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Articles

Rethinking the Role of NGOs in an Era of Extreme Wealth Inequality: The Example of the Bill & Melinda Gates Foundation

John J. Chung*

INTRODUCTION

We live in a world of extreme wealth inequality. Billionaires at one time were a rarity. In 1985, there were fourteen billionaires.¹ Today, there are 2,604.² Moreover, the total amount of their net worth is breathtaking. In 1985, the richest billionaire had a net worth of \$2.8 billion.³ Today, the richest have more than \$100 billion each.⁴ At the top are two familiar names, Bill Gates

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1. *The Forbes 400: Walton Tops List of Richest Americans*, L.A. TIMES (Oct. 15, 1985), http://articles.latimes.com/1985-10-15/business/fi-16339_1_billionaires [<https://perma.cc/9BZ9-C9E4>].

2. Alicia Adamczyk, *The US is home to more billionaires than China, Germany and Russia combined*, CNBC (May 9, 2019), <https://www.cnbc.com/2019/05/09/the-countries-with-the-largest-number-of-billionaires.html> [<https://perma.cc/S89Z-AAL2>].

3. *The Forbes 400: Walton Tops List of Richest Americans*, *supra* note 1.

4. See Taylor Telford, *Jeff Bezos might lose his title as world's richest person*, WASH. POST (Oct. 25, 2019), <https://www.washingtonpost.com/business/2019/10/25/jeff-bezos-might-lose-his-title-worlds-richest-man/> [<https://perma.cc/J7SH-QLMA>].

and Jeff Bezos, who have been trading the title of world's richest person in the past few years.⁵ The twenty-six richest people in the world reportedly have as much wealth as the poorest fifty percent of the world's population—approximately 3.8 billion people.⁶ The situation is so extreme that one billionaire, Ray Dalio, has described current wealth inequality as an “existential risk” for the United States.⁷ He fears widening inequality will lead to increased conflict between “haves” and “have nots.”⁸ Because this Article is about the wealth created by Bill Gates, his observations are relevant. A few years ago, Gates noted that “[h]igh levels of inequality are a problem—messing up economic incentives, tilting democracies in favor of powerful interests, and undercutting the ideal that all people are created equal.”⁹ Furthermore, “[c]apitalism does not self-correct toward greater equality—that is, excess wealth concentration can have a snowball effect if left unchecked. Governments can play a constructive role in offsetting the snowballing tendencies if and when they choose to do so.”¹⁰

5. *Id.* The magnitude of Bezos' wealth is demonstrated by the fact that his net worth is over \$100 billion despite paying approximately \$36 billion to his former spouse in a divorce proceeding. *Id.* Gates' net worth is over \$100 billion even after donating more than \$35 billion to his private charitable foundation. *Id.*

6. Larry Elliott, *World's 26 richest people own as much as poorest 50%*, says Oxfam, THE GUARDIAN (Jan. 20, 2019), <https://www.theguardian.com/business/2019/jan/21/world-26-richest-people-own-as-much-as-poorest-50-per-cent-oxfam-report> [https://perma.cc/A5XV-V5SR].

7. *US income inequality is a 'national emergency,' billionaire Ray Dalio says*, CNBC (Apr. 10, 2019), <https://www.cnbc.com/2019/04/05/us-income-inequality-is-a-national-emergency-billionaire-ray-dalio-says.html> [https://perma.cc/9XYC-LDAT]. Dalio, the founder of a successful hedge fund, has a net worth over \$18 billion. *Id.*

8. Mark Niquette, *Dalio Says Capitalism's Income Inequality Is National Emergency*, BLOOMBERG (Apr. 7, 2019), <https://www.bloomberg.com/news/articles/2019-04-07/dalio-says-capitalism-s-income-inequality-is-national-emergency> [https://perma.cc/75DP-5JE9].

9. Bill Gates, *Why Inequality Matters*, GATESNOTES (Oct. 13, 2014), <https://www.gatesnotes.com/Books/Why-Inequality-Matters-Capital-in-21st-Century-Review> [https://perma.cc/NE69-WY58].

10. *Id.*

More recently, Gates said that the growing inequality between the richest and the poorest shows that the “system isn’t fair.”¹¹

In my earlier writings, I expressed similar concern over growing wealth inequality.¹² It is difficult to make sense of a world where billionaires buy \$300 million yachts—perhaps the ultimate example of a non-essential purchase.¹³ Meanwhile, people in poor countries die because of the lack of health care and people in rich countries die because of their lack of health insurance.¹⁴

This Article is an attempt to find a silver lining in the situation. The rise of incomprehensible fortunes has also resulted in non-governmental organizations (NGOs) with money to rival the financial power of nation-states.¹⁵ In particular, this Article focuses on “the largest private charitable foundation in the world,”

11. Sergei Klebnikov, *Bill Gates Urges Lawmakers to Raise Taxes On America’s Billionaires*, FORBES (Jan. 13, 2020), <https://www.forbes.com/sites/sergeiklebnikov/2020/01/03/bill-gates-urges-lawmakers-to-raise-taxes-on-americas-ultra-rich/#a34f0dff3f54> [<https://perma.cc/6SXW-4MZ8>].

12. See generally John J. Chung, *Wealth Inequality as Explained by Quantitative Easing and Law’s Inertia*, 85 UMKC L. REV. 275, 279 (2017).

13. Examples of yachts over \$100 million are displayed at *Billionaire boats: the world’s most expensive superyachts*, MSN (June 24, 2019), <https://www.msn.com/en-in/money/photos/billionaire-boats-the-worlds-most-expensive-superyachts/ss-BBLTJUh> [<https://perma.cc/52PY-8MSM>]. This commentary should not be interpreted as an attack on yachts or the people who buy them. People are free to do what they wish, obviously. It is simply a statement of fact of one segment of human activity.

14. See Alison P. Galvani et al., *Improving the Prognosis of Health Care in the USA*, 395 LANCET 524, 524 (2020).

15. The role of NGOs in public international law is well-recognized:

[NGOs] play an active role on the international scene and in some cases have a recognized legal status under treaties and other international arrangements. . . . International NGOs range over the entire array of human activity, including disarmament, environment, health, human rights, humanitarian matters, labor, science and technology, and so on.

International NGOs are like international organizations in that they are legal persons operating transnationally and are organized to pursue public purposes. At the same time, NGOs are created under national law, not international law, and are the product of cooperation among private persons, not states.

See LORI FISLER DAMROSCH & SEAN D. MURPHY, INTERNATIONAL LAW 424–425 (7th ed. 2019). What is different now is the existence of NGOs with the financial resources to rival nation-states.

the Bill & Melinda Gates Foundation (Gates Foundation).¹⁶ This year, 2020, marks the twentieth anniversary of its formation.¹⁷ The Gates Foundation has an endowment of more than \$46 billion.¹⁸ Since its founding, it has spent \$53.8 billion.¹⁹ These amounts are greater than the annual gross domestic product (in U.S. dollars as of 2017) of countries such as Armenia, Bolivia, Cambodia, Georgia, Jordan, Paraguay, and Tunisia (among many others).²⁰ The Gates Foundation has used this money to assist developing countries to improve, among other things, nutrition for children, women's

16. Telford, *supra* note 4.

17. See *Who We Are: History*, BILL & MELINDA GATES FOUND., <https://www.gatesfoundation.org/Who-We-Are/General-Information/History> [<https://perma.cc/W9EE-P8GL>] (last visited Nov. 15, 2020).

18. *Who We Are: Foundation Fact Sheet*, BILL & MELINDA GATES FOUND., <https://www.gatesfoundation.org/who-we-are/general-information/foundation-factsheet> [<https://perma.cc/9TQS-DYMV>] (last visited Nov. 15, 2020).

19. Bill & Melinda Gates, *Why we swing for the fences*, GATESNOTES (Feb. 10, 2020), <https://www.gatesnotes.com/2020-Annual-Letter> [<https://perma.cc/S4ZR-L6SR>] [hereinafter *2020 Letter*].

20. See INTERNATIONAL MONETARY FUND, <https://www.imf.org/external/pubs/ft/weo/2019/02/weodata/weorept.aspx?pr.x=78&pr.y=6&sy=2017&ey=2024&scsm=1&ssd=1&sort=country&ds=.&br=1&c=911%2C218%2C233%2C288%2C915%2C744%2C439&s=NGDPD&grp=0&a=#download> [<https://perma.cc/8Y74-ZBE4>] (last visited Nov. 15, 2020). The International Monetary Fund defines Gross Domestic Product (GDP) as:

[T]he monetary value of final goods and services—that is, those that are bought by the final user—produced in a country in a given period of time (say a quarter or a year). It counts all of the output generated within the borders of a country. GDP is composed of goods and services produced for sale in the market and also includes some nonmarket production, such as defense or education services provided by the government.

Tim Callen, *Gross Domestic Product: An Economy's All*, INTERNATIONAL MONETARY FUND (last updated Feb. 24, 2020), <https://www.imf.org/external/pubs/ft/fandd/basics/gdp.htm>

[<https://perma.cc/5FV6-E59U>]. These types of comparisons are not like-for-like comparisons and do not embody analytical rigor. They are more in the nature of attention-grabbing comparisons to show the wealth of the Gates Foundation. They are not like-for-like because a nation's GDP may not be applied to one set of problems, unlike the Gates Foundation, which could theoretically devote its entire endowment to a single problem. Moreover, the wealth of the Gates Foundation would need to be compared to the entire wealth of a nation in order for it to be a like-for-like comparison, and a nation's wealth is not measured by GDP. See *id.*

health, agricultural productivity, and vaccination efforts.²¹ Its financial resources enable it to address problems that have been persistently difficult to solve, such as alleviation of diseases that are prevalent in poor countries but rare in rich ones. Its resources also enable it to address problems that do not attract widespread public attention but are nonetheless crucial to public health. For example, the documentary *Inside Bill's Brain: Decoding Bill Gates* opens with the Gates Foundation's efforts to spur invention of new types of low-cost toilets for developing countries that do not have modern plumbing systems.²² The widespread use of such inventions would greatly reduce deadly public health hazards such as cholera.²³ Addressing such challenges is hugely expensive, and the Gates Foundation has the money to do so.²⁴

21. See generally BILL & MELINDA GATES FOUND., <https://www.gatesfoundation.org/> [<https://perma.cc/N3S4-P4PE>] (last visited Nov. 15, 2020).

22. See *Inside Bill's Brain: Decoding Bill Gates* (Netflix Sept. 20, 2019) (The first part of this three-part series focuses on Bill Gates' concern over the lack of proper sanitation in poor countries. The problem is that slums with millions of residents were built without any sewage infrastructure. This means that the fecal waste of the residents ends up in the same water supply that provides for drinking and bathing. It is prohibitively expensive to install adequate infrastructure into the already existing slums. The national and local governments cannot afford it. So Bill Gates created a program to reward inventors who could come up with solutions in the form of small groups of toilets that could simply be placed in an area and dispose of the waste on that individual site without the need for building an entire infrastructure of pipes and processing facilities.) Another commentator observed:

This is just a guess, mind you, but it's likely that there are few people on the planet who get more excited talking about commodes than Bill Gates does. In a world where as many as 4.5 billion don't have "safely managed sanitation," according to the World Health Organization—and of whom nearly 900 million (mostly rural) people still defecate in the open—a safe, affordable, self-contained waste treatment apparatus that requires neither running water nor sewers is the sine qua non of public health interventions.

Clinton Leaf, *How Bill and Melinda Gates Are Transforming Life for Billions in the 21st Century*, FORTUNE (May 1, 2019), <https://fortune.com/longform/bill-melinda-gates-worlds-greatest-leaders/> [<https://perma.cc/67F4-TBJS>].

23. Leaf, *supra* note 22.

24. See *infra* notes 170–171 and accompanying text.

Given the nature of the activities of the Gates Foundation, it might be expected that such efforts would receive widespread acclaim. However, the Gates Foundation and other private-wealth-funded philanthropies have been the subject of sharp criticism. For example, one commentator asserts that charitable organizations named after the benefactor are vehicles for narcissism and self-aggrandizement.²⁵ Another commentator criticized philanthropic activities as being antidemocratic, paternalistic, and amateurish.²⁶ According to this view, philanthropy is antidemocratic because one rich person determines for himself or herself the best way to address a societal problem without the input of either society at large or the philanthropy's intended beneficiaries.²⁷ This commentator also alleges that philanthropists embody paternalistic worldviews by assuming that many of society's problems are born out of the personality faults of charity beneficiaries.²⁸ Thus, the philanthropist believes a person is not poor due to, for example, societal inequities, but rather, because "the person is lazy or lacks imagination."²⁹ Finally, this commentator asserts that "philanthropy's amateurism stems from the belief that wealthy individuals are better equipped to address the world's most complex and intransigent problems simply because they successfully amassed a fortune."³⁰

The Gates Foundation has been singled out for criticism due to the nature of, and the approach underlying, its activities. The criticism ranges from accusations of faulty implementation of health programs at the patient-care level to accusations that the power and size of the Gates Foundation is shifting and distorting the strategic focus of global health NGOs.³¹ Regarding the former set of accusations, one critic has accused the Gates Foundation of

25. See William A. Drennan, *Surnamed Charitable Trusts: Immortality at Taxpayer Expense*, 61 ALA. L. REV. 225, 239–40 (2010).

26. See Eric Franklin Amarante, *The Perils of Philanthrocapitalism*, 78 MD. L. REV. 1, 5 (2018).

27. *Id.*

28. *Id.*

29. *Id.* at 5–6.

30. *Id.* at 6.

31. See Julia Belluz, *The media loves the Gates Foundation. These experts are more skeptical*, VOX (June 10, 2015), <https://www.vox.com/2015/6/10/8760199/gates-foundation-criticism> [<https://perma.cc/6X8B-47B9>].

bearing responsibility for the deaths of people it seeks to serve.³² This accusation attempts to draw a link between the deaths of seven girls and a program funded by the Gates Foundation to administer the human papillomavirus (HPV) vaccine to girls in India.³³ The same critic also alleges that a project funded by the Gates Foundation to conduct clinical trials of a malaria vaccine in Africa is comparable to human experimentation.³⁴ During the summer of 2020, the Gates Foundation was the subject of outlandish conspiracy theories that it planned to use an eventual COVID-19 vaccine to implant microchips in people to monitor the global population.³⁵

With regard to criticism addressed to strategic concerns, another critic argues the Gates Foundation decides on its own to develop a single strategy to address a public problem without sufficient input from those organizations on the ground whose sole purpose is to effect changes at the street level.³⁶ The criticism

32. See Sharmeen Ahmed, *Accountability of International NGOs: Human Rights Violations in Healthcare Provision in Developing Countries and the Effectiveness of Current Measures*, 22 ANN. SURV. INT'L & COMP. L. 33, 42–45 (2017).

33. *See id.*

34. *Id.* at 48–50.

35. See Tom Huddleston, Jr., *Here's what Bill Gates has to say about those Covid-19 vaccine conspiracy theories he's pegged to*, CNBC (June 5, 2020), <https://www.cnbc.com/2020/06/05/bill-gates-responds-to-bizarre-covid-19-vaccine-conspiracy-theories.html> [<https://perma.cc/9VPM-43E9>]. In addition to this accusation, the Gates Foundation has also been accused of improperly conducting human testing of vaccines in Africa and distributing a tetanus vaccine in Africa that induces abortions. See Jane Wakefield, *How Bill Gates became the voodoo doll of Covid conspiracies*, BBC (June 6, 2020), <https://www.bbc.com/news/technology-52833706> [<https://perma.cc/Y7CN-DKTC>].

36. See Garry W. Jenkins, *Who's Afraid of Philanthrocapitalism*, 1 CASE W. RES. L. REV. 753, 797 (2011). Jenkins describes “philanthrocapitalism” in the following way, and specifically mentions Bill Gates:

As the portmanteau implies, philanthrocapitalism is a heightened combination of philanthropy and capitalism. At its core, it describes an ambitious new movement of charitable giving promoted by ultrarich “social investors, not traditional donors,” using big-business strategies. Among the most prominent faces of philanthrocapitalism are Bill Gates (billionaire founder of Microsoft), Pierre Omidyar (billionaire founder of eBay), and Eli Broad (billionaire founder of KB Home and SunAmerica, now a subsidiary of the American International Group, Inc.). As depicted by Bishop and Green, the new

echoes the assertion that billionaire-funded philanthropies that address global issues like poverty and health are inherently undemocratic by nature.³⁷ This view challenges the notion that a small number of extremely wealthy people should have the ability to impose their personal views and business experience on their selected choice of social problems and unilaterally offer solutions for the rest of society.³⁸ This statement implies that global

philanthrocapitalists “see a world full of big problems that they, and perhaps only they, can and must put right.” These are the kind of entrepreneurs who are used to large-scale success and now are seeking to apply that same approach to philanthropy. The concept encompasses more than just the marginal importation of sound, basic management principles and high levels of grantor engagement. Rather, the rhetoric of philanthrocapitalism emphasizes a complete remaking of philanthropic giving in the image of business, in part by appropriating business management values (e.g., data focused, results based, etc.). Philanthrocapitalism has also adopted a belief that business methods are superior and that experienced, private-sector business people to replicate corporate achievements in philanthropy.

Id. at 762–763 (footnotes omitted).

37. *Id.* at 815.

38. *Id.* at 817. Concerns about rich philanthropists have been part of America’s history, but what is different this time is the amount of money funded to charities by billionaires. When examining the history of suspicion towards philanthropy in the United States, one commentator noted:

The United States (and its economy) has been highly hospitable to philanthropists, but it has also provided a political system that nurtures conspiracy theories directed against them. Historically, both the right and left have crafted their own narratives, each fueled by a deep suspicion of concentrated power. Early-20th-century progressives worried that robber-baron benefactors were creating a shadow state that would overwhelm the federal government; conservatives and populists warned of the dense networks of charities, academic institutions, and private foundations that controlled public opinion. By mid-century, right-wing anti-Communist conspiracies targeted major philanthropies as seedbeds of pernicious internationalism. In the 1950s, congressional investigation of philanthropy sought to determine whether foundations subsidized “un-American and subversive activities” and supported efforts “to undermine our American way of life.” In the following decades, anti-imperial and anti-globalization movements lodged both legitimate grievances about philanthropies and more decadent tales of their power.

Benjamin Soskis, *George Soros and the Demonization of Philanthropy*, *THE ATLANTIC* (Dec. 5, 2017), <https://www.theatlantic.com/business/archive/2017/12/soros-philanthropy/547247/> [<https://perma.cc/R42P-SYWF>].

problems would be better addressed by democratic processes.³⁹

There are at least two problems with this statement. First, there is no global democracy. Thus, what is the democratic process that will address global problems? Second, democratic processes are confined to national governments. Democratically elected officials are first and foremost accountable to the people who elected them and must necessarily give priority to the problems faced by their electorate. This is an inherent and inescapable consequence of an international order based on the concept of the nation-state. The borders of a nation-state determine the areas of primary focus and concern for democratic governments. This necessarily means that matters outside the borders occupy a lower priority (except for situations such as threats to national security). It is structurally difficult for individual nation-states to address global problems that exist outside their borders.⁴⁰ Among other topics, this Article will discuss the failure of national democratic processes to solve global problems.

The criticism of billionaire philanthropy is not limited to the Gates Foundation. The billionaire Koch brothers have been criticized for funding right-leaning think tanks and anti-tax organizations, opposition to environmental protection laws, and supporting legislation favorable to the petrochemical industry.⁴¹ At the other end of the political spectrum, billionaire George Soros has been accused of organizing anti-Trump protests and organizing violence in Charlottesville in order to discredit right-wing organizations.⁴² The influence of such billionaires on the political landscape has raised concern for many observers. One commentator noted:

Whatever one thinks of the merits of those causes, the ability of Soros and other philanthropists to use their vast wealth to exercise power over the realms of democratic deliberation is worthy of serious reflection. It's up for

39. *See id.*

40. This problem manifests itself in a variety of matters such as climate change, refugee crises, as well as public health problems.

41. Joseph P. Williams, *Beyond the Boogeyman*, U.S. NEWS & WORLD REP. (June 26, 2015), <https://www.usnews.com/news/the-report/articles/2015/06/26/the-koch-brothers-gifts-to-society> [<https://perma.cc/6ETU-9DMZ>].

42. *See Profile: Billionaire philanthropist George Soros*, BBC (May 31, 2018), <https://www.bbc.com/news/world-44301342> [perma.cc/2HXE-CXTZ].

debate how much sway individuals should have over public policy, but it's almost impossible to weigh that question soberly when operating in a conspiratorial register. This suggests the second danger such narratives pose to civil society: feverish theories about shady influence from “outsiders” obscure the real threats philanthropic power can pose to democratic institutions and norms. Even if philanthropic bogeymen are not real, there still might be good reasons to fear the dangers they actually pose.⁴³

The activities of billionaire philanthropists have attracted both favorable and unfavorable attention. However, this Article makes a distinction in their activities and focuses on one aspect. As a general matter, this Article divides the activities into two rough categories. One category involves efforts to change attitudes, usually to influence political outcomes. Such activities would include funding liberal or conservative political candidates or causes dedicated to supporting or opposing gun control or abortion rights. The other category is not about changing attitudes, but achieving changes in physical, societal infrastructure, such as vaccinations against diseases or improving sanitary conditions.

43. Soskis, *supra* note 38. General concerns and criticisms of NGOs existed well before the rise of billionaire philanthropies. The growing influence of NGOs in public international law generated concerns along the following lines: (1) Those in charge of NGOs are not representative of those they seek to serve, and are not elected; (2) The goals and agendas of rich countries will dominate the concerns of poor countries; (3) NGOs are not accountable to anyone— to whom do they report?; and, (4) The influence of NGOs undermines the role and influence of nation-states. See David Gartner, *Beyond the Monopoly of States*, 32 U. PA. J. INT'L L. 595, 600–07 (2010). Another commentator observes:

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

In doing so, each has sought to change not just the marketplace but the law itself, to create novel legal structures that would foster their philanthropic and entrepreneurial goals. But the law's response to philanthropic entrepreneurship has been uneven, sometimes lagging behind change and sometimes regulating “doing good” in a manner that hinders rather than fosters creativity.

Shruti Rana, *Philanthropic Innovation and Creative Capitalism: A Historical and Comparative Perspective on Social Entrepreneurship and Corporate Social Responsibility*, 64 ALA. L. REV. 1121, 1123–24 (2013).

Such efforts change physical facts on the ground (as the saying goes) and directly impact living conditions. Perhaps it can be argued that the latter category of activities is as much political as anything else in that political will or even that opposition must be taken into account and influenced to achieve such changes. Nonetheless, the difference is that the primary goal of such efforts is not dedicated to changing political attitudes. For this reason, the Gates Foundation is the subject of this Article because it has established a large reputation in issues involving public health and poverty.⁴⁴

The controversy generated by entities such as the Gates Foundation suggests fundamental questions of first principles. Why do such entities exist? Why are they necessary? It would seem the activities of the Gates Foundation provide the self-evident answers. They exist because existing institutional structures have not been able to adequately resolve issues of treating curable diseases or improving public health conditions in poor countries. If nation-states or international organizations had achieved success in these areas, there would be no need for the Gates Foundation. The question then becomes what can the Gates Foundation do that nation-states or international organizations have been unable to do? The obvious, but incomplete, answer is to devote staggering sums of money to the problem. Focusing on the money, though, misses the more important role filled by the rise of billionaire philanthropies.

The answer to why such philanthropies exist lies in understanding why problems of public health and poverty exist in the first place. For example, why do poor countries suffer from inadequate vaccination against curable diseases? Why are rich countries able to solve such problems? In richer countries, there are two major institutional forces that provide systemic solutions: political will and capability (i.e., the government),⁴⁵ and private, market-based solutions.⁴⁶ In poorer countries, the political infrastructure may be too weak or too poor to provide an effective

44. For example, one of the key tenets of the Gates Foundation is to “Combat Infectious Diseases That Particularly Affect the Poorest.” See BILL & MELINDA GATES FOUND., <https://www.gatesfoundation.org/> [perma.cc/S5XD-UVKX] (last visited Dec. 19, 2020).

45. See *infra* Part III.

46. See *infra* Part II.

public health infrastructure. The market may be unable to provide solutions because the people are too poor to afford medication, or there may not be enough profit in the medication to incentivize healthcare companies to provide the cures. Thus, the problem of public health is unsolved because it falls in a large gap between politics, on one side, and market economics, on the other. The only way this gap can be filled is by the involvement of entities with enough money to provide solutions that do not depend on political will or capability, and do not to answer to the demands of free-market capitalism. This is the role of the Gates Foundation. Bill and Melinda Gates summarized their role by observing:

We know that philanthropy can never—and should never—take the place of governments or the private sector. We do believe it has a unique role to play in driving progress, though.

At its best, philanthropy takes risks that governments can't and corporations won't. Governments need to focus most of their resources on scaling proven solutions.

Businesses have fiduciary responsibilities to their shareholders. But foundations like ours have the freedom to test out ideas that might not otherwise get tried, some of which may lead to breakthroughs.⁴⁷

In the same letter, Melinda Gates added:

When we first started working in global health, we were shocked to learn how many children in low-income countries were still dying from diseases that could have been prevented with vaccines that were widely available in countries like the U.S. It drove home for us that the challenges of poverty and disease are always connected.

Since this wasn't something that markets and governments were solving on their own, we saw an opportunity for philanthropic dollars to help. We worked with the World Health Organization, the World Bank, and UNICEF to create Gavi, the Vaccine Alliance. Gavi brings together governments and other organizations to raise

47. 2020 Letter, *supra* note 19.

funds to buy vaccines and support low-income countries as they deliver them to children.⁴⁸

The purpose of this Article is to amplify this point and explain why philanthropies like the Gates Foundation are needed to fill a role left unserved by government and the market-driven private sector. Part I begins with a brief summary of the nature and scale of public health problems in poor countries. Part II examines why private, market-driven forces are unable to solve such problems. It examines the problem at the micro level by looking at the factors affecting decisions by individual corporate actors, and at the macro level by discussing the problem posed by the fact that global health is a “public good” as that term is used in economics. Part III then turns to the political aspect of public health issues and discusses why the political activities of nation-states are unable to solve the problems. This part of the Article discusses the current crisis created by the coronavirus or COVID-19 to show the problems in formulating government responses to public health crises. In many instances, the efforts of government, at one end, and the efforts of the profit-driven private sector, at the other, are able to solve systemic problems acting alone or in combination with each other. However, there are large problems that fall into a gap that cannot be solved by these forces. The evidence is all around us—persistent poverty and absence of lifesaving (or even any kind of) healthcare around the world. This inability of market and political forces to solve such problems leaves a wide gap. This means that entities that do not need to answer to market or political forces provide the means to fill this gap. Part IV takes a closer look at the Gates Foundation to examine how it fills this role.

I. A BRIEF SUMMARY OF THE SCALE OF GLOBAL HEALTH PROBLEMS

In 2016, about 1 million infants died on the day they were born.⁴⁹ In 2015, more than 2.6 million died in their first month of life.⁵⁰ The leading causes of death were sepsis and other infections, asphyxia (the newborn did not get enough oxygen), and

48. *Id.*

49. Bill & Melinda Gates, *Warren Buffet’s Best Investment: Our 2017 Annual Letter*, GATESNOTES (Feb. 14, 2017), https://www.gatesnotes.com/2017-Annual-Letter?WT.mc_id=02_14_2017_02_AL2017GFO_GF-GFO_&WT.tsrc=GFGFO [perma.cc/DR7M-S79E].

50. *Id.*

prematurity.⁵¹ More than 8 million people per year in poor countries die from conditions that should be treatable by an adequate health system.⁵² Avoidable deaths are largely the result of poor-quality care as opposed to lack of access to care.⁵³

According to the World Health Organization, approximately 2.3 billion people do not have access to rudimentary sanitation facilities.⁵⁴ Of the world's 7.7 billion population, only twenty-seven percent use private sanitation facilities with properly connected sewage pipes.⁵⁵ In India alone, around 450 million people relieve themselves in public places because of the lack of proper sanitation

51. *Id.*

52. See Margaret E. Kruk et al., *High-Quality Health Systems In The Sustainable Development Goals Era: Time For A Revolution*, *THE LANCET* (Sept. 5, 2018), [https://www.thelancet.com/journals/langlo/article/PIIS2214-109X\(18\)30386-3/fulltext](https://www.thelancet.com/journals/langlo/article/PIIS2214-109X(18)30386-3/fulltext) [perma.cc/B4GY-HTJY].

53. *Id.* For example, the authors stated:

[Sixty percent] of deaths from conditions amenable to health care are due to poor-quality care, whereas the remaining deaths result from non-utilisation of the health system. High-quality health systems could prevent 2.5 million deaths from cardiovascular disease, 1 million newborn deaths, 900,000 deaths from tuberculosis, and half of all maternal deaths each year. Quality of care will become an even larger driver of population health as utilisation of health systems increases and as the burden of disease shifts to more complex conditions. The high mortality rates in [low-income and middle-income countries] for treatable causes, such as injuries and surgical conditions, maternal and newborn complications, cardiovascular disease, and vaccine preventable diseases, illustrate the breadth and depth of the health-care quality challenge. Poor-quality care can lead to other adverse outcomes, including unnecessary health-related suffering, persistent symptoms, loss of function, and a lack of trust and confidence in health systems. Waste of resources and catastrophic expenditures are economic side effects of poor-quality health systems. As a result of this, only one-quarter of people in [low-income and middle-income countries] believe that their health systems work well.

Id.

54. See Sharmishta Sivaramakrishnan, *Better sanitation for India is in the pipeline*, *WORLD ECON. F.* (Apr. 23, 2019), <https://www.weforum.org/agenda/2019/04/india-sanitation-waste-management-sewage/> [perma.cc/5VJY-3NCN].

55. *Id.*

facilities.⁵⁶ In Indian cities, more than 150 million people, greater “than the population of Russia, lack decent toilet facilities.”⁵⁷ Much of the human waste is emptied into rivers, lakes, and ponds untreated.⁵⁸ The World Bank estimates one in ten deaths in India is the result of poor sanitation.⁵⁹ Diseases resulting from poor sanitation and unsafe water account for about ten percent of global disease.⁶⁰ Such diseases include diarrheal diseases, acute respiratory infections, and tropical diseases such as helminth and schistosomiasis infections.⁶¹

56. See *Why it is so hard to fix India's sanitation*, THE ECONOMIST (Sept. 25, 2017), <https://www.economist.com/the-economist-explains/2017/09/24/why-it-is-so-hard-to-fix-indias-sanitation> [perma.cc/C47G-2EPE].

57. *Id.*

58. *Id.*

59. *Id.* In Bill Gates' own words:

Nearly eight years ago, Melinda and I challenged engineers and scientists around the world to reinvent the toilet. More than 2 billion people around the world lack access to a decent toilet. Their waste often ends up in the environment, untreated, killing nearly 800 children every day. And exporting rich-world sanitation solutions isn't an option, because they require sewer systems that are too expensive to build and need a lot of water.

Last year we organized a toilet fair in Beijing, where I got to check out a number of next-gen toilets in person and even shared the stage with a beaker of human feces.

Several companies are business-ready. Their inventions check almost all the boxes: They kill pathogens, can keep pace with the needs of fast-growing urban areas, and don't require sewer infrastructure, external water sources, or continuous electricity to operate. The only area where they currently fall short is cost—which is why our foundation is investing in more [research and development] to help make them affordable for the poor.

Bill & Melinda Gates, *We Didn't See This Coming: Our 2019 Annual Letter*, GATESNOTES (Feb. 12, 2019), <https://www.gatesnotes.com/2019-Annual-Letter> [perma.cc/8ZEF-2PNF] [hereinafter *2019 Letter*].

60. Hoang Van Minh & Nguyen Viet Hung, *Economic Aspects of Sanitation in Developing Countries*, SAGE J. (Oct. 18, 2011), <https://journals.sagepub.com/doi/full/10.4137/EHI.S8199> [perma.cc/4587-NSVW].

61. *Id.* Diarrheal diseases are the most common sanitation-related diseases. *Id.* About 1.7 million people die every year from such diseases, and ninety percent are children under 5 years. *Id.* Eighty-eight percent of cases of diarrheal diseases worldwide are caused by unsafe water, inadequate sanitation, and poor hygiene. *Id.*

On a different front, curable infectious diseases continue to kill millions. Every two minutes, a child dies of malaria, and more than 200 million new cases of the disease are reported each year.⁶² Countries have reduced the total number of malaria cases and deaths since 2000, but malaria is on the rise again in some countries.⁶³ In 2017, there were an estimated 219 million cases of malaria in eighty-seven countries.⁶⁴ Approximately ninety percent of malaria cases and deaths occur in sub-Saharan Africa.⁶⁵

In sum, at least half of the world's population lacks access to essential health services.⁶⁶ Even those with access to health services risk death from poor quality service. These facts and figures are a simple snapshot into a reality of modern circumstances, and even though people in the rich world may not be aware of the statistics, they are certainly aware of the general problem. The problems of poverty and poor health are widely-known and have existed for centuries. A pertinent question today is why such conditions continue to exist in a world of multi-billion dollar fortunes and advanced technology that was unimaginable only a generation ago.

II. THE INABILITY OF PRIVATE, MARKET-BASED APPROACHES TO SOLVE GLOBAL HEALTH PROBLEMS

Many societal needs and problems are addressed and satisfied by private, market-based solutions. It is basic economics that the market will satisfy demand by producing supply until market equilibrium is achieved, if a reasonable rate of return is attainable.⁶⁷ The promise of return on investment and capital is

62. See *Malaria*, WHO (June 28, 2019), <https://www.who.int/news-room/facts-in-pictures/detail/malaria> [perma.cc/R4AB-WPJ2].

63. *Id.*

64. *Id.*

65. *Id.*

66. See *World Bank And WHO: Half the world lacks access to essential health services, 100 million still pushed into extreme poverty because of health expenses*, WHO (Dec. 13, 2017), <https://www.who.int/news-room/detail/13-12-2017-world-bank-and-who-half-the-world-lacks-access-to-essential-health-services-100-million-still-pushed-into-extreme-poverty-because-of-health-expenses> [perma.cc/XC49-2PJ7].

67. See *Market Equilibrium*, KHAN ACAD., <https://www.khanacademy.org/economics-finance-domain/microeconomics/supply-demand->

the incentive for suppliers to meet demand.⁶⁸ However, this basic principle assumes the consumer is able to pay to satisfy the demand. If the consumer is unable to pay, suppliers will not attempt to meet the need. This is a basic problem underlying health issues in poor countries.

A. *The Lack of Market Incentives at the Manufacturer and Consumer Levels*

For many curable diseases in poor countries, the afflicted are unable to pay for expensive drugs to treat the problem.⁶⁹ As such, few companies choose to invest in treatments for these conditions because there is no market for the drug maker's products.⁷⁰ The inability of consumers to pay for expensive drugs means that therapies for these conditions will be "chronically underproduced if private companies are the only source of innovation in this area."⁷¹ Further, the market does not provide adequate incentives for drug companies to invent new cures for diseases that affect the poor because most of the world's drug development addresses the health concerns of rich people.⁷² For example, of the 1,233 drugs licensed worldwide between 1975 and 1997, only thirteen targeted tropical diseases.⁷³ The reason for this statistic is simple: poor people cannot afford medication. This financial inability among patients suffering from these diseases means that therapies targeting these specific conditions will remain chronically underproduced considering private companies are the only source of innovation in this area.⁷⁴

Even if medication is available, the cost of medication is prohibitively expensive for poor countries. There has been repeated

equilibrium/market-equilibrium-tutorial/a/market-equilibrium [perma.cc/7JZD-RY6A] (last visited Dec. 19, 2020).

68. *Id.*

69. See Rachel E. Sachs, *Prizing Insurance: Prescription Drug Insurance as Innovation Incentive*, 30 HARV. J. L. & TECH. 153, 157 (2016).

70. *Id.*

71. *Id.* at 170.

72. Sebastian Mallaby, *A Patently Simple Idea*, FOREIGN POL'Y (Oct. 12, 2009, 8:01 PM), <https://foreignpolicy.com/2009/10/12/a-patently-simple-idea/> [perma.cc/9T2L-NV FY].

73. *Id.*

74. Sachs, *supra* note 69, at 170.

criticism of the high cost of medication, and many blame pharmaceutical companies.⁷⁵ The issue manifested itself in negotiations over international intellectual property rights. Pharmaceutical companies argued that the adoption of strong intellectual property laws would “help third world countries to develop their own high technology industries and products in the same manner that such laws spur innovations in developed countries.”⁷⁶ Whether this assertion is correct or not does not have an answer; critics argue that the pharmaceutical companies made this argument because it would support their own profits.⁷⁷ Another argument advanced by the pharmaceutical companies is more opaque. They argue that patents are the inventor’s “natural right” or just reward for inventive activity (a view attributed to John Locke’s writings that exclusive property rights to inventions are produced by virtue of the labor spent to create the invention).⁷⁸ This view is based on a moral obligation to recognize the rights of inventors by not copying their creative ideas without permission.⁷⁹

75. See, e.g., Ezekiel J. Emanuel, *Big Pharma’s Go-To Defense of Soaring Drug Prices Doesn’t Add Up*, THE ATLANTIC (Mar. 23, 2019), <https://www.theatlantic.com/health/archive/2019/03/drug-prices-high-cost-research-and-development/585253/> [perma.cc/2GTY-7MEE].

76. Michael A. Santoro, *Human Rights and Human Needs: Diverse Moral Principles Justifying Third World Access to Affordable HIV/AIDS Drugs*, 31 N.C. J. INT’L L. & COM. REG. 923, 928 (2005).

77. *Id.*

78. *Id.* at 928–29.

79. *Id.* at 929. Another commentator presented a counterview to the attack on pharmaceutical companies:

It is unfortunate that several high-profile NGOs have concentrated their effort in blaming the pharmaceutical industry and the patent regime for worsening the crises. While these groups have spent significant monetary resources and intellectual effort directing much of the debate over the access to essential medicines in the developing world on the issue of patent protection of pharmaceuticals to the actions of the pharmaceutical industry and the patent regime, the constant accusations and resulting publicity have not helped the situation and, to the contrary, have been highly divisive, arguably lengthening the time between the Doha Ministerial and the implementation of the Implementation Agreement and obscuring longstanding impediments to improving the lives and health of millions. In order to control the problem and even hope to alleviate suffering, all interested parties must realize that patent protection is only one of many factors that play a role in the health of the developing world and other critical factors, such as poor living conditions, the lack

In light of problems of healthcare costs, efforts have been made to provide other types of incentives to spur advances in healthcare. An example of this was mentioned above with the Gates Foundation's efforts to incentivize new sanitation technologies.⁸⁰ There are attempts to develop alternative innovation mechanisms to encourage innovation, such as prizes from private sources to those who develop solutions.⁸¹ There are also attempts to use tax credits and government grants.⁸²

This is one example of NGOs, like the Gates Foundation, working in underexplored areas to provide alternative methods of incentives to encourage research and development into problems that are ordinarily neglected. Such efforts are still apparently rare and have not achieved widespread success (yet). The proof of this statement is evidenced by the fact that severe problems persist, and will likely continue to persist, because private, market-driven firms are structurally unable to provide solutions (not because they are bad actors, but because the market is not structured to provide necessary incentives).⁸³ This supports the need for entities that are immune to market forces to fill the gap that private-sector businesses cannot.

B. *Global Health is a Public Good, and the Market is Unable to Provide Optimal Levels of Public Goods at the Macro Level*

Global public health is a public good. Containment and eradication of infectious or communicable diseases is a classic case of a global public good.⁸⁴ Public health issues are now discussed and framed in the language and analyses applicable to public

of medical facilities and proper infrastructure, malnutrition, and the lack of means for distributing and administering medicine, must be addressed in order to alleviate the public health crises.

Bryan Mercurio, *Resolving the Public Health Crisis in the Developing World: Problems and Barriers of Access to Essential Medicines*, 5 NW. J. INT'L HUM. RTS. 1, 14–15 (2006).

80. See *supra* note 22 and accompanying text.

81. Sachs, *supra* note 69, at 175.

82. *Id.*

83. See *infra* Section II.B.

84. See David Gartner, *Global Public Goods and Global Health*, 22 DUKE J. COMP. & INT'L L. 303, 307 (2012).

goods.⁸⁵ Discussions of controlling emerging infectious diseases and entirely eradicating diseases are informed by such an analysis.⁸⁶ The prevention and containment of infectious or communicable diseases squarely fits the paradigm of a global public good.⁸⁷ The current experience with COVID-19 is a perfect example. Eradicating or containing it within manageable levels is a public good, and the difficult challenge of achieving that goal highlights the importance of non-state actors in the provision of global public goods.⁸⁸

There is a major structural problem in providing anything that is a public good. The inherent and intractable problem of public goods is that the market is unable to provide adequate incentives to private actors to provide public goods⁸⁹ Because of this structural challenge, national governments have stepped into the market to provide public goods within their boundaries.⁹⁰ Providing or encouraging the production of public goods is a classic function of government. However, when a public good is global in nature, one national government, or even a group of national governments, lacks the ability to provide for global public goods.⁹¹

To understand this problem, it is necessary to examine the nature of a public good and its characteristics. A public good is a thing or condition that benefits all members of a society.⁹² For example, infrastructure, in all forms, generates public goods.⁹³ To use the scholarly jargon, a public good is something that is both

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *See id.* at 304.

90. *Id.* at 305.

91. *See id.* at 304–05.

92. Lawrence B. Solum, *Legal Theory Lexicon: Public and Private Goods*, LEGAL THEORY BLOG (June 19, 2016, 10:47 AM), <http://lsolum.typepad.com/legaltheory/2016/06/legal-theory-lexicon-public-and-private-goods.html> [perma.cc/B8UA-KV4C]. “The phrase ‘public good’ or ‘public goods’ shall be used . . . to refer to the economists’ idea of goods (in the broad sense that includes both ‘goods’ and ‘services’).” *Id.*

93. *See* Brett M. Frischmann, *An Economic Theory of Infrastructure and Common Management*, 89 MINN. L. REV. 918, 932 (2005).

nonexcludable and nonrivalrous.⁹⁴ The benefit accrues to each individual whether he pays for it or not, and an individual's enjoyment or consumption of a public good is not diminished or affected in any way by anyone else's enjoyment or consumption.⁹⁵ A good is nonexcludable if one is unable to prevent others from consuming or using it.⁹⁶ A good is nonrivalrous if one person's consumption does not negatively affect anyone else's consumption of the good.⁹⁷ The phrase "public good" is not limited to things that physically exist; it includes services and intangible benefits. To illustrate, the eradication of a disease is a nonexcludable good because one is unable to prevent others from benefiting from it. Nice weather is a nonrivalrous good because one person's enjoyment of the weather does not mean there is less nice weather for others. A pie is not a public good. One is able to prevent others from eating the pie, so it does not possess the characteristic of nonexcludability. The pie also does not qualify as a nonrivalrous good because if one person eats the pie, no one else can. In most situations, the government usually supplies public goods.⁹⁸

A general principle of economics (and related legal theory) is that markets should provide private goods and governments should provide public goods.⁹⁹ The reason for this is explained by economic theory. No economically rational actor will voluntarily pay for a public good as long as someone else does. An individual may enjoy clean air as long as someone else pays for the cost of clean air. This is the classic "free rider" problem.¹⁰⁰ Another aspect of this problem

94. See *Public Goods – The Economic Lowdown Podcast Series, Episode 17*, FED. RES. BANK OF ST. LOUIS, <https://www.stlouisfed.org/education/economic-lowdown-podcast-series/episode-17-public-goods> [perma.cc/FP4R-Q6VX].

95. *Id.*

96. See Solum, *supra* note 92. "Excludability' . . . is a property of consumption of a good." *Id.* Excludability can be achieved either through self-help, where an individual acts to exclude others from using the good, or through law, where the government criminalizes or provides for civil action against those who make unauthorized use of the good. *Id.*

97. *Id.* "Rivalrousness' is [also] a property of the consumption of a good. Consumption of a good is rivalrous if consumption by one individual X diminished the opportunity of other individuals, Y, Z, etc., to consume the good." *Id.*

98. *Id.*

99. *Id.*

100. See Solum, *supra* note 92.

is that the free rider enjoys as much of the public good as someone who pays for it. Because no rational individual will voluntarily pay for a public good, societies turn to government to pay for public goods through the taxing mechanism (the requirement of involuntary payments).

Another major reason why the private sector cannot be relied upon to provide public goods is explained by the presence of negative externalities. An economic externality is a cost generated by an activity that is not borne by the person or firm who engages in the activity.¹⁰¹ An externality may also be described as “an effect on the market the source of which is external to the market.”¹⁰² It is the imposition of a cost or benefit on a nonconsenting third party by the party engaging in the economic activity.¹⁰³ “Externalities can be either positive or negative.”¹⁰⁴ Positive externalities occur whenever an activity generates benefits that the producer is unable to capture as profit.¹⁰⁵ Although negative externalities occur when a producer engages in activity that imposes costs on others, the producer of the negative externality does not incur any cost or liability for the costs that others must bear.¹⁰⁶ Given the nature of externalities, the market will oversupply negative externalities relative to socially optimal levels “because the producer will internalize all benefits of the activity but not all the costs.”¹⁰⁷ The market will also undersupply positive externalities because third parties will free ride as they are not required to pay for the benefits of the positive externalities.¹⁰⁸ Externalities thus expose a failure of free markets. “The standard government response to a negative externality is to discourage the responsible conduct (e.g., with taxation or regulation); the standard response to a positive

101. Nathan A. Sales, *Regulating Cyber-Security*, 107 NW. U. L. REV. 1503, 1519 (2013).

102. *Id.*

103. *Id.* at 1520.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.* (quoting Christopher J. Coyne & Peter T. Leeson, *Who's to Protect Cyberspace?*, 1 J.L. ECON. & POL'Y 473, 479 (2005)).

108. *Id.*

externality is to encourage the responsible conduct (e.g., with a subsidy).”¹⁰⁹

To illustrate, smoke from a factory chimney that blankets the surrounding area is a negative externality because it is a harm suffered by nonconsenting third parties caused by the economic activity of the factory.¹¹⁰ Absent government intervention, the factory owner does not bear the cost imposed on others. Similarly, a disease outbreak in one country caused by a lack of investment in healthcare infrastructure, which then spreads to a neighboring country is another example of a negative externality. The country in which the disease originates does not bear the cost incurred by other countries when it crosses the border. The world is experiencing this situation with COVID-19. The virus originated in China and has spread around the world.¹¹¹ China’s inability to contain the virus has imposed significant damage and cost to the rest of the world.¹¹² However, it will likely never be held responsible for paying for those costs.

In contrast, a world-famous music festival that attracts visitors from around the world generates positive externalities. However, the festival is unable to capture the benefit that surrounding businesses enjoy for free (such as increased tourism and higher

109. *Id.*

110. An administrative law treatise states:

If a manufacturing process, for example, produces toxic vapors that make persons ill, the manufacturer should pay for the medical expenses of those persons and include them as part of the price for which the product is sold. If the manufacturer does not pay those costs, the product will be overproduced. There will be more demand for the product than if it were sold at a higher price that reflected the damages its production caused.

RICHARD J. PIERCE ET AL., ADMINISTRATIVE LAW & PROCESS 15 (6th ed. 2014).

111. James Gorman, *U.S. and Chinese Scientists Trace Evolution of Coronaviruses in Bats*, N.Y. TIMES (June 1, 2020), <https://www.nytimes.com/2020/06/01/science/coronavirus-bats-wuhan.html> [perma.cc/KN6F-HURS].

112. Jeff Stein, Carol D. Leonnig, Josh Dawsey & Gerry Shih, *U.S. officials crafting retaliatory actions against China over coronavirus as President Trump fumes*, WASH. POST (Apr. 30, 2020), <https://www.washingtonpost.com/business/2020/04/30/trump-china-coronavirus-retaliation/> [perma.cc/7ZPP-WAP4].

lodging prices) due to their proximity to the festival (absent government intervention).¹¹³

With respect to life-saving drugs in general, Professor Sachs describes the public goods problem in this way:

Consumers' willingness to pay for any particular product depends on its value to them. However, the social value of a drug is often poorly measured by the sum of its value to each individual consumer. There are often significant externalities associated with medical innovations that redound to the benefit of society, rather than the consumer, and are therefore not incorporated into individual willingness to pay. The positive externalities associated with vaccines and herd immunity are particularly well-known, as vaccines protect not only the people receiving them, but also other members of society who have not been vaccinated. The social value associated with a vaccine for a communicable disease may be higher than the social value associated with a drug treating the same condition, given the positive externalities particular to the former. However, a drug company's ability to recoup only a fraction of the vaccine's social value suggests that it will be systematically underproduced.¹¹⁴

The same problem and analysis apply to improved sanitation. Sanitation generates economic benefit, but the benefit does not accrue to the person who invests in the improved sanitation.¹¹⁵ The result is that the entities with the ability to improve sanitation on a systemic basis are simply unable or unwilling to invest because

113. In short, many other parties (including unidentifiable parties), other than the owner, benefit from infrastructure (critical or not):

Whether we are talking about transportation systems, the electricity grid, ideas, environmental ecosystems, or Internet infrastructure, the bulk of the social benefits generated by these resources derives from their downstream uses. They create value downstream by serving a wide array of end-users who rely on access to them. Yet social demand for the infrastructure itself is extremely difficult to measure.

Frischmann, *supra* note 93, at 958.

114. Sachs, *supra* note 69, at 169.

115. Duncan Mara, Jon Lane, Beth Scott & David Trouba, *Sanitation and Health*, 7 *PLOS MED.* 11, 5 (2010), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2981586/> [perma.cc/7KNW-E2B8].

they are unable to capture a sufficient amount of the benefit in the form of profit.¹¹⁶ Thus, public goods pose challenging problems because of the market's inability to provide them.

However, a former Senator and physician argued that the U.S. should devote more effort to global public health issues precisely because it involves a public good:

Globalization opens the door more prominently to the role of health diplomacy. In today's era of integration, interdependence, and global connectivity, foreign policy is appropriately being broadened to incorporate health matters more directly and with greater visibility. What happens to a single individual, wherever she might live, can affect not just a local community but the economy and the social fabric of a nation on the other side of the world. In recent times, we have seen the deeply disruptive impacts new health scares such as SARS and mad cow disease can have on travel and trade. We have seen the destructive threat of HIV/AIDS, drug-resistant tuberculosis, and other infectious diseases that do not respect geographical borders.

And the new reality of global interdependence, emerging diseases, potential pandemics, and public health underscores the advantage of identifying shared values and interests among societies around the world. The health of an individual is more directly tied to the health of a community and of populations throughout the world than ever before.

An increasing number of diplomats, scholars, and elected officials have begun to realize that health deserves a prominent place on the international agenda. Promoting global health has become a transnational strategic concern, generating new alliances and partnerships as nations bridge old divides to conquer new challenges.¹¹⁷

The recognition of public health as a public good is well-established. However, the inherent problem of public goods is an inextricable

116. *Id.*

117. William H. Frist, *Medicine as a Currency for Peace Through Global Health Diplomacy*, 26 YALE L. & POL'Y REV. 209, 210–11 (2007) (footnotes omitted).

part of human activity. So, the problem remains. If the private sector cannot provide optimal levels of public goods, what is the solution if government is unable to do so as well?

III. THE POLITICAL INABILITY OF NATION-STATES TO SOLVE GLOBAL HEALTH PROBLEMS

Surprisingly (or perhaps not so surprisingly) there is a school of thought arguing that nations should not engage in behavior such as increasing public goods such as public health. There are some foreign policymakers who have strong beliefs that it is inappropriate and perhaps even dangerous for nations to pursue moral objectives such as human rights.¹¹⁸ According to this view, such pursuits expose altruistic nations to exploitation by powerful states acting purely in their own self-interest, which leads to the conclusion that states cannot afford to be moral.¹¹⁹ This “realist perspective” argues it is imprudent to pursue moral objectives instead of objectives such as economic gain and military advantage.¹²⁰

This seems to be a particularly dark and cynical view of foreign relations. Whatever truth there may be in this view, there are also more prosaic explanations why nation-states are unable to improve global health in poor countries. A first and obvious question is: why should anyone in the United States devote tax dollars to problems on the other side of the world? Moreover, American politicians are

118. Michael A. Santoro, *Human Rights and Human Needs: Diverse Moral Principles Justifying Third World Access to Affordable HIV/AIDS Drugs*, 31 N.C. J. INT'L L. & COM. REG. 923, 923 (2006).

119. *Id.*

120. *Id.* at 924. Another commentator echoed the importance of philanthropy as a beneficial tool of soft power:

International aid is a powerful weapon in promoting civil society and advancing social and economic development across the globe. To that end, development aid also advances U.S. security interests by alleviating some of the situational factors, such as poverty, political oppression, and social inequality, that may breed terrorists and produce weak states where terrorism thrives, and replacing them with conditions for economic growth, trade, and private investment. As the United States seeks to understand and respond to security threats as well as prevent further conflict, development aid emerges as a key element of foreign policy.

Gary W. Jenkins, *Soft Power, Strategic Security, and International Philanthropy*, 85 N.C. L. REV. 773, 786 (2007).

elected by U.S. taxpayers, and will respond first and foremost to those who can ensure their election. Former Senator Frist addressed this question head-on and cited three reasons why Americans should care and devote resources to global health problems.¹²¹ First, the United States can best protect itself by giving international aid to prevent global health issues from harming U.S. interests.¹²² Poor health conditions in another country could result in a virus that spreads around the globe due to increased globalization and ease of travel across borders.¹²³ Secondly, global health problems and the resulting instability can represent threats to national security.¹²⁴ Serious health problems are inextricably tied to failed states, and failed states breed radicalism and terrorist threats to other countries.¹²⁵ Finally, global health initiatives provide the opportunity for America to improve its global reputation and standing by taking the lead on global health issues.¹²⁶

In addition to the reluctance of rich countries to improve conditions in poor countries, there is the obvious problem of poor countries' financial inability to address their public health problems. This basic problem is, at times, compounded by a lack of political will of local officials, corruption, and/or an absence of basic health infrastructure.¹²⁷ Money is, of course, at the root of these issues.¹²⁸ For example, "even when essential vaccines and medicines are heavily discounted or even donated to affected countries, the cost of transportation, storage and administration of vaccines and medicines often cost more than the drugs themselves."¹²⁹ The absence of adequate infrastructure "is evidenced by inadequate health facilities, lack of hospital beds and laboratories, lack of trained medical professionals, incomplete or

121. See Frist, *supra* note 117, at 213–16.

122. *Id.* at 213–14.

123. See *id.* at 214.

124. See *id.*

125. See *id.* at 214–15.

126. See *id.* at 215.

127. See Mercurio, *supra* note 79, at 15.

128. See *id.* at 21.

129. *Id.* at 20.

non-existent drug distribution systems,” and poor or non-existent physical infrastructure such as adequate sanitation systems.¹³⁰

Similar financial problems block improvement of sanitation infrastructure. However, lack of money is only part of the problem. “The lack of national policies is [also] a major constraint to success in sanitation.”¹³¹ Governments cannot play key roles as facilitators and regulators of sanitation without policies that support the transformation of national institutions “into lead institutions for sanitation, that increase focus on household behaviors and community action, that promote demand creation, and that enable health systems to incorporate sanitation and hygiene.”¹³² Other barriers to success in sanitation are population growth and high population densities, in addition to the fact that most of the people who lack improved sanitation live on less than two dollars per day, which makes high-cost, high-technology sanitation solutions impracticable.¹³³

Some, such as Senator Frist, have argued that foreign assistance by rich countries to poor countries should be increased, and that such assistance materially benefits the donor country.¹³⁴ Gates expressed his concern on this topic:

I worry that wealthy countries are turning inward and will take such a limited view of their own self-interest that they’ll decide these efforts aren’t worth the cost. Or that even if everyone agrees in principle that aid is important, they’ll be so polarized that their political allegiances will keep them from taking action.¹³⁵

However, foreign aid is a persistently controversial subject, and not a popular subject to present to voters. A study from the 1990’s described foreign aid as the most unpopular part of the federal budget among voters.¹³⁶ It may come as a surprise, though, that

130. *Id.* at 21.

131. Mara et al., *supra* note 115, at 5.

132. *Id.*

133. *Id.*

134. *See supra* notes 121–126 and accompanying text.

135. *2019 Letter*, *supra* note 59.

136. *See* Stephen Moore, *Foreign Aid: End It, Don’t Mend It*, CATO INST.: COMMENTARY, (March 17, 1997),

the amount of development aid supplied by rich countries is much smaller than what most people believe. According to Bill Gates:

For Norway, the most generous nation in the world, it's less than [three] percent. For the United States, it's less than [one] percent.

One percent of the U.S. budget is about \$30 billion a year. Of that, roughly \$11 billion is spent on health: vaccines, bed nets, family planning, drugs to keep people with HIV alive, and so on. (The other \$19 billion goes to things like building schools, roads, and irrigation systems.)¹³⁷

Melinda Gates said this in support of foreign aid:

The reason that countries like the [United States] invest in foreign aid is that it increases stability abroad and security at home. Strengthening health systems overseas decreases the chance of a deadly pathogen like Ebola becoming a global epidemic. And ensuring that every parent everywhere has the opportunity to raise safe, educated, healthy kids makes it less likely that they will embark on desperate journeys to seek better lives elsewhere. There is nothing about putting your country first that requires turning your back on the rest of the world. If anything, the opposite is true.¹³⁸

A. *Three Examples of Government Responses to a Public Health Crisis*

The opening section of this Article mentioned the criticism of billionaire philanthropies on the grounds they are non-democratic.¹³⁹ The implicit assumption in this line of criticism is that governments are better able to address public health issues and that non-governmental entities should not interfere with

<https://www.cato.org/publications/commentary/foreign-aid-end-it-dont-mend-it> [perma.cc/HD4E-YWDW].

137. Bill & Melinda Gates, *3 Myths That Block Progress for the Poor: 2014 Gates Annual Letter*, BILL & MELINDA GATES FOUND. (Jan. 2014), <https://www.gatesfoundation.org/who-we-are/resources-and-media/annual-letters-list/annual-letter-2014> [perma.cc/B4GV-DP8U].

138. *2019 Letter*, *supra* note 59.

139. *See supra* text accompanying notes 26–30.

democratically elected processes (assuming the government in question is a democracy). This Article was written in the midst of the COVID-19 outbreak. The coincidental timing allows an opportunity to observe how governments respond to a widespread public health crisis.

The first example is China. Starting in January 2020, China imposed a mandatory quarantine on Wuhan (a city of 11 million people) and the surrounding area, which is where the virus first emerged.¹⁴⁰ Under the quarantine, approximately 50 million people were banned from traveling and were required to remain at home.¹⁴¹ The purpose of the quarantine was to prevent people from that region from traveling to other parts of China and spreading the infection.¹⁴² The draconian nature of the government's response was described by some as "inhumane."¹⁴³ Many also note that only China could implement such a drastic and forceful response.¹⁴⁴ Only an authoritarian, one-party government in complete control of a country could act in this way, especially in a country with billions of people.¹⁴⁵

The United States provides a different example of governmental response. Obviously, the United States does not have the type of governmental structure that would permit authoritarian bans on freedom. The political climate in an election year resulted in an urgent public health crisis becoming politicized. President Trump accused the Democrats in Congress of politicizing the issue at a political rally.¹⁴⁶ At the same rally, the President

140. See Soumya Karlamangla, *Coronavirus: China has quarantined 50 million people. Experts worry that might backfire*, L.A. TIMES (Jan. 28, 2020), <https://www.latimes.com/science/story/2020-01-28/wuhan-chinas-coronavirus-50-million-people-quarantined> [perma.cc/MCE4-A3EB].

141. *Id.* "A quarantine of this scope is 'absolutely unprecedented,' said Lauren Sauer, an emergency medicine professor at Johns Hopkins University. 'I can't think of anything that comes even remotely close.'" *Id.*

142. *See id.*

143. *See id.*

144. *Id.*

145. *See id.*

146. Anne Gearan, Seung Min Kim, & Erica Werner, *Trump administration tries to play down the health and economic risks of the coronavirus*, WASH. POST (Feb. 28, 2020), https://www.washingtonpost.com/politics/trump-coronavirus-health-economic-risks/2020/02/28/0b817082-5a3a-11ea-9b35-def5a027d470_story.html [perma.cc/29HS-FC9B]. The Washington Post reported the following from a

characterized the COVID-19 outbreak as the Democrats' "new hoax."¹⁴⁷ In a separate effort to contain the political damage, the administration's National Economic Council Director "continued to play down the risks the outbreak poses to the economy and portrayed the massive market sell-off as an overreaction by investors."¹⁴⁸ In turn, President Trump's defenders accused the Democrats of politicizing and "weaponizing" the crisis to attack him.¹⁴⁹ So, the most serious public health crisis to confront the United States in years turned into an election year political issue, filled with hyper-inflated rhetoric. The crucial problem is that politicizing the virus might impair and hinder the scientific public-health response.¹⁵⁰

rally in South Carolina on February 28, 2020: "The Democrats are politicizing the coronavirus. They're politicizing it,' [President Trump] said. 'They don't have any clue. They can't even count their votes in Iowa. No, they can't. They can't count their votes.'" *Id.*

147. Lauren Egan, *Trump calls coronavirus Democrats' 'new hoax'*, NBC NEWS (Feb. 28, 2020), <https://www.nbcnews.com/politics/donald-trump/trump-calls-coronavirus-democrats-new-hoax-n1145721> [perma.cc/MWS5-EQD4]. In response to President Trump's remarks, the Democratic candidates for President attacked the use of the word "hoax" as "dangerous" and "disturbing." Dareh Gregorian, *Democratic candidates hit Trump's coronavirus 'hoax' claim*, NBC NEWS (Feb. 29, 2020), <https://www.nbcnews.com/politics/2020-election/democratic-candidates-hit-trump-s-coronavirus-hoax-claim-n1145911> [perma.cc/A59F-CAHQ]. The day after the rally, President Trump clarified his remark by saying that the Democrats' efforts to attack were a hoax, not that the COVID-19 threat was a hoax. Michael Collins & John Fritze, *'No need to panic': President Trump says risk to Americans is low as first coronavirus death reported in US*, USA TODAY (Feb. 29, 2020), <https://www.usatoday.com/story/news/politics/2020/02/29/trump-coronavirus-press-conference-covid-19-updates/4913935002/> [perma.cc/9PP4-H4VE]. This political back and forth underscores the politicization of the issue. *Id.*

148. Gearan et al., *supra* note 146.

149. Oliver Darcy, *Fox News hosts accuse Democrats and journalists of 'weaponizing' coronavirus to attack Trump*, CNN (Feb. 27, 2020), <https://www.cnn.com/2020/02/27/media/coronavirus-hannity-ingraham-limbaugh/index.html> [perma.cc/4KD9-39Y6].

150. See Alvin Powell, *A big coronavirus mystery: What about the children?*, HARV. GAZETTE (Feb. 27, 2020), <https://news.harvard.edu/gazette/story/2020/02/key-coronavirus-question-how-are-children-affected/> [perma.cc/6MPD-FGTE]. In an interview with Marc Lipsitch, an epidemiologist and head of the Harvard T.H. Chan School of Public Health's Center for Communicable Disease Dynamics:

Singapore provides a third example of government response. In contrast to other Asian countries like Japan and Korea, which are experiencing increasing levels of infections in the hundreds and several deaths, Singapore had reported no deaths and only 96 cases as of the end of February 2020.¹⁵¹ Singapore, however, enjoys the benefits of a “top-notch health system, draconian tracing and containment measures, a small population that’s largely accepting of government’s expansive orders,” and a warm climate (because most virus activity is temperature sensitive).¹⁵² So, a major part of Singapore’s success so far lies in a unique set of circumstances. It is a small, rich nation without a hinterland and with a state-of-the-art healthcare system.¹⁵³ It has been ruled by one political party for its nearly fifty-five years of independence, and local media carry the government’s messaging without question.¹⁵⁴ The population willingly abides by the government’s decisions.¹⁵⁵ Its governmental system is not as messy or rough-and-tumble as the United States’.¹⁵⁶

GAZETTE: What do you think of the president’s comments Wednesday evening that the [United States] is adequately prepared to meet this challenge?

LIPSITCH: I came away from the press conference feeling cautiously optimistic. The [P]resident repeatedly praised the scientists and public health officials standing beside him and put the [V]ice [P]resident in charge of the response, suggesting he was taking it seriously. And Secretary Azar laid out important priorities including expanding state and local response capacity. As is often the case, many of the president’s individual statements were at odds with his actions and with scientific fact, and he seemed to still be in denial. And with the news today that the leadership is shifting again and that federal health and science officials will be muzzled from speaking without clearance, my cautious optimism is gone. It is simply authoritarian and un-American for politicians to tell public health leaders what they can and can’t say about a public health crisis.

Id.

151. Philip J. Heijmans & Bloomberg, *Singapore’s coronavirus response has contained the outbreak—but its strategy is hard to replicate*, FORTUNE (Feb. 28, 2020), <https://fortune.com/2020/02/28/singapore-coronavirus-contained-response/> [perma.cc/7XWC-2F85].

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. This is what Bill Gates said about the COVID-19 crisis:

Now, in addition to the perennial challenge, we face an immediate crisis. In the past week, COVID-19 has started to behave a lot like the once-in-a-century pathogen we've been worried about. I hope it's not that bad, but we should assume that it will be until we know otherwise.

There are two reasons that COVID-19 is such a threat. First, it can kill healthy adults in addition to elderly people with existing health problems. The data so far suggests that the virus has a case fatality risk around 1%; this rate would make it several times more severe than typical seasonal influenza and would put it somewhere between the 1957 influenza pandemic (0.6%) and the 1918 influenza pandemic (2%).

Second, COVID-19 is transmitted quite efficiently. The average infected person spreads the disease to two or three others. That's an exponential rate of increase. There is also strong evidence that it can be transmitted by people who are just mildly ill or not even showing symptoms yet. This means COVID-19 will be much harder to contain than Middle East Respiratory Syndrome or Severe Acute Respiratory Syndrome (SARS), which were only spread by those showing symptoms and were much less efficiently transmitted. In fact, COVID-19 has already caused [ten] times as many cases as SARS in just a quarter of the time.

Bill Gates, *How to respond to COVID-19*, GATESNOTES (Feb. 28, 2020), <https://www.gatesnotes.com/Health/How-to-respond-to-COVID-19> [perma.cc/F8SR-CA2K]. Gates continued:

Then there is the question of funding. Budgets for these efforts need to be expanded several times over. Billions more dollars are needed to complete Phase III trials and secure regulatory approval for coronavirus vaccines, and still more funding will be needed to improve disease surveillance and response.

Why does this require government funding—can't the private sector solve this on its own? Pandemic products are extraordinarily high-risk investments, and pharmaceutical companies will need public funding to de-risk their work and get them to jump in with both feet. In addition, governments and other donors will need to fund—as a global public good—manufacturing facilities that can generate a vaccine supply in a matter of weeks. These facilities can make vaccines for routine immunization programs in normal times and be quickly refitted for production during a pandemic. Finally, governments will need to finance the procurement and distribution of vaccines to the populations that need them.

Obviously, billions of dollars for anti-pandemic efforts is a lot of money. But that's the scale of investment required to solve the problem. And given the economic pain that an epidemic can impose—just look at the way COVID-19 is disrupting supply chains and stock markets, not to mention people's lives—it will be a bargain.

Id. At a time like this, it would seem appropriate to mute criticism of a public health philanthropy with \$40 billion at its disposal.

The purpose for examining the public health responses of these three countries is to provide a more complete picture and context of criticism directed at the Gates Foundation for its public health work. Governments will respond to public health crises in their own way, based upon an innumerable set of factors including national wealth, the state of their healthcare infrastructure, their accountability to their citizens, their control of their citizens, their willingness to cooperate and share information with other governments, and so on. The effectiveness of a government's ability to solve public health problems will depend on these factors, and other factors such as geography and weather. Island nations have an easier time controlling movement in and out of the country, and countries with tropical climates face public health concerns not shared by cold weather countries. It goes too far to assert that governments are in a superior position to solve widespread public health issues. They, of course, have sovereign jurisdiction within their borders, but legal authority does not equate to ability to prevent or contain a global disease outbreak.

Obviously, the Gates Foundation is not a government and it was not elected or appointed by anyone to conduct its work. However, does this mean that governments are inherently more capable of solving public health issues? Does it mean that governments should relegate philanthropic NGOs to a reduced role? Moreover, it is doubtful that critics of the philanthropies can provide any persuasive, much less conclusive, arguments to show that governments are always better at solving public health crises. A reasonable conclusion seems to be that governments should accept as much help as they can so long as the consenting governments are not disturbed in their sovereign roles.

IV. THE ABILITY OF THE GATES FOUNDATION TO FILL THE GAP BETWEEN POLITICS AND THE MARKET

Nation-states are the bedrock of public international law; they provide the structure upon which public international law is based.¹⁵⁷ Over decades, however, international law has also

157. See MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 185 (4th ed. 2003). The primacy of the nation-state can be traced to 1648 and the Peace of Westphalia. See *id.* at 161. If public international law is viewed as a hierarchy, the next level (under the apex level occupied by nation-states) would be international organizations. See *id.* at 199. "Public international organizations are creatures of international agreement constituted by

developed to recognize and accommodate the role of NGOs in matters that were traditionally reserved for nation-states.¹⁵⁸

sovereign states to accomplish common goals.” *Id.* The most prominent is, of course, the United Nations. *See id.* at 208.

158. One commentator aptly observes:

In the twenty-first century, a wide range of complex global challenges will require unprecedented levels of global cooperation. However, most of the international institutions we inherited from the last century were designed only to promote cooperation among states in the context of a very different world in the wake of World War II. Sixty-five years later, many of today’s biggest challenges can no longer be managed or solved by states alone, but instead require the resources, ingenuity, and connectivity of diverse societal actors. A new generation of institutions is increasingly harnessing the energies of civil society organizations and other non-state actors through multi-stakeholder forms of governance. The governance of international institutions and the expanding role of these institutions in responding to key global challenges has become a resurgent area of research interest. However, a number of theorists remain skeptical that civil society should play a significant role in the governance of international institutions. . . . [I]nvolving civil society in the governance of international institutions is increasingly necessary and . . . the traditional approach of consultation is inadequate to catalyze their potential contribution to these institutions. Instead, multi-stakeholder forms of governance, which are features of a number of twenty-first century institutions, will be increasingly critical to the success of many international institutions.

Civil society groups are becoming key actors in a wide range of international arenas that were formerly the exclusive province of states and increasingly viewed as essential actors in many of these areas. Few people would suggest today that contemporary global challenges in areas such as climate change or global health can be solved by states alone without the extensive participation of non-state actors. Thus far, relatively few scholars have examined a new generation of twenty-first century international institutions that are moving away from exclusively intergovernmental structures and towards multi-stakeholder partnerships where non-state actors are full participants in governance. Most work on civil society participation within international institutions has primarily focused on the practice of twentieth century institutions, which significantly informs the conclusions that many theorists draw about the role of non-state actors in governance.

Innovative twenty-first century institutions, in areas such as global health, are demonstrating that multi-stakeholder governance can be extremely successful and increasingly undermining the logic of those who reject the idea of moving beyond exclusively intergovernmental arrangements. A rich literature on associative democracy, which is usually applied to national contexts, offers fresh

NGOs are created under domestic laws, rather than international agreement.¹⁵⁹ There are thousands of NGOs addressing a wide range of issues of international concern.¹⁶⁰ Their interests may or may not coincide with the interests of nation-states regarding the matters involved, and they may work in concert with some nation-states or against their interests.¹⁶¹ NGOs like the Gates Foundation have the flexibility and freedom to work on matters that may be beyond the ability or interest of nation-states. Bill Gates, in effect, stated that the creation of the Gates Foundation was influenced by the optimistic possibilities of international organizations, and that he envisioned an NGO that could coordinate its efforts with international organizations in the area of global public health.¹⁶² For example, Bill Gates created Gavi, an organization dedicated to vaccinating children around the world, because he saw that child vaccination was not an effort being adequately addressed by other international groups including the United Nations and the World Health Organization.¹⁶³

Since its founding, the Gates Foundation has occupied a key role in addressing the kinds of problems that surprised Bill Gates when the foundation began its efforts. In his 2020 Annual letter, Gates wrote:

insights into some of the key design challenges facing these multi-stakeholder institutions in terms of enhancing the contribution of civil society actors.

See David Gartner, *Beyond the Monopoly of States*, 32 U. PA. J. INT'L L. 595, 596–98 (2010) (footnotes omitted).

159. MARK WESTON JANIS & JOHN E. NOYES, INTERNATIONAL LAW, CASES AND COMMENTARY 650 (5th ed. 2014).

160. *Id.*

161. *See id.*; *see also* John Clark, *The Relationship Between the State and the Voluntary Sector*, GLOBAL POLY FORUM (Oct. 1993), <https://www.globalpolicy.org/component/content/article/176-general/32116.html> [perma.cc/G33G-DTKH].

162. *See infra* note 165 and accompanying text.

163. 2020 Letter, *supra* note 19. Gavi, the Vaccine Alliance, was formed to improve access to vaccinations for children in poor countries. *See About our Alliance*, GAVI, <https://www.gavi.org/our-alliance/about> [perma.cc/W3CS-GSC8] (last visited Dec. 19, 2020). Gavi's core partners are the World Health Organization, UNICEF, the World Bank, and the Bill & Melinda Gates Foundation. *Id.* For Melinda Gates' perspective on the founding of Gavi, *see supra* note 48 and accompanying text.

By 2019, Gavi had helped vaccinate more than 760 million children and prevent 13 million deaths. It also succeeded in bringing more vaccines and supplies into the market while lowering prices. For example, a single dose of the pentavalent vaccine, which protects against five deadly infections, used to cost \$3.65. It now costs less than a dollar.¹⁶⁴

The impact of the Gates Foundation on worldwide health outcomes is undeniable.¹⁶⁵

The Gates Foundation has already been instrumental in contributing to the progress of medical access that was made in poor countries during the 2000s.¹⁶⁶ Namely, the Gates Foundation was directly involved with addressing the lack of vaccine availability for diseases such as polio, yellow fever, and hepatitis B.¹⁶⁷ Even though vaccines existed, poor countries could not afford to buy them, and, during the 1990s, vaccine makers stopped manufacturing them.¹⁶⁸ The solution to this problem was simple: the Gates Foundation and other aid donors bought the vaccines.¹⁶⁹

The Gates Foundation stands apart for several reasons. First, of course, is the amount of money it has. But the way in which the

164. *Id.* Gates stated in an earlier Annual Letter:

It's hard to overstate how much good these projects have done in the world. Since 2002, when it was created to combat AIDS, TB, and malaria, the Global Fund and its partners have saved 27 million lives. Since 2000, Gavi has provided basic vaccines to more than 690 million children. That's like vaccinating nearly every person in Europe.

2019 Letter, *supra* note 59. The Gates Foundation is a key partner of the Global Fund and has contributed over \$2.2 billion to it. *Private & Nongovernment Partners: Bill & Melinda Gates Foundation*, THE GLOBAL FUND (June 11, 2020), <https://www.theglobalfund.org/en/private-ngo-partners/resource-mobilization/bill-melinda-gates-foundation/> [<https://perma.cc/LGM5-H7TF>].

165. See Clinton Leaf, *How Bill and Melinda Gates Are Transforming Life for Billions in the 21st Century*, FORTUNE (Apr. 18, 2019 6:30 AM EDT), <https://fortune.com/longform/bill-melinda-gates-worlds-greatest-leaders/> [perma.cc/4C77-LMLR].

166. Sebastian Mallaby, *A Patently Simple Idea*, FOREIGN POLICY (Oct. 12, 2009, 8:01 PM), <https://foreignpolicy.com/2009/10/12/a-patently-simple-idea/> [perma.cc/E5EU-74YW].

167. *Id.*

168. *Id.*

169. *Id.*

Gates Foundation makes its decisions and plans for the most effective deployment of those funds is also notable. From January 1995 through the end of 2017, the Gates Foundation deployed \$45.5 billion.¹⁷⁰ That \$45 billion “launched, and then continually supported, what global health experts widely acknowledge to be two of the most successful international, private-public partnerships ever formed.”¹⁷¹ The first was Gavi, which helped many countries vaccinate more than 500 million children.¹⁷² The second was the Global Fund to Fight AIDS, Tuberculosis, and Malaria.¹⁷³ The fund has “put more than 17 million people on retroviral therapy for HIV, cared for 5 million people with tuberculosis, and treated more than 100 million cases of malaria in 2017 alone.”¹⁷⁴ The Gates Foundation is also the largest donor to the World Health Organization, apart from national governments.¹⁷⁵ The involvement of the Gates Foundation has also contributed to objective, observable improvements in other areas. Through the Global Polio Eradication Initiative, the Gates Foundation helped reduce the existence of the disease “to the brink of elimination, leaving only two places on the earth, Afghanistan and Pakistan, where the wild poliovirus remains active,” even though thirty years ago it was found in 125 countries.¹⁷⁶ In addition, the Gates Foundation has spent more than a billion dollars to reduce the burden of neglected tropical diseases that can cause suffering from blindness to anemia to an abnormal swelling of limbs, which still affect one-seventh of the earth’s population.¹⁷⁷

170. Leaf, *supra* note 165.

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.* “The eradication quest is . . . sophisticated and data-driven. Gates-funded disease hunters have plumbed sewage systems in hotspot regions to check for poliovirus and used digital satellite data to understand how many kids were in a given area—and, therefore, how many houses inoculation teams needed to visit.” *Id.*

177. *Id.*

CONCLUSION

The Gates Foundation operates at a level where it can address problems that national governments of poor countries cannot address, and it stands on an equal footing and influence with international organizations created through the coordination and support of nation-states. Such an entity is the result of a world where one person can accumulate more than \$100 billion, and today there are several such persons.¹⁷⁸ In Gates' own words, there is something unfair about a system where one person can be worth over \$100 billion, and this kind of wealth inequality poses threats to social cohesion. However, it also matters what such a person does with such wealth. Government can solve many problems, but not all. The same is true for private-sector, profit-seeking entities. However, there is a large gap between the two that neither is able to fill.

Centuries ago, in the Western world, religious institutions occupied a crucial role between the government and the private sector (although the lines separating them were blurred). Today, contemporary society worships at a different altar, an altar that some find troublesome. Whether this is a desirable development or not does not change the world as we find it. What is important, however, is the existence of global problems that defy attempts by government and private sector market forces to solve them. A third type of entity is demonstrating that it is possible, at least in part, to fill the gap between those two forces. Like it or not, it takes an entity with immense wealth to take action that is immune from both political and market pressure. This Article started with a summary of criticisms directed against billionaire philanthropies. Such criticisms may have merit in some instances, but they are not universally applicable. The Gates Foundation demonstrates the point.

178. As another example, Jeff Bezos announced the creation of a fund in February 2020 with \$10 billion to mitigate the impact of climate change. Rishi Iyengar, *Jeff Bezos commits \$10 billion to fight climate change*, CNN (Feb. 18, 2020, 1:19 PM ET), <https://www.cnn.com/2020/02/17/tech/bezos-earth-fund-climate-change/index.html> [perma.cc/397P-5ZRH].