Chapter 1

Foundations and the Challenge of Legitimacy in Comparative Perspective

Steven Heydemann and Stefan Toepler

"Foundations are dandy things, but the truth is few institutions are as complacent, and potentially unaccountable to the real world as private foundations. When I was a public official, my dealings with philanthropy often left me with the question—who do they think they are?"

—Douglas W. Nelson, President, the Annie E. Casey Foundation

"In the great jungle of American democracy and capitalism there is no more strange or improbable creature than the private foundation. Private foundations are virtually a denial of basic premise: aristocratic institutions living on the privileges and indulgence of an egalitarian society; aggregations of private wealth, which, contrary to the proclaimed instincts of Economic Man, have been conveyed to public purposes. Like the giraffe, they could not possibly exist, but they do."

—Waldemar A. Nielsen, *The Big Foundations* (1972, 3)

Who do foundations think they are? Why do they even exist? Why do democratic societies accept, even foster, the presence of "aristocratic institutions" that control large amounts of capital, in perpetuity, with few constraints on how their assets may be used? On what grounds are institutions that control vast wealth able to secure the consent of society and government? To whom are private foundations accountable? What, in other words, gives private foundations their legitimacy?

For foundations, the challenge of legitimacy is pervasive and enduring. It exists in every setting in which private assets receive privileged treatment by governments in exchange for an obligation—often very loosely defined—to use those assets for the public good. Today, the challenge of legitimacy occupies a central place in American debates about foundations and tends to manifest itself in political calls for increased regulation—most recently in the form of proposals for tightening payout rates, that is, the share of endowment values that foundations have to distribute annually, or further restrictions on executive compensation practices and self-dealing. Conversely, it is also at the heart of contrary European debates about whether and how to liberalize rules that govern the formation of private foundations (de Borms 2005).

In both cases, competing ideas about the sources of foundation legitimacy are at the core of these debates. For those who support higher payout rates and greater foundation accountability in the United States, for example, legitimacy depends on the willingness of foundations to maximize the current use of their resources for public purposes. For critics of higher payout rates, legitimacy hinges on the ability of foundations to preserve endowments to ensure their ability to address future needs.[1] Underlying both positions, however, is the question of how to balance autonomy versus regulation in the management of foundation assets—and perspectives are clearly shaped by differing views on the legitimacy question. Does legitimacy derive from the freedom of foundations to define their own priorities and procedures within the limits of donor intent, or from their responsiveness to the public service obligations they accept in exchange for their nonprofit, tax-exempt status? Both matter, and how the two are reconciled will have a powerful impact on the future of private philanthropy in the United States.

If legitimacy concerns are pervasive, however, the question of foundation legitimacy per se—the issue raised by both Douglas Nelson and Waldemar Nielsen—is often obscured in current debates, especially those taking place in the United States. The reasons for this are worth noting. If foundations in the United States confront real and serious legitimacy challenges, they do not face a legitimacy crisis. Debates about foundation management and grant making have become increasingly politicized, yet the idea that Congress might act to discourage or prevent the establishment of philanthropic foundations is implausible. Demands for foundation accountability from Congress and from watchdog organizations have intensified, but do not reflect public or official doubt about the need for and potential value of private philanthropy. Similarly, public concerns about corruption and mismanagement in the foundation sector have deepened in the face of highly visible scandals. Yet Americans' confidence in and their positive view of foundations, philanthropy, and charitable giving remain high, overall. The underlying legitimacy of the foundation form in the United States is not in question.

As a result, public debate in the U.S. case often focuses less on the normative questions of why foundations exist and whether they are a legitimate means for the accumulation and distribution of private wealth—matters that remain on the table in some European cases—than on questions of foundation governance, regulation, oversight, and, above all, accountability. Indeed, accountability has in many respects become the dominant language through which concerns about the legitimacy of foundation practices is expressed. It too, like notions of governance and oversight, has the effect of framing foundation debates in procedural and technocratic terms that often seem remote from the normative language of legitimacy.

However, it would be a mistake not to recognize the legitimacy challenges that such concerns evoke, or to overlook the tight links that connect the procedural and the normative in discussions of foundations and philanthropy in the United States. If the foundation form itself is not in question—benefiting as it does from deep public and official support for charitable giving, volunteering, and self-help—this core legitimacy does not mitigate normative concerns about what foundations do and how they do it—whether they in fact help the poor, promote innovation, cure disease, or otherwise provide the public benefit on which their privileged status rests. American foundations are not insulated by their core legitimacy from the need to reinforce and justify their privileged standing, and to ensure that both their procedures and their broader purposes are in keeping with public and official perceptions about the appropriate roles and limits of private philanthropy. And because these perceptions are never stable, foundations themselves can never take their "everyday legitimacy" for granted.

Thus, even when challenges to foundations are framed in procedural and technocratic terms, normative questions are never far from the surface. And once they break into plain view, such questions can rapidly redefine debates that had been framed in procedural terms. As one elected official asked recently in congressional hearings on the tax-exempt status of nonprofits, "are the tax breaks that propel our philanthropy justified? . . . The question . . . is, 'What is the taxpayer getting in return for the tens of billions of dollars per year in tax subsidy' offered to donors through tax write-offs or to nonprofits through their tax exemptions?" As reported in the *New York Times* in fall 2005, "The hearings have received little public notice but have terrified nonprofit leaders, more than a Senate Finance Committee threat to tighten regulation of charities. 'When you start to ask what is the fundamental underlying rationale for tax exemption and the charitable deduction for donors, it leads to questions that are far more difficult to answer than questions about greater disclosure and better governance,' said John D. Colombo, a tax-law professor at the University of Illinois who testified [at the hearings]. 'It gets you to questions like, why should an institution with billions in the bank get tax exemption?' " (Strom 2005).

The future of private philanthropy is likewise under debate in Europe. On the surface, the issues are very different. The question of whether foundations should—or could for that matter—be forced to pay out certain minimum amounts each year is among the American regulatory idiosyncrasies that remain largely foreign to European foundation debates and policies. Rather, Europe appears to be searching for ways, however tentatively, to improve foundation laws and tax incentives in hopes of marshaling more private philanthropic resources to help address a range of public needs. In this, the newfound policy interest also represents a call on foundations to be responsive to public obligations and has at least some observers worried about the future ability of foundations to serve as independent and autonomous actors in Europe's emerging civil society. As such, the basic premise of the autonomy versus obligation conflict that is evident in the United States is present in Europe as well.

Yet, with few exceptions, comparative efforts to explore foundations and their responses to the challenge of legitimacy have been few and far between. In the United States, the foundation policy debates of the past four decades have been largely insular, with few attempts to explore experiences elsewhere. Similarly, the knowledge of U.S. foundation practices and regulations mostly remain shrouded in myth in Europe. The purpose of this volume is to set the stage for a more coherent trans-Atlantic dialogue about the legitimate roles and functions as well as the capabilities and limitations of philanthropic foundations in modern society. In the following, we discuss the issue of legitimacy and how it was operationalized for the purposes of this book and provide an overview of some of the issues raised in various chapters. Before doing so, however, we begin with a few comparative notes on foundations in the United States and Europe to help ground and contextualize the later discussions.

Comparing Foundations

Among the most persistent obstacles to a comparative assessment of the respective roles and importance of foundations cross-nationally is the imbalance of empirical data. Due to a long-standing arrangement between the Internal Revenue Service and the New York–based Foundation Center, an independent information clearing house, data drawn from the annual tax returns of U.S. foundations are publicly available and lend themselves easily to evaluating the size and scope of the American foundation community. For example, U.S. grantmaking foundations numbered approximately 66,000 in 2003, with a grants volume of $30 billion and assets of $477 billion (Foundation Center 2005). Similar data generally do not exist in Europe. Whether the accumulated assets and grants of European foundations compare favorably or not to their American counterparts remains a question without answer. However, given the frequent references to the United States in the European foundation literature and the growing interest in improving tax laws and liberalizing regulation to encourage future foundation growth, the underlying premise of the European debate is that the United States has a sizable philanthropic advantage over Europe that needs to be closed.

As notions about the economic and financial capacities and capabilities of foundations color at least implicitly the conceptions of what roles and functions foundations are expected to perform, it is worthwhile to revisit the issue briefly. Several American observers in the past have noted that the prominence accorded to foundations does not stand in relation to their relatively limited economic resources; there has also been some indication that the U.S. foundation community is not, in fact, much larger than in Europe, if measured in relation to broader economic parameters, such as GDP or public sector spending (Toepler 1998). This is borne out in table 1.1, which shows a range of size indicators and contrasts the United States with select European country data as presented by Anheier (2001). Anheier estimated the total number of foundations in nineteen western European countries and Turkey at 80,000 to 90,000, which means an average of seventeen to nineteen foundations per 100,000 inhabitants. Density varies significantly, with as few as one per 100,000 in France, two in Italy, three in Belgium, and as many as 111 in Switzerland and 200 in Sweden (table 1.1). The European average on this measure, however, is only somewhat below the U.S. ratio of twenty-two foundations per 100,000 inhabitants. Although there are fewer foundations in Europe in relation to total population, the question of whether there are significantly fewer remains open to debate.

Moreover, a similar picture emerges where Anheier (2001) and colleagues were able to derive estimates of other ratios from European data sources. As shown in table 1.1, U.S. foundation grants amount to the equivalent of one quarter of 1 percent of GDP—higher than the foundation expenditures to GDP ratio in Belgium and France, but lower than in Spain and Germany. The share of foundation grants of

Table 1.1 Comparative Measures, United States and Selected European Countries

	Foundations per 100,000	Expenditures as Percentage of GDP	Grants as Percentage of Nonprofit Sector Revenue	Assets per Capita
Belgium	3	0.07	—	
France	1	0.15	—	
Germany	10	1.50	1.80	€354
Italy	2	—	—	€1,340
Netherlands	5	—	2.11	
Spain	15	0.60	—	
Sweden	200	—	—	€1,500
Switzerland	111	—	—	€1,389
United Kingdom	16	—	2.81	€536
European countries average	17–19	—	—	
United States	22	0.24	1.49	$1,612

Sources: Authors' compilations. Anheier (2001); CIA (2006); Foundation Center (2005).

total nonprofit sector revenues appears to be actually lower in the United States than in the United Kingdom, Germany, or the Netherlands, whereas per capita assets of foundations are generally higher in the United States than in the five European countries where data were to be had (holding the euro-dollar conversion roughly at parity). However, only in the United Kingdom and Germany—where the real value of foundation assets is notoriously hard to gauge because many foundations either hold nonfinancial assets or stock in privately held companies—does the asset per capita ratio show a significant disparity. In relative terms, this rough cut at admittedly very unsatisfactory data suggests that the European foundation community may on balance not lag too far behind the United States. Notwithstanding those countries where foundation development has historically been stunted, such as Belgium, France, or Italy, any differences between the United States and Europe in the perceived roles and importance of foundations will more likely be grounded in factors other than economic weight and financial capacity.

Yet any attempt to draw comparative conclusions from the few hard data available on European foundations is hindered by their scarcity, and further complicated by a fundamental difference in the way Americans and Europeans tend to define foundations. In the continental European civil law tradition, there is a basic distinction between associations and foundations as the two main legal forms for nonprofit institutions. Associations are member-based, whereas foundations are asset-based organizations. Members may contribute assets to an association, but the foundation does not have members. Accordingly, the founding act and the donor's intention to transfer assets to an independent organization are integral parts of what constitutes a foundation in the European understanding. The nature of the required assets is generally not legally specified, and a foundation does not necessarily have to have a financial endowment or other revenue-generating assets. In fact, foundations can often be established with nonfinancial assets, such as art collections, or even institutions, such as a museum or a hospital. Where institutions form the core asset, European foundations may or may not hold an additional income-producing endowment to support the institution's operation.

In the United States, by contrast, the common law tradition does not proscribe a specific legal form for foundations. A donor may choose between a trust and a corporation, but at the level of establishment foundations are indistinguishable from all other types of nonprofit institutions. The Tax Reform Act (TRA) of 1969 first introduced a formal distinction, and legally the term "private foundation" is essentially a creation of the tax rather than the general law. For the purposes of tax regulation, foundations are donor-controlled (usually endowed) organizations that receive little if any external financial support on a regular basis. The defining characteristic, therefore, is the source of income rather than donor intent or the act of dedicating private assets to public purposes. However, the Internal Revenue Code grants a blanket exception from private foundation status to certain types of organizations, including hospitals and colleges and universities, independent of their revenue structure. Somewhat simplified, this regulatory slant has tilted the American foundation discourse (as well as foundation data which are based on tax designations) toward the endowed grant-making foundation.

All too easily masked by the apparent similarities, the small matter of the nature of foundation assets introduces a major conceptual challenge into the comparative discussion. If we follow the European tradition and argue that the nature of assets is irrelevant in defining what constitutes a foundation, then it follows that grant making is an incidental rather than a constitutive characteristic of the foundation as an institutional form per se. At issue, then, is the role and relative importance of operating foundations. In France, for example, it is not difficult to find hospital foundations, such as the Hôpital Rothschild, identified as significant parts of the foundation community, as Dogan points out in the foreword to this volume, and the same applies elsewhere. In the United States, hospital foundations exist as well, but they remain unaccounted for in the foundation discourse. Moreover, a good many of America's premier universities—such as Stanford, Chicago, and Johns Hopkins—are true foundations by European standards,[2] and rival the largest grant-making foundations in size, measured by financial endowments alone. The U.S. foundation literature also tends to exclude agencies funded by the government that act much like operating foundations—such as the National Science Foundation and the National Institutes of Health, as well as formal nonprofits which derive all of their funding from the government but act like grant-making foundations, such as the U.S. Institute for Peace. What the U.S. foundation sector would look like if such operating foundations were accounted for—as they currently are in Europe—

remains open to speculation, but in all likelihood, the dominance of the private grant-making foundation would not be as pronounced as it appears to be on the surface.

Following the American implicit assumption that a capital-based endowment (and hence the ability to make grants) is the defining characteristic of a foundation would, in turn, have severe consequences for our understanding of the European foundation field. Non-grant-making, operating foundations would drop from sight. Using rough data provided by Anheier (2001), this would mean that the foundation communities would shrink by at least 25 percent in Germany, by 30 percent in Finland, by 40 percent in Italy, and by 70 percent in Ireland. In Switzerland, Spain, Portugal, Greece, and France, the sector would essentially disappear. This unresolved comparative issue is reflected in the way in which the American and European contributors to the volume respectively approach the subject of foundation roles, legitimacy, and accountability, as these definitional and structural differences have some bearing on the nature of state-foundation relationships on both continents.

This relationship, in turn, reflects the balancing act between preserving foundation autonomy and ensuring the proper fulfillment of public obligations that we noted earlier, and finds its specific manifestation in the way foundations are regulated. Again generalizing somewhat, the regulatory concerns in Europe tend to center on the front end, that is the founding stage. This bias is apparent in the interest of policy makers in improving tax incentives to encourage new donors to form foundations, on the one hand, whereas on the other significant administrative burdens still complicate the process. In France, for example, establishing a foundation still requires a substantial initial endowment as well as approval at the highest levels of government. In other countries, such as Germany, the approval process remains lengthy and often involves intricate negotiations with the bureaucracy about the nature of activities to be funded and other administrative details. Once the approval is granted and the foundation established, European regulators seem less inclined to hold foundations to account for how well public obligations are performed.

The reverse is true in the U.S. case. Much to the envy of European observers, the very act of setting up a foundation requires no more than filing the requisite paperwork and paying a minimal incorporation fee. Once the foundation has legal personality and commences operations, however, tax regulation imposes a set of restrictions on foundation behavior that are largely unheard of in Europe. These restrictions originated with the Tax Reform Act of 1969. One of the key provisions of the act was an annual pay-out requirement for grant-making foundations of either all income or the equivalent of 6 percent of the asset value, whichever was greater. In the early 1980s, the pay-out requirement was changed to a flat 5 percent of asset value, but, as noted earlier, it has come up for debate again in the recent past. Other provisions prohibited self-dealing of any kind between foundation and donors, board members, and managers; prevented foundations from owning privately held businesses or controlling public corporations; and made it harder for foundations to make grants to individuals (rather than organizations).

Although the U.S. foundation community has learned to live with these provisions quite comfortably over the past three decades, they do nevertheless represent intrusions on the autonomy of foundations that are rarely found in Europe. Whatever functional equivalents there are for the payout requirement are at best lax and reflect a persistent disinterest in holding foundations to any particular efficiency or effectiveness standards (Toepler 2004). As Steen Thomsen's chapter suggests, foundation ownership of business corporations is not only uncontentious, but also regarded favorably in Europe; and even self-dealing is on occasion permissible. As but one, perhaps quaint, example, German law expressly allows foundations to set aside a portion of their annual income to pay a stipend to the donor or his or her immediate family or to maintain the donor's gravesite.

Foundations, Legitimacy, and Society

As these examples suggest, moreover, even if we acknowledge that foundations are here to stay, the nature of the legitimacy challenges they face extend well beyond immediate concerns about payouts and increased oversight in the United States or bureaucratic and regulatory reform in Europe. Different conceptions of how to balance autonomy and social accountability engage core questions about the appropriate uses of private wealth and the relationship between state, society, and capital. Like many other legitimacy questions, they thus reflect deep historical tensions around conceptions of national identity, social justice, economic inclusion, and the nature of the polity. For the authors in this volume, such links offer an important analytic opportunity. They permit us to use foundations as organizations that express deep—and often deeply contested—conceptions of how societies and polities should be organized, as lenses through which we can observe significant social processes play out, and as a useful basis for understanding patterns and variations in the trajectories of both the United States and European states.

In chapter 3, for example, David Hammack underscores these connections in the United States, recounting the social conflicts and deep political tensions that make up the contested history of foundations in the United States. In chapter 7, in her treatment on the emergence of distinctive foundation sectors in Italy and France, Giuliana Gemelli makes similar connections between historical contexts, social conditions, and the institutional structures that foundations adopt. She goes further, however, by noting that national contexts are not sharply circumscribed. Gemelli uses external interventions by U.S. foundations in the 1950s and 1960s in Germany, Italy, and France to trace the different trajectories that resulted from their efforts to build science infrastructure. Her findings point to significantly greater impact on local institutions in France than in Italy or Germany, and call into question the argument that Europe's extensive welfare states suppressed—whether intentionally or not—the development of a robust foundation presence. Instead, she argues, variation in the receptiveness of leading western European states to the work of foreign foundations requires that we treat this argument more skeptically, and subject it to case-by-case review grounded in careful assessment of the empirical evidence.

Kenneth Prewitt's chapter makes a different, and perhaps more provocative, claim about state-foundation relations in the United States. It links the legitimacy of foundations to their role as carriers of liberal values. Foundations "attach private wealth to public good without encroaching on political and economic freedoms." In his view, foundations thus represent a singularly American response to questions about the appropriate relationship between the state, the individual, and the community.

Thus legitimacy issues everywhere reflect broad social concerns about how private foundations are organized, how they operate, and how they interact with societies, governments, and markets. In this sense, we can look at the institutional forms that foundations take today, how they are governed and regulated, and the kinds of activities they support as expressions of the ways in which long-standing struggles over legitimacy have been resolved—if only for the moment. "For the moment" because no resolution of the legitimacy issue is ever permanent, universal, or fully secure. Although many of the legitimacy challenges that foundations face are entirely generic—and thus offer a basis for social scientists to generalize about the legitimacy challenge broadly defined—the particulars differ enormously across a wide range of variables. Macro-level legitimacy issues may look familiar from one setting to another (the need for foundations to appear fair and lawful in their dealings, for example), yet the precise form and content of specific legitimacy struggles are almost by definition the product of a given social, cultural, institutional, economic, and political context, even while they reflect distinctive historical experiences.

Today's legitimacy concerns are far removed from those that led to restrictions on the formation of private foundations in Europe during the era of modern state formation—notably the desire of new governments to curb the church's economic and political power. They differ profoundly, as well, from those of the late nineteenth-century United States, when a small group of former robber barons began the transformation of philanthropy from charitable giving as a way to alleviate individual suffering, to scientific philanthropy intended to address the root causes of social ills.

Indeed, variation in the nature of legitimacy challenges is almost endless. The issues faced by foundations in Europe differ from those confronting their counterparts in the United States, and within Europe we find considerable variation at the national level. If large banking foundations occupy the heights of the private foundation sector in Italy, their counterparts in Germany are the state-sponsored or initiated foundations such as the Volkswagen Foundation or the Federal Foundation for the Protection of the Environment, whereas some of the largest foundations in Scandinavia are the owners and managers of major global corporations, including Ikea and the Tuborg Brewing Company. In each case, the institutional form that private foundations take poses distinctive kinds of legitimacy challenges. In northern Europe, for instance, where foundations own a number of the region's largest corporations, these extend beyond the question of whether funds are used appropriately, or decisions are taken on an equitable basis, to include basic issues of economic performance. For these foundations, a central challenge is whether they can produce competitive rates of return. As Steen Thomsen shows, however, such foundations not only meet but also often exceed the profitability of their for-profit counterparts, projecting perhaps more of a socially responsible rather than strictly charitable image. From a comparative perspective, the northern European experience with industrial foundations is more than just a peculiar case study of a particular type of foundation. It is a salient example of how differences in political-economic environments lead to fundamentally different legitimacy outcomes. In fact, Thomsen's description of Danish and German assessments of these foundations stands in marked contrast to the United States, where foundation control of public corporations and privately held businesses was among the main reasons for the political backlash, increased tax regulation and general delegitimization of foundations that marked foundation-government relations in the late 1960s.

Similarly, in the United States, foundations created by firms that are accountable to shareholders face a different set of legitimacy challenges than do community foundations that depend on local citizens and businesses for support. For private corporations that engage in philanthropy, charitable activities must be integrated into the organizational culture and mission of a for-profit enterprise. They must be able to answer the basic question of why a firm should engage in philanthropic activity at all, and why the idea of corporate altruism isn't an oxymoron. In the case of community foundations, as Kirsten Grønbjerg's chapter points out, downward accountability, transparency, and responsiveness to constituencies are more important in securing the legitimacy of the communities in which they work—and from which they draw their revenues. As she argues, the demands of public accountability place a premium on procedural strategies for addressing legitimacy concerns among community foundations in the United States, including attention to issues such as inclusiveness, diversity, and equity in decision making. Yet these concerns are not shared to the same degree by community foundations in other settings. Diana Leat's chapter on community foundations in the United Kingdom underscores the extent to which their legitimacy context varies from that of their U.S. counterparts. Benefiting from the overall legitimacy extended to charitable organizations in the United Kingdom, community foundations have not felt pressed to justify themselves to the publics they serve. Nor have they experienced the intense, critical scrutiny of community foundations in the United States.

Alternately, for large, multipurpose foundations that operate globally, such as the Ford, Mott, MacArthur, and Rockefeller foundations, legitimacy challenges are transnational. The demands of securing the legitimacy of the Ford Foundation's work in both Israel and Palestine differ significantly from the demands it faces in Russia or in South Africa. No single resolution may be plausible or desirable, leading to highly complex strategies of legitimation within a single institution.

Thus, how foundations structure their work—whether grantmaking or operating—and how they secure their revenues matters for legitimacy. Sectoral differences—whether a foundation focuses on the arts, education, social services, human rights, the environment, and so on—will affect the kinds of legitimacy challenges they face. So do the legal and regulatory environments in which foundations operate. And, as indicated earlier, historical legacies shape legitimacy contexts in numerous ways.

Last, though in no sense least, the issue agendas that foundations adopt have a critical impact on the form and content of legitimacy challenges. Controversy about the role of private foundations for their support of voter registration drives in the 1960s or anti-apartheid movements in the 1970s has been superseded today by concerns about the possible use of foundation resources by terrorists. In the early twenty-first century, it is homeland security rather than civil rights that animates U.S. discussions about the legitimacy of foundations, their relationship to the state, and their role in a democratic society. Grant making to support research on HIV-AIDS, contraceptive practices, or abortion imposes different legitimacy demands on a foundation than does support for work on global poverty or diabetes, or sponsoring a local job training program, or building low-income housing. And, as is often the case, these variables can take on different values for different audiences at the same time, helping to ensure that legitimacy remains a hotly debated issue in its own right. For the Scaife Foundation in the United States, association with conservative political causes is a source of legitimacy for some, but a challenge to its legitimacy for others. Foundations identified as liberal face the identical dilemma, but in reverse.

Solutions to the challenge of legitimacy, however transient they might be, also exhibit a high degree of variation, and contribute to a highly differentiated and dynamic foundation landscape. In the United States, the rapid expansion of venture philanthropy, social enterprise philanthropy, and other new forms for the organization of private foundations reflects the increasing legitimacy of market-based and bottom-up strategies for addressing social problems. In Europe, the declining capacity of states to address demands for social services has reframed debates over the legitimate use of private resources for public ends. In this context, it is not surprising that efforts to liberalize rules governing the formation of private foundations are advancing in a number of states.

In both Europe and the United States, the rise of accountability as a major concern is changing foundation governance and reshaping patterns of grant making. Accountability, closely linked with the rise of market-based norms of nonprofit management, is often defined in terms of the measurable impact of foundation dollars. As the need to demonstrate short-term impact increases, funders may be less willing to support activities with longer time horizons, those where results are less easily measured, or where the risk of failure is high. This trend has significant implications for who will receive foundation grants and what kind of activities are most likely to secure support. It is also a source of potential conflicts within foundations as they struggle to reconcile the demands of competing institutional logics and modes of legitimacy. The pursuit of legitimacy via efficiency-based measures of accountability may not fit easily with mission-based sources of legitimacy, or with the view that foundations exist, in part, to provide an innovation function for societies—helping to launch new ideas, organizations, and services before they find support from either states or markets.

Advocates of increased accountability, on the other hand, find such concerns unpersuasive. As Frumkin notes, demands for accountability are justified not only by the privileged position foundations enjoy as a result of their tax-exempt status, but for two other reasons as well. First, he argues, the private assets held by foundations are used to bring about changes that affect the broader public. Second, the vast resources controlled by foundations place them in positions of power relative to their grantees: as in any such relationship, possibilities for exploitation and abuse are always present. Accountability is a means for addressing both these concerns, extending certain protections both to the communities affected by foundation programs and those who depend on foundation support. Yet, as Frumkin acknowledges, reconciling accountability demands with the autonomy of foundations will not be easy, even if the payoffs from accepting accountability procedures may well be to enhance their legitimacy.

For all these reasons, variation in the form and content of legitimacy struggles is a telling indicator. It sheds light on how states, societies, and the international system more broadly have changed over time. It also illuminates the tensions and conflicts that private foundations confront—internally as much as externally—as they navigate their interactions with society, state, and market. Moreover, foundations are not simply passive objects of the concerns directed at them by others. They are active participants in defining the conditions that generate, or undermine, their legitimacy. Through their programming, but also through public outreach, lobbying, support for grant makers' associations and interest groups, and other forms of intervention in the political arena, private foundations work assiduously to build public support for their work, shape the regulations that govern them, protect their autonomy, and otherwise contribute to an environment in which the legitimacy of foundations can be secured.

Location, sector, funding, institutional form and identity, the scope and priorities of programming—all of these contribute to the particular context in which legitimacy challenges play out, as does the broader social and political environment in which foundations work. Understanding the nature of this challenge in general thus requires keen attention to the many dimensions along which it varies. It also requires attention to the underlying conceptions of legitimacy around which such challenges play out.

Defining Legitimacy

Taken together, these issues suggest a level of complexity in approaching the subject of foundations in a comparative fashion that prohibits from the outset any attempt to impose a specific view of legitimacy or the nature of foundation accountability on the chapters in this volume—a caution reflected in the editors' comment. Nonetheless, the chapters that follow reflect shared features that permit us to establish the scope and importance of the legitimacy question as it relates to private foundations. In this limited sense, it is useful to distinguish between two broad levels or aspects of legitimacy and how they inform the chapters in this volume. At one level, legitimacy relates to the right to exercise power and the acceptance of that right by others. This combination of *procedural legitimacy,* in the sense of conforming to the requirements of law, and *normative legitimacy,* in the sense that the behavior of an institution is perceived as fair and just, are both part of the challenge that foundations face in securing the consent of society and the legal right from government to exist and operate that together constitute the base of their legitimacy. In adopting this perspective, we integrate conceptions of legitimacy that have often been treated as distinct—lexical and law-based definitions, on the one hand, and socially determined definitions, on the other. As Schaar has noted, the former are based on "the element of law or right," where "the force of a claim (whether it be a claim to political power or to the validity of a conclusion in an argument)" rests on "foundations external to and independent of the mere assertion or opinion of the claimant," whereas the latter "dissolve legitimacy into belief or opinion. If a people holds the belief that existing institutions are 'appropriate,' or 'morally proper,' then these institutions are legitimate" (Schaar 1984, 108).

Schaar and others have worked to differentiate these conceptions of legitimacy further. For our purposes, however, it is preferable to blur rather than to uphold this distinction. In part, this reflects our view of foundations as organizations that embody all three of Weber's sources of legitimate authority: tradition, charismatic leadership, and bureaucratic rationality, and thus—like many other social institutions—cannot be neatly categorized as reflecting one source of legitimacy in particular. The privilege accorded to foundation assets derives in part from law, yet legal frameworks themselves flow from deeply held and near-universal traditions that view charitable giving as an expression of individual and collective virtue. Further, foundations often rely on their standing as the organizational means through which the authority of a charismatic leader, the founding donor, acquires a bureaucratic-rational form of legitimacy—with important implications for the weight attached—socially if not legally—to a donor's original intent and a foundation's compliance with that intent as means for evaluating its legitimacy over time.

In addition, however, our hybrid conception of legitimacy reflects our sense of how best to capture the multidimensional quality of the challenges that foundations confront. It underscores the extent to which social and legal aspects of legitimacy have become interdependent in contemporary debates. In discussions of foundation accountability, for example, critics of foundations appeal to legal and social, as well as normative and procedural, conceptions of legitimacy in arguing for changes in the regulatory control of philanthropic assets. Those who argue that payout rates should be increased believe that the privileged treatment of private wealth requires a higher degree of responsiveness to social needs than is now demanded of foundations under the law. In their view, legal legitimacy and social legitimacy have diverged, and legal reform is needed to establish a socially more acceptable accommodation between them. Neither a legalistic nor a socialized conception of legitimacy could, on its own, capture the dynamic interplay between the two that is present in considerations of foundations and the challenge of legitimacy.

We see this blending of legitimacy concerns in other current debates, as well, notably as they touch on foundation governance and the perceived mandate of foundations to serve as representatives, whether of a broader public or an individual donor. Like many other institutions, foundations draw their legitimacy in part from their standing as agents, to which particular forms of autonomy and authority are delegated, whether by their founders or, via the state and law, by the public more broadly. Theoretically, individuals can delegate authority to the state (recalling contractual notions of legitimacy), thus legitimizing the exercise of power by government, including the authority to create rules that permit the accumulation, preservation, and distribution of private wealth by withdrawing it from the tax stream. Conversely, it can be argued that individuals have a derivative right to delegate authority to private institutions, even if these institutions pursue public purposes.

Although this proposition is contestable, a moral right to establish foundations thus rests on the notion of individual sovereignty. This view of legitimacy largely emphasizes the private aspects of foundations, and focuses mainly on donor intent, motivations, and control—issues that surface routinely in debates about whether, for instance, foundations should have the right to exist in perpetuity, or should have lifespans circumscribed by law as a guarantee against their deviation from the intent of their creators. In several notable instances, such as the Ford Foundation and the MacArthur Foundation, the decision by a founder's successors to use foundation assets for purposes either implicitly or explicitly at odds with the founder's intent is thought to undermine their legitimacy. Donor intent, as expressed in the vision of a sovereign individual, is accorded privileged standing in assessing the legitimacy of a foundation's grant making over its entire lifespan.

Thus, even when the answer to the question of the right to exercise power is affirmative (as it was not in the French Jacobinian tradition, for example), a second question arises as to whether power is exercised appropriately and responsibly, based on either pragmatic or normative assessments. Emphasizing the public aspects of foundations, the legitimacy issue then becomes a question of whether the (societal) performance of foundations justifies their preferential (tax) treatment and continued existence. In other words, the performance and effectiveness of foundations in pursuing their social roles and functions is a powerful determinant of foundation legitimacy. In the same sense, public debate and contention about what constitutes appropriate social roles, along with shifts in public culture and social norms, will help to define the kinds of challenges to which foundations must respond. One of the most visible of these shifts is the growing integration of market-based and philanthropic norms that is reshaping how philanthropy is organized and evaluated across the private, public, and nonprofit sectors. This change has altered perceptions about the centrality of the state-foundation relationship in determining foundation legitimacy, and elevated the importance of the market as a domain that is now crucial for the way citizens perceive of private foundations.

Social Roles and the Legitimacy of Foundations

The social nature of foundation legitimacy leads us back to our original question. Why do foundations exist? Their presence, after all, is intentional: they result from political decisions to extend special status, notably the exemption of income from taxes, to a particular class of institutions. First and foremost, therefore, foundations are a product of the belief that states may appropriately use the tax code to induce private actors to allocate their own resources in the public interest. But why? What social functions do foundations perform that justify this privileged treatment?

In part, foundations as institutions are the beneficiaries of deep normative commitments to charity, philanthropy, and volunteering that are so widespread as to be virtually universal. As Hammack stresses in chapter 3, foundations derive considerable legitimacy from their identity as nonprofit organizations. "Fundamentally," he indicates, "foundations derive their legitimacy from the nonprofit sector as a whole." It might also be said that in Europe, challenges to foundation legitimacy derive from enduring public and official skepticism about the legitimacy of a sector that is autonomous from the state. In this sense, the legal privileging of foundations in the United States, and increasingly in Europe, reflects the use of state power (and state legitimacy) to establish philanthropic values as central to a sense of identity that certainly goes beyond the national, but has nonetheless been appropriated as a core element of national citizenship. At a 1999 White House conference on philanthropy, for instance, William White, president of the Mott Foundation, called philanthropy "just as much a core value of our nation as freedom of speech or freedom of worship."

Thus, private foundations undoubtedly draw some measure of their legitimacy by virtue of their standing as formal, organized expressions of deeply held norms. Yet charitable giving and philanthropy do not require the presence of an organized foundation sector: governments can easily encourage volunteerism and giving by individuals without extending financial privileges to private institutions. To account for the presence of foundations, we must explain why the accumulation and persistence of endowments devoted to support for public purposes deserve legal protections above and beyond those that provide incentives for individual giving.

As the chapters in this volume suggest, one set of answers to the question of why foundations exist focuses on the social functions they are believed to perform. This argument is hardly new: indeed, it is the starting point for much of the small but growing literature on private foundations. And whether foundations are seen as complementing, supplementing, or ameliorating the role of states and markets, the range of functions assigned to them is exceptionally broad. Complementing Prewitt's U.S.-focused analysis of foundation functions in chapter 2, Anheier and Daly extend the discussion to Europe in chapter 8. Their comparative analysis underscores the exceptional breadth of possible functions as well as significant national differences in the way these functions are perceived, valued, and fit into conceptions, or visions, of what constitutes the good society and hence what are seen as appropriate and legitimate actions by foundations.

Frequently noted foundation roles include, prominently, a redistributive function, as Julian Wolpert discusses in chapter 5. Why is it reasonable to exclude the income and capital gains of foundation endowments from taxation? As Wolpert recounts, the privileges of nonprofit status are often justified on the grounds that foundation expenditures supplement the role of the state in the redistribution of resources from those who have to those who need. In this view, the short-term benefits of taxing large estates is outweighed, in theory, by the long-term social gains of foundation payouts for purposes that advance the public welfare. By exempting assets and the revenues they generate from taxation, individuals have an incentive to allocate resources in socially productive ways. However, Wolpert's data challenge the redistributive claims made about private foundations. In one of the few systematic assessments we have of the redistributive effects of foundation giving, he presents convincing evidence that their impact is more limited than advocates of this view might expect. With his work, we now have a new baseline for reassessing one of the most widely held views about the purposes and roles of private foundations.

Beyond their redistributive functions, the presence of private foundations is also justified on the grounds that they perform an innovation function, notably in the arts, sciences, research, and social policy. Absent the pressures and constraints faced by either for-profit organizations or public sector institutions, private foundations are seen as providing societies with a capacity for taking risk that goes beyond the limits of either states or markets.

While these two functions, redistribution and innovation, are compatible, other arguments about the sources of foundation legitimacy are more difficult to reconcile with this functional approach. If Prewitt's argument holds, for example—that the private foundation in the United States is an expression of the underlying liberalism of the American polity, its deeply rooted concern with the limits of state power, the virtue of markets, and the autonomy of the individual—then it matters little what foundations actually do. The more important point is what they represent. Their presence provides symbolic affirmation of America's commitment to economic liberalism. States provide incentives for individuals to use their wealth for public purposes, but intentionally leaves such purposes undefined. This ensures a limited role for the state in the oversight not only of foundation assets, but of their substantive activities as well. It explicitly avoids imposing on foundations a particular functional role.

Alternately, the presence of private foundations is sometimes justified not by their standing as an answer to the question of how a liberal society governs private wealth, but by their capacity to engage in what can be called positive discrimination. Unlike public institutions, which must treat citizens equally, private foundations can discriminate in the use of their resources, targeting funds toward particularistic purposes that benefit a social group or cause but "exclude" others (Smith 1999). Whether by allocating funds to support a particular region, religious affiliation, or social cause, foundations make it possible to accommodate plural identities within a given society. In one sense, this view is consistent with Prewitt's liberal polity argument: differing principles of inclusion and different criteria for access to funding permit private foundations to discriminate in their allocation of resources, and avoid conflicts that might otherwise result if public policies endorsed or permitted inequalities in the management of public funds. Diverse communities can ensure the presence of institutions and services that met their needs, without involving the state in divisive debates about whether and how public resources should serve particularistic ends.

Yet critics of private foundations might question whether these forms of discrimination have been positive in their effects, or served to reinforce distributive and other inequalities among social groups. In this view, what some describe as positive discrimination is seen by others in a different light: the capacity of private foundations to support negative forms of social exclusion. In Europe, where increasingly diverse societies exhibit growing tensions around issues of citizenship and religious identity, the capacity of private foundations for positive discrimination plays into debates about the nature of citizenship and how to accommodate egalitarian norms with increasing levels of social diversity.

In part, this proliferation of roles reflects the reality of a foundation sector populated, in both the United States and Europe, by highly diverse institutions engaged in a wide range of tasks. It also underscores the adaptive quality of private foundations as institutions, and their tractability as mechanisms for the pursuit of a wide range of ends. Yet the scope of arguments about the roles of foundations has an unresolved quality that is worth noting. It opens the door to an important debate, both theoretical and policy-related, about the social roles of private foundations and how these express a given set of legitimacy challenges. The key question is what we can learn from the proliferation of role-based arguments about the legitimacy of foundations, whether our focus is the underlying theories we use to explain foundations, or foundations themselves.

Structure of the Volume

Part I consists of this introductory chapter and Kenneth Prewitt's contribution—which in many ways throws down the gauntlet from a distinctively American perspective. Part II takes up the challenge by highlighting salient functionalist arguments and analyzing deep-running legitimacy concerns as they have played out in the United States, both historically and in contemporary debates. Part III provides a counterpoint by opening the debate to European perspectives. Although there are similarities in the way arguments for or against foundations are shaped, the chapters in this section make a striking case for how different the premises of the European foundation debate are, and hence how the legitimation needs of European foundations vary from their U.S. counterparts. If nothing else, this section clearly outlines how the often insular and self-referential American debate could profit from more serious engagement with European perspectives in efforts to rethink our fundamental understanding of the roles and legitimacy of foundations. Although this volume and its chapters are not intended as a decisive answer to the legitimacy of foundations question, they offer the basis for broader, more truly comparative approach to the issue, and provide many new starting points for how we think about it in the years ahead.

Notes

1. See Billiterri (2005) for an overview of the American payout debate.
2. Yale and Harvard were originally public institutions founded by the seventeenth-century colonial administration.

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