

# Private Policy: Rethinking State Action in Education Law (and Beyond)

Meredith R. Aska McBride\*

## ABSTRACT

*Private foundations are now the drivers of much education policymaking. This Article takes that empirical fact as a point of departure and uses it to crack open three bigger, interrelated problems. First, though scholars have critiqued and mostly moved on from the public/private law binary, that binary becomes critical in the private policymaking context because of the Supreme Court's continued adherence to the state action doctrine, which the Article demonstrates is a wholly insufficient frame for thinking about nominally governmental decision-making when so much public policy is now, rather, private policy. But this fact also requires a rethinking of the education law literature's focus on public law and public entities, and administrative law's treatment of public-private delegations, both of which might at first seem to be ways to theorize private policymaking in the realm of public education. The Article instead argues for a new problematic, in which the law must grapple with private action that is upstream from the critical, legally cognizable moment of public decision making, yet is almost wholly determinative of that decision. Second, building on the literature on heterarchical governance and problem definition, the Article argues for a new conception of state action, using theoretical models from political anthropology and sociology to map a more functionalist and fluid conception of the state, and its acts, onto legal doctrine. Third, the Article examines private mechanisms of accountability—private law, private politics, and private ordering—and concludes that they are insufficient to legitimize private policymaking, at least in the context of education. The Article concludes by calling for a renewed focus on legislation and political advocacy as a means of ensuring a high-quality and equitable education for all students.*

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\* Attorney in private practice in Chicago; formerly Law Clerk, U.S. District Court for the Northern District of Illinois; Law Clerk, U.S. Court of Appeals for the Seventh Circuit. J.D. Northwestern Pritzker School of Law, 2019; Ph.D. University of Chicago, 2015; A.M. University of Chicago, 2012; B.A. University of Pennsylvania, 2010. Thanks in particular to Janice Nadler and Jim Lindgren; to Nicole Upton, Joe Maurer, and Lindsay Wright; to my former colleagues in my past life in nonprofit fundraising; to Matt Meltzer and Maria Welch; and to Leah Beukelman for superb research assistance. All errors are my own.

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## INTRODUCTION

Since the turn of the twenty-first century, private philanthropists have become first among equals in education policymaking. Bill Gates, the most influential person in the field,<sup>1</sup> and other leaders of private foundations have aggressively advocated for almost all recent education reforms.<sup>2</sup> It is no exaggeration to say that philanthropies are the biggest drivers of ideas about public education and have seen remarkable success in translating these ideas into practice.<sup>3</sup>

Along with this influence has come concern. Scholars of education policy have traced empirically how philanthropies have wrested the policymaking function from public officials and encouraged school privatization.<sup>4</sup> These scholars have identified this as one of the biggest problems facing education policy today and have advocated

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1. Christopher B. Swanson & Janelle Barlage, *Influence: A Study of the Factors Shaping Education Policy*, Editorial Projects in Education Research Center (2006).

2. Priscilla Wohlstetter et al., *How Funding Shapes the Growth of Charter Management Organizations: Is the Tail Wagging the Dog?*, 37 J. EDUC. FIN. 150 (2011); Jay P. Greene, *Buckets into the Sea: Why Philanthropy Isn't Changing Schools, and How It Could*, in WITH THE BEST OF INTENTIONS: HOW PHILANTHROPY IS RESHAPING K-12 EDUCATION 49, 73 (Frederick M. Hess ed. 2005); PAULINE LIPMAN, THE NEW POLITICAL ECONOMY OF URBAN EDUCATION: NEOLIBERALISM, RACE, AND THE RIGHT TO THE CITY 105 (2011); DIANE RAVITCH, REIGN OF ERROR: THE HOAX OF THE PRIVATIZATION MOVEMENT AND THE DANGER TO AMERICA'S PUBLIC SCHOOLS 23 (2013); Michael Mintrom and Sandra Vergari, *Foundation Engagement in Education Policymaking: Assessing Philanthropic Support of School Choice Initiatives*, in FOUNDATIONS AND PUBLIC POLICY: LEVERAGING PHILANTHROPIC DOLLARS, KNOWLEDGE, AND NETWORKS FOR GREATER IMPACT 243, 243 (James M. Ferris ed., 2009); Frederick M. Hess & Jeffrey R. Henig, *Introduction*, in THE NEW EDUCATION PHILANTHROPY: POLITICS, POLICY, AND REFORM 1, 3–4 (Frederick M. Hess and Jeffrey R. Henig eds. 2015).

3. SARAH RECKHOW, FOLLOW THE MONEY: HOW FOUNDATION DOLLARS CHANGE PUBLIC SCHOOL POLITICS 3–10 (2015) [hereinafter FOLLOW THE MONEY]; MEGAN E. TOMPKINS-STANGE, POLICY PATRONS: PHILANTHROPY, EDUCATION REFORM, AND THE POLITICS OF INFLUENCE 17 (2016) [hereinafter POLICY PATRONS].

4. See, e.g., FREDERICK M. HESS, *Introduction*, in WITH THE BEST OF INTENTIONS 1, 2 (Frederick M. Hess, ed., 2005); RAVITCH, *supra* note 2; JEFFREY R. HENIG, THE END OF EXCEPTIONALISM IN AMERICAN EDUCATION: THE CHANGING POLITICS OF SCHOOL REFORM (2013); TOMPKINS-STANGE, POLICY PATRONS, *supra* note 3; Hess & Henig, THE NEW EDUCATION PHILANTHROPY, *supra* note 2; CHARLES M. PAYNE, SO MUCH REFORM, SO LITTLE CHANGE: THE PERSISTENCE OF FAILURE IN URBAN SCHOOLS (2008); Frederick M. Hess & Michael B. Horn, PRIVATE ENTERPRISE AND PUBLIC EDUCATION (Frederick M. Hess & Michael B. Horn eds., 2013); AMY BROWN, A GOOD INVESTMENT? PHILANTHROPY AND THE MARKETING OF RACE IN AN URBAN PUBLIC SCHOOL 15–16 (2015); RECKHOW, FOLLOW THE MONEY, *supra* note 3; Christopher Lubienski, T. Jameson Brewer, & Priya Goel La Londe, *Orchestrating Policy Ideas: Philanthropies and Think Tanks in US Education Policy Advocacy Networks*, 43 AUSTL. EDUC. RES. 55 (2016); Rick Cohen, *Strategic Grantmaking: Foundations and the School Privatization Movement*, NATIONAL COMMITTEE FOR RESPONSIVE PHILANTHROPY (2007); Sarah Reckhow & Jeffrey W. Snyder, *The Expanding Role of Philanthropy in Education Politics*, 43 EDUC. RESEARCHER 186 (2014); James M. Ferris et al., *Philanthropic Strategies for School Reform: An Analysis of Foundation Choices*, 22 EDUC. POL. 705 (2008); Janelle Scott, *The Politics of Venture Philanthropy in Charter School Policy and Advocacy*, 23 EDUC. POL. 106 (2009) [hereinafter Scott]; Catherine DiMartino & Janelle Scott, *Private Sector Contracting and Democratic Accountability*, 27 EDUC. POL. 307 (2012); Janelle Scott & Huriya Jabbar, *The Hub and the Spokes: Foundations, Intermediary Organizations, Incentivist Reforms, and the Politics of Research Evidence*, 28 EDUC. POL. 233 (2014); Christopher Lubienski, *Sector Distinctions and the Privatization of Public Education Policymaking*, 14 THEORY & RES. EDUC. 193 (2016) [hereinafter *Sector Distinctions*].

that policymaking philanthropists should be made accountable to the public. But providing and evaluating specific mechanisms of accountability has been beyond the scope of prior work.<sup>5</sup> This Article takes up that task.

This work has broader implications. Philanthropists are not the only private actors who have come to new prominence within public education.<sup>6</sup> And education is not the only sphere of policymaking in which private actors are influential.<sup>7</sup> Education is a particularly extreme case study of private influence on the policymaking process,<sup>8</sup> and therefore frames numerous problems caused by our legal system's adherence to a neat public/private binary when in fact our system of governance is deeply hybridized.<sup>9</sup> Consider, for example, environmental regulation, government contracting, prison management, welfare provision, and healthcare delivery.<sup>10</sup>

Within the legal literature, this Article has two goals. First, it makes a critical, empirically grounded intervention into recent education law scholarship and advocacy. Much of this work is litigation-oriented and engages the equal protection guarantees of the Fourteenth Amendment.<sup>11</sup> But the state action doctrine requires that Fourteenth Amendment claims be brought only against "state actors."<sup>12</sup> Even work advocating statutory change contemplates public entities as the object of regulation. This presents an obvious problem with regard to *private* policymakers, which this Article attempts to solve. Second, this Article brings education law into dialogue with the literature on governance theory, privatization, and private ordering, drawing particular attention to the unique problems posed not by government *delegation* of power to private actors,

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5. See, e.g., RECKHOW, FOLLOW THE MONEY, *supra* note 3, at 154; TOMPKINS-STANGE, POLICY PATRONS, *supra* note 3, at 6–7; Reckhow & Snyder, *supra* note 4, at 193.

6. See, e.g., the discussion of other private entities within the school privatization movement, such as advocacy organizations, think tanks, private schools, and charter schools, in Cohen, *supra* note 4, at 11; Lubienski, *Sector Distinctions*, *supra* note 4, at 195–99, 202–03, 205.

7. See, e.g., LINSEY MCGOEY, NO SUCH THING AS A FREE GIFT: THE GATES FOUNDATION AND THE PRICE OF PHILANTHROPY (2015); see also David P. Baron, *Private Politics*, 12 J. ECON. & MGMT. STRATEGY 31 (2003) [hereinafter *Private Politics*].

8. See, e.g., TOMPKINS-STANGE, POLICY PATRONS, *supra* note 3, at 17.

9. Jody Freeman, *The Private Role in the Public Governance*, 75 N.Y.U. L. REV. 543, 547 (2000); see also Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1371 (2003) [hereinafter *Privatization as Delegation*]; Kenneth A. Bamberger, *Regulation as Delegation: Private Firms, Decisionmaking, and Accountability in the Administrative State*, 56 DUKE L.J. 377, 383 (2006).

10. See, e.g., Michael P. Vandenbergh, *Private Environmental Governance*, 99 CORNELL L. REV. 129 (2013) (discussing environmental regulation); Jody Freeman, *The Contracting State*, 28 FLA. ST. U. L. REV. 155 (2000) (discussing government contracting); Metzger, *Privatization as Delegation*, *supra* note 9, at 1392 (discussing prison management); Michele Estrin Gilman, *Legal Accountability in an Era of Privatized Welfare*, 89 CAL. L. REV. 569 (2001) (discussing welfare provision); Metzger, *Privatization as Delegation*, *supra* note 9, at 1380 (discussing health care delivery).

11. See, e.g., Derek W. Black, *The Constitutional Compromise to Guarantee Education*, 70 STAN. L. REV. 735, 735 (2018) [hereinafter *The Constitutional Compromise*]; see also THE ENDURING LEGACY OF RODRIGUEZ: CREATING NEW PATHWAYS TO EQUAL EDUCATIONAL OPPORTUNITY (Charles J. Ogletree, Jr. & Kimberly Jenkins Robinson eds., 2015).

12. See *United States v. Harris*, 106 U.S. 629 (1883). See *infra* notes 226–229 and accompanying text.

but by the unilateral decisions of private actors to take government power for themselves, *upstream* of any public actor.<sup>13</sup>

Part I of this Article, “Making Public Policy, Privately,” describes the contours of the problem, providing historical background and synthesizing the empirical work on the influence of philanthropy. Drawing on theoretical frameworks from political science, political anthropology, and public policy, Part I models how private wealth has wrapped its influence around the state without formally entering the public sphere and demonstrates that the current, relatively limited legal constraints on philanthropic intervention in public policymaking are insufficient. Part II, “Failures of Accountability,” systematically explores the different accountability strategies that are available—public and private, decisional and statutory, federal and state, formal and informal—and concludes that all are likely inadequate because of how philanthropic influence blurs the bright line between state and nonstate action. Part II both advances a new concept of state action (by recourse to legibility and heterarchic governance,<sup>14</sup> theoretical models from political anthropology, and political sociology respectively) and shows how philanthropists, though private entities, escape accountability because they are not subject to the constraints of the private sphere either. The Conclusion, “The Limits of Law,” expands the scholar and advocate’s toolbox, proposing a renewed focus on legislation and political organizing as strategies for change.

## I. MAKING PUBLIC POLICY, PRIVATELY

This Part describes how private philanthropies have come to operate as education policy entrepreneurs.<sup>15</sup> Promoting and taking advantage of the narrative that the U.S. public education system is failing, philanthropists have bolstered their own legitimacy as policymakers.<sup>16</sup> Section A provides a brief history of philanthropic policymaking, focusing on four critical moments that have naturalized our present state of affairs, in which philanthropies often seem like the senior partner in a public-private hybrid governance model. Section B models how philanthropies have come to make public policy right at the edge of the public sector. Though philanthropic policymaking does

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13. Even the boldest and most skeptical analyses of privatization conceive of it as a governmental choice to cede power. *See, e.g., Metzger, Privatization as Delegation, supra* note 9, at 1462–64; *compare* Jon D. Michaels, *Privatization’s Progeny*, 101 *GEO. L.J.* 1023, 1025, 1060 (2013).

14. *See* Stephen J. Ball & Carolina Junemann, *NETWORKS, NEW GOVERNANCE AND EDUCATION* (2012); Stephen J. Ball, *Academies in Context: Politics, Business and Philanthropy and Heterarchical Governance*, 23 *MGMT. EDUC.* 100, 103 (2009); *see also* Reckhow & Snyder, *supra* note 4, at 187.

15. Rand Quinn, Megan Tompkins-Stange, and Debra Meyerson, *Beyond Grantmaking: Philanthropic Foundations as Agents of Change and Institutional Entrepreneurs*, 43 *NONPROFIT AND VOLUNTARY SECTOR QUARTERLY* 950, 951, 963 (2013).

16. *See* JAL MEHTA, *THE ALLURE OF ORDER: HIGH HOPES, DASHED EXPECTATIONS, AND THE TROUBLED QUEST TO REMAKE AMERICAN SCHOOLING* 84–117 (2013) [hereinafter *THE ALLURE OF ORDER*].

not look like traditional state action, Section B argues that it often serves to determine public-sector activities just as strongly. These mechanisms of influence trouble the public-private binary on which so many of our tools for legal accountability rest and, I argue in Part II, require a rethinking of that binary to the extent we care about democracy norms.

A clarification at the outset: the central concern of this Article is the unaccountability of wealth that has been aggregated for ostensibly charitable purposes. That aggregation can happen in different ways—sometimes directly in an individual's pocket, sometimes via a foundation or other entity. The Article mostly uses “philanthropy” to encompass all these forms but sometimes uses “foundation” or “philanthropist” in context.

## A. The Privatization of Education Policymaking: a Brief History

Private philanthropies have gained policymaking influence in public education in the past fifteen to twenty years in a way that is unparalleled both in other social sectors and within the historical norms for the field of education itself.<sup>17</sup> Though a comprehensive retelling of this history is beyond the scope of this Article, this Section traces four major historical through-lines that illuminate the present situation.

### *1. Arguments from Emergency: the Education “Crisis”*

Arguments from emergency engage the most fundamental debates over philanthropic legitimacy. If there is a widespread belief that public education is dysfunctional, and that this dysfunction is the fault of state actors, private entities become much more attractive, and legitimate, as political actors.<sup>18</sup> Though in the 1960s and 1970s the legitimacy of foundations was much debated, their role in education became nearly self-explanatory in the 1980s and 1990s after public education itself became delegitimized.<sup>19</sup>

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17. They have done so by “borrowing strength”: “The level of interest and involvement that a government demonstrates in a particular policy area depends on the advocacy of policy entrepreneurs who mobilize the government’s license and ability to act. Lacking license or capacity at their level of government, entrepreneurs can acquire these ingredients by borrowing strength from other governments in the American federal system. This argument implies that federalism creates potential agenda setting opportunities for individuals who carefully size up their own weaknesses and then make up for them by leveraging the arguments or capabilities that exist elsewhere in the system.” PAUL MANNA, *SCHOOL’S IN: FEDERALISM AND THE NATIONAL EDUCATION AGENDA* 14–15 (2006).

18. See Lubienski, *Sector Distinctions*, *supra* note 4, at 200; MANNA, *supra* note 17, at 30. See also FRANK R. BAUMGARTNER & BRYAN D. JONES, *AGENDAS AND INSTABILITY IN AMERICAN POLITICS* 127 (1993).

19. On the legitimacy debates of the 1960s and 1970s, see, e.g., MERRIMON CUNINGGIM, *PRIVATE MONEY AND PUBLIC SERVICE: THE ROLE OF FOUNDATIONS IN AMERICAN SOCIETY* (1972); ROBERT H. BREMNER, *AMERICAN PHILANTHROPY* (2d ed. 1988).

In 1983, the Reagan administration released *A Nation at Risk: The Imperative for Educational Reform*, which portrayed U.S. public schools as mediocre at best, a threat to national security at worst.<sup>20</sup> The report brought new urgency to calls for oversight of the public schools.<sup>21</sup> Previously, most foundations had perceived themselves as “publicly minded local patrons”; afterward, they “were far more likely to see themselves combating a pressing national problem.”<sup>22</sup>

Philanthropists therefore tried not only to reform the public education system but also to create a new one entirely, in which “public education” “mean[s] schools that are serving the public and thus should receive public funds without necessarily being directly administered by public authorities.”<sup>23</sup> For example, conservative foundations in the late 1980s and early 1990s began to push for the establishment and expansion of school voucher programs.<sup>24</sup> Arguments from emergency have even justified direct foundation intervention in local-level decision-making about school curriculum and management.<sup>25</sup>

Since *A Nation at Risk* was published, arguments from emergency have generated bipartisan consensus that public education needs significant reform—from outside.<sup>26</sup> Democrats and Republicans alike have opened the doors of city halls, state houses, and even the White House to business leaders, entrepreneurs, and, most notably, major national foundations as they cast about for external solutions to the purported problem.<sup>27</sup> The signature education initiatives of Presidents Bush and Obama differ in detail but not in fundamental logic (heavy federal involvement, quantitative accountability).<sup>28</sup> It has been easy for scholars to take the brokenness of public education as an empirical given; I want to suggest here that it must also be analyzed as a rhetorical strategy that has enabled jurisdictional shifts.

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20. U.S. DEP’T OF EDUC., NAT’L COMM’N ON EXCELLENCE IN EDUCATION, *A NATION AT RISK: THE IMPERATIVE FOR EDUCATIONAL REFORM: A REPORT TO THE NATION AND THE SECRETARY OF EDUCATION* (1983).

21. See MEHTA, *THE ALLURE OF ORDER*, *supra* note 16, at 156–189 and 190–248.

22. HESS, *supra* note 4, at 2–3.

23. Lubienski, *Sector Distinctions*, *supra* note 4, at 196.

24. Leslie Lenkowsky & James Pierson, *Education and the Conservative Foundations*, in *RECONNECTING EDUCATION & FOUNDATIONS: TURNING GOOD INTENTIONS INTO EDUCATIONAL CAPITAL* 350, 353, 358, 362 (Ray Bacchetti and Thomas Ehrlich, eds., 2007). See also Cohen, *supra* note 4, at 8, 17.

25. The Gates Foundation’s emphasis on small high schools in the mid-2000s is a prime example. See *infra* notes 142–148 and accompanying text. See also RAVITCH, *supra* note 2, at 39–41; Richard Lee Colvin, *A New Generation of Philanthropists and Their Great Ambitions*, in *WITH THE BEST OF INTENTIONS* 21, 32–34 (Frederick M. Hess, ed., 2005). This phenomenon has deep historical roots. See JUDITH SEALANDER, *PRIVATE WEALTH & PUBLIC LIFE: FOUNDATION PHILANTHROPY AND THE RESHAPING OF AMERICAN SOCIAL POLICY FROM THE PROGRESSIVE ERA TO THE NEW DEAL* 133–34, 159 (1997) [hereinafter *PRIVATE WEALTH & PUBLIC LIFE*].

26. See MEHTA, *THE ALLURE OF ORDER*, *supra* note 16, at 64–83.

27. TOMPKINS-STANGE, *POLICY PATRONS*, *supra* note 3, at 81; Cohen, *supra* note 4, at 1; see also RECKHOW, *FOLLOW THE MONEY*, *supra* note 3, at 150.

28. See MEHTA, *THE ALLURE OF ORDER*, *supra* note 16, at 190–247.

## 2. *The Annenberg Challenge and the Resurrection of Philanthropic Involvement*

The Annenberg Challenge was the “[m]ost famous contemporary gift to K–12 schooling” in the post-*A Nation at Risk* era.<sup>29</sup> Widely viewed as a failure, it has become a countercanonical template for twenty-first-century education funding strategies.<sup>30</sup>

The Annenberg Foundation initiated the Annenberg Challenge for School Reform in 1993, contributing \$500 million over five years to approximately two dozen communities, including major urban school districts.<sup>31</sup> It also required that recipients raise matching funds, catalyzing another \$600 million in capital flow.<sup>32</sup> The Challenge was intended to be spectacular: founder Walter Annenberg announced at its launch that “I felt I had to drop a bomb on the situation to show the public what needs to be done.”<sup>33</sup> The Challenge has been influential more for how it is remembered than for its actual impact.<sup>34</sup>

First, the Challenge spurred philanthropies to increase the scope and ambition of their giving.<sup>35</sup> Whereas foundations had previously operated locally or with narrow programmatic focus, the geographically sprawling and topically omnivorous Annenberg Challenge encouraged subsequent foundations to take a totalizing approach, with the goal of transforming, rather than supplementing, systems.<sup>36</sup> Foundations that previously supported a disparate group of organizations have now “converged,” intentionally supporting the same set of grantees to maximize their

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29. HESS, *supra* note 4, at 4.

30. See DAVID CALLAHAN, *THE GIVERS: WEALTH, POWER, AND PHILANTHROPY IN A NEW GILDED AGE* 158 (2017) (quoting Eli Broad: “We didn’t want to do what Walter Annenberg did. You can’t just write a check and throw money at it.”); see also Barbara Cervone, *When Reach Exceeds Grasp: Taking the Annenberg Challenge to Scale*, in RECONNECTING EDUCATION & FOUNDATIONS: TURNING GOOD INTENTIONS INTO EDUCATIONAL CAPITAL 141–161 (Ray Bacchetti and Thomas Ehrlich eds., 2007); Ellen Condliffe Lagemann & Jennifer de Forest, *What Might Andrew Carnegie Want to Tell Bill Gates? Reflections on the Hundredth Anniversary of the Carnegie Foundation for the Advancement of Teaching*, in RECONNECTING EDUCATION & FOUNDATIONS: TURNING GOOD INTENTIONS INTO EDUCATIONAL CAPITAL, 62–64 (describing the Annenberg Challenge as “hav[ing] left few traces in the sands”).

31. *Who We Are: Our Story*, ANNENBERG FOUNDATION (May 9, 2018), <https://www.annenberg.org/who-we-are/who-we-are> [hereinafter *Who We Are*]; HESS, *supra* note 4, at 4.

32. HESS, *supra* note 4, at 4.; see also ANNENBERG FOUNDATION, *Who We Are*, *supra* note 31.

33. HESS, *supra* note 4, at 4.

34. Because the Challenge has been so stigmatized, it is difficult to find sources that speak with any specificity to its activities. See Lagemann & de Forest, *supra* note 30, at 54; THE ANNENBERG CHALLENGE: LESSONS AND REFLECTIONS ON PUBLIC SCHOOL REFORM, ANNENBERG FOUNDATION 7 (2002), <https://www.annenberginstitute.org/publications/annenberg-challenge-lessons-and-reflections-public-school-reform> [hereinafter *The ANNENBERG CHALLENGE*] (setting forth Annenberg Foundation’s self-report of its successes).

35. HESS, *supra* note 4, at 4.

36. See Colvin, *supra* note 25, at 27, 32.



impact.<sup>37</sup> Along with this increased ambition has come hands-on involvement by foundation staff and donors—again, modeled by Walter Annenberg.<sup>38</sup>

Second, the Challenge raised questions about the reputational and oversight relationship between the public sector and private foundations.<sup>39</sup> The Annenberg Challenge was launched in a ceremony at the White House showing that such efforts had the blessing of the highest levels of government.<sup>40</sup> This visibility led to increased Congressional and public scrutiny when the Challenge was perceived to have failed.<sup>41</sup> As a result, foundations have become focused on obtaining, documenting, and promoting successful results.<sup>42</sup>

Third, the Annenberg Challenge reoriented foundations' focus to "leveraged" giving.<sup>43</sup> Whereas the Challenge gave money directly to teacher salaries, program costs, and curricular materials, the new education giving shies away from such budget lines. Rather, realizing that foundation funding represents approximately one percent of all public education spending,<sup>44</sup> post-Challenge philanthropists have used their money as a rudder to steer the unwieldy ship of public spending. Public dollars are spoken for, sometimes multiple times over.<sup>45</sup> "That leaves precious few public dollars available for experimentation, or what in private industry would be called R&D, research and development. That is where foundations . . . can have an outsized impact relative to their spending."<sup>46</sup>

Finally, whether as a result of the Annenberg Challenge itself, the shifts it catalyzed, or other causes, the cast of characters in education philanthropy has since changed almost entirely. In 1990, the Carnegie, MacArthur, Rockefeller, Ford, Hewlett, Kellogg, and Wallace Foundations, as well as the Pew Charitable Trusts, were the dominant players.<sup>47</sup> Nearly all are "independent" foundations, or foundations where the original donor or donors are no longer living and are thus controlled by trustees and professional staffers. Today, some still fund education initiatives, but many are peripheral to "core" K–12 education: after-school programs, preschool, arts education, and the like.<sup>48</sup> By contrast, today's major players are the Gates, Broad, Walton, Dell,

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37. Reckhow & Snyder, *supra* note 4, at 190–193; *see also* RECKHOW, FOLLOW THE MONEY, *supra* note 3, at 140–41.

38. Colvin, *supra* note 25, at 31–32.

39. HESS, *supra* note 4, at 4.

40. Hess & Henig, *supra* note 2, at 3.

41. Colvin, *supra* note 25, at 26.

42. HESS, *supra* note 4, at 12.

43. HESS, *supra* note 4, at 4.

44. Greene, *supra* note 2, at 49–50; Hess & Henig, *supra* note 2, at 6.

45. Colvin, *supra* note 25, at 23; *cf.* TOMPKINS-STANGE, POLICY PATRONS, *supra* note 3.

46. Colvin, *supra* note 25, at 23.

47. Robert B. Schwartz, *Foreword*, in TOMPKINS-STANGE, POLICY PATRONS, *supra* note 3, at vii, vii–vii, ix.

48. *See, e.g., How We Work: Our Work*, THE WALLACE FOUNDATION (last visited May 9, 2018), <http://www.wallacefoundation.org/how-we-work/our-work/pages/default.aspx>.

and Arnold Foundations—nearly all of whose major donors are living and highly engaged in day-to-day operations.<sup>49</sup> They frame their work and desired outcomes “technically” rather than “adaptively,” leading to command-and-control relationships with grantees.<sup>50</sup>

### 3. From Charity to Venture Philanthropy

The late twentieth and early twenty-first centuries have seen a major transition in attitudes among national philanthropies: an explicit turn toward venture, rather than charitable, philanthropic strategies.<sup>51</sup> A “venture” approach uses philanthropic funds not just as dollars but as tools to spark change, disrupt systems, and create new models that can be scaled up to solve problems translocally.<sup>52</sup> In the realm of education policymaking, it presents unique accountability concerns: venture philanthropists intervene directly in the public sector, often reorienting it in significant ways, without the typical mechanisms of democratic accountability.

Philanthropy in the U.S. began as a result of the “charitable impulse”—“a fundamental attitude and a way one person helped another with an immediate local difficulty.”<sup>53</sup> Over the course of the nineteenth century, this “impulse” became more systematized and institution-centered, thereby seeking to make direct interventions into public policy.<sup>54</sup> The major givers of the late nineteenth and early twentieth centuries—Andrew Carnegie, Julius Rosenwald, John D. Rockefeller—preferred to address public problems “wholesale.”<sup>55</sup> Rather than paying for hospitals, they funded research into the causes of or cures for diseases; rather than paying for the immediate daily needs of the poor, they funded research into the causes of poverty.<sup>56</sup> They explicitly saw their work

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49. Schwartz, *supra* note 47, at vii–viii.

50. TOMPKINS-STANGE, POLICY PATRONS, *supra* note 3, at 95 (“Gates and Broad tended to frame problems in a ‘technical’ fashion, preferring to address social issues that have a clear solution and where a causal link exists between the problem and the results, consistent with the norms of engineering as a discipline. By contrast, Kellogg and Ford primarily framed problems in an ‘adaptive’ way, viewing problems as caused by multifaceted factors that are frequently political, social, and cultural in nature and cannot be solved through technical intervention.”).

51. The analogy to venture capital is intentional and explicit. See CALLAHAN, *supra* note 30, at 58. Scott has problematized whether venture philanthropy is really new, or rather the mainstreaming of a model long practiced by conservative funders. Scott, *supra* note 4, at 114.

52. Ray Bacchetti & Thomas Ehrlich, *Recommendations: Building Educational Capital*, in RECONNECTING EDUCATION & FOUNDATIONS: TURNING GOOD INTENTIONS INTO EDUCATIONAL CAPITAL 24. See also Theodore Lobman & Ray Bacchetti, *Increasing Foundation Impact by Building Educational Capital*, in RECONNECTING EDUCATION & FOUNDATIONS: TURNING GOOD INTENTIONS INTO EDUCATIONAL CAPITAL 74.

53. Lawrence J. Friedman, *Philanthropy in America: Historicism and Its Discontents*, in CHARITY, PHILANTHROPY, AND CIVILITY IN AMERICAN HISTORY 1, 8 (Lawrence J. Friedman & Mark D. McGarvie eds., 2003).

54. *Id.* at 7–8. See also SEALANDER, PRIVATE WEALTH & PUBLIC LIFE, *supra* note 25, at 15, 26.

55. SEALANDER, PRIVATE WEALTH & PUBLIC LIFE, *supra* note 25, at 222. See also Judith Sealander, *Curing Evils at Their Source: The Arrival of Scientific Giving*, in CHARITY, PHILANTHROPY, AND CIVILITY IN AMERICAN HISTORY 217.

56. SEALANDER, PRIVATE WEALTH & PUBLIC LIFE, *supra* note 25, at 220–21.

as avant-garde, taking risks that government and market-sensitive firms could not.<sup>57</sup> Sealander notes the connection between that era's "huge new fortunes" and their owners' self-confident approach to solving social problems,<sup>58</sup> a connection present in our time as well.

In the period roughly between the Civil War and World War II, this approach was exemplified by three primary strategies. In that era, funders "primarily played the role of promoting change in official state policy concerning access to and content of public education"—consolidating what was then a mixed system of private and public elementary schools into a fully state-run system, and ensuring access to education for Black people in the South under Jim Crow.<sup>59</sup> First, foundations who were "political outsiders" used "state infiltration," attempting to put their people in government decision-making positions.<sup>60</sup> Sometimes, such foundations even took on state functions for themselves, such as Julius Rosenwald's funding of public school buildings for Black students across the segregated South.<sup>61</sup>

Second, foundations with access would use "political suasion to shape the decisions of educational policymakers."<sup>62</sup> For example, Rockefeller funded "innovative model programs" in hopes of creating a persuasive proof-of-concept for Southern politicians skeptical of public education; it also funded and disseminated research with the aim of influencing politicians.<sup>63</sup> Foundations also used these strategies to engage in problem definition—for example, the Russell Sage Foundation conducted research into the numbers of "overage" students in U.S. public schools and defined this as a problem in need of a solution, giving rise to our current system of age-grading.<sup>64</sup>

Finally, foundations seeking to effect nationwide change used "market intervention" strategies, circumventing the public sector entirely.<sup>65</sup> The prime example was Carnegie's creation of the Carnegie unit system, which led directly to the development of the SAT exam.<sup>66</sup> These strategies resemble many of those used by today's foundations. Critically, though, the goal of the early-twentieth-century philanthropies was to "stimulate the state to take on greater responsibility for the

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57. *Id.*

58. *Id.*

59. Pamela Barnhouse Walters & Emily A. Bowman, *Foundations and the Making of Public Education in the United States, 1867–1950*, in *AMERICAN FOUNDATIONS: ROLES AND CONTRIBUTIONS* 31, 31–32 (Helmut K. Anheier & David C. Hammack eds., 2010).

60. *Id.* at 32, 38.

61. *Id.* at 39–40.

62. *Id.* at 32.

63. *Id.* at 43.

64. *Id.* at 44.

65. Walters & Bowman, *supra* note 59, at 32.

66. *Id.* at 47.

funding and regulation of public elementary and secondary education”—not to create permanent alternatives to state governance.<sup>67</sup>

After the New Deal, the aims and methods of philanthropy shifted. Though foundations such as the Ford Foundation pursued developmentalist work overseas using methods similar to those of the earlier “scientific” philanthropy,<sup>68</sup> domestic funding strategies returned to something rather closer to the “charitable” model. Private funding for public education, in particular, was dominated by local foundations who saw themselves as “publicly minded local patrons,”<sup>69</sup> pursuing strategies dominated by the concept of “partial succor,” wherein foundations’ role was simply to add money to public sector initiatives.<sup>70</sup>

In the 1960s and 1970s, *national* (as opposed to local) foundations began to partner with government actors to engage in school reform: “[F]oundations would fund innovation and experimentation, and government would take charge of introducing effective programs to schools.”<sup>71</sup> This model, however, only worked in an era when both foundations and government actors could assume that public funding would be available for project implementation.<sup>72</sup> From the 1980s on, this was no longer the case, and foundations began to contemplate taking over both sides of the equation, “embrac[ing] new models of change in which they simultaneously engaged in the support of innovation and used their capacity to mobilize other actors to create pressures for more expansive adoption and systemic transformations.”<sup>73</sup> This perspective was perhaps most fully realized in the Annenberg Challenge of the 1990s.

Twenty-first-century foundations exhibit, in a word, impatience with the public sector.<sup>74</sup> These new players do not think that more money is in itself a solution but, rather, view the functioning of public-sector entities as inherently rotten.<sup>75</sup> Venture philanthropists often create alternatives to the public sector entirely, designed either to function independently of, or to destabilize and reconfigure, the public system.<sup>76</sup> Colvin describes the process that Gates, Broad, Dell, Arnold, Walton, and others use:

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67. *Id.*

68. SEALANDER, PRIVATE WEALTH & PUBLIC LIFE, *supra* note 25, at 239; *see also* HESS, *supra* note 4; *see generally* ARTURO ESCOBAR, ENCOUNTERING DEVELOPMENT: THE MAKING AND UNMAKING OF THE THIRD WORLD (paperback reissue 2012).

69. HESS, *supra* note 4, at 3.

70. Elisabeth Clemens & Linda C. Lee, *Catalysts for Change? Foundations and School Reform, 1950–2005*, in AMERICAN FOUNDATIONS: ROLES AND CONTRIBUTIONS 51, 65 (Helmut K. Anheier & David C. Hammack eds., 2010).

71. *Id.* at 71.

72. *Id.*

73. *Id.*

74. Colvin, *supra* note 25, at 26.

75. *Id.* at 29–30.

76. *Id.* at 29, 36.

[The group] identifies a niche in the broad area of education reform, seeks out innovative or entrepreneurial approaches to solving that problem [i.e., often in the form of independent organizations], analyzes their prospects, works to develop the capacity of the enterprise to better ensure its success, and then closely monitors progress toward agreed-upon [goals]. Should those targets be missed, a grant may be delayed, and if missed repeatedly, new management may be brought in or financial support withdrawn altogether.<sup>77</sup>

This hands-on approach means that philanthropists are “engaged in an effort” to use their dollars as levers “to reshape public education, alter public policy, and redirect public expenditures.”<sup>78</sup>

Such a strategy has been adopted “[a]t least rhetorically” by all major philanthropists in the space.<sup>79</sup> Some have questioned the actual leverage of most of the strategies employed by education philanthropists, noting that it is functionally very difficult to redirect public spending.<sup>80</sup> However, advocates highlight the creation of small public schools; the creation of new administrative structures, such as charter management organizations; support for research and advocacy; voucher programs; and board certification and alternative professional organizations as particularly high-leverage strategies that foundations should employ.<sup>81</sup> But these leverage strategies are often hampered by the jurisdictional patchwork of American education federalism.

#### *4. Federalization and Opportunity at Scale*

The increasing federalization of U.S. education policy provides the ultimate leverage. In the past two decades, philanthropists have advocated for federalization, taken strategic advantage of federal policies to influence greater numbers of local jurisdictions simultaneously, and shifted to non-jurisdiction-specific strategies of influence.<sup>82</sup> Once again, the Annenberg Challenge was both a harbinger of and a countercanonical case study for these reforms. On one hand, the Challenge was national in scale and had thematic uniformities.<sup>83</sup> On the other, the Challenge failed to navigate

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77. *Id.* at 36.

78. HESS, *supra* note 4, at 8.

79. Greene, *supra* note 2, at 58–59.

80. *Id.*

81. *Id.*

82. See e.g., RECKHOW, FOLLOW THE MONEY, *supra* note 3, at 150–52. As discussed in notes 17 and 18, these strategies are mechanisms of “borrowing strength” by working interfederally.

83. See THE ANNENBERG CHALLENGE, *supra* note 34, at 7.

the contingencies of two dozen separate jurisdictions<sup>84</sup>—leading the next wave of philanthropists to conclude that such engagement is best avoided.<sup>85</sup>

U.S. education federalism shifted decisively away from states with the No Child Left Behind Act of 2002 (NCLB),<sup>86</sup> and philanthropists took advantage. NCLB is best known for its high-stakes testing that tied federal support to school performance.<sup>87</sup> This system created huge amounts of data, which philanthropies have used to evaluate various policy interventions.<sup>88</sup> NCLB also helped to justify private intervention into public school systems to the extent that political rhetoric uses low test scores as proof of public-sector failure.<sup>89</sup> And once foundations became involved with particular districts, they could use rising test scores to tout their work or use falling test scores to justify further involvement.<sup>90</sup>

Obama-era education initiatives remained consistent in their use of federal leverage. Race to the Top<sup>91</sup> was a competitive grant program that assigned points to states for adopting various reform strategies.<sup>92</sup> This arrangement again gave the federal government more substantive control over state and local education policy.<sup>93</sup> The Every Student Succeeds Act (ESSA) of 2015<sup>94</sup> replaced NCLB's content but largely preserved its federalism approach: though ESSA (unlike NCLB) allows states to design their own accountability programs, states remain responsible for reporting data to the federal government, which then uses it to make policy and regulatory decisions.<sup>95</sup> Philanthropies have influenced substantive policy at the federal level by designing federal grantmaking initiatives<sup>96</sup> and at the state level by supporting public and nonprofit grantees in developing competition and compliance plans.<sup>97</sup>

Furthermore, philanthropic funding has converged in the last two decades. A “dramatic” example is Teach for America, “which received grants from 13 of the 15

84. HESS, *supra* note 4, at 4.

85. *See generally* TOMPKINS-STANGE, POLICY PATRONS, *supra* note 3, at 56–58.

86. No Child Left Behind Act (NCLB) of 2001, 20 U.S.C. §§ 6301–6577.

87. MEHTA, THE ALLURE OF ORDER, *supra* note 16, at 190–268, 232.

88. RECKHOW, FOLLOW THE MONEY, *supra* note 3, at 10. *See* TOMPKINS-STANGE, POLICY PATRONS, *supra* note 3, at 70, 125.

89. *See* RECKHOW, FOLLOW THE MONEY, *supra* note 3, at 140–41.

90. *See* Hess & Henig, *supra* note 2, at 1, 3.

91. As enacted by the American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 14005-6, 123 Stat. 115.

92. RAVITCH, *supra* note 2, at 15.

93. MEHTA, THE ALLURE OF ORDER, *supra* note 16, at 64–83.

94. Every Student Succeeds Act (ESSA) of 2015, 20 U.S.C. § 1001.

95. U.S. DEP'T OF EDUC., *Every Student Succeeds Act (ESSA)*, <https://www.ed.gov/essa?src=ft> (last visited May 13, 2018).

96. Sarah Reckhow & Megan Tompkins-Stange, “*Singing from the Same Hymnbook*” at *Gates and Broad*, in *THE NEW EDUCATION PHILANTHROPY: POLITICS, POLICY, AND REFORM* 55, 65 (Frederick M. Hess & Jeffrey R. Henig eds., 2015); RAVITCH, *supra* note 2, at 15; TOMPKINS-STANGE, POLICY PATRONS, *supra* note 3, at 25, 113–14.

97. RAVITCH, *supra* note 2, at 17; TOMPKINS-STANGE, POLICY PATRONS, *supra* note 3, at 25.

largest K–12 foundations.”<sup>98</sup> Convergence indicates similarity in grantees’ work and has allowed philanthropy to “amplif[y] a new set of voices in national policymaking around [a] more focused group of issues”<sup>99</sup>—for example, charter schools<sup>100</sup> and a framework of marketization<sup>101</sup> (“a more general shift toward embracing business-oriented principles . . . in education policy and in the discourse around the operation of schools and the purpose of education”) that has perpetuated itself as a new norm in federal policymaking.<sup>102</sup>

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Philanthropy’s power now parallels that of state actors in education policymaking. This Section has summarized some of the reasons why this has happened, including the delegitimization of the public sector, the increasing ambitions of philanthropists themselves, and the affordances of contemporary education federalism. The next Section explicates the mechanisms of this philanthropic influence.

## **B. Modeling Private Policymaking: Philanthropy at the Boundaries of State Action**

Our legal system nominally forbids philanthropic involvement in politics. However, philanthropists have found a number of other “technologies of influence” that have been every bit as powerful as more conventional methods of access.<sup>103</sup> Philanthropic politicking wraps around the partisan and the electoral modes, determining the course of state action through subtler methods that complicate our usual binary way of thinking about public and private control.

Empirical scholars of education policy recognize that philanthropists

tend to conceptualize “policy” in a much broader way than traditional ways of assessing policy influence allow, viewing “policy activities” as including such strategies as developing new professional communities of practice, changing debates and conversations about policy issues at a national level, or illustrating best practices in the administration of

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98. Reckhow & Snyder, *supra* note 4, at 191.

99. *Id.* at 193.

100. *Id.*

101. BROWN, *supra* note 4, at 3–4 (citing Maia Bloomfield Cucchiara, Eva Gold, & Elaine Simon, *Contracts, Choice, and Customer Service: Marketization and Public Engagement in Education*, 113 TCHRS. COLL. REC. 2460 (2011) [hereinafter Cucchiara et al.]).

102. See Reckhow & Tompkins-Stange, *supra* note 96, at 56, 65, 67. See also RECKHOW, FOLLOW THE MONEY, *supra* note 3, at 150.

103. TOMPKINS-STANGE, POLICY PATRONS, *supra* note 3, at 14–15 (quoting ELLEN CONDLIFFE LAGEMANN, THE POLITICS OF KNOWLEDGE: THE CARNEGIE CORPORATION, PHILANTHROPY, AND PUBLIC POLICY (1989)).

public organizations, rather than primarily intending to affect legislative output. Foundations' activities are as diverse as funding a research project or publishing a book, convening a commission or a group of advocates, spearheading a public information program, or offering technical assistance to government committees.<sup>104</sup>

Private funders intentionally and directly influence public policymaking while obeying federal law restricting them from doing just that: they “[f]und activities that can potentially have significant effects on public policy”<sup>105</sup>; “[c]reate stores of knowledge that can affect how others think about policy”; “[f]orge networks among individuals and organizations, bringing their knowledge to bear on policy debates”<sup>106</sup>; “[b]uild good relations with influential policymakers” (i.e., state-actor policymakers); and “[d]evelop reputations as credible, reliable policy players.”<sup>107</sup>

This Section traces how philanthropists have filled the gaps in the existing regulatory framework to have profound influence on education policy. The critical question here is whether, and how, philanthropic influence differs in kind from normal and accepted interest group attempts to influence political outcomes. Subsection 1 explains how philanthropic political activity is (and is not) regulated. Subsection 2 draws from the political science literature to show that philanthropy's greatest power is in setting the agenda and in creating a political “common sense” that occupies the field of choice for state actors. Subsection 3 shows how philanthropies have created what political scientists call “jurisdictional challengers,” entities that have in fact been able to pull state power away from public entities. These technologies of influence show that the law's existing understanding of the kind of public, political power that philanthropies are able to wield is incomplete, and therefore, our regulatory structures are inadequate.

### *1. How Private Philanthropy is Regulated*

Political activity by foundations and private philanthropists is regulated with a light touch. Though philanthropy is nominally prohibited from engaging in politics, the narrow way in which federal regulations define politicking allows philanthropists to honor those proscriptions in the breach. This, in turn, explains why bringing private policymaking to account is so difficult.

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104. TOMPKINS-STANGE, POLICY PATRONS, *supra* note 3, at 15.

105. *Id.*

106. *Id.*

107. James M. Ferris & Michael Mintrom, *Foundations and Public Policymaking: A Conceptual Framework*, in FOUNDATIONS AND PUBLIC POLICY: LEVERAGING PHILANTHROPIC DOLLARS, KNOWLEDGE, AND NETWORKS FOR GREATER IMPACT 9, 12 (James M. Ferris ed., 2009).



The first question to ask is “[w]hen is philanthropy?”<sup>108</sup> A schematic model of philanthropy begins with a private individual with wealth that he or she would like to direct toward a charitable purpose—one that the U.S. federal government will recognize as “charitable” from the point of view of tax policy.<sup>109</sup> Broadly speaking, the individual has two options. First, the individual can give the money directly to an operating public charity, that is, a not-for-profit entity actively putting funds to use in accomplishing its stated mission. Second, the individual can give the money to an intermediary organization.<sup>110</sup> Most typically, this is a charitable foundation (the individual’s own or someone else’s), and that foundation can distribute the money then or later.<sup>111</sup>

In theory, philanthropists do not need tax benefits.<sup>112</sup> In practice, nearly all U.S. philanthropy is carried out using tax-advantaged structures.<sup>113</sup> It is in exchange for these tax benefits that the federal government is able to regulate philanthropic activity.<sup>114</sup> A public charity or a private foundation must seek its entity form at the state level but becomes tax-exempt through the Internal Revenue Service.<sup>115</sup> The most relevant distinction for our purposes is that between 501(c)(3) and 501(c)(4) exempt organizations. Both types of organizations are tax-exempt in and of themselves.<sup>116</sup> However, a donor may only deduct donations to a 501(c)(3) organization on the donor’s personal tax return.<sup>117</sup> This creates obvious incentives to stay on the (c)(3) side of the

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108. Ray D. Madoff, *When Is Philanthropy?: How the Tax Code’s Answer to This Question Has Given Rise to the Growth of Donor-Advised Funds and Why It’s a Problem*, in PHILANTHROPY IN DEMOCRATIC SOCIETIES: HISTORY, INSTITUTIONS, VALUES 158 (Rob Reich, Chiara Cordelli, & Lucy Bernholz eds., 2016).

109. *See id.* at 158.

110. *Id.* at 158.

111. *See id.* at 158.

112. *See* Rob Reich, *On the Role of Foundations in Democracies*, in PHILANTHROPY IN DEMOCRATIC SOCIETIES 71 (Rob Reich, Chiara Cordelli, & Lucy Bernholz eds., 2016) [hereinafter *On the Role of Foundations in Democracies*] (“Why provide a subsidy for the exercise of a liberty that people already possess, namely to give their money away for a philanthropic purpose?”). Or in the words of Judge Richard Posner, “The puzzle for economics is why these foundations are not total scandals.” *See id.* at 69.

113. NCCS Project Team, *The Nonprofit Sector in Brief 2019*, URB. INST.: NAT’L CTR. FOR CHARITABLE STAT. (June 4, 2020), <https://nccs.urban.org/publication/nonprofit-sector-brief-2019#number>.

114. *See* Reich, *On the Role of Foundations in Democracies*, *supra* note 112, at 68 (describing foundations’ “minimal obligations of procedural accountability”).

115. *What is a 501(c)(3)?*, FOUND. GRP., <https://www.501c3.org/what-is-a-501c3/> (last visited Sept. 2, 2020). Many different types of entities can seek (c)(3) status, though most are not-for-profit corporations. INTERNAL REVENUE SERV., *Life Cycle of an Exempt Organization*, <https://www.irs.gov/charities-non-profits/life-cycle-of-an-exempt-organization> (last updated May 28, 2021).

116. *See* INTERNAL REVENUE SERV., *Life Cycle of a Public Charity/Private Foundation*, <https://www.irs.gov/charities-non-profits/charitable-organizations/life-cycle-of-a-public-charity-private-foundation> (last updated Apr. 2, 2021); INTERNAL REVENUE SERV., *Life Cycle of a Social Welfare Organization*, <https://www.irs.gov/charities-non-profits/other-non-profits/life-cycle-of-a-social-welfare-organization> (last updated Dec. 30, 2020).

117. *See* INTERNAL REVENUE SERV., *Donations to Section 501(c)(4) Organizations*, <https://www.irs.gov/charities-non-profits/other-non-profits/donations-to-section-501c4-organizations> (last updated Feb. 2, 2021).

line—not only for individual donors but also for organizations that fundraise more easily if they can offer tax benefits in return. (Both public charities and private foundations are (c)(3) organizations, assuming they meet the requirements for exemption.)<sup>118</sup> The tax code defines politicking essentially as partisan intervention in the electoral process: 501(c)(3) organizations are absolutely forbidden from contributing to or endorsing (or making statements against) any campaign or candidate and may lose exempt status if they do so.<sup>119</sup> The IRS limits lobbying by (c)(3) organizations, but it is still permitted, and most forms of advocacy do not strictly count as lobbying.<sup>120</sup>

Perhaps because political activity is both strongly proscribed and narrowly defined, the charitable and nonprofit sector has come to see itself as highly (even overly) regulated and proudly nonpartisan.<sup>121</sup> 501(c)(3) exemption has come to mean much more than tax status; it is a symbolic signifier of virtue, justice, and a paradoxical investment in changing social realities while viewing these efforts at change as inherently apolitical or transpartisan.<sup>122</sup> It would be risky and perhaps cognitively dissonant for insiders in the charitable sector to explicitly claim their work as political.<sup>123</sup> Nonetheless, political theorists have begun to reevaluate these assumptions, arguing that philanthropy is political insofar as it provides public goods and seeks to reorder “the scope of government power and the allocation of public resources.”<sup>124</sup> The following Subsections build on that work by describing some mechanisms by which education philanthropy currently diminishes the scope of government power and reallocates public resources.

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118. 26 U.S.C. § 501(c)(3). See also INTERNAL REVENUE SERV., *Life Cycle of a Public Charity/Private Foundation*, *supra* note 116.

119. INTERNAL REVENUE SERV., *The Restriction of Political Campaign Intervention by Section 501(c)(3) Tax-Exempt Organizations*, <https://www.irs.gov/charities-non-profits/charitable-organizations/the-restriction-of-political-campaign-intervention-by-section-501c3-tax-exempt-organizations> (last updated July 1, 2021).

120. Compare INTERNAL REVENUE SERV., *Measuring Lobbying: Substantial Part Test*, <https://www.irs.gov/charities-non-profits/measuring-lobbying-substantial-part-test> (last updated Nov. 10, 2020), with INTERNAL REVENUE SERV., *Measuring Lobbying Activity: Expenditure Test*, <https://www.irs.gov/charities-non-profits/measuring-lobbying-activity-expenditure-test> (last updated Dec. 8, 2020).

121. See, e.g., Evelyn Brody & John Tyler, *Respecting Foundation and Charity Autonomy: How Public Is Private Philanthropy?*, 85 CHI.-KENT L. REV. 571 (2010).

122. See, e.g., Peter Frumkin, ON BEING NONPROFIT: A CONCEPTUAL AND POLICY PRIMER 19 (2002); Peter Dobkin Hall, INVENTING THE NONPROFIT SECTOR: AND OTHER ESSAYS ON PHILANTHROPY, VOLUNTARISM, AND NONPROFIT ORGANIZATIONS 1–2, 13–14 (1992).

123. See Olivier Zunz, *Why Is the History of Philanthropy Not a Part of American History?*, in PHILANTHROPY IN DEMOCRATIC SOCIETIES 60–61 (Rob Reich, Chiara Cordelli, & Lucy Bernholz eds., 2016).

124. Rob Reich, Chiara Cordelli, & Lucy Bernholz, *Part II: Institutional Forms* 84, in PHILANTHROPY IN DEMOCRATIC SOCIETIES (Rob Reich, Chiara Cordelli, & Lucy Bernholz eds., 2016). See also Aaron Horvath & Walter W. Powell, *Contributory or Disruptive: Do New Forms of Philanthropy Erode Democracy?* 88–89, in PHILANTHROPY IN DEMOCRATIC SOCIETIES (Rob Reich, Chiara Cordelli, & Lucy Bernholz eds., 2016); Zunz, *supra* note 123, at 44.

## 2. *Setting the Terms: Problems and Solutions*

In holding private philanthropy accountable for its public influence, the critical question, paraphrasing Ray Madoff's formulation, is *when* is state action?<sup>125</sup> The question has been asked and answered before. In *Terry v. Adams*, the Supreme Court confronted "club primaries" in Jim Crow-era Texas.<sup>126</sup> In Fort Bend County, there existed a private, whites-only club called the Jaybird Democratic Association. It was run just like a political party, and always ran its own primary for all county offices prior to the Democratic Party primary. Each election year, for decades, the successful Jaybird primary candidate would then run unopposed in the official Democratic primary and win.<sup>127</sup> Black Fort Bend County residents could vote in the Democratic primary, but their votes made no difference by that point in the process. Jaybird officials openly acknowledged that the goal was to prevent Black citizens from having any political voice.<sup>128</sup> The official, public primary was meaningless because all the important decisions had been made in advance, in private.

Much the same is true of the present-day relationship between philanthropists and public school officials. The question this Section explores is not the narrow one of whether the Supreme Court would or would not apply a *Terry*-like analysis but the broader one of when state actors are so constrained by private actors' maneuvering that we no longer should view the state actor's decision as meaningfully public or meaningfully a decision at all.

Political scientists have long recognized that the definition of a policy problem significantly constrains that problem's eventual policy solution.<sup>129</sup> As E.E. Schattschneider wrote in 1960, "[t]he most important strategy of politics is concerned with the scope of conflict."<sup>130</sup> Whoever determines that scope and its definition—often after significant struggle—has the power in real, if not formal, terms.<sup>131</sup> Ideas matter.<sup>132</sup> The theory of "problem definition" that I apply here cuts against the rationalist model of policymaking that is formally encoded in the Supreme Court's state action

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125. *See supra* notes 108–111 and accompanying text.

126. 345 U.S. 461, 463–65 (1953).

127. *Id.*

128. *Id.* at 464–65.

129. AARON WILDAVSKY, *SPEAKING TRUTH TO POWER: THE ART AND CRAFT OF POLICY ANALYSIS* 26 (1987).

130. E.E. SCHATTSCHNEIDER, *THE SEMI-SOVEREIGN PEOPLE: A REALIST'S VIEW OF DEMOCRACY IN AMERICA* 3 (1960).

131. DEBORAH STONE, *POLICY PARADOX: THE ART OF POLITICAL DECISION MAKING* 217 (2012) ("In politics, an early policy decision forecloses the option to take a different path later . . ."); PAUL PIERSON, *POLITICS IN TIME: HISTORY, INSTITUTIONS, AND SOCIAL ANALYSIS* 11 (2004) (on path dependence).

132. *See, e.g.*, Daniel Béland & Robert Henry Cox, *Introduction: Ideas and Politics*, in *IDEAS AND POLITICS IN SOCIAL SCIENCE RESEARCH* 3 (Daniel Béland & Robert Henry Cox eds., 2011).

jurisprudence.<sup>133</sup> In the rationalist model, public policymakers define a policy problem or goal themselves, adhere consistently to that goal, consider and evaluate multiple alternative solutions or approaches, and select “the course of action that will maximize total welfare.”<sup>134</sup>

Under the rationalist view, there is a clear and unproblematic line between public and private. The public actors allow private actors to advocate their positions but ultimately retain all meaningful decision-making power. The problem definition literature suggests that this is highly idealized, if not naive.<sup>135</sup> Rather, policy entrepreneurs, who are able discursively to “link[] favored solutions to current problems,” are the agents driving the policymaking process.<sup>136</sup> The most effective tool of the policy entrepreneur is the “causal story,” itself an object of political conflict, which defines the problem, assigns responsibility, and suggests solutions all at once.<sup>137</sup> By gaining control of the causal story, a policy entrepreneur is able to influence—if not control—everything downstream of the purported cause and even reassign issues to different actors (public or private).<sup>138</sup>

The causal implications of private-actor problem definition would not be so concerning if, as in a modified form of the rationalist model, a variety of private actors advanced a variety of problem/solution packages from which public actors could choose. However, two features of our current education policy landscape combine to foreclose meaningful public-actor choice. First, private philanthropists have cornered the field on certain education policy issues such that many public decisionmakers are no longer presented with a range of problem/solution options.<sup>139</sup> Second, public education decisionmakers have few resources with which to do their own research and generate their own causal stories.<sup>140</sup> Philanthropists have often argued that their spending makes up only a small fraction of the total national education budget so that their power is minimal compared to that of the public sector. But their dominance in the field of ideas, plus their explicit embrace of high-leverage funding strategies,<sup>141</sup> shows that it is not how many dollars are spent, but where and how, that matters. The brief case studies that follow show that just as in 1950s Fort Bend County, Texas, private

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133. Jal Mehta, *The Varied Roles of Ideas in Politics: From “Whether” to “How,”* in IDEAS AND POLITICS IN SOCIAL SCIENCE RESEARCH 27 (Daniel Béland & Robert Henry Cox eds., 2011). See also STONE, *supra* note 131, at 11. On state action jurisprudence, see *infra* notes 226-229 and accompanying text.

134. STONE, *supra* note 131, at 260.

135. See, e.g., STONE, *supra* note 131, at 10.

136. Mehta, *The Varied Roles of Ideas in Politics*, *supra* note 133, at 29. See also, e.g., STONE, *supra* note 131, at 138, 158; MALCOLM SPECTOR & JOHN I. KITSUSE, CONSTRUCTING SOCIAL PROBLEMS 31, 47 (2001).

137. STONE, *supra* note 131, at 207, 223, 227; PIERSON, *supra* note 131, at 11.

138. SCHATTSCHNEIDER, *supra* note 130, at 3, 74; PIERSON, *supra* note 131, at 11.

139. See RECKHOW, FOLLOW THE MONEY, *supra* note 3, at 60. See also Reckhow & Snyder, *supra* note 4.

140. See *supra* notes 44-46 and accompanying text.

141. *Id.*; see also *supra* Section I.A.3 of this Article.

action antecedent to state action has often rendered state actors little more than a rubber stamp.

The Gates Foundation's emphasis on small high schools in the mid-2000s is a prime example. In 2005, Bill Gates made a speech to a group of governors, arguing that the standard American public high school model—relatively large, with a general-purpose curriculum—was “obsolete” and “broken.”<sup>142</sup> The Gates Foundation had, since 2001, focused its education initiatives on research and advocacy for a “small schools” model, in which large urban public high schools would either be broken up into multiple smaller schools, or closed altogether with the district opening new small schools in their place.<sup>143</sup> The Foundation had two objectives: to yield better student outcomes and to build a body of research on effective high schools.<sup>144</sup> Notice the dates: Gates pitched the “problem” to public decisionmakers only after the Gates Foundation had developed the “solution.”

By fall 2003, the Gates Foundation had made grants totaling \$51 million to ten third-party intermediary organizations to open sixty-seven new small high schools in New York.<sup>145</sup> Gates defined the problem, proposed a solution backed by the Foundation's own research, and funded its implementation, leveraging a small portion of New York's total schools' budget to fundamentally reorient its secondary education policy. But by 2008, the Gates Foundation had abandoned its focus on small schools and shifted abruptly to its Measures of Effective Teaching initiative.<sup>146</sup> Nonetheless, despite weak research results and diminishing funding from Gates, New York City public school decisionmakers continued to advocate for small high schools, resulting in nearly 300 small high schools operating in the district by 2012.<sup>147</sup> This shows how foundations' power over causal stories is not limited by their own funding. Philanthropist-proposed ideas can come to circulate as viable policy solutions even when the philanthropy itself has ceased to advocate for a given approach.<sup>148</sup>

The biggest paradigm shift that philanthropists have effected has been to problematize the public management of public schools, and promote charter schools as the solution.<sup>149</sup> Charter schools are commonplace<sup>150</sup> precisely because philanthropists have intentionally pursued coordinated strategies to make them so.<sup>151</sup> The Broad

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142. RAVITCH, *supra* note 2, at 39–41.

143. *See* Colvin, *supra* note 25, at 21, 32–34; BROWN, *supra* note 4, at 20–21.

144. BROWN, *supra* note 4, at 20–21.

145. *Id.*

146. RAVITCH, *supra* note 2, at 39–41.

147. BROWN, *supra* note 4, at 20–39.

148. *See generally* PIERSON, *supra* note 131, at 111.

149. *See* GANESH SITARAMAN & ANNE L. ALSTOTT, THE PUBLIC OPTION: HOW TO EXPAND FREEDOM, INCREASE OPPORTUNITY, AND PROMOTE EQUALITY 111–12 (2019).

150. *See 50-State Comparison: Charter School Policies*, EDUC. COMM'N OF THE STATES (Jan. 28, 2020), <https://www.ecs.org/charter-school-policies/>.

151. Cohen, *supra* note 4.

Foundation, one of the most active funders of charter-oriented school reform, identifies the public-schooling problems it seeks to solve precisely as “issues of governance, management, and labor relations”<sup>152</sup> and does not necessarily identify more funding, in and of itself, as a need.<sup>153</sup> Major private education funders have converged their funding on the same set of organizations,<sup>154</sup> in particular those advocating and operating charter schools.<sup>155</sup> This convergence is intentional<sup>156</sup> and represents a shift to a model in which philanthropy *as a sector* has established its own political agenda, provided the knowledge base for that agenda by funding research at major universities and think tanks, facilitated the creation of institutions to enact that agenda, and then provided the money for implementation.<sup>157</sup>

This example of problem definition may be the most difficult in which to parse private from state action, precisely because philanthropists have been so effective at occupying the field of possibility. Is it state action when a coordinated philanthropic agenda writes model legislation<sup>158</sup> and hands it to state legislatures who, theoretically, have freedom of choice whether or not to enact it but functionally have no alternative proposals to consider? Who is the real actor when the academic research literature with which a legislator might seek to inform herself on the issues is completely funded by the same coordinated philanthropies as part of their strategic agenda?<sup>159</sup> A formalist might stubbornly insist that the public actors technically retain the ability to affirm or reject philanthropy’s propositions, but political theorists have long recognized that the development of a shared and unquestioned common sense is far more powerful than nominal freedom of choice.<sup>160</sup>

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152. Colvin, *supra* note 25, at 27.

153. *Id.*

154. *See supra* notes 98–102 and accompanying text.

155. Reckhow & Snyder, *supra* note 4, at 190–91.

156. Cohen, *supra* note 4.

157. Ferris et al., *supra* note 4, at 715–17; Reckhow & Snyder, *supra* note 4, at 187, 189, 193; Lubienski, Brewer & La Londe, *supra* note 4, at 61–63; Scott, *The Politics of Venture Philanthropy in Charter School Policy and Advocacy*, *supra* note 4, at 118–22.

158. *See* Gary L. Anderson & Liliana Montoro Donchik, *Privatizing Schooling and Policy Making: The American Legislative Exchange Council and New Political and Discursive Strategies of Education Governance*, 30 *EDUC. POL.* 322, 323 (2016).

159. *See* Elizabeth DeBray et al., *Intermediary Organizations in Charter School Policy Coalitions: Evidence from New Orleans*, 28 *EDUC. POL.* 175 (2014); Reckhow & Snyder, *supra* note 4, at 192.

160. I use “common sense” here in the Gramscian sense of the term (properly, “senso comune”). For Gramsci, “the distinction between political society (force) and civil society (hegemony) should be seen simply as a methodological one. The state and civil society, that is, do not represent two bounded universes, always and for ever separate, but rather a knot of tangled power relations which, depending on the questions we are interested in, can be disentangled into different assemblages of threads. It should also be stressed that for Gramsci, just because civil society in general represents consent rather than force, it by no means follows that civil society is, therefore, necessarily benign.” KATE CREHAN, *GRAMSCI, CULTURE AND ANTHROPOLOGY* 103 (2002). In this context, “[p]erhaps it is useful to make a ‘practical’ distinction between philosophy and common sense in order to indicate more clearly

Finally, consider the Annenberg Challenge. Because Annenberg was able to depict the grantee districts as “beset by seemingly intractable problems,” a “tide of mediocrity,” his Challenge was able to take significant control over things nominally under district jurisdiction, such as curricula and personnel, with only a “simple message”: that “something should be done to stem this tide, and something *could* be done.”<sup>161</sup> In order to receive even small amounts of money, grantees had to submit a proposal for comprehensive reform keyed to Annenberg’s vision.<sup>162</sup> The power of problem definition combined with philanthropic dollars is such that merely by characterizing prospective grantee school districts as problems—even without specifying the nature of that problem—Annenberg was able to force districts to commit to his preferred solutions. Today, consider the implications of a problem-solution framework largely predicated on depicting “urban students . . . as poor, Black or Brown, at risk of academic failure, and in need of ‘help’ from philanthropic outsiders in order to succeed economically according to mainstream standards.”<sup>163</sup>

Ideas matter. The “when” of state action, empirically if not formally, seems to be at the point when a policy solution and its justifying problem are released into political discourse and gather enough momentum to be seen as self-evident.<sup>164</sup> Like the “when” of philanthropy under the tax code, the legal problem should become, I argue, at what point along the trail of path dependence we should recognize public-actor choice as meaningful.<sup>165</sup> As in *Terry v. Adams*, that point may be earlier than we think.

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the passage from one moment to the other. In philosophy the features of individual elaboration of thought are the most salient: in common sense on the other hand it is the diffuse, uncoordinated features of a generic form of thought common to a particular period and a particular popular environment. But every philosophy has a tendency to become the common sense of a fairly limited environment (that of all the intellectuals).” GRAMSCI, SELECTIONS FROM THE PRISON NOTEBOOKS 330 (1989 [1971 [1929–35]]). In other words, I am arguing that state action should be understood in the private policymaking context as coterminous with Gramscian hegemony: “[R]ather than being a precisely bounded theoretical concept, hegemony for Gramsci simply names the problem—that of how the power relations underpinning various forms of inequality are produced and reproduced—that he is interested in exploring. What in any given context constitutes hegemony can only be discovered through careful empirical analysis.” CREHAN at 104; compare TOMPKINS-STANGE, POLICY PATRONS, *supra* note 3, at 144 (“I argue that the issue is not whether an outcome-oriented versus field-oriented approach is ‘right’ or ‘wrong,’ but that, as informants nearly uniformly agreed, the outcome-oriented approach is increasingly viewed as ‘commonsensical’ in the field of education philanthropy, as technological and managerial expertise, with its emphasis on efficiency, effectiveness, and return on investment have become dominant in the field.”).

161. Cervone, *supra* note 30, at 143.

162. *Id.* at 149–50.

163. BROWN, *supra* note 4, at 9. Brown highlights the challenging “racial politics that can undergird public schools’ dependence on private or corporate philanthropy.” *Id.* Public schools increasingly dependent on philanthropy must “manage [their] image by constructing urban teachers and students as both needy and deserving of corporate charity. This particular definition of social justice, which is dependent upon a savior mentality both on an institutional and an individual level, ironically reifies the hierarchies of race and class that it purports to alleviate.” *Id.* at 82.

164. WILDAVSKY, *supra* note 129, at 3.

165. See STONE, *supra* note 131.

### 3. Jurisdictional Challengers

The primary mechanism by which education policymaking has become privatized is philanthropic support of jurisdictional challengers: “organizations that compete with or offer alternatives to public sector institutions.”<sup>166</sup> Reckhow and Snyder observe that “[i]ndividually, these organizations offer alternatives to the public sector; but as a linked set of actors, they present a coordinated challenge to the jurisdictional control traditionally held by the public sector in education.”<sup>167</sup> Jurisdictional challengers include individual charter schools, charter school advocacy organizations, charter management organizations (which often manage large networks of schools), Teach for America, think tanks and lobbyists, and organizations advocating new accountability policies and standards for public schools.<sup>168</sup>

Jurisdictional challengers are different in kind from the private schooling sector that has existed in the United States since before its founding.<sup>169</sup> First, jurisdictional challengers are not traditional religious or secular private schools that simply exist alongside public schools.<sup>170</sup> Instead, jurisdictional challengers justify their existence by arguing that there are “pathologies inherent to the public sector” that can only be addressed by policy solutions that “roll back the state as much as possible, replacing state entities, endeavors, and initiatives with market-based alternatives.”<sup>171</sup> Jurisdictional challengers are interconnected and represent a *systemic* alternative to the public schools. Second, jurisdictional challengers have risen to prominence while public education funding has decreased, enhancing their power in relative terms.<sup>172</sup>

Philanthropists have intentionally funded jurisdictional challengers as part of a coherent agenda aimed at decoupling public funding from public control over schools.<sup>173</sup> This agenda purposefully blurs the public-private binary, with the explicit goal of abandoning traditional public sector institutional arrangements that have been blamed for the “crisis” of public schooling.<sup>174</sup> New Orleans, for example, has become completely “charterized”—all of its public schools are charter schools, run by a variety

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166. HESS, *supra* note 4, at 186.

167. *Id.* at 187. Jurisdictional challenge in this sense is a phenomenon separate from, but related to, what many scholars of privatization have described as the “marketization” of bureaucracy or the public sector more generally. *See, e.g.*, BROWN, *supra* note 4, at 3–4; Cucchiara et al., *supra* note 101, at 2460, 2461–2464; Michaels, *supra* note 13, at 1041–42.

168. *Id.* at 188–89; *see also* Lubienski, *Sector Distinctions*, *supra* note 4, at 193, 195–96.

169. Lubienski, *Sector Distinctions*, *supra* note 4, at 195–96.

170. *Id.* at 200.

171. *Id.*

172. Reckhow & Snyder, *supra* note 4, at 186.

173. Lubienski, *Sector Distinctions*, *supra* note 4, at 195–96 (discussing Milton Friedman’s seminal 1950s arguments for “public schooling” consisting only in the public funding of private schools, *see, e.g.*, *The Role of Government in Education*, in *ECONOMICS AND THE PUBLIC INTEREST* (Robert A. Solo ed., 1955)); *see also* Reckhow & Snyder, *supra* note 4.

174. Lubienski, *Sector Distinctions*, *supra* note 4, at 200.



of charter management organizations (CMOs).<sup>175</sup> In other cities, charters exist alongside traditional public schools, receiving public funding while subject in the first instance to oversight by a CMO rather than by the school district.<sup>176</sup> Educational intermediary organizations (CMOs, advocacy groups, research consortia, parent coalitions, and teachers unions) have collectively grown so powerful as to form a new “intermediary sector.”<sup>177</sup> This intermediary sector has as much, if not at times more, control over what happens in schools than does the public sector that formally retains decision-making authority.<sup>178</sup> Many intermediary organizations receive significant proportions of their funding from philanthropists who view the creation of an intermediary sector as key to the success of their strategies for education reform—and many philanthropies themselves serve as intermediary organizations.<sup>179</sup> Indeed, though the academic benefits of market-oriented public education reforms remain unclear, “perhaps the more monumental and lasting impact is in terms of the institutional effects, where we see a blurring of the boundaries between public and private sectors.”<sup>180</sup>

Since the 1990s, education philanthropists have coupled a deregulatory reform agenda<sup>181</sup> with an intentional effort to build up an alternative system of institutions capable of managing schools, conducting policy-oriented empirical and theoretical research,<sup>182</sup> and articulating policy agendas at the district, state, and federal levels. The neat public/private binary in education governance that had consolidated throughout much of the twentieth century—in which public and private schools were separate in terms of funding source, management and governance, population served, and accountability and oversight mechanisms—is no longer so tidy.<sup>183</sup> Education policy scholars recognize this, empirically, as a qualitative shift in the balance of power in education policymaking.<sup>184</sup> The local school district, still considered the seat of control for constitutional purposes, is practically speaking now only one among many players.<sup>185</sup>

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175. DeBray et al., *supra* note 159, at 185–86.

176. *See, e.g.,* Scott, *The Politics of Venture Philanthropy in Charter School Policy and Beyond*, *supra* note 4, at 115–18.

177. Scott & Jabbar, *supra* note 4, at 237. *See also* JEFFREY HENIG, *THE END OF EXCEPTIONALISM: THE CHANGING POLITICS OF SCHOOL REFORM* (2013).

178. Scott & Jabbar, *supra* note 4, at 236–38.

179. *Id.* at 238–39, 242.

180. Lubienski, *Sector Distinctions*, *supra* note 4, at 200.

181. Scott, *The Politics of Venture Philanthropy*, *supra* note 4, at 107–08.

182. *Id.* at 118–19; Scott & Jabbar, *supra* note 4, at 252–54.

183. Lubienski, *Sector Distinctions*, *supra* note 4, at 195–96.

184. *Id.* at 202.

185. *Id.*; *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 49–50 (1973).

This Part has shown just how complicated the question of philanthropic politicking is, as against the backdrop of our existing regulatory system and legal norms. Part I outlines the problem: despite our legal system's formal, bright-line distinctions between public and private action, the empirical reality is that education policymaking is instead subject to hybrid governance, and state action has been but a ritualistic rubber stamp. Part II turns to the question of what is to be done.

## II. FAILURES OF ACCOUNTABILITY

Recast in strictly legal terms, the problem is this: Philanthropic influence, though strong and in many cases determinative of state action, remains upstream of what current decisional law formally recognizes as state action or, indeed, *public*.<sup>186</sup> Federal and state statutes, and regulations do not contemplate this type of private influence in this particular public sphere. Not a problem, one might argue—the private sphere has its own mechanisms of accountability.<sup>187</sup> Private philanthropies, however, are not quite like the private entities whose actions are most readily cabined by market or reputational forces. (This is by design; even skeptical proponents of philanthropy argue that philanthropy's ability to resist social pressures is what allows it to be innovative and to meet needs that no other kind of organization is incentivized to address.<sup>188</sup>) They are a contemporary example of a very old problem: they are matter out of place, neither fish nor flesh<sup>189</sup>—they do not fit into either of the categories, public or private, that our system uses to structure relationships and obligations. Scholars have critiqued the public-private law binary for at least the last forty years. Most of those critiques are well founded; the theoretical bright-line distinction fades as soon as it is applied to any number of real-world examples.<sup>190</sup> Nonetheless, the distinction persists in the doctrine,<sup>191</sup> and so remains relevant in thinking through how private policymakers may be held accountable. If positive law demands that entities can only be regulated under one or the other side of the binary, then it may be more practical to try to fit private policymaking into the existing framework than try to create a new one. Section A of this Part does so as to public law.

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186. Cf. Brody & Tyler, *supra* note 121, at 572.

187. See, e.g., Philip J. Harter & George C. Eads, *Policy Instruments, Institutions, and Objectives: An Analytical Framework for Assessing Alternatives to Regulation*, 37 ADMIN. L. REV. 221 (1985).

188. See, e.g., Reich, *On the Role of Foundations in Democracies*, *supra* note 112, at 75–80.

189. MARY DOUGLAS, PURITY AND DANGER 44 (1966 [2002]); WILLIAM SHAKESPEARE, HENRY IV, act 1, sc. 3, l. 128.

190. See, e.g., Michael P. Vandenbergh, *The Private Life of Public Law*, 105 COLUM. L. REV. 1, 13 n. 54 (2005); Morton J. Horwitz, *The History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423 (1982); Robert H. Mnookin, *The Public/Private Dichotomy: Political Disagreement and Academic Repudiation*, 130 U. PA. L. REV. 1429, 1434–39 (1982).

191. See *infra* notes 226–229 and accompanying text.

Recognizing that there can still be “order without law,”<sup>192</sup> Section B of this Part explores, and rejects, private-law, -politics, and -ordering options for bringing philanthropy to heel. Section C outlines a defense of education as a public good, emphasizing that even effective accountability strategies would be normatively undesirable. The Article concludes on a practical note.

## A. Public Law and the State Action Problem

### 1. Public Law Models: an Imperfect Fit

This Section examines two candidate public law models for regulating private policymaking. The first is mapped in the bulk of the education law literature: the quest for recognition of constitutional rights to education. The second comes from the administrative law literature, which has sought to cabin privatization of government functions through, among others, contracting-out and delegation models. But the underlying public-private relationship in the realm of private education policymaking is, as a factual matter, too different from the relationships these other scholarly works address. Instead, this Section advocates a statutory, rather than decisional, approach.

The point of departure for today’s education law scholarship and advocacy is, of course, *Brown v. Board of Education*.<sup>193</sup> *Brown*’s canonical power is hard to overstate; it has been called not only the most important education law decision, but the most important U.S. *constitutional* decision of the twentieth century.<sup>194</sup> Like the Annenberg Challenge, *Brown* is remembered both for what it accomplished and for its unfulfilled promise. I suggest here that *Brown* has overdetermined the intellectual history of education law.

The *Brown* Court held, famously, “that in the field of public education the doctrine of ‘separate but equal’ has no place,” and therefore that the plaintiffs had been, “by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.”<sup>195</sup> But the decision is confined to *public* education and to *public* actors.<sup>196</sup> Twenty years later, the Court decided a pair of cases that simultaneously purport to apply *Brown* and cabin its potential: *Milliken v. Bradley* and *San Antonio Independent School District v. Rodriguez*.<sup>197</sup> In both, advocates asked the Supreme Court to take account of the complex interaction between public and

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192. ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES (1991).

193. 347 U.S. 483 (1954).

194. See, e.g., JUSTIN DRIVER, THE SCHOOLHOUSE GATE: PUBLIC EDUCATION, THE SUPREME COURT, AND THE BATTLE FOR THE AMERICAN MIND 242 (2018).

195. 347 U.S. at 495.

196. *Id.* at 487, 492, 493.

197. *Milliken v. Bradley*, 418 U.S. 717 (1974); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

private segregationist behavior. Applying *Brown* narrowly, the Court declined to do so, and has reaffirmed that strictly-public position ever since.<sup>198</sup>

The problem in *Milliken* was that residential segregation (characterized, in that case, as private behavior) in the Detroit metropolitan area rendered the Detroit school district's formal desegregation efforts essentially meaningless.<sup>199</sup> The district court therefore created, and the Sixth Circuit upheld, an interdistrict busing plan covering the entire Detroit metropolitan area.<sup>200</sup> The lower courts took into account the effect of private behavior on state action and vice versa, and judged the sufficiency of state remedial action because of the net effects of the two together. The Supreme Court rejected this way of thinking: "The target of the *Brown* holding was clear and forthright: the elimination of *state-mandated* or *deliberately maintained* dual school systems with certain schools for Negro pupils and others for white pupils."<sup>201</sup>

In *Rodriguez*, the Supreme Court again used *Brown* rigidly to uphold Texas' wildly unequal system of school financing.<sup>202</sup> It rejected a Fourteenth Amendment approach to property tax redistribution.<sup>203</sup> And though *Brown* had affirmed that education "is the very foundation of good citizenship," the Court declined to equate education's unquestioned importance with its protection as a matter of substantive due process.<sup>204</sup> In other words, for the Supreme Court of the early 1970s, *Brown* stood not for an expansive vision of education justice, but for a narrow ban on state-sanctioned segregation in public schooling.

Scholars and advocates of many disciplines and professions have continued to seek both educational quality and equality. In law, though, they have mostly done so on the terrain the Supreme Court shaped years ago. That terrain no longer bears much resemblance to how education decisions get made, and, because it only contemplates public decisionmakers, it has little to say about procedural accountability issues for private entities. The paradigmatic contemporary education law article begins by marking out some of the problems in U.S. public education. It notes that the U.S. Supreme Court has declined to recognize a fundamental constitutional right to

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198. The canonical power of *Brown* was evident in the Court's most recent major decision on schooling and race, *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701 (2007). Chief Justice Roberts, writing for the plurality, *e.g.*, at 742–44, Justice Thomas, concurring, *e.g.*, at 749–50, Justice Kennedy, concurring in the result, *e.g.*, at 788–90, Justice Stevens, dissenting, *e.g.*, at 800–02, and Justice Breyer, dissenting, *e.g.*, at 803–04, 822, 842–43, 867–68, each explicitly claim the mantle of *Brown* and chastise the other opinions for misunderstanding the precedent.

199. *Milliken v. Bradley*, 418 U.S. at 725–30.

200. *Id.* at 735–36.

201. *Id.* at 737 (emphasis added).

202. *Rodriguez*, 411 U.S. 1 (1973).

203. *Id.* at 10–15, 15–16, 20–25.

204. *Id.* at 29–30, 111 (citing and quoting *Brown I*, 347 U.S. at 691). *See also id.* at 33–35, 37.

education.<sup>205</sup> The article then goes on to make a case for interpreting the Constitution to confer such a right.<sup>206</sup> Some make originalist arguments;<sup>207</sup> others apply an international human rights or dignitary framework,<sup>208</sup> or a “traditional” interpretive approach,<sup>209</sup> or find the right’s source in the Privileges or Immunities<sup>210</sup> or Citizenship Clauses.<sup>211</sup> Some imply the right given the importance of literacy to the exercise of political freedoms,<sup>212</sup> or because nearly all state constitutions contain an of education clause,<sup>213</sup> or synthesize it from the various clauses of the Fourteenth Amendment.<sup>214</sup>

Many writers have also critiqued the arguments for a constitutional right to education.<sup>215</sup> Commentators debate whether the substance of the right should consist in an equitable education,<sup>216</sup> or in an adequate education,<sup>217</sup> or in both.<sup>218</sup> Buoyed by

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205. See, e.g., Erwin Chemerinsky, *The Deconstitutionalization of Education*, 36 LOY. U. CHI. L.J. 111, 111 (2004) (“In my opinion, the simple reality is that without judicial action equal educational opportunity will never exist.”).

206. See, e.g., Susan H. Bitensky, *Theoretical Foundations for a Right to Education under the U.S. Constitution: A Beginning to the End of the National Education Crisis*, 86 NW. U. L. REV. 550, 553–54 (1991–1992). See also Penelope A. Prevolos, *Rodriguez Revisited: Federalism, Meaningful Access, and the Right to Adequate Education*, 20 SANTA CLARA L. REV. 75 (1980).

207. E.g., Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions when the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?*, 87 TEX. L. REV. 7 (2008); Black, *The Constitutional Compromise*, *supra* note 11, at 735.

208. Anna Williams Shavers, *Using International Human Rights Law in School Finance Litigation to Establish Education as a Fundamental Right*, 27 KAN. J.L. & PUB. POL’Y 457 (2018); Areto A. Imoukhuede, *Education Rights and the New Due Process*, 47 IND. L. REV. 467 (2014).

209. Barry Friedman & Sara Solow, *The Federal Right to an Adequate Education*, 81 GEO. WASH. L. REV. 92 (2013).

210. Kara A. Millonzi, *Education as a Right of National Citizenship under the Privileges or Immunities Clause of the Fourteenth Amendment*, 81 N.C. L. REV. 1286 (2003).

211. Goodwin Liu, *Education, Equality, and National Citizenship*, 116 YALE L.J. 330 (2006); see also Suzanna Sherry, *Responsible Republicanism: Educating for Citizenship*, 62 U. CHI. L. REV. 131 (1995).

212. Black, *The Constitutional Compromise*, *supra* note 11; see also Michael Salerno, *Reading Is Fundamental: Why the No Child Left Behind Act Necessitates Recognition of a Fundamental Right to Education*, 5 CARDOZO PUB. L. POL’Y & ETHICS J. 509 (2007).

213. Calabresi & Agudo, *supra* note 207; Derek Black, *Unlocking the Power of State Constitutions with Equal Protection: The First Step toward Education as a Federally Protected Right*, 51 WM. & MARY L. REV. 1343 (2010).

214. Gershon M. Ratner, *New Legal Duty for Urban Public Schools: Effective Education in Basic Skills*, 63 TEX. L. REV. 777 (1985); Michael A. Rebell, *The Right to Comprehensive Educational Opportunity*, 47 HARV. C.R.-C.L. L. REV. 47 (2012).

215. See, e.g., Joshua E. Weishart, *The Compromised Right to Education*, 71 STAN. L. REV. ONLINE 123 (2018); Richard Briffault, *The Role of Local Control in School Finance Reform*, 24 CONN. L. REV. 773 (1992); Daniel S. Greenspahn, *A Constitutional Right to Learn: The Uncertain Allure of Making a Federal Case out of Education*, 59 S.C. L. REV. 755 (2008).

216. See, e.g., Liu, *supra* note 211.

217. See, e.g., Friedman & Solow, *supra* note 209.

218. E.g., Joshua E. Weishart, *Transcending Equality Versus Adequacy*, 66 STAN. L. REV. 477 (2014); Joshua E. Weishart, *Reconstituting the Right to Education*, 67 ALA. L. REV. 915 (2016); Black, *Unlocking the Power of State Constitutions*, *supra* note 213; Rebell, *The Right to Comprehensive Educational Opportunity*, *supra* note 214.

the successes of adequacy litigation in state courts,<sup>219</sup> some scholars and advocates have responded to the federal “deconstitutionalization” of education by shifting their focus to state constitutional enforcement.<sup>220</sup>

What bears emphasis is that these pieces, which have been at the forefront of education law discourse over the last many years, are all grappling with “the enduring legacy of *Rodriguez*”<sup>221</sup> in an attempt to “resurrect the promise of *Brown*.”<sup>222</sup> To borrow a construct introduced earlier in this Article, the literature is largely working within the same problem-solution space. The problem is the lack of positive recognition of a constitutional right to education; the solution is to recognize such a right, or an appropriate substitute.

This is good and necessary work. But as the *Brown* Court acknowledged, “In the first cases in this Court construing the Fourteenth Amendment, decided shortly after its adoption, the Court interpreted it as proscribing all state-imposed discriminations against the Negro race.”<sup>223</sup> The *Brown* Court was referring, of course, to the state action doctrine laid out in the *Civil Rights Cases*.<sup>224</sup> In other words, “civil rights, such as are guaranteed by the Constitution against State aggression, cannot be impaired by the wrongful acts of individuals, unsupported by State authority in the shape of laws, customs, or judicial or executive proceedings.”<sup>225</sup>

If the interpretation of the Fourteenth Amendment is the problem, then the solution can only be to regulate state actors. And because the Privileges or Immunities Clause has effectively been read out of the Fourteenth Amendment,<sup>226</sup> advocates seeking to apply the Fourteenth Amendment, as currently interpreted (i.e., without a fundamental right to education),<sup>227</sup> can do so only by asserting unequal treatment of a protected class

219. See MICHAEL A. REBELL, *COURTS AND KIDS: PURSUING EDUCATIONAL EQUITY THROUGH THE STATE COURTS* (2009).

220. See Chemerinsky, *The Deconstitutionalization of Education*, *supra* note 205. See also REBELL, *COURTS AND KIDS*, *supra* note 219.

221. See Ogletree & Robinson, *supra* note 11.

222. See Kimberly Jenkins Robinson, *Resurrecting the Promise of Brown: Understanding and Remediating How the Supreme Court Reconstitutionalized Segregated Schools*, 88 N.C. L. REV. 787 (2010).

223. *Brown v. Board of Education*, 347 U.S. 483, 490 (1954).

224. 109 U.S. 3, 21–22 (1883). See also *U.S. v. Cruikshank*, 92 U.S. 542 (1875); *U.S. v. Harris*, 106 U.S. 629, 639–40, 643–44 (1883).

225. 109 U.S. at 25.

226. See *The Slaughter-House Cases*, 83 U.S. 36 (1872); see also, e.g., J.M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963, 1020 (1998); Richard L. Aynes, *Constricting the Law of Freedom: Justice Miller, the Fourteenth Amendment, and the Slaughter-House Cases*, 70 CHI.-KENT L. REV. 627, 627 (1994); cf. William J. Rich, *Taking “Privileges or Immunities” Seriously: A Call to Expand the Constitutional Canon*, 87 MINN. L. REV. 153 (2002).

227. Note that a panel of the Sixth Circuit recently recognized a fundamental right to education consisting in a minimum quantum of literacy—though the Circuit then voted to rehear the appeal en banc. See *Gary B. v. Whitmer*, 957 F.3d 616 (6th Cir. 2020), *reh’g en banc granted, opinion vacated*, 958 F.3d 1216 (6th Cir. 2020).

by a state actor.<sup>228</sup> Alternatively, they may assert a narrowly defined class of statutory rights against public entities. That framework constrains the issues that advocates can address, and does not always map neatly on to the reforms they hope to achieve using litigation as the tool.<sup>229</sup>

Administrative law scholars have long recognized that the shift from “government,” that is, exclusively by state actors, to “governance,” or fulfillment of government functions by a mix of public and private actors, has already happened.<sup>230</sup> The administrative law literature defines privatization as “the government contracting with private entities and individuals for services or in other ways transferring responsibility for performance of governmental functions to private hands.”<sup>231</sup> Accordingly, that literature has focused on tools regulating that point of transfer, and thereafter. Because most private entities participating in governance do so pursuant to a government contract, contract design and enforcement is one regulatory mechanism.<sup>232</sup> Obviously, though, a contract approach is only viable where there is a contract; here, there is none between philanthropic policymakers and members of the public.

The delegation model developed by Gillian Metzger and Kenneth Bamberger is perhaps the most appealing candidate for addressing privatization “situations that may present significant threats to constitutional accountability.”<sup>233</sup> Recognizing that state action doctrine is too black-and-white, Metzger instead argues for “rethink[ing] state action in private delegation terms,” in which “the key issue becomes not whether private entities wield government power, but rather whether grants of government power to private entities are adequately structured to preserve constitutional accountability.”<sup>234</sup> The delegation analysis is, self-consciously, trickier to apply to “tacit,” rather than express, “authorizations” of government power.<sup>235</sup> As Metzger argues, “most instances of privatization in this country represent moves to private

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228. Because the Privileges or Immunities Clause is unavailable, *see supra* note 226, and because *Rodriguez* has foreclosed a substantive due process approach, *see supra* notes 202-204 and accompanying text, the Equal Protection Clause is the only one that remains available in this context, albeit constrained by, *e.g.*, *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701 (2007).

229. For example, in *Peter P., et al. v. Compton Unified School Dist., et al.*, plaintiffs argued that they were disproportionately affected by trauma stemming from high rates of violence and poverty in their community, such that they required across-the-board accommodations under the Rehabilitation Act, 29 U.S.C. § 794; Department of Education regulations pertaining to their right to a free and appropriate public education at 34 C.F.R. §§ 104.32, 104.33, and 104.36; and the Americans with Disabilities Act. 135 F. Supp. 3d 1098 (C.D. Cal. 2015) (denial of motion to dismiss); 135 F. Supp. 3d 1126 (C.D. Cal. 2015) (denial of preliminary injunction). These issues might alternatively be addressed by the state legislature, the municipality, and/or the local school board.

230. *See* Freeman, *The Private Role in the Public Governance*, *supra* note 9, at 546–47.

231. Gillian B. Metzger, *The Constitutional Duty to Supervise*, 124 *YALE L.J.* 1836, 1849 (2015).

232. *See, e.g.*, Freeman, *The Contracting State*, *supra* note 10.

233. Metzger, *Privatization as Delegation*, *supra* note 9, at 1459.

234. *Id.* at 1456.

235. *Id.* at 1459.

implementation of government programs rather than government disengagement from an activity altogether,” and, therefore, that delegation theory is still a leading candidate for managing “situations that may present significant threats to constitutional accountability.”<sup>236</sup> Jurisdictional challenge, though, precisely forces government disengagement from particular activities.<sup>237</sup>

The administrative law literature quite reasonably views privatization within the following schematic. First, the government holds X power. Second, the government decides to transfer some or all of X power to a private entity. The accountability questions arise in asking what powers should be transferred and how the private entity should behave once the power has been transferred. But the privatization problem at stake here works differently. First, the government holds X power. But some private entity believes it should hold X power instead. Therefore, it begins, of its own volition, to take that power for itself via jurisdictional challenge. Alternatively, it so vigorously engages in problem definition that it dictates how and to what end the government wields X power. Private policymaking exists outside and, most critically, *upstream of* the transfer-of-power model contemplated in most of the governance literature.<sup>238</sup>

Some commentators have moved beyond decisional law. Kimberly Jenkins Robinson has argued that the legislative and executive branches, working together and in partnership with the states, can do more than decisional law alone in addressing inequality in education.<sup>239</sup> Her interbranch and interfederal framework could easily be applied to private policymaking. First, Jenkins Robinson focuses on federal statutes as the better practical source of educational rights. Especially when accompanied by funding, they are more likely to be implemented and can be detailed enough to make meaningful change; because of the political will necessary to enact them in the first place, they are less likely to be resisted by states and municipalities.<sup>240</sup> Second, her model recognizes that the remedies problem can only be addressed incrementally and

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236. *Id.*

237. Metzger addresses this at *id.* at n. 318, citing the Jaybird primaries in *Terry v. Adams*, 345 U.S. 461 (1953) as “the prime example of a government power existing absent an express delegation,” and observing that “cases such as *Shelley v. Kraemer*, 334 U.S. 1, 19–21 (1948), or *Reitman v. Mulkey*, 387 U.S. 369, 378–79 (1967), at best fit awkwardly under the private delegation label; their underlying concern instead appears to be with the state sanctioning or giving affirmative support to private racial discrimination.”

238. More recent contributions to the literature have observed that privatization has also begun to encompass, for example, the “marketization of bureaucracy” and “government by bounty,” both forms of refashioning the public sector in the image of the private. *See, e.g.*, Michaels, *supra* note 13, at 1026–27. I would suggest that these are important phenomena to study in the process of mapping empirically the extent to which the private has become hegemonic, *see supra* note 160, but pose a different accountability challenge from the hybrid public-private policymaking model.

239. Kimberly Jenkins Robinson, *The Case for a Collaborative Enforcement Model for a Federal Right to Education*, 40 U.C. DAVIS L. REV. 1653 (2007).

240. *See id.* at 1720–35.



with ongoing oversight.<sup>241</sup> A statutory model that enables the federal government to regulate over time, and to continue to incentivize states and municipalities by tweaks to funding packages, makes true change more likely—especially when combined with technical assistance.<sup>242</sup>

And statutes can and must be changed over time. Jenkins Robinson’s detailed diagnosis of the strengths and weaknesses of the Every Student Succeeds Act of 2015 (ESSA) highlights scholars’ ability and responsibility to “think with” statutes, to view them not only as objects of strictly doctrinal interpretation and application, but also of more expansive critique.<sup>243</sup> Why not also suggest that the next major education bill explicitly regulate policymaking behaviors of nonstate actors, or impose transparency and reporting requirements on private money in education policymaking, or ensure that state actors have their own research and development budgets to diminish the intellectual monopoly of private philanthropy? Statutes are far more generative of possibility in education law than is the U.S. Constitution, at least without a significant change in direction from the Supreme Court.<sup>244</sup> State-level adequacy decisions and Fourteenth Amendment jurisprudence only admit of certain problems, and, therefore, of certain solutions. To be sure, we must redress injustices like the persistence of segregation in public schooling. But we must also find ways to address issues that cannot be framed in strictly doctrinal terms of state action and inequality (including, perhaps, the canonical issue of segregation, as *Milliken* shows<sup>245</sup>), and to do so, we must operate on a broader terrain of problems and solutions. Statutory, rather than decisional, public law provides that terrain. And statutory strategies more easily allow private actors to become the objects of regulation, whether explicitly or through a delegation model.

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241. Kimberly Jenkins Robinson, *No Quick Fix for Equity and Excellence: The Virtues of Incremental Shifts in Education Federalism*, 27 STAN. L. & POL’Y REV. 201 (2016).

242. See generally Robinson, *Resurrecting the Promise of Brown*, *supra* note 222, at 839. See also Goodwin Liu, *Interstate Inequality in Educational Opportunity*, 81 N.Y.U. L. REV. 2044 (2006) (arguing for a cooperative-federalism approach to equalizing school financing across states).

243. Kimberly Jenkins Robinson, *Restructuring the Elementary and Secondary Education Act’s Approach to Equity*, 103 MINN. L. REV. 915 (2018). See also Derek W. Black, *Abandoning the Federal Role in Education: The Every Student Succeeds Act*, 105 CALIF. L. REV. 1309 (2017). On “thinking with,” see Claude Lévi-Strauss, TOTEMISM 89 (1963); see also Marjorie Garber, *Good to Think With*, 2008 PROFESSION 11, 14 (Lévi-Straussian “thinking with” allows us “to question the boundary between the terms of the opposition, and to use that questioning as a way of thinking beyond an impasse”).

244. Here I respectfully depart from commentators who, though recognizing the U.S. Supreme Court’s refusal to advance the cause of education justice in recent years, continue to address calls to action to that institution. See, e.g., DRIVER, *supra* note 194, at 423–29; Ogletree & Robinson, *supra* note 11.

245. See, e.g., Stephanie Schmitz Bechteler & Kathleen Kane-Willis, 100 YEARS AND COUNTING: THE ENDURING LEGACY OF RACIAL RESIDENTIAL SEGREGATION IN CHICAGO IN THE POST-CIVIL RIGHTS ERA, PART TWO: THE IMPACT OF SEGREGATION ON EDUCATION IN A “NO EXCUSES” ENVIRONMENT (The Chicago Urban League, February 2017).

A final lesson of *Brown*'s legacy is that the courts are limited in what they can do—and that the recognition of constitutional rights, combined with legislation and funding, can together catalyze change. The arguments against putting too much hope in the courts are well rehearsed.<sup>246</sup> After all, if a constitutional mandate could effect change on its own, school segregation would no longer exist after *Brown*. Nonetheless, the years after *Brown* saw the passage of the first major federal education bill, the Elementary and Secondary Education Act, which pushed huge sums to school districts with lower-income populations and began, incrementally, to reduce inequalities.<sup>247</sup> The real lesson of the extant public law models is that reliance on any one legal tool will only produce limited gains. An integrated strategy is more effective.

## 2. Are Philanthropists State Actors?

The simplest way of solving the private policymaking problem would be to bring it within the ambit of public law. To do so, courts and legislatures would need to recognize private policymakers as meaningfully public, in form or in function.

This Section examines whether current state action jurisprudence could be construed so as to bring private policymakers within the reach of the Fourteenth Amendment, as it is currently interpreted (i.e., without a right to education). Such a move would, for example, require private policymakers to provide a fundamentally equitable and/or adequate education should such rights come to be recognized. That is, it would make current thinking in education law suddenly applicable to the problem of private policymaking. Students and families who wanted, say, to challenge the Gates small-schools initiative, or the charterization of New Orleans or Detroit, as having created or exacerbated racial inequities, or as having diminished the overall quality of available education, could do so by bringing suit against the private policymaker directly.<sup>248</sup>

It seems unlikely that such a lawsuit would be cognizable, let alone successful. True, the U.S. Supreme Court has been clear that the state action question is a fact-

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246. See, e.g., GERALD ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (2d ed. 2008). Derrick Bell, of course, was an early critic of *Brown*'s promise on similar terms. See, e.g., Derrick Bell, *Waiting on the Promise of Brown*, LAW & CONTEMP. PROBS. 431 (1975); Derrick Bell, *The Community Role in the Education of Poor, Black Children*, 17 THEORY INTO PRACTICE 115 (1978); Derrick Bell, *Learning from the Brown Experience*, 11 BLACK SCHOLAR 9 (1979); Derrick Bell, *The Politics of Desegregation*, 11 CHANGE 50 (1979).

247. See Derek W. Black, *Leveraging Federal Funding for Equity and Integration*, in *THE ENDURING LEGACY OF RODRIGUEZ: CREATING NEW PATHWAYS TO EQUAL EDUCATIONAL OPPORTUNITY* 227–32 (Charles J. Ogletree, Jr. & Kimberly Jenkins Robinson eds., 2015); ROSENBERG, *supra* note 246, at 46–54.

248. For example, the pending case *Gary B. v. Whitmer*, discussed at *supra* note 227, challenges a state of affairs that some have attributed to the effects of charterization via private policymakers. See, e.g., Mark Binelli, *Michigan Gambled on Charter Schools. Its Children Lost.*, N.Y. TIMES (Sept. 5, 2017), <https://www.nytimes.com/2017/09/05/magazine/michigan-gambled-on-charter-schools-its-children-lost.html> (last visited Oct. 11, 2020).

intensive determination that is not necessarily foreordained.<sup>249</sup> But none of the guideposts the Court has established seem squarely to apply. Fourteenth Amendment plaintiffs may establish state action by showing that “there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may fairly be treated as that of the State itself.”<sup>250</sup> The private policymaking nexus is actually relatively clear, and in theory there *is* a state actor available to sue. (For example, someone wishing to challenge the Gates small-schools policy in New York could sue the school district.) The problem is that the state actor is not where the challenged decision is truly being made, as in *Terry v. Adams*. And the Court has recently confined *Terry* to the election context, making it unlikely that *Terry*’s broader relational analysis would be applied here.<sup>251</sup> Second, it is possible to hold a private actor “responsible for a private decision only when [the State] has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State.”<sup>252</sup> The relationship between the state and the private entity in the private policymaking context, however, is exactly the inverse. And “[m]ere approval of or acquiescence in the initiatives of a private party is not sufficient to justify holding the State responsible for those initiatives under the terms of the Fourteenth Amendment,” making it difficult to use public actors’ tacit acceptance of private policymakers’ jurisdictional challenges as the hook for state action either.<sup>253</sup>

The “public function” test of state action may be the most promising. There, a court asks first whether a private actor is serving a public function and, if so, whether that function has been “traditionally the exclusive prerogative of the State.”<sup>254</sup> The U.S. Supreme Court has recognized that education is a public function, but has hesitated to recognize education as exclusively within the province of the state.<sup>255</sup> Certainly, it is simply not true that all education has traditionally been state-provided within the United States. The better question is whether *public* K–12 education could be construed as traditionally to have been exclusively provided by the state.

The answer to that question would seem to be yes, by definition. Then, the question would become what, if anything, is irreducibly public about the bundle of functions a state entity would perform in the course of “providing” public education. The Court has widely protected decisions about curriculum and other aspects of what and how

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249. *Brentwood Academy v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 295 (2001); *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 939 (1982).

250. *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 350 (1974).

251. *Manhattan Cmty. Access Corp. v. Halleck*, 139 S.Ct. 1921, 1929 (2019).

252. *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982).

253. *Id.* at 1004–05.

254. *Rendell–Baker v. Kohn*, 457 U.S. 830, 842 (1982) (*citing Jackson*, 419 U.S. at 353, *quoted in Yaretsky*, 457 U.S. at 1011).

255. *See, e.g., Rendell–Baker*, 457 U.S. at 842.

children are schooled as core to a state's broad police power.<sup>256</sup> That may not mean, though, that such decisions are so *inherently* public as to be incapable of being made by a private entity with regard to public education. Indeed, most recently the Court has declined to find state action where a private actor administered, by express delegation from the city, New York City's public-access cable channel, a function that the Court acknowledged was among the most traditionally public and would have merited the highest level of constitutional protection absent the technicality of the delegation.<sup>257</sup>

The Court has already been confronted with the jurisdictional challenge problem in a different doctrinal context. In *Zelman v. Simmons-Harris*, the Court assessed the constitutionality of Cleveland's school-voucher program, which allowed parents to spend public dollars at religious private schools.<sup>258</sup> The Court held that this was not a First Amendment problem because of the parents' "true private choice" to direct the funds to religious schools.<sup>259</sup> In the opinion's introduction, the Court recited familiar arguments from emergency, justifying the establishment of the voucher program:

There are more than 75,000 children enrolled in the Cleveland City School District. The majority of these children are from low-income and minority families. Few of these families enjoy the means to send their children to any school other than an inner-city public school. For more than a generation, however, Cleveland's public schools have been among the worst performing public schools in the Nation.<sup>260</sup>

Against this backdrop, it is implied almost any scheme, public or private, is acceptable. The opinion clearly acknowledges that the state of Ohio enacted and directed a legislative scheme permitting the direction of public funds to private schools, and that this is the framework within which the legislatively contemplated, and perhaps even endorsed, individual choices of parents to spend those funds at religious schools operates.<sup>261</sup> But the Court does not see the part as subsumed by the whole. Between *Zelman* and *Manhattan Community Access Corporation*, then, it seems that a highly formalistic analysis would prevail.

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256. See *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–35 (1925); *Meyer v. Neb.*, 262 U.S. 390, 401–02 (1923); *Wis. v. Yoder*, 406 U.S. 205, 213–14 (1972).

257. See *Manhattan Cmty. Access Corp.*, 139 S.Ct. 1921 (2019).

258. 536 U.S. 639 (2002).

259. *Id.* at 649.

260. *Id.* at 644. See *supra* notes 18–28 and accompanying text.

261. *Id.* at 644–45.

### 3. State Action in an Era of Heterarchical Governance

This Article is not the first to observe that the state action doctrine, and the rigid public/private binary, are obsolete. Some have argued for a functionalist redefinition; others have argued for abolition.<sup>262</sup> In essence, these amount to the same doctrinal intervention, based on a shared recognition that the public and private have become hybridized. This Article updates the empirical foundation of these calls—and identifies a new topography of coercion of which courts and statutory drafters ideally might take account.

Government has given way to governance in many policy spaces. This shift signals a flattening of hierarchies, a broad legitimation of the exercise of state-like coercion by both public and private actors, transnationally as well as in the U.S.<sup>263</sup> Legal scholars tend to view governance with some optimism, as an alternative to the problems of regulation: Orly Lobel, for example, argues that “[t]he new governance model supports the replacement of the New Deal’s hierarchy and control with a more participatory and collaborative model, in which government, industry, and society share responsibility for achieving policy goals.”<sup>264</sup> Political theorists and, as relevant here, scholars of

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262. See Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349 (1982); Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503 (1985); Robert J. Glennon, Jr. & John E. Nowak, *A Functional Analysis of the Fourteenth Amendment State Action Requirement*, 1976 SUP. CT. REV. 221 (1976); Richard S. Kay, *The State Action Doctrine, the Public-Private Distinction, and the Independence of Constitutional Law*, 10 CONST. COMMENT 329 (1993); David A. Strauss, *State Action after the Civil Rights Era*, 10 CONST. COMMENT 409 (1993).

263. See, e.g., Manuel Castells, *THE RISE OF THE NETWORK SOCIETY: THE INFORMATION AGE: ECONOMY, SOCIETY, AND CULTURE*, VOL. 1 (2000); Anthony Giddens, *MODERNITY AND SELF-IDENTITY* (1991); Peter Triantafyllou, *Addressing Network Governance through the Concepts of Governmentality and Normalization*, 26 ADMIN. THEORY & PRAXIS 489 (2004); William D. Eggers, *The Changing Nature of Government: Network Governance*, in *COLLABORATIVE GOVERNANCE: A NEW ERA OF PUBLIC POLICY IN AUSTRALIA?* (Janine O’Flynn & John Wanna eds., 2008); R.A.W. Rhodes & David Marsh, *New Directions in the Study of Policy Networks*, 21 EUROPEAN J. POL. RES. 181 (1992); R.A.W. Rhodes, *THE NEW GOVERNANCE: GOVERNING WITHOUT GOVERNMENT*, State of Britain ESRC/RSA Seminar Series (1995); R.A.W. Rhodes, *UNDERSTANDING GOVERNANCE: POLICY NETWORKS, GOVERNANCE, REFLEXIVITY AND ACCOUNTABILITY* (1997); Mike Marinetto, *Governing Beyond the Centre: A Critique of the Anglo-Governance School*, 51 POL. STUDIES 592 (2003); Robert Agranoff & Michael Maguire, *Big Questions in Public Network Management Research*, 11 J. PUB. ADM. RES. & THEORY 295C (2001); John Clarke & Janet Newman, *PUBLICS, POLITICS AND POWER: REMAKING THE PUBLIC IN PUBLIC SERVICES* (2009); Christopher Hood, *BEYOND THE PUBLIC BUREAUCRACY STATE: PUBLIC ADMINISTRATION IN THE 1990S* (1990); David E. Osborne & Ted Gaebler, *RE-INVENTING GOVERNMENT* (1992); Mark Bevir & R.A.W. Rhodes, *Searching for Civil Society: Changing Patterns of Governance in Britain*, 81 PUB. ADM. 41 (2003).

264. Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 344 (2004). See also Bradley C. Karkkainen, “New Governance” in *Legal Thought and in the World: Some Splitting as an Antidote to Overzealous Lumping*, 89 MINN. L. REV. 471, 496 (2004); Jason M. Solomon, *New Governance, Preemptive Self-Regulation, and the Blurring of Boundaries in Regulatory Theory and Practice*, 2010 WIS. L. REV. 591 (2010); David M. Trubek & Louise G. Trubek, *New Governance & Legal Regulation: Complementarity, Rivalry, and Transformation*, 13 COLUM. J. EUR. L. 539 (2007); Neil Walker & Gráinne de Búrca, *Reconceiving Law & New Governance*, 13 COLUM. J. EUR. L. 519 (2007).

education policy tend to worry more about the accountability problems it poses.<sup>265</sup> This Section highlights the features of education governance that, collectively, show the unworkability of current legal concepts of public-ness—and charts a new path.

Education policy scholars have argued that network governance theory, in particular, describes the distribution of power over nominally public schooling.<sup>266</sup> In network governance, “government is understood to be located alongside business and civil society actors in a complex game of public policy formation, decision-making and implementation.”<sup>267</sup> Government actors are not necessarily even first among equals, as in a contracting-out or new-regulatory model; state actors’ roles may be only to mark out a deregulated space for other kinds of entities,<sup>268</sup> or to set benchmarks,<sup>269</sup> or to serve as a coordinating hub for the largely self-directed activities of the various other actors in the network.<sup>270</sup> In network governance, state actors are in heterarchical relationship with all other kinds of actors, “replac[ing] bureaucratic and administrative structures and relationships with a system of organization replete with overlap, multiplicity, mixed ascendancy and divergent-but-coexistent patterns of relation.”<sup>271</sup> This sounds unstable and unpredictable, and it is. In practice, it can only be understood empirically.<sup>272</sup>

Translating this reality to doctrine requires, first, a mapping of philanthropic involvement in heterarchical network governance and, second, consideration of the sorts of legal rules that might be sensitive to that terrain. At the outset, it is clear that thinking about state action from a functionalist perspective is necessary, but not sufficient. It is also necessary to map empirically where, and how, those “state functions” disperse among different actors in the policy network. It may be productive to apply the hoary “bundle of sticks” property-rights metaphor to state action: the state is not a unitary entity, but a bundle of functions that, under network governance, are not always held by a nominally public actor. I offer here several questions to guide a research agenda.

First, one might ask who has discursive power to determine the policy “problems” that in turn constrain the set of “solutions” that may be offered, debated, and ultimately adopted. Under network governance, such discursive power orchestrates the behavior

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265. Ball & Junemann, *supra* note 14; Lubienski, Brewer, & La Londe, *supra* note 4; Lubienski, *Sector Distinctions*, *supra* note 4.

266. Ball & Junemann, *supra* note 14.

267. JOOP KOPPENJAN & ERIK-HANS KLIJN, MANAGING UNCERTAINTIES IN NETWORKS: PUBLIC PRIVATE CONTROVERSIES 25 (2004).

268. See DeBray et al., *supra* note 159.

269. Ball & Junemann, *supra* note 14, at 133.

270. *Id.* at 134.

271. *Id.* at 137–38.

272. *Id.* at 141 (citing Danny MacKinnon, *Managerialism, Governmentality and the State: A Neo-Foucauldian Approach to Local Economic Governance*, 19 POL. GEOGRAPHY 293 (2000)). See also DeBray et al., *supra* note 159, at 181–82.

of the network.<sup>273</sup> In earlier iterations of governance, the identifiable state actor is unquestionably the problem-setter, even if private actors join in proposing, evaluating, and implementing solutions.<sup>274</sup> (This may be why earlier legal scholarship on governance is relatively optimistic—an ascertainable state actor, still accountable to the public in many ways, exerts substantial control merely through its power to identify “problems.”<sup>275</sup>) However, private actors, especially private philanthropies, now hold much of that problem-setting power in the education policy space. Understanding precisely how much, and the extent to which that power constrains both private and, in a *Terry v. Adams*-like analysis, public actors within the same governance network, is one way of understanding the “stateness” of this type of state action.

Second, one might ask about a particular entity’s power to “benchmark” the behavior of others in the network. Benchmarking-as-state-power, of course, is not unique to network governance. However, in network governance theory, it is often viewed as a hallmark of state power, something that the public entity does in its role as coordinator of the heterogenous policy network around it.<sup>276</sup> In the public education context, the critical questions to ask around benchmarking involve its incomplete transition from public to private and back again over the last sixty years. The federal government benchmarks to orchestrate the education policymaking of state and local governments under a “cooperative federalism” model.<sup>277</sup> Private philanthropies benchmark their own private grantees (e.g., universities undertaking research then used in problem-solution packages), often using benchmarking as a finely-tuned means of program control.<sup>278</sup> And philanthropies, in turn, have begun to benchmark governments, whether via advising on the development of the federal government’s own benchmarks or in conditioning assistance on meeting certain metrics.<sup>279</sup> Coupled with effective jurisdictional challenge, such oversight tactics may begin to exert state-like coercive force.

The private-to-public transition of such benchmarking activity, and in particular, the use of financial accounting tools has been described in the eponymous literature as the development of “audit culture”: “the corporate form . . . moving into domains of state and civil society governance with its engagement in processes of indicator

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273. BALL & JUNEMANN, *supra* note 14, at 139–40, 5–6.

274. *See, e.g.,* Freeman, *The Contracting State*, *supra* note 10.

275. *See, e.g.,* Jody Freeman, *Extending Public Law Norms through Privatization*, 116 HARV. L. REV. 1285 (2003); Lobel, *supra* note 2646.

276. BALL & JUNEMANN, *supra* note 14, at 133–34.

277. *See generally* MANNA, *supra* note 17; *see also* MEHTA, *THE ALLURE OF ORDER*, *supra* note 16, chapters 7 and 8.

278. *See supra* note 50 and accompanying text.

279. *See supra* note 82; *see also supra* notes 29–50, and accompanying text.

development and data collection.”<sup>280</sup> Direct philanthropist oversight and benchmarking explicitly has a “coercive dimension” functionally equivalent to that of a governmental authority.<sup>281</sup> At the same time that venture philanthropists insist that they are making policy decisions solely on the basis of objective evidence;<sup>282</sup> they decide which statistical measurements matter;<sup>283</sup> they fund the research and evaluation intended to provide “objective” support for their preferred policies;<sup>284</sup> and they create a “policy terrain” in which counter-evidence is unwelcome.<sup>285</sup> As in other audit cultures, that of privatized education policymaking frames what is essentially political as merely “administrative and technical matters to be dealt with by experts, thereby masking their ideological content and removing them from the realm of contestable politics.”<sup>286</sup> The presence of auditing practice, then, is one stick in the bundle of state power under network governance.<sup>287</sup>

Third, one might look for attempted or successful jurisdictional challenge as another meaningful exercise of state power under network governance. Private entities engaging in practices of jurisdictional challenge take away power that has historically accrued to state actors, without the consent, or formal delegation, or contracting of that power by those state actors. Jurisdictional challenge also differentiates private policymaking in the public education space from U.S. law and culture’s traditional recognition and protection of private education. Though the state does not have a traditional monopoly over education broadly (nor, in our constitutional arrangement,

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280. Sally Engle Merry, *Indicators, Human Rights, and Global Governance*, 52 CURRENT ANTHROPOLOGY S83, S91 (2011). See, e.g., Marilyn Strathern, *AUDIT CULTURES: ANTHROPOLOGICAL STUDIES IN ACCOUNTABILITY, ETHICS AND THE ACADEMY* (2000); Michael Power, *THE AUDIT SOCIETY: RITUALS OF VERIFICATION* (1997); *THE WORLD OF INDICATORS: THE MAKING OF GOVERNMENTAL KNOWLEDGE THROUGH QUANTIFICATION* (Richard Rottenburg et al. eds., 2015); *THE QUIET POWER OF INDICATORS: MEASURING GOVERNANCE, CORRUPTION, AND RULE OF LAW* (Sally Engle Merry, Benedict Kingsbury, & Kevin Davis eds., 2015); Sally Engle Merry, *THE SEDUCTIONS OF QUANTIFICATION: MEASURING HUMAN RIGHTS, GENDER VIOLENCE, AND SEX TRAFFICKING* (2016). On financial accounting tools in particular, see Cris Shore & Susan Wright, *Audit Culture Revisited: Rankings, Ratings, and the Reassembling of Society*, 56 CURRENT ANTHROPOLOGY 421, 421 (2015).

281. See, e.g., discussion of these theorists in Shore & Wright, *supra* note 280, at 426.

282. See, e.g., *Evidence-Based Policy*, ARNOLD VENTURES, <https://www.arnoldventures.org/work/evidence-based-policy/> (last visited Sept. 6, 2020).

283. See, e.g., THOMAS J. KANE ET AL., *Have We Identified Effective Teachers? Validating Measures of Effective Teaching Using Random Assignment*, THE GATES FOUNDATION, <http://k12education.gatesfoundation.org/resource/have-we-identified-effective-teachers-validating-measures-of-effective-teaching-using-random-assignment/> (2012) (last visited Sept. 6, 2020).

284. Scott & Jabbar, *supra* note 4, at 252.

285. *Id.* at 253.

286. Shore & Wright, *supra* note 280, at 421. As Schattschneider observes, “A tremendous amount of [political] conflict is controlled by keeping it so private that it is almost completely invisible.” See SCHATTSCHNEIDER, *supra* note 130, at 7.

287. Surveillance and the attempt to conform reality to metrics, rather than vice versa, was also a hallmark of the modernist state. See, e.g., James C. Scott, *SEEING LIKE A STATE: HOW CERTAIN SCHEMES TO IMPROVE THE HUMAN CONDITION HAVE FAILED* (1998).



should it), it *does* have a traditional monopoly over *public* education, by definition.<sup>288</sup> When that *particular* power is redistributed among other kinds of actors (rather than the existing power of private actors to engage in private education), those actors might be meaningfully thought of as exerting state power.

Whatever inquiry reforms or replaces the state action doctrine would necessarily be deeply fact-bound and potentially quite difficult to manage in practice without an underlying theory of state-ness. We have already seen the category problems that arise from focusing too narrowly on the identity and behavior of the entity participating in governance. Instead, I propose flipping the view to the other end of the governing relationship—the experience of the parent, student, community member, or educator. The real problem with private policymaking is not so much its private-ness per se—it is the incursion of that private-ness into a public sphere. In the paradigmatic example of American private K–12 education, a religious or independent private school, the parent, and child make the *choice* to attend that school (often at significant personal expense), as against the default option of attending the local public school. But many students cannot or do not wish to attend private school and rely on the availability of the public option. Similarly, the relationship between public school educators and their public employers is governed by preexisting, complex set of laws, policies, agreements, and norms predicated in large part on the public nature of that relationship, and of the rights and obligations each has to each other and to the public at large. The upstream incursion of private actors into public school employers’ decision-making disrupts those assumptions without providing any new forms of recourse.

Thinkers as diverse as Antonio Gramsci and Lester Salamon have abstracted this view of state-ness along a coercion-consent spectrum,<sup>289</sup> which can easily be combined with the insights of network governance theory to show that, in the present, nominally public actors do not have a monopoly on coercion. Coercion may, instead, be exerted by any policy actor within the network, to varying degrees.<sup>290</sup> The view of “state action” I propose asks two simple questions. First, is the putatively private policymaker acting within a policy space that has traditionally been considered “public”? Such policy spaces may need to be narrowly defined in order to be sufficiently precise—*public* K–12 education, rather than K–12 education broadly. Second, what degree of

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288. See *supra* notes 257–260 and accompanying text. Jody Freeman observes that “most so-called public functions are neither traditionally nor self-evidently inherently governmental,” citing private prisons, private police, and private charitable organizations as predating their public equivalents. Freeman, *supra* note 10, at 172 n.73. But it is nonetheless possible to mount a coherent argument that certain collective goods should be, as a normative matter, provided exclusively by the government; see, e.g., Michael Walzer, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 86, 198 (1983).

289. See *supra* note 160; Lester M. Salamon, *The New Governance and the Tools of Public Action: An Introduction*, 28 FORDHAM URB. L.J. 1611, 1650–54 (2001).

290. In other words, coercion is more a methodological, empirical problem than a theoretical or normative one. See *supra* note 160.

coercion is that policymaker able to exercise within that space—over nominally public actors, over particular decisions of those nominally public actors, over that particular policy network as a whole, over educators, over students? (This second question, of course, requires a prior determination of the threshold of coercion to be viewed as meaningfully “public” or “state” in nature. Such a determination could be made by decisional law and/or by statute.)

Such a view of the “public” would require private education policymakers to abide by the same constitutional and statutory guarantees that apply to the formally state actors from whom they have unilaterally arrogated power. It seems to be only a fair trade. And it is consistent with longstanding analytics of power in education federalism,<sup>291</sup> simply applying those heuristics to a new kind of actor jostling for position among the fifty states and thousands of municipalities and districts under the federal umbrella of public education governance.

## B. Private Mechanisms

### 1. Private Law

Public law mechanisms of accountability for private policymakers may not be practically feasible, at least without a comprehensive re-theorization of what “public” means. Another solution is to use *private* law—confined in this Section to positive sources of law—to hold philanthropists to account for their engagement in policymaking. After all, they are private entities. However, this approach ultimately proves to be a mismatch too. Private law contemplates different kinds of relationships than those that exist between private policymakers and public policymakers, students, parents, educators, and members of the public—and for that reason, does not currently include causes of action that are a good fit for the problems described in this Article. And private law may not be able to provide the kinds of wholesale structural remedies that education plaintiffs typically seek.

Broadly, a private law strategy might most obviously fall into one of three categories: contract theories, tort theories, and statutory causes of action. Philanthropies would be more attractive targets than public entities, perhaps, where plaintiffs sought money damages; where relief against the philanthropy directly could be more effective than against a public entity seemingly powerless to resist its influence, as in a present-day Annenberg Challenge-type situation;<sup>292</sup> and where a lawsuit is part of a rhetorical or political strategy.

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291. See, e.g., Michael Heise, *The Political Economy of Education Federalism*, 56 EMORY L.J. 125, 129 (2006); see also MANNA, *supra* note 17, at 14–15, 19, 41, 88.

292. See the discussion of the *Gary B. v. Whitmer* litigation, *supra* notes 227 and 248.

Contract theories are not viable options. A claim for breach of contract, of course, presupposes a contract—a preexisting, consensual relationship between the parties, with terms ascertainable enough to determine when one or more parties has breached them. Philanthropic involvement in education policymaking may involve a grant or donor agreement between the philanthropy and an entity such as a school district or university. It is conceivable that either party might exercise its contractual remedies for perceived nonperformance by withholding payment<sup>293</sup> or, in turn, by suing for nonpayment.<sup>294</sup> But this does nothing to remedy the existence of that grantor-grantee relationship in the first place, should anyone object to it or to its effects.<sup>295</sup>

Claims sounding in tort open up new, though as yet untested, possibilities. At base, tort theories require that the defendant owe some sort of duty to the plaintiff.<sup>296</sup> Most states have sources of positive law establishing a student’s right to some minimum standard of education, and equity and adequacy litigation over the past several decades based on these standards has been successful in forcing states and districts to change funding allocations and other key policies.<sup>297</sup> Education provisions in state constitutions may, under those states’ laws, give rise to implied private rights of action for enforcement of those rights under the common law.<sup>298</sup> Though implied private rights of action are disfavored under federal law, most states continue to apply an older *Cort v. Ash*-style analysis.<sup>299</sup> If such cases progressed past the pleading stage, however, plaintiffs would face the challenge of showing that the philanthropy’s behavior caused the harm complained of, and that that chain of causation was not interrupted by a public entity’s endorsement or enactment of the given policy.<sup>300</sup>

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293. See, e.g., Colvin, *supra* note 25, at 36.

294. I have not been able to find any examples of such a suit, however.

295. Freeman, *supra* note 10, at 202, has observed that “Given legitimate fears about lax government enforcement, contracts could go farther still by conferring explicitly . . . third-party beneficiary rights that would allow consumers to sue when government monitoring failed.” It seems, however, that most philanthropist-government contracts do not include such provisions, and indeed, even public comment or pushback has not been welcomed. See, e.g., Cucchiara et al., *supra* note 101, at 2460-462 (Philadelphia); DiMartino & Scott, *supra* note 4 (New York City). And in the wake of *Astra USA, Inc. v. Santa Clara County, Cal.*, 563 U.S. 110 (2011), it seems unlikely that courts would be inclined to imply such rights.

296. See, e.g., Leon Green, *The Duty Problem in Negligence Cases*, 28 COLUM. L. REV. 1014, 1022 (1928); David Owen, *Duty Rules*, 54 VAND. L. REV. 767 (2001).

297. See, e.g., REBELL, COURTS AND KIDS, *supra* note 219.

298. Sonja Ralston Elder, *Enforcing Public Educational Rights via a Private Right of Action*, 1 DUKE F. L. & SOC. CHANGE 137, 149–50 (2009).

299. *Id.* at 149–51; compare *Cort v. Ash*, 422 U.S. 66 (1975), with *Alexander v. Sandoval*, 532 U.S. 275 (2001).

300. See, e.g., Terry Christlieb, *Why Superseding Cause Analysis Should Be Abandoned*, 72 TEX. L. REV. 161 (1993).

Available statutory causes of action are nonexistent as of yet. The major federal education statutes appear not to contain express private rights of action.<sup>301</sup> (Implied private rights of action are, as mentioned, unavailable at the federal level.)<sup>302</sup> Section 1983 remains available as a private right of action to enforce federal statutes under very narrow circumstances.<sup>303</sup> However, even if Section 1983 were held to be available to private plaintiffs to enforce federal education statutes, it is, of course, only available against state actors.<sup>304</sup> This is so even though the plain language of the statute—“Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia . . . .”—implies the intriguing possibility that a private policymaker acting through a public one might also be open to suit.<sup>305</sup>

Creating a private right of action, however, is as easy as enacting a statute. Though bringing claims against private education policymakers has until now been unthinkable, this is only, I submit, because the extent of private influence over education policymaking has not been known or problematized within the law. If the political will existed, state legislators could be just as quick to pass laws holding philanthropic policymakers to procedural and substantive account as they have been to pass the laws drafted by philanthropic policymakers.<sup>306</sup>

## 2. Private Ordering in the Philanthrosphere

A legal vacuum does not imply a vacuum of all effective forms of ordering. As complete system of social control comprises many categories of rules, only some of which can be classified as “law.”<sup>307</sup> In Robert Ellickson’s system, rules that “emanate” from oneself are “personal ethics” from formalized second-party relationships of control, contracts; from social forces, norms; from organizations, organization rules; and finally, from governments, law.<sup>308</sup> Each can be equally determinative of behavior—rules designated as “laws” are not necessarily more likely to engender

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301. Benjamin Michael Superfine, *Using the Courts to Influence the Implementation of No Child Left Behind*, 28 CARDOZO L. REV. 779, 806 (2006). The Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400-1409, is an important exception to the general rule that the federal education statutes do not include private rights of action. Under 20 U.S.C. §§ 1401(19)(A) and (B), however, such actions may only be brought against public entities (with the caveat that subsection (19)(B) permits suit against “educational service agencies,” which in some cases may be private actors, but of a very specific kind unlikely to overlap with the kinds of private policymakers at issue here).

302. *See supra* note 299.

303. *See* *Blessing v. Freestone*, 520 U.S. 329, 340–41 (1997); *Gonzaga Univ. v. Doe*, 536 U.S. 273, 287–88 (2002).

304. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 935 (1982).

305. 42 U.S.C. § 1983.

306. *See, e.g.*, *Anderson & Montoro Donchik*, *supra* note 158.

307. ELLICKSON, *supra* note 192, at 123–24.

308. *Id.* at 128.

compliance and, in fact, may encode aspirational more than actual behavior.<sup>309</sup> Indeed, “a society’s operative rules are best revealed by the characteristics of events that regularly trigger enforcement activity.”<sup>310</sup> In other words, though the behavior of private policymakers is largely lawless, it is not anarchic. Rather, it is ordered by other kinds of rules and relationships, which can, perhaps must, be traced empirically.<sup>311</sup>

The classic theorists of private ordering suggest that it always begins from legal rights—liabilities and entitlements.<sup>312</sup> In a costless pricing system, Coase has famously argued, parties will always bargain to the most efficient allocation of resources regardless of the legal placement of liabilities or entitlements.<sup>313</sup> I want to highlight here another critical, and perhaps less appreciated, dimension of Coase’s theory and those that have followed from it: reciprocity. Like Coase, “[w]e are dealing with a problem of a reciprocal nature.”<sup>314</sup> The question of how to allocate initial rights between A and B, and the subsequent bargaining that may follow, is entirely predicated on the existence of a reciprocal relationship between the parties: “In the case of the cattle and the crops, it is true that there would be no crop damage without the cattle. It is equally true that there would be no crop damage without the crops . . . . If we are to discuss the problem in terms of causation, both parties cause the damage.”<sup>315</sup>

Right away, private policymaking presents several obvious problems for any kind of private ordering system in which members of the affected public would exercise meaningful control over them. First, education rights are among those that may be a poor fit for bargaining for or away at all, such that a state may wish to protect them with an “inalienable entitlement.”<sup>316</sup> (Another word for “inalienable” might be, as to the affective register of policymaking, “public.”)<sup>317</sup> Second, “contrary to standard law-and-economics analysis, in many contexts legal entitlements do not function as starting points for bargaining.”<sup>318</sup> Indeed, individuals and entities are often completely ignorant of the legal backdrop to their actions, disputes, and agreements.<sup>319</sup> Third, “when the law is dysfunctional, private order might arise in its place.”<sup>320</sup>

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309. *Id.* at 127, 129.

310. *Id.* at 136.

311. See discussion *supra* notes 160 and 290; see also ELLICKSON, *supra* note 192, at 1.

312. See ELLICKSON, *supra* note 192, at 137, 139; see also Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1092 (1972).

313. R. H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 2, 6, 15 (1960).

314. *Id.* at 2.

315. *Id.* at 13.

316. Calabresi & Melamed, *supra* note 312, at 1092–93, 1100.

317. See discussion *infra* Section II.C.

318. ELLICKSON, *supra* note 192, at viii.

319. *E.g., id.* at 102–04.

320. John McMillan & Christopher Woodruff, *Private Order under Dysfunctional Public Order*, 98 MICH. L. REV. 2421, 2421 (2000).

The extant empirical literature on philanthropic policymaking maps well onto these observations. Because of the persistent and frankly bizarre bright-line divide between public and private, positive law has carved out a space in which private policymakers are free to do as they wish, to the extent that they can wield informal and financial power over those state agents necessary to putting their plans into action. That bright-line divide severs the kind of reciprocity between philanthropic policymakers and those whom the education system is ultimately meant to serve that is a prerequisite to any meaningful private ordering between the two camps.

Our dysfunctional public order divides the relational communities amongst whom private ordering might arise into two: members of the public and their representative public actors and entities; and philanthropists and state actors, in a networked heterarchical governance configuration. The state actors, the lynchpin between the two, have been disempowered in the policymaking sphere by the very private policymakers they ostensibly are to check and regulate.<sup>321</sup> Extant empirical work, however, suggests that private policymakers primarily engage in private ordering amongst themselves, in the kind of closed, exclusionary grouping that is most likely to arise in the shadow of dysfunctional public order.<sup>322</sup> For example, private education policymakers have intentionally engaged in “idea orchestration” through private policy networks, advocating a defined set of incentivist policies.<sup>323</sup> In implementing this idea orchestration, they have converged on the same intermediary organizations, increasing the likelihood that these policies will be adopted transjurisdictionally.<sup>324</sup> The venture approach has become the “common sense” of a philanthropic sector talking mostly amongst itself, despite critical feedback from other stakeholders.<sup>325</sup>

In the case of philanthropic policymaking, the risks and downsides of insularity and exclusion are not balanced out by the traditional private ordering mechanisms of the market and of information-sharing. Philanthropies are different in kind from other “business persons.”<sup>326</sup> (Indeed, this is both its attraction and a major basis of criticism.<sup>327</sup>) Definitionally, they have an independent financial base of support. Except incidentally, they do not engage in the kinds of bilateral transactions that, in an ideal market system, keep both sides accountable to each other in an equitable exchange. Rather, though papered as contracts, their grantmaking takes the form of a gift, incurring behavioral obligations on the part of the recipient but not on the

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321. See discussion *supra* Sections I.B.2 and I.B.3.

322. See, e.g., McMillan & Woodruff, *supra* note 320.

323. Lubienski, Brewer & La Londe, *supra* note 4.

324. Reckhow & Snyder, *supra* note 4; see also notes 98–102 and accompanying text.

325. See *supra* note 25; see also Cucchiara et al., *supra* note 101.

326. See ERIC W. ORTS, BUSINESS PERSONS: A LEGAL THEORY OF THE FIRM 109, 202–03 (2013).

327. Compare, e.g., Andrew Carnegie, THE GOSPEL OF WEALTH (1889) and Darren Walker, *Toward a New Gospel of Wealth*, FORD FOUNDATION, <https://www.fordfoundation.org/ideas/equals-change-blog/posts/toward-a-new-gospel-of-wealth/> (Oct. 1, 2015) (last visited Feb. 2, 2020), with Sealander, *supra* note 25, at 220–23.

philanthropy.<sup>328</sup> Philanthropies have minimal reporting obligations, mainly designed to ensure that charitable giving is not being used as an improper form of tax evasion.<sup>329</sup> The public often has little sense from required reporting alone of what philanthropists hope to accomplish.<sup>330</sup> The reciprocity at the theoretical heart of private ordering exists only as between philanthropists, not between philanthropists and the public.

Can we imagine a new private ordering, based on meaningful public-private reciprocity? To the extent that legal rights matter, liabilities and entitlements would need to be set in different places: whether at the state or federal level, students, parents, and teachers would need to hold certain positive rights to education, in substance and in policymaking process.<sup>331</sup> The regulatory definition of “politics,” which yet allows such significant philanthropic involvement in that sphere, would need to change.<sup>332</sup> Key policymaking practices and decisions must become the inalienable entitlements of public actors, such that jurisdictional challenge becomes less threatening and less possible. And underlying wealth distributions must also change, such that philanthropists in the individual and in the aggregate are relegated once again to a “partial succor” role.<sup>333</sup> Against that backdrop, philanthropists’ power within the governance network would be diminished, and the public’s power, especially in terms of reputational strategies, would be increased. Another way of describing that kind of public engagement in private ordering might be “private politics.”

### 3. (Private) Politics and the Third Sector

Private politics is antecedent to and a potential consequence of private ordering, encompassing “strategic competition over entitlements in the status quo, direct competition for support from the public, bargaining over the resolution of the conflict, and maintenance of the agreed-to private ordering.”<sup>334</sup> If a given private ordering is unsatisfactory, members of the public can engage in private politics in an attempt to create a new private ordering. Indeed, such efforts have often been effective—for

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328. Gifts engender obligations, see Marcel Mauss, *THE GIFT: FORMS AND FUNCTIONS OF EXCHANGE IN ARCHAIC SOCIETIES* (Halls trans., Taylor & Francis 2002) (1925), which serve as one form of mutuality and accountability. In the philanthropic context, though, it is unthinkable for the recipient of a charitable gift to ever give a gift in return, so that the obligation becomes unidirectional and not reciprocal.

329. See *supra* note 114. Philanthropists are also finding ways of getting around even these minimal requirements, by forming LLCs. See, e.g., Martin Levine, *Chan Zuckerberg LLC: No Tax Breaks + No Accountability = What Exactly?*, NONPROFIT Q.G., <https://nonprofitquarterly.org/chan-zuckerberg-llc-are-no-tax-breaks-plus-no-accountability-good-for-the-public/> (Dec. 7, 2015) (last visited Oct. 26, 2020).

330. See *supra* notes 112–114 and accompanying text.

331. See, e.g., Calabresi & Melamed, *supra* note 312, at 1090.

332. See discussion *supra* Section I.B.1.

333. See *supra* notes 69–70 and accompanying text on partial succor strategies. See also Calabresi & Melamed, *supra* note 312, at 1098.

334. Baron, *Private Politics*, *supra* note 7, at 33.

example, in creating industry-wide third-party certification and monitoring efforts for conflict-free diamonds and in getting individual private companies to commit to changes in particular environmental standards.<sup>335</sup> There are few avenues available within the existing public and private order to address the serious procedural and substantive issues posed by private policymaking. Politicking is necessary to create change. And such politics, to be effective, will have to include both private and public forms. Under network governance, neither policymaking nor politics are limited to the state.<sup>336</sup>

Private politics are much like public politics, but “the parties do not rely on the law or public order . . . although both may be available.”<sup>337</sup> Boycotts are perhaps the best-known examples of private politics.<sup>338</sup> Quintessentially, the aims of private-politics campaigns “are assumed to conflict with the profit objectives of firms.”<sup>339</sup> The end result is often corporate social responsibility (CSR), in which corporations “pay attention to a broader group of stakeholders—customers, workers and communities beyond their usual obligations to shareholders.”<sup>340</sup> Philanthropies, of course, do not have profit motives or obligations, and social responsibility is thought to be inherent to the not-for-profit entity form. Nonetheless, key “contentious repertoires” from the private politics literature translate to philanthropic policymaking.<sup>341</sup>

First, an integrated private-public political strategy is necessary where the underlying policy sphere encompasses both public and private actors with significant power. Public education is one such sphere. Environmental regulation is another; private environmental governance occurs both in the shadow of, and in parallel to, public environmental law, such that it may be impossible to describe or theorize environmental policy as a whole without understanding both constituent parts and their interactions.<sup>342</sup> Private entities are most motivated to self-regulate under the *threat* of government regulation or what is perceived to be a radical strategy of private activism.<sup>343</sup> A social movement contesting private policymaking by philanthropists

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335. *Id.* at 36.

336. See Brayden G. King & Nicholas A. Pearce, *The Contentiousness of Markets: Politics, Social Movements, and Institutional Change in Markets*, 36 ANN. REV. SOC. 249, 250 (2010).

337. Baron, *Private Politics*, *supra* note 7, at 33.

338. *Id.* at 37.

339. *Id.* at 34.

340. Timothy Besley & Maitreesh Ghatak, *Retailing Public Goods: The Economics of Corporate Social Responsibility*, 91 J. PUB. ECON. 1645, 1646 (2007).

341. See Charles Tilly, CONTENTIOUS PERFORMANCES (2008), e.g., chapter 6, *Repertoires and Regimes*.

342. See Vandenberg, *Private Environmental Governance*, *supra* note 10; see also Vandenberg, *Private Life of Public Law*, *supra* note 190; Sarah E. Light & Eric W. Orts, *Parallels in Public and Private Environmental Governance*, 5 MICH. J. ENVTL. & ADMIN L. 1 (2015).

343. Gyorgy Egorov & Bård Harstad, *Private Politics and Public Regulation*, 2016 REV. ECON. STUDIES 1, 1–4; David P. Baron, Margaret Neale, & Hayagreeva Rao, *Extending Nonmarket Strategy: Political Economy and the Radical Flank Effect in Private Politics*, 1 STRATEGY SCI. 105, 106, 121–22 (2016); David P. Baron, *Self-Regulation in Private and Public Politics*, 9 QUARTERLY J. POL. SCI. 231, 232, 234 (2014).



would be most effective if it could raise the credible threat of tighter government regulation. Such a campaign might be directed at the federal level (at the federal tax code or at major federal education legislation and its implementation) or at the state and local level (to constrain the involvement of private actors in public policy decision-making). Such threats encouraged philanthropic self-regulation in the early twentieth century and again in the 1960s and 1970s.<sup>344</sup> As an empirical matter, as much as activists may wish to focus their calls for change in public education policy on public actors and institutions, such a campaign will always be limited in efficacy in a network-governance policy space. Even if the ultimate goal is to shift power back toward the public sector, that will need to be achieved through a hybrid private-public political strategy.

Second, reputation matters. Where firms value their reputations highly, private-politics strategies often motivate those firms to change their behavior.<sup>345</sup> Philanthropy is itself often a reputation-management strategy.<sup>346</sup> And even independent philanthropies are reputation-sensitive, often perceiving their ability to carry out their social missions as dependent on the goodwill of the public, collaborators, and grantees.<sup>347</sup> More charitably, many philanthropists and employees of philanthropies undertake their efforts in order to benefit society in some way (as they define benefit).<sup>348</sup> A campaign strategy that questions whether a given philanthropic gift or agenda is morally or socially “good” could motivate philanthropists to change their behavior.

Targeted at legislators and other state actors who are necessary instruments of philanthropies’ education policy agendas, such reputational and informational campaigns could become an existential threat to private policymaking itself.<sup>349</sup> A social movement might be able to change the problem-solution package around philanthropic involvement in public education, discursively positioning that involvement itself as the problem, and formal and informal restrictions on that involvement as the solution. The research cited heavily in the first Part of this Article is an important first step in articulating this as a problem in need of real regulatory solutions (private or public).

Finally, any serious attempt to engage in private politicking against private policymakers forces a reexamination of the underlying rationale for private policymaking. The private politics literature positions CSR as a means of the private

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344. See, e.g., Sealander, *supra* note 25, at 220–24; CUNINGGIM, *supra* note 19, at 190.

345. Jose Miguel Abito, David Besanko, & Daniel Diermeier, *Private Politics and Public Interest: NGOs, Corporate Campaigns, and Social Welfare 2* (Kellogg School of Management, Nw. U., Working Paper, 2015).

346. See, e.g., Anand Giridharadas, WINNERS TAKE ALL: THE ELITE CHARADE OF CHANGING THE WORLD 120–28, 157–64 (2019).

347. See Walker, *supra* note 327.

348. See, e.g., CALLAHAN, *supra* note 30, at 36–43.

349. Scott & Jabbar, *supra* note 4; DeBray et al., *supra* note 159.

provision of public goods where government is unable to do so.<sup>350</sup> Even Milton Friedman argued that “perfect government trumps the case for CSR and then firms should ignore the external effects that they create.”<sup>351</sup> It is only where government has failed that the market may be pressured to take over the provision of certain public goods.<sup>352</sup> Such arguments from government failure were made at the inception of private education policymaking.<sup>353</sup> They have been sustained and strengthened by the complementary processes of jurisdictional challenge and problematization of the public sector, by which philanthropic policymakers have intentionally weakened public policymakers’ capacity to craft, without private intervention, a public education system that is both equitable and excellent.<sup>354</sup> It is one thing to view private politics as normatively desirable where government is simply not capable of providing the particular public good (“where the CSR activity is intrinsically bundled with the firm’s production process,” and so “government provision is not an option and blunter instruments such as regulation seem more plausible”).<sup>355</sup> But the private education policymaking context is not such an example. Instead, private politics are strategically necessary here in order to redirect power toward the public sector, but normatively undesirable where an appropriately resourced government would be able to provide the dual public goods of public education and of democratic accountability of education policymakers.

### C. Education as a Public Good

Assuming the problems of accountability could be solved, would philanthropic influence over education policymaking be a cause for concern? Is the category mistake described here inherently a problem? A full exploration of the normative implications of education privatization, much less privatization more generally, is beyond the scope of this Article. (Indeed, numerous authors have already addressed education privatization directly.<sup>356</sup>) However, I offer a few oblique approaches to these questions, tracing a tentative case for answering “yes” to both in ways that have not been explored by the education-privatization literature.

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350. Besley & Ghatak, *supra* note 340, at 1654.

351. *Id.* at 1660 (citing Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES MAG. (Sept. 13, 1970), available at <http://www.colorado.edu/studentgroups/libertarians/issues/friedman-soc-resp-business.html>).

352. *Id.*

353. See discussion *supra* Part I.A.I.

354. See discussion *supra* Parts I.B.2 (problematization), I.B.3 (jurisdictional challenge); see also notes 216-218 and accompanying text.

355. Besley & Ghatak, *supra* note 340, at 1654.

356. The interdisciplinary literature is too vast to itemize here. In the legal literature, see, e.g., Derek W. Black, *Charter Schools, Vouchers, and the Public Good*, 48 WAKE FOREST L. REV. 445 (2013).

First, and most simply, it is not obvious that the accountability problems described above can be solved. It is unlikely that the state action doctrine will be completely overhauled or that Congress will pass major new education or tax legislation proscribing or regulating philanthropic involvement in education. Though accountability may be possible in concept, creating a real, workable system that actually enforces desired accountability guarantees requires something quite different.<sup>357</sup> If accountability and democracy norms are important to us, we should hesitate to allow them to be violated and, therefore, proscribe the major involvement of any actors whose behavior cannot be managed.<sup>358</sup> This is a pragmatic normative case against strategic philanthropy in education, rather than a theoretical one. That is, it is a normative case that may have an expiration date, rather than one that holds in all circumstances. But it may amount to the same thing in the end, if the conditions for real accountability are never in fact in place.

Second, certain public law norms may be incompatible with privatization—especially unilateral privatization via the mechanism of jurisdictional challenge. Jody Freeman has argued that privatization of government functions may in fact be an opportunity to extend public law norms into the private sphere.<sup>359</sup> In Freeman’s view, private actors already, and inevitably, play a significant role in governance in the United States.<sup>360</sup> If we accept “the reality of public/private interdependence,” then the better question is how best to manage these relationships.<sup>361</sup> Most government privatization consists of “contracting out,” and therefore contract and other negotiated, relational tools may be quite effective in imposing public law norms on government service providers.<sup>362</sup> These arguments are potentially quite persuasive as to situations in which a government actor has, *in fact*, delegated or contracted a power or function that it, *in fact*, holds. Freeman also recognizes that there are situations in which privatization is not optimal: “The argument for publicization is strongest in instances when services are highly contentious, value-laden, and hard to specify, and when providers enjoy significant discretion; when services affect vulnerable populations with few exit options and little political clout; and/or when the motivation for privatization is explicitly ideological or clearly corrupt.”<sup>363</sup> Public education clearly meets all of these criteria, and for these reasons, it is a strong candidate for exemption from privatization. Paul Verkuil, by way of “meditat[ing] on our constitutional values,” has suggested other, theoretically and historically grounded limits on the extent of

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357. See, e.g., Bamberger, *supra* note 9, on the implementational challenges of even clearly cabined delegations.

358. See also Gilman, *supra* note 10.

359. See generally Freeman, *Extending Public Law Norms through Privatization*, *supra* note 275.

360. See Freeman, *The Private Role in the Public Governance*, *supra* note 9, at 547.

361. *Id.* at 548.

362. See Freeman, *The Contracting State*, *supra* note 10.

363. Freeman, *Extending Public Law Norms through Privatization*, *supra* note 275, at 1291.

privatization.<sup>364</sup> Martha Minow, by contrast, has suggested that “insisting on such public values does not require public monopoly over the actual delivery of services or even over their design,” even while recognizing that “[then-]recent privatization efforts,” especially in the realm of education, “depart from the longstanding American practice of partnership between the public and private sectors.”<sup>365</sup>

But one of the most salient features of the particular form of privatization I describe and critique in this Article is that it directly attacks the kinds of public values that commentators like Freeman and Minow are confident that private actors can be made to uphold. The entire notion of jurisdictional challenge is predicated on delegitimizing the public sector, and even the public sphere, as the optimal source of anything beyond tax dollars. Public norms and practices, venture philanthropists argue, are the source of the problems they are trying to solve. The fear that “if publicization does occur, it will effectively turn private actors into public ones, undermining all the benefits of privatization” has been allowed to justify an attack on public norms altogether.<sup>366</sup>

Therefore, the normative case for viewing public education as irreducibly public-law in nature must be predicated on a deeper theoretical defense of the public sphere, one that challenges the formalistic way in which the law, and by extension legal scholarship, often conceives of the public. Bonnie Honig suggests that “public things press us into relations with others. They are sites of attachment and meaning that occasion the inaugurations, conflicts, and contestations that underwrite everyday citizenships and democratic sovereignties.”<sup>367</sup> For Honig, “public things” are, literally, things, tangible objects that allow “all of us in common [to] get our very sense of commonness from the object.”<sup>368</sup> Public things are the substratum on which we are able to form the interpersonal bonds and affective orientations that enable public discourse and, ultimately, democratic sovereignty. Crucially, for Honig the term “cover[s] more than those things that are provided by the state and secured by its sovereignty.”<sup>369</sup> Rather, the public is defined by a common intersubjectivity. In other words, anything can be made public by virtue of its capacity to facilitate the kinds of relationships and emotions that constitute a democracy.<sup>370</sup> And Wendy Brown has warned that “when

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364. Paul R. Verkuil, *Public Law Limitations on Privatization of Government Functions*, 84 N.C. L. REV. 397, 406 (2006).

365. Martha Minow, *Public and Private Partnerships: Accounting for the New Religion*, 116 HARV. L. REV. 1229, 1242, 1241 (2003). See also Martha Minow, *Partners, Not Rivals: Redrawing the Lines Between Public and Private, Non-Profit and Profit, and Secular and Religious*, 80 B.U. L. REV. 1061 (2000). Cf. Michael J. Trebilcock & Edward M. Iacobucci, *Privatization and Accountability*, 116 HARV. L. REV. 1422 (2003).

366. Freeman, *Extending Public Law Norms through Privatization*, *supra* note 275, at 1286.

367. BONNIE HONIG, PUBLIC THINGS: DEMOCRACY IN DISREPAIR 6 (2017).

368. *Id.* at 31.

369. *Id.* at 90.

370. One way of bringing Honig’s work into line with doctrinal legal thinking is to think of DRIVER, *supra* note 194, at 9: “The public school has served as the single most significant site of constitutional interpretation within the

governance becomes a substitution for government, it carries with it a very specific model of public life and politics,” divesting average people from even “modest control over setting parameters and constraints and . . . the capacity to decide fundamental values and directions,” to the point of evacuating any “normative conflicts over the good.”<sup>371</sup> She argues instead for a thicker form of citizenship, one in which, at minimum, “we are accountable to the present and entitled to make our own future.”<sup>372</sup>

Brown and Honig offer paths by which we may confront the empirical reality of public and private, recognizing that legal categories of ownership and sovereignty form only one layer in the complex process of determining whether, and how, something is public or private. Category mistakes, as empirics, doctrine, and theory show, are the rule, not the exception here. A minimalistic and rigid definition that conceives of the public as only that which can unambiguously be defined as an arm of the state ultimately serves to erode public law norms and impoverish our concepts of democracy and self-government.

### CONCLUSION: THE LIMITS OF LAW

This Article has demonstrated that private philanthropies are almost entirely unaccountable to anyone else, despite the unprecedented influence they now hold over education policymaking. Philanthropy, of course, has long been criticized as unaccountable and undemocratic.<sup>373</sup> The terms of its uneasy truce with our system of government have been clear: stay out of politics and the public sector.<sup>374</sup> As scholars of education policy have shown, philanthropy has flagrantly violated those terms in recent decades. But because our legal system still contemplates a philanthropy confined by regulation and gentlemen’s agreement to the private sphere, we have almost no tools by which to bring it to heel. In the context of education, and indeed private policymaking more broadly, philanthropy is a category mistake. It is too private to be regulated as public entities are, but because it acts through state actors, private law is largely ineffective. Because it does not participate in the market and does not care about its reputation with those who feel its influence most strongly—students, parents, and community members—private ordering will not work either. In Ellickson’s terms, we have reached “the limits of law.”<sup>375</sup>

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nation’s history.” Applying Honig’s theoretical perspective, that kind of interpretive work is critical to making the public school public (or, perhaps, the public-ness of the school and its potential for interpretation are mutually constitutive).

371. WENDY BROWN, UNDOING THE DEMOS: NEOLIBERALISM’S STEALTH REVOLUTION 127–29 (2015).

372. *Compare id.* at 218, with HONIG, *supra* note 367, at 28, 54.

373. *See, e.g.,* SEALANDER, PRIVATE WEALTH & PUBLIC LIFE, *supra* note 25, at 220–24; CUNINGGIM, *supra* note 19, at 190.

374. *See supra* notes 108–124 and accompanying text.

375. ELLICKSON, *supra* note 192, at 280–85.

Instead, we need new laws and a new kind of private politics that engages with private policymaking and private policymakers—to mandate transparency, adherence to democratic process norms, and substantively equitable and adequate outcomes. Other commentators have been optimistic about the potential of new constitutional doctrines to create change.<sup>376</sup> I am not. For me, the persistence of deep educational segregation and inequality even after *Brown* and extraordinarily successful adequacy litigation, shows that litigation and decisional law may be necessary preconditions for change, but are insufficient on their own.<sup>377</sup> “Social reformers, with limited resources, forgo other options when they elect to litigate. Those options are mainly political and involve mobilizing citizens to participate more effectively.”<sup>378</sup> At the very least, litigation must be coupled with legislative and regulatory strategies.<sup>379</sup>

Such strategies, however, require political will. At the core, what is needed is both a public and private politics that directly confronts philanthropic influence: a public politics that holds elected officials to account in passing the needed reforms, and a private politics that borrows from the playbook of consumer activist groups and, ironically, philanthropies themselves in creating new reputational and discursive pressures. Most importantly, public education needs more funding. Philanthropies have been able to steer the ship with comparatively few dollars precisely because there is little public money devoted to idea generation, to the development of new policies and tools that will allow those with the greatest expertise and stakes in our public education system—educators, students, parents, and average citizens—to have the greatest role in charting the way forward.

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376. See, e.g., *supra* notes 205-220 and accompanying text.

377. See generally ROSENBERG, *supra* note 246. See also Schmitz Bechteler & Kane-Willis, *supra* note 245.

378. ROSENBERG, *supra* note 246, at 428.

379. See, e.g., Robin Rogers, *Why Philanthro-Policymaking Matters*, 48 SOCIETY 376 (2011); Michael Heise, *Litigated Learning, Law's Limits, and Urban School Reform Challenges*, 85 N.C. L. REV. 1419 (2007); Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1016 (2004).