

COMMON CORE STATE STANDARDS AND  
PHILANTHROCAPITALISM: CAN PUBLIC LAW  
NORMS MANAGE PRIVATE WEALTH'S  
INFLUENCE ON PUBLIC EDUCATION  
POLICYMAKING?

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2016 MICH. ST. L. REV. 161

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## INTRODUCTION

The adoption of the Common Core State Standards (Standards) has been called “one of the swiftest and most remarkable shifts in education policy in U.S. history.”<sup>1</sup> First proposed in 2008, the Standards were quickly promoted by wealthy philanthropists like Bill Gates and the Federal Department of Education as part of its Race to the Top (RTTT) initiative.<sup>2</sup> Through a combination of private grants, federal grants, and conditional waivers to states of requirements of the No Child Left Behind Act (NCLB), an astonishing forty-five states had adopted and begun implementing the Standards by 2010.<sup>3</sup>

The process by which the Standards were adopted raises compelling public law questions concerning administrative law, federalism, nonprofit law, and education policymaking. Several scholars have examined the implications of the Department of Education’s use of waivers of NCLB requirements along with federal grantmaking under the RTTT initiative to incentivize state adoption of the Standards.<sup>4</sup> Some have hailed the Standards approach as a triumph of innovative and efficient cooperative federalism through which the Department of Education bypassed partisan legislative gridlock to encourage states to improve educational standards, achievement, and equity across the country.<sup>5</sup> Others describe the Standards initiative as an example of federal overreach into

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1. Lyndsey Layton, *How Bill Gates Pulled off the Swift Common Core Revolution*, WASH. POST (June 7, 2014), [https://www.washingtonpost.com/politics/how-bill-gates-pulled-off-the-swift-common-core-revolution/2014/06/07/a830e32e-ec34-11e3-9f5c-9075d5508f0a\\_story.html](https://www.washingtonpost.com/politics/how-bill-gates-pulled-off-the-swift-common-core-revolution/2014/06/07/a830e32e-ec34-11e3-9f5c-9075d5508f0a_story.html) [https://perma.cc/437B-2SJU].

2. *Id.*

3. *Id.*

4. See, e.g., Kimberly Jenkins Robinson, *Disrupting Education Federalism*, 92 WASH. U. L. REV. 959, 988-92 (2015); Derek W. Black, *Federalizing Education By Waiver?*, 68 VAND. L. REV. 607, 663-64 (2015).

5. See, e.g., Martin A. Kurzweil, *Disciplined Devolution and the New Education Federalism*, 103 CALIF. L. REV. 565, 594-95 (2015).

educational policymaking, which is considered the province of states and localities.<sup>6</sup> Some of these observers call for restrictions on the federal role in education, either based on Tenth Amendment limitations on state coercion through federal spending or based on the limit to the Education Department's waiver authority, which they agree has exceeded the scope of legislative delegation.<sup>7</sup>

A crucially important, yet less explored, concern about the education reform agenda (as related to Common Core and beyond) is private philanthropy's role in impacting public policymaking. The speed with which the Standards were conceived and adopted is due in significant part to the influx of private dollars to support development of the Standards. Private money also allowed proponents of the Standards to press the federal government, a majority of states, and a variety of education stakeholders to adopt and implement the Standards in record time.<sup>8</sup>

Indeed, wealthy individuals and foundations, through what some have dubbed "philanthrocapitalism,"<sup>9</sup> have played a significant role in setting the current education reform agenda.<sup>10</sup> They have done this in a number of areas including support for charter schools, small school establishment, removal of teacher job protections in the name of accountability, and other recent education policy initiatives that have gained traction.<sup>11</sup> The role of philanthrocapitalists in the Common Core process is a striking example of the degree to which a small number of wealthy individuals can play a prominent role in education policymaking. Their role in this endeavor and in other educational initiatives is of particular concern given (1) the impending presidential election; (2) growing concerns about the impact of income and wealth inequality both on educational opportunity and on ordinary people's ability to engage with and influence important public policy development; (3) the mixed record of the recent slew of reforms to foster meaningful positive change in

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6. See, e.g., Robert S. Eitel & Kent D. Talbert, *The Road to a National Curriculum: The Legal Aspects of the Common Core Standards, Race to the Top, and Conditional Waivers*, 13 ENGAGE: J. FEDERALIST SOC'Y PRAC. GROUPS 17, 24-25 (2012).

7. See generally Lynn A. Baker, *Conditional Federal Spending After Lopez*, 95 COLUM. L. REV. 1911, 1935-36 (1995).

8. See, e.g., Layton, *supra* note 1.

9. See, e.g., Garry W. Jenkins, *Who's Afraid of Philanthrocapitalism?*, 61 CASE W. RES. L. REV. 753, 755 (2011).

10. See, e.g., Noelle Quam, Note, *Big Philanthropy's Unrestrained Influence on Public Education: A Call for Change*, 21 WASH. & LEE J. C.R. & SOC. JUST. 601, 614-15 (2015).

11. *Id.* at 616-17.

public education; and (4) concern about ulterior motives behind the reforms.

This Article examines the phenomenon of philanthrocapitalism in current education reform, with a focus on the Standards initiative. Part I describes the role that a small group of philanthropists played in setting and catalyzing the Standards development and implementation. This description includes private philanthropists' interactions with federal, state, and local government actors and other stakeholders. It also examines their work in the political process and the public discourse. Part II then considers the Common Core initiative over the last five years, including the role of philanthrocapitalists, nonprofits, and the state and federal governments, and the recent public backlash against and reconsiderations of the Standards. Part III considers the proper scope and limits of private philanthropists' role in public education policymaking from the perspective of public law norms, governance, and policymaking. Drawing upon structural governance models designed to support robust public engagement in education policymaking, as well as those designed to prevent agency capture, the Article closes by considering methods for placing appropriate boundaries on the influence of philanthrocapitalists. At the same time, it acknowledges the difficulty of imposing meaningful limits in a political environment dominated by the influence of private wealth.

## I. PHILANTHROCAPITALISM AND ITS ROLE IN U.S. EDUCATION REFORM AND COMMON CORE STATE STANDARDS DEVELOPMENT

### A. Philanthrocapitalism

Against a backdrop of stark and growing income and wealth inequality in the United States,<sup>12</sup> a new<sup>13</sup> form of philanthropy has

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12. According to a recent report:

[T]he share of wealth owned by the top 1% families has regularly grown since the late 1970s and reaches 42% in 2012. Most of this increase is driven by the top 0.1%, whose wealth share has grown from 7% of in 1978 to 22% in 2012, a level comparable to that of the early 20th century.

Emmanuel Saez & Gabriel Zucman, *Wealth Inequality in the United States Since 1913: Evidence from Capitalized Income Tax Data*, Q.J. ECON., Feb. 16, 2016, at 1 <http://sticerd.lse.ac.uk/dps/pep/pep26.pdf> [<https://perma.cc/72JE-M2CD>]. At the same time, the share of income and wealth of the bottom 90% of U.S. families has declined:

[I]n a sharp reversal of past trends, the bottom 90% wealth share has fallen since [the mid 1980's], to about 23% in 2012. . . . The key driver of the

emerged that has significant implications for public law and policy. Dubbed philanthrocapitalism (and sometimes “venture philanthropy”), this model of philanthropic giving has as its aim the explicit application of business principles to philanthropy and the leveraging of private dollars to effect significant public policy change.<sup>14</sup> Philanthrocapitalism, according to its proponents, promotes social good through targeted giving, while also benefiting the private sector contributors. The term “philanthrocapitalism” is said to have been first coined in a 2006 *Economist* magazine article<sup>15</sup> and more fully developed in a book by Matthew Bishop and Michael Green.<sup>16</sup>

Philanthrocapitalism conceives of financial giving as investment in the work of social entrepreneurs that will have significant impact on the particular issue or problem to be addressed. This impact is often viewed through the lens of a market infrastructure that imposes market models of competition, quantification, and profit-taking stemming from successful private business models. Philanthrocapitalism also seeks to maximize the social return on the philanthropic investment, both in terms of the stated goals and in terms of benefit to the social investors. One of the

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declining bottom 90% share is the plummeting of middle-class saving, a fall which itself may partly owe to the low growth of middle-class income, to financial deregulation leading to some forms of predatory lending, or to growing behavioral biases in the saving decisions of [the] middle-class.

*Id.* at 3.

13. Some say that this form of philanthropy is not new. *See, e.g.*, LINSEY MCGOEY, NO SUCH THING AS A FREE GIFT: THE GATES FOUNDATION AND THE PRICE OF PHILANTHROPY 40 (2015) (“Organized philanthropy is not at all new or unique to America.”).

14. Critiques of philanthrocapitalism in the public education context relate it to broader efforts to privatize public schooling:

The new philanthropy is at the forefront of a right-wing movement to corporatize education at multiple levels. That is, venture philanthropy (VP) contributes to both the privatization of public schooling as well as the transformation of public schooling that is based on the model of corporate culture—from voucher schemes to charter schools to the remaking of teacher education, educational leadership, and classrooms. Educational philanthropy that appears almost exclusively in mass media and policy circles as selfless generosity poses significant threats to the democratic possibilities and realities of public education.

KENNETH J. SALTMAN, THE GIFT OF EDUCATION: PUBLIC EDUCATION AND VENTURE PHILANTHROPY 1 (2010).

15. *The Birth of Philanthrocapitalism*, *ECONOMIST* (Feb. 23, 2006), <http://www.economist.com/node/5517656> [<https://perma.cc/YPM9-X6C4>].

16. MATTHEW BISHOP & MICHAEL GREEN, PHILANTHROCAPITALISM: HOW THE RICH CAN SAVE THE WORLD 5 (2008).

most notable characteristics of philanthrocapitalism is its emphasis on using philanthropic contributions as investments to leverage other money—often public dollars—to maximize the impact of its social investments and related policy choices.<sup>17</sup> Some have called philanthrocapitalists “hyperagents of change” because the design of their targeted philanthropy extends beyond large monetary contributions by combining with nonprofit and government partners to effect larger scale change.<sup>18</sup> Indeed, certain proponents of philanthrocapitalists explicitly state that one of the most effective ways to leverage their money is “to use it to shape how political power is exercised.”<sup>19</sup>

Responses to this new philanthropy vary. Some applaud the model’s combination of significant monetary contribution with a focus on metrics, outcomes, and multipliers.<sup>20</sup> Proponents see philanthrocapitalism as capable of solving problems government is ill-equipped to handle. Proponents generally accept the notion that philanthropists can “do well by doing good” with little concern about downside implications for public structures or public policymaking.

Critics of the new philanthrocapitalism question why market-based approaches are viewed as more effective than public problem-solving,<sup>21</sup> particularly in the face of massive market failure exemplified by the Great Recession and the growth of wealth inequality in the United States and globally. They raise the concern that many initiatives, though nominally focused on issues related to poverty, actually may serve to undermine broader public efforts to reduce poverty and inequality.<sup>22</sup> More broadly, some critics note that given the degree to which the world’s wealthiest people have benefited from the financial crisis, the focus of their charitable giving not only fails to reduce income and wealth inequality, but appears to

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17. See MCGOEY, *supra* note 13, at 15-16. McGoeY notes that while the application of business techniques to philanthropy is not new, both the scale and explicitness of market-based approaches to philanthropy are new developments. *Id.*

18. David Rieff, *Philanthrocapitalism: A Self-Love Story*, NATION (Oct. 1, 2015), <http://www.thenation.com/article/philanthrocapitalism-a-self-love-story/> [https://perma.cc/D87E-F9HM].

19. BISHOP & GREEN, *supra* note 16, at 240.

20. *Id.* at 6-7.

21. See Michael Edwards, “Philanthrocapitalism” and Its Limits, 10 INT’L J. NOT-FOR-PROFIT L. 22, 24-25 (2008).

22. See, e.g., Devi Sridhar & Rajaie Batniji, *Misfinancing Global Health: A Case for Transparency in Disbursements and Decision Making*, 372 LANCET 1185, 1185 (Sept. 27, 2008), <http://www.thelancet.com/pdfs/journals/lancet/PIIS0140-6736%2808%2961485-3.pdf> [https://perma.cc/D2MV-HG9Z].

have had the opposite effect.<sup>23</sup> This raises a concern about philanthropy having a role in making the rich richer and the poor poorer.<sup>24</sup> Concerns also arise with respect to expertise,<sup>25</sup> public engagement, and the impact of philanthrocapitalism on public policymaking and priority setting.<sup>26</sup> This concern includes policy priorities in areas like health and education, as well as broader structural public policy involving taxation and regulation designed to protect the interests of the broader public. As Linsey McGoeY notes:

Another concern is that philanthropy is used to thwart demands for higher taxation, protecting and expanding assets rather than redistributing wealth. Philanthropy often opens up markets for US or European-based multinationals which partner with organizations such as the Gates Foundation in order to reach new consumers. Giving more is an avenue for getting more, helping to concentrate wealth in an ever-narrowing nucleus of power-brokers with growing influence over policy-setting . . . .<sup>27</sup>

Critics also raise concerns about the lack of accountability and transparency of philanthrocapitalists in public policymaking and the erosion of support for government spending on health and education when large private sums of money are channeled toward public services.<sup>28</sup>

Some critics, like Robin Rogers, also note the need to differentiate philanthrocapitalism from philanthro-policymaking.<sup>29</sup> The former is focused on applying business principles to philanthropy, along with the notion of “doing well while doing good.” The latter involves the use of philanthropic investments to drive public policymaking and direct public funds.<sup>30</sup> As Noelle Quam notes:

Big Philanthropy is open about its commitment to implementing its own theories of educational change. For example, the Walton Family Foundation—one of the largest philanthropic foundations involved in education reform—has specified particular initiatives funded by the 158

23. MCGOEY, *supra* note 13, at 18.

24. *Id.*

25. See Peter Lorenzi & Francis G. Hilton, *Optimizing Philanthrocapitalism*, 48 SOC'Y 397, 399 (2011), <http://link.springer.com/article/10.1007/s12115-011-9468-x#> [<https://perma.cc/E259-DFFH>].

26. See Robin Rogers, *Why Philanthro-Policymaking Matters*, 48 SOC'Y 376, 376-78 (2011), <http://link.springer.com/article/10.1007%2Fs12115-011-9456-1#page-1> [<https://perma.cc/5S5W-GD3K>].

27. MCGOEY, *supra* note 13, at 19.

28. See *id.* at 8.

29. See Rogers, *supra* note 26, at 376-77.

30. See *id.*



million dollars the foundation spent on education reform in 2012. These initiatives included investments in charter schools, teacher effectiveness, and replacement of low-performing schools. The Gates Foundation—perhaps the largest philanthropic contributor to education reform—states that its focus is primarily on teacher effectiveness, implementation of the Common Core, and technological innovation in the classroom.<sup>31</sup>

The Gates, Broad, and Walton foundations have contributed significantly to public education reform in the United States.<sup>32</sup>

However, the largest impact on public education reform has occurred with significant funding from Gates. Public education reform efforts funded by the Gates Foundation include small schools, charter schools, mayoral control of large urban school systems, high-stakes standardized testing tied to teacher evaluation, and most recently, imposition of the Common Core State Standards. Regarding the Standards, Bill Gates has been fairly candid about his views: “‘This is like having a common electrical system,’ Gates told the Wall Street Journal in 2011. ‘It just makes sense to me.’”<sup>33</sup> Many global corporate leaders share this view and express concern about the preparedness of U.S. workers in an increasingly globalized economy.<sup>34</sup> This view is consistent with a reform model that emphasizes metrics, competition, quantification, and standardization. Indeed a frequent critique of the Standards approach is that it conflates standards and standardization.<sup>35</sup>

In addition, the emphasis on “data driven” approaches has raised concerns about Mr. Gates’s motives given that his corporation Microsoft is one of the largest computer hardware and software makers in the world. Similar concerns have been raised about the broader corporate business interest in market-based education reform. Gates’s reform approach draws on longer-term efforts to apply market models, accountability, and standardization to public education as part of a larger privatization effort that many trace back to the late 1980s.<sup>36</sup> The privatization effort was fostered by the

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31. Noelle Quam, *Big Philanthropy’s Unrestrained Influence on Public Education: A Call for Change*, 21 WASH. & LEE J. CIV. RTS. & SOC. JUST. 601, 616-17 (2015) (footnotes omitted).

32. See SALTMAN, *supra* note 14, at 1.

33. Peter Elkind, *Business Gets Schooled*, FORTUNE MAG., Jan. 1, 2016, at 48, 53.

34. *Id.* at 52 (“To CEOs, the issue has always been a no-brainer. In an increasingly global economy, what sense does it make for America to have 50 different sets of education standards?”).

35. Eitel & Talbert, *supra* note 6, at 24-25.

36. Elkind, *supra* note 33, at 52.

report, *A Nation at Risk*, which sent an alarm about the mediocre and declining quality of the U.S. public education system.<sup>37</sup> It sparked the mantra of “failing public schools” that has yielded everything from voucher proposals, to accountability provisions in the NCLB, to the current push for a range of metrics-driven, market-based public education reforms. This Article focuses on the Standards because this kind of private–public rapid and broad impact policy development seems to create the greatest challenges in terms of the impact of private forces, including philanthropy, on shaping public policy and redefining public processes.

Several critics raise the concern that absent some limitations, public education policymaking will have been ceded to a small group of wealthy billionaires who will (1) squander money and good intentions on education reforms that lack empirical support or genuine connection to community needs; (2) create chaos in public education by constantly changing reform priorities to the overall detriment of public education; or (3) use philanthropy to set policies that benefit their for-profit bottom lines by giving their related private companies and partners favored access to public education markets in technology, curriculum, charter management, etc.<sup>38</sup>

The most vociferous critics of market-based public education reform efforts emphasize that the reforms are all related in seeking to privatize public education, as Kenneth Saltman asserts:

These corporate school reforms are deeply interwoven with commercial interests in the multi-billion-dollar test and textbook publishing industries, the information technology and database tracking industries, and the contracting industries. The corporate sector has in the last decade positioned education in the United States as a roughly \$800-billion-per-year ‘industry’, ripe for takeover.<sup>39</sup>

Supporters of the reforms counter that the reforms are designed to improve student achievement and educational rigor.<sup>40</sup> Many further

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37. *Id.*

38. See, e.g., Joanne Barkan, *Got Dough? How Billionaires Rule Our Schools*, DISSENT MAG. (2011), <https://www.dissentmagazine.org/article/got-dough-how-billionaires-rule-our-schools> [<https://perma.cc/N4XU-4TLF>].

39. Kenneth J. Saltman, *Why Henry Giroux’s Democratic Pedagogy Is Crucial for Confronting Failed Corporate School Reform and How Liberals Like Ravitch and Darling-Hammond Are Making Things Worse*, 10 POL’Y FUTURES EDUC. 674, 675 (2012), [www.wwwords.co.uk/PFIE](http://www.wwwords.co.uk/PFIE) [<https://perma.cc/KA3Y-A9YP>].

40. See, e.g., Bill Gates, *Bill Gates on Innovation in Education Reform*, FORBES (2014), <http://www.forbes.com/video/3117956152001/> [<https://perma.cc/TZ87-V88R>]; *About the Standards*, COMMON CORE ST. STANDARDS INITIATIVE,

argue that the reforms support civil rights goals of providing choices and excellent education to students traditionally disserved by failing public schools.<sup>41</sup>

## B. Genesis and Development of the Common Core State Standards and the Role of Philanthrocapitalists, States, and the Federal Government

The development and implementation of the Standards are part of a longstanding effort to improve and provide consistency for public school curricular standards in states across the country.<sup>42</sup> The Standards effort is also characterized as part of a broader project of privatizing and applying market models to public education.<sup>43</sup> This project has been propelled by a narrative emphasizing the failure of public schools focused on student achievement gaps. Some attribute achievement gaps to the impact of poverty, inequality, and disinvestment in public schools.<sup>44</sup> Others attribute public school

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<http://www.corestandards.org/about-the-standards/> [https://perma.cc/3XJ9-ZVZ7] (last visited Mar. 16, 2016).

41. See, e.g., Eitel & Talbert, *supra* note 6, at 20; see also John Legend, *Education Reform: The Civil Rights Issue of Our Time*, HUFFINGTON POST BLOG (May 25, 2011), [http://www.huffingtonpost.com/john-legend/education-reform-the-civi\\_b\\_426490.html](http://www.huffingtonpost.com/john-legend/education-reform-the-civi_b_426490.html) [https://perma.cc/XG5Z-FUP8]. But see Diane Ravitch, *Public Education: Who Are the Corporate Reformers?*, MOYERS & CO. (Mar. 28, 2014), <http://billmoyers.com/2014/03/28/public-education-who-are-the-corporate-reformers/> [https://perma.cc/L73A-Q5J5].

42. *Development Process*, COMMON CORE ST. STANDARDS INITIATIVE, <http://www.corestandards.org/about-the-standards/development-process/> [https://perma.cc/4CWR-LQ88] (last visited Mar. 16, 2016).

43. See, e.g., ANTHONY CODY, *THE EDUCATOR AND THE OLIGARCH* 168 (2014). Cody observes: “In Gates’ view, the way to meet the needs of the poor is to make it profitable for corporations to do so. The simple fact that a drive for profits is far more often the source of poverty than a solution to it has escaped him.” *Id.* at 169; MERCEDES K. SCHNEIDER, *A CHRONICLE OF ECHOES* 202-03 (2014).

44. See, e.g., Richard Rothstein, *For Public Schools, Segregation Then, Segregation Since: Education and the Unfinished March*, *ECON. POL’Y INST.* 1, 17 (Aug. 27, 2013), <http://www.epi.org/publication/unfinished-march-public-school-segregation/> [https://perma.cc/M6H3-2JA7] (“For low-income African American children, continued improvement will most likely be accomplished by addressing the socioeconomic barriers the Coleman Report identified a half century ago; by providing high-quality early childhood care, staffed by well-educated professionals who can expose children to sophisticated intellectual environments like the ones typical middle-class children enjoy; and by providing high-quality after-school and summer programs in which children can acquire background knowledge and non-cognitive skills that predict high achievement. Other social and economic improvements could also help—stabilizing and improving low-income families’

failure primarily to the lack of rigorous standards, metrics, and accountability. There is significant evidence that persistent achievement gaps in U.S. public schooling derive primarily from the effects of poverty, segregation, and race and class inequality.<sup>45</sup> Nonetheless, market-based reforms funded by wealthy private interests and adopted by various governmental actors have successfully fostered a narrative that privatization, choice, and other market-based approaches will improve public education.

The Standards effort claims several goals, including: (1) strengthening the quality, rigor, and consistency of learning standards across states and (2) supporting a market-based, metrics and data-driven accountability system across the United States. These goals are in tension with one another. They draw support and ire from across the political spectrum.<sup>46</sup> The efficacy of the Standards themselves is contested.<sup>47</sup> This Article does not attempt a substantive assessment of the Standards. If the Standards set important benchmarks and provide an opportunity to provide rigorous and equitable preparation of students for college, work, and full

housing opportunities, and ensuring that children can come to school in good physical and emotional health, able to be in regular attendance and to concentrate on lessons.”).

45. See, e.g., Helen F. Ladd, *Presidential Address: Education and Poverty: Confronting the Evidence*, 31 J. POL’Y ANALYSIS & MGMT. 203, 203-27 (2012); Valerie Strauss, *Leave No Unwealthy Child Behind*, WASH. POST (May 7, 2013), <https://www.washingtonpost.com/news/answer-sheet/wp/2013/05/07/leave-no-unwealthy-child-behind/> [https://perma.cc/FB9T-G9Q3]; Sean Reardon, *No Rich Child Left Behind*, N.Y. TIMES (Apr. 27, 2013), <http://opinionator.blogs.nytimes.com/2013/04/27/no-rich-child-left-behind/?ref=opinion&r=0> [https://perma.cc/SHS3-MEWP]; SCHNEIDER, *supra* note 43, at 1-8, 39-40; SALTMAN, *supra* note 14, at 120; Antonia Darder, *Schooling and the Empire of Capital: Unleashing the Contradictions*, 50 VILL. L. REV. 847, 853-54 (2005).

46. PATRICIA BURCH, HIDDEN MARKETS: THE NEW EDUCATION PRIVATIZATION 4-7 (2009).

47. See, e.g., Brandi M. Haskins, *State Discretion over Subject Matter Standards: The Rise and Fall of Common Core in Oklahoma*, 39 OKLA. CITY U. L. REV. 441, 454 (2014); see also Saltman, *supra* note 39, at 677-78 (“The problem with the common core standards is not merely . . . that there is no evidence behind them. Of course, the standards and the curriculum put forward by the common core groups offer little in the way of encouraging students to comprehend how, for example, standardization and standardized testing are big business; who, for example, is claiming the knowledge in the curriculum and on the future tests to be valuable and how they got the social power to enforce it; or what, for example, is missing from these canons, such as the voices from below, the perspectives of the oppressed, and how the knowledge learned is struggled over by classes and cultural groups and relates to the agency of students to work collectively to transform oppressive structures of power.”).

development as engaged democratic participants, they deserve support. If, by contrast, the Standards' implementation is geared primarily toward quantification and data collection for purposes other than addressing meaningful student preparedness and educational equity, then they must be reconsidered. The difficulty appears to be that the goals and rationales supporting the Standards are mixed.

One of the difficulties that has emerged in assessing the Standards has to do with the current political environment surrounding public education policy.<sup>48</sup> Efforts to apply market models to public education are linked with privatization goals that include the notion that public education itself is a market from which private investors might profit.<sup>49</sup> Defenders of public education as a common good that is central to a healthy, equitable, and inclusive democracy tend to oppose the market-based version of public education and its associated reforms. At the same time, these public education advocates seek to improve the quality of the public education system as a whole, a goal in tension with reforms based on competition and consumer choice. This includes applying resources equitably and ensuring quality education with standards that will support the growth and development of young people. Specifically, these public education advocates seek goals that prepare students to be college- and career-ready, fully engaged participants in democratic society, and able to achieve their human potential.<sup>50</sup>

The Standards project contains elements that people across the spectrum—from market-based reformers to those concerned with broad, equitable access to high quality public schools—can support and oppose.<sup>51</sup> As a general matter, the Standards' requirement for

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48. See Allie Bidwell, *The Politics of Common Core*, U.S. NEWS (Mar. 6, 2014), <http://www.usnews.com/news/special-reports/a-guide-to-common-core/articles/2014/03/06/the-politics-of-common-core> [<https://perma.cc/H78C-G64L>]; Valerie Strauss, *The Coming Common Core Meltdown*, WASH. POST (Jan. 23, 2014), <https://www.washingtonpost.com/news/answer-sheet/wp/2014/01/23/the-coming-common-core-meltdown/> [<https://perma.cc/8YPL-77UM>].

49. Concerns about “reform” models that include private profit from public education have centered around charter schools, publishing and testing arrangements, among other aspects. See generally Susan L. DeJarnatt, *Follow the Money: Charter Schools and Financial Accountability*, 44 URB. LAW. 37 (2012); Natalie Gomez-Velez, *Urban Public Education Reform: Governance, Accountability, Outsourcing*, 45 URB. LAW. 51 (2013).

50. Gomez-Velez, *supra* note 49, at 61.

51. Compare Barkan, *supra* note 38, with Howard Husock, *Bill Gates and the Common Core: Did He Really Do Anything Wrong?*, FORBES (June 18, 2014), <http://www.forbes.com/sites/howardhusock/2014/06/18/bill-gates-and-the-common->

depth, inquiry, growth, and consistent benchmarks with flexibility in local curricular design, seem to satisfy both camps.<sup>52</sup> The emphases under the Standards on assessments tied to punitive results for students, teachers, and others; the collection of data for a range of purposes; and the potential use of the Standards as a mechanism to support a mantra of “failure” to justify the system of public common schools raise questions among progressives.<sup>53</sup> The Standards’ national sweep and the involvement of the federal government and a small group of elite technocrats raise alarms among conservatives.

Another difficulty involves the almost unprecedented swiftness with which the Standards were developed, adopted, and implemented.<sup>54</sup> The Standards are often described as resulting from a public, state-led process. While this description may be partially true, it is well documented that the Standards were developed by business leaders in association with several state governors, with significant funding support from the Gates Foundation.<sup>55</sup> Indeed, the practically nationwide adoption of the Standards within less than two years provides an example of the way in which private dollars can be leveraged to shape core public policy on virtually a national scale.<sup>56</sup>

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core-did-he-really-do-anything-wrong/#2715e4857a0bd6cb992398d9  
[<https://perma.cc/D88G-PV6Y>].

52. See, e.g., Neelam Takhar, *No Freedom in a Ship of Fools: A Democratic Justification for the Common Core State Standards and Federal Involvement in K-12 Education*, 26 HASTINGS WOMEN’S L.J. 355, 377 (2015).

53. See, e.g., Michael P. Mazenko, *Bill Gates Needs to Drop His Common Core Obsession*, SALON.COM (July 7, 2014), [http://www.salon.com/2014/07/07/bill\\_gates\\_needs\\_to\\_drop\\_his\\_common\\_core\\_obsession/](http://www.salon.com/2014/07/07/bill_gates_needs_to_drop_his_common_core_obsession/) [<https://perma.cc/ZH2A-TPLV>].

54. See, e.g., N.Y. COMMON CORE TASK FORCE, FINAL REPORT 13 (Dec. 10, 2015), <https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/NewYorkCommonCoreTaskForceFinalReport2015.pdf> [<https://perma.cc/PW5C-P2CF>] (noting a 2009 Memorandum of Understanding among the states for a national dialogue about the Standards, followed by the 2010 adoption of the Standards in New York state as part of the federal Race to the Top application and “an aggressive timeline targeting full implementation in the 2012-2013 school year”).

55. AJ Vicens, *Bill Gates Spent More than \$200 Million to Promote Common Core. Here’s Where It Went*, MOTHER JONES (Sept. 4, 2014), <http://www.motherjones.com/politics/2014/09/bill-melinda-gates-foundation-common-core> [<https://perma.cc/S5AR-SEJJ>]; Valerie Strauss, *Gates Foundation Pours Millions More into Common Core*, WASH. POST (May 12, 2015), <https://www.washingtonpost.com/news/answer-sheet/wp/2015/05/12/gates-foundation-pours-millions-more-into-common-core/> [<https://perma.cc/ZBS5-8PXF>].

56. The swiftness with which the Standards were developed and implemented may make it appear as if the Gates Foundation waved a multimillion dollar magic wand to get the Standards adopted and implemented by a majority of states. While it is true that Gates Foundation funding catalyzed the formulation, adoption, and implementation of the Standards themselves, it must be noted that the

The idea of national standards-based education is part of a longer-term trend in public education toward inserting business models and metrics into public education policymaking. Most observers trace this trend to the publication of *A Nation At Risk*,<sup>57</sup> a report finding the United States public education system deficient according to international comparisons and from the perspective of domestic, economic development needs. Accountability measures soon took center stage in public education reform discourse, legal change, and policy development. This movement used a variety of vehicles—public, nonprofit, and corporate entities and partnerships contributed to reform efforts over the last two decades. For example, at the 1996 National Education Summit, a bipartisan group of governors and corporate leaders decided to create and lead an organization dedicated to supporting standards-based education reform efforts across the states.<sup>58</sup>

Achieve [is] an independent, bi-partisan, non-profit education reform organization. . . . This unique perspective has enabled Achieve to set a bold and visionary agenda over the past 15 years, leading Education Week in 2006 to rank Achieve as one of the most influential education policy organizations in the nation.<sup>59</sup>

Thus the public, private, and independent sectors have had a hand in seeking to influence education policy for some time. Yet an initiative to change core curricular policy nationwide had never been proposed, developed, and adopted in such a short span of time and

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process toward standardization and market-based education policy change stems from a much longer term strategic effort. See Judson N. Kempson, *Star Crossed Lovers: The Department of Education and the Common Core*, 67 ADMIN. L. REV. 595, 607-09 (2015). Specifically, wealthy business leaders used accountability measures and a narrative of public school failure to foster privatization/corporatization of public education through everything from voucher programs to charter schools to the elimination of teacher tenure. At the same time, a range of education reform policies aimed at improving quality and equity in public schooling were being proposed and implemented. Differentiating well-intentioned reform efforts from those with primarily self-serving or profit-seeking goals can be a difficult task in connection with several of the reforms, including the Standards. See SARAH RECKHOW, FOLLOW THE MONEY: HOW FOUNDATION DOLLARS CHANGE PUBLIC SCHOOL POLITICS 114-15 (2013). See generally SCHNEIDER, *supra* note 43.

57. NAT'L COMM'N ON EXCELLENCE IN EDUC., *A NATION AT RISK: THE IMPERATIVE FOR EDUCATIONAL REFORM* (Apr. 1983), <http://www2.ed.gov/pubs/NatAtRisk/title.html> [<https://perma.cc/57AT-VYLR>].

58. See ACHIEVE, *ACHIEVE & THE AMERICAN DIPLOMA PROJECT NETWORK* (Apr. 2012), <http://www.achieve.org/files/About%20AchieveADP-Apr2012.pdf> [<https://perma.cc/L4DR-FDLS>].

59. *Id.*; see also Elkind, *supra* note 33, at 57.

with such a pivotal role played by philanthrocapitalists. The adoption of the Standards resulted from a rare confluence of circumstances. The Great Recession of 2008 impacted state school budgets across the country, causing states to force cuts and seek funding support wherever they could find it.<sup>60</sup> The federal government stepped in by including in the American Recovery and Reinvestment Act (ARRA) the RTTT Initiative, which included incentive grants supporting the Standards.<sup>61</sup> These developments converged with a series of education reforms established against a background narrative of public school failure, creating a perfect storm for pushing forward significant standards-based policy change across the states. Philanthro-policymakers formulated and funded much of that narrative, along with related policy reforms.

There are differing accounts of how the Standards came to be developed and implemented in a majority of states in a startlingly short span of time. These accounts include those that emphasize the role of private philanthropy and private enterprise, those that emphasize state governors' roles, and those that emphasize the federal government's role.

### 1. *The Role of Private Philanthropy and Private Enterprise in Promoting the Common Core State Standards*

The Common Core story that is the focus of this Article centers on the key influence of philanthrocapitalists and philanthro-policymakers in developing, implementing, and promoting the Standards. As Susan Layton wrote in an article that drew national attention:

On a summer day in 2008, Gene Wilhoit, director of a national group of state school chiefs, and David Coleman, an emerging evangelist for the standards movement, spent hours in Bill Gates's sleek headquarters near Seattle, trying to persuade him and his wife, Melinda, to turn their idea into reality.

Coleman and Wilhoit told the Gateses that academic standards varied so wildly between states that high school diplomas had lost all meaning, that as many as 40 percent of college freshmen needed remedial classes and that U.S. students were falling behind their foreign competitors.<sup>62</sup>

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60. Rajashri Chakrabarti et al., *The Great Recession's Impact on School District Finances in New York State*, 21 *ECON. POL'Y REV.* 45, 47-48 (2015).

61. *Id.* at 48.

62. Layton, *supra* note 1.



Coleman and Wilhoit's narrative matched the broader narrative about public school failure and its threat to global competitiveness that was enlisted to support several corporate-based education reforms, including charter schools, parent trigger laws, and high-stakes testing. No mention was made of the fact that U.S. public schools in affluent districts were doing very well in global competitiveness or of the impact of poverty and inequality on student achievement.<sup>63</sup> Instead, Coleman and Wilhoit argued "that a fragmented education system stifled innovation because textbook publishers and software developers were catering to a large number of small markets instead of exploring breakthrough products. That seemed to resonate with the man who led the creation of the world's dominant computer operating system."<sup>64</sup>

Gates was persuaded and provided significant philanthropic support to "one of the swiftest and most remarkable shifts in education policy in U.S. history."<sup>65</sup> That support extended beyond direct funding to develop and write the Standards to include advocacy and incentive grants aimed at state governments, certain school districts, education advocacy organizations, teachers unions, and other key policymakers and their constituents.<sup>66</sup> "With more than \$200 million, the foundation also built political support across the country, persuading state governments to make systemic and costly changes."<sup>67</sup>

The Gates Foundation's philanthropic contribution was significant, but did not stand alone in terms of private support of the Standards. In addition to support from other foundations, certain private sector corporations were persuaded to use their money and influence to back the Standards.<sup>68</sup> This effort effectively enlisted state and federal government actors and others to move a majority of states in the U.S. public education system—a system supported by hundreds of billions of dollars in taxpayer money—to adopt and implement curricular standards applied to elementary and high school public education. "The result was astounding: Within just two

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63. See, e.g., MCGOEY, *supra* note 13, at 128-29; CODY, *supra* note 43, at 157.

64. Layton, *supra* note 1.

65. *Id.*

66. *Id.*; see also Vicens, *supra* note 55.

67. Layton, *supra* note 1.

68. Elkind, *supra* note 33, at 51, 57.

years of the 2008 Seattle meeting, 45 states and the District of Columbia had fully adopted the Standards.”<sup>69</sup>

The Standards effort was far from the Gates Foundation’s first foray into public education reform efforts. The Gates Foundation had also funded and supported small schools, mayoral control, high-stakes standardized testing tied to student retention, teacher evaluation, school closure and “turnaround,” and charter schools.<sup>70</sup> That is to say, the Gates Foundation, along with others in “big philanthropy” had been effecting public education reform for several years.<sup>71</sup> The difference with the Common Core is the degree to which it represented more than a pilot or state-by-state effort in experimenting with and then seeking to bring market-based reforms to scale.<sup>72</sup> Rather, Common Core was a policy change that had virtually nationwide scope and effected the very heart of public education policy—the determination of curricular standards.

## 2. *National Governors Association and Public–Private Partnerships in Developing and Adopting the Common Core State Standards*

The Common Core effort also had the support of the National Governors Association (NGA), which worked in partnership with private entities. With funding support from the Gates Foundation and other philanthropists, the National Governors Association in a public–private partnership with Achieve, Inc.; the College Board; and ACT established the Common Core State Standards Initiative in 2008. Shortly thereafter, the initiative formed working groups and feedback groups to develop the Standards and support their adoption and implementation by a majority of states. As noted by the NGA in 2009:

Forty-nine states and territories have joined the Common Core State Standards Initiative. The initiative is being jointly led by the NGA Center and CSSO in partnership with Achieve, Inc, ACT and the College Board. It builds directly on recent efforts of leading organizations and states that have focused on developing college-and career-ready standards and ensures that these standards can be internationally benchmarked to top-performing countries around the world.

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69. Layton, *supra* note 1.

70. See MCGOEY, *supra* note 13, at 122-47.

71. See Quam, *supra* note 10, at 613-17.

72. See MCGOEY, *supra* note 13, at 136-37.

“It is time for us as states to challenge the education system and finally answer the question, [W]hat will it take for every child to be successful?” stated Gene Wilhoit, executive director of CCSSO. “Fewer, clearer, and higher standards will help us get there.”<sup>73</sup>

Thus, although regularly described as resulting from a public process, the Standards were developed, promoted, and readied for adoption by a majority of states with the impetus provided by private philanthropists and a public–private partnership involving the National Governors Association. The federal government further catalyzed the adoption of the Standards through a grant initiative.

### 3. *The Federal Government’s Race to the Top Initiative and the Adoption of the Common Core State Standards*

The federal government, under the Obama Administration and Education Secretary Arne Duncan, used ARRA<sup>74</sup> stimulus dollars to help leverage the already significant support that the Gates Foundation had given to developing and implementing the Standards.<sup>75</sup> Included in the stimulus package were several education reform measures, most notably the RTTT initiative.<sup>76</sup> “The program dedicated \$4.35 billion for a competitive grant program that would be allocated only to states that met specific criteria established by the Department of Education to demonstrate that state decision makers would follow the direction set by Secretary Duncan.”<sup>77</sup> Key among the criteria for obtaining an RTTT grant was the inclusion of college- and career-ready standards. It soon became clear that the standards requirement referred to the Common Core State Standards.

Secretary Duncan was keen to point out that during the course of the competition thirty-five states and the District of Columbia “have adopted rigorous common, college- and career-ready standards in reading and math, and thirty-four states have changed laws and policies to improve education,” suggesting that the new law already had a discernible effect.<sup>78</sup>

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73. *Common Core State Standards Development Work Group and Feedback Group Announced*, NAT’L GOVERNORS ASS’N (July 1, 2009), [http://www.isbe.state.il.us/%5Cprep-eval/pdf/meetings/psag/pdf/nga\\_core\\_standards\\_panels.pdf](http://www.isbe.state.il.us/%5Cprep-eval/pdf/meetings/psag/pdf/nga_core_standards_panels.pdf) [<https://perma.cc/29YA-63CU>].

74. See Joseph P. Viteritti, *The Federal Role in School Reform: Obama’s “Race to the Top,”* 87 NOTRE DAME L. REV. 2100-01 (2012).

75. See Kempson, *supra* note 56, at 609-10 (describing the Race to the Top initiative and its relationship to the Standards).

76. Viteritti, *supra* note 74, at 2102.

77. *Id.*

78. *Id.* at 2103.

Working in conjunction with and building on the policy and advocacy spurred by Gates and other philanthro-policymakers, the RTTT initiative represented an unprecedented achievement in terms of federal influence on public education policy. Some describe this as a voluntary collaboration among the states, the federal government, and private partners to achieve national standards. Others view it as an example of federal overreach into education policy, long understood to be the province of the states.

Whatever one's view of the relationship or the involvement of the state governors and the Federal Education Department, there is little question that funding from the Gates Foundation, other philanthro-policymakers, and corporate interests catalyzed the development and implementation of the Standards. There is also little question that the Standards moved from idea to implementation at lightning speed.<sup>79</sup> The Gates Foundation (and others) did not stop with funding to support the development and implementation of the Standards.<sup>80</sup> Gates also funded a broad range of organizations to advocate for the Standards, introduce the Standards to school officials at all levels, and enlist the support (or buy the silence) of key stakeholders with regard to adopting the Standards.<sup>81</sup> The Gates Foundation's philanthropic contributions to the Standards effort was estimated at more than \$200 million by 2014.<sup>82</sup>

## II. THE EFFECT OF COMMON CORE STATE STANDARDS 2010-2015, THE ROLE OF PHILANTHROCAPITALISTS, AND PUBLIC RESPONSES

The response to the rapid adoption of the Standards was mixed. Some viewed the Standards' adoption as a positive development.<sup>83</sup> From an equity perspective, there had long been a view that the adoption of consistent, rigorous curricular standards across the States could improve both quality and equity in public education<sup>84</sup> and also help reverse the phenomenon of watered-down standards used to

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79. See Strauss, *supra* note 55.

80. See Vicens, *supra* note 55.

81. See *id.*

82. See *id.*

83. For examples of quotes from supporters of the Standards, see *Quotes from Supporters*, COMMON CORE ST. STANDARDS INITIATIVE <http://www.corestandards.org/assets/Quotes-from-Supporters.pdf> (last visited Mar. 16, 2016) [<https://perma.cc/8UPG-TL8L>].

84. See generally Kimberly Jenkins Robinson, *The High Cost of Education Federalism*, 48 WAKE FOREST L. REV. 287, 324-25 (2013); Goodwin Liu, *Interstate Inequality in Educational Opportunity*, 81 N.Y.U. L. REV. 2044, 2105 (2006).

mask unequal educational opportunity in certain states and school districts.<sup>85</sup> Those holding this view support common standards generally. Other advocates support the Standards in particular as a means of providing quality, equity, and preparation in public education. For example, former Governor Bill Richardson said that the Standards should appeal to both Democrats and Republicans because they improve rigor, level the playing field, and fuel innovation and opportunity.<sup>86</sup> Other supporters emphasize that the Standards promise to provide clear, consistent baseline expectations that will equip students to navigate more complex learning.<sup>87</sup>

Opponents of the Standards raised procedural, substantive, and political objections. Many questioned the rapid adoption of the Standards, linking it to lack of study, input, and evidence supporting their efficacy. Others expressed concern about the overly formulaic and prescriptive nature of the Standards, arguing that they risked stifling genuine learning in the name of metrics and testing. Many opponents of the Standards were most concerned about their relationship to standardized testing and the punitive implications for students, teachers, and schools. In their view, the Standards and testing model served external interests in quantification over interests in genuine and effective teaching and learning.<sup>88</sup>

#### A. Rapid Implementation of Testing and Lack of Progress Under the Common Core State Standards Drew Opposition

As noted above, states first began developing the Standards in 2008 and school districts began adopting them as early as 2010. Receptivity to and implementation of the Standards varied. Some viewed the mixed state, federal, and private collaboration that supported rapid adoption of the Standards as a creative approach to

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85. See, e.g., Kempson, *supra* note 56, at 596, 598.

86. Bill Richardson, *The Common Core State Standards Are Good for Democrats and Republicans*, HUFFINGTON POST (Oct. 7, 2015), [http://www.huffingtonpost.com/gov-bill-richardson/politics-aside-the-common\\_b\\_8253762.html](http://www.huffingtonpost.com/gov-bill-richardson/politics-aside-the-common_b_8253762.html) [<https://perma.cc/X6QP-2XEV>].

87. See, e.g., Karin Chenoweth, *Common Core in a Little Town in Arkansas*, HUFFINGTON POST (Aug. 20, 2015), [http://www.huffingtonpost.com/Karin-Chenoweth/common-core-in-a-little-t\\_b\\_8016576.html](http://www.huffingtonpost.com/Karin-Chenoweth/common-core-in-a-little-t_b_8016576.html) [<https://perma.cc/F3QC-PCU5>].

88. David Bosworth, *The Cultural Contradictions of Philanthrocapitalism*, 48 Soc'y 382, 386 (2011), <http://www.frontporchrepublic.com/2011/11/compensation-the-cultural-contradictions-of-philanthrocapitalism/> [<https://perma.cc/J3AQ-FHLB>].

governance and policymaking in the face of congressional gridlock and wide variations in state education quality.<sup>89</sup>

Kentucky was one of the earliest states to adopt the Standards, with the hope to compete more effectively with the country's "education elite."<sup>90</sup> Kentucky's adoption of the Standards followed a state-based effort to improve standards under the Kentucky Education Reform Act, which failed to achieve the desired improvements.<sup>91</sup> Despite Kentucky's relative enthusiasm for the Standards, implementation has been challenging, causing some observers to predict "a slow and potentially frustrating road ahead for the other states that are using the Common Core."<sup>92</sup> This is because implementation of the Standards is costly and labor intensive, with the bulk of costs and labor falling on states and localities. Moreover, testing under the Standards, which began shortly after their implementation, showed very limited levels of student proficiency.<sup>93</sup> After three years of implementation, there has been some movement toward proficiency, but that movement has been sluggish at best.<sup>94</sup>

In several states, testing under the Standards began before schools and teachers had sufficient opportunity to fully implement Standards-based curricula.<sup>95</sup> Several States experienced significant declines in student standardized test scores with the first wave of tests administered pursuant to the Standards.<sup>96</sup> Many teachers, parents, and students were surprised by the rapid introduction, implementation, and testing under the Standards. This prompted questions in several quarters about how the Standards had been

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89. See, e.g., Kurzweil, *supra* note 5, at 623 (praising the process used to adopt the standards and noting "[t]he collaborative nature of the Common Core consortia's work, the organizational structures that have built up around it, and 'safety in numbers' all likely contribute to the resilience of the project").

90. Sarah Butrymowicz, *What Kentucky Can Teach the Rest of the U.S. About the Common Core*, ATLANTIC (Oct. 15, 2013), <http://www.theatlantic.com/education/archive/2013/10/what-kentucky-can-teach-the-rest-of-the-us-about-the-common-core/280453/> [https://perma.cc/L28E-ZTCY].

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. See Elkind, *supra* note 33, at 56.

96. See, e.g., Motoko Rich, *Test Scores Under Common Core Show that 'Proficient' Varies by State*, N.Y. TIMES (Oct. 6, 2015); *Grades 3-8 English Language Arts and Mathematics*, N.Y. ST. EDUC. DEP'T: INFO. REP. SERVS. (2013), [http://www.p12.nysed.gov/irs/ela-math/2013/2013-08-06FINALELAandMathFULLDECK\\_rev.pdf](http://www.p12.nysed.gov/irs/ela-math/2013/2013-08-06FINALELAandMathFULLDECK_rev.pdf) [https://perma.cc/R2MJ-UZ2Y].

adopted so quickly and with so little public knowledge or participation in their development.<sup>97</sup> For example, as noted in a recent report issued by a New York State Task Force on the Common Core:

The NGA and CCSSO released the final standards for Mathematics and English Language Arts & Literacy in History/Social Studies, Science and Technical Subjects on June 2, 2010.

In April 2009, New York State signed a Memorandum of Agreement with fifty other states and territories to participate in the national dialogue to develop these voluntary standards. Then in 2010, as part of its federal Race to the Top application, New York adopted the Common Core Learning Standards for English Language Arts (ELA) and Mathematics which were phased in with an aggressive timeline targeting full implementation in the 2012-2013 school year.

By the start of the 2012-13 school year, every New York public school district was required to have adopted and implemented the Common Core. However, SED resources were not fully available at the start of that school year, with very few curriculum modules posted on EngageNY.org. This timing means that teachers were asked to implement and teach to an unavailable curriculum—an impossible task.<sup>98</sup>

## B. Public, Political, and Legal Responses: Challenges to the Common Core State Standards

Following the rollout of the Standards, educators, advocates, politicians, and policymakers from across political and ideological spectra weighed in.<sup>99</sup> Proponents of the Standards hailed their relatively rapid and broad adoption by the states as a triumph of merit over politics and noted their importance in improving education quality.<sup>100</sup>

Because the Standards had been released very shortly before being implemented in a majority of states, there was little

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97. Elkind, *supra* note 33, at 54, 56.

98. N.Y. COMMON CORE TASK FORCE, FINAL REPORT 13 (Dec. 10, 2015), <http://www.ny.gov/programs/common-core-task-force> [<https://perma.cc/UF9H-5XQD>].

99. See, e.g., Motoko Rich, *Common Core School Standards Face a New Wave of Opposition*, N.Y. TIMES (May 29, 2014), [http://www.nytimes.com/2014/05/30/education/common-core-standards-face-a-new-wave-of-opposition.html?\\_r=0](http://www.nytimes.com/2014/05/30/education/common-core-standards-face-a-new-wave-of-opposition.html?_r=0) [<https://perma.cc/MU8F-UFQY>]; Elkind, *supra* note 33, at 56-57.

100. See, e.g., Jennifer Rubin, *Common Core, Uncommon Opposition to Standards*, WASH. POST (May 6, 2014), <https://www.washingtonpost.com/blogs/right-turn/wp/2014/05/06/common-core-uncommon-opposition-to-standards> [<https://perma.cc/FE2D-VD7H>].

understanding of what they were or how they worked.<sup>101</sup> There was little clarity about the substance of the benchmarks, how they related to existing requirements, how the Standards related to curricula, and the degree of uniformity and prescriptiveness in the Standards as opposed to local flexibility in implementation, among other things.<sup>102</sup> There also was concern about the process through which the Standards were adopted and the motives behind it. Concerns about the Standards drew legal challenges and arguably spurred federal legislative action, with the adoption of the Every Student Succeeds Act (ESSA).

### 1. *Public Responses, Concern, Skepticism, and the Opt-Out Movement*

Public concern about the Standards intensified significantly when several states began testing students under the Standards very shortly after adopting them.<sup>103</sup> Steep declines in students' proficiency determinations under the Standards' regime caused many parents and students to question both the value and purposes of the Standards.<sup>104</sup> Rather than a mechanism to support and improve student learning, the Standards seemed designed to punish students, teachers, and schools; to aggregate data about students;<sup>105</sup> and to reinforce a false narrative about wholesale public school failure as a way to foster a privatization agenda. Some expressed concern about what they perceived as the Gates Foundation's interest in profiting from deals

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101. See Elkind, *supra* note 33, at 54, 56.

102. See generally N.Y. COMMON CORE TASK FORCE, FINAL REPORT (Dec. 10, 2015), <https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/NewYorkCommonCoreTaskForceFinalReport2015.pdf> [<https://perma.cc/PW5C-P2CF>].

103. See, e.g., Adrienne Lu, *States Reconsider Common Core Tests*, HUFFINGTON POST (Jan. 27, 2014), [http://www.huffingtonpost.com/2014/01/27/states-reconsider-common-core\\_n\\_4674273.html](http://www.huffingtonpost.com/2014/01/27/states-reconsider-common-core_n_4674273.html) [<https://perma.cc/L357-BMHY>]; Associated Press, *Some States Push Back on Common Core Standards*, HUFFINGTON POST (May 28, 2013), [http://www.huffingtonpost.com/2013/05/28/states-common-core-push-back-standards\\_n\\_3346210.html](http://www.huffingtonpost.com/2013/05/28/states-common-core-push-back-standards_n_3346210.html) [<https://perma.cc/9ZYM-T2VY>].

104. See, e.g., *Massachusetts Drops Common Core, Will Develop Evaluations* (PBS broadcast Nov. 22, 2015), <http://video.pbs.org/video/2365613890/> [<https://perma.cc/3X9U-CN5M>].

105. See Elkind, *supra* note 33, at 56 (citing concerns that the Standards “would allow the federal government to engage in wholesale data collection on schoolchildren—including iris scans—then sell the information ‘to the highest bidders’”); see also SCHNEIDER, *supra* note 43, at 165-83.



with textbook publishers and testing companies, and from the development, population, and future uses of student data systems.<sup>106</sup>

Reports about the roles of philanthrocapitalists,<sup>107</sup> the federal government, and governors who sought to establish national standards only added to the skepticism and lack of trust about the Standards.<sup>108</sup> However, the bases for opposition differed somewhat among various groups.<sup>109</sup> Perhaps the most virulent opposition came from parents and teachers who viewed standardized tests under the Standards and their connection to teacher evaluation as unfair and an attempt to punish teachers and students.<sup>110</sup> This opposition led to organizing among parents and students to opt-out of taking standardized tests under the new Standards.<sup>111</sup> The opt-out movement began in 2013 and grew by 2015 to the point where the number of students opting out of standardized testing began to affect the ability of some school districts to assess the efficacy of the Standards.<sup>112</sup> These bases for opposition converged in several states, resulting in challenges to, and several reversals in, the implementation of the Standards.<sup>113</sup>

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106. Mazenko, *supra* note 53. See generally Adrienne Lu, *Q&A: Common Questions About the Common Core*, HUFFINGTON POST (Dec. 3, 2013), [http://www.huffingtonpost.com/2013/12/03/common-core-questions\\_n\\_4378643.html](http://www.huffingtonpost.com/2013/12/03/common-core-questions_n_4378643.html) [<https://perma.cc/N749-ZZ5B>] (noting misconceptions about the state and federal roles in the adoption of the Common Core and demonstrating widespread lack of public understanding about the Standards and their adoption).

107. See, e.g., Martin Levine, *Gates, Koch, and Common Core: What Are Citizens to Do?*, NON-PROFIT Q. (Jan. 4, 2016), <https://nonprofitquarterly.org/2016/01/04/gates-koch-and-common-core-what-are-citizens-to-do/> [<https://perma.cc/6U6U-8NMK>].

108. See, e.g., SCHNEIDER, *supra* note 43, at 165-83; RECKHOW, *supra* note 56, at 46-50.

109. See Elkind, *supra* note 33, at 50; Mazenko, *supra* note 53.

110. See, e.g., Michelle Maitre, *Gallup Finds Opposition to Common Core*, EDSOURCE (Aug. 19, 2014), <http://edsources.org/2014/gallup-finds-opposition-to-common-core/66439> [<https://perma.cc/49AC-ZQGL>].

111. See, e.g., Frederick M. Hess, *Opt-Out Parents Have a Point*, U.S. NEWS (May 5, 2015), <http://www.usnews.com/opinion/knowledge-bank/2015/05/05/parents-opting-out-of-common-core-tests-have-a-point> [<https://perma.cc/VRF6-JGJT>] (discussing middle class parents' opposition to the Standards and related standardized tests).

112. Associated Press, *Common Core Test Results Start Trickling In*, CBS NEWS (Aug. 30, 2015), <http://www.cbsnews.com/news/common-core-test-results-start-trickling-in/> [<https://perma.cc/C6DZ-9YTE>].

113. See *50-State Look at How Common Core Playing Out in U.S.*, HUFFINGTON POST (Sept. 2, 2014), [http://www.huffingtonpost.com/2014/09/02/50-states-common-core\\_n\\_5751864.html](http://www.huffingtonpost.com/2014/09/02/50-states-common-core_n_5751864.html) [<https://perma.cc/53LC-NCSU>].

Others were most concerned with the lack of information, transparency, and input provided to primary stakeholders—students, teachers, parents, and principals, among others. This opposition to the Standards centered not only on the content of the Standards themselves but also on the process by which they were implemented and their connection to high-stakes tests that would determine the fates of students, teachers, and schools (and perhaps the entire public education system). One process concern included the speed with which school districts were testing students under the Standards without having had sufficient opportunity to implement and teach under the new Standards. Another concern was the degree to which standardized testing would drive education decisions. Many observers noted a disconnect between what was taught under the new Standards and what was tested. Test scores in many states plummeted under the Standards. For example, in New York approximately 30% of students statewide were deemed proficient in reading and math based on test results in 2012 under the newly implemented Standards.<sup>114</sup>

## 2. *Legal Challenges Addressing Federal and Private Overreach*

### a. Federal Overreach

Opposition to the Standards and concerns about their implementation spurred several states to reverse course. Concern about the federal role in promoting adoption of the Standards through RTTT grants and waivers of NCLB requirements to in effect impose educational policy change on states and localities sparked both public outcry and legal challenges.<sup>115</sup> Challengers viewed the role of the federal RTTT initiative in implementing the Standards as an example of federal overreach.<sup>116</sup> A previous supporter of the Standards initiative—Governor Bobby Jindal of Louisiana—sued the Federal Department of Education on grounds that it had violated the

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114. See Corinne Lestch, Ben Chapman & Jennifer Fermino, *City Students' Scores Take Dramatic Plunge on New Standardized Tests*, N.Y. DAILY NEWS (Aug. 7, 2013), <http://www.nydailynews.com/new-york/education/city-students-scores-dramatic-plunge-new-standardized-tests-article-1.1419973> [<https://perma.cc/3M46-XEEJ>].

115. See, e.g., Black, *supra* note 4, at 649, 657.

116. Complaint for Plaintiff at ¶ 21, *Jindal v. U.S. Dep't of Educ.*, No. 14-cv-534, 2015 WL 854132 (M.D. La. Aug. 27, 2014), 2014 WL 4211009, at \*¶ 21.

Tenth Amendment by coercing states to adopt the Standards.<sup>117</sup> The Tenth Amendment provides that any power not explicitly delegated to the federal government is reserved for the states. Because the Constitution does not confer federal power over education, federal statutes addressing education are drawn to respect state power. The complaint alleged that the Department's Race to the Top grant through ARRA exceeded federal authority by directing standards, assessments, and programs of instruction.<sup>118</sup> The district court dismissed the case with a finding that the facts did not bear out the claim that Louisiana was coerced by the federal government into adopting the Standards through its RTTT grant initiative.<sup>119</sup> Rather, the court found that the state's adoption of the Standards was voluntary.<sup>120</sup> Notwithstanding the failure of Jindal's argument, public narratives about federal coercion and overreach persisted.

Another legal challenge under a theory of federal coercion focused on the requirement that states must contract with particular members of the Standards consortia.<sup>121</sup> These contractors then aid in curricular development tied to the Standards' implementation. In September 2014, Missouri residents and taxpayers, filed a petition for declaratory and injunctive relief challenging Missouri's membership in and payment of dues to the Smarter Balanced Assessment Consortium (SBAC), an educational consortia whose purpose was to replace patchwork state standards with uniform national educational standards (e.g., the Standards).<sup>122</sup> The complaint

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117. See Casey Quinlan, *Bobby Jindal's Lawsuit Against Common Core Law He Signed Moves Forward*, THINKPROGRESS (May 29, 2015), <http://thinkprogress.org/education/2015/05/29/3664139/bobby-jindal-continues-legal-crusade-common-core-law-signed/> [<https://perma.cc/7YXV-QTFE>].

118. Complaint for Plaintiff, *supra* note 116, at \*¶ 1.

119. See *Jindal v. U.S. Dep't of Educ.*, No. 14-534-SDD-RLB, 2015 WL 5474290, at \*15 (M.D. La. Sept. 16, 2015); see also Joy Resmovits, *Bobby Jindal Is Being Sued by His Own School Board over the Common Core*, HUFFINGTON POST (July 29, 2014), [http://www.huffingtonpost.com/2014/07/29/bobby-jindal-lawsuit\\_n\\_5631416.html](http://www.huffingtonpost.com/2014/07/29/bobby-jindal-lawsuit_n_5631416.html) [<https://perma.cc/B2WL-MKDU>]. See generally Complaint for Plaintiff, *supra* note 116.

120. *Jindal*, 2015 WL 5474290, at \*5.

121. *Sauer v. Nixon*, 474 S.W.3d 624, 626-27 (Mo. Ct. App. 2015).

122. *Id.* at 627 ("SBAC was one of the multi-state consortia formed to take advantage of the RTTT assessment funding. In May 2010, Governor Nixon and Commissioner Nicastro signed a memorandum of understanding committing Missouri to be a member of SBAC. The memorandum of understanding provided that, in addition to adopting and implementing the Common Core standards, Missouri agreed to fully implement statewide SBAC's summative assessments in grades 3-8 and high school for both mathematics and English language arts no later

alleged that Missouri's membership in SBAC is illegal on three grounds: (1) it violates the Compact Clause of the U.S. Constitution, Art. I, § 10, cl. 3; (2) it violates federal law guaranteeing state and local control of curriculum, programs of instruction, and related matters in public schools; and (3) it violates Missouri law limiting the number of academic performance standards that the state board of education can adopt.<sup>123</sup>

Missouri residents and taxpayers challenged Missouri's membership in SBAC and sought to have it enjoined and declared invalid.<sup>124</sup> These cases exemplify the significant attention that has been given to the federal role in implementing the Standards. Indeed, several conservative and Tea Party opponents of the Standards coined the term "ObamaCore" to rally opposition to perceived federal overreach.<sup>125</sup>

#### b. Private and Philanthropic Overreach

Comparatively less attention has been drawn to concerns about overreach by philanthrocapitalists and their corporate allies. This is true not only in shaping public education policy to serve their general policy preferences in developing "skilled workers," but also in shaping public policy and driving public dollars to enhance private profit.<sup>126</sup> News reports, books, and policy statements about how corporations that have aligned with philanthrocapitalists stand to profit from policies only contribute to public skepticism and mistrust about the Standards and the role of philanthrocapitalists generally.<sup>127</sup> For example, the New York Attorney General determined that the

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than the 2014–2015 school year; adhere to the governance of SBAC as outlined in the document; agree to support SBAC's decisions; agree to follow agreed-upon timelines; be willing to participate in the decision-making process and, because Missouri was a governing state in the consortium, be willing to participate in final decisions; and identify and implement a plan to address barriers in state law, statute, regulation, or policy to implementing SBAC's proposed assessment system.").

123. *Id.* at 627-28.

124. *Id.* at 628.

125. See Elaine McArdle, *What Happened to the Common Core?*, HARV. EDUC. MAG. (Sept. 3, 2014), <http://www.gse.harvard.edu/news/ed/14/09/what-happened-common-core> [<https://perma.cc/VV6U-Y9CV>]; MCGOEY, *supra* note 13, at 137.

126. See CODY, *supra* note 43, at 26-28.

127. See, e.g., Nancy Thoner, *Gates and Pearson Partner to Reap Tens of Millions from Common Core*, SOMEWHAT REASONABLE (Nov. 25, 2014), <http://blog.heartland.org/2014/11/gates-and-pearson-partner-to-reap-tens-of-millions-from-common-core/> [<https://perma.cc/78Z9-AXQX>]; DIANE RAVITCH, *THE DEATH AND LIFE OF THE GREAT AMERICAN SCHOOL SYSTEM* 221 (2010) (critiquing market approaches to school reform).

Pearson Foundation<sup>128</sup> had created Common Core products to generate tens of millions of dollars for one of its affiliated corporate entities.<sup>129</sup> Pearson Foundation developed courses, instructional materials, and software offerings aligned with the Standards.<sup>130</sup> Pearson sought to win the endorsement of the Gates Foundation and to enhance its reputation with policymakers using the Pearson Foundation, rather than one of the Pearson for-profit entities.<sup>131</sup> The projection was that Pearson's investment in the courses, related systems and teaching, professional development, and support materials could yield profits in the tens of millions.<sup>132</sup> The New York Attorney General found that

[b]y engaging in [such] conduct . . . , the Foundation distributed some of its assets and projected income to its sole member, Pearson Inc., in violation of N-PCL § 515 and failed properly to administer the charitable assets and funds committed to its care as a trustee, in violation of EPTL §§ 8.1-1 and 8.1-4 and the common law.<sup>133</sup>

The Pearson incident exemplifies concerns about private overreach and profiteering from policies presented as fostering public education for the public good. Dissenters fear those policies were actually designed to generate profits for private affiliates and corporate allies while also shaping public policy to serve broader privatization and profit-taking goals. This concern represents the dark side of philanthrocapitalists' cheerful claims about the ability "do well by doing good."<sup>134</sup>

The Pearson example also demonstrates a growing concern about the use of philanthropy to benefit for-profit corporate interests.<sup>135</sup> Yet philanthrocapitalists often work hand-in-hand with large corporations to achieve aligned policy goals.<sup>136</sup> Philanthropic

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128. The nonprofit arm of Pearson, Inc., "the largest learning company in the world." *In re Pearson Charitable Found. & Pearson Inc.*, Assurance No. 13-487, at 2 (Att'y Gen. N.Y. Dec. 12, 2013) (Assurance of Discontinuance), [http://www.ag.ny.gov/pdfs/Pearson\\_Executed\\_AOD.pdf](http://www.ag.ny.gov/pdfs/Pearson_Executed_AOD.pdf) [<https://perma.cc/HX6F-EF4H>].

129. *Id.* at 5.

130. *Id.* at 4.

131. *See id.*

132. *Id.* at 5.

133. *Id.* at 6.

134. *See BISHOP & GREEN, supra* note 16, at 43-46.

135. *See MCGOEY, supra* note 13, at 116, 138; RAVITCH, *supra* note 127, at 203, 211.

136. For example, a recent *Fortune* article describes how Bill Gates enlisted Exxon Mobil, GE, Intel, and other large corporations to push for the Standards. *See Elkind, supra* note 33, at 50.

practices supporting for-profit entities and motives raise significant questions about the purposes of charitable foundations and their treatment under law.<sup>137</sup> Some critics cast current foundation practice as “plutocratic by nature” and “unaccountable.”<sup>138</sup> Defenders of philanthropists (including presumably philanthrocapitalists and philanthro-policymakers) argue that private parties should be free to donate their money as they see fit—that is, without the need for public oversight or transparency. Yet the premise behind philanthropy is that nonprofit, charitable donations are meant to promote the public good. Legal structures providing for tax exemption and other favorable treatment draw from this “public benefit” premise. Philanthrocapitalism highlights a broader concern about philanthropy’s contributions to the public good,<sup>139</sup> particularly as related to relieving the problems of poverty. Although nonprofit charities and foundations exist and receive tax exemption ostensibly to serve public and charitable purposes, it has been found that most foundation dollars go to wealthy cultural, arts, academic, and religious institutions.<sup>140</sup> So little foundation money goes to the poor that “we need to consider whether tax deductions are warranted at all.”<sup>141</sup> Perhaps of more concern than seeing foundation dollars go to wealthy nonprofit endeavors is the use of philanthropy to benefit for-profit corporations by pushing public policy change designed to provide access and “corner” public markets, like the market for public education. As Linsey McGoey observes, “A frequent worry among teachers and parents is that Gates money helps position private firms such as Pearson and Microsoft to benefit from the testing industry that is tightening like a corset around students and

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137. Linsey McGoey, *Love from Mom and Dad...But Who Gains from Mark Zuckerberg's \$45bn Gift?*, *GUARDIAN* (Dec. 5, 2015), <http://www.theguardian.com/commentisfree/2015/dec/06/mark-zuckerberg-philanthrocapitalism-45bn-facebook-shares> [https://perma.cc/6G4J-8NHH]; Alex Daniels & Nicole Wallace, *Using For-Profits to Funnel Big Sums to Charities Raises Transparency Concerns*, *CHRON. PHILANTHROPY* (Dec. 2, 2015), <https://philanthropy.com/article/using-for-profits-to-funnel/234429> [https://perma.cc/93P3-RLC7].

138. Linsey McGoey, *The Philanthropy Hustle*, *JACOBIN* (Nov. 2015), <https://www.jacobinmag.com/2015/11/philanthropy-charity-banga-carnegie-gates-foundation-development/> [https://perma.cc/LDC6-D2T3].

139. For helpful discussions of relationships between the private and public spheres and the relationship to civil society and democracy, see generally *PRIVATE ACTION AND THE PUBLIC GOOD* (Walter W. Powell & Elisabeth S. Clemens eds., 1998); BRUCE R. SIEVERS, *CIVIL SOCIETY, PHILANTHROPY, AND THE FATE OF THE COMMONS* (2010).

140. See McGoey, *supra* note 138.

141. *Id.*

teachers.”<sup>142</sup> Also of concern is philanthro-policymakers’ practice of targeting contributions to disrupt existing public systems to serve privately motivated policy goals. Such concerns about the true aims behind the Standards initiative contributed to the wave of opposition, which led to significant reversals of support for the Standards.<sup>143</sup>

### 3. *Legislative Response: Passage of the “Every Student Succeeds Act” Limits the Federal Role and Reach of the Standards*

In part as a response to the myriad concerns raised about the implementation of the Standards, Congress, in what was dubbed a “Christmas miracle,” passed the “Every Student Succeeds Act” (ESSA) on December 10, 2015. ESSA is the long overdue reauthorization of the Elementary and Secondary Education Act (ESEA), following the broadly recognized failure of the NCLB to achieve its stated goals related to improving educational attainment and closing achievement gaps among cohorts of U.S. students.<sup>144</sup> The ESSA significantly constrains the federal role in public education policymaking, reducing the power of the Federal Department of Education, which had drawn strong opposition in connection with the implementation of the Standards.

## III. COMMON CORE STATE STANDARDS, PRIVATIZATION, PHILANTHRO-POLICYMAKING, AND PUBLIC LAW NORMS

As noted above, much attention has been given to the federal–state process in developing and implementing the Common Core State Standards across most of the United States. While some attention has focused on the role played by private philanthropists and private corporations in fostering the Standards,<sup>145</sup> further examination of the impact of private and philanthropic influence on public education policymaking is needed. Regardless of whether one favors or opposes the Standards, the impact of philanthrocapitalists, philanthro-policymakers, and other wealthy private interests on the public education policy process raises important questions about how these investors impact and intersect with public law norms.

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142. *Id.*

143. *See* CODY, *supra* note 43, at 26.

144. *See* MCGOEY, *supra* note 13, at 119-21.

145. *Id.* at 137; *see also* RECKHOW, *supra* note 56, at 70; SCHNEIDER, *supra* note 43, at 165-83, 353-68.

A key question is how the Standards development process squares with public law norms. Can existing understandings of public law norms manage appropriately the influence of philanthrocapitalists (or philanthro-policymakers) on core public education policies? Before exploring these questions, it may be helpful to articulate basic public law norms and general understandings about how public education policy should be developed in the United States, where education is largely viewed as central to the viability of democracy and notions of self-governance.<sup>146</sup>

Public law is generally understood to involve government and the power of the state. In the United States, this power is understood to reside in the first instance with “We the People.”<sup>147</sup> Government power exists to, among other things, “promote the general welfare.”<sup>148</sup> The United States’ constitutional structure carves out roles for the legislature, executive, and judiciary.<sup>149</sup> It also establishes a relationship between the federal government and the states that reserves to the states or to the people “powers not delegated to the United States by the Constitution, nor prohibited by it to the states.”<sup>150</sup>

The administrative state—on the federal, state, and local levels—has developed over time to implement legislative power delegated to the executive through a procedural structure that balances public participation and public accountability with agency expertise and efficiency.<sup>151</sup> Administrative law emphasizes the respective influence of the executive, the legislature, and the judiciary in determining the application of key principles and the appropriate balance among expertise, efficiency, transparency,

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146. See generally AMY GUTMANN, *DEMOCRATIC EDUCATION* 11 (1999) (“A democratic theory of education provides principles that, in the face of our social disagreements, help us judge (a) who should have authority to make decisions about education, and (b) what the moral boundaries of that authority are.”).

147. See Michael Sant’Ambrogio, *Standing in the Shadow of Popular Sovereignty*, 95 B.U. L. REV. 1869, 1895 (2015) (“[T]he people of each state are a part of ‘We the People of the United States’ who, ‘acting as sovereigns of the whole country; and in the language of sovereignty, establish[ed] a Constitution.’”).

148. U.S. CONST. pmbl.

149. See *id.* arts. I-III.

150. *Id.* amend. X.

151. See, e.g., Paul R. Verkuil, *Public Law Limitations on Privatization of Government Functions*, 84 N.C. L. REV. 397, 402 (2006).



deliberation, and public participation.<sup>152</sup> In doing so, these delegations force the three branches to grapple with various theories of democratic governance related to agency action.<sup>153</sup>

Of course, “public law” covers a lot of law. Its range stretches from law and policy issues on tax,<sup>154</sup> to nonprofit,<sup>155</sup> and even to criminal law—all of which are beyond the scope of this Article. The focus here is on public law governance, or public government policymaking. It encompasses the constitutional structure of government and the application of administrative law principles to public policy making.<sup>156</sup> It highlights tensions that arise when public policymaking is instead driven by privatization and the influence of wealthy corporate and philanthropic interests. The inquiry also centers on a general understanding that the public, private, and civic spheres are treated as discrete in law and understood to operate differently based on different roles, powers, and limits tied to their societal purposes.<sup>157</sup>

#### A. Public Law Norms, Governance, Policymaking, and Privatization

Privatization is one of the most significant recent challenges to public law and public institutions.<sup>158</sup> A particular concern in the current market-focused public education reform era is the impact of

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152. See generally RICHARD J. PIERCE, JR., SIDNEY A. SHAPIRO & PAUL R. VERKUIL, *ADMINISTRATIVE LAW AND PROCESS* 10-20 (5th ed. 2009).

153. See *id.*

154. See, e.g., Terri Lynn Helge, *Policing the Good Guys: Regulation of the Charitable Sector Through a Federal Charity Oversight Board*, 19 CORNELL J.L. & PUB. POL’Y 1 (2009).

155. See Dana Brakman Reiser, *There Ought to Be a Law: The Disclosure Focus of Recent Legislative Proposals for Nonprofit Reform*, 80 CHI.-KENT L. REV. 559, 559-60 (2005) (discussing legislative efforts to regulate the nonprofit sector).

156. See generally Verkuil, *supra* note 151; Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1369-70 (2003); Gomez-Velez, *supra* note 49.

157. As such, it also draws to some extent upon public enforcement of nonprofit law. See Helge, *supra* note 154, at 5-6. *But see* Evelyn Brody & John Tyler, *Respecting Foundation and Charity Autonomy: How Public is Private Philanthropy?*, 85 CHI.-KENT L. REV. 571, 572 (2010).

158. See Kimberly N. Brown, “*We the People*,” *Constitutional Accountability, and Outsourcing Government*, 88 IND. L.J. 1347, 1376 (2013); Gillian E. Metzger, *Private Delegations, Due Process, and the Duty to Supervise*, in *GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY* 291, 291 (Jody Freeman & Martha Minow eds., 2009).

privatization<sup>159</sup> on public law norms and requirements, as applied to public schools as public institutions.<sup>160</sup> This shift raises important questions about public education, which plays a particularly important role in a democratic society that envisions a public sphere centered on supporting the common good.<sup>161</sup>

The introduction and expansion of privatization in the delivery of public education raise questions and concerns about the operation of public law norms in public education.<sup>162</sup> The establishment and growth of charter schools; outsourced training of teachers and administrators; assessment and evaluation of public school students, teachers, and administrators; and the increase in public-private

159. By privatization, I refer to the many ways in which for-profit entities and structures are engaged in public education. As Kenneth Saltman explains:

In the United States, public education has become increasingly privatized and subject to calls for further privatization while business and markets have come to influence or overtake nearly every aspect of the field of education. Privatization takes the form of for-profit management of schools, “performance contracting,” for-profit charter schools, school vouchers, scholarship tax credits or “neovouchers,” school commercialism, for-profit online education, online homeschooling, test publishing and textbook industries, electronic and computer based software curriculum, for-profit remediation, educational contracting for food, transportation, and financial services, to name but a partial list.

Kenneth J. Saltman, *Putting the Public Back in Public Schooling: Public Schools Beyond the Corporate Model*, 3 DEPAUL J. SOC. JUST. 9, 12-13 (2009).

160. See generally SALTMAN, *supra* note 14.

161. As Martha Minow noted:

Education has dimensions of a public good, with crucial externalities affecting the entire population. Ensuring a good education for members of the next generation is important to the entire society; to our economic, cultural, and political well-being, as well as to the life prospects for the individual students involved. Cultivating capacities to act as informed and responsible citizens and as productive workers matters to everyone else. Our political fortunes, retirement benefits, and tax dollars are all at stake.

In addition, *public* education has distinct purposes in a democratic society. Philosophers and pundits have debated the purposes of education through the centuries. Historians still dispute the core motivations behind America’s public school movement. But a basic statement of public school purposes would include forging commonality, promoting civic engagement in a diverse and democratic nation, and offering quality opportunities on an equal basis.

Martha Minow, Lecture, *Reforming School Reform*, 68 FORDHAM L. REV. 257, 270 (1999) (footnote omitted).

162. See Jon D. Michaels, *Privatization’s Progeny*, 101 GEO. L.J. 1023, 1062 (2013); GARY MIRON & CHRISTOPHER NELSON, WHAT’S PUBLIC ABOUT CHARTER SCHOOLS? LESSONS LEARNED ABOUT CHOICE AND ACCOUNTABILITY 7-12 (2002).

partnerships amplify these concerns. Among others, these public law norms include constitutional principles, statutory requirements, public oversight, and democratic accountability. This debate raises questions about political accountability, often defined as “amenability of an action or activity to monitoring and control through the political process.”<sup>163</sup>

Privatization challenges public law norms and complicates the treatment of public functions placed in private hands. For example, as Gillian Metzger notes,

A foundational premise of our constitutional order is that public and private are distinct spheres, with public agencies and employees being subject to constitutional constraints while private entities and individuals are not. Private involvement in government is addressed primarily through the state action doctrine, which inquires whether, in a particular context, ostensibly private parties should be considered “state (or federal) actors.”<sup>164</sup>

And regarding the impact of privatization on constitutional norms,

Little effort is made to rethink the basic terms of constitutional analysis in the face of the disconnect between administrative reality and constitutional doctrine. Instead, the focus is on reforming nonconstitutional law to better address accountability concerns raised by privatization, specifically the moral hazard problem: the danger that private actors will exploit their position in government programs to advance their own financial or partisan interests at the expense of program participants and the public. In response, scholars have proposed reforming administrative statutes to improve public oversight of privatized programs, imposing greater regulation and contractual controls on recipients of government funds, or ensuring program participants’ access to private law remedies.<sup>165</sup>

In response, several scholars have proposed mechanisms for retaining public law norms in an environment of increased privatization of government functions, like public education.<sup>166</sup> This has proven difficult, as public law issues related to privatization continue to take a back seat to market-based framing of public services as public–private hybrids become increasingly dominant in changing the shape and understanding of the public sphere.<sup>167</sup> The

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163. Richard Briffault et al., *Public Oversight of Public/Private Partnerships*, 28 *FORDHAM URB. L.J.* 1357, 1358 (2001).

164. Metzger, *supra* note 156, at 1369-70.

165. *Id.* at 1372 (footnotes omitted).

166. *See, e.g., id.* at 1374.

167. *See* Michael P. Vandenbergh, *The Private Life of Public Law*, 105 *COLUM. L. REV.* 2029, 2039 (2005); Jody Freeman, *The Private Role in Public Governance*, 75 *N.Y.U. L. REV.* 543, 547 (2000).

rise of public–private hybrids has been described as part of a “New Governance” model that blurs regulatory and policymaking boundaries along both public and private lines as well as vertical and horizontal governmental structures.<sup>168</sup>

Philanthrocapitalism and philanthro-policymaking add yet another dimension to the blurring of governance and policymaking boundaries, extending it to the nonprofit sector, which is normally treated as distinct from the public and private sectors. Because philanthropy involves voluntary donation of private money, ostensibly to advance charitable goals or projects meant to serve the common good, it is subject neither to public law restrictions nor to the more limited contractual boundaries that are found in the context of privatization of public services by contract or charter.<sup>169</sup> Yet, the Standards example, as part of a broader philanthropic effort to reform public education, raises concerns about what Linsey McGoeys dubs “shadow ministries of education.”<sup>170</sup> Observing that U.S. philanthropic donors spend about \$4 billion on education each year, McGoeys notes that these contributions significantly influence the more than \$500 billion in public dollars spent on public education each year.<sup>171</sup>

At issue is whether the kind of involvement in public education policymaking exemplified by philanthropists’ roles in the rapid adoption of the Standards raises public law concerns about public policymaking. If so, at what point do such concerns outweigh the benefits that flow from philanthropic contributions to public

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168. See, e.g., Jason M. Solomon, *New Governance, Preemptive Self-Regulation, and the Blurring of Boundaries in Regulatory Theory and Practice*, 2010 WIS. L. REV. 591, 595 (2010) (“The conventional story on regulation involves either the formulation of something called ‘law,’ which is more or less fixed, and can then be ‘enforced’ by state actors trying to maximize compliance. . . . Or else regulation involves the formulation of something called ‘policy,’ which involves the balancing of the number of factors to inform the way the state approaches a particular issue. Once the policy is formulated, the next stage is ‘implementation.’ . . . New governance blurs the boundaries between law and enforcement, and policy and implementation.”). As noted with respect to charter schools: “Over the last two decades, charter schools have become further complicated by not only crossing public and private boundaries, but merging nonprofit and for-profit organizational forms in the provision of education.” Julia L. Davis, *Contracts, Control and Charter Schools: The Success of Charter Schools Depends on Stronger Nonprofit Board Oversight to Preserve Independence and Prevent Domination by For-Profit Management Companies*, 2011 BYU EDUC. & L.J. 1, 8 (2011).

169. See Helge, *supra* note 154, at 3-4; Brody & Tyler, *supra* note 157, at 571.

170. MCGOEYS, *supra* note 13, at 122.

171. *Id.*

education? Further, can public law norms manage philanthrocapitalism (or perhaps more aptly philanthro-policymaking) when it appears to cross a boundary in influencing the direction of both public policy and public dollars?

This inquiry has two parts. First, at what point (if ever) does private philanthropy cross a line in directing public dollars and/or public policy such that public law norms are threatened? Second, assuming that line is crossed, what public law mechanisms can and should be used to set boundaries and prevent philanthropic overreach? Scholars have considered similar questions in the philanthropic<sup>172</sup> and broader privatization contexts. They raise questions about transparency, public notice, participation, engagement in policymaking, and accountability in a sphere where there are few oversight requirements that relate to public law norms surrounding public policymaking. The increased blurring of lines among public, private, and civic (or civil society) spheres presents a central challenge to public law norms in the public education context and in other sectors. Notably, the ways that public law responds to the effects of philanthro-policymaking—where private actors drive policymaking and agenda-setting—is more complicated than in the context of privatization through contracting.

The experience with the Standards provides an example of philanthrocapitalism that catalyzed massive policy change in public education across the country. Whether one favors or opposes the Standards, their development and implementation was a significant disruption in which private interests were able to shortcut a public deliberative process to implement change. The resulting law drew a range of public responses, including policy reversals. On a larger scale, however, the philanthro-policymaking process presents challenges for public policymaking and public administration.

It is also an example of a process in which private philanthro-policymakers frame and shape the policy and reform debate in ways that have proven difficult for stakeholders and others to reframe. Thus, for example, the public education reform discourse in the United States over the last several decades has centered on market- and metrics-based models, all but ignoring evidence of the impact of poverty, inequality, and segregation on public school success.<sup>173</sup>

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172. See, e.g., Quam, *supra* note 10, at 640.

173. See, e.g., Rothstein, *supra* note 44, at 2; see also SCHNEIDER, *supra* note 43, at 358 (describing wealthy philanthropists as “smothering the democratic institution of the community public school . . . inadvertently cheapening American education, making it little more than scoring high numbers on tests, a skill that is

1. *Public Choice? Capture? New Governance? Challenging Public Law Norms and Democratic Education Policymaking in the Development of Common Core State Standards*

The public law challenge here is multifaceted and difficult to define. A small group of philanthrocapitalists and members of the business community played a significant—and perhaps outsized—role in developing and implementing the Standards in forty-five states. Nevertheless, the process continues to be described as a “public” process.<sup>174</sup> Indeed, although it is undisputed that the Gates Foundation’s \$233 million enabled “writing the new standards without a penny from Uncle Sam[,] ‘State-led initiative’ became advocates’ mantra for describing Common Core.”<sup>175</sup> The actions by several important actors created a strong incentive for states to adopt the Standards. Specifically, state governors and education-policy leaders focused their efforts through Achieve, Inc. Meanwhile, the National Governors Association and Federal Department of Education developed testing and data collection policies under NCLB, as well as the RTTT initiative.<sup>176</sup> At the end, these efforts combined to create the Standards, but highlighted how the overall initiative was at best a nominally “public” process.

The influence of a very small group of wealthy donors and contributors in framing, drafting, and promoting the Standards stands in stark contrast to general notions of a public, deliberative, democratic process.<sup>177</sup> The lack of information and input from key stakeholders—local school districts, school administrators, teachers, parents, and students—raises concerns about the degree to which Standards development involved an authentic public process. The lack of public understanding, input, and participation in the development and implementation of the Standards, and the speed

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increasingly separated from genuine learning as focus upon it intensifies”). *See generally* Ladd, *supra* note 45.

174. *See* Elkind, *supra* note 33, at 53.

175. *Id.*; *see also* MCGOEY, *supra* note 13, at 137 (noting the Gates Foundation spent over \$233 million to back the Standards and allocated the money to both conservative and progressive interest groups).

176. *See* description of the Standards development process, *supra* note 49 and accompanying text. The Standards were also reviewed by representatives of “teachers’ unions, state education officials, academic groups, feedback panels, and independent validation committees. Two drafts were published online, generating 10,000 public comments and prompting further revisions.” Elkind, *supra* note 33, at 53.

177. *See, e.g.*, MCGOEY, *supra* note 13 at 136-38; SALTMAN, *supra* note 14, at 16.

with which they were adopted and implemented, gave many the sense that the Standards were imposed rather than deliberated on with public participation. For many of those most affected, implementation of the Standards came as a surprise and testing under the Standards came as a rude awakening (including what has been described as an “assessment cliff”).<sup>178</sup> Some say that this led to the local pushback reflected in various opt-out movements across the country.<sup>179</sup>

#### a. Public Choice

Considering the only nominally public processes and procedures used to develop, adopt, and implement the Standards,<sup>180</sup> they are perceived as lacking democratic legitimacy.<sup>181</sup> However, some theorists might say that the process of establishing the Standards, far from illegitimate, is simply an example of politics and public choice theory in action.<sup>182</sup> That is, the development of the

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178. See, e.g., *The Common Core FAQ*, NPR ED (May 27, 2014, 12:03 PM), <http://www.npr.org/sections/ed/2014/05/27/307755798/the-common-core-faq#q21> [<https://perma.cc/89MQ-VU43>] (describing “assessment cliff”); see also Carolyn Thompson, *NY Standardized Test Scores Drop as Expected*, HUFFINGTON POST (Oct. 7, 2013), [http://www.huffingtonpost.com/2013/08/07/new-york-common-core-scores\\_n\\_3721360.html](http://www.huffingtonpost.com/2013/08/07/new-york-common-core-scores_n_3721360.html) [<https://perma.cc/K65E-JGTR>].

179. See Valerie Strauss, *Why the Movement to Opt out of Common Core Tests Is a Big Deal*, WASH. POST (May 3, 2015), <https://www.washingtonpost.com/news/answer-sheet/wp/2015/05/03/why-the-movement-to-opt-out-of-common-core-tests-is-a-big-deal/> [<https://perma.cc/CJ8N-A8U9>].

180. See *supra* note 49 and accompanying text.

181. See generally Stan Karp, *The Problems with the Common Core*, RETHINKING SCHS., [http://www.rethinkingschools.org/archive/28\\_02/28\\_02\\_karp.shtml](http://www.rethinkingschools.org/archive/28_02/28_02_karp.shtml) [<https://perma.cc/BUR8-LZCM>] (last visited Mar. 16, 2016); Kurzweil, *supra* note 5, at 616 (critiquing the use of federal waiver authority in the process of adopting the Standards as lacking democratic legitimacy).

182. Jeffrey J. Rachlinski & Cynthia R. Farina, *Cognitive Psychology and Optimal Government Design*, 87 CORNELL L. REV. 549, 551-52 (2002) (“For some public choice theorists, government is so suffused with self-interested behavior that it is inescapably rotten to the core. Beginning from the premise that human actors are self-interested, these scholars reach the conclusion that the only good government is less government. Under this view, bad public policy decisions can be avoided only by shrinking the quantum of pervertable public power through radical deregulation, creating a minimalist night-watchman state. Although this view has influential proponents in law and legal scholarship, most scholars who employ public choice analysis have a somewhat more optimistic perspective on government. They believe that, at least in some circumstances, it is possible to co-opt individually opportunistic behavior, so that self-interest-maximizing actors further the collective good despite themselves. For these theorists, the goal of those who design

Standards resulted from a process based on self-interested actions by government and other actors (while articulating nominally public goals).<sup>183</sup> Others might argue that even under public choice theory, the Common Core process should be characterized as simply the monopolization of public policymaking in the hands of the most wealthy and powerful rent-seekers to the ultimate exclusion of all others, contrary to the structure of a participatory democratic republic.

### b. Capture

Still others might characterize the impact of philanthro-policymaking as a form of capture. “Capture” refers to circumstances when private interests, ostensibly regulated by public agencies, become so entwined with those agencies that they steer agency policymaking to serve private special interests in lieu of the agency’s public purposes. In the Standards development and implementation process, capture may have occurred through the placement of proponents of the Gates Foundation’s position within agencies charged with education policymaking. Such claims have been levied, for example, against Education Secretary Arne Duncan and in connection with New York State’s use of privately compensated research fellows to implement state education policy.<sup>184</sup>

### c. New Governance

There is an argument that might seek to counter concerns about capture—or disproportionate influence of the billionaire or business constituency in shaping public education policy. This view might

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government institutions should be to discover when and how individual self-serving desires can be channeled toward public-serving ends. Whenever such channeling cannot be accomplished, institutional design should concentrate on curbing the damage that self-regarding public and private actors will wreak with government power. By thus offering both a descriptive and a normative theory of government, public choice responds powerfully to the need to understand why regulatory policymaking and execution go wrong.”)

183. See *id.* See generally Matthew J. Parlow, *Civic Republicanism, Public Choice Theory, and Neighborhood Councils: A New Model for Civic Engagement*, 79 U. COLO. L. REV. 137 (2008); GLEN O. ROBINSON, *AMERICAN BUREAUCRACY: PUBLIC CHOICE AND PUBLIC LAW* (1991).

184. Michael Winerip, *Regents Pay a Political Price for Their Free Advisers, Dissenters Warn*, N.Y. TIMES (Aug. 14, 2011), [http://www.nytimes.com/2011/08/15/nyregion/free-advisers-cost-ny-education-dept-critics-say.html?\\_r=0](http://www.nytimes.com/2011/08/15/nyregion/free-advisers-cost-ny-education-dept-critics-say.html?_r=0) [<https://perma.cc/GEU8-DYVC>].



characterize the process used in adopting the Standards as exemplifying a remade public process, perhaps within the very general category of “New Governance.”<sup>185</sup> According to Douglas NeJaime: “New Governance scholars and practitioners have taken advantage of the blurred boundary between public and private regulation to identify opportunities for more collaborative problem solving that empowers stakeholders, including individuals and NGOs.”<sup>186</sup> He notes how “traditionally state-centered, top-down regulatory projects are detaching from a centralized state apparatus and devolving from the command-and-control regime of public law litigation.”<sup>187</sup> NeJaime further observes that “New Governance scholarship places primacy on (1) collaborative process, (2) stakeholder participation, (3) local experimentation, (4) public/private partnership, and (5) flexible policy formation, implementation, and monitoring.”<sup>188</sup>

Some features of New Governance, such as public–private collaboration and a problem-solving approach that seek to avoid top-down bureaucratic pitfalls, were elements of the Standards implementation process. The Standards’ process was clearly deficient, however, with respect to meaningful, inclusive stakeholder participation and local engagement in a deliberative process of policy formation.

Thus, the argument that the Standards’ development and implementation operated as a public process under “New Governance” is difficult to sustain. Where were the key stakeholders in developing Standards for an education system in which poverty, segregation, and inequality have been identified as the primary drivers of achievement gaps? Indeed, in identifying risks associated with “New Governance,” NeJaime notes a central concern that “New Governance systems may promise meaningful participation for outsider interests but may fail to deliver; instead, New Governance regimes might merely confirm the status of outsider groups.”<sup>189</sup>

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185. See Douglas NeJaime, *When New Governance Fails*, 70 OHIO ST. L.J. 323, 325 (2009). New Governance scholars “situate local stakeholders as key governance participants and position fair process as a way for various actors—public and private, large and small, groups and individuals, lawyers and non-lawyers, experts and lay citizens, conservatives and progressives—to collectively imagine, implement, monitor, and revise policy.” *Id.*

186. *Id.* at 331.

187. *Id.*

188. *Id.* at 332.

189. *Id.* at 362.

Similarly, Archon Fung, an early proponent of New Governance approaches in school reform and community policing, acknowledges the risks of “domination or capture by powerful factions.”<sup>190</sup> Therefore, even if characterized as a form of “New Governance,” concerns about capture, exclusion, and the domination of powerful private interests remain, demonstrating a need to strengthen public law norms in this area.

## B. Reinvigorating Public Norms in Public Education in the Face of Extreme Inequality and Segregation

Administrative law scholars and others have examined the challenges to traditional governance posed by the blurring of the public and private spheres in public policymaking, particularly as related to accountability, transparency, and democratic responsiveness. As Mark Vanderbergh observes,

[P]ublic/private hybrids raise difficult accountability concerns. The traditional administrative law means of ensuring agency accountability through judicial review of rulemaking and similar measures may do little to ensure that public/private hybrids are transparent and responsive to the electorate. Importantly, scholars have argued that concerns about the accountability of agencies should be redirected to a new search for alternative accountability mechanisms that can assure the aggregate accountability not only of agencies, but of the new public/private hybrids.<sup>191</sup>

The Standards process, and education reform policymaking over the last several years, highlight the accountability, transparency, and public participation concerns raised under new public/private arrangements in governance and public policy development. These challenges are all the greater at a time of increasing income and wealth inequality. They become even more complex in the face of growing philanthrocapitalism and philanthro-policymaking. Given the degree of disruption caused in connection with the development of the Standards (and what some view as private policymaking), there is a perceived need to reinvigorate public law norms in public education policymaking. Questions arise, however, over what processes or procedures could be used to address this perceived need and whether such prescriptions are warranted.

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190. *Id.* at 360 (quoting Archon Fung, *Accountable Autonomy: Toward Empowered Deliberation in Chicago Schools and Policing*, 29 POL. & SOC'Y 73, 75 (2001)).

191. Vanderbergh, *supra* note 167, at 2039.

1. *Is There a Need To Reinvigorate Public Law? Or Is This Simply a New Kind of Public Process?*

The story of the Standards offers two arguments about the efficacy of public law norms of democratic accountability, public engagement, and civic republicanism in cabining the influence of wealthy philanthrocapitalists on public education policymaking. By one argument, responses to the Standards demonstrate the availability of effective public law boundaries to limit the influence of philanthrocapitalists. For example, opposition to the Standards included organized responses from the public—such as parents, students, teachers, and unions engaged in the opt-out movement or other forms of advocacy. Other responses included appeals to the courts, administrative enforcement, and perhaps most significantly, the federal legislative response in the enactment of the ESSA. Indeed, it might be said that, the most contested aspects of the Standards’ implementation—including federal overreach and uses of standardized tests for teacher evaluation—have been abrogated by ESSA.<sup>192</sup> These developments could support the view that notwithstanding “blurred lines” and public-private collaborations under “New Governance” frameworks, existing public law structures provide a sufficient backstop to the most contested policy outcomes fostered by wealthy private interests.

It could be argued, for example, that the Standards resulted from a valid public process—perhaps even a more effective “New Governance” process that enabled swift, broad policy change to occur by avoiding traditional political barriers that had prevented the adoption of common standards in the past. Under this account, the opposition to the Standards was simply “politics as usual” catching up. It might further be said that even after significant opposition, pushback, and reversals, the core of the Standards project remains in place. If the ESSA is considered the most robust public response to the Standards, it may be argued that despite the Act’s new limitations on the federal role in education and the de-linking of teacher evaluation from standardized test scores, much of the framework supporting the Standards remains intact. The most important component is the continued requirement of high-stakes standardized tests in virtually every grade.

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192. See generally Every Student Succeeds Act, Pub. L. No. 114-95, 129 Stat. 1802 (2015) [hereinafter ESSA].

Some might say that this result represents a public process as it should be. A policy is proposed and implemented. Particular components draw broad opposition. A compromise is reached that retains the core of the policy while also responding to the strongest objections to it. Public choice theorists might explain the process as an example of various constituencies with varying degrees of power vying for policy outcomes that best serve their interests.

If one views the outcome of the ESSA and the Standards' development process overall as a net positive, why should there be any concern about the role of philanthrocapitalists? Might it not be said that their involvement made the process quicker and more efficient? Perhaps. But an important rationale for the existence of public law norms is missing from this view—transparency, accountability, and meaningful, inclusive stakeholder participation. This means that the framing and development of the Standards should have involved a public deliberative process rather than a private handshake on a summer day.<sup>193</sup>

2. *There Is a Need to Reinvigorate Public Law: Public Education Reform Must Involve Procedures Assuring Inclusion of Voices and Participation of Those Most Affected*

A different view of the Standards process might focus on the absence of key stakeholder participation in framing reform or shaping the Standards. It might consider the broader project supported by philanthrocapitalists and the degree to which key policy preferences fostered by wealthy interests remain in place, notwithstanding evidence that many such policies do little to benefit either key stakeholders (e.g., vulnerable public school students) or public education goals, overall. For example, with regard to the Standards, the central role of standardized testing aligned to narrowly drawn standards remains in place<sup>194</sup> as does the project of

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193. See Layton, *supra* note 1.

194. For example, the ESSA provides that states “engage and support teachers in developing and scoring assessments that are part of the innovative assessment system, including through the use of high-quality professional development, standardized and calibrated scoring rubrics, and other strategies, consistent with relevant nationally recognized professional and technical standards, to ensure inter-rater reliability and comparability.” ESSA § 1204(e)(2)(B)(v).

student data collection.<sup>195</sup> Indeed, it may be argued that some of the ESSA's key changes, such as the limits on the federal role in public education<sup>196</sup> and on the use of tests for teacher evaluation,<sup>197</sup> respond only to the most powerful and organized opposition to the Standards.<sup>198</sup> Several matters central to the objectives of philanthrocapitalists and philanthro-policymakers remain in place and continue as policy under ESSA with little critical examination. Thus, the broad project of imposing market-based approaches—including high-stakes testing, expansion of choice/privatization, and student data collection—remains in place in current public education policy. This holds, notwithstanding growing evidence that market-based reforms have not succeeded in improving public education, even on their own terms. Consider Kenneth Saltman's observation:

Corporate school reform has failed on its own dubious terms. It has not succeeded in increasing student test scores, reducing costs, reducing bureaucracy that impedes efficiencies, or reducing the so-called achievement gap. But it has succeeded spectacularly in reframing the debates about education in the academic, policy and public realms.<sup>199</sup>

This goes to concerns about both transparency and accountability. Through the Standards implementation process and responses to it, little attention was given to the documented drawbacks surrounding the high-stakes use of standardized tests. Evidence is growing that the manner in which high-stakes tests are used under the market-model of education reform is doing little to

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195. *Id.* § 1111(b)(2)(H)(v) (“(v) REQUIREMENTS.—To receive approval from the State educational agency under clause (iii), a locally-selected assessment shall— . . . (II) provide comparable, valid, and reliable data on academic achievement, as compared to the State-designed assessments, for all students and for each subgroup of students defined in subsection (c)(2), with results expressed in terms consistent with the State’s academic achievement standards under paragraph (1), among all local educational agencies within the State; (III) meet the requirements for the assessments under subparagraph (B) of this paragraph, including technical criteria . . .”).

196. *Id.*

197. *Id.*

198. In other words, it might be said that conservatives got what they wanted in reducing the federal government’s role in education and that teachers’ unions got what they wanted with respect to teacher evaluation. At the same time, key policy components related to more fundamental changes in public education policy—like the ubiquity of high-stakes standardized tests aligned with market-based accountability models and the emphasis on data collection—remain.

199. Saltman, *supra* note 39, at 675.

improve student learning or achievement.<sup>200</sup> Yet the heavy use of standardized tests remains in place under ESSA. Similarly, questions and concerns surrounding student data collection are growing among parents, students, privacy advocates, and members of the public, yet these questions are not addressed in ESSA or elsewhere. More broadly, there remains a lack of transparency about who actually develops and decides education policy. Nor is there a plausible accountability mechanism for private parties who play a significant role in education policy experimentation that may cost the public billions of dollars while sending students, teachers, and administrators scrambling to keep up with constant change.

In addition, the involvement of key stakeholders in education policymaking remains marginalized.<sup>201</sup> This means that input from students, parents, teachers, and school administrators most affected by public education policy is not part of the policymaking process. This contributes to lack of key information about student, teacher, and school needs that is essential to effective policy development.

Philanthrocapitalism, or philanthro-policymaking, is problematic because it tends to be opaque, unaccountable, exclusionary, and uninformed, while having a significant impact on public policy. It also encourages a view aligned with extreme privatization that every problem can be solved by applying market-based principles—even problems created by unchecked markets such as an extreme and growing poverty—to the exclusion of those most experienced with the problems that need to be solved. “[W]ith its emphasis on superrich hyperagents solving social problems, philanthrocapitalism” has amplified “the voice of those who already wield substantial influence, access, and power.”<sup>202</sup> This means, as Rieff notes, that

for the first time in modern history, it has become the conventional wisdom that private business—the most politically influential, undertaxed, and underregulated sector among those groups that dispose of real power

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200. See, e.g., Valerie Strauss, *Darling-Hammond: The Mess We Are in*, WASH. POST (Aug. 1, 2011), [https://www.washingtonpost.com/blogs/answer-sheet/post/darling-hammond-the-mess-we-are-in/2011/07/31/gIQXWSIoI\\_blog.html](https://www.washingtonpost.com/blogs/answer-sheet/post/darling-hammond-the-mess-we-are-in/2011/07/31/gIQXWSIoI_blog.html) [<https://perma.cc/N46U-RUQF>].

201. While the ESSA includes provisions related to parent input, concerns remain about a longstanding lack of support for robust, meaningful input by parents, students, and other stakeholders. See generally Tiffani N. Darden, *Parental Exclusion from the Education Governance Kaleidoscope: Providing a Political Voice for Marginalized Students in Our Time of Disruption*, 22 WM. & MARY BILL RTS. J. 1093 (2014).

202. Jenkins, *supra* note 9, at 817 (footnotes omitted).

and wealth in the world, as well as the least democratically accountable—should be entrusted with the welfare and fate of the powerless and the hungry.<sup>203</sup>

Thus a major problem with policy overreach by philanthrocapitalists is that it risks perpetuating structures of inequality that are key drivers of student-achievement gaps in the name of improving public education.

### C. Are There Remedies? Can Philanthrocapitalism in Public Education Policymaking Be Managed According to Public Law Norms?

To respond to the concerns about the excessive influence of wealthy philanthrocapitalists on public school policymaking, some observers have called for (1) increased transparency so that the public is made aware of private donations, their purposes,<sup>204</sup> and an opportunity to respond in a manner that impacts public policy; (2) accountability mechanisms to address private overreach in the contexts of both privatization and philanthro-policymaking; (3) expanding or importing public law norms where privatization and private influence on public policymaking threaten public processes; and (4) establishing mechanisms to ensure that inherent public functions remain within the purview of accountable public actors.

#### 1. *Transparency and Public Participation*

In many ways, proposed responses to philanthrocapitalism's overreach in education policy tend to be similar to proposals to manage privatization's impact on public law norms more broadly. Key recommendations for responding to philanthropic overreach into public education policy include increased transparency—ensuring that the public is timely made aware of the terms and substance of private influence on public education policy. Such transparency is designed to serve public interests in meaningful understanding, engagement, and participation in the policymaking process. For example, in the context of private influence in promoting “parent trigger legislation,” one proposal is to “require that any paid organizers publicly identify themselves and disclose their financial

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203. Rieff, *supra* note 18.

204. See generally Evelyn Brody, *Sunshine and Shadows on Charity Governance: Public Disclosure as a Regulatory Tool*, 12 FLA. TAX REV. 183 (2012).

backers.”<sup>205</sup> The purpose of such transparency is to ensure that privately paid organizers are understood to be agents of private interests and aren’t perceived as citizens acting on their own behalf. It would give parents and community members a more accurate understanding of issues, how they are framed, and the sources of their support or opposition. The hope is that such transparency would decrease confusion, coercion, and disruption caused by “astroturf” organizing funded by private interests to support education reform experiments.<sup>206</sup>

Transparency also would help to encourage public participation. Providing key stakeholders and the public with information about the sources of support for particular policy proposals would improve understanding of motives and rationales, and would give interested persons an opportunity to participate more effectively in the policymaking process.<sup>207</sup> It is important that such involvement take place before sweeping policy change is adopted. Public input and meaningful deliberation tend to improve the policymaking process. In the context of the Standards, such a process might have produced less disruption and perhaps yielded better outcomes more attuned to the needs of public school students.

## 2. *Mechanisms to Better Regulate Private Delegations and to Support a Public Duty to Supervise*

Administrative law scholars grappling with the need to preserve public law norms in an increasingly privatized world have proposed means of extending public law norms to set appropriate public interest boundaries on private actors performing public services. For example, Gillian Metzger proposes treating government outsourcing of public services as a form of private delegation.<sup>208</sup> Under such a construct, government delegations of authority would import public law norms such as due process protections and common public oversight mechanisms into privatized government

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205. See Quam, *supra* note 10, at 641 (quoting *PAA on the Parent Trigger*, PARENTS ACROSS AM. (Sept. 17, 2012), <http://parentsacrossamerica.org/paa-parent-trigger/> [<https://perma.cc/2G38-RY2C>]).

206. *Id.*

207. See generally Glen Staszewski, *Reason-Giving and Accountability*, 93 MINN. L. REV. 1253, 1267 (2009) (“If citizens do not know about the existence of a policy issue, they will probably not have formed any meaningful preferences on its most desirable resolution.”).

208. See generally Metzger, *supra* note 156.



services. The requirements of adequate notice and opportunity to be heard prior to significant actions would be imported into government outsourcing arrangements. This notion of private delegation seeks to elide the “state action” boundary that limits the application of procedural due process requirements. Therefore, the basic principles of fair notice and opportunity to be heard would travel with the government’s delegation of authority over public services to private entities.

Another mechanism for preserving public law norms in the privatization context is to maintain a public duty to supervise the actions of private entities in the performance of public services. This duty would extend beyond the limits of contractual terms to import (or preserve) public law norms of oversight and supervision of the work of private agents. This idea of a public duty to supervise is related to the concept articulated by Paul Verkuil that there exist inherent public functions that cannot be delegated to private third parties.<sup>209</sup> Where such inherent public functions are to be performed, they cannot be delegated or outsourced to private third parties.

The concepts of private delegation, public duty to supervise, and excluding inherent public functions from privatization are difficult to apply directly to philanthrocapitalism. This is because unlike most privatization arrangements, the government is not reaching out to the private entity to perform public services under a contractual arrangement. Instead, a private entity is voluntarily donating significant resources to encourage and support particular policy directions or outcomes by government. Often, as noted above, the philanthropist applies funding not only to government entities or public-private partnerships like Achieve, Inc., but also funds advocacy groups and interested organizations as a means of shaping the public and political discourse around the policy change. It is much more difficult to structure means of importing public law norms into such arrangements. Yet, building on the notion of private delegation could help public entities to mark a boundary that could trigger requirements for increased public notice or more robust efforts at public participation. For example, the requirements might trigger when private philanthropic donations operate to impact public policy in significant and disproportionate ways. Thus, large philanthropic donations aimed at catalyzing major policy change could be viewed as approaching a private delegation of public policymaking, thus requiring additional procedures to notify the

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209. See Verkuil, *supra* note 151.

public of the policy change and the catalysts for it, and to provide greater opportunities for input from key stakeholders and average citizens. This concept could be imposed under either a notion of private delegation or as an expression of a continued public duty to supervise public policymaking, particularly in the face of private efforts to exert significant influence.<sup>210</sup>

### 3. *Oversight of Philanthrocapitalists or Philanthro-Policymakers—Difficult Yet Imperative*

Were it possible to fit philanthrocapitalists or philanthropypolicymakers into a structure that would require increased transparency and public participation, implementing such a requirement would be challenging. Just as the Standards were adopted according to a nominally public process, it is possible (and perhaps likely) that procedures would be put in place that would provide for more robust transparency, public participation, deliberation, and accountability that similarly would fail to achieve the desired public counterweight.

Another approach might be to regulate philanthropic contributions deemed to have a disproportionate impact on public policy.<sup>211</sup> This might include limits on philanthropic giving or tighter regulation where public policy is involved. A problem with such a regulatory approach is that it likely would be difficult to structure and enforce.<sup>212</sup> In addition, as a general matter, generous philanthropic support for public projects is generally understood as something to be encouraged. Moreover, given the widely varying philanthropic approaches and goals, it would be difficult to distinguish circumstances that warrant regulation and limits from those that do not.

That seems to leave us with transparency, participation, and public accountability as the primary available remedies to counterbalance the excessive influence of philanthrocapitalists and

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210. In the Standards example, it would require states seeking to adopt the policy to expand public notice and opportunities for input. This could serve as a modest counterweight to private influence.

211. See, e.g., MICHAEL EDWARDS, JUST ANOTHER EMPEROR? THE MYTHS AND REALITIES OF PHILANTHROCAPITALISM 65-66, 82-90 (2008).

212. See generally Brody & Tyler, *supra* note 157. Not to mention that it probably would not overcome legal challenges under the current Citizen's United regime equating money with speech and with the broader understanding that people can donate money according to their wishes with few limitations.

philanthro-policymakers on public education. Yet these remedies are likely difficult to achieve in an environment of extreme income and wealth inequality, where politics is dominated by the influence of a small number of extremely wealthy elites.<sup>213</sup> This invokes the questions whether and to what degree more robust public involvement in public education policymaking is possible. These kinds of questions tend to divide public law idealists and pragmatists<sup>214</sup> and highlight the difficulties in achieving the aims of democratic education and participatory democracy.<sup>215</sup> Despite the goal of inclusive deliberative democracy, particularly as related to the important project of universal public education, actually including and engaging the public, particularly those most marginalized, whose interests and lives are most affected by reform policies, presents significant challenges.<sup>216</sup> As Martin Gilens and Benjamin I. Page note:

Despite the seemingly strong empirical support in previous studies for theories of majoritarian democracy, our analyses suggest that majorities of the American public actually have little influence over the policies our government adopts. Americans do enjoy many features central to democratic governance, such as regular elections, freedom of speech and association, and a widespread (if still contested) franchise. But we believe that if policymaking is dominated by powerful business organizations and a small number of affluent Americans, then America's claims to being a democratic society are seriously threatened.<sup>217</sup>

Therefore, notwithstanding the difficulties in structuring public policy generally, and education policy in particular, to meaningfully include the voices, positions, and interests of those most affected yet most marginalized, such efforts must be supported and continued. This means that at minimum, there should be greater transparency about philanthropic contributions impacting public education policymaking and a responsibility among public policymakers to

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213. See EDWARDS, *supra* note 211.

214. See generally Jerry L. Mashaw, *Essay: Deconstructing Debate, Reconstructing Law*, 87 CORNELL L. REV. 682 (2002).

215. See *id.*; see generally Rachlinski & Farina, *supra* note 182, at 582-86.

216. See, e.g., Mark Seidenfeld, *The Role of Politics in a Deliberative Model of the Administrative State*, 81 GEO. WASH. L. REV. 1397, 1431-32 (2013); Natalie Gomez-Velez, *Public School Governance and Democracy: Does Public Participation Matter?*, 53 VILL. L. REV. 297 (2008).

217. Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 PERSP. ON POL. 564, 576-77 (2014), [https://scholar.princeton.edu/sites/default/files/mgilens/files/gilens\\_and\\_page\\_2014\\_testing\\_theories\\_of\\_american\\_politics.doc.pdf](https://scholar.princeton.edu/sites/default/files/mgilens/files/gilens_and_page_2014_testing_theories_of_american_politics.doc.pdf) [<https://perma.cc/DX69-RCY6>].

expand opportunities for ordinary stakeholders—particularly those most marginalized—to be informed about and be heard with respect to major policy change. There also should be mechanisms for public accountability when private interests exert major influence on public policy change.<sup>218</sup> These mechanisms include robust enforcement of existing limitations on charities vis-à-vis private aggrandizement. In addition, because of difficulties regulating those who voluntarily give money to foster certain public policies, the emphasis of the regulation should operate in tandem with the requirement that public actors limit and report significant donations and other methods of influence on public policymaking.

4. *Persuading Philanthrocapitalists to Act in Accordance with Public Law Norms Designed to Foster the Public Good*

The private, nonprofit, voluntary sector (or independent sector) is known for its independence from government regulation. Therefore, perhaps in tandem with proposing greater oversight, a request should be made directly to key philanthrocapitalists and philanthro-policymakers to practice philanthropy differently. The experience with the Standards should give the Gates Foundation and other philanthrocapitalists pause. The fierce opposition to the Standards coming from all across the political spectrum can be attributed to the failure to include key voices in the decision-making process. This starts with framing the issues and identifying meaningful solutions to the perceived failure of public schools to prepare all students adequately. For example, rather than focusing only on career and college readiness as goals, why not include preparing for engaged citizenship, critical thinking, and achievement of human potential as equally important policy goals? In addition, in identifying causes of opportunity gaps among public school students, the vast literature on the impacts that poverty, inequality, and segregation have on student learning should be enlisted to shape policy responses.

The risk that proposing such a request to philanthrocapitalists like Bill Gates will be perceived as naïve or pointless is not lost on me. Nonetheless, I believe that such a request should be made. Just as a handful of wealthy philanthropists were persuaded to commit to a giving pledge so might they be persuaded to focus their giving in

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218. See generally Helge, *supra* note 154.

ways that more effectively address structural issues of poverty and inequality that impact public school students. A recent article describing the Ford Foundation's approach to philanthropy noted its focus on reaching out to the key stakeholders—the people to be served—and asking them what they need to solve the problem to be addressed.<sup>219</sup> Only after hearing and understanding from stakeholders what is needed to solve an identified problem is a policy, program, or reform implemented. Such an approach keeps the focus on those closest to an issue or problem and perhaps may help to remind powerful, wealthy funders what is most important in both public education policy and philanthropy. As Henry Giroux observes:

The notion that children should be viewed as a crucial social resource—one that represents, for any healthy society, important ethical and political considerations about the quality of public life, the allocation of social provisions and the role of the state as a guardian of public interests—appears to be lost in a society that refuses to invest in its youth as part of a broader commitment to a fully realized democracy. As the social order becomes more privatized and militarized, we increasingly face the problem of losing a generation of young people to a system of increasing intolerance, repression, and moral indifference.<sup>220</sup>

When one considers what is truly at stake in shaping our system of public education, the importance of preserving public law norms becomes clear. The public interest must be the central focus of public education policy. Public law norms must be used to preserve the public, humanitarian goals of public education for the development of each student's full human potential and the realization of engaged democratic citizenry.

## CONCLUSION

The well-documented influence of a handful of foundations in pushing public education reform (with respect to the Standards and beyond) has caused a great deal of disruption, significant public expenditure, and the framing of the public education debate in market terms. This calls for governance and public policy attention. The Common Core State Standards have been touted as an important part of the effort to close the achievement gap. Federal involvement

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219. Larissa MacFarquhar, *What Money Can Buy: Darren Walker and the Ford Foundation Set Out to Conquer Inequality*, THE NEW YORKER, Jan. 4, 2016, <http://www.newyorker.com/magazine/2016/01/04/what-money-can-buy-profiles-larissa-macfarquhar>.

220. HENRY GIROUX, *POLITICS AFTER HOPE: OBAMA AND THE CRISIS OF YOUTH, RACE, AND DEMOCRACY* 143 (2010).

in the adoption of the Standards in almost all states has drawn significant opposition evidenced in the recently adopted ESSA, which reduces the power of the Federal Education Department and empowers states with respect to curricular standards and educational policymaking. A prominent question is what this means for the neediest students. Not only has the framing of public education reform by philanthrocapitalists caused great disruption with little improvement, it has diverted public policy attention from more promising approaches. Absent policies that address the impact of poverty, segregation, and discrimination on access to quality education, well-funded reforms, whether fostered on the federal, state, or local level, will not begin to impact the well-documented causes of educational opportunity gaps. These gaps relate to wide and increasingly entrenched inequality. Unless and until philanthrocapitalists and public policymakers attend to fundamental issues of income and wealth inequality, education disparities are likely to remain. The question is whether and how the application of public law norms can help include those most affected by public education policy change. Proposals to increase transparency, public oversight, and enforcement and a public duty to supervise and engage stakeholders should be adopted and implemented. Philanthropists also should be reminded of the impacts of poverty and structural inequity on public education and of the importance of public institution not a private good. Philanthropic approaches that include key stakeholders and seek to address structural inequality should be supported. Such proposals should be adopted to help steer public education policy in the direction of supporting quality public education that will be made available to all children, with an emphasis on broad engagement to address structural inequality. Otherwise, as Robin Rogers has noted, “Democracy may go the way of the concept of privacy, not rejected so much as made obsolete.”<sup>221</sup>

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221. Rogers, *supra* note 26, at 381.