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For-Profit Philanthropy

Dana Brakman Reiser

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ESSAY

FOR-PROFIT PHILANTHROPY

*Dana Brakman Reiser**

This Essay examines Google's adoption of the novel and unorthodox for-profit philanthropy model. Google created a division of its for-profit company that is tasked with pursuing philanthropic activities. Specifically, this division is responsible for addressing the global issues of climate change, poverty, and emerging diseases. Of course, companies have long blended philanthropic and business objectives. They make contributions, commit to corporate social responsibility, or even form as social enterprises. For-profit philanthropy, though, differs from these familiar techniques in both structure and scale. Likewise, for-profit philanthropy stands in stark contrast to the nonprofit, tax-exempt form of organization typically used by those pursuing exclusively philanthropic endeavors. This Essay investigates the for-profit philanthropy model, drawing out these distinctions as well as the reasons why Google chose to adopt it. These reasons reveal a fascinating mismatch between Google's philanthropic vision and that of nonprofit law. Exploring this divergence exposes the fundamental policy choices underlying the legal structures for philanthropic activity, as well as the undertheorized boundary between nonprofits and for-profits.

INTRODUCTION

Google is known for its innovative search methodology, pricing structure, even employee benefits. When this for-profit corporation created a philanthropic division, it grasped the mantle of philanthropic innovator as well. This division stands alongside divisions for engineering, sales, and finance, but is tasked with addressing climate change, poverty, and

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emerging diseases. It is known as Google.org. This organizational structure has been termed "for-profit philanthropy."[1] The for-profit philanthropy structure distinguishes Google.org from the customary range of corporate philanthropic practice. It also differentiates this model from philanthropy pursued in the traditional organizational form: a tax-exempt, nonprofit corporation. This Essay will explore Google.org and its for-profit philanthropy model, drawing out the implications for nonprofit law, for-profit law, and the boundary between them.

Part I introduces the Google.org phenomenon, describing its roots and initiatives. It also identifies the major themes defining this experiment in for-profit/nonprofit hybridization. Part II considers several other ways in which for-profits engage in philanthropic activities: corporate charitable contributions, corporate social responsibility, and social enterprise. Comparing these examples with Google.org highlights the distinct innovations of for-profit philanthropy. Part III explores the reasons that Google undertook the for-profit philanthropy experiment, rather than using a traditional philanthropic vehicle. While Google treasures any chance to innovate, its reasons for adopting the for-profit philanthropy model are linked to practical legal concerns. If structured using traditional organizational forms, Google.org would be constrained in pursuing its intended philanthropic strategies. Legal restrictions would frustrate its desire to make for-profit investments, to directly access Google Inc. resources, and to engage in political action, all in service of philanthropic goals. This part details these restrictions, and in doing so, identifies a fascinating mismatch between Google's philanthropic vision and that of nonprofit law.

Part IV examines the implications of for-profit philanthropy and the questions it raises, offering insights drawn from both nonprofit and for-profit legal traditions. The nonprofit law perspective prompts difficult questions about enforcement and about the limits, if any, on changing a for-profit philanthropy's mission. A for-profit law perspective reminds us to consider how adopting the for-profit philanthropy model might undermine shareholder primacy, muddy fiduciary obligations, or both. Ultimately, these perspectives combine to reveal the more fundamental questions that for-profit philanthropy presents. In important ways, the law defining nonprofit and for-profit forms also defines the boundaries of philanthropy and business. For-profit philanthropy defies these limits. It challenges the entire boundary-setting exercise and contests the utility and propriety of its categories.

I. GOOGLE.ORG'S FOR-PROFIT PHILANTHROPY MODEL

Google Inc. is a widely known and fantastically successful public company. It offers an ever-expanding array of products and services, first

1. *See* David Haskell, *For-Profit Philanthropy*, N.Y. TIMES, Dec. 10, 2006, § 6 (Magazine), at 50.

and most notably its eponymous search engine.[2] Google Inc. positions itself as a different kind of company, and its actions support this claim. It ran its initial public offering as a Dutch auction to give greater access to small investors.[3] It offers unusual and extravagant employee benefits to recruit top creative talent.[4] It refuses to run lucrative pop-up ads, or indeed any ads on its homepage.[5] It even took on "Don't be evil" as a kind of corporate motto.[6]

Google Inc.'s goals also extend beyond the company. Its leaders "aspire to make Google an institution that makes the world a better place," and have pledged to commit one percent of the company's equity and profits to philanthropic pursuits.[7] Here, too, Google Inc. has innovated. From its inception as a public company, Google Inc. sponsored a traditional corporate foundation.[8] Yet, Google Inc.'s experiment with the for-profit

2. Google Inc. operates in myriad technological fields and grew exponentially virtually from its inception. DAVID A. VISE & MARK MALSEED, THE GOOGLE STORY 1–9 (2005). Although the current economic crisis has put a damper on business performance worldwide, Google Inc. has stated that thus far it has continued to "perform[] well" and reported an increase in revenues in the fourth quarter of 2008 over the previous quarter and the corresponding quarter the year before. *See* Press Release, Google Investor Relations, Google Announces Fourth Quarter and Fiscal Year 2008 Results (Jan. 22, 2009), *available at* http://investor.google.com/releases/2008Q4_google_earnings.html. Its core product remains its web search technology and it "generate[s] revenue primarily by delivering relevant, cost-effective online advertising." Google Inc., Annual Report (Form 10-K), at 1 (Feb. 15, 2008), *available at* http://investor.google.com/documents/2007_google_annual_report.html.

3. *See* Les Christie, *The ABCs of a Unique IPO: The Hottest Tech IPO in Years Will Be Run as a "Dutch Auction,"* CNNMONEY, Apr. 29, 2004, http://money.cnn.com/2004/04/29/technology/googleauction (last visited March 3, 2009). In a Dutch auction, the issuer solicits bids from would-be buyers of the initial public offering (IPO) stock for the number of shares they desired to purchase and the price at which they would be willing to buy them. The highest set of bids making up the number of shares the company has made available can then purchase the shares; however, all bidders pay only the price bid by the lowest successful bidder. *See* JAMES D. COX ET AL., SECURITIES REGULATION 124–25 (5th ed. 2006).

4. *See* Google, Google Jobs: Benefits, http://www.google.com/support/jobs/bin/static.py?page=benefits.html (last visited Feb. 20, 2009) (describing benefits available to Google employees ranging from health insurance, retirement savings, and employee stock ownership plans to free food, employee shuttle services, and on-site laundromats); *see also* Adam Lashinsky, *Search and Enjoy*, FORTUNE, Jan. 22, 2007, at 70; Robert Levering & Milton Moskowitz, *The 100 Best Companies to Work for 2008: The Rankings*, FORTUNE, Feb. 4, 2008, at 75 (ranking Google Inc. as the number one company to work for and reporting that "[t]he company gives stock options to 99% of employees"); Robert Levering & Milton Moskowitz, *The 100 Best Companies to Work for 2007: In Good Company*, FORTUNE, Jan. 22, 2007, at 94 (same).

5. *See* VISE & MALSEED, *supra* note 2, at 6 (describing Google Inc.'s decision not to include advertising on this "most valuable piece of real estate on the Internet"); Google, Corporate Information: Are Pop-Up Ads Allowed on Google?, http://www.google.com/corporate/nopopupads.html (last visited Feb. 20, 2009).

6. Google Inc., Letter from the Founders: "An Owner's Manual" for Google's Shareholders (Amendment No. 9 to Form S-1), at 27, 32 (Aug. 18, 2004) [hereinafter Letter from the Founders], *available at* http://www.sec.gov/Archives/edgar/data/1288776/000119312504142742/ds1a.htm (referencing Warren Buffet's essays in his annual reports and his *An Owner's Manuel* to Berkshire Hathaway shareholders).

7. *Id.*

8. *Id.* (noting the establishment of the Google Foundation).

philanthropy concept has come to dominate its philanthropic program. Google.org is the primary home and driver of Google Inc.'s philanthropic activities. Today, Google.org "manage[s]" the Google Foundation, and the company does not plan to make any additional contributions to fund the foundation.[9] Google.org's most recent pronouncements promise to "continue to iterate on our philanthropic model" away from traditional philanthropic mechanisms and toward closer alignment with Google Inc.[10]

Google.org is a division of Google Inc. tasked with pursuing the company's philanthropic goals.[11] These goals aim broadly to address "climate change, poverty and emerging disease," now focusing on several more specific initiatives.[12] These initiatives employ a mix of methods. Like traditional foundations, Google.org makes grants to nonprofit entities. In addition, it makes equity investments in for-profit companies. Wherever possible, Google.org is committed to using Google Inc.'s human resources, technology, and products to pursue its philanthropic goals. Though its purposes resonate with typical philanthropic pursuits and many companies engage in philanthropic activities, Google.org's use of an integrated for-profit division inaugurates a new model: for-profit philanthropy.

The current Google.org initiatives demonstrate many of the distinctive elements of the for-profit philanthropy model. The first two focus on projects to curb climate change: developing cost-effective renewable energy sources (Renewable Energy Cheaper than Coal, or RE<C) and plug-in vehicles for mass consumer use (RechargeIT).[13] As part of RE<C, Google.org has become a key investor in companies researching renewable energy technology.[14] It also formed its own internal group to engage in renewable energy research at the company's headquarters.[15] In addition to

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9. Google.org, About Us (2008) [hereinafter About Google.org], *available at* http://web.archive.org/web/20080212020552/http://google.org/about.html; Posting of Sheryl Sandberg, Vice President, Global Online Sales & Operations, Google.org, to The Official Google Blog, http://googleblog.blogspot. com/2005/10/about-googleorg.html (Oct. 11, 2005, 9:02 PM) (stating that Google does not "expect to make further donations to the Foundation for the foreseeable future").

10. Posting of Larry Brilliant, Chief Philanthropy Evangelist, Google.org, to The Official Google.org Blog, http://blog.google.org/2009/02/next-chapter-for-googleorg.html (Feb. 23, 2009, 4:14 PM) (describing Google.org's future plans in a posting about Dr. Brilliant's change of role with the company).

11. Press reports often refer to Google.org as a subsidiary. *See, e.g.*, Brad Stone, *A Subsidiary Charts Google's Next Frontier: Renewable Energy*, N.Y. TIMES, Nov. 28, 2007, at C3. Google.org's own public materials do not address this question directly. Whether the division is housed in a separate wholly owned subsidiary or is an unincorporated unit within Google Inc., Google.org clearly operates as a for-profit enterprise within the Google Inc. umbrella.

12. Google.org, Searching for Solutions, http://www.google.org/index.html (last visited Feb. 20, 2009) [hereinafter Searching for Solutions].

13. Google.org, Plug into a Greener Grid: RE<C and RechargeIT, http://www.google.org/rec.html (last visited Feb. 20, 2009) [hereinafter A Greener Grid].

14. *Id.*

15. *Id.*; *see also* Google, Google Is Committed to Helping Build a Clean Energy Future, and We Need Your Help, http://www.google.com/jobs/energy/ (last visited Feb. 20, 2009) [hereinafter Cleaner Energy Future].

a series of grants to nonprofit research institutes and advocacy projects, RechargeIT collaborates with a series of large and small for-profit companies engaged in the energy, automotive and plug-in industries.[16]

The Small and Medium-Sized Enterprises (SME) initiative seeks to encourage the creation and growth of these businesses in developing countries.[17] This initiative likewise includes traditional grants to nonprofit organizations supporting entrepreneurship.[18] Breaking from these traditional means, however, Google.org and two partners invested $17 million to create the Small to Medium Enterprise Investment Company for India, a for-profit investment fund.[19] The SME initiative also works to generate private investment and increase liquidity in their capital markets, such as by linking investors with information about developing country SMEs.[20] In late December 2008, Google.org announced its decision to put the "SME initiative on the back burner" in order to focus more on other initiatives.[21] Still, Google.org has promised to honor its commitments under existing grants and investments in the SME space.

In its announcement de-emphasizing SME, Google.org specifically mentioned its desire to focus more on its Inform & Empower (I&E) initiative. This initiative focuses on India and East Africa, working to supply information regarding education, health, water, and sanitation to underserved communities.[22] Google.org expects that making this information available will empower individuals and communities to demand change from their governments.[23] To pursue these goals, I&E has thus far made many grants to nonprofit research and advocacy groups, and contracted with a few individuals and for-profit companies, primarily in-country in the target areas.[24] Google.org's final initiative to date, Predict and Prevent (PnP), focuses on tracking emerging diseases. PnP funds

16. Google.org, RechargeIT.org: A Google.org Project: What We Are Doing, http://www.google.org/recharge/overview.html (last visited Feb. 20, 2009) [hereinafter RechargeIT.org].

17. *See* Google.org, Fuel Growth of Small and Medium-Sized Enterprises (Jan. 2008) [hereinafter SME Brief], *available at* http://www.google.org/SME_Brief.pdf.

18. Google.org, Grants and Investments, http://www.google.org/projects.html (last visited Feb. 20, 2009) [hereinafter Grants and Investments].

19. Press Release, Google.org, Soros Economic Development Fund, Omidyar Network and Google.org Launch Small to Medium Enterprise Investment Company for India (Feb. 19, 2008), *available at* http://www.google.com/intl/en/press/pressrel/20080219_omidyar_googleorg.html.

20. *See* SME Brief, *supra* note 17.

21. Posting of Sonal Shah to The Official Google.org Blog, http://blog.google.org/2008/12/sharpening-our-focus-in-global.html (Dec. 23, 2008, 10:39 AM).

22. Google.org, Inform and Empower to Improve Public Services, http://www.google.org/inform.html (last visited Feb. 20, 2009) [hereinafter Inform and Empower]; *see also* Google.org, Inform and Empower to Improve Public Services (Jan. 2008) [hereinafter I&E Brief], *available at* http://www.google.org/Inform_Empower_Brief.pdf.

23. Inform and Empower, *supra* note 22; *see also* I&E Brief, *supra* note 22. In addition, Inform & Empower (I&E) will provide public sector and civil society groups with data and analytical tools to respond to the calls for change it anticipates. *Id.*

24. Grants and Investments, *supra* note 18.

nonprofit organizations and academic research groups engaging in data collection, monitoring, and other efforts to track disease outbreaks, primarily in Southeast Asia and sub-Saharan Africa.[25] While these two initiatives have so far used only traditional mechanisms, their lofty objectives and reliance on the power of information suggest that a range of techniques will be employed over time.

Together these initiatives make up an ambitious and diverse philanthropic program. Still, commonalities of Google.org's approach emerge. Google.org leverages Google Inc.'s financial, human, and technological resources, utilizing its business competencies and products. Further, it relies on skills, methodologies, and ideas gleaned from Google Inc.'s for-profit success. Moreover, Google.org's initiatives are highly reliant on the power of information[26]—Google Inc.'s stock in trade. These tenets of the Google.org approach differentiate it from a traditional charity, although its conservation, public health, and antipoverty mission would also be appropriate for a nonprofit, tax-exempt entity. Further, these common threads shed some light on the philosophy behind Google Inc.'s pursuit of a for-profit philanthropy model.

As a division of Google Inc., Google.org is poised to exploit the company's wealth, human resources, technology, and business products in service of its philanthropic goals. The Google.org initiatives already comprise sizeable financial outlays. It has made grants to a wide range of nonprofit partners.[27] Google.org also is heavily seeding several for-profit ventures linked to its philanthropic initiatives. The $17 million in initial start-up funds for the Small to Medium Enterprise Investment Company for India is just one of the most recent of these. RE<C has invested over $35 million in cutting-edge companies working on solar, wind, and geothermal energy capabilities.[28] In late 2007, Google.org requested proposals for up to $10 million of investment capital as part of RechargeIT.[29] The request clarified that it would consider only for-profit partners, though investments

25. *Id.*; Google.org, Predict and Prevent, http://www.google.org/predict.html (last visited Feb. 20, 2009); *see also* Google.org, Predict and Prevent (Oct. 14, 2008) [hereinafter PnP Brief], *available at* http://www.google.org/Predict_Prevent_Brief.pdf.

26. Searching for Solutions, *supra* note 12 ("Google.org aspires to use the power of information and technology to address the global challenges of our age: climate change, poverty and emerging disease."); Posting of Larry Brilliant to The Official Google.org Blog, *supra* note 10 ("[O]ur greatest impact has come when we've attacked problems in ways that make the most of Google's strengths in technology and information . . . .").

27. Grants and Investments, *supra* note 18.

28. *Id.*; Google, Going Green at Google: Powering a Clean Energy Revolution, http://www.google.com/corporate/green/clean-energy.html (last visited Feb. 20, 2009) [hereinafter Powering a Clean Energy Revolution] (describing Google.org's investments in several solar, wind, and other alternative energy companies).

29. Google.org, RechargeIT.org: A Google.org Project, RechargeIT Request for Investment Proposals, http://www.google.org/recharge/rfp/ (last visited Feb. 10, 2009) [hereinafter RechargeIT Request for Investment Proposals]; *see also* Press Release, Google Press Ctr., Google.org Launches $10 Million Request for Investment Proposals to Advance Sustainable Transportation Solutions (Sept. 12, 2007), *available at* http://www.google.com/intl/en/press/annc/rechargerfp.html.

made under it would be bolstered by prior and continuing grants to nonprofit research and policy organizations.[30] To date, Google.org's grants and investments have exceeded $100 million.[31] Its financial commitments are large and diverse, and appear to be growing.[32]

Google.org also taps Google Inc.'s valuable human resources, and its ability to attract and recruit top talent. This idea has been taken furthest in Google.org's RE<C initiative. As mentioned above, RE<C includes an internal research and development group to study renewable energy. This group is part of Google Inc.'s engineering organization and is currently advertising new positions.[33] Google.org relies on or plans to utilize Google Inc.'s human resources in its other initiatives too. It described its plan to focus more attention on I&E as spurred in part by "Google.org's unique strengths—including the ability to tap Google engineers to build and link better pathways to information."[34] RechargeIT's demonstration plug-in fleet is available as part of an employee car-sharing fleet program.[35] Employee use of the cars generates data used for future research to improve the plug-in technology. Google Inc. personnel are a key resource for Google.org's programs, one it will continue to mine.[36]

Finally, Google.org can leverage Google Inc.'s technological resources, business projects, and products. Data on the RechargeIT fleet's performance is collected via software Google Inc. developed, and this data is disseminated through the company's websites.[37] Predict and Prevent plans to provide disease warnings through real time data-sharing, "leverage[ing] existing Google tools and resources."[38] Inform and Empower plans to assist governments and policymakers in "[e]xpanding service delivery with innovative information-based tools."[39] Google Inc.

30. RechargeIT Request for Investment Proposals, *supra* note 29.

31. Grants and Investments, *supra* note 18.

32. *Face Value: Google's Guru of Giving*, ECONOMIST, Jan. 19, 2008, at 75 ("If the pilots go well, Google.org plans to scale up fast . . . .").

33. Clean Energy Future, *supra* note 15.

34. Posting of Sonal Shah to The Official Google.org Blog, *supra* note 21. Similarly, in its former efforts in the small and medium-sized enterprise (SME) area, Google.org explained that Google Inc. software engineers would work alongside for-profit partners to develop the informational and investment tools necessary to establish and mature a global SME capital market. SME Brief, *supra* note 17.

35. RechargeIT.org, *supra* note 16; *see also* Felicity Barringer & Matthew L. Wald, *Google and Utility to Test Hybrids that Sell Back Power*, N.Y. TIMES, June 19, 2007, at C3 ("The six vehicles are used by Google employees near the company's Mountain View headquarters, and sit under a carport with a roof of solar cells.").

36. *See* Posting of Larry Brilliant to The Official Google.org Blog, *supra* note 10 (announcing that "Google [Inc.] has decided to put even more engineers and technical talent to work on . . . issues and problems" addressed by Google.org).

37. *See* Google.org, RechargeIT: A Google.org Project: Our Fleet, http://www.google.org/recharge/dashboard (last visited Feb. 20, 2009) (providing links for each of the six cars and maintaining a calendar for each date that data is available, along with event summaries).

38. PnP Brief, *supra* note 25, at 4.

39. Inform and Empower, *supra* note 22. Before its move to the back burner, the SME initiative also contemplated "partner[ing] on Google.com projects." SME Brief, *supra* note 17.

will no doubt be a potential source for procuring them. Google.org will continue to partner with Google Inc. to collect, manage, and deploy the information its initiatives count on, and will rely on its human and technological resources to do so.[40]

Although operating outside of the Google.org flagship initiatives, the Google Grants program also uses Google Inc.'s business products in service of its philanthropic goals. This program awards advertising to selected nonprofit organizations. The ads appear next to Google's search results when users search on targeted terms related to the nonprofit's mission and programs. The free advertising can be used to "raise awareness and increase traffic."[41] Each grant includes at least three months of free advertising, which may be valued at up to $10,000 per month.[42] The ads operate as an in-kind contribution program, providing for free to chosen nonprofits the valuable services Google Inc. sells to other advertisers. Through this program, Google.org leverages Google Inc.'s most profitable product—advertising[43]—to support philanthropic ends.

Beyond these concrete relationships with Google Inc., Google.org's methodology is infused with the vision that made the company a for-profit success. In its policy documents, Google.org speaks of the importance of moving from top-down to bottom-up visions of change,[44] of the importance of speed,[45] and of lowering transaction costs.[46] These tenets of Google.org's vision are traceable to the corporate philosophy of Google Inc. "Democracy on the web works"—Google Inc.'s innovative bottom-up approach to ranking search results—is one of Google Inc.'s ten truths.[47] So is "Fast is better than slow."[48] Likewise, Google Inc.'s principles of design stress that "every millisecond counts."[49] Google Inc. underscores the importance of lowering the costs of search transactions when it advocates

40. Posting of Larry Brilliant to The Official Google.org Blog, *supra* note 10 ("By aligning Google.org more closely with Google as a whole, [Google.org's leadership] will ensure that we're better able to build innovative, scalable technology and information solutions.").

41. Google for Non-Profits, Google Grants: Reach and Engage Your Supporters Through Free Online Advertising, http://www.google.com/nonprofits/grantstutorial.html (last visited Feb. 20, 2009).

42. Breezo—What Is Google Grants?, http://services.google.com/grants/edu/what/ (last visited Feb. 20, 2009).

43. Google, Investor Relations: Investor FAQ, http://investor.google.com/faq.html#money (last visited Feb. 10, 2009) (noting, in response to the FAQ "How does Google make money?" that "the majority of our revenue comes from advertising").

44. I&E Brief, *supra* note 22.

45. *See, e.g.*, A Greener Grid, *supra* note 13 (describing Google.org's efforts to produce renewable energy "in years, not decades" and to "accelerate mass commercialization of plug-in vehicles").

46. SME Brief, *supra* note 17.

47. Google, Corporate Information: Our Philosophy, http://www.google.com/corporate/tenthings.html (last visited Feb. 10, 2009).

48. *Id.*

49. Google, Corporate Information: Google User Experience, http://www.google.com/corporate/ux.html (last visited Feb. 10, 2009).

simplicity and eschews distraction.[50] Finally, and most prominently, both Google.org documents and the broader range of Google Inc. materials are riddled with references to the power of information.[51]

Google.org partner organizations also demonstrate a commitment to business skills, methodologies, and vision. Even nonprofit partners often tout their market orientation. The core principles of the Rocky Mountain Institute, a nonprofit grantee in the RechargeIT initiative, include embracing "Market-Oriented Solutions" and a commitment to "natural capitalism."[52] CalCars, another RechargeIT grantee, describes itself as a "startup" organization, echoing Google's roots as a small business.[53] The website of TechnoServe, an SME initiative grantee, proclaims "Social change has a business plan."[54] At times, funding recipients even adopt a hybrid approach of their own. Pratham, an Indian nongovernmental organization (NGO) and grantee in the I&E initiative, relies on a "triangular partnership" among corporate leaders, government, and community members.[55] Google.org has funded a wide variety of grantees and for-profit partners who both promote their programmatic goals and share their philanthropic vision. This shared vision often includes the notion that business ideas, skills, and methodologies are essential links in achieving social change.

The for-profit philanthropy model itself, of course, is a testament to Google Inc.'s faith in the power of its for-profit vision. Google.org's creators and managers could have continued their philanthropic activities using the Google Foundation, a traditional corporate foundation already in existence and making grants. Instead, they struck out to create Google.org and have essentially halted funding to the foundation.[56] Their belief that achieving ambitious social goals requires them to draw on Google Inc.'s

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50. *Id.*

51. *See, e.g.*, Searching for Solutions, *supra* note 12 ("Google.org aspires to use the power of information and technology to address the global challenges of our age."); Google, Corporate Information: Company Overview, http://www.google.com/corporate/index.html (last visited Feb. 20, 2009) ("Google's mission is to organize the world's information and make it universally accessible and useful.").

52. Rocky Mountain Institute, Natural Capitalism: Companies Can Profit from the Principles of Natural Capitalism, http://www.rmi.org/sitepages/pid69.php (last visited Feb. 20, 2009).

53. CalCars: The California Cars Initiative, http://www.calcars.org/ (last visited Feb. 20, 2009).

54. TechnoServe: Business Solutions to Poverty, http://www.technoserve.org/ (last visited Feb. 20, 2009). Other SME grantees, the Acumen Fund and the Grameen Foundation, have similar missions to battle poverty through supporting entrepreneurship. *See* Acumen Fund Blog, http://www.acumenfundblog.org/ (last visited Mar. 25, 2009); Grameen Foundation: Fighting Poverty with Microfinance, http://www.grameenfoundation.org/ (last visited Feb. 20, 2009).

55. Pratham, About Us, http://www.pratham.org/aboutus/aboutus.php (last visited Feb. 20, 2009).

56. Posting of Sheryl Sandberg to The Official Google Blog, *supra* note 9. This Essay's inquiry focuses on the unique mechanism of a for-profit philanthropic division, and its references to the for-profit philanthropy model and Google.org thus denote this division rather than any remaining activities of the traditional Google Foundation.

business methods and assets stirred them to develop their for-profit philanthropy model.

II. THE FORBEARS OF FOR-PROFIT PHILANTHROPY

Another key to Google.org's for-profit philanthropy model is Google's desire to be an innovator in all respects. The Google brand is founded on the idea that it is a unique company, with a distinct business model. Google Inc. and its leaders rightfully view innovation in philanthropy as a way to further this public image.[57] The idea of blending philanthropic impulses with business activities, though, is not unknown. The notion that companies should use their business skills and resources to pursue needs beyond those of their shareholders, and indeed have the responsibility to do so, has a long historical pedigree. This part canvasses three familiar methods for blending business and philanthropy and illustrates how Google.org is different.

Perhaps the most mundane example of philanthropy by for-profit entities is the corporate charitable contribution. Corporations make these contributions for various reasons: to gain media exposure with consumers and future employees, build goodwill with their communities, and prop their brands as companies that care. Of course, some economists criticize corporate charitable contributions as careless or inefficient expenditures.[58] Legal commentators have made similar criticisms and also argued that contributions are made more to improve the reputations of CEOs, directors, and managers than the companies and shareholders these fiduciaries serve.[59] Despite these complaints and some early attempts by courts to curtail the practice, corporate contributions have gained widespread legal acceptance[60] and are an expected norm of business practice.[61]

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57. Jim Hopkins, *Google Foundation May Invest in For-Profit Firms*, USA TODAY, Apr. 27, 2005, at 1B (noting that innovation in philanthropy meshes with Google Inc.'s overall branding).

58. *See, e.g.*, MILTON FRIEDMAN, CAPITALISM AND FREEDOM 135–36 (1962).

59. *See, e.g.*, R. Frank Balotti & James J. Hanks, Jr., *Giving at the Office: A Reappraisal of Charitable Contributions by Corporations*, 54 BUS. LAW. 965, 968, 982–83 (1999); Faith Stevelman Kahn, *Pandora's Box: Managerial Discretion and the Problem of Corporate Philanthropy*, 44 UCLA L. REV. 579, 611–27 (2003); *see also* Victor Brudney & Allen Ferrell, *Corporate Charitable Giving*, 69 U. CHI. L. REV. 1191, 1198 (2002) (suggesting shareholders rather than managers should be permitted to select corporate donees for this and other reasons).

60. Every state has enacted statutes specifically permitting charitable contributions by corporations. *See* Balotti & Hanks, *supra* note 59, at 970–73; *see also* JAMES D. COX, THOMAS LEE HAZEN & F. HODGE O'NEAL, CORPORATIONS § 4.4 (1997); PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 2.01 (1994) (asserting that corporations may devote reasonable amounts to philanthropic activities "even if corporate profit and shareholder gain are not . . . enhanced").

61. BUS. ROUNDTABLE, PRINCIPLES OF CORPORATE GOVERNANCE 34 (2005) (asserting that corporations have the responsibility to be good citizens, which includes making charitable contributions).

Corporate contributions have flourished, totaling $15.69 billion in 2007.[62] Of this sum, twenty-eight percent was donated through corporate foundations and the balance directly to operating charities or needy individuals.[63] Nor has corporate generosity been limited to cash donations; an estimated one-third to one-half of corporate giving takes the form of in-kind contributions.[64] Some firms combine a range of contribution styles, with a few even making broad company-wide commitments to giving.[65] Cause-related marketing, where consumers are offered a charitable contribution packaged with their purchase, also continues to grow.[66] Likewise, corporate sponsorships of charity events and programs are legion. For-profit leaders clearly believe that making corporate contributions is good for their businesses, and many are integrating philanthropy into their broader corporate strategies.[67]

Google.org might be viewed simply as a significant corporate contribution; Google Inc. has committed to dedicate one percent of its equity and profits to philanthropy. The arguments justifying corporate contributions certainly hold true in this case. Press accounts chronicled the initial announcement of Google.org and the media has traced its every step, generating significant positive publicity.[68] As a company operating on the Internet, Google.org's projects around the globe resonate with Google Inc.'s potential customers and partners, building on its already behemoth presence in the virtual community. Additionally, several of Google.org's initiatives have a particular nexus with its home community in Mountain

62. GIVING USA FOUND., GIVING USA 2008: THE ANNUAL REPORT ON PHILANTHROPY FOR THE YEAR 2007, at 10 (2008).

63. *Id.*

64. *Id.* at 81.

65. Salesforce.com, a purveyor of customer relationship management software, follows a 1% time, 1% equity, and 1% product philanthropy program. *See* Salesforce.com Foundation, http://www.salesforce.com/foundation/ (last visited Feb. 20, 2009). Its "employees are encouraged to donate one percent of their working time to the community," the company donated one percent of its equity to its corporate foundation at its founding, and it seeks to give away one percent of its product by donating or discounting its software licenses for nonprofits. *Id.*

66. The entire business model of Working Assets, a credit card company, and its affiliated mobile company, Credo, are founded on this practice. These companies promise consumers that they will donate a portion of each purchase consumers make with them to a range of progressive organizations. Working Assets, About Working Assets, http://www.workingassets.com/About.aspx (last visited Feb. 20, 2009). Customers may even nominate and vote on the year's roster of donees on the company's website. *See id.*

67. GIVING USA FOUND., *supra* note 62, at 80 ("Aligning philanthropy with business goals has been a major trend in the corporate world for a number of years.").

68. *See, e.g.*, Chris Gaither, *Google Sets Aside $1 Billion for Causes*, L.A. TIMES, Oct. 12, 2005, at C2 (describing the initial funding of Google.org and its unusual for-profit structure); Katie Hafner, *Philanthropy Google's Way: Not the Usual*, N.Y. TIMES, Sept. 14, 2006, at A1 (reporting on Google.org's early initiatives and the appointment its first executive director); Haskell, *supra* note 1 (including Google.org's for-profit philanthropy model in its sixth annual ideas issue); Harriet Rubin, *Google's Searches Now Include Ways to Make a Better World*, N.Y. TIMES, Jan. 18, 2008, at C1 (detailing the Google.org initiatives).

View, California.[69] More generally, the idea that Google Inc. is contributing to philanthropic endeavors on a substantial scale meshes with and bolsters its image as a company gaining success without "being evil."

Yet, Google.org differs from the corporate contribution model in significant respects. Corporate contributions take corporate largesse out of the company's coffers and place it with external charities, or at least a separately incorporated and managed nonprofit foundation. Google.org's status as a division of Google Inc. keeps control over philanthropic funds, and the funds themselves, firmly within the confines of the business organization.[70] Further, Google Inc. has integrated its philanthropic goals more fully into its business model than do corporate contributors.

The extent and reach of Google Inc.'s philanthropic commitments resonate with the idea of corporate social responsibility (CSR). This concept suggests corporations should go further than mere donations in pursuit of community and societal aims. Rather, the various CSR movements have proposed that corporations and their leaders be permitted or required to consider interests beyond those of shareholders in their everyday business decisions.[71] Like corporate contributors, the CSR concept has drawn consistent, and often withering, criticism.[72] Yet, the idea is tenacious. Today it has strong, though not unqualified, legal support.[73]

More importantly, CSR has become a fundamental trope in the rhetoric and culture of large corporations.[74] Both as advocated and adopted, CSR

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69. Stone, *supra* note 11; Powering a Clean Energy Revolution, *supra* note 28 (reporting that Google's offices and data centers became carbon neutral in 2007, and in June 2007, completed a 1.6MV solar installation at the company headquarters—the largest U.S. corporate installation at that time); RechargeIT.org, *supra* note 16 (describing the demonstration plug-in fleet located at the company's headquarters).

70. Again, recall that the focus here is on the activities of Google Inc.'s philanthropy division and leaves to one side those of its retreating traditional Google Foundation.

71. Douglas M. Branson, *Corporate Governance "Reform" and the New Corporate Social Responsibility*, 62 U. PITT. L. REV. 605 (2001); C. A. Harwell Wells, *The Cycles of Corporate Social Responsibility: An Historical Retrospective for the Twenty-First Century*, 51 U. KAN. L. REV. 77 (2002).

72. Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES, Sept. 13, 1970, § 6 (Magazine), at 32; *see also* Wells, *supra* note 71, at 109–10, 123–25 (noting Friedman's opposition and that of earlier commentators Henry Manne and Yale Law School Dean Eugene V. Rostow).

73. Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 733, 738–39 (2005) (describing the view that corporate leaders must act to maximize profits as canonical but overstated, considering statutory and other legal support for corporate actions motivated by social responsibility).

74. DAVID VOGEL, THE MARKET FOR VIRTUE: THE POTENTIAL AND LIMITS OF CORPORATE SOCIAL RESPONSIBILITY 6–12 (2005) (describing the pervasiveness of CSR); Lisa M. Fairfax, *Easier Said than Done? A Corporate Law Theory for Actualizing Social Responsibility Rhetoric*, 59 FLA. L. REV. 771, 773 (2007) ("Virtually every corporation not only professes a desire to engage in charitable endeavors but also generates a report regarding those endeavors."); *see also, e.g.*, ExxonMobil, Corporate Citizenship at ExxonMobil, http://www.exxonmobil.com/Corporate/community_ccr_overview.aspx (last visited Feb. 20, 2009) ("At ExxonMobil, corporate citizenship is embedded in our business model and effectively integrates good corporate governance, safety, and environmental and

means companies view a responsibility to community and society as more than an occasional philanthropic impulse. Companies committed to CSR bring consideration of social impact into the mainstream of their business operations. In addition to sponsoring corporate foundations and making both cash and in-kind donations, these companies speak of leveraging employee time and partnering with organizations and enterprises in underserved communities. They trumpet themselves not purely as engines of profit, but as responsible corporate citizens and agents of change. Some companies seek to distinguish their brands as leaders in CSR.[75] Many others simply recognize that a respectable level of CSR commitment is an indispensable part of any modern company's public image.[76] The CSR theme can now be found across corporate America and beyond.

Google.org aligns with this CSR paradigm. Google Inc. does not purport to view "the business of business as business" with philanthropy as a public relations move or a sideline. The Google.org division considers social impact when it makes business decisions. Its very existence integrates Google's philanthropic vision within its corporate operations. But, Google.org differs from CSR in both scope and structure. CSR asks companies to be mindful of the impact their decisions will have on constituencies other than shareholders. At times, this rubric will motivate for-profits to take actions to minimize harm to those constituencies, perhaps even actively to help them. Google.org goes well beyond CSR's aims of awareness and consideration. Funding a division to engage solely in philanthropic activities is a much more ambitious and specific approach than merely adding social impact to the mix of factors considered whenever business leaders make decisions. The for-profit philanthropy model is thus distinct from what is typically contemplated by CSR's proponents. There are, however, companies that use philanthropic vision to guide areas of their business, or even build an entire business model around philanthropic ideals.

These for-profit companies have joined business and social goals as the foundation of their corporations. Although this phenomenon has been

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social responsibility into all aspects of our global business."); General Motors, 2006 Corporate Responsibility Report: Our Message: Chairman's Message, http://www.gm.com/corporate/responsibility/reports/06/100_message/100.html (last visited Feb. 20, 2009) (asserting a "commit[ment] to sound corporate citizenship in all aspects of [its] business"); Microsoft, Microsoft Corporate Citizenship: Community Engagement and Investment, http://www.microsoft.com/About/CorporateCitizenship/us/CommunityInvestment/default.mspx (last visited Feb. 20, 2009) (accepting Microsoft's "responsibility to apply its expertise in software to helping people, particularly people in underserved communities" and noting projects including partnerships and devotion of employee time).

75. The Timberland Company prominently promotes its CSR strategy on its website, providing reports on key CSR performance indicators on a quarterly basis and publishing a comprehensive biannual report. Timberland, About Timberland: Corporate Social Responsibility, http://www.timberland.com/corp/index.jsp?page=csroverview (last visited Feb. 10, 2009).

76. *The Good Company*, ECONOMIST, Jan. 22, 2005, at 3; *Just Good Business*, ECONOMIST, Jan. 19, 2008, at 4.

called by a host of names, the term "social enterprise" will be used here.[77] Social enterprises integrate philanthropy into their business models at a more basic level than companies that make corporate contributions or practice CSR. Social entrepreneurs pursue social and business goals together, viewing them as synergistic and mutually reinforcing, as equal partners in their business vision. This deep and particular commitment to philanthropic endeavor is the thrust of the social enterprise ideal.

The precise point where a social enterprise brings social concerns into its business processes varies widely.[78] Social enterprise firms may marry their business and social missions when obtaining the supplies they need to make their products.[79] While other, more cost-effective and therefore profit-maximizing sources might be available, these companies choose their partners to achieve social aims. Social enterprises may steer the employment opportunities they provide to the impoverished, individuals with disabilities, or those reentering society following incarceration.[80] They may produce their wares with environmental impact and profit as equal criteria for judging success.[81] Much of the microfinance movement is based on a vision that there is both social good and profit to be made from lending to poor individuals formerly unable to access credit.[82] Even

77. James J. Fishman, *Wrong Way Corrigan and Recent Developments in the Nonprofit Landscape: A Need for New Legal Approaches*, 76 FORDHAM L. REV. 567, 568 (2007) (using "social enterprise" as an umbrella term); *cf.* James Austin, Howard Stevenson & Jane Wei-Skillern, *Social and Commercial Entrepreneurship: Same, Different, or Both?*, 30 ENTREPRENEURSHIP: THEORY & PRAC. 1, 2 (2006) (using "social entrepreneurship"); J. Gregory Dees & Beth Battle Anderson, *For-Profit Social Ventures*, *in* SOCIAL ENTREPRENEURSHIP (Marilyn L. Kourilsky & William B. Walstad eds., 2003) (using "for-profit social venture"); Janet E. Kerr, *Sustainability Meets Profitability: The Convenient Truth of How the Business Judgment Rule Protects a Board's Decision to Engage in Social Entrepreneurship*, 29 CARDOZO L. REV. 623, 624 (2007) (using "social entrepreneurship" and other terms).

78. Dees & Anderson, *supra* note 77, at 3–5.

79. Ben & Jerry's Homemade, Inc. sources milk and cream from a local cooperative, brownies from another social enterprise (a bakery providing job-training), and much of its vanilla, coffee, and cocoa from cooperatives of poor farmers. Ben & Jerry's, Activism: Inside the Pint, http://www.benjerry.com/activism/inside-the-pint/ (last visited Mar. 25, 2009). The fair-trade sourcing policies now in effect at many companies proceed on a similar footing.

80. *See, e.g.*, Christopher St. John, *The Humanitarian Divide: A Cambodian 'Nonprofit Company' Peddles Digitization—With a Social Edge*, STAN. SOC. INNOVATION REV., Spring 2004, at 52, 53 (describing Digital Divide Data, a company founded on the idea of providing jobs for poor Cambodians).

81. *See, e.g.*, Leslie Berger, *Garden-Variety Revolution: TerraCycle Turns What Others Leave Behind into Fertilizers and Fashion*, STAN. SOC. INNOVATION REV., Spring 2008, at 73 (describing the social enterprise, TerraCycle, which uses environmentally friendly processes to produce plant fertilizer from worm waste); Rob Walker, *The Worm Turns*, N.Y. TIMES, May 20, 2007, § 6 (Magazine), at 32 (same).

82. *See, e.g.*, Grameen Bank, General Questions on Grameen Bank FAQ, http://www.grameen-info.org/index.php?option=com_easyfaq&task=cat&catid=80&Itemid=524 (last visited Feb. 20, 2009) (describing Grameen's business plan to lend to poor borrowers and its intention and achievement of profits).

investment policies can be founded on philanthropic vision.[83] Rather than merely committing to be mindful of social concerns as they proceed with their business ventures, these organizations place philanthropic and profit-making goals on a par from the outset and at the very core of their business models. Profit remains a central goal, but not the exclusive one.

Google.org's for-profit philanthropy is certainly related to social enterprise, but again several aspects differentiate it. First are the related features of size and scope. Social enterprise companies are often small and controlled by owners who have a personal commitment to their social goals.[84] A few have begun that way, but grew quite large as a result of their success. By comparison, Google.org is a division of a mammoth publicly owned company, and Google.org's scale, determined as a percentage of Google Inc.'s equity and profits, is infinite. Of course, Google Inc. has social commitments, perhaps more than most companies of its age and size. Yet, in the general range of its business, these do not have an equal place with building a financially successful company.[85] Profit and business imperatives figure too strongly in Google Inc.'s overall decision making to view the entire company as a social enterprise.

If considered standing alone, Google.org comes closer to fitting the social enterprise category. In the Google.org division, social mission is wholly mixed with business ethos. Its initiatives target areas of operation to maximize philanthropic impact. Simultaneously, it brings business acumen and a desire for efficiency, speed, and knowledge management to transform social conditions. Google.org also takes its social values very seriously when determining its means and mode of production. Social goals are deeply embedded in the Google.org business model. This is the very crux of the for-profit philanthropy ideal.

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83. *See, e.g.*, Acumen Fund Blog, About, http://blog.acumenfund.org/about/ (last visited Mar. 25, 2009) ("Acumen Fund is a non-profit global venture fund that uses entrepreneurial approaches to solve the problems of global poverty."); Omidyar Network, Portfolio, http://www.omidyar.com/portfolio (last visited Mar. 24, 2009) ("We fund and help scale both for-profit companies and nonprofit organizations around the world to catalyze broad, positive social impact.").

84. Michael Chertok, Jeff Hamaoui & Eliot Jamison, *The Funding Gap*, STAN. SOC. INNOVATION REV, Spring 2008, at 44 (describing the difficulties in financing faced by social enterprises desiring to expand); Dees & Anderson, *supra* note 77, at 17–19 (describing the need for social enterprises to remain controlled by owners sympathetic to their dual mission); Gregory Dees, Beth Battle Anderson & Jane Wei-Skillern, *Scaling Social Impact: Strategies for Spreading Social Innovations*, STAN. SOC. INNOVATION REV., Spring 2004, at 24 (offering advice for the social entrepreneurs facing the common difficulty of increasing the scale of their enterprises); Jim Schorr, *Social Enterprise 2.0: Moving Toward a Sustainable Model*, STAN. SOC. INNOVATION REV., Summer 2006, at 12 (same). *See also generally* JOHN ELKINGTON & PAMELA HARTIGAN, THE POWER OF UNREASONABLE PEOPLE 179–96 (2008) (discussing the challenges of "scaling" up).

85. Andy Serwer, *Larry Page on How to Change the World*, FORTUNE, May 12, 2008, at 82, 86 (quoting the Google founder, who states "70% of our resources are spent in our core business and 10% end up in unrelated projects, like energy or whatever. [The other 20% goes to projects adjacent to the core business.] Actually, it's a struggle to get it to even be 10%." (alteration in original)).

Still, Google.org is also not a perfect fit with social enterprise. It is artificial to consider it in isolation from its Google Inc. whole. Furthermore, Google.org is actually too focused on social mission to match the social enterprise category precisely. Google.org views profit as a distant and unlikely possible consequence of its activities. Its leaders have emphasized, "'[w]e're not doing it for the profit. And if we didn't get our capital back, so what? The emphasis is on social returns, not economic returns.'"[86] This nonchalance lacks the passion for the coexistence of social mission and profit that drives social enterprise.

Blending philanthropy and business has long been in fashion and entities have pursued it in a variety of ways.[87] In fact, calls for capitalism to spearhead solutions to society's greatest problems are mounting all the time.[88] The three variants assessed in this part are exemplary, but do not offer an exhaustive catalogue. By comparison, though, the for-profit philanthropy model offers genuine innovation. It envisions a division within a for-profit company tasked solely with pursuing philanthropy. This division engages in major initiatives, but the core business remains primarily devoted to profit maximization. Google.org has pushed the for-profit philanthropy model forward and provided it with significant prominence. The next part considers Google.org's reasons for embarking on this innovation, many of which are grounded on legal limitations it desired to avoid.

III. THE REASONS FOR FOR-PROFIT PHILANTHROPY

Just as it differs from its for-profit forbears, Google.org is significantly and intentionally distinct from traditional philanthropic forms. As compared with a tax-exempt nonprofit entity, the for-profit Google.org division has greater freedom to invest, direct access to Google Inc.'s resources, and more ability to engage in political activities.[89] State and federal law applicable to traditionally organized philanthropic entities would curtail all of these, in differing ways and to varying degrees. This part explains how these legal limits would frustrate Google.org's strategy.

Prior to that, however, it is important to specify the benefits attendant to traditional legal forms for philanthropic activity. This clarifies what Google.org gives up in exchange for the freedom of investment, direct access, and political flexibility it gains by using a for-profit structure. A nonprofit incorporated under state law obtains status as a separate entity

86. Hafner, *supra* note 68 (quoting then-Google.org Executive Director Dr. Larry Brilliant).

87. *See, e.g.*, Fishman, *supra* note 77, at 603–06.

88. *See generally* MATTHEW BISHOP & MICHAEL GREEN, PHILANTHROCAPITALISM: HOW THE RICH CAN SAVE THE WORLD (2008); MICHAEL EDWARDS, JUST ANOTHER EMPEROR? THE MYTHS AND REALITIES OF PHILANTHROCAPITALISM (2008); *The Birth of Philanthrocapitalism*, ECONOMIST, Feb. 25, 2006, at 8.

89. About Google.org, *supra* note 9 (explaining that its structure permits it to "invest in for-profit endeavors," "lobby for policies that support [its] philanthropic goals," and "tap Google's innovative technology and, most importantly, its inspired workforce").

with the ability to transact in its own name and limited liability for its members, if any.[90] Of course, incorporated for-profit firms are also characterized by corporate personhood and limited liability. In addition, however, state law often offers property tax exemption, exemption from sales and use taxes, and even limitations on tort liability to nonprofit charities.[91] These benefits would not likely be extended to Google.org.

Philanthropic groups organized along traditional lines also can qualify for tax benefits under federal law. As the tax-exempt label suggests, principal among these is exemption from corporate taxation on net income.[92] Of course, for philanthropic groups running at a loss, this exemption is not necessarily a great boon. Moreover, a for-profit division like Google.org might well be able to set off its losses against gains in other portions of Google Inc.'s business.[93] Thus, for Google.org, exemption could be a less desirable alternative than taxability. Another important federal tax benefit is the ability to offer donors tax-deductible contributions. Donors to certain exempt entities may deduct the contributions they make to these entities against their income in determining their tax due, up to a percentage limit of their adjusted gross income.[94] For Google Inc., the sole donor to Google.org, this limit would be ten percent. Finally, organizations known as nonprofit, charitable, or tax-exempt can experience a halo effect; they benefit from the general positive association the public has with charities. However, Google.org's self-styling as a philanthropy, its use of the ".org" suffix, and the content of its programs may provide it with a significant glow of its own.

These various benefits often propel philanthropists to use tax-exempt, nonprofit corporations to pursue their goals. Even standing alone, in Google's circumstances, they might not have provided sufficient inducement. Whether or not they are compelling, they are not the reasons Google.org has cited. The remainder of this part explores the ways

90. *See, e.g.*, REVISED MODEL NONPROFIT CORP. ACT § 3.02 (1987) (granting nonprofit corporations powers to act and transact in the corporate name); *id.* § 6.12 (limiting members' liability). Nonprofits may also be organized as charitable trusts or unincorporated associations. MARILYN E. PHELAN, NONPROFIT ENTERPRISES: CORPORATIONS, TRUSTS, AND ASSOCIATIONS § 1:03 (2000). In addition, Vermont recently passed legislation permitting organizations founded with a mix of business and charitable purposes to form as a low-profit limited liability company (L3C), a new type of hybrid form. Debra E. Blum, *Vermont Poised to Recognize Businesses that Are Created to Offer Social Benefits*, 20 CHRON. PHILANTHROPY 21 (2008). This Essay compares the for-profit philanthropy model with the nonprofit corporate form, as the latter is by far the most common form used by U.S. charities. PHELAN, *supra*.

91. HOWARD OLECK & MARTHA STEWART, NONPROFIT CORPORATIONS, ORGANIZATIONS, AND ASSOCIATIONS § 7 (6th ed. 1994).

92. I.R.C. § 501(c)(3) (2000).

93. *See* Victor Fleischer, *Urban Entrepreneurship and the Promise of For-Profit Philanthropy*, 30 W. NEW ENG. L. REV. 93, 101 (2007); Christopher Lim, *Google.org, For-Profit Charitable Entity: Another Smart Decision by Google?*, 17 KAN. J.L. & PUB. POL'Y 28, 52–54 (2007) (describing this possibility as well as Google.org's potential utility in avoiding accumulated earnings tax).

94. I.R.C. § 170(c).

Google.org explains its choice to take the for-profit philanthropy route instead.

A. *Freedom of Investment*

One of the major reasons Google.org cites for adopting a for-profit philanthropy model is the freedom to invest in for-profit businesses in pursuit of its philanthropic goals.[95] If structured as a traditional nonprofit, state nonprofit corporate law and federal tax regulation would significantly limit Google.org's ability to invest in for-profits. Further, these regimes would restrict the use of any gains Google.org realized on its investments.

Several aspects of state nonprofit corporate law could hinder Google.org's investment plans. The nondistribution constraint prohibits nonprofit corporations from distributing net earnings to those with control over the corporation's decisions.[96] Thus, if Google.org were a nonprofit corporation, any profits it realized from investments in for-profit companies would have to be reinvested in the nonprofit's mission, rather than shared with Google Inc. or its shareholders. Neither Google Inc. nor its investors could be granted a true equity stake in Google.org. Of course, Google.org has dismissed any intention to use profits for anything other than future philanthropy.[97] For it, and for other for-profit philanthropists willing to make such a commitment, the nondistribution constraint should not be a reason to avoid the nonprofit form.

State law imperatives regarding permissible nonprofit purposes and activities, though, could restrain a nonprofit Google.org's freedom of investment. State law may demand that nonprofit corporations organized under its auspices have charitable purposes.[98] Furthermore, pecuniary or commercial purposes or activities might occasionally be limited.[99] A

95. About Google.org, *supra* note 9 ("[W]e can also invest in for-profit endeavors, such as efforts by companies to develop breakthrough renewable energy technologies.").

96. *See, e.g.*, REVISED MODEL NONPROFIT CORP. ACT §§ 1.40, 13.01 (1987) (prohibiting payments from nonprofit corporations to their "members, directors, or officers"); *see also* Henry B. Hansmann, *The Role of Nonprofit Enterprise*, 89 YALE L.J. 835, 838 (1980) (coining the term "nondistribution constraint" to describe this prohibition and identifying its role in an economic rationale for the nonprofit sector).

97. *See* Hafner, *supra* note 68 ("All of Google.org's spending, [Google.org then-Executive Director] Dr. Brilliant said, will be in keeping with its mission, and there is to be no 'blowback.' That is, should Google.org make a profit with one of its ventures, those funds will not go to the search engine business, but will stay within Google.org."); Rubin, *supra* note 68.

98. *See, e.g.*, N.Y. NOT-FOR-PROFIT CORP. LAW § 201(b) (McKinney 2008) (requiring Type A and B nonprofit corporations to be formed for a range of civic, associational, or charitable purposes).

99. *Compare, e.g.*, N.Y. NOT-FOR-PROFIT CORP. LAW § 204 (limiting "activities for pecuniary profit or financial gain" by nonprofits); 15 PA. CONS. STAT. ANN. § 5306(a)(4) (West 2008) (providing that a nonprofit's articles of incorporation must include "[a] statement that the corporation is one which does not contemplate pecuniary gain or profit, incidental or otherwise"), *with* REVISED MODEL NONPROFIT CORP. ACT § 3.02(16) (stating that nonprofits incorporated under its auspices "ha[ve] the purpose of engaging in any lawful activity" and empowering nonprofits "to carry on a business"). *See generally* JAMES J.

nonprofit Google.org substantially devoted to investing in for-profit companies, or developing products or services for eventual sale by a for-profit entity, could breach these restrictions. However, engaging in some commercial activities or investing in certain for-profit entities as part of a wider program pursuing conservation, public health, and poverty reduction would likely not breach the requirements—especially if all profits are reinvested in charitable efforts. Still, there is some greater risk in pursuing these investments as a nonprofit entity than as a for-profit.

Finally, state law regulating nonprofit investment activity could limit a nonprofit Google.org's freedom of investment. Nonprofit fiduciaries are bound by the duty of care to manage and invest corporate assets prudently.[100] These investments should make up a portfolio with a risk and return profile appropriate to the size, goals, and other attributes of the organization.[101] It is uncertain whether investments in for-profit companies made for programmatic purposes—to further the mission of the organization directly, rather than to maintain or increase its assets—would even be subject to these restrictions. A strong case can be made that these are program decisions, on which the law defers to nonprofit corporate fiduciaries so long as there is no self-dealing and leaders and managers utilize careful and appropriate process in reaching them. Yet, if judged by a yardstick of prudent investment, investing charitable assets in risky ventures (even those seeking socially useful goods) may not comply with fiduciaries' obligations. Taken together, these three state law concepts would create some hazards for Google.org's investment plans, were it to organize as a nonprofit corporation.

If Google.org were to seek federal tax benefits, further and more serious restrictions would apply. Organizing as a nonprofit corporation does not automatically trigger the tax advantages available to some nonprofits under federal law, principally income tax exemption and qualification to receive tax-deductible contributions. To obtain these benefits, Google.org would have to request, obtain, and maintain tax-exempt status under I.R.C. § 501(c)(3). The federal law constraints on tax-benefited nonprofits would hinder Google.org's freedom of investment considerably more than would those under state law.

Federal tax law imposes various limits on the organizational purposes for which tax benefits will be granted. Statutes and regulations provide a list of purposes for which an exempt organization must be primarily organized and operated: "religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international

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FISHMAN & STEPHEN SCHWARZ, NONPROFIT ORGANIZATIONS 81 (2006) ("Nonprofit organizations may conduct activities for pecuniary gain so long as the profit is used for the organization's exempt purpose and there is no distribution of profits to members or exploitation of the organization for direct monetary gain.").

100. PRINCIPLES OF THE LAW OF NONPROFIT ORGANIZATIONS §§ 315, 320(b)(6), 335 (Am. Law Inst., Tentative Draft No. 1, 2007) (approved at the 2007 and 2008 American Law Institute annual meetings).

101. *Id.* § 335 cmt. (b)(2).

amateur sports competition . . . , or for the prevention of cruelty to children or animals."[102] Google.org's goals of pursuing environmental conservation, public health, and poverty reduction should fit within the permitted range. However, restrictions apply to exempt organizations' activities as well. An entity exempt under § 501(c)(3) cannot engage or even be empowered "to engage, otherwise than as an insubstantial part of its activities, in activities which in themselves are not in furtherance of one or more exempt purposes."[103] Such nonexempt activities include engaging in "a manufacturing business,"[104] and other commercial activities will attract regulators' attention. Regulations explain that

> [a]n organization may meet the requirements of section 501(c)(3) although it operates a trade or business as a substantial part of its activities, if the operation of such trade or business is in furtherance of the organization's exempt purpose or purposes and if the organization is not organized or operated for the primary purpose of carrying on an unrelated trade or business . . . .[105]

Furthermore, income from an exempt organization's unrelated business activity is subject to tax.[106] There is no outright prohibition, but federal law clearly looks skeptically upon commercial activity by tax-exempt entities.

Google.org desires the flexibility to invest in for-profit businesses to further its philanthropic goals. If necessary, Google.org wants the flexibility to develop this technology itself. Ensuring these activities do not amount to more than an "insubstantial part" of its program or become categorized as an "unrelated trade or business" that is its "primary purpose" might limit this flexibility. The murky commerciality limitations will be costly to comply with and monitor.[107] In addition, if business activities are deemed *unrelated* to exempt purposes, income from them is taxable, limiting the tax exemption benefit. It is entirely understandable that Google.org would want to avoid these federal law limits by opting out of the federal tax benefit apparatus.

The purpose and commerciality limits hardly stand alone, however; the private benefit doctrine would further frustrate Google.org's vision. This doctrine forbids tax-exempt entities from conferring substantial benefits on unrelated individuals and entities.[108] Conferring such a benefit is

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102. I.R.C. § 501(c)(3) (2000); Treas. Reg. § 1.501(c)(3)-1 (2008). Federal law also includes a prohibition on distributing profits to equity investors. *Id.* § 1.501(c)(3)-1(d)(1)(ii).

103. Treas. Reg. § 1.501(c)(3)-1(b)(1)(i)(b).

104. *Id.* § 1.501(c)(3)-1(b)(1)(iii) (emphasis omitted).

105. *Id.* § 1.501(c)(3)-1(e)(1).

106. I.R.C. § 511; *see also* Lim, *supra* note 93, at 35–38 (describing how the commerciality doctrine and unrelated business income tax would limit Google.org's plans).

107. FISHMAN & SCHWARZ, *supra* note 99, at 596 (calling the area "untidy").

108. I.R.C. § 501(c)(3) (stating that "no part of the net earnings [of a tax-exempt entity may] inure[] to the benefit of any private shareholder or individual"); *see generally* John Simon, Harvey Dale & Laura Chisolm, *The Federal Tax Treatment of Charitable Organizations*, *in* THE NONPROFIT SECTOR: A RESEARCH HANDBOOK 267, 282–83 (Walter W. Powell & Richard Steinberg eds., 2d ed. 2006) (describing the private benefit doctrine and distinguishing its cousins, inurement and excess benefit).

punishable by loss of exemption, cancellation of donors' deductions, and fines. If any Google.org investment were deemed to confer a substantial benefit on its for-profit recipient, this would be an improper private benefit with serious consequences. Thus, Google.org's for-profit investment strategy is perilous on this ground as well.

If these various limits were not enough, the internal classification system within tax-exempt status would subject Google.org to even more onerous restrictions. Each tax-exempt organization qualifying under § 501(c)(3) is further classified as either a public charity or a private foundation.[109] Because of its single funding source, Google.org would be deemed a private foundation and made subject to a series of additional restrictions on its activities. Breach of these restrictions triggers initial penalty taxes assessed against the private foundation and its managers. Confiscatory additional taxes apply if the relevant transactions are not unraveled.

Google.org's investment plans would likely run afoul of several of the private foundation restrictions, exposing it to costly penalty tax liability. Private foundations cannot hold more than twenty percent of the voting control of any corporation or partnership.[110] This rule would limit the size of the investments Google.org could make when funding for-profit ventures. In addition, private foundations cannot invest any amount in a manner that would jeopardize the carrying out of their exempt purposes.[111] Whether an investment is one that creates such jeopardy is a fact-sensitive question, and the regulations prize diversification.[112] Google.org's exclusively high-risk, high-return investment strategy could thus threaten jeopardy investment liability. So-called "program related investments" (PRIs) are exempt from designation as jeopardizing exempt purposes, but only if their primary purpose "is to accomplish one or more of the [organization's exempt] purposes . . . and no significant purpose of [them] is the production of income or the appreciation of property."[113] Again, ensuring its investments fall within the PRI exception would entail both cost and inherent risk for a nonprofit, tax-exempt Google.org set up as a private foundation. Even if these risks could be managed, any expenditure the IRS deemed outside of a private foundation's exempt purposes would create liability as well.[114] Finally, a Google.org organized as a private foundation would be required to engage in pre-grant review and post-grant evaluation of any payments to its for-profit partners and to report on these

109. I.R.C. § 509.
110. *Id.* § 4943.
111. *Id.* § 4944.
112. *See* Treas. Reg. § 53.4944-1(a)(2) (2008).
113. I.R.C. § 4944(c) (emphasis added); *see also* Anita L. Horn, *Venture Capital Philanthropy: The IRS and Treasury Hold the No-Cost Key to the Growth of Self-Sufficient Nonprofits*, *in* FEDERAL BAR ASSOCIATION SECTION OF TAXATION REPORT 9–11 (2003) (offering advice on how nonprofits may make investments in for-profits as part of their charitable programs without running afoul of tax rules).
114. I.R.C. § 4945.

findings to the IRS.[115] Together, these restrictions would create a minefield for a Google.org organized as a tax-exempt private foundation.

In sum, if organized using traditional philanthropic forms, legal limitations would create serious barriers for Google.org's freedom to invest. Various state law restrictions could interfere with Google.org's for-profit investment strategy. These restrictions would not likely quash Google.org's plans altogether, but would make them more costly and risky. Federal tax law would more seriously inhibit Google.org's plans to utilize and potentially profit from investments in for-profit entities. Its planned activities would expose it to loss of exemption, as well as significant penalty tax liability. These restrictions, along with those addressed in the next two sections, make nonprofit incorporation and tax-exempt status quite unattractive for Google.org.

B. *Direct Access to Google Inc.*

Incorporation as a nonprofit, and particularly status as a tax-exempt private foundation, would also hinder Google.org's desired direct access to Google Inc.'s resources. On the state law side, again, the potential impact of the nondistribution constraint, charitable purpose requirements, and the commerciality restrictions all stem from the same concern. A nonprofit Google.org could be perceived by state regulators as overly concerned with the affairs of Google Inc. or to be acting at its behest. If so, regulators could challenge the bona fides of Google.org's charitable purposes or claim it had crossed the line into being a commercial entity. If Google Inc. or its key personnel had control over the affairs of a nonprofit Google.org, it would be important to ensure that neither Google Inc. nor those key players received inappropriate distributions. In the same vein, fiduciary obligations on a nonprofit Google.org's directors and officers would attach liability to unfair self-dealing.[116] Resource-sharing arrangements would thus need to be scrutinized to ensure that Google.org received any benefits of such bargains.

Analogous federal tax law concepts would pose similar obstacles for direct access. The exempt purpose requirement would be breached by a substantial purpose to benefit a for-profit business. Although proprietary activities are permitted, too much intermingling of Google Inc.'s personnel, technology, and other resources with Google.org would raise alarms regarding the commerciality limits on tax-exempt entities. Additionally, the mutually beneficial relationship envisioned by direct access could raise

115. *Id.* § 4945(h); Garry W. Jenkins, *Soft Power, Strategic Security, and International Philanthropy*, 85 N.C. L. REV. 773, 805–06 (2007) (describing the required "expenditure responsibility" that private foundations must exercise for grants made to entities other than tax-exempt public charities); *see also* Horn, *supra* note 113, at 10 (similar).

116. *See* MARION R. FREMONT-SMITH, GOVERNING NONPROFIT ORGANIZATIONS: FEDERAL AND STATE LAW AND REGULATION 219–25 (2004); Harvey J. Goldschmid, *The Fiduciary Duties of Nonprofit Directors and Officers: Paradoxes, Problems, and Proposed Reforms*, 23 J. CORP. L. 631, 646 (1998).

concerns under the inurement doctrine and the excess benefit statute. The inurement doctrine bars exempt organizations from distributing net earnings to insiders with organizational control.[117] This inurement ban applies to any distributions, whether substantial or not, and is punishable by loss of exemption, but its vagueness and extreme penalty limit its application.[118] The excess benefit statute, I.R.C. § 4958, is more easily applied to curb similar behavior. It imposes penalty taxes on transactions that provide excessive benefits to fiduciaries or major donors.[119] Together, these restrictions would place intermingling of Google Inc. and Google.org resources under even greater scrutiny than state fiduciary law.

Federal tax law would again, however, have the most dramatic effect on Google.org if it were classified as a private foundation (as it almost certainly would be). As a private foundation, especially strict rules would penalize or prevent sharing of resources between Google.org and Google Inc., as its sole funder. Among other things, these rules would characterize as self-dealing any "sale or exchange, or leasing, of property" between Google.org and Google Inc., even if the transfer were at fair-market price or better for Google.org.[120] Likewise, unless Google Inc. "furnish[ed] . . . goods, services, or facilities" to Google.org entirely free of charge and to be used exclusively for charitable purposes, providing such items would be deemed self-dealing.[121] As under the private foundation restrictions discussed above, self-dealing transactions subject foundations and their managers to penalty taxes and must be unwound. Thus, Google.org's direct access plan would be fraught with risk if the entity were set up as a traditional nonprofit, and particularly dangerous were it deemed a private foundation.[122]

C. *Political Activities*

Finally, Google.org emphasizes that its choice of a for-profit model avoids restrictions on its political activities.[123] Federal tax law creates more severe limitations on political activities by traditionally organized philanthropic entities, limitations of which nonprofits are aware and often

117. FREMONT-SMITH, *supra* note 116, at 248–49; Fishman, *supra* note 77, at 584–85.

118. FREMONT-SMITH, *supra* note 116, at 248–50; Fishman, *supra* note 77, at 585.

119. I.R.C. § 4958; Treas. Reg. §§ 53.4958-1 to 53.4958-8 (2008).

120. I.R.C. § 4941(d)(1)(A). A lease made by Google Inc. to Google.org and entirely without charge would be permissible under a regulatory exception. Treas. Reg. § 53.4941(d)-2(b)(2).

121. I.R.C. §§ 4941(d)(1)(C), (2)(C).

122. The Google Foundation experienced some of these difficulties firsthand early in its life, an experience that in part motivated the formation of Google.org. Kevin J. Delaney, *Google: From Don't Be Evil to How to Do Good*, WALL ST. J., Jan. 18, 2008, at B1 (noting Google's dismay when it encountered problems donating to One Laptop Per Child, a "project aimed at increasing Internet access [that] arguably could boost Google's online advertising revenue").

123. *See* About Google.org, *supra* note 9.

worry over.[124] The extent and dimensions of these limitations are, again, determined by an organization's precise classification within tax-exempt status. If Google.org were able to achieve status as a tax-exempt public charity (an aspiration unlikely to be realized if Google Inc. remained its sole funder) federal law would allow "no substantial part" of its earnings to be spent on lobbying.[125] No regulation defines substantial,[126] and few cases or rulings address it directly.[127] The chilling effect of this uncertainty leads some charities to elect a series of optional and complex, but more quantifiable, restrictions.[128] These restrictions require lobbying expenditures to be maintained below a certain percentage of the entity's operating budget.[129] An entity that exceeds these limits faces penalty excise taxes;[130] repeated infractions are punishable by revocation of exemption.[131] In contrast, if a tax-exempt Google.org were deemed a private foundation, as is most likely, it would not be permitted to lobby at all.[132]

Regardless of classification, political campaign activities are subject to a more straightforward ban.[133] Engaging in such activities subjects an exempt entity to revocation of exempt status,[134] as well as additional penalty taxes that vary somewhat based on classification.[135] To complicate matters further, the line between lobbying and campaign activities under tax-exempt law does not always align with a lay idea of this border, or even that set by other legal regimes. One might assume messages about issues of policy, rather than encouraging support of a particular candidate, would qualify as lobbying efforts that are curtailed but permitted. Yet, if Google.org reached out to voters with its views on a policy issue, and it was

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124. *See* Mark Chaves, Laura Stephens & Joseph Galaskiewicz, *Does Government Funding Suppress Nonprofits' Political Activity?*, 69 AM. SOC. REV. 292, 297 (2004).

125. I.R.C. § 501(c)(3).

126. *Developments in the Law: Nonprofit Corporations*, 105 HARV. L. REV. 1578, 1662 (1992).

127. Seasongood v. Comm'r, 227 F.2d 907, 912 (6th Cir. 1955) (holding that less than five percent of political activity is not substantial); Haswell v. United States, 500 F.2d 1133, 1142 (Ct. Cl. 1974) (eschewing a percentage rule).

128. Oliver A. Houck, *On the Limits of Charity: Lobbying, Litigation, and Electoral Politics by Charitable Organizations Under the Internal Revenue Code and Related Laws*, 69 BROOK. L. REV. 1, 62–67 & n.379 (2003) (noting groups' claims that the "no substantial part" test chilled lobbying made in the hearings on the new regime).

129. I.R.C. § 4911(c)(2).

130. Treas. Reg. § 1.501(h)-3 (2008).

131. *Id.* § 1.501(h)-3(b).

132. *Id.* § 4945(d)(1) (subjecting any lobbying expenditure by a private foundation to prohibitive penalty taxes).

133. *Id.* § 501(c)(3) (noting that "no part of the net earnings of" a tax-exempt public charity may be used to "participate in, or intervene in . . . any political campaign on behalf of (or in opposition to) any candidate for public office").

134. *See, e.g.*, Branch Ministries v. Rossotti, 211 F.3d 137, 141–42 (D.C. Cir. 2000) (affirming IRS revocation of a church's exempt status due to campaign activities).

135. I.R.C. § 4955 (taxing campaign expenditures by any exempt organization); *id.* § 4945(d)(2) (subjecting campaign activity by a private foundation to prohibitive penalty taxes).

one about which candidates differed, these efforts might well be characterized as campaign activities subject to an outright ban.[136]

The extent to which state nonprofit law would check Google.org's involvement in politics is less clear than the obvious federal law obstacles. Still, state law poses risks for nonprofit corporations engaged in political activities. State courts generally permit nonprofits with political purposes or activities to maintain their status, but the tone of their pronouncements remains skeptical.[137] Further, under various state court tests, political activities will at some point disqualify a nonprofit organization from tax benefits under state law.[138]

Although Google.org does not mention a specific desire to participate in political campaigns, it highlights plans "to lobby for policies that support [its] philanthropic goals" as part of its rationale for choosing for-profit charity.[139] Federal tax law would chafe any plans to do so directly, even if Google.org were classified as one of the organizations with relatively liberal restrictions on political activities. The most likely classification for a nonprofit, tax-exempt Google.org—a private foundation—would require it to abandon virtually all plans for political activity. State corporate law would create additional suspicion around these political activities. Of course, if organized as a private foundation, Google.org could still rely on Google Inc. to engage in any political activities necessary to support its philanthropic objectives, and corporate foundations frequently avail themselves of this technique.[140] Still, by opting out of traditional philanthropic forms, Google.org is able to pursue political activities as it sees fit to achieve its social goals, and may do so on its own.

The legal restraints on nonprofit, tax-exempt entities would interfere with major strands of the Google.org vision. They would limit Google.org's ability to invest in for-profit ventures in pursuit of its philanthropic goals. They would scrutinize and, at times, punish its use of and access to Google Inc. resources to support its activities. They would constrain, if not entirely

136. Several revenue rulings provide a structure whereby publication of a politician's stated views and voting records may qualify as prohibited political campaign activity depending on the range of issues addressed, the neutrality of presentation, and the timing of the publication. *See* Rev. Rul. 86-95, 1986-2 C.B. 73; Rev. Rul. 80-282, 1980-2 C.B. 178.

137. *See, e.g.*, Register of Wills v. Cook, 216 A.2d 542, 549 (Md. 1966); Jackson v. Phillips, 96 Mass. (14 Allen) 539, 555 (1867).

138. *See, e.g.*, *In re* Westboro Baptist Church, 189 P.3d 535, 554 (Kan. Ct. App. 2008) (noting that "our Supreme Court has determined that political action or activities are not considered a religious activity" in affirming a denial of tax exemption for personal property owned by a religious group, but used for political purposes); New England Legal Found. v. City of Boston, 670 N.E.2d 152, 158–59 & n.8 (Mass. 1996) (specifically declining to "embark on a path of adopting the detailed Federal rules and regulations of political organizations" but asserting that its state law also precludes tax exemption for organizations at some level of political activity); Mich. United Conservation Clubs v. Twp. of Lansing, 378 N.W.2d 737, 743 n.6 (Mich. 1985) (noting that, while the instant organization's lobbying activities would not prevent it from obtaining state tax exemption, "certain forms of lobbying may preclude a tax exemption").

139. About Google.org, *supra* note 9.

140. I thank Garry Jenkins for this insight.

prohibit, Google.org from engaging in political action to promote its philanthropic mission. Google Inc.'s decision to eschew traditional charitable forms to pursue its philanthropic endeavors is thus easily understood. The mismatch of its philanthropic vision and the legal limitations imposed on traditional charitable forms should encourage a discourse about whether these limitations represent good policy choices or unduly restrict philanthropic activities. The next part begins to address these fundamental issues, as well as some more pragmatic concerns raised by the for-profit philanthropy model.

IV. CONCERNS RAISED BY FOR-PROFIT PHILANTHROPY

The for-profit philanthropy model raises an array of concerns for those steeped in the traditions of nonprofit and for-profit law alike. Of course, nonprofit law will not apply to for-profit philanthropy divisions directly,[141] but taking a nonprofit law perspective brings out important pragmatic concerns about this new model. This perspective forces one to ask questions about the availability and suitability of enforcement mechanisms for for-profit philanthropy. Nonprofit law's focus on mission, and its concern for constraining mission evolution, pose further challenges for the for-profit philanthropy model. A for-profit law perspective reveals different but likewise important pragmatic concerns—ones for-profit philanthropists will need to address because for-profit law will actually apply to these entities. For-profit law's shareholder primacy norm and its concern over protecting investors are certainly implicated by the for-profit philanthropy model. Further, this model tests the limits of fiduciary discretion. Finally, the for-profit philanthropy model and the Google.org example expose fundamental issues regarding the law's construction of a boundary between nonprofit and for-profit endeavor, and whether its present location is well-charted.

A. *Nonprofit Law's Perspective*

Drawing on nonprofit legal sources and debates, three major strains of concern arise from the for-profit philanthropy model. Does for-profit philanthropy perilously evade enforcement measures? Will it inappropriately blur or influence philanthropic mission? Can it mislead partners, beneficiaries, or the public? The answers to these questions are neither easy nor crystalline. Contending with them uncovers issues that for-

141. There are legal regimes in which this division would not be as clear. For example, under English law, organizations do not come under the Charity Commission's regulation by their positive choice. Rather, a charity is "any institution, corporate or not, which is established for charitable purposes." Nuzhat Malik, *Defining "Charity" and "Charitable Purposes" in the United Kingdom*, INT'L J. NOT-FOR-PROFIT L., Nov. 2008, at 36, 36 (citing L. B. CURZON, DICTIONARY OF LAW 52 (1979)). Under such a regime, Google.org might not be so easily able to opt out of traditional philanthropic regulation. I thank Debra Morris for this insight.

profit philanthropists and nonprofit advocates should monitor, to ensure this new model operates to enhance philanthropy.

Placement of philanthropic activity inside a for-profit entity immediately sparks questions about enforcement, a major preoccupation of nonprofit law and scholarship.[142] Its structure puts philanthropic activity conspicuously outside the oversight of both state attorneys general and federal tax regulators traditionally charged with monitoring philanthropic organizations. Of course, as detailed in Part III, this is quite deliberate. Google.org's structure is a response to the scrutiny and penalties these regulators would place on its plans to invest in for-profit entities, directly access Google Inc.'s resources, and engage in political activities. In order to pursue these strategies, Google.org needs to be outside of their jurisdiction.

State and federal regulators, however, have a fairly broad mandate. They are empowered to protect charitable assets, prevent donor fraud, safeguard the reputation of the charitable sector, and police the benefits nonprofits are given.[143] To do so, these regulators can engage in front-end review of charitable purpose. They can consider changes to purpose when governing documents are amended, when major transactions occur, or when an entity dissolves.[144] They can prosecute fiduciaries when self-dealing transactions do, in fact, disadvantage philanthropic entities.[145] They can require disclosure of internal policies, spending decisions, and program choices for regulatory, donor, and public review.[146] In its effort to escape a few particularly troublesome restrictions imposed by nonprofit law and federal tax-exemption requirements, for-profit philanthropy avoids this broad regulatory framework entirely.

Without the constraints of state nonprofit or federal tax law, a for-profit philanthropy might misbehave badly. It could squander or misuse philanthropic assets, confuse partners or the public as to its goals or activities, even deleteriously impact the reputation of the charitable sector, without any sanction. For-profit accountability mechanisms offer some promise for keeping these entities honest. Shareholder suits or offers for control might prevent or punish embezzlement or other direct self-dealing harms that ultimately impact the for-profit's bottom line. In addition, the pure self-interest of a for-profit philanthropy like Google.org—in achieving

142. Shruti Rana, *From Making Money Without Doing Evil to Doing Good Without Handouts: The Google.org Experiment in Philanthropy*, 3 J. BUS. & TECH. L. 87, 93–96 (2008).

143. Evelyn Brody, *Whose Public? Parochialism and Paternalism in State Charity Law Enforcement*, 79 IND. L.J. 937, 946–50 (2004) (addressing the enforcement prerogatives of state attorneys general).

144. *See, e.g.*, REVISED MODEL NONPROFIT CORP. ACT §§ 11.02, 12.02, 14.03 (1987) (providing nonprofits must notify the state attorney general prior to merger, sale of substantially all assets, or dissolution).

145. FREMONT-SMITH, *supra* note 116, at 309 (describing the range of court actions available to state attorneys general).

146. James J. Fishman, *Improving Charitable Accountability*, 62 MD. L. REV. 218, 239–42 (2003) (describing state and federal disclosure and filing requirements).

its own stated and well-publicized goals—should encourage it to pursue accountability. If it is part of a highly visible public company, a for-profit philanthropy division will be subject to some public scrutiny. Still, the for-profit form provides only limited and structured transparency, geared to investors rather than the public at large.[147] Further, none of these mechanisms are likely to challenge Google.org if it strays from or lags on its philanthropic course.[148] For-profit philanthropy's potential avoidance of enforcement regimes therefore remains concerning and merits continued observation.

Importantly, though, this concern is tempered by the fact that nonprofit regulators engage in a relatively low level of enforcement. In fact, the dearth of resources state attorneys general bring to their nonprofit enforcement efforts is oft-cited and the subject of frequent criticism in the nonprofit legal literature.[149] Federal regulators offer somewhat greater enforcement wherewithal than their state counterparts. This relative advantage, however, still leaves them with meager financial, human, and technological resources to achieve their tasks.[150] Due to standing limitations, members of the public rarely may bring enforcement suits against philanthropic organizations or their leaders.[151] Without more resources available in the nonprofit enforcement architecture, Google.org's decision to opt out creates lower accountability costs than might be imagined.

The perspectives of nonprofit law and scholarship also draw out several mission-based concerns regarding the for-profit philanthropy model. Combining for-profit attributes with traditionally nonprofit activities is the point of for-profit philanthropy. This might make philanthropic activities more efficient, but it could also blur mission in unintended and undesirable ways. For-profit philanthropy's embrace of business methods may put additional pressure on entities like Google.org to measure their performance.[152] But, performance metrics for nonprofit production are

147. *See* Rana, *supra* note 142, at 95.

148. Dana Brakman Reiser, *Enron.org: Why Sarbanes-Oxley Will Not Ensure Comprehensive Nonprofit Accountability*, 38 U.C. DAVIS L. REV. 205, 212–15 (2004) (articulating the accountability problem created by mission creep).

149. *See, e.g.*, FREMONT-SMITH, *supra* note 116, at 352 (noting that state attorneys general have achieved some nonprofit enforcement successes and "[a]ll of them operate with severely limited budgets, which has meant a shortage of legal and accounting support"); Fishman, *supra* note 146, at 262–63 (addressing the limitations on nonprofit enforcement presented by scarce governmental resources).

150. FREMONT-SMITH, *supra* note 116, at 459–61 (describing the challenges federal regulators face); Evelyn Brody, *Accountability and Public Trust*, *in* THE STATE OF NONPROFIT AMERICA 471, 479 (Lester M. Salamon ed., 2002) ("Funding for charity enforcement has never been high, at either the state or federal level . . . .").

151. Rob Atkinson, *Unsettled Standing: Who (Else) Should Enforce the Duties of Charitable Fiduciaries?*, 23 J. CORP. L. 655, 657 (1998) (noting that standing to challenge fiduciary breaches by anyone other than the attorney general and fellow fiduciaries is extremely limited).

152. Rana, *supra* note 142, at 94.

notoriously slippery and contested.[153] Some of Google.org's initiatives provide obvious opportunities for benchmarking progress. If a plug-in vehicle produced through RechargeIT becomes viable for even small-scale production, this would certainly be an achievement. Likewise, RE<C might chart its progress as greater efficiencies in electricity production are achieved by processes it develops or funds. Often, though, identifying and measuring milestones will be far more complicated. Perhaps a count of emerging disease hot spots identified would track the PnP initiative's success. Or, perhaps a small advance in the understanding of the basic science relating to disease mutation is the proper target. There is always a danger with performance measures that an inapt one will be selected. Even if good choices are made, the risk of overemphasizing metrics remains. Concentrating on achieving the measures can become an organization's whole purpose, eclipsing and blinding it to broader goals or alternative visions of success. These risks exist for nonprofit entities as well, of course. The call to use business methods to reengineer philanthropy in search of greater efficiency, however, suggests that the dilemma over performance measures will be particularly acute in for-profit philanthropy. Philanthropy advocates would do well to monitor this issue as for-profit philanthropy grows.

The for-profit philanthropy model could also undesirably skew mission in other ways. What begins as a philanthropic mission could, as a result of it being embedded within a business, become biased toward alignment with the goals of the for-profit company. This is not to suggest any nefarious intent. Rather, a for-profit philanthropy division's position within the larger organizational culture, along with its desire to take advantage of its direct access to the for-profit's resources and technology, could well cause slow but steady drift in mission toward service of for-profit goals. One could herald this type of development as welcome synergy. Indeed, some commentators suggest that both business and social goals can be enhanced by integrating philanthropy more fully with overall corporate strategy.[154] In important ways, though, this integration might degrade the idea of corporate philanthropy.[155] If "philanthropic" expenditures are made to

153. Patrice Flynn & Virginia A. Hodgkinson, *Measuring the Contributions of the Nonprofit Sector*, *in* MEASURING THE IMPACT OF THE NONPROFIT SECTOR 3, 15 (Patrice Flynn & Virginia A. Hodgkinson eds., 2001); Rosabeth Moss Kanter & David V. Summers, *Doing Well While Doing Good: Dilemmas of Performance Measurement in Nonprofit Organizations and the Need for a Multiple-Constituency Approach*, *in* THE NONPROFIT SECTOR: A RESEARCH HANDBOOK 154, 154–59 (Walter W. Powell ed., 1987).

154. CTR. FOR CORP. CITIZENSHIP, STRATEGIC PHILANTHROPY: THE BUSINESS VALUE OF CONTRIBUTIONS 1 (2004) (describing the value of "align[ing] charitable activities . . . with a social issue or cause that supports their business objectives").

155. *See, e.g.*, COMM. ENCOURAGING CORPORATE PHILANTHROPY, BUSINESS'S SOCIAL CONTRACT: CAPTURING THE CORPORATE PHILANTHROPY OPPORTUNITY 23–24 (2008) (arguing, based on a McKinsey study, that "[t]he most efficient philanthropists are also seeking to make their philanthropy congruent with the business footprint"); Michael E. Porter & Mark R. Kramer, *The Competitive Advantage of Corporate Philanthropy*, HARV. BUS. REV., Dec. 2002, at 5, 7–8.

improve the lot of the corporation and its shareholders, they are hardly a gift to humankind. More importantly, if this drifting effect indeed skews deployment of philanthropic resources to only those social issues that neatly align with for-profit imperatives, there is real cause for concern. Again, this concern is not limited to the for-profit philanthropy domain.[156] Corporate foundations are subject to similar criticism for shifting mission from original unrelated philanthropic goals toward ones more closely aligned with the branding and ideals of the for-profit company.[157] The for-profit philanthropy model, by bringing traditionally nonprofit activities within business operations, would only enhance this effect. Again, contemplation and monitoring are warranted.

The ultimate mission-based fear raised by the for-profit philanthropy model is that resources contributed with much fanfare to achievement of philanthropic aims could, one day, be recaptured by the for-profit and used instead for profit-making purposes.[158] Such recapture is not possible if resources are gifted to a separately incorporated nonprofit. It simply could not be done with a tax-exempt private foundation, even a corporate foundation with many overlapping leaders and with significant interaction between the company and the foundation. And, it is important to note, Google.org and its leaders vehemently object to any suggestion it would happen there. Perhaps not, but no legal obstacle would prevent Google.org from doing so. Moreover, future adopters of the for-profit philanthropy model might not be so willing to dedicate their resources irreversibly to their philanthropic stream.

The possibility of recapture, of course, will not necessarily reduce overall corporate expenditures on philanthropy. It may instead be beneficial to allow companies to contribute resources to philanthropic endeavors only for as long as they are so inclined. On the one hand, the ability to recapture these assets for profit-making purposes at a later time might increase corporate willingness to fund philanthropic activities in the current period. It might expand the range of social aims companies are willing to bankroll or encourage greater experimentation. On the other hand, meeting philanthropic goals often requires sustained attention and stability. The risk that funds might be cut off at any time could curtail the scale of for-profit philanthropists' efforts, or undesirably limit their goals' scope and ambition. These are empirical questions that merit further exploration.

Finally, the nonprofit law perspective highlights concerns about misleading customers, partners, and the public. Protecting donors and others from nonprofit frauds or schemes is a crucial concern of nonprofit

156. *See, e.g.*, Debra C. Minkoff & Walter W. Powell, *Nonprofit Mission: Constancy, Responsiveness, or Deflection?*, *in* THE NONPROFIT SECTOR, *supra* note 108, at 591, 606 (describing how a nonprofit's donors may induce mission changes).

157. *Cf.* Linda Sugin, *Encouraging Corporate Charity*, 26 VA. TAX REV. 125, 144–51 (2006) (arguing that the alignment of corporate philanthropy with business goals makes these expenditures more appropriately deductible as business expenses than as charitable gifts).

158. *See* Fishman, *supra* note 77, at 607.

law.[159] The recapture possibility elicits real concerns about how for-profit philanthropists describe and publicize their activities. The idea that funds once contributed may be taken back for the donor's private use does not track with the traditional idea of charitable giving. Characterizing as for-profit *philanthropy* an activity marked by this flexibility misuses the term. Without a real commitment to restrain recapture of ostensibly donated funds, the for-profit philanthropy concept risks casting future adopters of the model as unduly charitable. If for-profit philanthropists free ride on the positive associations of the philanthropic community, they may mislead customers, partners, or the public generally. They may even dilute or damage these associations, at a point when they are already showing wear.[160] Like all of the mission-related concerns outlined here, for-profit philanthropists and philanthropy advocates should carefully mind these issues.

B. *For-Profit Law's Perspective*

The perspective of for-profit law exposes a range of other concerns about the for-profit philanthropy model. The model tests the strength of the shareholder primacy norm and the limits of fiduciary discretion. Is philanthropy, when taken this far, still a valid corporate objective? Can the decision to create a philanthropic division be sustained as a proper exercise of fiduciary responsibility? Likely yes on both counts, and for mostly familiar reasons. The Google.org example, however, expands on these rationales and offers some guidance for future for-profit philanthropists.

A for-profit legal perspective quickly seizes upon the shareholder primacy challenge that for-profit philanthropy represents. As a for-profit corporation, the primary objective of Google Inc. is to make profits for its shareholders.[161] These profits may be obtained by shareholders immediately, through dividends or rises in stock price, or over the long term, when reinvestment in the corporation leads to growth in its value. Google Inc., of course, is pursuing profits doggedly, but not exclusively. It is also pursuing philanthropic goals through Google.org. The debate over whether and to what extent corporations should expend funds and resources for purposes other than increasing shareholder value has raged for decades.[162] The creation of a division specifically devoted to pursuit of

159. Brody, *supra* note 143, at 947 (noting this was reported as state regulators' "biggest problem").

160. Suzanne Perry, *Public Confidence in Nonprofit Groups Slides Back, New Survey Finds*, CHRON. PHILANTHROPY, Apr. 3, 2008, at 3.

161. PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 2.01 (Am. Law Inst. 1994) (noting that "a corporation . . . should have as its objective the conduct of business activities with a view to enhancing corporate profit and shareholder gain"); *see also* Elhauge, *supra* note 73, at 745 (accepting without argument that "managers' *primary* obligation is and should be to make profits").

162. *See generally* Branson, *supra* note 71; Wells, *supra* note 71. A particular resurgence in this debate arose after states' adoption of corporate constituency statutes in the 1990s. Wells, *supra* note 71, at 125–29.

social rather than shareholder returns raises these issues more pointedly.[163] Google Inc.'s especially shareholder-resistant corporate structure makes shareholder primacy concerns even more vivid. Under its dual class structure, one class of its common stock provides a single vote per share and is held by most shareholders; a second class of common stock, with ten votes per share, is held primarily by insiders.[164] The structure thereby entrenches control with a few manager-owners, insulating it from the shareholder pressure and threat of hostile takeovers that enforce the shareholder primacy norm.[165]

In the main, though, Google.org could be easily defended using traditional responses to shareholder primacy arguments opposing corporate charitable contributions. Google Inc.'s corporate do-gooding meshes with its non-"evil" brand positioning. Google.org seems likely to enhance Google Inc.'s standing with consumers and potential partners. Its design of a new model for corporate philanthropy aligns with its reputation for innovation. This reputation is key to Google Inc.'s strategy for recruiting and inspiring the highly prized and sought after technical job force its business requires. Many other businesses could likewise use such claims to support efforts to create for-profit philanthropy divisions in their own corporations.

Google Inc. can add an additional argument to the mix: notice. Its plans regarding the extent of the company's philanthropic reach have been public and long-standing, dating from its initial public offering. Its pledge then to commit one percent of equity and profits to philanthropy informed all would-be Google Inc. shareholders of the company's broad philanthropic orientation. Any shareholders disdaining such use of their capital could have looked elsewhere to invest. Google Inc.'s capital and control structure were likewise detailed in these early documents, and have continued to be transparent to investors who cared to inquire. Shareholders thus purchased with notice, and Google Inc. need not hear them complain. In fact, some shareholders may have purchased because of Google Inc.'s philanthropic commitment and would want to hold the company to its promises.[166] Disclosure is the bedrock of federal securities law; it provides Google Inc. a strong defense to any claim that Google.org breaches protections for investors. This notice strategy is also relatively easy to copy, though more

163. Stone, *supra* note 11 (reporting that the announcement of Google's entry into the renewable energy field was greeted by some concern on the part of investors and analysts).

164. VISE & MALSEED, *supra* note 2, at 172.

165. *Id.*; Letter from the Founders, *supra* note 6, at 29–30. A shareholder proposal to end the dual-class structure was defeated in 2006. *See Google Keeps Two-Tier Ownership Structure*, N.Y. TIMES, May 11, 2006, http://www.nytimes.com/2006/05/11/technology/12google-wire.html?pagewanted=print.

166. The B corporation certification system is premised on the idea that shareholders will be able to enforce just such claims. *See* B Corporation, http://bcorporation.net/ (last visited Feb. 13, 2009).

so for companies just making shares available to the public than for established public corporations.[167]

The questions raised by fiduciary obligation, another persistent for-profit law theme, also can be quickly answered. In most cases, the only potentially viable shareholder claim for breach of fiduciary duty is for a lapse in loyalty. Like in any other for-profit entity, a shareholder could claim that fiduciaries are engaged in embezzlement, taking of corporate opportunities, or the like. Existing for-profit fiduciary law could deal with these claims as effectively in a company engaging in for-profit philanthropy as in one with more traditional activities. Unique to the for-profit philanthropy context, however, would be shareholder claims that the for-profit philanthropy division is merely a veiled perquisite for a company's directors or officers. Such claims would argue the company undertook philanthropic activities for the benefit of these fiduciaries, but using corporate assets. This type of case is theoretically possible, but difficulties of proof as well as law would make its success unlikely. It would be quite hard to demonstrate that philanthropic activity was for the benefit of a fiduciary, not the company.[168] Even if proof could be made, if the philanthropic expenditure when added to the fiduciary's compensation was still within a reasonable range, there would be little harm.

Claims under the duty of care have even lower chances of success. Initially, the complex procedural obstacles to bringing them would stymie shareholder plaintiffs challenging for-profit philanthropy. The standard of review in duty of care suits poses further obstacles. Provided that fiduciaries take decisions in an informed, good faith, and nonconflicted manner, the business judgment rule requires only that they act rationally. This highly deferential standard would generally protect decisions by for-profit directors and managers to pursue social ends, as either efficiently unreviewable business judgments or in pursuit of long-term benefits for the corporation.[169] Creating a for-profit philanthropy division can be seen as merely a new take on relatively uncontroversial business activities like charitable contributions and CSR, and likewise can withstand scrutiny under the duty of care.

Even without resort to efficiency arguments or the philanthropic high ground, however, the decision to fund Google.org should fall well within the broad range of rational decisions. Despite its claims that it is unconcerned with the return on its investments, Google Inc. is certainly more likely to profit from its for-profit philanthropy initiatives than it would from making charitable donations of the same magnitude. The

167. Companies frequently disclose their philanthropic activities to shareholders already, for the dual purposes of disclosure and public relations.

168. *See* Elhauge, *supra* note 73, at 834.

169. *Id.* at 783–814 (arguing these decisions are well within directors' and managers' discretion); Kerr, *supra* note 77, at 668 (concluding that fiduciaries' decisions responding to social concerns will be protectable as ultimately beneficial to the corporation and its shareholders).

division could be viewed as just one part of a diversified portfolio of corporate investments. This division pursues extremely high-risk, but potentially very high-return, projects. If Google.org finds a way to produce one gigawatt of electricity cheaper than coal, or to prevent and predict diseases of grave concern to public health worldwide, these achievements could be translated into significant profits. Of course, these endeavors are great challenges and may come to nothing. But, that is true of many corporate projects. Provided corporate leaders used the appropriate process in considering the matter, they would be acting well within the standard of care to create a for-profit philanthropy division like Google.org. It uses a relatively low overall financial investment to pursue projects unlikely to pan out, but that, if successful, could expand its business exponentially, not unlike some research and development units.

Of course, according to statements by its leaders, the profits Google.org's investments might earn will not translate into income for Google Inc.'s shareholders or the profit-making arms of its business. There is no reason not to take them at their word. Perhaps shareholders might argue that a potential investment return only supports a finding of rationality if that return would benefit the shareholders.[170] Still, the for-profit philanthropy structure leaves the reinvestment decision open for reconsideration if and when such profits might materialize. Moreover, although Google remains committed to keeping any Google.org profits in the philanthropic stream, it appears willing to use the philanthropy's first mover position in some of these emerging areas to serve a kind of investment research and development function for Google Inc. For example, recent reports suggest that following Google.org's investment in renewable energy startups, Google Inc. is considering making larger scale investments on behalf of its for-profit business.[171] For future for-profit philanthropists, the door also remains open to forego any kind of reinvestment commitment.

Finally, one could conceivably question whether for-profit philanthropy could undermine the value of the for-profit corporate form more generally. Substantial benefits accrue to for-profit corporations in recognition of the role they play in producing economic vitality.[172] If for-profit philanthropy so seriously distracted the captains of industry that it undermined this trade-off, it would be cause for distress. Of course, the same fear could be raised with regard to corporate contributions, corporate social responsibility, and social enterprise. And, it would be similarly overstated. None of these examples blending business and philanthropy pose such catastrophic threats. They do not adopt, or even advocate, a wholesale abandonment of

170. I thank Adam Parachin for this insight.

171. *See* Miguel Helft, *Idealists and a Green Agenda*, N.Y. TIMES, Oct. 28, 2008, at B1 (noting that Google Inc. may follow Google.org's lead in investing in renewable energy and reporting that a recent status meeting on energy included employees from philanthropic and other divisions).

172. Not least of these is limited liability, which can stimulate investment and foster risk taking, all in service of greater efficiency. CHARLES CLARK, CORPORATIONS § 1.1 (1986); COX, HAZEN & O'NEAL, *supra* note 60, § 7.2.

the role of business in building economic prosperity. It remains to be seen whether a trend toward more nonprofit and for-profit hybridization is forming. Today, at Google Inc. and elsewhere, outlays on philanthropy are still tiny compared to those spent developing, producing, and marketing products and services. Moreover, depending on whether the global economic crisis persists or deepens, philanthropic expenditures may diminish as companies feel far less flush with funds to allocate to social goals.[173] For-profit philanthropy, like its forbears, seems highly unlikely to be the undoing of the business-driven economy.

The pragmatic legal questions a for-profit perspective brings to mind can thus fairly easily be answered. Indeed, other commentators find the for-profit philanthropy model of so little concern that they argue for encouraging these efforts by extending tax benefits to reach them. Professors Eric Posner and Anup Malani argue that none of the rationales supporting tax benefits for philanthropic activities can justify premising these benefits on the adoption of a nonprofit form.[174] Thus, they propose decoupling nonprofit form from tax benefits based on social activities, and opening these benefits to any type of entity engaging in activities that benefit the community.[175] Only time will tell if for-profit philanthropy will figure largely in the corporate mainstream. If Posner and Malani's prescription is not adopted, other for-profits may be unwilling to give up the tax and other benefits attendant to structuring their philanthropy along more traditional legal lines. Assuming refinement and replication of the model do occur, for-profit legal concerns should not create serious obstacles.

C. *Fundamental Concerns About the Nonprofit/For-Profit Boundary*

The for-profit philanthropy model and the Google.org example do, however, highlight a more fundamental issue: the utility of the legal boundary between nonprofit and for-profit endeavor. There is a real and evident mismatch between Google Inc.'s philanthropic vision and the legal restrictions on traditional forms for philanthropic activity. This divergence exposes fundamental policy choices around how the law structures, and thereby encourages, philanthropic activity. These policy choices have delineated several key boundaries between what is philanthropy and what is not:

- Philanthropy is qualitatively different than commercial activity. It produces something different from, perhaps larger than, products and services.

173. Thus far, Google.org has stated that its response to the current economic crisis will be more, rather than less, philanthropic funding. *See* Posting of Sonal Shah to The Official Google.org Blog, *supra* note 21 ("We know that the global financial crisis is disproportionately affecting the poor and plan to increase our overall giving in 2009.").

174. *See generally* Anup Malani & Eric A. Posner, *The Case for For-Profit Charities*, 93 VA. L. REV. 2017 (2007).

175. *Id.* at 2065.

- Philanthropy defines a charitable class and provides the benefits of its success to them, not to equity investors, not to leaders or managers, not even to unrelated parties if they are outside the benefited class. It embodies at least this basic level of altruism.

- Philanthropy is not engaging in the political system. It is working for change in some more direct or at least different way, without becoming embroiled in political processes that might taint or overtake a charitable mission.

Because the law is complex and sometimes confused and because organizations cannot be expected to fulfill the philanthropic ideal to perfection, the boundaries are muddy. There are exceptions. Limited incursions across them are permitted or overlooked. But, these boundaries are there.

The for-profit philanthropy model does not just push or question the boundaries the law has placed on philanthropy. It ignores the map altogether. Google.org shows that structural innovation can limit the potency of the law's boundaries. It defies the law's attempt to chart human endeavor into easy categories of public or private, other-regarding or self-regarding, noble or base. In doing so, for-profit philanthropy raises serious questions about whether the boundaries the law has placed on traditional charitable forms represent the right policy choices. Exposing these fundamental questions may ultimately be for-profit philanthropy's greatest contribution to nonprofit law and the philanthropic community. Full exploration of the theoretical implications of this revelation will continue beyond this Essay, in my future work, and hopefully that of others.

CONCLUSION

Google.org's for-profit philanthropy model is the most recent in a long line of phenomena blending nonprofit and for-profit endeavor. The persistence of corporate charitable contributions and corporate social responsibility initiatives, as well as the advent of social enterprise and the new advocates of philanthrocapitalism,[176] suggest innovation may well continue in this direction. For-profit philanthropy's innovation is mainly structural, placing philanthropic activity in-house, as a division of a for-profit company. This structure responds to reasonable concerns about the feasibility of pursuing Google Inc.'s particular philanthropic vision and program through traditional charitable forms. Its novel approach, however, raises real questions about nonprofit and for-profit law and the boundary these regimes establish between their constituents. Through its examination of these questions, this Essay provides signposts for the evaluation of for-profit philanthropy. More work must be done to better understand and guide the legal impact of for-profit philanthropy, especially if it becomes

176. *See supra* note 88.

subject to widespread replication. Until then, the Google.org example offers valuable insight on the undertheorized boundary between nonprofits and for-profits.