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The Shifting Ground Beneath Us: Framing Nonprofit Policy for the 21st Century

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I. Introduction

The advent of modern philanthropy can be dated with surprising precision. It began exactly one hundred years ago. The federal chartering of the Rockefeller Foundation in 1913 and the creation of a national income tax that same year (and attendant tax exemptions for philanthropic giving a few years later) gave birth to modern institutional philanthropy as we know it. Today—one hundred years, two million nonprofit organizations, many revisions to the tax code, and several decades of intense technological change later—it is time to revisit the rules that shape how we use private resources for public good.

For most of the last century, American social sector policies have been organized around a particular enterprise form—the nonprofit corporation—characterized by non-distribution requirements and privileged by tax exemptions. In just the first decade of the twenty-first century we have seen the emergence of new institutional arrangements, such as social businesses and online networks, and a resurgence of older, traditional arrangements, such as co-operatives that create and distribute privately financed public goods. The last few years have also seen the rise of new mechanisms for financing the production of these goods, including impact investing, social impact bonds, crowdfunding sites, and market guarantees.

Simultaneously, rules that encourage political donors to create and use nonprofit social welfare organizations for campaign finance purposes draw new attention to old boundaries. Where new forms of finance and enterprise pull many nonprofit organizations toward market mechanisms and norms, the rules of campaign finance (as well as the role of government contracting to nonprofits) pull them closer to the public or political domain. These twin forces are breaking down the traditional barriers among the commercial, public, and nonprofit sectors and compromising the role, and perhaps the integrity, of the so-called independent sector. Will the independent, expressive nature of civil society, which serves as host to a vast array of associations, survive these powerful forces?

Just as important, and possibly more so, the first decade of the twenty-first century is proving to be a foundational era for the digital domain. The implications of online infrastructure, data privacy, ownership and access are becoming clear to citizens around the globe. Privacy policies and practices on commercially provided social networks, such as Facebook, Twitter, and Google, affect billions of people. State surveillance of phone systems and Internet traffic is front-page news— surveillance that often occurs through formal but secretive and legally coerced public-private partnerships. This transformation of anonymity and privacy has prompted both hand wringing and shoulder shrugging.

Further, the efforts of commercial ventures to patent human genetic sequences raise general awareness of one's body as a critical source of data to medical research and innovation.[1] Predictive analysis of large data sets, the contents of which are unknown to most of us, promise certain conveniences: they promise to help us find the consumer goods we want and to deliver more relevant advertising. But they also represent a great information asymmetry, where citizens may not know what data is being collected about them by whom, and even if they know what data is being collected about them, they may not know why or what their data reveals. The disclosures of Edward Snowden about the United States government's practice of routinely collecting user data from cellular telephone providers as well from the largest Internet companies where citizens leave digital traces of their activity—Skype, Google, Yahoo, Facebook, Twitter—have been met with alarm by civil liberty advocates but widespread indifference among the American public. Civil society groups have struggled to convey why even "outside of the envelope" metadata can raise important privacy concerns.

The first decade of the twenty-first century is proving to be a foundational era for the digital domain.

Most people understand that the Constitution protects against unwarranted searches and seizures, but how does this protection map onto things like metadata, whose informational capacity is both poorly understood and fast evolving?[2]

We must examine not only how civil society can respond to public and private sector actions but investigate how information resources are used within civil society itself.

Civil society's role as a potential bulwark against both corporate and government overreach now has a digital component. Recent experiences with both government and commercial breaches of online privacy reveal the need for and the challenge of developing effective advocacy regarding digital public goods. We must examine not only how civil society can respond to public and private sector actions but investigate how information resources are used within civil society itself. How will we donate these resources, how can we build trust in their use, and what does their potential financial value imply for civil society?

The innovations in form and finance, the blurring of the boundaries between sectors, and the transformations wrought by digital technology compel us to reconsider the entire framework of using private assets for public goods. They challenge us to examine the multiple policy domains that shape these innovations, and that provide incentives for some and barriers to others. They force us to confront new issues of transparency and accountability.

This paper adopts some new language to capture the new landscape. We leave behind talk of an independent sector, comprised of nonprofit and philanthropic entities, and we instead discuss a broader *social economy,* consisting of these entities in addition to social enterprises, public-private partnerships, for-profit foundations, and entirely new organizational forms such as benefit corporations. In our view, the concept of *social economy* better captures the vast plurality of social institutions having a common economic purpose: channeling private resources to the production of public benefits. Within the social economy, our goal here is to identify key policy domains worthy of attention. These go far beyond the 501(c)(3) tax code.

II. The social economy

For many decades, when we thought of private assets directed toward the production of public benefits, we thought of either nonprofit organizations or philanthropic foundations. Today, the nonprofit-philanthropic dyad is no longer the only way that we use private resources for public good. The rise of social businesses, impact investing, peer-to-peer and sharing enterprises, and the numerous and diverse ways we organize and fund informal networks of "doers and donors" using digital tools are key parts of the picture.

To facilitate an understanding of where and how we are using our own resources to drive social change, our first step is to expand the frame from the nonprofit and philanthropic sector to the entire social economy. The enterprise side of this economy, as shown in Figure 1, includes nonprofits, foundations, benefit corporations, L3Cs, online networks, co-ops, and social welfare organizations. The sources of revenue for these enterprises are as diverse as their institutional forms, including charitable donations, political contributions, consumer purchases, dollars raised through crowdfunding platforms, and impact investment vehicles ranging from low-interest loans to equity investments.

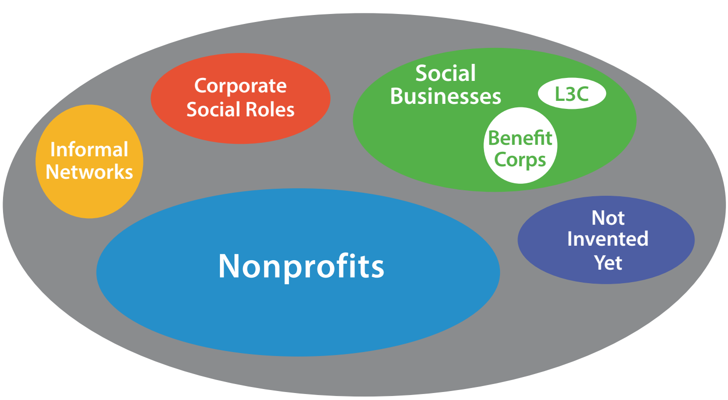
The social economy is also supported by considerable public investments. There are direct infusions of public funds into private organizations through government contracts and grants, and there are indirect subsidies in the forms of tax exemptions and, for eligible nonprofit organizations called "public charities," tax deductions for donors. Though they are the traditional face of the independent, nonprofit sector, public charities earn almost a third of their revenue from government contracts and grants, second only to the forty-nine percent of revenue they generate from fees for services, much as a commercial entity would.[3] This raises questions not just of financial priorities, but also of sectoral purpose and independence.

The social economy crosses several policy domains and regulatory infrastructures.

The social economy crosses several policy domains and regulatory infrastructures. Nonprofits and foundations have been the purview of the tax code, corporate code, state attorneys general and the Internal Revenue Service. Publicly traded for-profit corporations and their social responsibility efforts are the domain of the Securities and Exchange Commission and industry-specific regulators, such as Financial Industry Regulatory Authority, the Consumer Financial Protection Bureau, or even the U.S. Department of Agriculture. Users of online services, nonprofit or commercial, must abide by the Terms of Service of the few major Internet service providers, telecommunications companies, and online social networks. Actions taken online and data stored there are subject to oversight by telecommunications regulators, the Department of Justice and the Department of Defense. Online activities also implicate intellectual property laws such as the Digital Millennium Copyright Act and, in some cases, patent law.

Those organizations in the social economy becoming increasingly active in politics are subject to review by the Federal Elections Commission and state attorneys general offices. Open data, campaign finance, fair elections, and political watchdog groups will monitor their activities.

Figure 1: The Social Economy



Note: The nonprofits category includes all organizations registered under 501(c) Section of the Internal Revenue Code.

As the diversity of the social economy grows, the dynamics of using private resources for public good become more complicated. Each new set of actors brings with it new regulatory concerns, overseers, and norms of accountability and transparency. Just as important, each new actor brings its own industry standards and norms of practice regarding information sharing, partnering with others, and ethics.

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Given the number of actors in the social economy and the multiplicity of policy domains at work, we must expand our collective understanding about how nonprofits work, what policy issues matter to them, and how we should think about the policy framework for civil society.

Policy domains that will shape the future

This broader context allows us to identify shared policy concerns across a range of actors. We can begin to identify categories of practice that should inform new policies.

These include:

- **Structuring social good:** Governance and corporate structures
- **Financing social good:** Investing and philanthropy
- **Creating digital social good:** Using data as a resource
- **Accountability for social good:** Transparency, anonymity, disclosure
- **Incentivizing social good:** Distribution of tax advantages

These issues are examined independently below.

Structuring Social Good: Governance and Corporate Structures

What distinguishes a nonprofit, the work it does or the way it does it? The charitable purposes section of the IRS tax code may lead one to conclude that it is the *type of work* that is done. Developments in the social economy over the last few years, however, suggest that it is in fact *the way the work gets done*.

Nonprofit corporate structures are distinguished by their prohibition on private inurement and the requirement that revenue in excess of costs be used only to further the purpose of the organization. They cannot be distributed in the form of profit to interested parties. In other words, nonprofit organizations may earn revenue in excess of costs but cannot enrich any individual shareholder or investor.

Institutional forms such as benefit corporations, low-profit limited liability corporations, and flexible purpose corporations provide alternative structures that ignore these limits on private benefit. Instead, they offer a variety of ways to integrate a social purpose into the profit-making structure of a traditional corporate form.

The structural requirements for the different enterprises in the social economy extend beyond their tax status. The regulations for nonprofit organizations emphasize the use of revenue for public purpose; the alternatives make no such claim.[4] Rather, they rely on a contractual requirement in the incorporation documents, and an independent reporting mechanism as the tools by which enterprises focus on, and demonstrate their pursuit of, social goods. If both institutional forms can produce similar social goods, when and why should each be used? What government incentives or subsidies (if any) make sense, and when?

The non-profit organizational structure, with a board of directors, restrictions on financial benefit and profit distribution, and annual reporting of activities, has long been synonymous with social good and public accountability. Indeed, even as public opinion of government and private sector enterprises has fallen in recent years, trust in nonprofits tends to be high.[5]

However, this trust should not be taken for granted, nor should we assume that the institutional forms designed for a pre-digital age can or will meet public expectations of accountability in the twenty-first century.

The 2012 backlash against the Susan G. Komen Foundation, which acted entirely within its legal and traditional bounds in making a policy change about funding choices, demonstrates just how the public's expectations are shifting. It can be seen as a first sign of widespread demand for more transparent boards and greater direct public accountability. At the very least, the traditional nonprofit board will need to adapt to an age of rapid, multidirectional, grassroots calls for transparency.

Susan G. Komen Foundation and Digital Governance

In January 2012 the Board of Directors of the Susan G. Komen Foundation, a breast cancer research foundation, announced that the Foundation was discontinuing funding to Planned Parenthood of America. The Foundation had long supported Planned Parenthood's programs to provide breast cancer screening and education.
The move was seen by many as a statement against legal access to abortion procedures. Backlash was immediate—and dispersed.
Social media campaigns led by previous Komen supporters overwhelmed the Foundation. Within weeks, the Board had reversed the decision and reinstated the funding to Planned Parenthood.
The action did not stem the tide of staff, board, and, most important, donor defections. More than a year later, the Foundation has still not regained its fund development prowess, its famous "Walks for the Cure" are undersubscribed and many have been canceled, and several regional chapters of the Foundation have declared their independence.
Calls for a new CEO have persisted since January, 2012, with the first efforts at new leadership widely discredited as disingenuous.

The events are an important example of self-organized activists coming together to change the policies, practices and governance structure of an independent nonprofit organization.

The Komen experience illustrates the role of a new force in the social economy, the organizationally unaffiliated, technologically connected, issue-identified crowd, or what we tend to depict as an informal network. In events as diverse as the Arab Spring, the efforts to stop changes in Internet piracy laws (SOPA/PIPA), tax revolts in France, the outrage against Komen, and even the online search for the bombers of the 2013 Boston Marathon, we can find the fingerprints of these crowds. Networked crowds are now a part of every social movement and many community change efforts, with both positive and negative effects. We need to think systematically about how these networks operate, where they fit into the social economy, what they are and are not capable of, what influence they are having on the institutions with which they interact, and what norms and rules should govern them. How will such groups, which may be temporary by design, be held accountable, when, and by whom? Perhaps most important, how different are these online networks from their more familiar offline counterparts? Answering these questions must precede any attempt to understand what they might hope to accomplish and how they ought to be regulated.

Finally, the governance models and requirements of commercial enterprises, social businesses, B corporations, 501(c)(3), c(4) and c(6) nonprofits, as well as limited partner investors and private foundations, are distinct in important ways for important reasons. While the social economy may be built on these enterprises working toward shared goals, their operating requirements often work at cross-purposes. For example, B corporations are assessed by an independent evaluative organization and audit results are made public. Tax-exempt charitable nonprofits, on the other hand, simply provide annual reports of financial activity. Nonprofits are limited in the ways they can raise and use revenue, where social businesses are not. The enterprises may work together but their governance requirements (and their overseers) are often at odds.

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We can't predict if the future will bring a blending of existing forms or the creation of entirely new forms. We can be sure that the near future, at least, will continue to see the kind of online-offline, formal-informal, and cross-structure dynamics that have defined the social economy during the last decade. This realization gives us the option of proactively laying out shared principles, areas where common governance practices make sense, and areas where there are legitimate reasons for distinct norms and regulations.

Financing Social Good: Investing and Philanthropy

For more than five decades, philanthropic foundations, which possess a tax-advantaged endowment of funds and do not need to raise money, have been making donations to public charities that support their mission. Such donations may also come in the form of debt or equity investments and are regulated by the IRS as part of the foundation's payout depending on investment purpose and foundation type. Over the same time period, investment managers and funds interested in a range of social and environmental issues have also been very active, screening funds and voting financial proxies according to publicized value statements. These activities, known as socially responsible investing, are widespread: estimates peg them at ten percent of all U.S. managed investment capital and up to twenty percent of global assets under management.[6]

Since 2000, there also has been notable, deliberate growth in what is known as impact investing.

Since 2000, there also has been notable, deliberate growth in what is known as impact investing—the creation and use of funds to be actively invested in enterprises that are expected to produce both social goods and financial returns. Impact investing is, in some ways, a more specialized version of socially responsible investing. It draws its funds from nonprofit endowments, commercial investment firms, and public sector pension plans. These funds are usually invested in the form of low interest loans, loan guarantees, or equity investments. They can be found across asset classes, from angel investments to private equity, venture capital, debt and fixed income.

When endowment funds are used for social mission investments, the regulatory mix includes those with oversight of typical capital investments plus the IRS and trust law, as nonprofit directors have a fiduciary responsibility to the nonprofit's mission.[7] Corporate governance advocacy groups seeking to encourage greater activism among shareholders often focus attention on the activities of endowments and pension funds. Regulatory changes regarding sanctioned investment options for nonprofits or public pension funds could significantly influence the pool of capital available and the shareholder activity associated with certain investments. To date, most of the efforts have been successful in shifting norms of practice, while regulatory requirements have for the most part remained unchanged.

When commercial or individual investors seek to participate as active impact investors, they are subject to the rules of the financial market.

Redefining the fiduciary responsibilities of, and possibilities open to, endowment investment managers is a key goal of many shareholder activists. It also is an important component of the corporate code reforms embodied in the creation of the benefit corporation and the low-profit, limited liability company (L3C). Both of these efforts have already succeeded in creating new corporate forms at the state level.
Both movements have as their larger goals the expansion of the capital markets for these enterprises. In pursuit of this goal, these groups push for new enterprise forms, financial investment practices, and regulations.

When commercial or individual investors seek to participate as active impact investors, they are subject to the rules of the financial market. Companies seeking to raise capital from such investors are also subject to the traditional rules of finance, plus they must meet the reporting and disclosure demands being developed by the impact investing community. Those rules and practices are currently being developed within the community and administered and overseen by such bodies as the Global Impact Investing Network and its partners[8]. Various efforts at creating secondary exchanges for selling impact investments are underway, and each of these interacts with the securities and exchange authorities of the relevant region.

We are not yet seeing significant regulatory interest at the level of the securities industry. Instead, the regulators of industries popular with social enterprises, such as sharing businesses offering transportation or accommodation alternatives, are very involved on issues of public safety, accountability and transparency. In particular, several car-sharing and room-sharing companies are fighting regulatory battles in cities across the United States, having fallen afoul of, for example, hotel tax, rent control, and taxi industry regulations. Insurance providers are also paying close attention to these enterprises. Janelle Orsi, a lawyer focused on sustainable enterprises, has identified four areas ripe for action as a result of these new kinds of enterprises and investments: employment law, antidiscrimination rules, local health and safety regulations, and jurisdictional questions raised by activity that crosses regulatory borders.[9] These are all areas that investors or philanthropic funders should be watching.

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Creating Digital Social Good: Using Data as a Resource

A new sphere of policy is increasingly important to nonprofits and foundations, as more and more of their work relies on digital access and information. In an age when accountants, economists, businesses and government officials are looking for ways to value data as an asset, the way information is used and valued as a resource for social good also warrants scrutiny. Reporting requirements on nonprofits have been limited to annual filings of financial activities. As independent entities accumulate large databases of information from across the sector, they have begun to report findings that compare foundation investment holdings or map all foundation funding on a certain issue in a certain area. These enterprises provide greater visibility into the data about the philanthropic and nonprofit sectors.

Expectations, third party analyses, and potential new regulations will begin to drive new data practices within nonprofits and foundations regarding the data they use and generate. Several major foundations are beginning to make the switch from traditional copyright restrictions on research conducted with their funding to the use of more open, alternative licensing systems such as Creative Commons. Other foundations require data and software code built by their grantees to be licensed and shared using open source principles and repositories. These practices are philanthropic applications of the same principles that drove the National Institutes of Health to require its grantees to provide open access to their datasets.

Much of our associational life today occurs online.

However, there is no such pressure for openness or sharing on the social businesses now active in the sector. The pressure for these enterprises to generate revenue—and protect intellectual property—serves as a countervailing force to the principles of more open sharing of social purpose research or data. Once again, the distinct regulatory structures and different governance or corporate motivations at play become visible here. One common resource, data and digital information, will be treated quite differently within the context of a subsidized public purpose enterprise and in an earned revenue-based business with a social mission.

Data matter to the social economy in other ways. Much of our associational life today occurs online. Currently, our access to those digital spaces is typically mediated by businesses—much more so than our access to physical associational spaces ever was. In order to get online—and to participate in the digital commons, most people must agree to the predetermined terms of service set by commercial businesses, which typically aim to monetize the data they collect on users. Moreover, many national governments also heavily mediate access to these digital associational spaces for their citizens.

How do the preconditions and roles of a well-functioning civil society transfer from our analog practices and policies to the digital environment? There are three levels to this question. The first concerns access to digital infrastructure itself, the "pipes" of the Internet and mobile communications. Policy issues at this level are focused on whether access to these technologies is a fundamental right. Should there be the Internet equivalent of the universal service fund for rural telephone coverage or low-cost postal rates for nonprofit organizations? Should Internet access be thought of, and regulated, as an essential public infrastructure resource or public utility? Or, as Mark Zuckerberg has recently announced, is connectivity a basic human right?

Is connectivity a basic human right?

The second level focuses on the production, distribution, and consumption of the digital goods that flow through the infrastructure. We refer here to the ways in which traditionally "analog" social goods, such as libraries or scientific research in the public interest, function in the digital environment. Now that books, databases, scholarship, and journalism, not to mention music, art, and other cultural artifacts, can be distributed digitally, what are the roles for libraries, museums, academic journals, newspapers and magazines, and even concert halls? The proliferation of online educational courses developed by major universities (both public and nonprofit) and by for-profit commercial enterprises to be distributed for free on the Internet is the latest example of how digital technology is challenging the traditional production, distribution, and consumption models of large industries. The nature of distributing digital goods is fundamentally different from that of analog or material goods. How do we define, pay for, and ensure fair and equitable access to these goods?

The third level deals directly with the associational or "voice" role of civil society. In the actual, non-digital world, people physically meet and organize, correspond via mail, pamphlet, or other publication to pursue their common interests, whether those are cultural creation, environmental cleanup, political protest, or neighborhood sharing. We built a set of institutions and philanthropic behaviors on top of these basic practices. In the digital world, associational life is different. First, associational activity happens online and through mobile devices and involves our digital "persons" as much as our "analog" selves. But our presence and full catalogue of activity in the digital sphere is visible to the companies and governments that provide the infrastructure in ways that weren't possible, or were legally prohibited, in the analog space. How do we ensure freedom of speech and association online? How do we protect digital associational activity from commercial or government control? How does online anonymity change how we feel about online speech and associational life, and what do we make of so-called "real name" policies that seek to eliminate that anonymity?

Our digital interactions spin off a secondary set of data unlike anything possible in the physical world.

Second, our digital interactions spin off a secondary set of data unlike anything possible in the physical world. This combined "data exhaust" of clicks and calls, search terms and consumer purchases, create a repository of information that is perhaps most valuable in its aggregate form. Companies use it to sell space to advertisers and governments may use it to track relationships among terrorists and criminals, or more worrisome, political dissidents, whistleblowers, and critics. These aggregate data findings can also be used for the public good, such as predicting disease outbreaks, finding unanticipated relationships between medications and side effects, or even as raw material for new kinds of social science. As new forms of data emerge, so do new privacy concerns. In the past, metadata such as phone logs did not reveal much information on their own, or the private information they could reveal was prohibitively expensive to uncover, so privacy protection was not considered a pressing issue. In an era in which complex social network analysis has become trivially easy, however, our privacy laws and norms may need to change. How can we protect personal privacy, allow contributions to and the creation of new shared social resources, while at the same time maintaining a shared associational space free from corporate or government overreach?

It behooves organizations that seek to use private resources for public good to get issues of "private" and "public" right. This is not new territory for philanthropy—in fact, the issues of donor control and intent (regarding financial assets) are central to the operating structures of private and public foundations. But we now face similar questions about donating private data assets to organizations working for the public benefit. The global success of the Creative Commons movement shows that people do not hold a set or uniform view about how or to what extent their data should be preserved exclusively for private use. When we are given the choice, many of us give a lot away. How enterprises navigate the tensions of private data and public good will become a differentiating factor for organizations in the social economy; not all will make the same choices.

These practices and choices about data may even serve to distinguish and define organizations the way financial profit motive does now.[10] Given civil society's responsibility as a bulwark against corporate and government intrusion on individual liberties, as well as its longstanding role as a haven for dissenters, alternative viewpoints, and minority rights, nonprofits should consider the potential of sector-wide data privacy, access and usage norms.

Accountability for Social Good: Transparency, Anonymity, Disclosure

Nonprofit organizations expanded their roles in fundraising for political campaigns and electioneering activities in the 2010 midterm elections and established themselves as key players during the 2012 Presidential race. Of the $876 million spent by outside groups (not by candidates) at least $500 million of it passed through organizations registered in the 501(c) section of the tax code. These organizations are not required to disclose their donors.[11]

One response to the role of outside money in politics has been increased efforts to require donor disclosure. Because of the role that non-disclosing social welfare organizations are playing in campaigns, these disclosure efforts effectively target the donor disclosure requirements for nonprofits. The long tradition of anonymous charitable giving is caught in this crossfire. Religious teachings and tradition, First Amendment guarantees to free speech and freedom of religion, and Supreme Court precedent dating back to 1958 provide a rationale for anonymity. The 1958 case, *NAACP v. Alabama*, found that the Constitutional right to freedom of association blocked any compelled disclosure of the membership of persons active in the NAACP. It is unclear whether these cultural and legal traditions will prevail in the face of new calls for donor disclosure of funders of politically active nonprofit organizations. It is not clear that such precedent is enough to forestall across-the-board calls for donor transparency.[12]

One response to the role of outside money in politics has been increased efforts to require donor disclosure.

Greater demand for donor transparency has typically (and unintentionally) accelerated the flow of funds to anonymous alternatives. Donor anonymity is often cited as a factor in the rise of donor advised funds as an alternative to private foundations. As campaign finance shows, disclosure regulations often serve to shift money elsewhere in the system. Within the charitable sphere, increasing disclosure requirements on donors is likely to have similar predictable, if undesired, consequences.

Might we come to require all nonprofits to identify their donors? While this is hard to imagine, especially where religious giving is concerned (32 percent of 2012 individual giving and the largest share of giving for decades), it is also hard to imagine that the 501(c)(4) donor disclosure loophole makes much sense in light of campaign finance jurisprudence and regulation.[13] This is a clear example of conflict between previously siloed regulatory domains.

Incentivizing Social Good: Distribution of Tax Advantages

Calls for comprehensive tax reform can be heard coming from both sides of the political aisle; they have been heard as well from bipartisan Congressional and independent commissions. In the face of such calls, the nonprofit sector's advocacy groups have focused almost exclusively on preserving the tax deductibility of charitable donations and the income tax exemption on nonprofit organizations. Groups representing the nonprofit sector, including Independent Sector, Philanthropy Roundtable, and the Alliance for Charitable Reform, have spoken out in favor of retaining the status quo.

> **Tax deductibility for donations to public charities are tax expenditures, just like tax credits for oil companies or corporate foreign tax credits or tax deductions for mortgage interest payments.**

This position, however, threatens the credibility of the sector. Tax deductibility for donations to public charities are tax expenditures, just like tax credits for oil companies or corporate foreign tax credits or tax deductions for mortgage interest payments. For nonprofits that receive more funding from public grants and contracts than from individual donors, financial self-interest should direct their attention to state and federal budget allocations more than to the tax code. The sector needs to expand its policy horizons.

Pressure on nonprofits increases whenever the public coffers are bare. The mere existence of alternative corporate forms that might focus on social good production is an attractive alternative for public budget crunchers, as they see enterprise creation and social good production without loss of tax revenue. These alternative enterprises will extend their own demands for equal treatment under tax law, seeking tax credits (as B corporations have done successfully in Philadelphia) for their work.

Seen within the social economy, the disparate tax treatment of nonprofits and social businesses shifts from background to foreground as a policy issue. Where both taxable and tax-exempt organizations act as production and distribution mechanisms for social services, we should expect to see accelerated demands for quantitative measures, revenue sustainability, and efficiency. Neither side—social businesses or nonprofits—has a commanding lead on any of these qualities, although it is arguable that the social business community has done more to distinguish itself on these fronts. According to traditional models of organizational behavior, nonprofits give greater weight than for-profits to goals for which performance is either difficult or very costly to measure.[14]

The nonprofit community, seeing its monopoly on the social sector eroding, has been playing catch-up on both the rhetorical and practical fronts.

However, recent studies have shown that these differences are shrinking and that for-profits and nonprofits are in fact converging in both their managerial structures and in the way they evaluate their performance.[15] The nonprofit community, seeing its monopoly on the social sector eroding, has been playing catch-up on both the rhetorical and practical fronts of demonstrating results. Both public officials looking for revenue and social business competitors looking for a fairer playing field are calling into question the value of the nonprofit tax exemption.

Most important, the crucial expressive role that civil society associations play is muted in this frame. As many nonprofits rely on public funds to support programs that were once provided directly by public systems, they find themselves in close competition with commercial firms and social businesses. Far from being the vibrant, spontaneous, and expressive realm described by Alexis de Tocqueville almost two centuries ago, American civil society is nowadays composed for the major part of instrumental organizations, which *de facto* operate as government agents while resembling market actors in their managerial style. Within this context, the issue of concern in discussions about incentives is often cost effectiveness and efficiency, areas where nonprofits are at something of a disadvantage in demonstrating their value. It is the expressive and associational elements of civil society organizations, where business has little interest, that most naturally distinguish them from these other enterprises.

III. Conclusion

The policy landscape that has given rise to 1.5 million U.S. nonprofits, more than 75,000 foundations, a volunteer workforce of more than 60 million people, and that treats the millions of religious congregations as nonprofits is undergoing fundamental change. The changes are coming from several directions. External forces include the laws and policies that guide data and digital behavior, the changing expectations for governance and accountability engendered by these tools, and the changing nature of intellectual property in a digital age.

Market-based solutions for the provision of social goods, whether termed social enterprise or alternative corporate forms, are a second external force for change. Budget pressures on public officials heighten the allure of these alternative forms.

One thing is clear: the narrow set of policy issues, regulatory overseers, and industry practices that have shaped the nonprofit sector no longer cover the full scope of practice.

Within the world of nonprofits and philanthropy, the growing demand for outcomes, metrics, and revenue sustainability are contributing factors to the sector-wide shifts. These efforts feed and are fed by the demand for market solutions, divorcing the segment of nonprofit enterprises for whom efficient service delivery is both possible and desirable from those organizations whose missions focus on inclusivity, participation, and the other less easily measured purposes of associational life.

Civil society wants it both ways. Nonprofits and philanthropists want to be seen as a coherent, effective, and mission-driven sector when doing so would be useful for protecting their industry privileges. Thus we see calls for a unified policy voice around tax deductions and exemptions or advocacy efforts that tout the number of jobs or the cumulative contribution to GDP by 501(c) organizations. For most other purposes, however, tax-exempt enterprises are more apt to identify within a specific industry (healthcare, arts, social services) or within an ideological frame (conservative or progressive) than as nonprofits generally.

The social economy itself is still nascent, so it is not surprising that the policy domains at work are not always connected or compatible. The sheer number of regulatory frameworks at play creates confusion and crosscutting pressures. We can expect to see two things, continuing innovation in institutional forms (such as the development of the B corporation) and escalating conflict between social businesses and nonprofits. One thing is clear: the narrow set of policy issues, regulatory overseers, and industry practices that have shaped the nonprofit sector no longer cover the full scope of practice. The multiple motivations of different actors in the economy are reflected in their corporate codes, their governance requirements, their transparency practices, and their view of data or intellectual property as either a public resource or a revenue generator.

What role are nonprofits and philanthropy uniquely positioned to play in our social sector?

The cluttering and confusion of the social sector with new enterprises, new finance mechanisms, and new distribution approaches should not lead us to discount nonprofits. Rather, two key questions arise. First, what role are nonprofits and philanthropy uniquely positioned to play in our social sector? Second, what twenty-first century policies do we need to maintain, protect, and develop them?

Given the number of variables at play, we have several choices. We can allow the natural pattern of policy oversight to play out, in which individual conflicts are resolved over time, by a hodgepodge of legislative decree, offensive and defensive action by interest groups, court order, and regulatory patch. We can reform by slow and idiosyncratic increments. Or we can attempt to gather evidence to inform choices of enterprise form and investment structure and use that evidence to push for broader adoption of proven best practices. We also might prospectively imagine policy alternatives for consideration by a range of stakeholders from inside and outside the social economy. These might range from re-allocating tax privileges away from the enterprise form and toward a set of activities or a type of asset. They might involve tying incentives to a type of public purpose data license or experimenting with new governance mechanisms. We can experiment with and engage a broad set of stakeholders in designing a better set of policies for social good, just as they have stepped forward to innovate and experiment in creating new practices.

Just as there are different expectations for public accountability regarding financial transactions using public or private resources, we will also need to consider the ethical dimensions of public and private data transactions.

Policy interventions must be considered through multiple lenses, including desired social outcomes, motivations for participation, the goal of fostering a robust and diverse civil society, maintaining an external check on government and market players, and democratic ideals. We need to balance both the multiplicity of actors in the social economy with the distinctive purposes of different enterprise forms. Different enterprises should not necessarily be treated the same way by our policies simply because they provide the same services or products. Additional factors, such as populations served, demonstrated public or private use of excess value, and self-imposed accountability mechanisms may become more important ways of differentiating policy treatments. Just as there are different expectations for public accountability regarding financial transactions using public or private resources, we will also need to consider the ethical dimensions of public and private data transactions.

The framework for nonprofit institutions that emerged and thrived in twentieth century America focused on the resources of that age—money and time. The global digital infrastructure of the twenty-first century has brought forward digital data as a new type of resource. The economics of this resource—how it is used, shared, stored, and kept secure—are different in fundamental ways than its analog predecessors. Civil society secures the rights of individuals to freely express themselves, to come together in association, and to provide alternative social goods to those entrusted to the public sector. Its ability to continue to do this in the next century depends upon our ability to develop new norms, policies, and practices governing our digital infrastructure and data practices that respect these same ideals.

1 See the 2013 decision of the US Supreme Court in *Association for Molecular Pathology et al v. Myriad Genetics.*

2 In describing the information being collected from Verizon by the National Security Agency, *The Guardian* explains telephone metadata as "the phone number of every caller and recipient; the unique serial number of the phones involved; the time and duration of each phone call; and potentially the location of each of the participants when the call happened." James Ball, "Verizon court order: telephone call metadata and what it can show, " *The Guardian,* June 6, 2013, Accessed online http://www.theguardian.com/world/2013/jun/06/phone-call-metadata-information-authorities?

3 The Urban Institute, *The Nonprofit Sector in Brief, 2012,* Washington, DC: The Urban Institute 2012, http://www.urban.org/UploadedPDF/412674-The-Nonprofit-Sector-in-Brief.pdf

4 For IRS approval rates of nonprofit applications see Rob Reich, Lacey Dorn, Stefanie Sutton, "Anything Goes: Approval of Nonprofit Status by the IRS," Stanford University Center on Philanthropy and Civil Society, October 2009. Accessed online http://www.stanford.edu/group/reichresearch/cgi-bin/site/wp-content/uploads/2009/11/Anything-Goes-PACS-11-09.pdf

5 Edelman Trust Barometer, 2013, accessed online http://www.scribd.com/doc/121501475/Executive-Summary-2013-Edelman-Trust-Barometer

6 *2012 Report on Sustainable and Responsible Investing Trends in the United States,* US SIF Foundation, Executive Summary accessed online http://www.ussif.org/files/Publications/12_Trends_Exec_Summary.pdf

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15 Alnoor Ebrahim and V. Kasturi Rangan, "The Limits of Nonprofit Impact: A Contingency Framework for Measuring Social Performance" Harvard Business School Working Paper, No. 10–099, May 2010.