, BETABEAT (June 8, 2012, 8:52 AM), <http://betabeat.com/2012/06/the-u-k-already-has-equity-based-crowdfunding-and-this-startup-just-set-a-record/>.

223. See, e.g., Angus Loten, *Crowd-Funding Brings Unease*, WALL ST. J. (Nov. 17, 2011), [http://online.wsj.com/article/SB10001424052970203611404577042333598282986.html?mod=WSJ\\_Tech\\_LEFTTopNews](http://online.wsj.com/article/SB10001424052970203611404577042333598282986.html?mod=WSJ_Tech_LEFTTopNews) (noting restrictions on equity-based crowdfunding in late 2011).

224. See Jumpstart Our Business Startups (JOBS) Act, Pub. L. No. 112-106, 126 Stat. 306 (2012) (codified in scattered sections of 15 U.S.C.).

225. Theresa W. Carey, *Adventurous Capital: SEC Eases Limits on Venture Investing by Individuals*, BARRONS.COM (Sept. 8, 2012), <http://online.barrons.com/article/SB50001424053111904294104577631472073678432.html>.

advertisement of enterprises through the mechanisms crowdfunding organizations were attempting to use.<sup>226</sup>

The U.S., as compared to the U.K., has failed to recognize the differences between emerging firms like Kickstarter.com and traditional intermediaries. The failure of the U.S. to recognize the differences in these respective entities, and to support emerging firms like Kickstarter.com, has left the U.S. with a competitive disadvantage. Specifically, this lack of recognition and the corresponding lack of regulatory action means that the regulatory framework governing crowdfunding enterprises in the United States is falling significantly behind the regulatory framework in the UK. As one commentator describes the situation:

U.S.-based crowdfunding sites like Kickstarter, Indiegogo and ArtistShare offer a huge range of creative perks like T-shirts, backstage access, chip clips, or a week's worth of personal training alongside Bret Easton Ellis. But what if a startup could offer equity in the company to the little people who helped make it happen?

The JOBS Act, passed in April, gave the SEC a directive to clear the path for equity-based crowdfunding (some call it "crowdinvesting") sites. The regulatory agency is [still as of this writing] deliberating over the rules . . . .<sup>227</sup>

I urge U.S. regulators not only to take into account the competitive disadvantage the U.S. is facing discussed above, but also to continue to consider the need for consumer protection. Balancing these issues is a complex task, yet is one I believe can be accomplished by allowing individual investors to invest in "crowdinvesting sites" at the same time that regulators could maintain a watchful eye over these organizations and step in to protect investors when necessary.

Meanwhile, across the pond, equity-based crowdfunding is already legal and underway. A London-based startup called Escape the City has raised £557,920 (roughly \$892,481) on a £600,000 goal with 14 days to go on the equity crowdfunding platform Crowdcube. The startup upped its goal because of high demand. Escape the City is a social network somewhere between LinkedIn

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226. *Id.* For a more detailed explanation of how this is supposed to work, see Ben Protes, *Regulator Seeks Feedback on JOBS Act*, N.Y. TIMES DEALBOOK BLOG (Apr. 11, 2012), <http://dealbook.nytimes.com/2012/04/11/regulator-seeks-feedback-on-jobs-act/> ("The JOBS Act also exempts small companies from various public disclosure requirements, while blessing a new form of financing to start-up companies known as crowdfunding that allows companies to go online to raise up to \$1 million by pooling mass solicitations."). Notably, these changes are to be implemented in an atmosphere where the S.E.C. has argued that lighter regulations would weaken investor protections. *Id.*

227. Jeffries, *supra* note 222.

and Idealist.org; it aims to match dissatisfied corporate drones with new jobs, more noble jobs, or professional adventures abroad.<sup>228</sup>

In this light, the JOBS Act offers the U.S. an opportunity to facilitate the development of entities like Kickstarter.com, and perhaps regain its lead in philanthropic innovation. Specifically, the JOBS Act requires the SEC to adopt rules to implement a new exemption to its investor protection rules that will allow crowdfunding.<sup>229</sup> Until these rules are implemented, crowdfunding is technically unlawful under federal securities laws.<sup>230</sup>

While the JOBS Act, if implemented, could revolutionize internet and social media philanthropies, its implementation is currently mired in intra-agency battles and vague rules that leave unclear which activities are legal and which are not. The SEC was supposed to issue the first set of rules on this issue on July 5, 2012, but this was repeatedly rescheduled until August 29, 2012.<sup>231</sup> On that date, the SEC released proposed rules aimed at eliminating the prohibition against general solicitation and general advertising in “certain securities offerings” including crowdfunding.<sup>232</sup> These proposed rules are intended to permit companies to use general solicitation and general advertising to offer securities under Rule 506 of Regulation D of the Securities Act and Rule 144A of the Securities Act.<sup>233</sup>

At the time of this writing, the comment period had closed, and no interim or final rule had been issued.<sup>234</sup> During the public commentary period the proposed rules were criticized for their vagueness and for leaving the legality of crowdfunding activities murky.<sup>235</sup>

To give effect to the JOBS Act, the SEC must approve the rule changes adopted by the Financial Industry Regulatory Authority (FINRA), Wall-

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228. *Id.*

229. *Information Regarding the Use of the Crowdfunding Exemption in the JOBS Act*, U.S. SEC. & EXCH. COMM’N (Apr. 23, 2012), <http://www.sec.gov/spotlight/jobsact/crowdfundingexemption.htm>.

230. *Id.*

231. Chance Barnett, *First S.E.C. Ruling Launch Crowdfunding with Accrediteds*, FORBES.COM (Aug. 30, 2012, 12:11 PM), <http://www.forbes.com/sites/chancebarnett/2012/08/30/first-s-e-c-rulings-launch-crowdfunding-with-accrediteds/>.

232. Press Release, U.S. Sec. & Exch. Comm’n, SEC Proposes Rules to Implement JOBS Act Provision About General Solicitation and Advertising in Securities Offerings (Aug. 29, 2012), <http://www.sec.gov/news/press/2012/2012-170.htm>.

233. *Id.*

234. *Id.*

235. *See, e.g.*, E-mail from Stephen Dresner, Chief Exec. Officer, DealFlow Analytics, to Elizabeth M. Murphy, Secretary, U.S. Sec. & Exch. Comm’n (Oct. 29, 2012) (*available at* <http://www.sec.gov/comments/s7-07-12/s70712-173.pdf>) (taking issue with the “reasonable steps” language in the proposed rule eliminating the prohibition against general solicitations and general advertising for Rule 506 and Rule 144A offerings).



Street's self-regulator.<sup>236</sup> The SEC will also likely have to create a new process for smaller companies, such as crowdfunding entities, to file confidential disclosures.<sup>237</sup>

At the time of this writing, it appears that the regulatory changes resulting from the JOBS Act have left companies wary rather than encouraged.<sup>238</sup> At a minimum, these rules should be clarified and strengthened to permit and encourage crowdfunding enterprises to operate legally in the United States. Currently, crowdfunding operations may run afoul of investment regulations when they seek investors or offer equity stakes in a philanthropic endeavor.<sup>239</sup> It is important to note that traditional charitable organizations organized under § 501(c)(3) rules are allowed to seek donations over the internet,<sup>240</sup> rather, it is venture and investment based entities that are stifled by existing regulations. If such investment-based entities were allowed to freely operate, this could usher in a new wave of philanthropic innovation, using the power of social media to raise investments, not just donations, for philanthropic causes—perhaps creating the as yet elusive ideal of a truly sustainable donative organization.

Regulators continue to make gradual steps towards the implementation of the new rules required by the JOBS Act. In January 2013, FINRA issued a voluntary interim form seeking information from crowdfunding portals,<sup>241</sup> followed in February by a list of frequently asked questions

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236. See generally Protes, *supra* note 226 (“[The SEC] will have to approve rule changes adopted by the Financial Industry Regulatory Authority, Wall Street’s self-regulator, which is likely to relax some of its policies to comply with the JOBS Act.”).

237. See *id.*; see also FINANCIAL INDUSTRY REGULATION AUTHORITY, REGULATORY NOTICE 12-34, JUMPSTART OUR BUSINESS STARTUPS ACT: FINRA REQUESTS COMMENT ON PROPOSED REGULATION OF CROWDFUNDING ACTIVITIES (2012), available at <http://www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/notices/p131268.pdf> (soliciting public comment on development of registered funding portal rules and application of FINRA rules to crowdfunding activities by broker-dealers).

238. See Jessica Holzer, *Some Firms Shun Looser IPO Rules*, WALL ST. J., Nov. 15, 2012, at C1 (describing how some companies are shying away from the looser requirements stemming from the JOBS Act).

239. Burkett, *supra* note 221, at 64, 78–83.

240. As of the date of this writing, the IRS has just recently advised that there is no prohibition against a charitable organization using an internet fundraising platform to raise money, explaining that the charity must comply with the rules that apply to other solicitations and must ensure that its fundraising programs are structured in a manner consistent with § 501(c)(3) status. See I.R.S. Info. Letter 2013-0001 (Mar. 29, 2013), available at <http://www.irs.gov/pub/irs-wd/13-0001.pdf>. While this letter clarifies law, it does not address the problem described above that social network campaigns such as Crowdrise.com cannot accept investments.

241. News Release, Financial Industry Regulatory Authority, FINRA Issues Voluntary Interim Form for Crowdfunding Portals (Jan. 10, 2013), available at <http://www.finra.org/Newsroom/NewsReleases/2013/P197636> (“Those intending to become a funding portal may voluntarily submit information regarding their business on the interim form. The information received will help FINRA develop rules specific to crowdfunding portals.”).

regarding the JOBS Act exemptions, released by the SEC.<sup>242</sup> The SEC has also granted exemptions to two crowdfunding portals under existing rules. Both portals deal only with accredited investors rather than the general public.<sup>243</sup> In addition, the portals are compensated through a stake in the businesses they fund, rather than through commission.<sup>244</sup>

In any case, the JOBS Act is just one piece of a broader package of regulatory reforms needed to support the current wave of philanthropic entrepreneurship.<sup>245</sup> The broader problem remains the need to reform our legal institutions so as to facilitate philanthropies leveraging the technological and commercial developments related to the internet and social media.<sup>246</sup> State laws, for example, may offer fertile ground for experimentation in this area, as they have been a laboratory of change for emerging hybrid entities,<sup>247</sup> and could do so again for philanthropies who seek to leverage social media and internet technologies to raise money and operated in novel ways.

To fully support American philanthropic innovation, we need to identify ways to support social entrepreneurship in the social media arena,

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242. *Frequently Asked Questions About the Exemption from Broker-Dealer Registration in Title II of the JOBS Act*, U.S. SEC. & EXCH. COMM'N (Feb 5, 2013), <http://www.sec.gov/divisions/marketreg/exemption-broker-dealer-registration-jobs-act-faq.htm>.

243. Steve Quinlivan, *SEC Exempts Another Crowd Funding Site from Broker-Dealer Rules*, MAKING SENSE OF DODD-FRANK (Mar. 29, 2013), <http://dodd-frank.com/sec-exempts-another-crowd-funding-site-from-broker-dealer-rules/>. SEC issued no-action letters to AngelFund and thefundersclub.com. Letter from David W. Blass, Chief Counsel, U.S. Sec. & Exch. Comm'n Div. of Trading & Markets, to Robert H. Rosenblum, K&L Gates (Mar. 28, 2013), *available at* <http://www.sec.gov/divisions/marketreg/mr-noaction/2013/angellist-15a1.pdf>; Letter from David W. Blass, Chief Counsel, U.S. Sec. & Exch. Comm'n Div. of Trading & Markets, to W. Hardy Callcott, Bingham McCutchen LLP (Mar. 26, 2013), *available at* <http://www.sec.gov/divisions/marketreg/mr-noaction/2013/funders-club-032613-15a1.pdf>.

244. *See id.*

245. For further proposals of regulatory reforms to support philanthropic entrepreneurship, see Henderson & Malani, *supra* note 15, at 609, 611 (recommending that the government “allow all consumers to deduct the charitable component of the green goods they purchase,” “allow all consumers to deduct donations of cash or assets to nonprofit organizations,” and “tax donations of stock and other appreciated assets the same as donations of cash to nonprofits”). For other examples of philanthropic entrepreneurialism using internet technology, see generally Raj M. Desai & Homi Kharas, *Democratizing Foreign Aid: Online Philanthropy and International Development Assistance*, 42 N.Y.U. J. INT'L L. & POL. 1111 (2010); Melissa G. Liazos, Comment, *Can States Impose Registration Requirements on Online Charitable Solicitors?*, 67 U. CHI. L. REV. 1379 (2000).

246. As this Article goes to press, the U.S. regulatory landscape regarding emerging forms of social entrepreneurship is in a state of flux, as discussed above. Thus, fully analyzing the regulatory framework the U.S. should develop to address these issues is a question I hope to return to in future work. In this Subpart, I focus on analyzing the case of crowdfunding regulation in order to illustrate some of the ways the U.S. could move forward by increasing regulatory flexibility, informed by the historical and comparative analyses such as the analyses in this paper.

247. *See, e.g.*, CAL. GOV'T CODE § 12599 (West 2006) (California state law regulating professional fundraising for charity); *see also* CALIFORNIA ATTORNEY GENERAL'S GUIDE FOR CHARITIES 26–32 (2005), *available at* [http://oag.ca.gov/sites/all/files/pdfs/charities/publications/guide\\_for\\_charities.pdf](http://oag.ca.gov/sites/all/files/pdfs/charities/publications/guide_for_charities.pdf).

encouraging growth and innovation without stifling registration, structural, or disclosure requirements, while maintaining accountability mechanisms<sup>248</sup> and regulatory flexibility.<sup>249</sup>

Specifically, as discussed above, we should consider changes to crowd-funding rules, securities laws, changes to hybrid form laws, and look to lessons from abroad to create the most fertile atmosphere for philanthropic innovation.

This Article has attempted to demonstrate how the existing legal literature has focused on hybrid entities at the expense of emerging and potentially transformative philanthropic entrepreneurial activities. Currently, the primary obstacles to such innovation (or innovations seeking to creatively utilize internet technologies) are not tax or corporate structure laws, but rather securities and investor and consumer protection laws, which have not yet caught up to entrepreneurial activity in the philanthropic realm. If we fail to recognize this neglected perspective in the dominant legal paradigm, we risk losing out on innovative philanthropic developments as well as falling behind other countries. As noted above, the United Kingdom has already legalized crowdfunding organizations, and if we do not act quickly, we risk losing our competitive edge as philanthropy progresses and flowers around the world.<sup>250</sup>

At the same time, the law surrounding hybrid entities should be clarified so that founders of hybrid entities are not forced to choose between either for-profit or non-profit structures—there is no reason to throw out the baby with the bathwater. Also, transparency, accountability, and mission-fulfillment mechanisms should be developed to prevent the regulatory failures and fill the regulatory gaps noted *supra*. For example, anti-fraud and consumer rules must also be changed to prevent non-charitable entities from bilking individual investors.<sup>251</sup>

Finally, lasting philanthropic reform should contain a comparative element that recognizes and supports American exceptionalism in supporting philanthropic innovation in the private sector. As noted, the

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248. See Lieber, *supra* note 49, at 744 (noting that the “coming of the Internet Age” poses serious new problems to a legal structure governing philanthropy that is not yet up to speed in detecting the latest in online fraud and abuse, and providing examples).

249. Cf. ADRIAN SARGEANT & JEN SHANG, GROWING PHILANTHROPY IN THE UNITED STATES: A REPORT ON THE JUNE 2011 WASHINGTON, D.C. GROWING PHILANTHROPY SUMMIT 11–12, 17 (2011), available at [https://www.blackbaud.com/files/resources/downloads/whitepaper\\_growingphilanthropy\\_report.pdf](https://www.blackbaud.com/files/resources/downloads/whitepaper_growingphilanthropy_report.pdf) (describing recommendations from a non-profit summit and emphasizing honesty in reporting, accountability, and philanthropic best practices in social media).

250. Tim Rowe, *The New Law that Will Turn the Start-Up World Upside Down: Crowdfunding*, ALL THINGS D (Mar. 15, 2012, 1:35 PM), <http://allthingsd.com/20120315/the-new-law-that-will-turn-the-start-up-world-upside-down-crowdfunding/>.

251. Frank Greve, *In the Internet Era, It's Donor Beware*, KNIGHT RIDDER TRIBUNE NEWS SERVICE (Dec. 28, 1999), available at LexisNexis; Liazos, *supra* note 245.

United States has provided particularly fertile ground for innovation and entrepreneurship.<sup>252</sup> We should not cede this ground to other countries. The United Kingdom has already legalized crowdfunding organizations and other countries are rapidly researching and developing new methods of social entrepreneurship.<sup>253</sup> The United States should follow suit, to recognize and support its competitive edge and its unique ties between its commercial and philanthropic sectors to maintain its lead as the land of philanthropic innovation.

At the same time, comparative analyses also suggest that the United States should not undermine the legitimacy and ability of the government sector to provide philanthropic measures. For instance, in China, anecdotal evidence suggests that the lack of trust among the general public in state-run philanthropies has stunted government-based philanthropy while pushing philanthropic entrepreneurs towards private social entrepreneurship.<sup>254</sup> The United States has a unique atmosphere that can support both public and private philanthropy and philanthropic innovation, and we should support, not weaken, this atmosphere through proactive regulation and transparency.

Adopting an approach of regulatory flexibility will go a long way toward creating a positive atmosphere for organizations applying social media and other technological and commercial innovations towards philanthropic ends. Adopting an approach based on regulatory flexibility would provide a start to developing a proactive legal regime that would promote, rather than hinder, philanthropic innovation, especially innovation focusing on social media and e-philanthropy. The analysis this Article has presented suggests the need for a broad package of legal and regulatory reforms. While fully outlining these reforms is beyond the scope of this Article (and also hinges on the outcome of current attempts at regulatory change), the approach suggested here is intended to spark the larger dialogue necessary for comprehensive reform.<sup>255</sup> Hopefully, through such

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252. See CLAYTON M. CHRISTENSON, *THE INNOVATOR'S DILEMMA: THE REVOLUTIONARY BOOK THAT WILL CHANGE THE WAY YOU DO BUSINESS* (1997).

253. Rowe, *supra* note 250.

254. See Juliana Lu, *Social Entrepreneurship Takes Off in China*, BBC NEWS (Sept. 23, 2012, 11:38 AM), <http://www.bbc.co.uk/news/business-19652712>.

255. As this Article goes to press, the U.S. regulatory landscape regarding philanthropic and emerging forms of social entrepreneurship is changing rapidly, as discussed above. As the legal and regulatory framework for such entities solidifies, I plan to address these topics more fully in future work. As a comprehensive examination of the currently developing regulatory framework is beyond the scope of this paper, in this paper, I have focused on analyzing the case of the regulation of crowdfunding. Looking at this case study reveals the ways in which the US regulatory landscape is in flux and illustrates how the U.S. should develop an approach to regulatory flexibility in many areas in light of the historical and comparative analyses set forth *supra* in this paper.

reform, we can emerge from this period of regulatory lag and financial and social turmoil in a way that will enhance philanthropic innovation.

In sum, we are living in a time of great social, technological, and philanthropic change. It is moments like this that lead to bursts of progress and innovation, in ways that would have been inconceivable just a decade ago. This Article has attempted to identify and analyze some of the seismic shifts occurring in the business and charitable realms. It seeks to take this analysis further, by seeking to propose methods for ameliorating the problems of the past while working towards a more efficient, less contentious, and proactive path and methodologies for positive change. Ultimately, I hope that the entrepreneurial-philanthropic nexus continues to go in both directions, and that this information sharing and idea dissemination can enhance progress both in the business realm and the philanthropic realm.

#### CONCLUSION

This Article has attempted to shed light on some understudied aspects of philanthropic innovation. Such innovation should not be viewed just through the narrow lens of tax or corporate structure regulations, but rather through a broader historical and comparative lens that reveals the deep links between philanthropic innovations and market commercial and technological developments. Indeed, analyzing philanthropic innovation may provide insights into the future of capitalism as it wrestles with notions related to both profit and philanthropy. In this light, legislation should allow for flexibility in form and regulation of philanthropies, allowing for the formation of creative philanthropic structures. At the same time, regulatory regimes should still seek to regulate these new philanthropic endeavors, for example by implementing additional transparency, accountability, and consumer protection mechanisms.

This Article has sought to add to the dominant paradigm on philanthropic innovation and has attempted to focus attention on a largely unrecognized but significant link between philanthropic and market entrepreneurialism. These debates and insights are significant in this time of flux and the blurring of lines between public and private in the United States, and can enhance the dialogue as to where we go from here in terms of both sustaining philanthropic entrepreneurship and supporting and enhancing creative capitalism. To end with a prescient quote:

In the final analysis, the future of American philanthropy—and to some yet-unknown degree the future of America itself—depends upon the collective imagination of its philanthropists. Thus far, they have created much that we all cherish, and a little of what we

most abhor about our civilization. That dichotomy won't end. In fact, it seems certain that the impact of philanthropy on our society and our lives will increase as philanthropists and philanthrocrats become more proficient at leveraging their money and have more money to leverage. The products of their imaginations will continue to excite and infuriate us.<sup>256</sup>

If we can promote and support the imaginations of today's philanthropic entrepreneurs, we can foster the growth of creative attempts to harness market mechanisms to enhance philanthropic impact, while also providing the space for new, groundbreaking philanthropic endeavors that could help provide solutions to many of our current societal dilemmas. We should continue to study the nature of philanthropic entrepreneurialism and change to draw out the lessons they provide for transformative technological and philanthropic endeavors.

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256. DOWIE, *supra* note 6, at 245.