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# LIBERTARIANISM AND THE CHARITABLE TAX SUBSIDIES

MIRANDA PERRY FLEISCHER\*

**Abstract:** Despite libertarianism's political popularity, tax scholarship is largely silent about the interaction between libertarian principles and the structure of our tax system. To fill that gap, this Article mines the nuances of libertarian theory for insights into one feature of our tax system—the charitable tax subsidies—and finds some surprising insights. Although one strand of libertarianism suggests that charitable tax subsidies are in and of themselves illegitimate, several other understandings of libertarianism see a role for the state to engage in a varying amount of redistribution or to provide varying amounts of public goods. Surprisingly, some readings even lend weight to the common criticism that the charitable tax subsidies do not do enough to assist the poor and disadvantaged. Only a lenient interpretation of classical liberalism that conceives of a vibrant non-profit sector as a public good in and of itself and an expansive reading of left-libertarianism support something akin to our current structure, in which elite cultural institutions such as the opera are subsidized even if they provide no free or discounted services to the poor. In addressing these questions, this Article rounds out a series on the interaction of distributive justice and the charitable tax subsidies.

## INTRODUCTION

Although many Americans claim to subscribe to libertarian theories of justice, tax scholarship is largely silent about the interaction between libertarian principles and the structure of our tax system.<sup>1</sup> This is not surprising,

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\* Professor of Law, The University of San Diego. I would like to thank Larry Alexander, Michael Doran, Richard Epstein, Dov Fox, Maimon Schwarzschild, Mila Sohoni, Chris Wonnell, participants in the 2013 Columbia Tax Scholars Workshop and in the Pepperdine School of Law Tax Policy Colloquium, and especially Matt Zwolinski for extremely valuable feedback. I would also like to thank Ally Keegan for helpful research assistance.

<sup>1</sup> Notable exceptions include work by Richard Epstein and Milton Friedman. *See, e.g.*, MILTON FRIEDMAN, CAPITALISM AND FREEDOM 172–76, 191–92 (3d ed. 2002); MILTON FRIEDMAN & ROSE FRIEDMAN, FREE TO CHOOSE: A PERSONAL STATEMENT 120–27, 306–07 (1980); Richard A. Epstein, *Can Anyone Beat the Flat Tax?*, 19 SOC. PHIL. & POL'Y 140 (2002); Richard A. Epstein, *Taxation with Representation: Or, the Libertarian Dilemma*, 18 CAN. J.L. & JURIS. 7 (2005); Richard A. Epstein, *Taxation in a Lockean World*, 4 SOC. PHIL. & POL'Y 49 (1986); *see also* Jennifer Bird-Pollan, *Death, Taxes, and Property (Rights): Nozick, Libertarianism, and the Estate Tax*, 66 MAINE L. REV. 1 (2013) (challenging libertarian arguments against the estate tax); David G. Duff, *Private Property and Tax Policy in a Libertarian World: A Critical Review*, 18 CAN. J. L. & JURIS. 23 (2005) (first discussing the tax policy implications of libertarian theories of

for what springs to mind when one hears the word “libertarianism” is Robert Nozick’s argument that taxation is slavery.<sup>2</sup> If all taxation is indeed slavery, why bother analyzing libertarian principles for insights into our tax system? This dismissal, however, ignores the diversity of libertarian thought.<sup>3</sup> To that end, this Article mines the nuances of libertarian theory for insights into one feature of our tax system: the charitable tax subsidies.

Exploring the nuances of libertarian theory yields some surprising results. Some strands of libertarian thought suggest that the charitable tax subsidies are in and of themselves illegitimate. These strands of libertarianism forbid not only redistribution but also anything except the most minimal provision of public goods needed to protect life and property, such as defense. Yet several other strands do see a role for the state to produce varying amounts of public goods and engage in some redistribution, ranging from providing a safety net to the very poorest to assisting victims of past injustices. Only a lenient interpretation of classical liberalism and an expansive version of left-libertarianism, however, support something more akin to our current structure.

By examining libertarianism, this Article rounds out a series examining what each theory of distributive justice common to legal scholarship suggests for the charitable tax subsidies. The goal of the series is two-fold. First, it argues that even though the charitable tax subsidies are inherently redistributive, existing scholarship on the topic (which focuses on efficiency and pluralism) generally ignores serious discussions of distributional issues.<sup>4</sup> This oversight leaves key questions unanswered in both current law and scholarship: should charities that receive tax benefits be required to help the poor? How valid are common criticisms that subsidized groups do “too much” for the wealthy and “too little” for the poor? How should we

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private property rights on their own terms and then challenging those theories). Scholars have paid much more attention to the interaction of libertarian principles and the broader legal system; perhaps the two most prominent examples are Epstein and Randy Barnett. *See, e.g.*, RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* (rev. ed. 2014); RANDY E. BARNETT, *THE STRUCTURE OF LIBERTY: JUSTICE AND THE RULE OF LAW* (2d ed. 2014); RICHARD A. EPSTEIN, *PRINCIPLES FOR A FREE SOCIETY: RECONCILING INDIVIDUAL LIBERTY WITH THE COMMON GOOD* (2002) [hereinafter EPSTEIN, *PRINCIPLES*]; RICHARD A. EPSTEIN, *SIMPLE RULES FOR A COMPLEX WORLD* (1995) [hereinafter EPSTEIN, *SIMPLE RULES*]; RICHARD A. EPSTEIN, *SKEPTICISM AND FREEDOM: A MODERN CASE FOR CLASSICAL LIBERALISM* (2003) [hereinafter EPSTEIN, *SKEPTICISM*]; Randy E. Barnett, *Afterword: The Libertarian Middle Way*, 16 *CHAPMAN L. REV.* 349 (2013).

<sup>2</sup> *See* ROBERT NOZICK, *ANARCHY, STATE AND UTOPIA* 169 (1974).

<sup>3</sup> For a discussion of the term “libertarianism,” see *infra* notes 68–75 and accompanying text (Part II).

<sup>4</sup> *See* Miranda Perry Fleischer, *Theorizing the Charitable Tax Subsidies: The Role of Distributive Justice*, 87 *WASH. U. L. REV.* 505 (2010) [hereinafter Fleischer, *Theorizing*].

evaluate the distributional impact of various proposals to reform the tax benefits given to the non-profit sector?

Second, the series explores how each theory of distributive justice common to tax scholarship (equality of opportunity theories, utilitarianism,<sup>5</sup> and libertarianism) provides insight into those questions.<sup>6</sup> A nuanced analysis of libertarianism yields counterintuitive answers. One reading of minimal state libertarianism, for example, suggests that only charities that help the very poor should be subsidized, whereas another implies that only organizations assisting individuals who have been harmed by past injustices should be subsidized. These two interpretations lend weight to the common criticism that the charitable tax subsidies do not do enough to assist the poor and disadvantaged. In contrast, classical liberalism suggests that groups providing public goods should be subsidized regardless of whether they assist the poor. Within classical liberalism, a strict understanding would likely narrow the definition of what counts as a public good suffering from market failure, whereas a more lenient interpretation might conceive of a strong non-profit sector as a public good in and of itself. Only that more lenient reading and an expansive reading of left-libertarianism support our current structure, in which elite cultural institutions such as the opera are subsidized even if they provide no free or discounted services to the poor. Most readings of utilitarianism and resource egalitarianism also suggest that there is something special about groups that help the poor and disadvantaged. This overlap suggests that the subsidies should be restructured to emphasize aid to such groups.<sup>7</sup>

In exploring the nuances of libertarian theory, this Article starts from a different baseline from its sister articles. Prior articles first assumed the existence of the charitable tax subsidies as but one part of government efforts to engage in a given type of redistributive activity, and then explored how

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<sup>5</sup> To be clear, some libertarians and classical liberals—most notably Epstein—employ a utilitarian framework in defending their views. In the context of this series, however, I am using the term “utilitarianism” to refer to “left” or non-libertarian, non-classical liberal theories of justice that employ utilitarianism to justify an extensive state with large redistributive programs. These theories—in contrast to those of utilitarian libertarians and classical liberals—place much less emphasis on the importance of private property rights, economic liberty, and private action. Instead, such theories place greater value on the benefits from government action. For example, such theories typically justify greater redistribution on the grounds of diminishing marginal utility and place less emphasis than the classical liberal or libertarian on the consequences to the upper-income individual.

<sup>6</sup> Miranda Perry Fleischer, *Equality of Opportunity and the Charitable Tax Subsidies*, 91 B.U. L. REV. 601 (2011) [hereinafter Fleischer, *Equality of Opportunity*]; Miranda Perry Fleischer, *Utilitarianism and the Charitable Tax Subsidies: Problems and Priorities*, 89 IND. L.J. 1485 (2014) [hereinafter Fleischer, *Utilitarianism*].

<sup>7</sup> The next article in this series addresses how that insight translates into policy recommendations.

charitable tax subsidies to effectuate that redistribution might be structured. That starting point was used because both utilitarianism and equal opportunity theory accept a large role for the government in redistribution and in the provision of public goods. Prior articles thus sidestepped the difficult task of determining whether such goals would be better effectuated solely by the state, or by a combination of state and charitable activity. Instead, the articles reasoned that the valuable non-distributive goals of pluralism and efficiency suggested that subsidized charitable activity would supplement state efforts, and then proceeded from there.<sup>8</sup>

But because the libertarian baseline concerning the proper scope of government is much different, this Article does not initially assume the existence of *any* governmental redistribution efforts or state provision of public goods. Instead, it starts by asking to what extent each strand of libertarian theory countenances the governmental provision of any redistribution or public goods other than those necessary for the night watchman state. The Article then considers which types of public good activities currently subsidized can legitimately be provided by the government, and whether outsourcing such provision through the charitable tax subsidies is consistent with libertarian theory.<sup>9</sup> It sets aside, however, the question of whether the charitable tax subsidies would be the *only* justifiable means to these ends under libertarianism, or whether the state could also engage in these activities.

This Article proceeds as follows. Part I provides background information on the charitable tax subsidies, their theoretical justifications, and the existing questions about which the series as a whole is concerned.<sup>10</sup> Part II briefly addresses what “libertarianism” means,<sup>11</sup> and Part III explores the set of libertarian theories that are grounded in John Locke’s notion of self-ownership and private property rights, including Nozick’s theories.<sup>12</sup> Parts

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<sup>8</sup> The overall goal of the series is not to explore whether a given theory of justice would have charitable tax subsidies in an ideal world and if so, how they would be designed. Attempts to use broad theories of justice to design specific policy systems are fraught with peril. But when questions arise in our current non-ideal world, normative theories underlie our responses. To that end, the goal of the series is to examine how various theories of distributive justice would shape our responses to recurring unanswered questions concerning the charitable tax subsidies: how would those who subscribe to utilitarian theories of justice answer these questions? How would resource egalitarians and libertarians answer them? What insights can we glean from comparing and contrasting these responses?

<sup>9</sup> In so doing, this Article assumes the continuation of an income tax (as opposed to, for example, a consumption tax), even though an ideal libertarian world might not have an income tax. As explained in note 8, *supra*, this Article explores what insights libertarian theory can provide in our existing non-ideal world.

<sup>10</sup> See *infra* notes 16–67 and accompanying text.

<sup>11</sup> See *infra* notes 68–75 and accompanying text.

<sup>12</sup> See *infra* notes 76–145 and accompanying text.

IV and V, respectively, explore classical liberalism<sup>13</sup> and left-libertarianism.<sup>14</sup> Part VI discusses an assumption implicit in the rest of the Article: the idea that if the government is justified in conducting a given activity, then subsidizing the charitable sector to do so is consistent with libertarianism.<sup>15</sup>

## I. THE CHARITABLE TAX SUBSIDIES: THEORETICAL JUSTIFICATIONS AND UNRESOLVED ISSUES

Although this Article does not take the existence of the charitable tax subsidies as a given, a sense of their theoretical justifications—and the unanswered questions that remain—is helpful to understand the series as a whole and this Article’s contribution. Namely, a number of distributional questions are unresolved by current law and scholarship. This series seeks to compare and contrast the most common theories of distributive justice—including libertarianism—for insights into those questions. Additionally, it is interesting to consider to what extent libertarianism supports or contradicts current justifications for the subsidies, for such an understanding could help policymakers assess the current structure.

Accordingly, section A of this Part explains the concept of tax subsidies generally.<sup>16</sup> Section B discusses the most common theories proffered for subsidizing charities;<sup>17</sup> section C then explores the rationales for using tax subsidies as the mechanism to do so.<sup>18</sup> Section D discusses some of the questions left unanswered by the theoretical justifications for granting tax subsidies to charities,<sup>19</sup> and section E explains why distributive justice concerns are relevant to those questions.<sup>20</sup>

### A. *The Concept of Tax Subsidies*

Section 170(c) of the Internal Revenue Code allows individuals who donate to charity to reduce their taxable income by the amount donated;<sup>21</sup> section 501(c)(3) exempts charitable organizations from the corporate income tax.<sup>22</sup> These provisions, along with a variety of other tax benefits,

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<sup>13</sup> See *infra* notes 146–286 and accompanying text.

<sup>14</sup> See *infra* notes 287–321 and accompanying text.

<sup>15</sup> See *infra* notes 322–324 and accompanying text.

<sup>16</sup> See *infra* notes 21–30 and accompanying text.

<sup>17</sup> See *infra* notes 31–32 and accompanying text.

<sup>18</sup> See *infra* notes 33–43 and accompanying text.

<sup>19</sup> See *infra* notes 44–63 and accompanying text.

<sup>20</sup> See *infra* notes 64–67 and accompanying text.

<sup>21</sup> I.R.C. § 170(c) (2012).

<sup>22</sup> I.R.C. § 501(c)(3) (2012).

such as the deduction for home mortgage interest<sup>23</sup> or credits for purchasing solar panels,<sup>24</sup> are widely considered to be subsidies for favored social policies that are hidden in the tax code. This concept (known as “tax expenditure analysis”) emerged in the 1960s, based on the hope that by identifying hidden spending in the tax code, such provisions might be evaluated in the same manner as direct spending, their numbers reduced, and overall government spending decreased.<sup>25</sup>

Briefly, tax expenditure analysis holds that any deviations from an ideal income tax base<sup>26</sup> for social policy reasons should be considered indirect spending.<sup>27</sup> To illustrate, assume that based on an ideal income tax, *Adam* would owe tax of \$100. Next, imagine that society decides that anyone who purchases residential solar panels should receive a tax credit of \$10. *Adam* purchases solar panels for his home, and reduces his taxes to \$90. It is as if the government paid for \$10 of his solar panels; the government has \$10 less in its pocket (from the foregone revenue) and *Adam* has \$10 more in his pocket (from the decrease in his taxes).

How does this apply in the case of charitable giving? Economists and tax scholars generally use the Schanz-Haig-Simons definition of income to determine what a “pure” income tax would tax.<sup>28</sup> Under this definition, income equals the sum of personal consumption plus increases in one’s wealth. If *Adam* spends \$750 on personal consumption items such as food, clothes, housing, and wine during the year, and the value of his investments increases by \$250, *Adam* has \$1,000 in income. If, however, *Adam* spends \$100 on items like paper clips for his business, that expenditure should not be treated as personal consumption, and that \$100 should not be considered part of *Adam*’s income. An ideal income tax would therefore disallow deductions for personal expenditures but allow deductions for business expenses.

It is easy to identify the credit for solar panels as a tax expenditure. Housing is clearly a personal consumption expenditure, so reducing *Adam*’s taxes because he buys solar panels for his house is an easily identifiable

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<sup>23</sup> I.R.C. § 163(h)(3) (2012).

<sup>24</sup> I.R.C. § 25D (2012).

<sup>25</sup> Stanley S. Surrey & Paul R. McDaniel, *The Tax Expenditure Concept and the Budget Reform Act of 1974*, 17 B.C. INDUS. & COM. L. REV. 679, 679–81 (1974) (Surrey, the first to articulate this subject, termed this concept “tax expenditure analysis”); see *id.* at 697–98 (discussing the benefits of considering tax expenditures openly).

<sup>26</sup> Dispute exists as to whether income is, in fact, the best tax base to use, or whether a different tax base—such as wealth, endowment, or benefits received—should be used.

<sup>27</sup> See Surrey & McDaniel, *supra* note 25, at 680.

<sup>28</sup> See, e.g., Jerome Kurtz, *The Interest Deduction Under Our Hybrid Tax System: Muddling Toward Accommodation*, 50 TAX L. REV. 153, 158 (1995) (discussing the prominence of what is termed “the Haig-Simons definition”).

deviation from the norm of taxing income. Although it might be harder for a layperson to see, most tax scholars—across the ideological spectrum—agree that charitable giving should also be considered personal consumption.<sup>29</sup> One voluntarily gives to charity, much like one decides whether to spend money on wine or a new sweater. In addition, donors receive a number of benefits (some tangible and some intangible), such as the “warm glow” of giving, the satisfaction of furthering causes that they support, and prestige and recognition from others.<sup>30</sup>

### B. Why Subsidize Charitable Activities?

Based on the foregoing, most tax theorists consider sections 170(c) and 501(c)(3) subsidies for the charitable sector.<sup>31</sup> Theorists disagree, however, about why that sector deserves a subsidy. The oldest argument (the “traditional subsidy theory”) is that non-profit organizations provide benefits that are “good” for society. For example, they often reduce governmental burdens, such as poor relief. Charities also provide diverse solutions to problems facing our society, and they offer alternative artistic and cultural viewpoints. Finally, the very existence of a healthy charitable sector can act as a counterweight to governmental power and can enrich pluralism.

The newer, more accepted justification for subsidizing non-profits is grounded in economics. According to this “economic subsidy theory,” subsidizing charities helps them to provide public goods that would otherwise

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<sup>29</sup> Although in the minority, a few academics justify these provisions on measurement grounds. See, e.g., William D. Andrews, *Personal Deductions in an Ideal Income Tax*, 86 HARV. L. REV. 309, 346 (1972) (discussing the charitable deduction); Boris I. Bittker & George K. Rahdert, *The Exemption of Nonprofit Organizations from Federal Income Taxation*, 85 YALE L.J. 299, 333 (1976) (analyzing tax exemption).

<sup>30</sup> See M. Todd Henderson & Anup Malani, *Corporate Philanthropy and the Market for Altruism*, 109 COLUM. L. REV. 571, 583 (2009); see also Brian Galle, *Social Enterprise: Who Needs It?*, 54 B.C. L. REV. 2025, 2029 (2013) (discussing how current tax policy subsidizes the “warm glow”). Henderson and Malani go on to describe the “market” for charitable activity and offer an argument justifying corporate charitable activity on the grounds that shareholders care about utility from charitable activity in addition to monetary profits. See Henderson & Malani, *supra*, at 588–90.

<sup>31</sup> To illustrate, consider a taxpayer whose marginal rate is 40%. If she makes a \$100 donation to charity and receives a \$100 deduction, the deduction reduces her tax bill by \$40. This \$40 reduction in taxes lowers the net cost to her of her charitable transfer to \$60, with the government in essence picking up the remaining \$40 (the charity still gets \$100, and the government has foregone \$40 in revenue it would otherwise collect). Offering taxpayers a subsidy for making charitable gifts is thought to encourage taxpayers to make more contributions, in turn increasing the size and scope of non-profit activity. Tax exemption aids charities as follows. A taxable organization with net revenues of \$100,000 that faces a 40% tax bill would have only \$60,000 after taxes. But an exempt organization with similar revenues pays zero tax (ignoring the unrelated business income tax), leaving it all \$100,000 to spend on charitable activities in the future. The \$40,000 in taxes that the government foregoes from the exempt group is its subsidy.

be under-produced. In the market, free-rider and other informational problems lead to market failure. At the government level, the median voter's preferences<sup>32</sup> or the outcome of processes such as logrolling can also lead to under-production. The charitable tax subsidies represent an implicit bargain among those who favor the various under-supplied public goods, with supporters of each good agreeing to provide partial funding (by means of the subsidy) for the public goods supported by others. In this manner, the charitable tax subsidies allow taxpayers with tastes not reflected in the initial legislative process to redirect part of the funds otherwise flowing to the federal fisc toward their preferred public projects.

### C. Using the Tax System to Subsidize Charity

The foregoing, of course, assumes that it is government's role to provide the public goods or benefits just described. As this Article demonstrates, many strands of libertarian thought dispute that assumption, although some admit that limited redistribution or the limited provision of public goods is a proper role of government. Once it has been decided that government has a role to play in providing a given benefit, the next question is why charitable tax subsidies should be part of that project.

Putting aside for now any reasons specific to libertarianism,<sup>33</sup> theorists have identified several benefits from subsidizing charitable activity through the tax system. One theory argues that providing indirect subsidies via tax deductions (or credits)<sup>34</sup> is more efficient than providing direct grants, because tax deductions allocate a given project's cost in proportion to how much one values the project.<sup>35</sup> In contrast, direct grants would increase eve-

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<sup>32</sup> Although majority preferences do not always prevail, the literature generally uses such a model for simplicity. See, e.g., JOHN D. COLOMBO & MARK A. HALL, THE CHARITABLE TAX EXEMPTION 102 (1995); Burton A. Weisbrod, *Toward a Theory of the Voluntary Nonprofit Sector in a Three-Sector Economy*, in THE ECONOMICS OF NONPROFIT INSTITUTIONS 21, 22–26 (Susan Rose-Ackerman ed., 1986).

<sup>33</sup> Part VI of this Article discusses whether subsidizing the private production of public goods through the tax system is consistent with libertarianism. See *infra* notes 322–324 and accompanying text.

<sup>34</sup> Scholars debate, however, whether a tax deduction or a tax credit is more efficient. Compare Jeff Strnad, *The Charitable Contribution Deduction: A Politico-Economic Analysis*, in THE ECONOMICS OF NONPROFIT INSTITUTIONS, *supra* note 32, at 265, 272–76 (supporting a deduction), with Harold M. Hochman & James D. Rodgers, *The Optimal Tax Treatment of Charitable Contributions*, in THE ECONOMICS OF NONPROFIT INSTITUTIONS, *supra* note 32, at 224, 236 (supporting a credit).

<sup>35</sup> See Mark P. Gergen, *The Case for a Charitable Contributions Deduction*, 74 VA. L. REV. 1393, 1399–1406 (1988) (summarizing the works of Hochman, Rodgers, and Weisbrod on both the deduction and exemption). This is so because high-demanders pay “more” by making a voluntary donation to the project, whereas low-demanders pay “less” by refusing to contribute but being forced (through the tax system) to indirectly pay something. See *id.* at 1402–03. This forced pay-

ryone's taxes uniformly, which would rarely (if ever) reflect the value a given taxpayer placed on the project.<sup>36</sup>

Other theorists emphasize pluralism. In particular, Saul Levmore conceptualizes the charitable deduction as a mechanism that allows individual taxpayers to "vote" on which projects deserve subsidies, and at what level.<sup>37</sup> This "taxes as ballots" theory argues that allowing taxpayers to vote in this manner best matches taxpayer support for a given project with the size of the subsidy granted to it.<sup>38</sup> It further suggests that allowing taxpayers to have a say in determining which projects to fund will increase their commitment to such projects, their activity levels as volunteers and monitors, and their toleration for higher levels of redistribution and government-funded public goods.<sup>39</sup> David Schizer similarly posits that giving individual taxpayers a voice in choosing which projects to support enhances generosity and monitoring.<sup>40</sup>

The "donative theory" developed by John Colombo and Mark Hall identifies dual benefits from having taxpayers decide which activities to subsidize when they make donations.<sup>41</sup> The theory first argues that the existence of donations signals that the recipient organization's activities are under-supplied by the market and government and that the project therefore needs a subsidy.<sup>42</sup> It next argues that the contributions show that project deserves a subsidy by demonstrating that the public believes the activities are

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ment is thought to reflect the fact that low-demanders do receive some benefit (even if small) from the subsidized project. *See id.*

<sup>36</sup> *Id.* at 1402 ("People who desire more of a collective good, but who do not place great value on the increase, may refuse to support a subsidy because they fear that they will bear a disproportionate share of the tax cost.")

<sup>37</sup> Saul Levmore, *Taxes as Ballots*, 65 U. CHI. L. REV. 387, 405 (1998). When someone donates to charity and takes the corresponding deduction, he or she "votes" for that charity to receive a federal subsidy equal to the foregone tax revenue. *See id.* ("[E]ach individual taxpayer's choice, deduction, or 'ballot,' . . . triggers a matching government contribution in the form of a reimbursement of part of the taxpayer-donor's gift."). Saul Levmore acknowledges two common criticisms of this structure. *Id.* at 405–06. First, allowing taxpayers to vote this way could be compared to a "poll tax" because one must make an out-of-pocket payment to trigger a subsidy. Second, using a deduction (instead of a credit) gives more "votes" to higher-bracket taxpayers because of the upside-down effect of deductions.

<sup>38</sup> *See id.* at 411–12; *see also* David M. Schizer, *Subsidizing Charitable Contributions: Incentives, Information and the Private Pursuit of Public Goals*, 62 TAX L. REV. 221, 229 (2009).

<sup>39</sup> Levmore, *supra* note 37, at 406.

<sup>40</sup> Schizer, *supra* note 38, at 230–42, 257–67. Although Levmore and Schizer focused on the charitable contributions deduction, their arguments are somewhat translatable to tax exemption: all a taxpayer needs to do to direct a subsidy to a given project is start the requisite organization or purchase goods and services from it.

<sup>41</sup> COLOMBO & HALL, *supra* note 32, at 99.

<sup>42</sup> *Id.* at 107. One might wonder why donations alone are not enough to fund the activity at an appropriate level. Colombo and Hall respond that voluntary donations are subject to the same free-rider problems that plague market provision, thus requiring a further subsidy from the government. *Id.* at 104–05.

beneficial.<sup>43</sup> According to the donative theory, therefore, donations signal worthiness for both the deduction and tax exemption.

#### *D. Lingering Questions*

Despite the valuable insights into the charitable tax subsidies provided by existing scholarship, several questions remain unanswered. Most notably, existing law and current scholarship provide little help in prioritizing which projects deserve subsidies. The purposes listed in Internal Revenue Code sections 170 and 501 are vague and broadly construed; further, the negative prohibitions (such as the private inurement doctrine) that are used to police subsidized groups do little to illuminate why some activities but not others deserve a subsidy.

Why is this breadth troubling? Given the differing conceptions of “the good” that citizens hold in our pluralistic society, why not allow such a wide range of groups to qualify for the charitable tax subsidies? Why explore the interaction of the charitable tax subsidies and distributive justice? This section briefly summarizes arguments tackled extensively elsewhere.<sup>44</sup> In addition to efficiency and pluralism, we must consider distributive justice to have a full understanding of the charitable tax subsidies.

#### 1. Current Law Is Confused

One consequence of this breadth is that current law inconsistently requires some organizations, but not others, to help the poor in order to qualify for the subsidies. If a group serves an enumerated purpose other than the catch-all “charitable” purpose (as educational and religious organizations do), it is *not* required to help the poor. Schools, for example, can qualify for the charitable tax subsidies without offering any scholarship assistance. This is so even though U.S. Supreme Court precedent requires enumerated-purpose organizations to be “charitable”<sup>45</sup> in other aspects of their operation, and “charitable” organizations sometimes must help the poor. The reason for distinguishing among the statutory purposes in this manner remains unexplained.<sup>46</sup>

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<sup>43</sup> *Id.* at 163–64.

<sup>44</sup> Fleischer, *Theorizing*, *supra* note 4, at 508 (“While identifying these advantages is a necessary and important contribution to our understanding of charitable giving policy, avoidance of distributive justice concerns ignores the very purpose of charity: voluntary redistribution.”).

<sup>45</sup> *Bob Jones Univ. v. United States*, 461 U.S. 574, 586 (1983) (refusing tax exemption to a university with a racially-discriminatory admissions policy because “entitlement to tax exemption depends on meeting certain common-law standards of charity”).

<sup>46</sup> John Simon et al., *The Federal Tax Treatment of Charitable Organizations*, in *THE NON-PROFIT SECTOR: A RESEARCH HANDBOOK* 267, 277–78 (Walter W. Powell & Richard Steinberg eds., 2d ed. 2006) (discussing how some subsidized groups but not others are required to help the

Moreover, not all “charitable” groups are required to help the poor to qualify for the tax subsidies. For example, arts organizations do not need to help the poor to qualify, but housing assistance organizations generally do. Helping middle-class families afford housing in an otherwise unaffordable place like Manhattan is not considered charitable; providing housing assistance to such families is considered charitable only if the neighborhood is decaying or the assisted families are racial minorities.<sup>47</sup>

Similarly, the law governing health care organizations and aid to the poor is a mess. Technically, hospitals do not have to provide free or discounted services to the poor.<sup>48</sup> A number of scholars have noted, however, that hospitals are essentially required to do so by accepting Medicaid or having an open emergency room policy. Moreover, IRS rulings and court opinions basically require other types of health organizations, such as pharmacies and Health Maintenance Organizations (“HMOs”), to offer reduced-cost care to the poor.<sup>49</sup>

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poor); John D. Colombo, *The Role of Redistribution to the Poor in Federal Tax Exemption 4–13* (2009) (unpublished manuscript) (on file with author) (discussing the changing standards used by courts and the IRS to determine whether groups are eligible for the subsidies).

<sup>47</sup> Rev. Rul. 70-585, 1970-2 C.B. 115 (allowing tax exemption for organizations encouraging and supporting housing opportunities for low- and moderate-income families in neighborhoods where such housing helps reduce racial and ethnic imbalances and in neighborhoods where such housing helps combat community deterioration, but not for organizations encouraging and supporting housing opportunities for moderate-income families in neighborhoods lacking housing for such families).

<sup>48</sup> Rev. Rul. 83-157, 1983-2 C.B. 94 (specialized hospitals without emergency rooms offering no free or reduced-cost services to the poor may qualify for exemption); Rev. Rul. 69-545, 1969-2 C.B. 117 (hospitals can qualify for exemption without offering inpatient care to indigent patients if they offer an open emergency room). That said, several states have begun challenging whether hospitals that do not offer free or reduced-cost services to the poor are eligible for property tax exemptions. *See, e.g., Provena Covenant Med. Ctr. v. Dep’t of Revenue*, 925 N.E.2d 1131, 1154–55 (Ill. 2010) (upholding the revocation of a hospital’s property tax exemption); *see also* John D. Colombo, *Provena Covenant: The (Sort of) Final Chapter*, 65 *Exempt Org. Tax Rev.* 489, 496 (2010).

<sup>49</sup> *See, e.g., IHC Health Plans, Inc. v. Comm’r*, 325 F.3d 1188, 1200 (10th Cir. 2003) (denying exempt status to an HMO that did not offer free or below-cost medical services); *Fed’n Pharm. Serv., Inc. v. Comm’r*, 625 F.2d 804, 809 (8th Cir. 1980) (denying exemption to a pharmacy that sold drugs and other items at cost to the poor and elderly); John D. Colombo, *The Failure of Community Benefit*, 15 *HEALTH MATRIX* 29, 30–37 (2005) (detailing various rulings denying tax exempt status to HMOs). In contrast, art galleries and community theaters need not reduce fees to the poor in order to qualify, yet groups that provide other recreational facilities for adults (such as health clubs) are generally required to do so. *See Goldsboro Art League v. Comm’r*, 75 T.C. 337, 344 (1980) (art galleries qualified for tax subsidies even though they did not reduce fees for the poor); John D. Colombo, *The Role of Access in Charitable Tax Exemption*, 82 *WASH. U. L.Q.* 343, 358–60, 384 (2004) (explaining how the IRS and the Tax Court historically have distinguished between non-profit and for-profit arts organizations and community theaters). In at least one instance, however, an ice rink received exempt status with little more than vague plans to offer some sort of program for disadvantaged children. *I.R.S. Priv. Ltr. Rul. 05-32-058* (Aug. 12, 2005) (“A . . . [p]rogram shall be offered to provide disadvantaged youth in the local area the opportunity to

The outpouring of charity after the September 11 terrorist attacks highlighted this confusion. Before September 11, disaster relief groups such as the Red Cross were allowed to help only victims with financial need. When such groups indicated that they would help families of all the victims, regardless of financial need, the IRS balked. After public outcry, the IRS relented and allowed assistance to non-needy families if the assistance was made “in good faith using objective standards.”<sup>50</sup>

## 2. Public Policy Debates Raise Distributive Concerns

Several public policy debates concerning the charitable tax subsidies also implicate distributive justice considerations. Several recent congressional hearings on the subsidies have raised the issue of aid to the poor,<sup>51</sup> with both witnesses and lawmakers urging that Congress increase incentives for charitable gifts that help the poor.<sup>52</sup> A number of other commentators have voiced similar concerns; debates about the size and use of university endowments also raise the issue.<sup>53</sup> Likewise, some states have scaled back

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learn to skate and to attend a day program at the Ice Arena.”). In that case, the IRS held that simply providing recreation on a nondiscriminatory basis promoted social welfare, thus meriting a subsidy. *Id.*

<sup>50</sup> I.R.S. Notice 2001-78, 2001-2 C.B. 576; see JAMES J. FISHMAN & STEPHEN SCHWARZ, *TAXATION OF NONPROFIT ORGANIZATIONS* 143–47 (2d ed. 2006) (summarizing the status of disaster relief as a charitable purpose); see also David Barstow & Diana B. Henriques, *I.R.S. Makes an Exception on Terror Aid*, N.Y. TIMES, Nov. 17, 2001, at B1 (reporting announcement of I.R.S. Notice 2001-78 and reactions thereto).

<sup>51</sup> *Tax-Exempt Charitable Organizations: Hearing Before the Subcomm. on Oversight of the H. Comm. on Ways & Means*, 110th Cong. 4 (2007) (statement of Rep. John Lewis, Chairman, Subcomm. on Oversight of the H. Comm. on Ways & Means) (announcing the hearing and noting that one goal thereof will be to “review . . . charities’ efforts to assist diverse communities”); *To Examine Whether Charitable Organizations Serve the Needs of Diverse Communities: Hearing Before the Subcomm. on Oversight of the H. Comm. on Ways & Means*, 110th Cong. 4 (2007) [hereinafter *Diverse Communities Hearing*] (statement of Rep. John Lewis, Chairman, Subcomm. on Oversight of the H. Comm. on Ways & Means) (“[T]he resources of the charitable community do not exactly match our needs. Sadly those with the greatest need are not always served.”).

<sup>52</sup> See *Diverse Communities Hearing*, *supra* note 51, at 57 (statement of Rep. Xavier Becerra, Member, Subcomm. on Oversight of the H. Comm. on Ways & Means) (“So, you could probably incent noble activity by providing a better return for your contribution . . . if [it is] directed at the general welfare, or direct general welfare of serving those who are in need[.]”).

<sup>53</sup> For example, former Labor Secretary Robert B. Reich has argued that the charitable sector needs to do more to promote equality and aid the less fortunate. Robert B. Reich, Opinion, *Revamp Deductions for the Rich’s ‘Charities,’* PITT. TRIB. REV. (Oct. 7, 2007), [http://triblive.com/x/pittsburghtrib/opinion/columnists/guests/s\\_531422.html](http://triblive.com/x/pittsburghtrib/opinion/columnists/guests/s_531422.html) [<http://perma.cc/7YHA-FPRZ>] (proposing that donors be allowed to deduct the full amount of contributions to agencies that help the poor but only half the amount of contributions to other non-profits); see also Pablo Eisenberg, Opinion, *What’s Wrong with Charitable Giving—and How to Fix It*, WALL ST. J., Nov. 9, 2009, at R1 (urging foundations and wealthy donors to direct more of their giving to the poor and disadvantaged); Stephanie Strom, *Big Gifts, Tax Breaks and a Debate on Charity*, N.Y. TIMES, Sept. 6, 2007, at A1 (collecting arguments for and against the proposition that more tax-subsidized charitable giving should help the poor).

property tax benefits for hospitals that do not provide a certain level of charity care; a few years ago, the Illinois Supreme Court revoked the state property tax exemption of a non-profit hospital on such grounds.<sup>54</sup> Lastly, some early versions of the Affordable Care Act required hospitals to provide certain levels of charity care, although that requirement was later removed.

In addition, policymakers are discussing several reforms to the charitable deduction's structure. These range from capping the value of all itemized deductions to twenty-eight percent (even if the donor is in a higher bracket), instituting a floor beneath which contributions would not be deductible, or changing the deduction to a credit.<sup>55</sup> Each proposal would likely cause some donors to contribute less, and others to contribute more.<sup>56</sup> Because high- and low-income donors generally contribute to different kinds of organizations, each proposal would likely change the amount of donations to various kinds of non-profits.<sup>57</sup> Some organizations would be helped and some would be hurt, and the system needs a way to evaluate these outcomes.

### 3. Existing Scholarship Is Incomplete

Existing scholarship provides little guidance on these questions, as it generally ignores distributive concerns. This is largely purposeful. Scholars turned to efficiency in the 1970s and 1980s out of frustration with the vagueness of the traditional subsidy theory, hoping to create objective tests for the charitable tax subsidies.<sup>58</sup> In the 1990s and later, scholars refined these tests by integrating pluralism concerns.<sup>59</sup> Together, existing scholarship provides the following test for determining whether to subsidize a given project: (1) it must be a pure or impure public good; (2) it must suffer from market and government failures; (3) it cannot directly benefit the donor; and (4) it must have some threshold level of support from people other than the donor.<sup>60</sup>

Unfortunately, this body of scholarship is necessary but not sufficient for a full understanding of the charitable subsidies.<sup>61</sup> As an initial matter, these tests do not help us prioritize among the many projects meeting their

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<sup>54</sup> *Provena Covenant*, 925 N.E.2d at 1146–51.

<sup>55</sup> See generally CONG. BUDGET OFF., *OPTIONS FOR CHANGING THE TAX TREATMENT OF CHARITABLE GIVING* (2011) (analyzing the effects of various options for altering the tax treatment of charitable giving).

<sup>56</sup> See *id.*

<sup>57</sup> See *id.*

<sup>58</sup> Fleischer, *Theorizing*, *supra* note 4, at 530.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 531.

<sup>61</sup> See generally *id.* (arguing that a full understanding of the charitable tax subsidies requires consideration of distributive justice issues).

objective criteria. On the broadest level, what do we do when resources are scarce?<sup>62</sup> How do we evaluate reform proposals that have winners and losers? And more narrowly, how do we know if a given project really is a “public good”? After all, there are certain activities (like religion) that some consider “public goods” but that others consider “social costs.” Does a voluntary donation necessarily demonstrate the project’s worthiness? To borrow from Schizer, “[W]hy does the fact that a group of people want a ketchup museum justify subsidizing it?”<sup>63</sup> More significantly, what should we do when the project in question is not harmless (like the ketchup museum), but one that almost everyone agrees is harmful, such as racially segregated schools?

### *E. The Role of Distributive Justice*

In light of these unanswered questions, distributive justice is a logical place to turn for guidance for several reasons. First, the charitable tax subsidies are inherently redistributive. This is obvious with respect to the charitable giving that the charitable deduction seeks to encourage: one person (the donor) parts with money or property, and another (the charity’s patron) benefits in the form of charitable goods or services.<sup>64</sup> And with respect to both donative and non-donative organizations (groups that charge for their services, such as day care and health organizations) taxpayers pay more taxes than they would otherwise so that the group in question can receive a subsidy. The charitable tax subsidies are part of the tax system,<sup>65</sup> and distributive justice issues play a key role in many other tax policy debates.<sup>66</sup>

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<sup>62</sup> Several states, for example, have proposed limiting the tax benefits offered to non-profits in light of the economic downturn. Terry Schwadron, *To Tax or Not to Tax? Cities Ask the Billion-Dollar Question*, N.Y. TIMES, Nov. 12, 2007, at H30 (“Despite a long tradition of waiving taxes for charitable non-profit groups, communities are feeling more pressure to eliminate property-tax exemptions . . . as communities struggle over diminishing revenue . . .”).

<sup>63</sup> Fleischer, *Theorizing*, *supra* note 4, at 532; Schizer, *supra* note 38, at 230 (presenting a hypothetical eccentric donor determined to build a ketchup museum).

<sup>64</sup> See John K. McNulty, *Public Policy and Private Charity: A Tax Policy Perspective*, 3 VA. TAX REV. 229, 247 (1984) (“Any analysis of philanthropy and its related tax allowances must consider that both its purpose and consequence is the redistribution of resources. Indeed, at an elemental level redistribution seems to be what philanthropy is.”).

<sup>65</sup> See, e.g., Thomas D. Griffith, *Theories of Personal Deductions in the Income Tax*, 40 HASTINGS L.J. 343, 345 (1989) (“[A] satisfactory tax policy must make its underlying ethical assumptions and distributional goals explicit.”).

<sup>66</sup> See, e.g., Daniel N. Shaviro, *Endowment and Inequality*, in TAX JUSTICE: THE ONGOING DEBATE 123, 125 (Joseph J. Thorndike & Dennis J. Ventry, Jr. eds., 2002); Anne L. Alstott, *Equal Opportunity and Inheritance Taxation*, 121 HARV. L. REV. 469 (2007); William D. Andrews, *Fairness and the Personal Income Tax: A Reply to Professor Warren*, 88 HARV. L. REV. 947, 947–53 (1975); Joseph Bankman & Thomas Griffith, *Social Welfare and the Rate Structure: A New Look at Progressive Taxation*, 75 CAL. L. REV. 1905, 1907 (1987) (“[A]ll [tax] rate structures must be premised upon, and measured by, a theory of distributive justice.”); Lily L. Batchel-

To that end, this Article is part of a series that explores the theories of distributive justice most common to tax scholarship (libertarianism, utilitarianism, and equality of opportunity theories) for insight into these unresolved questions. For the most part, this series takes the existence of the charitable tax subsidies as a given. It is not attempting to assess whether an ideal utilitarian or egalitarian world, for example, would have the charitable tax incentives and what those incentives would look like.<sup>67</sup> Instead, the series argues that answers to existing questions concerning the charitable tax subsidies will turn on our underlying normative priors. Looking more closely at the most common theories of justice will show how each theory might answer those existing normative questions. If one is a resource egalitarian, what answers does a close read of egalitarian theory provide? Utilitarian theory? Libertarian theory?

In exploring these questions, this Article on libertarianism and prior articles on equality of opportunity and utilitarianism assessed their respective theories of justice in isolation. The series will conclude by reviewing the theories together, to see what insights can be gleaned from comparing and contrasting the responses that each theory provides. One such insight, for example, is that the non-profit activity for which there is the most overlap among the various distributive theories are programs that help the very poor, suggesting that there is something special about these organizations.

## II. LIBERTARIAN POLITICAL THEORY IN BRIEF

Quite generally, libertarianism celebrates individual rights to be free from coercion, respect for private property rights, the primacy of the free market, and the idea that the market's resulting distributions are just and should generally not be disturbed.<sup>68</sup> What exactly this means, however, is

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der, *What Should Society Expect from Heirs? The Case for a Comprehensive Inheritance Tax*, 63 TAX L. REV. 1, 2 (2009); Walter J. Blum & Harry Kalven, Jr., *The Uneasy Case for Progressive Taxation*, 19 U. CHI. L. REV. 417 (1952); Barbara H. Fried, *Fairness and the Consumption Tax*, 44 STAN. L. REV. 961 (1992); Edward J. McCaffery, *The Uneasy Case for Wealth Transfer Taxation*, 104 YALE L.J. 283, 291–92 (1994); Michael J. Graetz, *To Praise the Estate Tax, Not to Bury It*, 93 YALE L.J. 259, 274–78 (1983); Eric Rakowski, *Transferring Wealth Liberally*, 51 TAX L. REV. 419, 430 (1996); Alvin Warren, *Would a Consumption Tax Be Fairer Than an Income Tax?*, 89 YALE L.J. 1081, 1082 (1980); Lawrence Zelenak, *Taxing Endowment*, 55 DUKE L.J. 1145, 1149–72 (2006).

<sup>67</sup> It might be the case, for example, that in an ideal resource egalitarian world, direct government programs would be the only means of effectuating the ideal distribution.

<sup>68</sup> For overviews of libertarian thought, see HARRY BRIGHOUSE, JUSTICE 86–94 (2004); WILL KYMLICKA, CONTEMPORARY POLITICAL PHILOSOPHY: AN INTRODUCTION 102–65 (2d. ed. 2002); Eric Mack & Gerald F. Gaus, *Classical Liberalism and Libertarianism: The Liberty Tradition*, in HANDBOOK OF POLITICAL THEORY 115, 124–29 (Gerald F. Gaus & Chandran Kukathas eds., 2004); Matt Zwolinski, *Classical Liberalism and the Basic Income*, 6 BASIC INCOME STUD. 1 (2011) [hereinafter Zwolinski, *Basic Income*]; Peter Vallentyne & Bos van der Vossen, *Libertari-*

contested. Most legal academics, for example, associate libertarianism with Nozick, who famously asserted that only “a minimal state, limited to the narrow functions of protection against force, theft, fraud, enforcement of contracts, and so on, is justified”<sup>69</sup> and that “taxation is on par with forced labor.”<sup>70</sup>

Such a view (commonly referred to as “minimal state libertarianism”), however, is but one point along a spectrum. Some theorists (“anarcho-capitalists”) disagree that *any* state is justified at all, arguing that voluntary associations can provide the desired protection.<sup>71</sup> A third group (“classical liberals”) believes that the government can legitimately provide a limited amount of public goods, though classical liberals differ in the amount and type of public goods they believe are justified. At one end of the classical liberal spectrum are those who believe that the government can legitimately fund varying amounts of public goods,<sup>72</sup> even though they oppose many of the activities engaged in by our current government as well as the greater amount of redistribution favored by other kinds of utilitarians and resource egalitarians. On the other end of the spectrum are libertarians who also believe that the state can legitimately provide a minimal safety net to the destitute, or some type of “basic income” to all. And a fourth interpretation, “left libertarianism,” supports a large amount of redistribution, much like resource egalitarianism.<sup>73</sup>

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*anism*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2014), <http://plato.stanford.edu/archives/fall2014/entries/libertarianism> [<http://perma.cc/TG2J-ECJ5>]; and Matt Zwolinski, *Libertarianism*, INTERNET ENCYC. PHIL., <http://www.iep.utm.edu/libertar> [<http://perma.cc/SA9D-NX9L>].

<sup>69</sup> NOZICK, *supra* note 2, at ix.

<sup>70</sup> *Id.* at 169.

<sup>71</sup> See, e.g., DAVID D. FRIEDMAN, *THE MACHINERY OF FREEDOM* (3d ed. 2014); MICHAEL HUEMER, *THE PROBLEM WITH POLITICAL AUTHORITY* (2013); MURRAY ROTHBARD, *THE ETHICS OF LIBERTY* (1982). This Article sets aside these libertarian anarchist views and does not discuss them further. If they oppose even Nozick’s minimalist state, they would certainly oppose a state with taxes and tax subsidies for charitable purposes.

<sup>72</sup> Even here, however, classical liberals differ among themselves in how rigid a definition of “public good” they would require.

<sup>73</sup> Both “right-libertarians” (which include anarcho-capitalists, minimal state libertarians, and classical liberals) and “left-libertarians” assume an initial right of self-ownership. “Left-libertarians,” however, argue that the right of self-ownership does not lead to private property rights in what were previously *commonly-owned* natural resources. In their view, redistributive taxation is justified to compensate non-appropriators for their lost use rights. See Part V, *infra* notes 287–321 and accompanying text, for a longer discussion of left-libertarianism. In contrast, “right-libertarians” believe that self-ownership leads to private property rights in previously *un-owned* natural resources. Although this overlaps on many economic matters with “right” political doctrines (for example, opposition to most governmental economic regulation), it often parts with the political right when it comes to social policies. Most “right-libertarians,” for example, support policies such as drug legalization, equal rights regardless of sexual orientation, and abortion rights and oppose programs such as the death penalty and prayer in schools. To that end, Matt Zwolinski

Readers unfamiliar with the breadth of libertarian political philosophy might ask whether the acceptance of anything more than the night watchman state means a theory is not “libertarian.” A minority of philosophers argue so, and the philosophy literature contains debate about who “counts” as a libertarian. Some theorists argue, for example, that anarchy is the only social arrangement consistent with libertarianism.<sup>74</sup> At the other end of the spectrum, some scholars distinguish between “classical liberal” and “libertarian” views, while others believe that classical liberalism should be considered a subset of libertarianism.<sup>75</sup>

This Article sets that debate aside. What matters for present purposes is that there is a set of beliefs distinct from both utilitarianism and from the type of liberal egalitarianism envisioned by John Rawls and the resource egalitarians. Views within that set have much in common with each other (individuals should be free from coercion; the free market should be left undisturbed to the greatest extent possible; and large-scale redistribution of the type in modern welfare states is unjust), even if they differ in their rigidity. Many who hold these beliefs call themselves “libertarians” and are often referred to as such by others, even if the most rigid among them seek to limit the term “libertarian.” It thus seems plausible to group these theories together, just as there is room in resource egalitarianism for both those who do and do not believe in talent-pooling. This Article thus follows scholars who group them together.

### III. MINIMAL STATE LIBERTARIANISM AND THE CHARITABLE TAX SUBSIDIES

Because most legal academics associate libertarianism with Nozick, this Article first discusses the type of minimal state libertarianism that he made famous. As this Part shows, an initial look at minimal state libertarianism implies that *any* charitable tax subsidies are unjust—certainly including the broad array of groups currently subsidized. A closer look at this set of theories, however, suggests that charitable tax subsidies for very targeted purposes—much narrower than under current law—are justified.<sup>76</sup>

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has suggested that a better term is “market” libertarians. See Zwolinski, *Basic Income*, *supra* note 68.

<sup>74</sup> See, e.g., ROTHBARD, *supra* note 71.

<sup>75</sup> Compare E-mail from Richard A. Epstein, James Parker Hall Distinguished Serv. Professor Emeritus of Law, Univ. of Chi. Law Sch., to author (Apr. 7, 2015, 07:06 PST) (on file with author) (drawing a distinction between classical liberalism and libertarianism), and EPSTEIN, SKEPTICISM, *supra* note 1, at 1–12, with JOHN TOMASI & MATT ZWOLINSKI, A BRIEF HISTORY OF LIBERTARIANISM (forthcoming 2016) (manuscript at ch. 1) (draft on file with author) (classifying classical liberalism as a subset of libertarianism).

<sup>76</sup> This Part III discusses which government activities are justifiable under minimal state libertarianism. Part VI discusses why a libertarian might support outsourcing those activities to sub-

Section A of this Part traces the historical roots of minimal state libertarianism.<sup>77</sup> Section B discusses and rejects two overly simplistic assessments of the interaction between the charitable tax subsidies and minimal state libertarianism.<sup>78</sup> Section C explores whether the theory of rectification supports some charitable tax subsidies under minimal state libertarianism.<sup>79</sup> Section D examines whether using the charitable tax subsidies to fund a safety net strengthens private property rights, thereby rendering the subsidies compatible with minimal state libertarianism.<sup>80</sup>

### A. *The Origins of Minimal State Libertarianism*

As readers familiar with Nozick know, the most common justification for minimal state libertarianism stems from the theory of natural property rights and self-ownership articulated by Locke.<sup>81</sup> Under this view, (1) natural resources are initially un-owned, but (2) each person has a property right in his or her own person and own labor.<sup>82</sup> Mixing one's labor with land or other natural resources therefore gives that person property rights to that resource, subject to certain conditions.<sup>83</sup> Most importantly, an individual may appropriate natural resources for himself only if "enough, and as good" is left for others.<sup>84</sup> (This is known as the "Lockean proviso" or the "sufficiency requirement" and is discussed further below).<sup>85</sup> If these conditions are met, nobody else has a right to the newly appropriated resources,<sup>86</sup> which suggests that any redistributive taxation is unjust.

Nozick's entitlement theory builds upon Locke's thought. Although Nozick does not fully flesh out his entitlement theory, he does articulate the three principles that would form the core of a complete entitlement theory: (1) justice in acquisition; (2) justice in transfer; and (3) the rectification of past injustice in holdings. Under these principles, if *Alice* justly acquires a

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dized charities instead of having the government conduct them directly. *See infra* notes 322–324 and accompanying text.

<sup>77</sup> *See infra* notes 81–94 and accompanying text.

<sup>78</sup> *See infra* notes 95–98 and accompanying text.

<sup>79</sup> *See infra* notes 99–129 and accompanying text.

<sup>80</sup> *See infra* notes 130–145 and accompanying text.

<sup>81</sup> *Introduction to THE LIBERTARIAN READER: CLASSIC & CONTEMPORARY WRITINGS FROM LAO-TZU TO MILTON FRIEDMAN*, at xi–xii (David Boaz ed., 1997) (“[Locke’s] ideas have been an essential foundation for libertarian thought . . .”).

<sup>82</sup> JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* 19 (C.B. Macpherson ed., Hackett Publ’g Co. 1980) (1690).

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 21. A second limitation is the spoilage limitation, which requires that one should not appropriate more resources than can be used before they spoil. *Id.*

<sup>85</sup> Jeremy Waldron, *Nozick and Locke: Filling the Space of Rights*, 22 *SOC. PHIL. & POL’Y* 81, 89 (2005).

<sup>86</sup> LOCKE, *supra* note 82, at 30.

holding, she can do with it whatever she wants.<sup>87</sup> How do we know if *Alice* has justly acquired a holding? Nozick argues that *Alice*'s appropriation of a given object is just if it satisfies the Lockean proviso, meaning that "the position of others no longer at liberty to use the thing is [not] worsened."<sup>88</sup> Nozick interprets this to mean that others are not made worse off *overall*, even if they are made worse off in that they can no longer use or appropriate for themselves what *Alice* has taken for herself.<sup>89</sup> To borrow an example from one scholar, *Alice* may appropriate a field previously farmed by many individuals, if enough other farmland is left for the others, or if *Alice*'s appropriation of the field leaves the others in a similar or better position.<sup>90</sup> Perhaps, for example, *Alice* employs *Ben* to farm the fields, and the wage *Alice* pays *Ben* allows him to live as well or better than when he farmed the fields for himself.<sup>91</sup> Both instances would satisfy the Lockean proviso.

Nozick's second principle, the principle of justice in transfer, focuses on whether *Alice*'s later actions with respect to her holdings are voluntary. If *Alice* freely gives her holdings to *Christine*, or freely transfers them to *Christine* in a voluntary exchange, the principle of justice in transfer is satisfied. *Christine*'s ownership of that holding is just and cannot be interfered with via taxation or otherwise.

Nozick illustrates these principles with his famous Wilt Chamberlain example, whereby one million people each drop a quarter into a box each time they see Chamberlain play basketball.<sup>92</sup> At the end of the season, Chamberlain has \$250,000, more than anyone else. Nozick uses this example to argue against "time-slice" principles of justice that only look at end results. In his view, if the initial holdings of the audience members are just and they freely transfer their quarters for the thrill of watching Chamberlain play basketball, then nothing is unjust about the result even if money is now unequally distributed. Thus, taxing Chamberlain in order to achieve some

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<sup>87</sup> Nozick does recognize the need for some limits on what one can do with one's property in times of catastrophe. Imagine that *Alice* owns an island. NOZICK, *supra* note 2, at 180. Nozick admits, for example, that she cannot force a shipwrecked castaway to leave. Nor can she charge monopolistic prices if she owns the only waterhole in a desert. In a sense, use has its own "Lockean proviso," for *Alice* cannot use her property in a way that makes others worse off.

<sup>88</sup> *Id.* at 178.

<sup>89</sup> Many scholars believe this interpretation is consistent with Locke's view of the sufficiency requirement, given a later passage in which he argues that the worst-off person in the market-oriented English economy is better off than a "king" in the Americas, where natural resources were still in abundance. LOCKE, *supra* note 82, at 25–26.

<sup>90</sup> KYMLICKA, *supra* note 68, at 115–17; LOCKE, *supra* note 82, at 23–24.

<sup>91</sup> KYMLICKA, *supra* note 68, at 115–17.

<sup>92</sup> NOZICK, *supra* note 2, at 161–63.

other pattern of distribution (for example, one based on utilitarianism or resource egalitarianism) violates his justly achieved property rights.<sup>93</sup>

The foregoing assumes, however, that the principles of justice in acquisition and transfer have been satisfied. When either has been violated, then Nozick's third principle, that of rectification, comes into play. Imagine that *Alice's* acquisition of the holding was unjust, or the transfer to *Christine* was somehow unjust (perhaps *Christine* steals from *Alice* or defrauds her). If so, some type of compensation is due whomever was harmed, and this may justify taxation for the limited purpose of rectification.<sup>94</sup>

Other than the limited case of rectification, however, this view appears to leave no room for any type of redistributive taxation. Absolute libertarianism holds that state provision of anything other than basic protective services is unjust.

### *B. The Initial Take on Minimal State Libertarianism and the Charitable Tax Subsidies*

The foregoing theory of property rights undergirds the common understanding of libertarianism, which is that all redistributive taxation is unjust. At the same time, however, Nozick and most other minimal state libertarians stress the importance of private charity. But they are silent about the state subsidization of private charitable activity.

Superficially, it seems that minimal state libertarians would applaud the charitable tax subsidies. Take the charitable deduction, which reduces *Diane's* taxes when she gives to a charity. If *Diane's* tax rate is 40%, then her tax bill drops by \$40 when she donates \$100 to charity. Looking solely at *Diane*, the deduction seems consistent with libertarianism: the \$40 less that *Diane* pays in taxes is \$40 less the government takes from her and redistributes to others against her will. But this ignores the fact that the cost of the charitable deduction is borne by many people, namely other individuals who pay higher taxes or individuals for whom services are reduced.<sup>95</sup>

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<sup>93</sup> *Id.* A bit later, Nozick offers another argument against taxation. He imagines that requiring "unemployed hippies to work for the benefit of the needy" would be opposed on the grounds that such a requirement would be forced labor. *Id.* at 169. If forcing someone to work five hours for the needy is forced labor, he reasons, then so too is taking in taxes the fruits of five hours of work. Both interfere with one's right to self-ownership, rendering taxation for redistributive purposes illegitimate on two grounds.

<sup>94</sup> *See id.* at 152–53. Unfortunately, Nozick discusses the principle of rectification even less than he discusses justice in acquisition and justice in transfer. *See id.* at 153 (choosing "not [to] attempt [the] task" of specifying the details of the principles of acquisition of holdings, transfer of holdings, and rectification). He raises the idea, however, that Rawls's difference principle might serve as a rough means of implementing rectification. *Id.* at 231.

<sup>95</sup> *See* Eric M. Zolt, *Tax Deductions for Charitable Contributions: Domestic Activities, Foreign Activities, or None of the Above*, 63 HASTINGS L.J. 361, 374 (2012). This reasoning, of

The charitable deduction, therefore, is better understood as another mechanism by which governmental redistribution<sup>96</sup> is enforced. *Diane* acts as the government's agent by deciding (with her \$100 donation) which charity will get \$40 from *other taxpayers*. And it is the latter transfer that should concern libertarians. *Diane's* gift is not coerced by the government,<sup>97</sup> whereas the transfer from other taxpayers *is* coerced.<sup>98</sup>

Seen in this light, the redistribution inherent in the charitable tax subsidies appears to violate the basic principles of minimal state libertarianism, for it involuntarily takes from non-donors to give to charitable recipients. This reading, however, does not account for some of the nuances in the work of Nozick and other minimal state libertarians. The rest of this Part discusses two such nuances that might support two distinct sets of very limited charitable tax subsidies: the provision of a minimal safety net to the very destitute as a means of best protecting others' property rights and the principle of rectification.

### C. The Principle of Rectification

As explained earlier, the entitlement theory holds that the justice of the current distribution depends on not only whether the initial acquisition was just, but also whether later transfers were just. If existing conditions result from unjust acquisitions or transfers, then redistribution on the grounds of rectifying past injustice may be justified.<sup>99</sup> To that end, Nozick notes that "past injustices might be so great as to make necessary in the short run a more extensive state in order to rectify them."<sup>100</sup> He further admits that us-

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course, assumes a constant budget and that to pay for tax subsidies, rates are increased or other benefits decreased. Given the existence of deficits, some may wonder whether this is true. In tax policy and scholarship, however, discussions of tax reform across the ideological spectrum assume that reduced rates must be accompanied by cuts in deductions and credits or that new deductions and credits must be paid for in some way, either by higher rates or cuts in other deductions and credits. The Tax Reform Act of 1986, which lowered rates in exchange for the repeal of or limits on a number of deductions and credits, exemplified these tradeoffs. *See generally* JEFFREY BIRNBAUM & ALAN S. MURRAY, *SHOWDOWN AT GUCCI GULCH* (1988) (recounting the passage of the Tax Reform Act of 1986).

<sup>96</sup> "Redistribution" as used here does not mean solely redistribution from the better- to the worse-off. It means any redistribution that occurs from one person to another, as when individuals are taxed to pay for goods and services enjoyed by others.

<sup>97</sup> Although some might argue she is "coerced" in other ways, such as peer pressure or a desire to make fundraisers go away, those are not the concern of libertarians because they do not involve the use of force.

<sup>98</sup> Taxpayers at large are also one source of the subsidy inherent in tax exemption.

<sup>99</sup> *But see generally* Jan Narveson, *Present Payments, Past Wrongs: Correcting Impressions from Nozick on Restitution*, 1 *LIBERTARIAN PAPERS* 1 (2009) (arguing that rectification involving anyone but the immediate parties is incompatible with libertarian thought because it involves coercion of third-parties not involved in past injustices).

<sup>100</sup> NOZICK, *supra* note 2, at 231.

ing “patterned principles of distributive justice” might, in some cases, roughly match up with what the principle of rectification requires.<sup>101</sup>

This, of course, leads to the question of how this might apply to the United States today. Here, it is quite likely that even minimal state libertarians would countenance some taxation<sup>102</sup> to finance the rectification of past injustices in our society:

[Nozick] was never prepared to say that the historical-entitlement critique of equality and welfarism in his book amounted to a defense of actually existing market institutions . . . . On the contrary, he thought it undeniable that contemporary holdings would be condemned as unjust by any remotely plausible conception of historical entitlement. (The point of Nozick’s argument . . . was that egalitarians were condemning the existing distribution for the wrong reason—that is, simply as unequal—rather than on account of the violence, fraud, expropriation, ethnic cleansing, state corruption, and so on, involved in the history of most holdings of property in America.)<sup>103</sup>

Given this description of contemporary property holdings in the United States today, the idea of justifying some redistribution on the grounds of rectifying past injustice does not seem a stretch.

#### 1. Rectification and the Charitable Tax Subsidies: Initial Thoughts

What then, does rectification entail? In theory, it involves three steps: (1) identifying past injustices; (2) trying to figure out what distribution would result if those past injustices had not occurred; and (3) then restoring the victims to a position as good as that which would have resulted without the injustices.<sup>104</sup> Some instances of past injustice<sup>105</sup> in our society are clear:

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<sup>101</sup> *Id.* Adam James Tebble has characterized this pattern as “[t]o each according to their being no worse off [because of rectification] than they would have been had any injustice against them not taken place.” Adam James Tebble, *The Tables Turned: Wilt Chamberlain Versus Robert Nozick on Rectification*, 17 *ECON. & PHIL.* 89, 100 (2001).

<sup>102</sup> Scholars read Nozick as regarding rectification as a duty of the state and therefore financed by taxation. *See, e.g.*, Narveson, *supra* note 99, at 3 (stating that many scholars view the appropriateness of taxation as an “implication[] widely attributed” to Nozick’s theory “including, apparently, . . . Nozick himself” but disagreeing with that implication); Tebble, *supra* note 101, at 93 (assuming “safely” that the source of rectifying compensation will be taxation).

<sup>103</sup> Waldron, *supra* note 85, at 103.

<sup>104</sup> NOZICK, *supra* note 2, at 152–53; Lawrence Davis, *Nozick’s Entitlement Theory*, in *READING NOZICK: ESSAYS ON ANARCHY, STATE AND UTOPIA* 344, 351 (Jeffrey Paul ed., 1981); Tebble, *supra* note 101, at 89, 92–93. To be clear, rectification does not involve identifying the precise holding that was the subject of an unjust transfer and returning that “holding” to its proper owner. Davis, *supra*, at 349. Nor does it turn on inheritance rights of descendants of those previously subject to an injustice.

our treatment of Native Americans, slavery, and past state-enforced discrimination against women. To illustrate, it is likely that Native Americans initially acquired much of North America in accordance with the Lockean proviso—but then were deprived of their justly acquired holdings through theft, fraud, coercion, and physical force. Under Nozick’s principles, this injustice should be rectified.<sup>106</sup> Likewise, many African Americans have suffered due to past injustices of slavery, violence, and state interferences with their freedom to contract and so on.<sup>107</sup> And given past laws that interfered with women’s freedom to hold property and to contract, a good argument can be made that some rectification is also due to women.

Assume for now that the charitable tax subsidies will be part of a scheme to provide rectification to individuals harmed by these three injustices.<sup>108</sup> The next step is trying to figure out what position these individuals would have been in without the past injustices. This, of course, entails numerous assumptions and counterfactuals.<sup>109</sup> Imagine, for example, that Native Americans had not been defrauded out of their land. To trace the holdings that would result, we would need to make assumptions about past individuals’ preferences concerning consumption versus saving, for that decision would affect the current distributional pattern. We would also need to know what past individuals would have done with their holdings at death—

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<sup>105</sup> A victim who was still alive would likely be owed *compensation* of the type discussed in the first portion of Nozick’s ANARCHY, STATE AND UTOPIA. See NOZICK, *supra* note 2. If the original wrongdoer and victim are dead, however, *rectification* is the process that would be used to set things right.

<sup>106</sup> For a fuller version of this argument, see David Lyons, *The New Indian Claims and Original Rights to Land*, in READING NOZICK: ESSAYS ON ANARCHY, STATE AND UTOPIA, *supra* note 104, at 355 (arguing that land in the northeastern United States should be returned to Native American tribes).

<sup>107</sup> For an argument along these lines that libertarianism requires affirmative action, see Andrew Valls, *The Libertarian Case for Affirmative Action*, 25 SOC. THEORY & PRAC. 299 (1999). Interestingly, Nozick alludes to this possibility when discussing rectification by citing to a “useful” book written by noted tax professor Boris Bittker. See NOZICK, *supra* note 2, at 344 n.2 (citing BORIS BITTKER, THE CASE FOR BLACK REPARATIONS (1973)).

<sup>108</sup> To be clear, this Article does not assert that rectification that is due as a matter of justice is the same as the voluntary act we normally associate with the word “charity.” The set of subsidies known as the charitable tax subsidies encompass a number of goods and services that do not meet that definition. Rather, this Article asserts that in assessing those subsidies from a libertarian perspective, one would first insist that the state was justified in coercing individuals to help pay for some activity. If so, then using the charitable tax subsidies to help finance that good is legitimate in order to harness the subsidies’ efficiency and pluralism benefits. Part VI of this Article discusses why subsidizing charities to provide this rectification, either in lieu of or in addition to direct governmental provision, is consistent with libertarianism. See *infra* notes 322–324 and accompanying text.

<sup>109</sup> Nozick recognizes the difficulty of precisely identifying this counterfactual, acknowledging that estimates and probability distributions will likely be used. NOZICK, *supra* note 2, at 152–53.

give them to charity, or bequeath them to heirs?<sup>110</sup> And lastly, we would have to make some assumption about the growth rate of assets held in the past.<sup>111</sup> Any estimation of what a given individual would be owed, therefore, would be exceedingly imprecise. Determining the holdings that would have resulted without slavery in this country involves additional complications. Should the baseline assumption be that large numbers of African Americans would have immigrated here voluntarily? Or would they have stayed in Africa? Or would they have been taken as slaves by another country?<sup>112</sup>

Moreover, identifying the precise individuals alive today who merit rectification raises its own set of questions.<sup>113</sup> Take, for example, African Americans. Assume that descendants of slaves deserve rectification.<sup>114</sup> Would other African Americans, whose holdings are less not because their ancestors were directly subjected to injustice, but because of conditions in our society arising from past injustice to others' ancestors, also deserve rectification? Imagine, for example, poor educational opportunities for African Americans that stem from underfunded public schools, which stem from low tax bases, which stem from past injustices in wealth and state-sanctioned redlining practices. It is conceivable that many African-American children currently in these schools are not the descendants of slaves, or of individuals who were directly harmed by redlining, yet they still suffer from the effects.<sup>115</sup> One could also argue that even financially successful members of these groups—say, African American heart surgeons—are owed rectification, on the grounds that they might have been even more successful without the past injustices.

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<sup>110</sup> See Robert E. Litan, *On Rectification in Nozick's Minimal State*, 5 POL. THEORY 233, 234–35 (1977); Tebble, *supra* note 101, at 103.

<sup>111</sup> Valls, *supra* note 107, at 312; see also Richard A. Epstein, *The Case Against Black Reparations*, 84 B.U. L. REV. 1177, 1185–87 (2004) [hereinafter Epstein, *Reparations*] (discussing the difficulty of determining the extent to which corporations that engaged in slavery profited from the practice, and distinguishing reparations for slavery from restitution for owners of art stolen by the Nazis).

<sup>112</sup> Even these are contestable assumptions. Perhaps Africans would not have immigrated to America in large numbers, and in the absence of slavery would have continued living in Africa (or had their rights violated by other countries). What pattern of holdings would have resulted then?

<sup>113</sup> Some theorists read Nozick as requiring that a given individual actually trace his or her roots back to a victim and then establish that he or she would have somehow benefited from that victim's holdings had there been no injustice, see Litan, *supra* note 110, at 244–45 (requiring such a link), whereas others do not require a direct link.

<sup>114</sup> Of course, this raises the non-identity problem: most individuals alive today who are descendants of slaves would likely not be alive but for the past unjust institution of slavery. For a thoughtful discussion of the non-identity problem in this context, see Larry Alexander & Maimon Schwarzschild, *Book Review: Race Matters*, 29 CONST. COMMENT. 31 (2013).

<sup>115</sup> Litan, *supra* note 110, at 236 (recognizing that past unjust property transactions have likely influenced “the present distribution of family and social backgrounds”).

One solution to these difficulties would be to assume that rectification should be due to all members of these identifiable victim groups, and not just to descendants of past victims.<sup>116</sup> Working under that assumption, and given the difficulty of identifying the distribution that would have resulted without injustice, an easy but extremely imprecise solution appears: perhaps one could just compare the current situations of the victim group to that of the non-victim group (African Americans and Native Americans to white Americans, and women to men), and chalk the differences up to past injustices.<sup>117</sup> Next, one could plausibly think that any efforts to improve the position of the victim group, to close those gaps, would be justified under the principle of rectification.

The principle of rectification, then, could support subsidizing charitable organizations that helped improve the situation of these groups. For example, assuming that members of these groups have lesser educational and employment opportunities due to past injustices, then we would subsidize activities aimed at improving those: private schools in neighborhoods populated by these groups, tutoring programs, job skills training, and so on. But the principle of rectification might likely go further, and subsidize activities in any situation where the opportunities of the victim group fell short of the opportunities for white Americans or men. Take, for example, recreation. Many African American and Native Americans do not have the same recreational opportunities as white Americans (access to summer camps, swimming pools, sports leagues, etc.). If that lack of access is due to past injustice, then the principle of rectification would suggest subsidizing such programs. The same would likely be true of cultural programs focused on the culture of victim groups, such as museums devoted to African-American art or music groups devoted to Native American music.<sup>118</sup> Put another way,

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<sup>116</sup> See, e.g., *id.* at 242 (suggesting that one approach to rectification might “consist of identifying those characteristics of the present-day population that are most likely to be correlated with past injustices,” therefore “a very simple rectification procedure would award compensation to the Blacks and Indians for the prior injustices suffered by both groups at the hands of Whites”).

<sup>117</sup> See Valls, *supra* note 107, for a more extensive elaboration of this reasoning. This of course, assumes not only that Native Americans, African Americans, and white Americans would have all made the same types of decisions as each other concerning education and jobs in the absence of past injustices (which is likely), but also that women and men would have made the same types of decisions as each other, which is more contested. There are further questions with respect to defining the control group. For example, should “men” include all men, including Native Americans and African Americans? Should the “white” control group include both women and men?

<sup>118</sup> In some respects, by seeking to identify disparities due to past injustices but not those due to choice, this idea is similar to the choice versus chance distinction found in both luck egalitarianism and left-libertarianism. None of these theories would remedy disparities due to choice. But because the comparative baseline is different, it is likely that rectification would suggest a different set of subsidies than the other theories. For example, luck egalitarianism would subsidize assistance to children born to poor families on the grounds they should have an equal shot. Rectification would not do so, unless the differences were due to past injustices.

then, the charitable tax subsidies could be used as an “in-kind” complement to any direct financial resources that should be due under rectification.

## 2. Rectification and the Charitable Tax Subsidies: Some Complications

Several glaring difficulties with designing the charitable tax subsidies to assist in rectification present themselves. First, the above discussion makes several contestable assumptions in imagining what rectification might look like and to whom it might be due. Under the assumption that all members of the above victim groups merit rectification (an admittedly big assumption), a similar problem presents itself on the perpetrator side. In theory, rectification would only be due from those individuals whose positions are better off than they would be otherwise due to past injustices. This would clearly include, for example, perpetrators of such injustices and those who inherited holdings from past perpetrators. How can such people be identified? Would rectification be due only from inhabitants of the Southern states that practiced slavery? What of people whose families came to those states after slavery was abolished?<sup>119</sup>

Perhaps one way to solve the problem of identifying those from whom rectification is due is as follows. An argument could be made that even if a given white individual's family did not own slaves, he or she is financially better off due to the past injustices of others. This would be due, perhaps, to past injustices that reduced competition for jobs and comparatively increased educational and cultural opportunities for whites but not African Americans, thus improving her position. Under this reasoning, we would want rectification to be paid by white taxpayers. There are several problems with this, however. First, the charitable tax subsidies are borne by all taxpayers, not just white taxpayers. The only way out of this quandary would be to impose some type of very small surtax on white taxpayers to finance the government subsidization of charitable programs designed to effectuate rectification.<sup>120</sup> Without such an adjustment, rectification would be paid by many individuals in addition to those who had benefitted from past injustice.<sup>121</sup> And even with such an adjustment, it is likely that the set of payers would be overbroad. Many white individuals have ancestors who died fighting for the north in the Civil War, and perhaps this sacrifice on the part of their ancestors should suffice when it comes to rectification from them.<sup>122</sup>

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<sup>119</sup> See Epstein, *Reparations*, *supra* note 111, at 1188.

<sup>120</sup> Although this Article is theoretical, it is worth noting that this suggestion would be politically impossible.

<sup>121</sup> Tebble, *supra* note 101, at 101 n.33.

<sup>122</sup> Epstein, *Reparations*, *supra* note 111, at 1188.

And, as discussed below, many white individuals have also been subject to past state injustice and therefore should also be due rectification.

A second problem comes to identifying victims. As previously discussed, focusing on groups that aid, say, any African Americans already makes quite a leap to assume that all African Americans have been harmed by past injustice. Thus, focusing on groups, and not individuals, requires making some assumptions that could likely be contested. Another complication emerges, however, when we want to identify groups in addition to African Americans and Native Americans who merit rectification. To which other groups should rectification be extended? Perhaps it should be extended to Japanese Americans, because of the World War II Japanese internment camps. What about white Americans of European ancestry who immigrated under fraudulent arrangements in which the state played some role?<sup>123</sup> What about ethnic groups such as Asians, Hispanics, the Irish, and Jews that at some point encountered state-sanctioned discrimination in the United States?<sup>124</sup> It seems that almost every ethnic group, with the exception of wealthier white European settlers, has been the subject of past injustice by the state at some point. This illustrates not only the difficulty of identifying past victims, but also the fact that without the type of adjustment suggested above, many victims would also likely be paying for rectification as part of the broad group of taxpayers subsidizing charitable programs.<sup>125</sup>

Interestingly, Nozick briefly raises the question of whether Rawls's difference principle could be used as a means of rough justice here, on the grounds that the least-advantaged in society are the most likely to be the victims of past injustice.<sup>126</sup> Although it is noteworthy that he raises this possibility, this is not a compelling means of identifying to whom rectification should be owed. Namely, it ignores deviations that are due not to past injustice but to individual choices (whether on the part of individuals who are currently the least-advantaged or on the part of their ancestors). Imagine, for example, a well-off European family who immigrated very early in our country's history and was never subject to any injustice. Living individuals from the family likely occupy all walks of life right now—both due to their own choices about how much schooling to obtain, what jobs to pursue,

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<sup>123</sup> Note that Nozick would not consider purely private discrimination—without theft or fraud—the grounds for rectification.

<sup>124</sup> See, e.g., *Yick Wo v. Hopkins*, 118 U.S. 356, 374 (1886) (laundry permit rules discriminating against Chinese immigrants); *Jew Ho v. Williamson*, 103 F. 10, 23–24 (N.D. Cal. 1900) (sham quarantine rules for Chinese immigrants). And what about individuals who were defrauded, stolen from, coerced, or subject to state coercion and discrimination in other countries before immigrating here?

<sup>125</sup> See Litan, *supra* note 110, at 243 (discussing the likelihood that any identification of past victims and wrongdoers would likely be incorrect).

<sup>126</sup> NOZICK, *supra* note 2, at 230–31.

whether to become drug addicts, and so on, but also due perhaps to their parents,' grand-parents,' and great-grand-parents' choices. Thus, there may well be individuals from that family who are currently among "the least-advantaged" due to past voluntary choices and not due to past injustice.<sup>127</sup>

### 3. Final Thoughts on Rectification

The problem with designing the charitable tax subsidies to effectuate rectification,<sup>128</sup> then, is that it requires historical facts that are essentially unknowable: who is a victim of past injustice? Who is a perpetrator? What would the country's holdings look like if injustice had not occurred? In a sense, these unknowns undermine rectification in much the same way that implementing utilitarianism requires comparably unknowable information concerning an individual's utility or the consequences of future actions. All that can be done is very rough justice. But what *is* noteworthy is that the concept of rectification would countenance some state-financed redistribution, unlike the more familiar take on minimal state libertarianism that usually springs to mind.<sup>129</sup>

#### *D. Funding a Safety Net to Strengthen the Private Property Rights of Others*

Putting aside rectification, most minimal state libertarians who emphasize the primacy of individual property rights hold the absolutist view that any taxation beyond that necessary to fund the night watchman state is tantamount to theft. There are exceptions, however, such as the influential libertarian philosopher Eric Mack. Mack "confess[es] to a fondness for the dictum that all taxation is theft," yet argues that rights-based libertarianism could support taxation that would "fund something like a minimal safety-net for individuals who would faultlessly find themselves in dire straits without that net."<sup>130</sup>

Simplifying a bit, Mack reasons as follows. Imagine a fully prepared hiker on a well-planned trip who, through no fault of her own, encounters unforeseen fatally cold temperatures.<sup>131</sup> The hiker stumbles across an unoccupied locked cabin in the woods, with a fire and blankets that would save

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<sup>127</sup> Again, there is some overlap with the choice or chance distinction of luck egalitarianism and left-libertarianism.

<sup>128</sup> There are also problems with prioritizing groups that pursue rectification.

<sup>129</sup> Part VI of this Article discusses why subsidizing charities to engage in rectification (as opposed to direct governmental provision) is consistent with libertarianism. *See infra* notes 322–324 and accompanying text.

<sup>130</sup> Eric Mack, *Non-Absolute Rights and Libertarian Taxation*, 23 SOC. PHIL. & POL'Y 109, 109 (2006).

<sup>131</sup> *Id.* at 119.

her life. The hiker, then, can save her life by violating the cabin owner's property rights. Responding to this hypothetical, Mack thinks that "no plausible moral theory" would allow this faultless hiker to freeze to death.<sup>132</sup> There are thus some instances in which property rights can be ignored.

These instances, however, must be carefully limited to situations of extreme need. A hiker who is merely tired and sore (and not at risk of death) should not be allowed to ignore the owner's property rights.<sup>133</sup> How does Mack draw the line? He looks at incentives: the more people that potentially can ignore the cabin owner's rights, the greater incentive the cabin owner has to avoid situations where his rights will be violated (for example, the cabin owner could avoid such situations by moving to a warmer climate, the extreme wilderness, or putting stronger defenses around his cabin).<sup>134</sup> Cabin owners would thus prefer to limit who can potentially ignore their rights. And because hikers likely care much more about avoiding death than avoiding discomfort, Mack reasons that hikers would acquiesce to drawing a line between the two.<sup>135</sup>

What does this mean for taxation? Most of us, of course, will not be faced with the issue of a freezing hiker breaking into a cabin. But a more realistic version of the freezing hiker would instead be a homeless person who sleeps in our garage or someone on the verge of starvation who steals a pie cooling in our window.<sup>136</sup> Property owners, Mack reasons, have an incentive to preempt those types of incursions by providing a minimal safety net so that those in dire straits do not need to steal food or shelter from us.<sup>137</sup> By thus minimizing the likelihood of individual excursions into property rights, Mack believes a safety net would strengthen those property rights.

Under this reasoning, the governmental provision of a minimal safety net does not necessarily contradict minimal state libertarianism.<sup>138</sup> If the purpose of government is to protect property, and the government can do that by providing a safety net in addition to police, then such activity should

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<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 129.

<sup>134</sup> *Id.* at 133.

<sup>135</sup> *Id.* at 134.

<sup>136</sup> *Id.* at 112.

<sup>137</sup> *Id.* at 141.

<sup>138</sup> Mack points out that Nozick off-handedly acknowledges that preventing moral catastrophe may justify ignoring rights, but then quickly dismisses those instances without discussion. *Id.* at 112. Likewise, Mack notes that Ayn Rand admitted that emergencies might limit rights. Thus, Mack does not believe he is directly contradicting the libertarian theorists for whom self-ownership and property rights are paramount. *Id.* at 113.

be considered legitimate.<sup>139</sup> In making this argument, however, Mack limits the safety net's provision to individuals whose dire straits are not their fault.<sup>140</sup> Moreover, Mack would impose some type of workfare requirement, on the grounds that those who ignore property rights due to extreme need should compensate affected property owners wherever possible. Lastly, Mack limits this assistance to items like food, clothing, and shelter.<sup>141</sup>

### 1. Implementation Concerns

This nuance of minimal state libertarianism potentially justifies very limited charitable tax subsidies for organizations that provide basic needs to the very poor who are unable to support themselves through no fault of their own.<sup>142</sup> Although a few practical complications arise, structuring subsidies to this end is far more feasible than structuring subsidies to effectuate rectification. For example, one option might be to subsidize groups providing one or more of a given list of services to a clientele base primarily comprised of individuals at or under some benchmark determined by reference to the poverty line.

This would involve a number of judgment calls, but once those calls are made, implementation would be fairly straightforward. Consider which services should be eligible. It seems that organizations providing food, clothing, shelter, and medical assistance help meet basic needs, and that art and recreation organizations do not. The main question seems to be how to treat activities like job training that are beyond what is needed for current subsistence but might enable a beneficiary to become self-sufficient in the future. Once that question is resolved, however, it is easy to identify what services a given charity provides.

Next consider the task of determining whether someone is poor enough to merit assistance. Choosing a benchmark such as the poverty line, a percentage of that line, or enrollment in existing welfare programs, requires making a choice, but again, either an individual qualifies or does not. Likewise, determining what percentage of a charity's clientele should be below that benchmark involves a choice (should it be 50%, 75%, or 90%?).

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<sup>139</sup> See *id.* at 141. This argument should not be confused with whether individuals can trespass in times of necessity, or whether individuals have a moral or legal duty to help those in need. This argument is about what activities the state may permissibly coerce its citizens to pay for.

<sup>140</sup> In some respects, narrowing beneficiaries in this manner overlaps with some of the insights of luck egalitarianism, though luck egalitarianism supports a far greater amount of redistribution and to a greater number of people. See Fleischer, *Equality of Opportunity*, *supra* note 6.

<sup>141</sup> Mack, *supra* note 130, at 140.

<sup>142</sup> Part VI of this Article explains why the charitable provision of this safety net (as opposed to direct governmental provision) is consistent with libertarianism. See *infra* notes 322–324 and accompanying text.

But once that choice is made, identifying such charities is reasonably feasible. How would taxpayers or the IRS know which organizations qualify? In states with similar measures for state tax purposes, charities apply to and receive certification from the relevant state non-profit agency.<sup>143</sup> This does not seem unduly intrusive or burdensome and many charities providing these services likely keep track of much of this information already, for the purposes of applying for foundation and government grants.

On the other hand, determining who is responsible for their own poverty and who is not would be extremely difficult and expensive, and may invite a level of governmental intrusion that libertarianism finds repugnant. Although the context is slightly different, many supporters of the basic income favor providing an unconditional basic income to all citizens precisely so the government is not involved in making determinations about who is “deserving” and “not deserving”:

Discriminating between the deserving and the undeserving poor requires states to possess a tremendous amount of information about some of the most intimate aspects of people’s lives. It might require knowing how much they earn from work, how much support they receive or could receive from relatives, how much effort they have expended at finding a job and doing well at it, whether they have spent their money on necessities or frivolous luxuries, etc. The answers to these questions—insofar as they are ascertainable at all, could only be uncovered through the analysis of a massive amount of private information.<sup>144</sup>

For these reasons, limiting the provision of a safety net only to the deserving poor may invite the type of governmental meddling into private lives that libertarian thought abhors. Initially, this concern seems unrelated to the charitable tax subsidies, for the charitable agencies that would require this information would be private actors. This overlooks, however, that the government would need that information to ascertain whether a given charitable organization was providing the type of assistance that merits a subsidy or not. It also overlooks the fact that subsidized charities are in essence the government’s agent.

It is hard to know how to resolve these difficulties in a non-ideal world. In an ideal world with much less economic regulation (for example, without arbitrary licensing laws), it is quite likely that many more individuals would be able to find work that provided at least a subsistence level. That is not our world, however. As a result, two options present themselves.

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<sup>143</sup> See, e.g., ARIZ. REV. STAT. ANN. § 43-1088 (West 2013).

<sup>144</sup> Zwolinski, *Basic Income*, *supra* note 68, at 8.

On one hand, ignoring desert and instead providing a safety net to anyone in dire straits, regardless of the reasons, might be more consistent with libertarianism due to the costs just identified. This is not to say that a given charity could not impose work requirements, or limit its aid to individuals it determines to be free of fault. It suggests only that imposing such a requirement as a precursor to eligibility for the charitable tax subsidies has drawbacks.

On the other hand, absence of desert could be assumed in the case of able-bodied adults, and aid limited only to the disabled, children, and the elderly. Although the former would be over-inclusive, the latter would be under-inclusive. Given the barriers to economic activity created by the current regulatory state, however, it is plausible that even minimal state libertarians might favor the former.<sup>145</sup>

#### IV. CLASSICAL LIBERALISM

As explored above, the minimal state libertarianism grounded in the natural right of self-ownership (such as Nozick's entitlement theory) is rather absolute. Although some such libertarians (such as Mack) accept the legitimacy of a safety net for the extremely destitute, most believe that the only proper role of a state is to provide physical protection and enforce contracts, and nothing else. In contrast, those on the "classical liberal" end of the libertarian spectrum<sup>146</sup> believe that a slightly-more-than-minimal state can be justified. The phrase "slightly-more-than-minimal" reflects the fact that classical liberals (like the absolutists) reject the implementation of large scale welfare programs on utilitarian or egalitarian grounds, oppose most current government regulations, and strongly believe that government should be smaller than it currently is. On the other hand, classical liberals admit that in some instances, the government can legitimately do things such as provide public goods, reduce negative externalities, and prohibit monopolies:

The missing . . . element of many classical libertarian theories is that they do not offer a comprehensive explanation of the role of *forced exchanges* in structuring a political system. The principle of autonomy never permits a draft in times of war. . . . The principle of freedom of contract cannot distinguish between an ordinary sale and a cartel arrangement. A categorical prohibition

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<sup>145</sup> The next Article in this series discusses these implementation concerns in more detail.

<sup>146</sup> See Part II of this Article for a brief discussion of this debate. *See supra* notes 68–75 and accompanying text. For an illustration of some of the arguments levied by more absolute libertarians, see Murray N. Rothbard, *Milton Friedman Unraveled*, 16 J. LIBERTARIAN STUD. 37 (2002) (arguing that Friedman should not be considered a libertarian).

against taking does not recognize any privilege to take property of others in time of necessity. The stripped-down libertarian theories . . . preclude[] the use of taxation, condemnation, and the state provision of infrastructure. These practices were part and parcel of government action long before the rise of the modern welfare state. Figuring out why these institutions are needed and how they should be designed and funded requires a major correction to the starker versions of libertarian theory, which is what the classical liberal approach seeks to supply.

Yet by the same token, the effort to respond to these difficulties does not require us to abandon the vision of limited government and fall into the deadly embrace of the welfare state. Even after all these adaptations are made, government would occupy a far smaller place than it holds under contemporary political theory and constitutional law.<sup>147</sup>

Although classical liberals champion private property rights, their theoretical roots differ from Nozick's deontological natural rights theory and are a bit harder to classify. Many (including Epstein, Friedman, and Friedrich Hayek) incorporate consequentialist arguments about the benefits that flow from free markets and robust property rights, as well as the harms that stem from government. Hayek, for example, argues that due to the diffusion of knowledge across individuals, free markets are superior to centralized planning.<sup>148</sup> Epstein and others celebrate the ability of private property rights to solve problems such as the tragedy of the commons, yet decry the harmful incentives of large-scale government welfare programs.

Yet these theorists also rely on liberal arguments from the eighteenth and nineteenth centuries about an individual's right to be free from coercion.<sup>149</sup> These individual rights both limit what can be done to achieve the consequentialist goals they value (be it freedom or efficiency) and justify strong property rights and free markets (because free markets allow for the free expression of individual preferences). Friedman, for example, argues that the free market is a necessary precursor to political freedom, meaning

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<sup>147</sup> EPSTEIN, SKEPTICISM, *supra* note 1, at 7 (footnote omitted).

<sup>148</sup> See generally FRIEDRICH A. HAYEK, THE CONSTITUTION OF LIBERTY (1960) [hereinafter HAYEK, CONSTITUTION] (arguing, *inter alia*, that free markets are more efficient than central planning because in a free market, those with the power to make decisions, the individuals, are the same as those with the information on which those decisions need to be based). Similarly, Friedman notes that "the great advances of civilization, whether in architecture or painting, in science or in literature, in industry or in agriculture, have never come from a centralized government." FRIEDMAN, *supra* note 1, at 3.

<sup>149</sup> See, e.g., EPSTEIN, SKEPTICISM, *supra* note 1, at 2–5 (discussing the interrelation of consequentialism and natural rights).

one's ability to live one's life free from coercion by others, free to resolve ethical problems how one sees fit, and generally free to do whatever one likes with one's freedom.<sup>150</sup> In contrast, government-run economies interfere with freedom and entail coercion, because they force individuals to do what they would not do otherwise. In Hayek's famous words, government planning is "the road to serfdom."<sup>151</sup> John Tomasi echoes this, arguing that economic liberty is just as important as religious and political freedom.<sup>152</sup> He believes that high liberal theories (such as those of Rawls) are defective in that they relegate economic liberty to a lesser status.<sup>153</sup>

Others rely on contractarian justifications. Loren Lomasky, for example, starts by characterizing individuals as project pursuers who value their ability to pursue whatever projects characterize their life.<sup>154</sup> Inevitably, however, one person's pursuit of a project will interfere with another's. How does one maximize one's ability to pursue one's own project while minimizing the interference of others?<sup>155</sup> Lomasky's answer is a twist on the Prisoner's Dilemma. Instead of assuming that people are purely self-interested, it reasons that individuals are empathetic social creatures. As such, they eventually adopt a cooperative strategy of deliberately attempting to avoid interfering with others.<sup>156</sup> Each individual now has "valued moral space that each has reason to accord to the other,"<sup>157</sup> and the boundaries of this non-interference constitute rights—including property rights. Because property enables individuals to pursue their projects, "each individual has some reason to extend deference to others with respect to their holdings conditional upon the receipt of like deference."<sup>158</sup> Because each individual wants as much freedom as possible to pursue his or her projects, the space that rights protect from interference by others is quite large, leading to a limited state with limited powers of taxation.<sup>159</sup>

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<sup>150</sup> See FRIEDMAN, *supra* note 1 at 1–22; see also BRIGHOUSE, *supra* note 68, at 86–94 (summarizing Friedman's arguments).

<sup>151</sup> FRIEDRICH A. HAYEK, *THE ROAD TO SERFDOM* 75–78 (2d ed. 1994) [hereinafter HAYEK, *SERFDOM*].

<sup>152</sup> See generally JOHN TOMASI, *FREE MARKET FAIRNESS* (2012) (arguing that economic liberty and social justice are complementary, rather than conflicting, ideals).

<sup>153</sup> *Id.*

<sup>154</sup> LOREN LOMASKY, *PERSONS, RIGHTS, AND THE MORAL COMMUNITY* 25–27, 31–34 (1989).

<sup>155</sup> *Id.* at 65.

<sup>156</sup> *Id.* at 65–79.

<sup>157</sup> *Id.* at 73.

<sup>158</sup> *Id.* at 120–21.

<sup>159</sup> *Id.* at 79–83. For critiques of Lomasky, see Eric Mack, *Against Agent-Neutral Value*, 14 REASON PAPERS 76 (1989); Christopher W. Morris, *Loren Lomasky's Derivation of Basic Rights*, 14 REASON PAPERS 86 (1989); and Douglas B. Rasmussen, *The Right to Project Pursuit and the Human Telos*, 14 REASON PAPERS 98 (1989).

What might this school of thought mean for the charitable tax subsidies? As explored below, classical liberalism is a spectrum. One end of the spectrum would require a fairly rigorous justification for spending state resources but would allow the government to provide public goods, strictly defined, and possibly a minimal safety net for the poor in addition.<sup>160</sup> This reading of classical liberalism, however, does not justify the broad array of groups currently subsidized. At the other end of the spectrum is a more lenient interpretation that would support extremely broad subsidies like the current structure, even if direct governmental spending on all the activities currently covered could not be justified.

The remainder of this Part examines the classical liberal perspective on two different theories that support the charitable tax subsidies. Section A explores the classical liberal approach to a safety net.<sup>161</sup> Section B discusses public goods from a classical liberal perspective.<sup>162</sup>

#### A. Classical Liberals and a Safety Net

It will likely surprise most legal academics to learn that although classical liberal scholars oppose large-scale redistributive programs, many (but not all) display at least some concern for the poor and disadvantaged.<sup>163</sup> Scholars ranging from Locke, Adam Smith, Hayek, Friedman, and Epstein to even Ludwig von Mises, Ayn Rand and Murray Rothbard have defended classical liberalism in part because they believe it best promotes the interests of the poor.<sup>164</sup> One scholar argues that this concern implies that even for classical liberals, social and economic systems that do not benefit the working poor are morally defective.<sup>165</sup> Because of classical liberalism's other commitments, however, this concern does not lead to broad-based redistribution or attempts at equalization. Instead, this concern has more of a sufficientarian flavor.<sup>166</sup> Hayek, for example, carefully limits this provision to a minimum income that provides "security against severe physical privation" in contrast to assuring "a given standard of life . . . determined by compar-

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<sup>160</sup> Part VI of this Article addresses whether the charitable tax subsidies are an acceptable way for the government to provide such goods. *See infra* notes 322–324 and accompanying text.

<sup>161</sup> *See infra* notes 163–196 and accompanying text.

<sup>162</sup> *See infra* notes 197–286 and accompanying text.

<sup>163</sup> TOMASI, *supra* note 152, at 125.

<sup>164</sup> *Id.* at 127–39. This is not to suggest that all these thinkers viewed benefit to the poor as necessary to their defense of markets or a reason to support markets. Although some may hold that view, the point here is that at minimum, such theorists recognized that the benefit to the poor from markets was an additional good generated by markets.

<sup>165</sup> *Id.* at 125; *see also* HAYEK, CONSTITUTION, *supra* note 148, at 259.

<sup>166</sup> TOMASI, *supra* note 152, at 126–27; *see also* Jason Brennan & John Tomasi, *Classical Liberalism*, in OXFORD HANDBOOK OF POLITICAL PHILOSOPHY 115, 122–23 (David Estlund ed., 2012) (explaining a sufficientarian case for the wellbeing of the disadvantaged).

ing the standard enjoyed by a person or a group with that of others.”<sup>167</sup> In his view, trying to achieve a “more even or more just distribution of goods”<sup>168</sup> interferes with freedom in a way that providing a minimal safety net does not.

To that end, a number of classical liberal scholars have explicitly voiced support for some type of minimal safety net.<sup>169</sup> Justifications tend to fall into four camps: moral duty, self-protection or insurance on the part of the non-needy, free-rider problems, and the necessity of justifying a liberal scheme to all members, although many theorists are either vague about their reasoning or mix and match these arguments.<sup>170</sup> Take Hayek, who concedes such a net on several different occasions.<sup>171</sup> He states that “[t]here can be no doubt that some minimum of food, shelter, and clothing, sufficient to preserve health and the capacity to work, can be assured to everybody.”<sup>172</sup> Later, he writes that “[t]here is no reason why in a free society government should not assure to all protection against severe deprivation in the form of an assured minimum income, or a floor below which nobody need[s] to descend.”<sup>173</sup> Although Hayek adds that minimal safety nets “need not lead to a restriction of freedom, or a conflict with the rule of law,”<sup>174</sup> he does not justify his support for such programs in any detail. At times, Hayek argues that these arrangements are in the interest of the non-needy by protecting them

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<sup>167</sup> HAYEK, CONSTITUTION, *supra* note 148, at 259.

<sup>168</sup> *Id.*

<sup>169</sup> See, e.g., Elizabeth Anderson, *How Should Egalitarians Cope with Market Risk?*, 9 THEORETICAL INQUIRIES L. 239, 262 (2008) (“As Hayek’s example shows, nearly everyone besides the most rigid libertarians accepts a sufficientarian safety net at the bottom.”); Stephen Macedo, *Haurwas, Liberalism, and Public Reason: Terms of Engagement?*, 75 LAW & CONTEMP. PROBS. 161, 167 (2012) (“Classical liberal scholars, such as Friedrich A. Hayek and Milton Friedman, allowed for a social safety net, but opposed institutional mechanisms designed to promote social justice and fair equality of opportunity . . .”).

<sup>170</sup> Although these four justifications are the most common, other classical liberal scholars have offered differing justifications. Charles Murray, for example, has expressed sympathy for people who “get[] the short end of the stick on several dimensions” and thus suffer from poverty through no fault of their own, which echoes many of the arguments common to resource egalitarianism. CHARLES MURRAY, *IN OUR HANDS: A PLAN TO REPLACE THE WELFARE STATE* 4–5 (2006) (proposing an annual minimum income as a replacement for the current array of tax and transfer programs). Eric Mack and Gerald Gaus provide a useful overview of the various arguments for a safety net in Mack & Gaus, *supra* note 68, at 124–29.

<sup>171</sup> See Adam James Tebble, *Hayek and Social Justice: A Critique*, 12 CRITICAL REV. INT’L SOC. & POL. PHIL. 581, 595–97 (2009) for a fuller discussion of these claims.

<sup>172</sup> HAYEK, *SERFDOM*, *supra* note 151, at 133.

<sup>173</sup> FRIEDRICH A. HAYEK, *LAW LEGISLATION AND LIBERTY, VOLUME 2: THE MIRAGE OF SOCIAL JUSTICE* 87 (1976) [hereinafter HAYEK, *MIRAGE*].

<sup>174</sup> *Id.*

“against acts of desperation on the part of the needy”<sup>175</sup> or are akin to insurance programs intended to prevent extreme misery.<sup>176</sup>

At other times, however, Hayek suggests that such programs for the truly indigent are a moral duty of the community.<sup>177</sup> Locke also appears to ground his support for a safety net in the concept of duty:

God the Lord and Father of all, has given no one of his Children such a Property, in his peculiar Portion of the things of this World, but that he has given his needy Brother a Right to the Surplusage of his Goods; so that it cannot justly be denied [sic] him, when his pressing Wants call for it. . . . As *Justice* gives every Man a Title to the product of his honest Industry, and the fair Acquisitions of his Ancestors descended to him; so *Charity* gives every man a Title to so much out of another’s Plenty, as will keep him from extream [sic] want, where he has no means to subsist otherwise . . . .<sup>178</sup>

Whereas Hayek and Locke imply a duty to help the less fortunate, Friedman exemplifies the free-rider argument in favor of so doing. Consider

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<sup>175</sup> HAYEK, CONSTITUTION, *supra* note 148, at 285.

<sup>176</sup> HAYEK, MIRAGE, *supra* note 173, at 87; HAYEK, CONSTITUTION, *supra* note 148, at 286.

<sup>177</sup> HAYEK, CONSTITUTION, *supra* note 148, at 285; FRIEDRICH A. HAYEK, LAW LEGISLATION AND LIBERTY, VOLUME 1: RULES AND ORDER 152 (1973); HAYEK, MIRAGE, *supra* note 173, at 87.

<sup>178</sup> Waldron, *supra* note 85, at 91 (quoting JOHN LOCKE, FIRST TREATISE ON GOVERNMENT 21 (1689)). To be clear, the precise meaning of this passage is the subject of debate among philosophers. Although some theorists believe Locke only countenanced an “imperfect duty” (that is, a duty that is left to one’s discretion to perform) others believe Locke’s statements support a stronger duty of charity, one that endorses an extremely minimal government safety net. These theorists focus on Locke’s phrase that “*Charity* gives every Man a Title to so much out of another’s plenty,” interpreting use of the word “title” to grant such men a positive right to subsistence aid. *Id.* Some scholars base this interpretation on the historical context in which Locke was working, noting that he was writing in response to earlier thinkers’ conceptions of the duty of charity. See Robert Lamb & Benjamin Thompson, *The Meaning of Charity in Locke’s Political Thought*, 8 EUR. J. POL. THEORY 229, 233–35 (2009), for a concise description of the conclusions of James Tully, A. John Simmons, and Jeremy Waldron on this point. To others, the fact that Locke constrained the right to private property with the spoilage and sufficiency provisions shows that Locke did not intend the right to private property to be utterly absolute. See, e.g., Steven Forde, *The Charitable John Locke*, 71 REV. POL. 438, 438–39 (2009); Waldron, *supra* note 85, at 89. And yet others emphasize passages elsewhere in Locke’s writings that discuss the preservation of mankind, or decry price gouging. See, e.g., Steven J. Heyman, *Foundations of the Duty to Rescue*, 47 VAND. L. REV. 673, 701–02 (1994) (also believing this duty is enforceable). Notably, some scholars also believe that Thomas Hobbes supported the state provision of a minimal safety net. See, e.g., *id.* at 705 (“As Hobbes puts it, those who by unavoidable accident ‘become unable to maintain themselves by their labour . . . ought not to be left to the Charity of private persons; but to be provided for, (as far[ ] as the necessities of Nature require,) by the Lawes [sic] of the Commonwealth.’” (quoting THOMAS HOBBS, LEVIATHAN 239 (Richard Tuck ed., Cambridge Univ. Press 1991) (1651))).

his support for a negative income tax, which he views as superior to the current welfare system. In discussing poverty, Friedman first expresses a preference for voluntary charity. But he then proceeds to accept “governmental action to alleviate poverty; to set, as it were, a floor under the standard of life of every person in the community.”<sup>179</sup> As he explains,

I am distressed by the sight of poverty; I am benefited by its alleviation; but I am benefited equally whether I or someone else pays for its alleviation . . . . To put it differently, we might all of us be willing to contribute to the relief of poverty, *provided* everyone else did. We might not be willing to contribute to the same amount without such assurance. In small communities, public pressure can suffice . . . . In the large impersonal communities that are increasingly coming to dominate our society, it is much more difficult for it to do so.<sup>180</sup>

Friedman thus supports some government aid to the poor because he thinks voluntary charity is insufficient due to free-rider problems.<sup>181</sup>

The last argument in favor of a minimal safety net turns on the idea that in a liberal society, the political and economic order must be justifiable to all citizens.<sup>182</sup> For these theorists, support for a sufficientarian safety net is intertwined with their justification of a classical liberal order in the first instance. Take Lomasky, who justifies robust individual rights by appealing to a vision of individuals who are simultaneously project pursuers and social creatures.<sup>183</sup> In Lomasky’s ideal world (free of economic restrictions such as minimum wage laws, licensing laws, zoning laws, and so on), almost all individuals will be able to obtain what they “urgently need, even if not all that they would like to have.”<sup>184</sup> But when someone lacks the most basic necessities, and therefore the prerequisites for project pursuit, an extremely limited safety net is justified.<sup>185</sup> Lomasky reasons that otherwise,

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<sup>179</sup> FRIEDMAN, *supra* note 1, at 191.

<sup>180</sup> *Id.*

<sup>181</sup> *See id.*; *see also* Mack & Gaus, *supra* note 68, at 124 (explaining Friedman’s approach).

<sup>182</sup> For a summary of these arguments, see Zwolinski, *Basic Income*, *supra* note 68, at 1.

<sup>183</sup> *See supra* notes 154–159 and accompanying text.

<sup>184</sup> LOMASKY, *supra* note 154, at 126. Once they have the bare necessities, they may live as project pursuers, even though the responsibility devolves to them to obtain whatever is needed beyond the bare necessities to pursue their chosen projects. *Id.*

<sup>185</sup> *Id.* at 126–29. Lomasky argued:

If a person is otherwise unable to secure that which is necessary for his ability to live as a project pursuer, then he has a rightful claim to provision by others who have a surplus beyond what they require to live as project pursuers. In that strictly limited but crucial respect, basic rights extend beyond liberty rights to welfare rights.

individuals would face the choice of either pursuing their own projects or respecting the rights of others. Individuals who face such a choice would have no “rational stake in the moral community established by that system of rights,” and would withdraw the cooperation that makes that system possible.<sup>186</sup> A minimal safety net is therefore necessary to get the buy-in that supports the system of rights in the first place.<sup>187</sup>

Another type of justificatory argument is exemplified by Gerald Gaus. Gaus argues that a just society treats individuals as free (meaning that “each has a fundamental claim to determine what are her obligations and duties”) and equal (meaning that “members of the public are symmetrically placed insofar as no one has a natural or innate right to command others or to impose obligations on them”).<sup>188</sup> Because individuals are free and equal, any coercion must be justified to them. Free and equal individuals, however, will have differing conceptions of how much coercion (if any) is justified. Gaus reasons that given these different opinions, a just society is one which each individual concludes is better than no state at all: “[i]f a system of strong property rights is to be publicly justified, it must be the case that everyone has reason to accept it and no one has reason to reject it.”<sup>189</sup> Gaus notes, however, that “some people inevitably are left out of the general abundance of modern economies,”<sup>190</sup> and rational individuals will not consent to a system of strong private property rights if they are made worse off by that system. To rectify any such harm, a sufficientarian safety net should be provided to those individuals otherwise left out. Only then will such individuals have reason to accept a system with strong property rights.<sup>191</sup>

To be sure, recognizing that classical liberalism allows for the provision of a sufficientarian safety net does not necessarily mean that classical liberalism would support charitable tax subsidies for that purpose (instead of governmental provision).<sup>192</sup>

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*Id.* at 126. For a critique of this argument, see Tibor R. Machan, *Against Lomaskyan Welfare Rights*, 14 REASON PAPERS 70, 70–75 (1989).

<sup>186</sup> LOMASKY, *supra* note 154, at 127.

<sup>187</sup> Mack and Gaus characterize Lomasky’s argument as one of self-protection. See Mack & Gaus, *supra* note 68, at 125.

<sup>188</sup> Gerald Gaus, *Coercion, Ownership, and the Redistributive State: Justificatory Liberalism’s Classical Tilt*, 27 SOC. PHIL. & POL’Y 233, 234 (2010) [hereinafter Gaus, *Coercion*].

<sup>189</sup> GERALD F. GAUS, SOCIAL PHILOSOPHY 188–91 (1999) [hereinafter GAUS, SOCIAL PHILOSOPHY].

<sup>190</sup> *Id.* at 170.

<sup>191</sup> *Id.*

<sup>192</sup> Part VI of this Article addresses this question. See *infra* notes 322–324 and accompanying text.

### 1. A Safety Net for All, or Some?

Acknowledging that classical liberalism supports a minimal safety net leads to further questions: what should this safety net encompass, and who should be eligible? First, a minimal safety net would likely include soup kitchens, homeless shelters, emergency medical care, and basic provisions such as clothes and toiletries, but not services such as recreation programs, access to the arts, and the like. What is less clear is whether, in today's world, classical liberalism justifies programs that go beyond basic subsistence but enable the industrious to provide for themselves in the future—activities such as child care that enable parents to work, and job training and other educational programs that would enable them to learn marketable skills. Although this Article does not provide an answer for this, it seems that a classical liberal safety net would be much more likely to include such services than a minimal state safety net of the type justified by Mack.

Second, should this safety net be restricted to the “deserving poor,” that is, to individuals who are unable to support themselves through no fault of their own? At first glance, the answer seems to be yes; classical liberal scholars from Locke to Hayek make such a distinction when discussing aid to the very poor.<sup>193</sup> Locke's writings, for example, repeatedly emphasize the deserving poor, meaning those who are willing to work but due to circumstances beyond their control find themselves without enough to survive.<sup>194</sup> As discussed in Part III section D, however, determining which poor people are “deserving” requires a high level of government intrusion into their lives. It is plausible that a classical liberal may prefer to dismiss that requirement, and instead aid any adult at a given income level or less, along with children, the elderly, and the disabled.<sup>195</sup> Alternatively, one may prefer to implement that requirement indirectly, by providing such a safety net only to children, the elderly, and the disabled, but not to able-bodied adults.<sup>196</sup>

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<sup>193</sup> Hayek, for example, focuses on individuals such as the unemployed, *see* HAYEK, CONSTITUTION, *supra* note 148, at 286, and the “sick, the old, the physically or mentally defective, the widows and orphans—that is all people suffering from adverse conditions which may affect anyone and against which most individuals cannot alone make adequate provision.” FRIEDRICH A. HAYEK, THE POLITICAL ORDER OF A FREE PEOPLE 55 (1979), *reprinted in* Tebble, *supra* note 171, at 596.

<sup>194</sup> *See* Waldron, *supra* note 85, at 96–97.

<sup>195</sup> Deciding what income should be the trigger requires a judgment call, but does not provide a practical obstacle to implementing a safety net. *See* Part III, section D, *supra* notes 142–145, for a discussion of implementation issues related to safety nets.

<sup>196</sup> The next Article in this series shall discuss implementation concerns related to a safety net in more detail.

### B. Classical Liberalism and Public Goods

Classical liberalism generally makes room for “provision of public goods and improvements, education . . . [and] financial, health, and safety regulations.”<sup>197</sup> These classical liberals tend to be consequentialists (such as Epstein and Friedman) who believe that a voluntary market economy coupled with robust protections for private property and other economic liberty rights best promotes the public welfare.<sup>198</sup> The main role of government is therefore to provide the framework necessary for a smoothly functioning free market.<sup>199</sup>

These theorists recognize, however, that even a functioning market sometimes underprovides public goods because of free-rider and other effects. A public good is generally defined as a good that meets two criteria. The first is that the good is non-rivalrous, meaning that its use by one person does not diminish its use by another.<sup>200</sup> For example, *Eloise’s* enjoyment of a clean environment does not diminish *Frank’s* enjoyment of a clean environment. The second is that the good is non-excludable, meaning that if it is provided to one person, others cannot be precluded from enjoying it as well.<sup>201</sup> Imagine a fireworks show: once the show is provided, it is impossible to exclude anyone within viewing distance from enjoying it. This latter quality is thought to give rise to free-riding (why should *Eloise* pay for the fireworks show, when she can enjoy it even if she does not pay?), which in turn is thought to lead to the under-provision of such goods by private actors.<sup>202</sup> Because the government can use its taxing power to overcome these problems, many consequentialist classical liberals endorse the governmental provision of public goods<sup>203</sup> subject to market failure.<sup>204</sup>

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<sup>197</sup> Gaus, *Coercion*, *supra* note 188, at 235; accord Gerald F. Gaus, *Public and Private Interests in Liberal Political Economy, Old and New*, in PUBLIC AND PRIVATE IN SOCIAL LIFE 183, 192–93 (Stanley I. Benn & Gerald F. Gaus eds., 1983) [hereinafter Gaus, *Public and Private*].

<sup>198</sup> See, e.g., FRIEDMAN, *supra* note 1; FRIEDMAN & FRIEDMAN, *supra* note 1; EPSTEIN, PRINCIPLES, *supra* note 1; EPSTEIN, SIMPLE RULES, *supra* note 1; EPSTEIN, SKEPTICISM, *supra* note 1. In contrast, libertarians with deontological roots generally limit state activities to protective services and possibly a sufficientarian safety net. Gaus, *Public and Private*, *supra* note 197, at 183.

<sup>199</sup> FRIEDMAN, *supra* note 1, at 25–28.

<sup>200</sup> See, e.g., Harold Demsetz, *The Private Production of Public Goods*, 13 J.L. & ECON. 293, 295 (1970); Paul Samuelson, *The Pure Theory of Public Expenditure*, 36 REV. ECON. & STAT. 387, 387 (1954); David Schmitz, *Contracts and Public Goods*, 10 HARV. J. L. & PUB POL’Y 475, 475 (1987). But see Tyler Cowen, *Public Goods Definitions and Their Institutional Context: A Critique of Public Goods Theory*, 43 REV. SOC. ECON. 53, 55 (1985) (arguing that whether a good exhibits these traits depends on the context in which it is provided).

<sup>201</sup> See Cowen, *supra* note 200, at 54.

<sup>202</sup> Gaus, *Public and Private*, *supra* note 197, at 192.

<sup>203</sup> Henry Hansmann has similarly described how private goods that are subject to contract failure (for example, complex personal services) are also under-supplied by the market. See Henry

Other scholars, such as Gerald Gaus, justify the governmental provision of public goods using a contractarian framework.<sup>205</sup> Gaus argues that a governmental system is just if each member of society would prefer that system to no government at all. In his view, if each individual would prefer a system with public goods such as clean air or national defense, but free-riding makes market provision impossible, then governmental provision of that public good is justified. But as Gaus points out, “For any public good, we can think of at least one person who would prefer that the good not be secured.”<sup>206</sup> So how can providing public goods be justified? In Gaus’s ideal world, objectors to any given public good would be exempted from paying for it.<sup>207</sup> Recognizing that this is rarely a viable option, Gaus offers another justification, one that tax scholars will find familiar. If individuals are not asked to justify the provision of each and every public good separately, but instead must simply justify a world that provides a bundle of public goods, each has reason to accept that bundle rather than reject it.<sup>208</sup> *Georgia*, who likes clean air but not the army, and *Henry*, who likes the army but does not care about clean air, would agree to a bundle of public goods that provides both the army and clean air.<sup>209</sup> The danger, as Gaus notes, is that this could easily lead to the over-provision of public goods.<sup>210</sup>

For these reasons, classical liberalism supports the governmental provision of goods that are public goods subject to market failure. Some classical liberals, however, insist on a stricter definition of public goods than others.

### 1. A Strict Definition of Public Goods

One end of the classical liberal spectrum believes that the government can do a little—but not much—more than simply protect life and property (as minimal state libertarianism holds). These classical liberals would therefore fund public goods, but would likely insist on a strict adherence to the formal definition of a public good; they believe that that set of goods is smaller than popularly thought and that in many cases, the private market

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B. Hansmann, *The Role of Nonprofit Enterprise*, 89 YALE L.J. 835, 862–63 (1980). The analysis in this section applies with equal force to such private goods.

<sup>204</sup> FRIEDMAN, *supra* note 1, at 27–32; LIONEL ROBBINS, *THE THEORY OF ECONOMIC POLICY IN ENGLISH CLASSICAL POLITICAL ECONOMY 188–89* (1953); Gaus, *Public and Private*, *supra* note 197, at 192.

<sup>205</sup> See GAUS, *SOCIAL PHILOSOPHY*, *supra* note 189, at 188–98.

<sup>206</sup> *Id.* at 188–91.

<sup>207</sup> *Id.*

<sup>208</sup> *Id.* at 191.

<sup>209</sup> *Id.* at 189.

<sup>210</sup> *Id.*

can actually provide public goods.<sup>211</sup> In some cases, this is because a given good lacks the non-excludability that defines public goods. Other times, free-riding may be less prevalent than commonly assumed. Lastly, in some instances, private action may be able to overcome the initial market failure after all.<sup>212</sup>

#### a. Excludability

Many classical liberals would argue that many goods traditionally considered public goods lack the non-excludability that defines pure public goods as an economic matter.<sup>213</sup> If non-payors can be excluded from the good in question, then the private market can effectively provide it.<sup>214</sup> In some cases, new technology makes excludability feasible where it was not before. For example, given the rise of cable, satellite, and other methods of viewing television programs, there is no reason that public television could not be offered only to those willing to pay.<sup>215</sup> The willingness of audiences to buy or rent DVDs of popular public television shows like *Downton Abbey* suggests that such willingness exists. Likewise, recent experiments with congestion pricing on roads show that excluding non-paying drivers is possible on roads other than those few roads traditionally thought to be amenable to tolls.<sup>216</sup>

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<sup>211</sup> See, e.g., Daniel Klein, *Tie-Ins and the Market Provision of Collective Goods*, 10 HARV. J.L. & PUB. POL'Y 451, 459 (1987) ("The pure public good may remain . . . but as is frequently pointed out, there seem to be few real instances of such goods."). Daniel Klein further argues that "[t]here is a clear propensity among academics to consider public goods as an area in which it is appropriate for the public sector to enter . . . . [But] the government is not needed to supply a considerable variety of goods and services." *Id.* at 471.

<sup>212</sup> See *id.* ("[I]nnumerable collective goods are currently provided successfully by the private sector.").

<sup>213</sup> See, e.g., Kenneth D. Goldin, *Equal Access Vs. Selective Access: A Critique of Public Goods Theory*, 29 PUB. CHOICE 53, 63–66 (1977) (illustrating how a number of goods traditionally considered to be public goods can be provided selectively).

<sup>214</sup> See Demsetz, *supra* note 200. It generally costs the same for a producer of a non-rivalrous good, such as a television program, to produce it for one person or one million people. To that end, Demsetz addresses whether "an individual buyer could extort other buyers into subsidizing his purchases under the threat that otherwise he would purchase nothing, for if he purchases nothing, the price to other buyers, because there are fewer of them, must be increased to cover production cost." *Id.* at 299. Demsetz argues that the costs to the individual buyer of engaging in such strategic behavior are so large that such a "game is seldom worth playing." *Id.* at 300.

<sup>215</sup> See *id.* at 295 (using the example of paying for television); Mark P. Gergen, *The Case for a Charitable Contributions Deduction*, 74 VA. L. REV. 1393, 1443–44 (1988).

<sup>216</sup> RANDY T. SIMMONS, BEYOND POLITICS: THE ROOTS OF GOVERNMENT FAILURE 112 (2011); Cowen, *supra* note 200, at 62 ("Tolls, gates, electronic monitoring, and police patrols are simply a few of the methods of excluding non-payors from using the road."). In fact, although we consider roads to be quintessential public goods, England and Wales contain over 40,000 private roads. SIMMONS, *supra*, at 121.

A number of activities provided by the charitable sector are not characterized by non-excludability. Any non-profit that provides goods and services for a charge, by definition, can exclude non-payors.<sup>217</sup> Many such organizations, such as tax-exempt schools and hospitals, do just that. Exempt schools are not required to offer any scholarship assistance at all to qualify for the charitable tax subsidies;<sup>218</sup> hospitals are likewise not required to provide any charity care for those otherwise unable to pay their medical expenses.<sup>219</sup> Operas, symphonies, and the ballet can exclude non-payors from viewing their performances, and museums can limit admission to those paying an entrance fee. Even some research, like scientific research, could be made available selectively via licensing and patents.<sup>220</sup>

Charitable tax subsidies that comported with a more rigid definition of public goods would therefore subsidize a much smaller number of activities than under current law. Pure environmental research would likely qualify, and maybe some medical and scientific research that could not be monetized into licenses and patents.<sup>221</sup> Providing basic needs to the poor would be subsidized as well; based on the arguments in section A, subsection 1 of this Part, limiting such aid to those who can pay defeats the purpose of such aid. Several other activities not mentioned here might also qualify, but the take-away is that many activities currently subsidized would not be.

For some excludable activities, however, subsidization may be justified nonetheless. This might be true in two instances. Some activities (such as going to an art museum) might generate positive externalities if their benefits are extended to non-payors or to those who would not pay the price demanded in an unsubsidized market. In other cases, something about the nature of an activity might lead non-profits to provide it, ensuring the activity's efficient provision has positive externalities, and subsidization might be justified to overcome constraints imposed by the non-distribution constraint. In each case, the argument would be that the positive externalities exhibit non-excludability, thus indicating a market failure. These possibilities are explored below.

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<sup>217</sup> The fact that many organizations allow access to a few non-payors does not change the fact that non-payors could, as an economic matter, be excluded.

<sup>218</sup> Although most non-profit schools do offer financial assistance to needy students, many non-profit hospitals provide only minimal charity care.

<sup>219</sup> That is, so long as they offer an open access emergency room. Rev. Rul. 69-140, 1969-1 C.B. 46.

<sup>220</sup> Goldin, *supra* note 213, at 64.

<sup>221</sup> Lomasky seems to accept "basic research" and environmental protection as public goods that can be justified under the mutual benefit theory. Loren Lomasky, *Libertarianism as if (the Other 99 Percent of) People Mattered*, 15 SOC. PHIL. & POL'Y 350, 368 (1998).

i. The non-distribution constraint and positive externalities

Many excludable activities that are currently subsidized (such as health care, education, day care, and nursing home care) represent complex personal services. According to Henry Hansmann, a contract failure arises because purchasers have no way of judging the quality of the service being provided; this contract failure leads firms providing these services to organize as non-profits.<sup>222</sup> The resulting inability to distribute profits, Hansmann reasons, assures purchasers that their payments will be used to provide a quality service, instead of being diverted for managers' personal uses.<sup>223</sup> The downside of the non-distribution constraint is that it impedes an organization's ability to raise capital. Hansmann argues that tax subsidies are justified to make up for the inability to raise capital.<sup>224</sup>

This argument, however, raises the question of why such organizations deserve a subsidy. After all, many organizations face difficulties raising capital, and other types of complex services (such as car repair) face information constraints similar to those thought to lead to contract failure when it comes to health care or schools. If providers of the former can overcome information asymmetries and continue to operate in the for-profit market, a classical liberal might ask what is different about a health care provider.

The strongest answer would be that the consequences of a consumer making a poor choice in the health care or education sector are graver than when a consumer makes a poor choice about car repair. If a crooked auto repair shop promises to repair the squeak a car is making and does not do so, the car's owner is the only one harmed.<sup>225</sup> But if a hospital, nursing home, or school deceives someone, society suffers because it is in society's interest as a whole for the population to remain healthy, well cared for, and educated. In other words, the services provided by these firms generate positive externalities when they are high quality and negative externalities when they are low quality. These positive externalities (a healthy and educated population) exhibit non-excludability, thus justifying government subsidization for firms organizing as non-profits.

One problem with the foregoing argument, however, is that it assumes a lack of sophistication on the part of consumers that many classical liberals would likely find repugnant. Consider the myriad ways consumers may now gather information about a given service provider, such as internet review sites, consumer message boards, third party certification, and review

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<sup>222</sup> Hansmann, *supra* note 203, at 862–63.

<sup>223</sup> *Id.*

<sup>224</sup> Henry Hansmann, *The Rationale for Exempting Nonprofit Organizations from Corporate Income Taxation*, 91 *YALE L.J.* 54, 55 (1981).

<sup>225</sup> On the other hand, others may suffer if the shop does not fix someone's faulty brakes and an accident results.

of required regulatory filings (which are often available online). If enough information is available for consumers to decide for themselves which nursing homes (for example) provide quality care, then the non-distribution constraint would be extraneous.<sup>226</sup> If so, then subsidization is also extraneous.

Along the same lines, scholars have suggested two contractual mechanisms whereby for-profit providers might reassure consumers that funds are being used as promised.<sup>227</sup> First, such providers could promise donors (or purchasers) via contract that they would hire a manager at a fixed salary to run the enterprise.<sup>228</sup> The contract would preclude the manager from owning shares in the firm, and it would limit his ability to indirectly extract profits via perks. If desired, an outside auditor could be hired to police the contract. If the manager skimmed on the firm's operation in order to somehow benefit from increased profits, donors (or purchasers) could sue for breach of contract. A second option would be for providers either to charge on a cost-plus basis or refund profits at year's end.<sup>229</sup> Both would mimic cooperative pricing schemes by contractually ensuring that residual profits are returned to the donor/purchaser and by giving the donor (or purchaser) the ability to sue for breach of contract if that did not occur. According to this theory, the fixed wage aspect of these mechanisms minimizes the incentive of whoever is running the firm to skimp on quality.<sup>230</sup> Again, if the non-distribution constraint is extraneous, then so is subsidization.<sup>231</sup>

Moreover, there are many sectors (including health care) where non-profits operate alongside for-profits. Given that non-profits and for-profits often provide similar services, how can it be said that the non-distribution constraint is a necessary feature of providing that service? To justify subsidizing these organizations because of the non-distribution constraint, a classical liberal would desire proof that there was something intrinsically different about the non-profit and for-profit provision of what seemed like an identical service, and that that difference justifies subsidization.

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<sup>226</sup> One exception might be in emergency medical care, where consumers generally do not have time to shop around. That said, it is unlikely that under the current scheme, consumers take the time to choose non-profit medical providers over for-profit providers.

<sup>227</sup> Anup Malani & Eric A. Posner, *The Case for For-Profit Charities*, 93 VA. L. REV. 2017, 2035–37 (2007).

<sup>228</sup> *Id.* at 2036.

<sup>229</sup> *Id.* at 2036–37.

<sup>230</sup> *Id.* at 2037. Malani and Posner also assume that whoever is controlling the firm, be it a manager or the owners of the firm, is altruistically motivated.

<sup>231</sup> M. Todd Henderson and Anup Malani have argued that in some situations, for-profit firms can provide charitable goods and services more efficiently than non-profits. *See generally* Henderson & Malani, *supra* note 30 (proposing to extend tax subsidies to for-profits that engage in charitable activities). For one, markets and shareholders can act as a stronger check on a for-profit firm than can donors and the government on non-profit firms, thus minimizing agency costs.

Consider hospitals. Some studies have suggested that non-profit hospitals are neither more efficient nor provide more charity care than for-profit hospitals. On the other hand, there is some evidence that non-profit hospitals are more likely than for-profit hospitals to provide unprofitable medical services such as emergency psychiatry services, whereas for-profit hospitals focus on more profitable areas like cardiac medicine.<sup>232</sup>

If one assumes then that non-profit hospitals are more likely to provide unprofitable services, and that society has an interest in ensuring these services are provided even if they would not be under normal market provisions, the question becomes: why subsidize all non-profit health providers just because some engage in activities worthy of subsidization? And of those engaging in activities worthy of subsidization, why subsidize all of their activities, instead of simply those deemed worthy of subsidization? Subsidizing only the latter—for example, the provision of mental health services, whether by non-profit or for-profit providers—is more consistent with classical liberalism than subsidizing the whole non-profit health care sector.

## ii. Merit goods

Two additional potential arguments for subsidizing excludable activities relate to the concept of merit goods. Briefly, merit goods are goods that individuals purchase “too little” of from the market for society’s taste.<sup>233</sup> Examples include education, health care, environmental amenities, and cultural activities.<sup>234</sup> Many of these, of course, are excludable; schools can exclude non-payers. Likewise, museums, operas, and symphonies can restrict admission to patrons who pay. The theory holds that if individual preferences, as reflected by market decisions to purchase such experiences, do not reflect society’s overall preferences regarding the appropriate amount of such activities, then government provision is warranted. This is so even if it means disregarding individuals’ preferences as expressed in the market.<sup>235</sup>

One potential justification for governmental provision of such services is as follows. Perhaps these activities generate positive externalities if their benefits are extended to non-payers or to those who will not pay the price demanded in an unsubsidized market. If those benefits exhibit non-excludability, then perhaps subsidization is justified. Subsidizing these activities would thus turn on the idea that there are benefits beyond the initial users and that these positive externalities constitute a public good from

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<sup>232</sup> Jill R. Horwitz, *Does Nonprofit Ownership Matter?*, 24 YALE J. REG. 139, 171–74 (2007).

<sup>233</sup> RICHARD A. MUSGRAVE, *THE THEORY OF PUBLIC FINANCE* 13–14 (1959).

<sup>234</sup> *Id.*

<sup>235</sup> *Id.*

which nobody can be excluded. This, of course, assumes second-order benefits—for example, that the existence of art provides consumption value to people other than those who go to a museum or attend a play. The more people who consume art, the more second-order benefits are generated. A related argument for providing merit goods is that individuals do not know their own preferences for them because the benefits from art or education are indirect or far in the future. Government provision is warranted, some argue, to “correct” individual preferences.

Both justifications raise essentially the same question for a classical liberal: how do we know which preferences should be overridden (why opera but not zombie movies), and how do we know which activities generate a second-order benefit? It might be the case, for example, that art affects some people’s utility negatively.<sup>236</sup> One scholar notes that “elites” would likely decide.<sup>237</sup> Indeed, several scholars have noted that many activities considered merit goods—such as art and education—reflect the tastes of the middle-class cultural elite.<sup>238</sup> That is likely an unsatisfactory response for the classical liberal, because it allows the tastes of a few to override individuals’ expressed preferences. Nor can the answer lie in the bargain that tax scholars generally rely on to justify the charitable tax subsidies.<sup>239</sup> Classical liberals would argue majority approval does not override the boundaries of what government may or may not do. Due to these and other difficulties, some scholars have argued that the political process is incapable of improving upon the market when it comes to merit goods.<sup>240</sup>

On the other hand, it might be the case that individuals have two sets of preferences, market preferences and reflective preferences expressed

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<sup>236</sup> Cowen, *supra* note 200, at 57–58.

<sup>237</sup> SIMMONS, *supra* note 216, at 124.

<sup>238</sup> *Id.* This is the case not just with respect to merit goods, but with respect to much governmental redistribution. *See id.* at 105 (citing George J. Stigler, *Director’s Law of Public Income Redistribution*, 13 J.L. & ECON. 1 (1970)); GORDON TULLOCK, *WEALTH, POVERTY, AND POLITICS* (1988). Randy T. Simmons has described Gordon Tullock’s argument:

[T]he middle class profits most from redistributive efforts of democratic governments. . . . [A]dopting welfare programs for the poor requires the support of the middle class, who provide their support in exchange for having welfare benefits extended to themselves. More than one study has demonstrated this to be so in such fields as housing, education, transportation, environmental improvements, and health services. And of course, much tax policy is so designed as to confer tax benefits on the middle class.

SIMMONS, *supra* note 216, at 105.

<sup>239</sup> *See supra* notes 21–67 and accompanying text (Part I).

<sup>240</sup> *See, e.g.*, John G. Head, *On Merit Goods*, 25 FINANZARCHIV/PUB. FIN. ANALYSIS 1, 25 (1966).

through the political process. To borrow an example, imagine a smoker.<sup>241</sup> His market preferences are to buy cigarettes to assuage his cravings. But he may desperately wish to rid himself of the desire to smoke. In this case, he has a meta-preference about smoking, and might act upon that preference by voting for stricter anti-smoking measures. Scholars make a similar argument about merit goods. They recast such goods as goods that an “individual recognizes he ought to provide, but which due to weakness of will, moral turpitude or laxity he will not adequately provide in the market where the cost in ‘selfish pleasure’ foregone is too high.”<sup>242</sup> Under this view, the government provision of merit goods simply reflects individuals’ reflective meta-preferences, and therefore is not necessarily inconsistent with individual sovereignty.

*b. Free-Riding*

As discussed above, a classical liberal would likely insist that a given activity exhibit non-excludability or (if excludable) generate positive externalities before supporting the government provision thereof. Although such characteristics would be necessary precursors to government provision, they would likely not be sufficient; a classical liberal would also want some assurance that free-riding was, in fact, a problem and that government intervention was necessary to overcome it.<sup>243</sup> If it were the case that free-riding did not affect willingness to pay for a given collective good, then there would be no justification for the government to tax its citizens to pay for it. At least one experiment, for example, suggests that individuals still reveal their true demand for goods like television programming or theater performances even when they are told they will not be excluded if they do not contribute.<sup>244</sup> If this were true of other goods currently subsidized, classical liberalism would argue that such subsidies are unfounded.<sup>245</sup>

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<sup>241</sup> Geoffrey Brennan & Loren Lomasky, *Merit Goods*, 41 FINANZARCHIV/PUB. FIN. ANALYSIS 183, 195 (1983).

<sup>242</sup> *Id.* at 199.

<sup>243</sup> See, e.g., Mack & Gaus, *supra* note 68, at 124–25.

<sup>244</sup> See Earl R. Brubaker, *Free Ride, Free Revelation, or Golden Rule?*, 18 J.L. & ECON. 147, 159–61 (1975) (citing Peter Bohm, *Estimating Demand for Public Goods: An Experiment*, 73 SWED. J. ECON. 55, 125–26 (1971)).

<sup>245</sup> Nozick, for example, rejects the notion that government assistance is necessary to overcome the free-rider problems that some argue accrue to purely private charity. NOZICK, *supra* note 2, at 265–68.

i. Using social mechanisms to overcome free-riding

Even assuming an inclination to free-ride, however, a variety of social mechanisms might temper that tendency.<sup>246</sup> Churches, for instance, benefit from their club-like nature in limiting free-riders.<sup>247</sup> In other contexts, some individuals might be aware that the welfare of their friends and neighbors depends on what they do, minimizing free-riding.<sup>248</sup> Additionally, social pressure and moral suasion can minimize free-riders.<sup>249</sup> An elementary school, for example, may give out a class-wide pizza party to the first class to reach 100% participation in the annual fund.<sup>250</sup> There, both the stigma of being the holdout that precludes one's child's kindergarten class from having a special pizza party and the desire to tangibly benefit one's child by allowing them to enjoy the party minimize free-riding.

Donor lists inside any college alumni magazine or opera program further illustrate the power of social pressure. Donors are well aware of the recognition that accompanies giving at a certain level, and often adjust their giving to fall within the next most prestigious level of giving—but at the lowest cost to themselves possible.<sup>251</sup> To illustrate, imagine that an alumni magazine lists donors at the \$250–\$500 level, the \$500–\$750 level, and the \$750–\$1000 level.<sup>252</sup> Gifts will tend to cluster at the lowest contribution amount necessary to jump into a given level; donors are much more likely to contribute \$500 than \$499, \$750 than \$749, and \$1000 than \$999. This suggests that recognition plays a role of some importance in driving giving patterns. The sale of naming rights is another example of using social forces to overcome free-riding; for that reason, some scholars have proposed disallowing a charitable deduction for donations that come with naming rights.<sup>253</sup>

Of course, social pressure and moral suasion are more likely to work in some situations than others. The settings where these types of incentives are

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<sup>246</sup> In a separate context (that of cattle ranchers and farmers), Robert Ellickson has demonstrated how social norms arise to solve a variety of problems traditionally thought to be solvable only by government. *See generally* ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991) (discussing how residents of a rural California county settle disputes triggered by wayward cattle and developing a theory about how people find ways to interact in a mutually advantageous manner without state intervention).

<sup>247</sup> Gergen, *supra* note 215, at 1438.

<sup>248</sup> Brubaker, *supra* note 244, at 154.

<sup>249</sup> *See* Klein, *supra* note 211, at 466.

<sup>250</sup> This example comes from the author's experience with her daughter's school.

<sup>251</sup> Amihai Glazer & Kai A. Konrad, *A Signaling Explanation for Charity*, 86 *AM. ECON. REV.* 1019, 1021 (1996).

<sup>252</sup> *See id.*

<sup>253</sup> John D. Colombo, *The Marketing of Philanthropy and the Charitable Contributions Deduction: Integrating Theories for the Deduction and Tax Exemption*, 36 *WAKE FOREST L. REV.* 657, 661–62 (2001).

currently employed—such as churches, schools, and the opera—generally provide benefits to a well-defined group of people and exhibit a club-like nature. Individual churches tend to be relatively small organizations where members know one another. Similar communities develop around schools, either through the parents' social lives (for a K–12 school) or among alumni of a given college or university. Such alumni have an incentive to maintain or enhance their image with their peers, as do donors to operas. In instances where the users of charitable services may not have that incentive (for example, hospital patients), auxiliary groups are often created precisely to foster a club-like setting where social status can be cemented or maintained. In contrast, organizations with a large number of widely dispersed beneficiaries (such as environmental or medical research organizations) will likely find it harder to use these incentives.

Robert Cooter has offered another approach for minimizing free-riding that is targeted at increasing overall levels of giving (instead of giving to a specific organization) and relies less on a given organization's ability to itself harness social pressure. Cooter argues that when it comes to the social norms governing charitable giving, “[W]e don't know exactly how much we ought to give . . . . Consequently, we don't give very much to charity.”<sup>254</sup> To remedy the lack of information that makes complying with the social norm difficult, he proposes that charities create a donation registry. He envisions that charities could pressure public figures (including politicians, athletes, and entertainment stars) to disclose the portion of their adjusted gross income donated to charity.<sup>255</sup> Cooter further suggests that the IRS should ask regular taxpayers to allow it to transmit to the donation registry the taxpayer's name and the percentage of adjusted gross income contributed.<sup>256</sup> He argues that armed with this information, we could use social pressure to increase giving.

Would these types of social pressure constitute coercion? Not of the kind feared by libertarians and classical liberals, for it is not accompanied by the use of force. Consider a private school parent who does not contribute to the annual fund, or a neighborhood resident whom the donation registry shows contributes either nothing to charity or far less than his neighbors. The worst that can happen is that other parents or neighbors may shun these individuals who contribute nothing. Although some may find that repercussion distasteful, the other parents do not have the power to imprison or physically harm the non-donating parents.<sup>257</sup>

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<sup>254</sup> Robert D. Cooter, *The Donation Registry*, 72 *FORDHAM L. REV.* 1981, 1981 (2004).

<sup>255</sup> *Id.* at 1984–85.

<sup>256</sup> *Id.* at 1985.

<sup>257</sup> Some also may wonder whether using social pressure and other mechanisms dilutes the purity of altruistic voluntary giving. As one reader at a colloquium presentation of this Article

ii. Using contractual mechanisms to overcome market failure

A variety of contractual or economic mechanisms can also be used to overcome an initial market failure.<sup>258</sup> For example, the use of “tie-ins” can sometimes overcome free-rider problems.<sup>259</sup> When providers use tie-ins, they charge not for the public good itself, but for another private good that is closely associated with the public good and that establishes exclusivity.<sup>260</sup>

Take the quintessential example of a public good, the lighthouse.<sup>261</sup> Lighthouses are often thought to be subject to market failure because once the lighthouse is operating, nearby ships cannot be excluded from enjoying its light whether or not they have contributed to its existence. Therefore, the story goes, ship captains will not be willing to pay for its light, justifying the tax-funded governmental provision of lighthouses. Private actors, however, actually operated lighthouses in England up until the mid-1800s.<sup>262</sup> Operators avoided the free-rider problem by charging ships docking at nearby ports. The only way for a ship to avoid paying the fee was to avoid

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asked, “[D]o we really want a society that gives . . . only out of some sense of competition instead of a desire to serve and give to others freely?” These mechanisms, however, fare no worse on that point than the financial incentives provided by the charitable deduction. Others may wonder whether reliance on these incentives (instead of tax subsidies) will cause charities to increase expenditures on fundraising at a cost to their charitable activities. Two points deserve mention. First, empirical evidence is mixed as to how changes in tax subsidies affect the fundraising expenditures of non-profits. Some studies show that increases in the tax subsidies cause firms to decrease their expenditures, whereas other studies suggest that increases in the subsidies cause firms (counter-intuitively) to increase such expenditures. See Brian Galle, *How Do Nonprofit Firms Respond to Tax Policy?* (Bos. Coll. Law Sch. Legal Studies Res. Paper No. 320), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2443621](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2443621) [<http://perma.cc/2Q37-3BAM>]. Second, the fact that subsidies may increase or decrease the amount firms spend on a given program is not dispositive for a libertarian or classical liberal. The activity itself must still be the type of activity for which a justification for the spending of state resources can be found. Once such a justification can be found, however, the subsidies’ impact may affect whether direct state provision or the subsidization of private providers is preferable.

<sup>258</sup> See, e.g., Klein, *supra* note 211, at 471.

<sup>259</sup> Demsetz, *supra* note 200, at 306 (suggesting that tie-ins make the private provision of some, but not all, collective goods possible); Klein, *supra* note 211, at 471.

<sup>260</sup> Tie-ins only work, however, when there is a private good closely associated with the collective good. When there is no such good (as with national defense, for example), using tie-ins is likely not very effective. Compare Klein, *supra* note 211, at 472–73 (exploring the ways in which national defense could be tied to various goods and services), with David Friedman, *Problems in the Provision of Public Goods*, 10 HARV. J.L. & PUB. POL’Y 505, 509–10 (1987) [hereinafter Friedman, *Public Goods*] (critiquing Klein’s arguments on this point).

<sup>261</sup> See Ronald H. Coase, *The Lighthouse in Economics*, 17 J.L. & ECON. 357, 357–58 (1974) (discussing the writings of John Stuart Mill, Henry Sidgwick, Arthur Pigou, and Paul Samuelson, and their use of a lighthouse as an example of a public good).

<sup>262</sup> *Id.* at 362–67. Another quintessential example of market failure—apple orchard owners and beekeepers—has also been similarly debunked. See Steven N. S. Cheung, *The Fable of the Bees: An Economic Investigation*, 16 J.L. & ECON. 11, 12–13 (1973).

the port, which often meant docking at a more treacherous shore or spending “an unduly long period at sea.”<sup>263</sup>

Other examples include tying the payment for neighborhood security patrols (the joint good) to the purchase of a home in the covered neighborhood (the private good),<sup>264</sup> or tying the enjoyment of watching a sports game (the joint good) to the purchase of a seat (the private good).<sup>265</sup> One can imagine a variety of tie-ins that could be used in the non-profit sector. Pew rents, for example, are a form of tie-in. So are preferred seats for shows and concerts. Although not exactly a tie-in in the strict sense, offering donors extra benefits, such as the ability to mingle with performers after shows and concerts, can serve the same role. This is not meant to be an exclusive list, but rather to illustrate that a variety of mechanisms other than government intervention can be used to provide public goods. In the private arena, two examples of tie-ins are Starbucks’s bundling of aid to farmers in developing countries with the private good of coffee, and Toyota’s bundling of environmental protection with the private good of a Prius.<sup>266</sup>

Free-riding, however, is not the only problem that can plague public goods. The assurance problem occurs when a given level of funding is needed to produce the good in question.<sup>267</sup> A donor may be worried that if that level of funding is not reached, his or her contribution will effectively be wasted. The donor may wonder, “Why should I contribute money for vaccine research if that money will not do any good unless enough other people contribute?” As a result, he or she may decide not to contribute.<sup>268</sup> One scholar argues that the assurance problem can be overcome via conditional binding assurance contracts (“CBACs”). In such contracts, a donor would pledge to support a given project, but that pledge would become enforceable only when total pledges reached the level necessary to fund the project.<sup>269</sup> Although this issue has received less attention in the non-profit law area than the free-rider problem, one can imagine that at least some potential donors are affected by it. In fact, two examples of affected areas—

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<sup>263</sup> Klein, *supra* note 211, at 454 (quoting Coase, *supra* note 261, at 375).

<sup>264</sup> *Id.* at 452. The developer can require each home purchaser to pay a yearly fee for the patrol service.

<sup>265</sup> *Id.* at 455.

<sup>266</sup> Henderson & Malani, *supra* note 30, at 594.

<sup>267</sup> See generally Schmidt, *supra* note 200 (describing contract solutions to the assurance problem). But for a critique of Schmidt’s argument, see Friedman, *Public Goods*, *supra* note 260, at 512–20.

<sup>268</sup> Schmidt, *supra* note 200, at 476.

<sup>269</sup> *Id.* Alternatively, a donor could be guaranteed a refund of her donation if enough others did not contribute to the project in question. See also Brubaker, *supra* note 244, at 151–53 (discussing a range of outcomes an individual donor may encounter).

vaccine research and public television funding—constitute activities found in the non-profit sector.

*c. Even if Market Failure, Then What?*

Despite the foregoing observations, it is likely that there are some activities where free-riding continues to be an attractive option for many. This, however, does not necessarily answer the normative question of whether the government should provide a given good.<sup>270</sup> One scholar notes that much economic analysis of public goods assumes very high transaction costs when private parties overcome market failures and very little inefficiencies or other costs when the government overcomes market failures.<sup>271</sup> In his view, however, it might well be the case that once more realistic assumptions about the costs to each of the private sector and the government are used, government intervention might not be the best method of overcoming free-riding after all.<sup>272</sup>

Assume, however, that government intervention is the best method of overcoming free-riding for these goods. Two further points arise. First, how would we know which public or quasi-public goods are actually subject to market failure such that subsidies for them can be justified? Would we only fund goods that are non-excludable, and stop funding excludable activities like museums and schools? How do we know which excludable goods generate positive externalities that are non-excludable? How would we know which types of providers can minimize free-riding by using tie-ins or other contractual arrangements? Likewise, how would we identify the types of providers that can use social pressure and the like to minimize free-riding? It would be hard to identify precisely which types of activities should merit subsidies if we more stringently enforced a prerequisite of free-riding. These difficulties do not undermine the larger point, however, which is that strict classical libertarian principles would justify a much smaller set of subsidies than under current law.

Second, when the government does provide a public good, how do we determine the appropriate level of that public good? Some scholars have suggested that the governmental provision of public goods results in over-production.<sup>273</sup> When the government provides a public good, the cost is

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<sup>270</sup> As Daniel Klein notes, “[C]ollective goods analysis is, like all analysis, policy-neutral . . . . ‘The merits or demerits of subscription TV cannot be settled by an appeal to abstract reasoning or principles.’” Klein, *supra* note 211, at 471 (quoting Paul A. Samuelson, *Public Goods and Subscription TV: Correction of the Record*, 7 J.L. & ECON. 81, 83 (1964)).

<sup>271</sup> Cheung, *supra* note 262, at 32–33.

<sup>272</sup> *Id.*

<sup>273</sup> See, e.g., Edi Karni, *On the Private Production of Public Goods*, 34 REV. SOC. ECON. 41, 49 (1976).

necessarily spread out, such that individuals might pay less than a market-clearing price (assuming a market could be constructed for the good). Rational individuals may well demand more than otherwise, given this artificially low price, leading to oversupply.<sup>274</sup>

Along those same lines, the charitable tax subsidies represent an odd version of government production: a private actor (the charity) is, in fact, producing a public good, but with a government subsidy. Assuming that the activities being subsidized suffer from market failure, classical liberal tenets suggest that subsidization is justified only if subsidizing the sector actually causes an increase in the output of the non-profit sector.

Whether the charitable tax subsidies increase the non-profit sector's output is an empirical question. Some have argued that the charitable tax subsidies do little to increase charitable giving. In their view, the fact that charity giving has remained a fairly constant percentage of the United States' gross domestic product ("GDP") despite fluctuations in the charitable deduction suggests that the economy is the main factor driving levels of giving.<sup>275</sup> But looking solely at the level of overall charitable giving likely obscures the way tax incentives impact the giving patterns of subsectors of society, such as the very wealthy.<sup>276</sup> Given that most economists believe that the charitable tax subsidies increase charitable giving, and that classical liberals tend to believe that rational individuals react to price changes, it is plausible for classical liberals to believe that the subsidies do increase charitable donations and therefore the production of public goods over an unsubsidized world.

The bigger problem is determining what is the "right" amount of a given public good. The assumption under current law seems to be that more is better, but how do we know when we have enough of a given public good? Even if the tax subsidies increase giving over an unsubsidized world,

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<sup>274</sup> See, e.g., SIMMONS, *supra* note 216, at 124–25; Karni, *supra* note 273, at 49.

<sup>275</sup> See, e.g., Daniel J. Mitchell, *Should We End the Tax Deduction for Charitable Donations? Yes: It Doesn't Increase Giving*, WALL ST. J. (Dec. 16, 2012), <http://www.wsj.com/articles/SB10001424127887324469304578143351470610998> [<http://perma.cc/6DXX-7GUG>].

<sup>276</sup> Jon Bakija explains why the ratio of charitable donations to the GDP in the recent past has remained steady as follows. E-mail from Jon Bakija, Professor of Econ., Williams Coll., to author (Aug. 2, 2015, 09:31 EST) (on file with author). First, evidence suggests that giving as a share of one's disposable income rises with income. Holding all else steady, then, the large increases in income to the wealthy in the recent past should have triggered more donations from that group. However, evidence also exists that tax incentives affect the donation patterns of the wealthy. As tax rates rise (decreasing the after-tax cost of giving), donations rise. Conversely, as tax rates drop (increasing the after-tax cost of giving), donations drop. In the recent past, the rise in income for the wealthy (which normally increases incentives to give) coincided with lower tax rates (which normally decrease incentives to give). Because these two incentives offset each other, overall giving levels remained steady.

how do we know that not subsidizing non-profits to produce public goods would actually lead to under-production?

The absence of a market, of course, makes it hard to know. On one hand, a number of non-profits exist and contribute to society without benefiting from the charitable tax subsidies. Charities that rely heavily on donations from non-itemizers, for example, are effectively operating without the subsidy of the charitable deduction. Likewise, charities that do not have accumulated earnings are operating without the subsidy of tax-exemption. Further, a number of the great philanthropic projects that shaped society in the last century were funded before the income tax, meaning that the families establishing many civic institutions, such as libraries and museums, received no tax subsidies from their expenditures.

On the other hand, even if free-riding may not be as prevalent as some believe, there is little reason to believe that it is nonexistent and that everyone who desires a given public good is already contributing to it, rational or not. Thus, it seems plausible that due to some rational free-riders, voluntary unsubsidized donations may result in an under-supply.

Assuming under-production, however, it is quite likely that the level of public goods produced by subsidizing them through the charitable deduction and tax exemption is closer to the right answer than either having the government provide the goods directly or determine the correct level of funding for each non-profit via direct grants. Because the charitable deduction provides a subsidy only when a taxpayer makes a contribution to an organization, the subsidy flows from individual choices instead of governmental decisions. Because non-profits have to compete for donations, a market for donations essentially results. What is different, however, is that the government helps each buyer in this market (the donor) pay for the purchase (the donation). But each donor is still the decisionmaker as to which non-profit gets the donated funds, and at what level. These donations may be the best signal that a good is under-supplied by the market and government.<sup>277</sup>

## 2. A More Expansive Classical Liberalism with a More Lenient Definition of Public Goods

Not surprisingly, within classical liberalism, some theorists are comfortable with more government activity than others, and the above discussions have assumed a fairly limited tolerance for government activity. To that end, the foregoing analyses of both minimal state libertarianism and classical liberalism have assumed that there must be a justification for the

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<sup>277</sup> COLOMBO & HALL, *supra* note 32.

state to exercise its coercive taxing power to fund a given type of activity (such as rectification or providing a safety net) in order for the charitable tax subsidies to fund the private provision of that activity. Justifying the state funding of the activity comes first, and the question of whether using the charitable tax subsidies to fund that activity is appropriate comes second. As just shown, these interpretations of minimal state libertarianism and classical liberalism do not support the breadth of our current structure.

But some classical liberals allow for more government activity while still believing that a great deal of what the modern regulatory state does is unjustified. There is thus a more permissive reading of classical liberalism that does support the current structure's breadth. Under this view, the charitable sector itself is an activity worthy of funding for several reasons.<sup>278</sup>

#### *a. Better Information*

The first reason has to do with the dispersal of information. Take the above discussion of public goods. How would one know which activities are actually subject to market failure? Operationalizing a rule in which only such activities are eligible for the subsidies would require the lawmaker to identify whether the market is underfunding a given activity, such as art performances, poor relief, or environmental research. This, of course, requires a great deal of information. For example, how can one body know what the proper amount of opera performances should be? That same body could never know the proper amount of wheat production. Instead, the market finds the proper amount through the separate decisions of individuals who each have access to their own discrete information points.

Using that reasoning, one might argue that by organizing as a non-profit, founders of a given organization signal that they possess information that the activity might suffer from market failure.<sup>279</sup> And by donating to that organization, donors are signaling that they have been convinced that the market is not providing enough of that activity and that the activity is worthy of extra support. Together, these could be viewed as signals that the good or service is the type of activity with enough of the characteristics of a

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<sup>278</sup> See E-mail from Richard A. Epstein, *supra* note 75 (arguing that the charitable deduction, which acts like a matching grant on the part of the government, is a superior method of funding public and quasi-public goods than direct government aid because of its decentralized nature); E-mail from Maimon Schwarzschild, Professor of Law, Univ. of San Diego, to author (Apr. 6, 2015 01:52 PST) (on file with author) (arguing that the deduction encourages an ethos of volunteerism and private giving, which is pluralism-enhancing and less sensitive to the public choice and corruption problems that can pervade direct governmental provision of public goods).

<sup>279</sup> See Hansmann, *supra* note 224, at 69–70.

public good that a classical liberal would feel comfortable funding it, even if it is not a true public good.<sup>280</sup>

Moreover, this mechanism is less likely to be subject to public choice concerns such as capture. Even if the list of eligible activities is broadly worded (“poor relief” instead of “soup kitchens”), one can imagine various types of non-profit organizations lobbying to be included on the list of eligible activities while encouraging other types of activities to be left off of the list. The current mechanism has costs, such as funding seemingly silly activities like the ketchup museum.<sup>281</sup> But having the government identify which projects merit subsidies also has costs, given that the government does not have perfect information either. Both mechanisms would likely result in the funding of some organizations that are not really public or even quasi-public goods. With respect to the subsidy that accompanies the charitable deduction, however, the size of the support is somewhat tied to the public’s enthusiasm for the project.<sup>282</sup> The signaling mechanism of donations may thus be another reason to support the proposal that exemption be tied to a threshold level of donations.<sup>283</sup>

*b. Providing an Alternative to Government*

A second reason classical liberals might support a broad structure is to conceptualize the charitable sector as a public good in and of itself. Under this view, a healthy sector acts as a counterweight to governmental power and helps ensure that some activities remain in private control (even if subsidized) rather than being directly undertaken by the government itself. And just as strong markets help ensure that government does not grow too large, a strong non-profit sector can act as a similar buffer. It also ensures that in areas where the government also operates, voices other than the government’s weigh in on important policy issues. By subsidizing giving, the deduction encourages a voluntary ethos of giving that helps keep a need for coercive taxation at bay. In a variety of ways, therefore, a strong non-profit sector reduces dependence on government. Under this view, there is no need to justify funding a given activity within the sector because funding the sector itself is the good-producing act.

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<sup>280</sup> This argument in many respects mirrors the donative theory developed by Colombo and Hall. See COLOMBO & HALL, *supra* note 32.

<sup>281</sup> See Schizer, *supra* note 38, at 230 (raising the specter of an eccentric donor insistent on building a ketchup museum).

<sup>282</sup> If anything, the subsidy may underrepresent the public enthusiasm for a project, because it does not account for non-itemizers and because it matches the enthusiasm of lower-income taxpayers less heavily than upper-income taxpayers.

<sup>283</sup> See COLOMBO & HALL, *supra* note 32.

These arguments reflect many of the traditional justifications for subsidizing the non-profit sector, and would not require subsidized groups to aid the poor. Under this view, redistribution of any type is not the goal of the sector, and the fact that many already-well-off individuals benefit from the subsidies exemplifies the fact that a variety of individuals benefit from any given governmental program. For example, better-off individuals benefit more than others from a functioning market, but that does not mean there is anything per se wrong with the market. One might also argue that the availability of the charitable deduction distorts work incentives less than heavy taxation, and that a healthy economy that does not disincentivize the well-off ultimately aids the less wealthy.

Although these arguments are compelling, the distributional consequences of the charitable tax subsidies merit closer scrutiny nonetheless. It is true that redistribution is not the goal of many governmental activities, but the charitable tax subsidies are not the same as, say, the defense system. Namely, the charitable tax subsidies are often touted as a superior method of providing redistribution, and some argue direct governmental assistance to the poor should be replaced by increased charitable giving.<sup>284</sup> Likewise, whenever changes to the sector are proposed, opponents of those changes insist that such changes should not be made because they would harm the poor.<sup>285</sup> In reality, however, very little giving aids the poor. This is not to say that redistribution should be the only goal of the sector, only that aid to the poor is often publicly touted as a goal of the sector, and as such, that goal should be acknowledged and given more weight than under current law.<sup>286</sup>

## V. LEFT-LIBERTARIANISM

The strands of libertarianism previously discussed reason that private ownership of previously un-owned natural resources necessarily follows

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<sup>284</sup> See, e.g., Mike Konczal, *The Conservative Myth of a Social Safety Net Built on Charity*, ATLANTIC (Mar. 24, 2014), <http://www.theatlantic.com/politics/archive/2014/03/the-conservative-myth-of-a-social-safety-net-built-on-charity/284552> [<http://perma.cc/4MWM-7FSP>].

<sup>285</sup> See, e.g., Fred Stokeld, *Budget Addresses Tax Treatment of Sports Events, Facilities*, 146 TAX NOTES 712, 712 (2015) (quoting critic of proposed cap on charitable deduction as saying, “This misguided proposal would cost our most vulnerable communities”); Thune, Wyden, *Lead Bipartisan Group of Senators Calling for Maintaining the Charitable Tax Deduction*, U.S. SENATOR JOHN THUNE (Jan. 23, 2014), <http://www.thune.senate.gov/public/index.cfm/2014/1/thune-wyden-lead-bipartisan-group-of-senators-to-call-for-maintaining-the-charitable-tax-deduction> [<http://perma.cc/ERP6-F5QQ>] (bipartisan group of senators urging that the charitable deduction remain unchanged because “it is not a loophole, but a lifeline for millions of Americans in need. . . . [W]eakening the charitable deduction would most hurt the adults and children who receive vital charitable services from organizations like soup kitchens, after-school programs, and medical research projects, just to name a few”).

<sup>286</sup> The next article in this series proposes changes to the structure to better balance distributive goals alongside pluralism and efficiency.

from the concept self-ownership. In contrast, a set of “left-libertarian” theorists challenge that reasoning, arguing that self-ownership does not necessarily translate into unconstrained private ownership of resources. These theorists concur in the notion of self-ownership<sup>287</sup> but believe that prior to appropriation, natural resources should be considered *commonly* owned (instead of un-owned). Due to this common ownership, left-libertarians interpret the Lockean proviso more stringently than right-libertarians. Nozick, for example, interprets the proviso to mean that appropriators cannot make others worse off than they were before appropriation (recall *Alice* and *Ben* from Part III, section A<sup>288</sup>). But according to left-libertarians, this sets the compensation too low, for it ignores the value those resources bring after appropriation.<sup>289</sup> Left-libertarians also believe that revising the proviso to require that others be left some minimal or subsistence amount is too lenient:

Suppose that there are enough natural resources to give everyone fabulous life prospects, and someone appropriates (or uses) natural resources leaving others only minimally adequate life prospects and generating ultra-fabulous life prospects for herself. It is implausible to hold that those who use or first claim a natural resource are entitled to reap all the benefits in excess of what is needed to leave others adequate life prospects. Natural resources were not created by any human agent and their value belongs to all of us in some egalitarian manner.<sup>290</sup>

As a result, an individual who appropriates more than his or her fair share of natural resources must compensate others.<sup>291</sup> Notably, left-libertarians extend this fair share rule beyond initial acquisitions, arguing that it is an “ongoing requirement for continued ownership.”<sup>292</sup> Imagine that

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<sup>287</sup> For left-libertarian discussions of self-ownership, see Peter Vallentyne, *Left-Libertarianism and Liberty*, in CONTEMPORARY DEBATES IN POLITICAL PHILOSOPHY 136, 138–44 (Thomas Christiano & John Christman eds., 2009), and MICHAEL OTSUKA, LIBERTARIANISM WITH INEQUALITY 11–22 (2003).

<sup>288</sup> See *supra* notes 90–91 and accompanying text.

<sup>289</sup> OTSUKA, *supra* note 287, at 23.

<sup>290</sup> Vallentyne, *supra* note 287, at 148; see also OTSUKA, *supra* note 287, at 24.

<sup>291</sup> See Vallentyne, *supra* note 287, at 147–48. According to left-libertarianism, this compensation is not unjust because individuals who take more than their fair share forfeit some of their rights to self-ownership, but only to the extent needed for compensation. *Id.* at 142 (someone who takes an apple from another’s property loses self-ownership rights only to the extent that he or she owes the apple orchard owners compensation); OTSUKA, *supra* note 287, at 40. More radical versions of left-libertarianism argue that if natural resources are commonly owned, they can be appropriated only with the consent of all other individuals, but reject this interpretation of common ownership. Peter Vallentyne considers these “implausible.” Vallentyne, *supra* note 287, at 146.

<sup>292</sup> Vallentyne, *supra* note 287, at 147. This is necessary to account for later arrivals and brute luck changes in the total value of natural resources.

*Emma* and *Fred* are the only two inhabitants on an island, and they initially divide the island's resources fairly. If *Georgia* and *Harry* suddenly appear on the island, the existing allocation is not deemed fair simply because it was fair initially.<sup>293</sup> *Georgia* and *Harry* merit a fair share of the island's resources, too.

This of course, leads to the question of what is a "fair share" of natural resources. First, it should be thought of as a fair initial share. As with the liberal egalitarianism of Rawls, Ronald Dworkin, and the luck egalitarians, left libertarians are unconcerned if holdings depart from a just initial distribution because of voluntary choices.<sup>294</sup> Assume that *Emma*'s and *Fred*'s initial holdings are fair. If *Emma* sunbathes on the beach each day while *Fred* works hard to improve his holdings, leading to later differences in welfare, so be it. In the real world, of course, there is no one point of time that we can look at to determine whether or not fair initial shares exist. The real world consists of people of all ages, some of whom are just starting out, and some of whom are further along in their lives and careers. For the latter, their holdings are likely a mix of luck and their own choices. What one can do, however, is apply this concept at the individual level and try to ensure that each person has a fair share at the start of his or her life.<sup>295</sup>

Second, as in the liberal egalitarian literature, debate exists as to what counts as a natural resource<sup>296</sup> and what constitutes a "fair share" of those resources. One interpretation ("equal share left-libertarianism") is that appropriators must leave "an equally valuable per capita share of the value of natural resources for others."<sup>297</sup> This distribution would be roughly equivalent to that of the more basic resource egalitarianism, one that does not take into account disabilities or other personal characteristics that influence one's ability to convert resources into welfare. The more common (and somewhat more expansive) left-libertarian interpretation, however, is that

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<sup>293</sup> *Id.*

<sup>294</sup> See OTSUKA, *supra* note 287, at 25 n.39.

<sup>295</sup> For a longer discussion of this concept, see Fleischer, *Equality of Opportunity*, *supra* note 6, at 632–35.

<sup>296</sup> The left-libertarian literature treats all natural resources as part of this common pool. Some theorists, however, criticize the breadth of this interpretation. Larry Alexander, for example, argues that only those natural resources available to or appropriable by all should be considered as held in common. Larry Alexander, *The Jurisdiction of Justice: Two Conceptions of Political Morality*, 41 SAN DIEGO L. REV. 949, 959–60 (2004). Imagine two individuals who wish to pick apples from a tree. One is short and can only reach the bottom apples. The other is tall but has trouble leaning down and can only reach the top apples. Alexander argues that only the apples in the middle, which both could reach, should be considered held in common.

<sup>297</sup> Vallentyne, *supra* note 287, at 148. Henry George and Hillel Steiner are advocates of this interpretation. See, e.g., Hillel Steiner, *The Natural Right to the Means of Production*, 27 PHIL. Q. 41, 49 (1977) (stating that "[e]ach individual has a right to an equal share of the basic non-human means of production" (emphasis omitted)).

initial shares should give each individual an equal opportunity for welfare.<sup>298</sup> This conceptualization recognizes that innate differences in individuals affect their ability to generate welfare. The most obvious example is that of a person who cannot walk; because that person needs funds to purchase crutches or a wheelchair, he or she needs more resources than an able-bodied person to achieve the same level of welfare.<sup>299</sup> As discussed below, however, some theorists also argue that individuals with expensive tastes (champagne) or below-average talents (a bad singing voice) also merit extra resources so that they have the same shot at welfare as those with inexpensive tastes (beer).<sup>300</sup>

This leads to a final question. Ideally, society could identify individuals who have appropriated more than their share (or who currently have more than their fair share) and force only those people to compensate others who do not have a fair share. To some left-libertarians, this means that compensation would not be financed by universal taxation.<sup>301</sup> In contrast, others essentially argue that universal taxation is justified on the grounds that one's income represents one's ability to convert resources into welfare.<sup>302</sup> Recall that the charitable tax subsidies invoke universal taxation, because *Diane's* voluntary contribution elicits a match from the government (discussed in Part III, section B). Although it seems likely that those who support limited taxation for the purposes of ensuring a fair share would also support charitable tax subsidies for that purpose, what about stricter left-libertarians? Perhaps they would, too. One member of the latter group has argued for a scheme whereby the "unjust" (prisoners) are taxed to pay compensation to the less-advantaged when voluntary contributions to the less-advantaged are insufficient to provide them with equal opportunity for welfare.<sup>303</sup> Under this view, the ideal of voluntary contributions can be supplemented with limited state measures.<sup>304</sup> Given that this is exactly what the charitable tax subsidies do, perhaps adherents of this view would allow them on the grounds they supplement (and perhaps incentivize) voluntary contributions.

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<sup>298</sup> This is the interpretation favored by Vallentyne. See Vallentyne, *supra* note 287, at 149; see also OTSUKA, *supra* note 287, at 25.

<sup>299</sup> See OTSUKA, *supra* note 287, at 27, 29. Notably, Michael Otsuka concedes that a disabled person such as Tiny Tim merits a greater share to compensate him for his disability, even if without compensation his opportunity for welfare would be as great as the fully-abled (due to his sunny disposition). *Id.* at 27.

<sup>300</sup> See *infra* notes 318–320 and accompanying text (discussing fair shares).

<sup>301</sup> OTSUKA, *supra* note 287, at 41–53.

<sup>302</sup> PHILIPPE VAN PARIJS, REAL FREEDOM FOR ALL: WHAT (IF ANYTHING) CAN JUSTIFY CAPITALISM? §§ 113–19 (1995).

<sup>303</sup> OTSUKA, *supra* note 287, at 41–53.

<sup>304</sup> *Id.*

This Article thus assumes that left-libertarianism countenances some state-financed redistribution to try to reach fair initial shares. Given that baseline, and the other benefits from having charities provide public goods in addition to the state,<sup>305</sup> this Article also assumes for purposes of this section that the charitable tax subsidies would be part of such a scheme. Even if, for example, a society decided to provide money directly to those without a fair share, it is likely that such society would also want charitable activity directed to the same goal. What left-libertarianism therefore means for the charitable tax subsidies overlaps in many respects with what the resource egalitarianism of Rawls, Dworkin, and others suggests,<sup>306</sup> a question addressed extensively elsewhere.<sup>307</sup> This Part shall briefly highlight a few points here.<sup>308</sup>

Section A of this Part explores what implications the left-libertarian goal of equalizing fair shares of initial material resources has for the charitable tax subsidies.<sup>309</sup> Section B expands the analysis by considering physical and mental endowments;<sup>310</sup> section C addresses expensive tastes.<sup>311</sup> Section D briefly highlights a few implementation difficulties in structuring the charitable tax subsidies to reflect left-libertarian ideals.<sup>312</sup>

### A. Fair Shares of Material Resources

As a starting point, both the “equal shares” and “equal opportunity for welfare” versions of left-libertarianism would support providing financial resources and their equivalent to children born into families with few financial resources so that such children have life prospects similar to children from affluent families.<sup>313</sup> Obvious examples include the direct provision of resources in the form of programs such as pre- and post-natal care for poor

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<sup>305</sup> See *supra* notes 33–43 and accompanying text (Part I, section C); *infra* notes 322–324 and accompanying text (Part VI).

<sup>306</sup> Scholars with similar views include Anne Alstott, Bruce Ackerman, Eric Rakowski, Richard Arneson, and G. A. Cohen.

<sup>307</sup> See Fleischer, *Equality of Opportunity*, *supra* note 6.

<sup>308</sup> Two related points not addressed here are whether left-libertarianism countenances assistance only to the poor, or also to the middle-class, and whether it would require leveling down in addition to leveling up. Given the large overlap between left-libertarianism and resource egalitarianism, it seems plausible that some but not all interpretations of left-libertarianism would approve of assistance to the middle-class, and that most interpretations would require some leveling down. For a fuller exploration of these questions, see Fleischer, *Equality of Opportunity*, *supra* note 6, at 652–60. For a discussion of the measurement and implementation issues implicated by this analysis, see *id.* at 643–45, 660–62.

<sup>309</sup> See *infra* notes 313–314 and accompanying text (section A).

<sup>310</sup> See *infra* notes 315–317 and accompanying text (section B).

<sup>311</sup> See *infra* notes 318–320 and accompanying text (section C).

<sup>312</sup> See *infra* note 321 and accompanying text (section D).

<sup>313</sup> Recall the discussion conceptualizing fair initial shares on an individual basis by focusing on what resources and assets one has at birth. See *supra* note 294–295 and accompanying text.

mothers, health care for poor children, orphanages, adoption groups, tutoring programs, libraries, scholarship programs, private schools in poor areas, projects like the Harlem Children's Enterprise Zone, and the like.<sup>314</sup> With respect to training programs, it seems logical that skills that are obviously practical and relevant to entering the workplace should also be provided. This is so because poor children who do not have a chance to develop marketable skills due to unequal resources are at a disadvantage both in terms of resources and in terms of the opportunity to convert their personal endowments into welfare. Such training programs would include, for example, reading skills programs, as well as groups that help children develop marketable practical skills (such as preparing inner-city children for careers as auto mechanics).

A harder case involves programs such as chess teams, golf classes or music camps for non-wealthy children. These appear frivolous at first, as the skills that they enable children to develop seem less marketable than learning how to fix cars. For example, helping a poor but talented cellist to attend music camp may have no impact on his or her financial resources later. So would a left-libertarian scheme of charitable subsidies treat the development (in children) of all skills and talents equally?

The answer is likely yes. If the goal is to give disadvantaged children the same life prospects as others, society should not differentiate among various skills and talents for several reasons. First, although most young cellists do not become professional musicians, the child given a scholarship to music camp might be the next Yo-Yo Ma. Second, these activities are valuable even if they remain hobbies. Helping an individual develop a non-marketable talent (in addition to simply providing the individual with material resources) is integral to ensuring he or she has similar life prospects, especially if his or her conception of a good life includes the activity in question. And finally, engaging in these activities develops skills, such as patience and discipline, which do have practical financial rewards.

### 1. Cultural Appreciation

Now consider organizations like museums and theaters that allow the poor and middle-class to enjoy cultural benefits. Is access to such goods part of ensuring similar life prospects for all, or simply catering to expensive tastes?

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<sup>314</sup> Although this project is academic in nature (instead of prescriptive), a great deal of research exists analyzing the effectiveness of various programs in assisting those with fewer financial advantages. To that end, delineating a list of programs that level up in this manner should not present policymakers who choose to follow this path with an insurmountable hurdle.

It is most likely the former. Opportunities for cultural appreciation might introduce poor children to talents and interests of which they were previously unaware, thereby broadening their life prospects. Wealthy children with access to these cultural resources likely have broad conceptions of “the good life.” In contrast, poor children who do not have such access may well envision narrower life prospects for themselves. This distinction seems to violate the left-libertarian goal of ensuring equal life prospects.

This analysis answers one recurring question: a set of charitable tax subsidies inspired by this interpretation of left-libertarianism would subsidize cultural groups, such as museums and the opera, only if they offered free or discounted admission to the poor or otherwise helped the financially disadvantaged develop their abilities.

## 2. Assistance to Adults

The foregoing has focused on assistance to children, because it is easy to hold children unaccountable (in the choice or chance distinction) for their financial circumstances. But children do not exist in a vacuum; they live with adults. And although the adults’ situations reflect a mix of choice and chance, from the children’s perspectives, their families’ circumstances are pure chance. Does helping the adults comport with left-libertarianism by increasing the children’s life prospects, or does it undermine left-libertarianism by rewarding the adults’ poor choices? Imagine a family that lacks health insurance in which the mother is ill because she smoked her entire life. Refusing to aid the mother harms her child’s life prospects; yet helping her compensates her for her voluntary prior choices. Here, keeping the parent healthy likely brings such great benefits to the child that they outweigh any negative incentive effects from aiding the mother despite her poor past choices. To that end, the charitable tax subsidies would subsidize groups that provide basic necessities (food, clothing, shelter, health care) for poor adults caring for young children.

A harder question involves groups that provide basic services to disadvantaged childless adults. What about assisting groups that provide similar services to needy adults who are not parents? One might counsel against assisting such adults on the grounds that their past choices led them to their current straits. This response would hold disadvantaged adults responsible for past choices such as quitting school or pursuing minimum wage jobs. Aiding them would not create equal life prospects *ex ante*, but instead would effectuate *ex post* equalization that ignores the role of choice.

Ongoing inequality, however, makes it hard to know whether an adult individual’s dire circumstances are the result of choice or chance. Imagine *Ivan*, who grows up in a high crime area with terrible public schools, avoids

college, and is recently laid off from a factory job. Is he a victim of chance, choice, or a combination? Answering this question likely turns on one's opinion about the current state of society. If one believes that many public schools fail to provide an adequate education that allows children to develop their talents, then *Ivan* may seem more a victim of chance. But if one thinks that any given public school can adequately prepare a hard worker for college, and that there are enough scholarships out there, then *Ivan* seems more culpable for his plight.

*B. Physical and Mental Endowments and Equal Opportunity for Welfare*

As mentioned previously, left-libertarians disagree as to whether one's fair share of resources should be an "equal share" of initial resources or a share that provides one with equal opportunity for welfare. For those who think the former, the charitable tax subsidies would likely be limited, as discussed above, to programs that are rough equivalents to distributing financial resources to individuals who are poor through no fault of their own. Those who think the latter, however, would likely support a somewhat expanded set of charitable tax subsidies. This section shall start by addressing disabilities.<sup>315</sup>

If one interprets left-libertarianism in the latter manner, left-libertarianism also countenances subsidizing health organizations and groups that assist the disabled *even if* they do not offer free or reduced-cost services to the poor. This is so because among individuals with equal amounts of material resources, a disabled individual is at a disadvantage in terms of accessing welfare due to lesser physical endowment. Providing medical care (even if the individual pays for it) is equivalent to transferring nonfinancial resources (better health, pain relief, or a leg that is no longer broken). Thus, simply providing health care should be viewed as a transfer of nonfinancial resources that are distinct from financial resources.

Still assuming equal material resources, should providing medical care for a cost be considered "charitable" in the sense contemplated by the charitable tax subsidies? How is providing health care for a price any different than providing a consumer good, such as an iPad, for a price? The efficiency scholarship helps provide an answer. It posits that activities suffering from contract failure (such as medical care) form as non-profits to overcome information asymmetries, but then face difficulties raising capital due

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<sup>315</sup> Most left-libertarians draw a line between compensating for diminished physical and mental endowments on one hand, and compensating for expensive tastes and talent-pooling on the other. See Barbara H. Fried, *Left Libertarianism: A Review Essay*, 32 PHIL. & PUB. AFFAIRS 86 (2004); Peter Vallentyne, *Left-Libertarianism: A Primer*, in LEFT LIBERTARIANISM AND ITS CRITICS: THE CONTEMPORARY DEBATE 1, 19–20 n.20 (Peter Vallentyne & Hillel Steiner eds., 2000).

to the non-distribution constraint.<sup>316</sup> Without a subsidy, the medical care needed to remedy the individual's disability may not be provided. Subsidizing health care therefore allows the disabled individual to remedy the physical disadvantage (for example, by fixing a broken leg). This reduces the inequality in physical endowments.

If the individual in question pays for the health service, however, now the individual's material resources are diminished. The individual no longer has the same financial resources as his or her peers to pursue his or her life prospects (recall that this discussion is assuming equal initial financial resources). Fully remedying the physical disadvantage would therefore require both fixing the physical disability and addressing the resulting disparity in financial resources.<sup>317</sup> Does this mean we should require subsidized medical providers to offer free medical care in order to address both disparities simultaneously? Probably not, as such a requirement is likely not economically feasible; even with a subsidy medical providers could not afford to provide all their services for free, and requiring them to do so would likely cause an under-supply of providers. Remedying all of the inequalities resulting from physical disabilities thus seems impractical. But even if those inequalities cannot be fully mitigated via the charitable tax subsidies, it seems better to address at least some of the inequality by subsidizing health care organizations so that they can exist.

Hospitals and health care organizations could therefore further equalize life prospects as envisioned by left-libertarianism without providing charity care. However, any provider that does offer free or reduced-cost services would be mitigating inequality in two ways, and therefore deserves an additional subsidy.

### C. Expensive Tastes

Although most left-libertarians believe that one's fair share should be adjusted to reflect internal differences in physical and mental endowments, what exactly this should encompass is contested. Several theorists believe, for example, that individuals with expensive tastes should be compensated.<sup>318</sup> If a preference for expensive champagne is as arbitrary as a physi-

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<sup>316</sup> See Hansmann, *supra* note 224, at 69–75 (discussing the advantages that non-profits have in responding to contract failure and the disadvantages they face in raising capital).

<sup>317</sup> To be sure, some physical impairments may never be fully remedied. Even with implants and hearing aids, for example, some deaf individuals may never hear as sharply as non-deaf individuals. As such, this discussion uses the words “remedy,” “fix,” and “address” in a general sense to mean “limit disadvantages as much as possible.”

<sup>318</sup> At least some left-libertarians would compensate for expensive tastes. They frequently cite to the works of luck egalitarians Arneson and Cohen, who support the notion of expensive tastes, when discussing what “equality of opportunity for welfare” means.

cal trait, such as hair, then that preference impacts one's ability to convert resources into welfare; for example, a beer drinker can afford much more of his or her preferred beverage than a champagne drinker can with the same amount of resources.<sup>319</sup>

Admitting the need to compensate for expensive tastes when seeking equality of opportunity for welfare would justify an even broader set of charitable tax subsidies. Consider, for example, the "high arts." An individual who has a taste for the opera is worse off than one who has a taste for *American Idol*. This is so not only because the opera is costlier, but also because it suffers from market failure and therefore would not exist absent some state subsidization to overcome collective action problems. As interpreted in this manner, left-libertarianism would thus subsidize groups like Ivy League universities and the opera that provide expensive services for a fee, even if they did not provide assistance to the poor. If they did provide services to the poor, however, they would merit an extra set of subsidies.<sup>320</sup>

#### D. Implementation Concerns

As with the interpretations of libertarianism previously discussed, structuring a set of subsidies to reflect left-libertarian ideals presents some implementation questions: who counts as poor for purposes of equal share left-libertarianism? Should the middle-class also benefit from these policies? Should leveling down be required in addition to leveling up? What of the fact that the deduction only subsidizes the expensive tastes of taxpayers who itemize, and subsidizes the tastes of upper-income taxpayers more heavily than lower-income taxpayers?

Unlike the challenges that accompany rectification, however, these concerns do not present insurmountable design challenges. They require judgment calls (e.g., who counts as poor?), but once decisions have been made, such individuals can be identified. Leveling down can be implemented by not subsidizing donations to groups over which the donor or a family member has control or from which such individuals receive benefits.

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<sup>319</sup> On the other hand, most left-libertarians reject the notion of talent-pooling. See, e.g., OTSUKA, *supra* note 287, at 27; VAN PARIJS, *supra* note 302. Briefly, talent-pooling is based on the idea that one's skill set is a matter of luck. For example, the fact that Michelle Wie has much more natural talent for golf than this author is as arbitrary as one's brown hair. Thus, if this author preferred to be a professional golfer rather than a tax professor, she would merit compensation for her arbitrary disadvantage. This is obviously quite controversial. See Fleischer, *Equality of Opportunity*, *supra* note 6, at 629–30, for a longer discussion.

<sup>320</sup> This is similar to the health care example discussed in Part V, section B.

Changing the deduction to a credit removes the problems identified earlier with respect to the differential subsidization of expensive tastes.<sup>321</sup>

#### VI. IS OUTSOURCING THE PROVISION OF PUBLIC GOODS TO NON-PROFITS CONSISTENT WITH LIBERTARIANISM?

The foregoing has shown that several strands of libertarianism support either limited government redistribution or the provision of public goods (or both), although the purposes and scope of permissible activities vary among libertarian theories. Lurking throughout this discussion has been the assumption that if the government can legitimately provide a public good, it could also subsidize the provision of that public good by a third party. But is this necessarily true? After all, when the government does something, voters can act as a check on it. But if a third party is acting in its stead, who acts as a check?<sup>322</sup>

For a number of reasons, libertarian and classical liberal ideals would likely countenance this outsourcing. As an initial matter, public goods might suffer not only from market failures, but also from government failures. The government generally provides goods at either the level demanded by the median voter or the level determined through log-rolling and other legislative processes. It is possible that this level is not the socially optimal level of provision, either. In fact, one standard economic justification for the charitable tax subsidies stems from this conception of government failure. It posits that voters who desire more of a given public good than the level determined by the democratic process agree to provide partial funding for each others' projects via the charitable tax subsidies. Opera lovers might not be willing to fund the full costs of protecting the ruffled grouse, and vice versa, but each might be willing to partly fund the costs of the others' projects.<sup>323</sup> If some strands of libertarianism would support the outright government provision of public goods in order to produce the optimal level of such goods when markets cannot determine that level, why would they not support the partial subsidization of such goods as well if that were a necessary part of overcoming market failure for such goods?

Further, classical liberal tenets suggest that the private provision of public goods would likely be preferable to the public provision of such goods. For one thing, a vibrant charitable sector acts as a counterweight to

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<sup>321</sup> Much more can be said along these lines, of course, and many of these issues have been discussed elsewhere. *See, e.g.*, Miranda Perry Fleischer, *Charitable Contributions in an Ideal Estate Tax*, 60 TAX L. REV. 263 (2007); Fleischer, *Equality of Opportunity*, *supra* note 6; Miranda Perry Fleischer, *The Surprising Philosophical Roots of the Charitable Tax Subsidies*, in THE PHILOSOPHICAL FOUNDATIONS OF TAX LAW (forthcoming 2016) (on file with author).

<sup>322</sup> Thank you to Michael Doran for raising this point.

<sup>323</sup> *See* COLOMBO & HALL, *supra* note 32, at 107–08; Weisbrod, *supra* note 32, at 36.

governmental power. The more private groups can provide public goods (even if subsidized by the government), the less economic power the government has. Additionally, the market for charitable contributions mirrors the for-profit market in many respects. Charities must compete with each other in a market for donations; ineffective and unpopular charities receive fewer contributions than others, just as ineffective for-profit firms are not as successful. Given this competition, it is plausible that charities are more efficient than government in the sense of spending more of each dollar received on goods and services.

Lastly, as in the traditional market, the output of the charitable market represents the independent decisions of diffuse people. One reason classical liberals favor the market over government when it comes to directing economic activity is that the former can harness the vast knowledge of dispersed individuals. In contrast, it is impossible for a centralized decisionmaker to have enough knowledge to make efficient decisions about economic activity. Support for school vouchers exemplifies the classical liberal preference for individualized decision making over centralized decision making; one way to think about the charitable tax subsidies is that they are essentially vouchers for charitable goods and services.<sup>324</sup> As a result, donors and non-profit founders, who likely have better information than the government about the need for a given public good-type activity, can decide which charitable goods and services to provide, and in what form and quantity. Local individuals on the ground in a given area can better identify which types of programs, such as job training or after-school sports activities for troubled youth, will be most effective.

On the other hand, libertarian principles are less supportive of outsourcing and privatization when those measures amount to giving a chosen provider a state-sponsored monopoly. This is often the case, for example, when governments turn over management or ownership of existing interests, such as toll roads or golf courses, to private companies. That concern, however, seems less applicable in this context. Here, the government is not choosing which soup kitchens or environmental research groups receive subsidies. Instead, individuals are making those choices. All the groups must do to receive subsidies is comply with a set of fairly lenient rules designed to ensure that they are serving a public rather than a private interest.

#### CONCLUSION

This Article has rigorously explored the philosophical literature on libertarianism for insights into some recurring questions concerning the chari-

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<sup>324</sup> See, e.g., FRIEDMAN & FRIEDMAN, *supra* note 1, at 158–71.

table tax subsidies: are they consistent with our notion of the role of government? Which organizations should be subsidized? Should they be required to help the poor? Not surprisingly, various conceptions of libertarianism yield conflicting answers.

Some conceptions of libertarianism suggest that the charitable tax subsidies are illegitimate and should be abolished. These versions of libertarianism give almost absolute priority to private property rights, and forbid all government activity but the most minimal provision of public goods necessary to protect life and property. Subsidizing the provision of additional public goods or redistribution is therefore unwarranted.

Several other strands of libertarianism, however, see a broader role for the state. Some libertarians and classical liberals believe that the state should provide a minimal safety net to the very poor, but no more. This suggests that charitable tax subsidies for organizations that assist the very poor are legitimate. Many classical liberals further believe that the state can subsidize the provision of additional public goods (such as schools and health care), provided that a market failure exists. That said, a strict interpretation of classical liberalism shows that many goods subsidized under the current structure would not be subsidized using a more rigorous definition of market failure. On the other hand, a more lenient reading of classical liberalism that conceives of the non-profit sector as a public good in and of itself might justify something like our current structure, as does left-libertarianism.

As with other theories of distributive justice common to tax policy, a commonality emerges from these various interpretations. Almost all would subsidize aid to the very poorest members of society, but then each conception differs in what additional activities it would subsidize. This suggests that there is something special about aid to the poor. The final Article in this series shall examine this implication.

