

Philanthropy and the Law:

Remembering and Measuring the Common Good^{1*}

Rob Atkinson²

So if you are willing, we shall begin our inquiry as to its nature in cities, and after that let us continue our inquiry in the individual also, looking for the likeness of the greater in the form of the less.

Plato, *The Republic*.³

And the same principles of virtue and vice are characteristic of cities and constitutions; for the constitution is in a figure the life of a city.

Aristotle, *Politics*.⁴

¹ This paper was written for the National Center on Philanthropy and the Law's 21st annual conference, "Shades of Virtue: Measuring the Comparative Worthiness of Charities," scheduled for Thursday and Friday, October 29 and 30, 2009. My assigned topic, "Measuring the Comparative Worthiness of Charity: Rationales for Exemption and Deductible Contributions," appears here as Part III.

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³ PLATO, THE REPUBLIC 44 (A.D. Lindsay, trans., Everyman ed., 1992).

⁴ ARISTOTLE, POLITICS 190 (Jowett trans., Modern Library ed., 1943)

A Guide for the Perplexed

(With apologies to Moses ben Maimon, a.k.a. Maimonides)

Dear Fellow Philanthropy Folk,

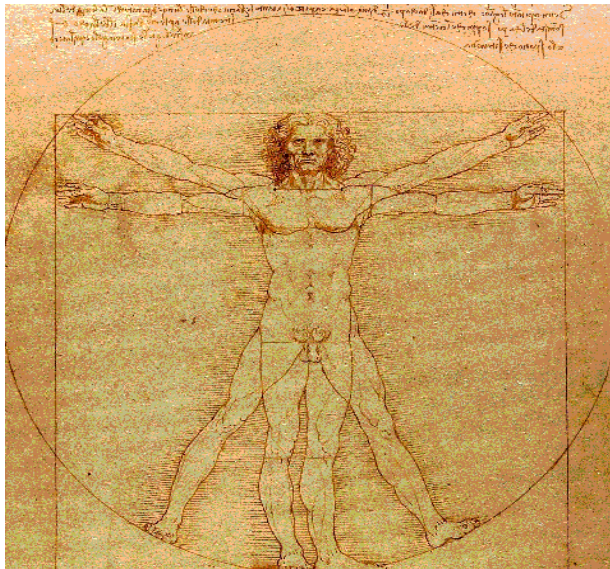
This paper, you will have already noticed, is far longer than it need be, or perhaps should be, for purposes of this year's Philanthropy and the Law conference. I'm quite sorry about that; I'll explain, later, how it happened.

Right now, I need to give you a guide to the parts that will best prepare you for the conference. I suggest you read the Introduction: From Basic Rationales to Relative Merits (and Back), Part I (The Need to Measure Philanthropy's Performance), and Part III (Merits, Metrics, and the Special Income Tax Treatment of Charity). Part III, you will notice, covers more or less exactly my assigned topic. I think you will find Part II (Theories of Philanthropy's Function and their Implications for Its Assessment) useful background, but it is not really necessary reading. Part IV (A Faith and Philosophy for Philanthropy), is my effort to outline a more suitable model of philanthropy and the law; it is, I should forewarn you, highly unorthodox, though not really very radical, or even original.

I truly appreciate your bearing with me on this, and I very much look forward to talking with you at the Conference.

Sincerely,

Rob Atkinson



Therefore, since nature has designed the human body so that its members are duly proportioned to the frame as a whole, it appears that the ancients had good reason for their rule, that in perfect buildings the different members must be in exact symmetrical relations to the whole general scheme.

~Vitruvius, *The Fundamental Principles of Architecture*.⁵

Is your body not a temple?

~Paul, Corinthians⁶

⁵ THE TEN BOOKS OF ARCHITECTURE 102, (Morris Hicky Morgan, trans., Harv. 1914) (Google Project).

⁶ Paul, First Epistle to the Corinthians (?)

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Abstract

This paper seeks a measure of the relative merits of charity, a metric for comparing charitable organizations both among themselves and with their counterparts in the for-profit, governmental, and household sectors. It first explains the need for such a measure, in both theory and practice. It then considers two appealing sources for this measure: the four-sector theory of nonprofits' function and three sets of theories of nonprofits' special treatment under the Income Revenue Code. That dual analysis delivers an ironic result: To provide a plausible comparative measure of charity, theories of both charity's function and charity's special tax treatment themselves need further refinement. That refinement, in turn, reveals an embarrassment of riches, not one but several related measures of charitable performance, each of which derives from an identifiable social function: Production, allocation, distribution, and valuation.

The performance measures derived from these functions can, in turn, be integrated into a single standard. But that integration requires not only identifying the functions of charity within our four-sector society, but also specifying the goals of our society as a whole. Conceding that no such goals can be satisfactorily specified by either a liberal democratic polity or a capitalist market economy, this article shows how one such goal, a neo-classical conception of justice, can be applied not only to charity as a sector complementing our polity and economy, but also to those sectors themselves and to our society as a whole. This produces a paradox that both classical Western philosophy and the West's Abrahamist religious tradition clearly appreciate: Philanthropy, rightly understood and practiced, is at once the goal and the gauge of all things human.

Introduction: From Basic Rationales to Relative Merits (and Back)

We may define a good thing as that which ought to be chosen for its own sake; or as that for the sake of which we choose something else; or as that which is sought after by all things, or by all things that have sensation or reason, or which will be sought after by any things that acquire reason; or as that which must be prescribed for a given individual by reason generally, or is prescribed for him by his individual reason, this being his individual good; or as that whose presence brings anything into a satisfactory and self-sufficing condition; or as self-sufficiency; or as what produces, maintains or entails characteristics of this kind, while preventing or destroying their opposites.

* * *

Since, however, it often happens that people agree that two things are both useful but do not agree about which is the more so, the next step will be to treat of relative goodness and relative utility.

Aristotle, *Rhetoric*.⁷

Aristotle, with amazing prescience (if inadvertent humor), neatly anticipates our task today: to move from defining charity's distinctive goodness to measuring, or at least comparing, that goodness. As he suggests, beginning the latter task implies having completing the former; before measuring, first identify what is to be measured. So, too, to address the topic of this year's Philanthropy and the Law conference, the relative worthiness of charity, we must look back to the topics of two prior conferences.

Students of philanthropy a generation ago faced two fundamental questions: Why our society has a voluntary, nonprofit sector⁸, and whether organizations in that sector

⁷ ARISTOTLE, RHETORIC 42-46 (W. Rhys Roberts, trans., Modern Library ed., 1954).

⁸ This sector goes by various other names. Economists tend to call it the nonprofit sector; political scientists, the voluntary sector; sociologists and others "civil society." As we shall see in more detail, below, its constituent organizations have two defining attributes: they are voluntary, and they are nonprofit. They include public benefit organizations, mutual benefit organizations, and cooperatives. The focus of this paper is the first of these three types, more commonly called charities or philanthropies.. Somewhat in tension with general practice, I use "philanthropy" to cover the entire sector, not simply the subsector of public benefit organizations; where the difference matters, as in taxation, I will be more specific. Although, in describing public benefit organizations, "charity" is more commonly used than "philanthropy," the latter term suits this project much better. Not least, philanthropy is the name of its sponsor, the Program on Philanthropy and the Law. "Philanthropy" also has the advantage of its etymology, "love of humankind." "Charity," on the other hand, has lost much of that connotation, despite its eloquent expression in Paul's Second Epistle to the Church at Corinth. What is worse, in the narrower sense of "alms-giving," "charity" tends to connote that its recipients are somehow insufficiently self-reliant, and thus that they should accept some measure of shame or other social stigma. See *The Code of Maimonides (Mishneh Torah)*, Book VII, The Book of Agriculture 92-93 (Isaac Klein, trans., 1979) ("One should always restrain himself and submit to privation rather than be dependent upon other people or cast himself upon public charity....").

warrant favorable legal treatment, most notably the exemption of their income from federal taxation.⁹ Accordingly, back in 1991, this conference took as its topic *Rationales for Federal Income Tax Exemption*; a decade later, we dug even deeper, with the theme of *Defining Charity: A View from the 21st Century*. In the nearly two decades since we first took up these twin issues, it is safe to say, we have found no final answer to either.

If anything, we have come to appreciate Mencken's wry wisdom, of which Harvey Dale never tires of reminding us: "there is always a well-known solution to every human problem – neat, plausible, and wrong".¹⁰ And at least some of us have come to rue our own efforts¹¹ to improve on Aristotle's comically cumbrous definition of goodness. The upshot is this: We have neither a single entirely satisfactory unified field theory to explain charity¹² nor a universally accepted rationale for its special legal treatment, even in the fairly narrow subfield of federal income tax law.

Yet we have not only accepted yesterday's embarrassment of theoretical riches; today we are adding a new layer of analytic complexity. Onto our multiple-part theory of why philanthropies arise and our competing theories of whether they deserve special legal treatment, we now want to overlay a metric of philanthropy's relative merits. Beyond our theories of what makes charities distinctive, and distinctively good, we are trying to extrapolate ways to compare their goodness, or goodnesses. Having analyzed philanthropy as a matter of kind, we now want to assess it as a matter of degree. That effort to move from qualitative to quantitative, from defining the hallmarks of philanthropic purpose to setting the benchmarks of philanthropic achievement, is the theme of this paper.

Part I briefly examines our needs for means of measuring charity; it shows how, across the whole spectrum of our wide-ranging interactions with charity, we have always

⁹ I.R.C. § 501(c)(3).

¹⁰ H. L. Mencken, *Prejudices* 2d 158 (1977) .

¹¹ See, e.g., Rob Atkinson, *Altruism in Nonprofit Organizations*, 31 B.C. L. Rev. 501 (1990).

¹² See, e.g., Steven Rathgeb Smith and Kirsten A Gronberg, *Scope and Theory of Government-Nonprofit Relations*, in *THE NONPROFIT SECTOR* 221 (Powell & Steinberg, ed.) (setting out three broad and overlapping theories of the nonprofit sector's role vis-à-vis the state and the market.)

needed, never more than now, a means of making comparisons. But, even as Aristotle suggested, before we measure, we must know what we are measuring; in charity as elsewhere, “what is good about this?” logically precedes “how good is this, compared to that?”

Accordingly, **Part II** of this paper returns to the basic theory of nonprofits in general and charity in particular. This review will remind us that the received wisdom, criticized though it is around the edges, is basically sound at its core. Our society has four essential sectors –the market, the governmental, the philanthropic, and the household – each of which complements the other three by performing functions for which its own constituents are distinctly fit. Stated negatively, as it usually is, this is a quadruple failure theory: Each sector of our society provides what the other three cannot provide, or cannot provide as well.

The principal problem with this elegant theory, alas, is not that it is too complex, but that it is too simple. It implies that each of the four sectors fails in only one way; thus market failure theorists point to allocative inefficiency and government failure theorists point to supra-majority demand. As we shall see, however, both these sectors can be seen to fail in other ways, ways related to their particular function in our society. Ours is a capitalist market economy and a liberal democratic polity; as such, both our economy and our polity function under constraints that can only be met by other sectors, particularly the cultural sector. Only if we expand our notion of market and government failure can we approach anything like an adequate account of the function of charity.

And, of course, we must also elaborate another complication implicit in the four-sector theory, the one that turned us back to that theory in the first place. Each sector of our society, we have said, provides what the other three cannot provide or—and this is a qualification critical to our present project—cannot provide *as well*. Giving content to this qualification requires us to move from qualitative to quantitative analysis. Our society’s four sectors, we shall see, do not generally produce unique kinds of goods and services; rather, they more typically produce the same kinds of goods and services

differently. A school or hospital may be for-profit, nonprofit, or governmental (and “home-schooling” is a Constitutionally protected option,¹³ even as “home-remedies” will always be available therapies). At the margin, the only identifiable difference in a given product may be the sector providing it, not any quality identifiable in the good or service itself. All the more reason, then, to understand what it means to produce that good or service “well,” better than alternative producers.

Grounding our quest for that comparative measure in the admittedly complex four-sector theory of charity does offer us one wonderfully simplifying prospect: performance measures function. The standard four-sector, four-failure system is implicitly teleological, even Aristotelian: to borrow his term, the “virtue” of each component is derived directly from its function. On this view, how well a sector, or an organization within a sector, does is a matter of its performance of its particular function. Thus the means of assessing each sector and its components will have a common structure; “how well” will always be derived from “for what.”

But here we must tread carefully. Even as this “performance measures function” pattern offers an appealing simplification, it also tempts us with a potentially serious false step. This pattern, for all its promise, presses us to two inextricably related questions, one about the good, the other about its measure: Is there a good of the whole of society, the sum of the goods of the individual sectors and their respective constituents? And, if there is, how are the goods of the individual sectors to be compared, reduced, as it were, to a common denominator?

Classical philosophy, we will need to remind ourselves, had an answer to both questions. Its ultimate good was human flourishing, individually and collectively, citizens and society performing their proper functions well, and the higher the function, the better.¹⁴ Its metric was, in a word, justice, a proper ordering of all constituents, personal

¹³ [Cite case, which is in the *Wisconsin v. Yoder* and *Pierce v. Society of Sisters* line of cases.]

¹⁴ PLATO, *THE REPUBLIC*; ARISTOTLE, *POLITICS* 51 (“But, if all communities aim at some good, the state or political community, which is the highest of all, and which embraces all the rest, aims at a good in a greater degree than any other, and at the highest good.”); *Id.* at 149 (“In all sciences and arts the end is the good,

and societal, in the way that each best performs its highest function, integrated with every other: a good person in a good society. All functions are thus comparable, but all comparisons are not, strictly speaking, mathematical. All goods are ultimately commensurate, though not all “goodnesses” are ultimately quantifiable. The proper mix of goods is a matter, not of measure, but of balance; the necessary skill for finding the balance is not computation, but wisdom (even as the proper assessors of the ideal equilibrium are not economists or political scientists, much less lawyers or accountants, but philosophers.)

We are now, of course, deeply suspicious of this classical conclusion, and, at least in some respects, quite properly so. From a philosophical perspective, the classical answer may come from asking the wrong kind of question, what philosophy itself later identified as a category error. To be able to ask the function of the heart, or the circulatory system as a whole, suggests a question that may have no such answer: What is the function of a human being? So, too, to ask the function of the economy or the polity may dubiously imply an analogous “super-function” of all of society. The fact that every element in a complex system has a given function does not necessarily imply that the system itself has such a function. So, too, even if every element in an artistic composition has its place, the composition as a whole – not to mention art itself -- may have no such “place” in any “grand scheme.” Art may be for art’s sake,¹⁵ even as human beings may be ends in and unto themselves.¹⁶

The classical conception of goodness, individual and social, may, we now suspect, have been more of a choice than a discovery; theirs may well have been one way to order

and the greatest good and in the highest degree a good in the most authoritative of all – this is the political science of which the good is justice, in other words, the common good.”) (Jowett trans., Modern Library ed., 1943) and NICOMACHEAN ETHICS, BOOK I, THE AIM OF MAN, SECTION II, PRIMACY OF STATECRAFT, SECTION VII FUNCTIONAL DEFINITION OF MAN’S HIGHEST GOOD. (Philip Wheelwright, trans., 1951). See also John Rawls, A Theory of Justice 414 (adopting the “Aristotelian principle” “that, other things equal, human beings enjoy the exercise of their realized capabilities (their innate or trained abilities), and that this enjoyment increases the more the capacity is realized, or the greater its complexity.”).

¹⁵ Stephanie Z. Dudek, *Art and Aesthetics*, in 2 ENCYCLOPEDIA OF CREATIVITY 99-108 (Mark A. Runco & Steven R. Pritzker ed., Academic Press, 1999).

¹⁶ See IMMANUEL KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS.

ourselves and our world, but not the only way, maybe not even the best. What's more, whether their way was a matter of choice or discovery, we know there are, in fact, alternatives. The diametrically opposed alternative to classical humanism is very much among us: subordination of one's own reason to the will of another, the way of Jerusalem as opposed to the way of Athens. Nor, of course, are there simply these two ways, humanism and theism; each city, Athens and Jerusalem, has its own schools – in Jerusalem, Judaism, Christianity, and Islam; in Athens, the Epicureans, the Stoics, and the Skeptics – even as each school has its branches and offshoots. These differences can, of course, be overstated; between Athens and Jerusalem may run, not polar opposition, but an axis of profound, if not perfect, harmony. So, indeed, the great medieval scholar Moses Maimonides, learned in both Torah and Aristotle, court physician to Saladin¹⁷, tried to demonstrate.¹⁸

Pending that demonstration, this diversity of views on the proper aim of humanity poses a problem of politics, both practical and theoretical, to which liberal theory and the liberal state are proffered (if not preferred) solutions. The liberal state – the kind of state we have – must accommodate these competing views of human goodness. But here at the outset the liberal state and its proponents run into a paradox: Isn't liberalism itself, with its preference for accommodation, just one jarring sect among the others? It is committed to taking no position among the others. But isn't it implicitly given to indulging, even imposing, a preference for itself? Can the very notion of a liberal state as neutral among visions of the ultimate good be anything other than a contradiction in terms? Our particular constitutional regime poses an even more pressing problem: How can the state grant special favors to religious organizations without violating the First Amendment's ban on the establishment of religion?

¹⁷ See JOEL L. KRAEMER, MAIMONIDES 215 (citing evidence that Maimonides served Saladin, as he certainly did Saladin's son, to whom he dedicated a medical treatise).

¹⁸ MAIMONIDES, A GUIDE OF THE PERPLEXED (Freidlander, ed., 1881). Nor was he the first in such an undertaking. See *The Evolution of God* (describing effort of Philo of Alexandria to synthesize Judaism and Plato.).

As we will see in Part III, these questions arise with particular insistence when we move from explaining philanthropy's function to justifying its favorable treatment under the Internal Revenue Code. Identifying these related problems for the liberal state – how to identify the public good and how to include religion in that good -- will inform our assessment of the Code's treatment of charity, particularly the income tax exemption and deduction.

Part III examines the three basic sets of exemption and deduction theories: the traditional thesis that the exemption and deduction are subsidies of the goods and services charities provide; the antithetical view that exemption and deduction are not subsidies, but artifacts of a proper definition of the income of charities and their donors, respectively; and a set of synthetic theories that ground the exemption and deduction, not the particular goods charities provide, but rather in the special ways that they provide any kind of good or service. We will see that the traditional subsidy thesis raises exactly the problems we have identified, and that the other theories try, quite unsuccessfully, to avoid those problems. We will also see that the metric of charitability that each of the three theories implies is, itself, further evidence of that theory's inadequate treatment of charity.

The traditional subsidy theory maps nicely onto the functional definition of the role of charity outlined in Part II: Charities provide goods other sectors do not; the exemption and deduction subsidize that provision. But the traditional subsidy theory runs afoul of exactly the problems our theory would predict for the granting of legal advantages to charity in a liberal state: choosing among different visions of the good, and treating religion as one of the goods chosen.¹⁹

The other two sets of theories – the definition of income theory and the synthetic theories – are best seen as clever, though ultimately unsatisfactory, efforts to dodge these two basic questions. The technical definition theory, the antithesis of traditional theory, denies that the special treatment is a subsidy; if that is true, then both problems disappear.

¹⁹ And, as we shall see, there is a third, more technical problem: the relative merits of “tax subsidies” and “direct subsidies,” the so-called “tax expenditure” question.

The other, synthetic theories insist that the exemption and deduction are subsidies, not of the good any particular charity does, but of the special ways that all charities do what other sectors do not, or cannot, do – or do well.

As this final clause reminds us, each of these three sets of theories needs to provide a standard for comparing charities both among themselves and with organizations in the other sectors. And each theory, as we shall see, has clear implications for this standard. Unfortunately for our purposes, our examination of these implications produces a paradox: Instead of giving us a usable metric of charity, they show us, in even starker relief than before, the reasons why the alternatives to the traditional subsidy theory are inadequate, and why that theory itself needs serious re-examination. The technical definition theory gives us no metric at all; the synthetic theories all give us a metric based only on the sources of charitable revenue, not the goods that charities provide the needy or the public at large. Traditional subsidy theory rested on these latter goods, but it never gave an adequate means for comparing them.

On reconsideration, we can see this as more a strength than a weakness, arguably a concession, if unconscious, rather than a thoughtless omission. On this view, the traditional subsidy theory is a way of both accommodating the conflict over which ends to support and compromising on the question of which means to use to support them. The traditional subsidy approach makes a virtue of three necessities: the theoretical limitations on the liberal state's favoring any particular vision of the good, the practical difficulties of providing direct subsidies to all eligible "goods," and the constitutional ban on direct subsidies to religious organizations. "Pluralism of ends" and "diversity of means" thus become the mantras of traditional exemption and deduction. For a liberal democratic polity and a capitalist market economy, this is a very nice fit. Just as the cultural sector, under the "four failure" theory, provides what the market and the government, by their own standards, fail to provide, so the tax system, under traditional subsidy theory, gives this supplemental sector a suitable supplement of its own.

But, for all its appeal as an approach to a liberal democratic state's support of charity, this "all things to all people," "something for everyone" neo-traditional subsidy theory has an obvious problem: It begs both of our basic questions, namely, what good does charity do (or do best), and how can we measure its performance? Part II will have shown us that this question-begging is an inherent feature of both liberal democracy and market capitalism; Part III shows that the traditional subsidy approach to exemption and deduction is the ideal complement to that polity and that economy. But Part II will also have reminded us that charity, traditionally, has another role: Calling all political and economic systems to account under standards that are not theirs, but its own. Those independent charitable standards provide not only the qualitative and quantitative measures of charity, but also the metric of social justice in the political and economic sectors themselves.

Part IV offers one such set of charitable standards, a variant of the kind of synthesis of Jerusalem and Athens that Maimonides offered from the court of Saladin at Cairo. This Abrahamist Republicanism, although by no means the only viable set of charitable standards, has much to recommend it. Most basically, both its qualitative and its quantitative standards of charity map nicely onto the expanded four-sector functional theory outlined in Part II, thus providing a guide for determining which sectors best supply which goods and services. What's more, these standards imply a parallel account of the income tax exemption and deduction, and with it a way to make comparisons among the goodness of various charitable purposes.

Most ambitiously, Abrahamist Republicanism offers a way both to reconcile the theism of Jerusalem with the humanism of Athens and to accommodate religion within our liberal state under our constitution's anti-establishment clause. And, most importantly, it shows how charity can move that our state, and with it our entire society, in a direction that is consistent with the highest aspirations of both Athens and Jerusalem. It shows how to unite the two great commandments of Jerusalem – love the Most High with all your

heart, and your neighbor as yourself²⁰ – and the two cardinal virtues of Athens – piety, what we owe the divine, and justice, what we owe each other.²¹

These commandments and virtues all come down, we shall see, to the proper theory and practice of philanthropy, to knowing and doing charity. That will turn out to be what we have always known it had to be. To our two basic questions – what philanthropy is ultimately for, and why our law, especially our tax law, favors it – we will give the answers of the traditional subsidy theory. The exemption and the deduction subsidize, albeit indirectly, the two fundamental goods of philanthropy, providing the neediest with whatever it takes to flourish and promoting the highest forms of human flourishing wherever we find them. And the ultimate measure of all philanthropy will have to be the ideal balance of all things, social and individual: justice, even as the Classics and the Scriptures have taught us.

I. The Need to Measure Philanthropy's Performance: Multiple Comparisons, Dual Perspectives.

Philanthropy: The love of humankind; the disposition or effort to promote the happiness and well-being of one's fellow people; practical benevolence.

Shorter Oxford English Dictionary.²²

Humanity is the measure of all things.

Plato, *Protagoras*.²³

Across the whole spectrum of our wide-ranging interactions with charity, we have always needed, never more than now, a means of making comparisons. This part first

²⁰ *Deuteronomy* 6:4-5 ("Hear, O Israel: The Lord our God is one Lord, and you shall love the Lord your God with all your heart, and with all your soul, and with all your might.") (RSV); *Leviticus* 19:18 ("You shall love your neighbor as yourself: I am the Lord"); *Mathew* 22: 34-40 (Jesus's recitation of these commandments and declaration that "on these two commandments depend all the law and the prophets"); *Qur'an* 76:8-9 ("They give food, out of love for Him, to the poor, the orphan, and the slave, saying: We feed you only for Allah's pleasure – we desire from you neither reward nor thanks").

²¹ PLATO, EUTHYPRO.

²² Volume 2 (Sixth edition, 2007).

²³ Plato, *Protagoras* (in a speech attributed to Protagoras, who gets rather the worst of his dialogue with Socrates).

surveys the contexts in which this need arises, then distills them down to two basic perspectives: Analysis of the proper role of philanthropy in our society and assessment of our own proper practice of philanthropy.

A. Multiple Comparisons.

Philanthropy permeates our society, touching our individual lives at every turn. We regulate charities, even as we run them. We provide charities with their revenues -- as individuals, by gift and by purchase; as a society, by grants and other subventions. So, too, in multiple and overlapping capacities, we receive charities' benefits, sometimes as quid pro quo, sometimes as pure gratuity.

In all these capacities -- as regulators and operators, as patrons and as protégés, benefactors and beneficiaries -- we need to know, not just *how* an organization is charitable, but also how charitable an organization *is*. Sometimes we need to compare one charity with another; sometimes we need to compare charities with alternative providers in other sectors, even the nonprofit sector as a whole to other sectors; sometimes we need to assess the achievement of a single charity in different periods or on different projects. We need to know what to devote resources to, and what to expect results from, in what amounts, and when, and we need to know how well those allocations have gone.

Not at all well, we must be ready, when appropriate, to admit. Some charities, we all recognize, are simply not very good at doing good. And what some charities do, we all suspect, simply is not good, or good enough. It is not, as we shall see, merely that they transgress the present legal bounds of charitability; more seriously, those bounds themselves have sometimes been badly drawn. Charities, to state the matter none too starkly, do not always benefit the public, their ultimate *raison d'être*; sometimes they are a burden.

Sometimes that burden is obvious, as in the patently wasteful use of precious resources. But sometimes that burden is both more subtle and more serious: Sometimes charities displace other sectors of our society from work that is more properly theirs, work

that they can do better, and thus should have been doing in the first place. We all hope, sooner rather than later, to beat our swords into plowshares, and our spears into pruning hooks; in the meantime, we would do well to use each tool according to its proper task. We need, again, better measures of which social sectors should be doing what.

These are hardly novel questions. At the most basic level, the Scriptures themselves recognize both competing demands on the resources at our disposal and complementary social institutions. Make your haj, even as you give your alms²⁴; from even the most sacred sacrifice, save a share for the scribes and priests, and another for the widow and orphan²⁵; render unto Caesar, that which is Caesar's, and to other authorities, whether higher or lower, their due.²⁶ Nothing could more radically require a proper division of essential sectoral functions or more clearly imply careful allocations to each. Of those to whom much is given, we are told elsewhere, much will be required²⁷ (although with no specifics about how to relate present receipts to future accountings).

And, of course, the Scriptures do not deal merely in generalities; they also descend to the level of quite minute detail. They stipulate minimum gifts,²⁸ even as they teach that it is better to give more by a progressive measure,²⁹ but best to give all, at least at certain levels of wealth.³⁰ Maimonides ranked charitable giving on a descending scale of excellence, with eight tiers in all and almost as many implicit metrics.³¹

²⁴ See Ahmad ibn Naqib al-Misri, *THE RELIANCE OF THE TRAVELLER: A CLASSIC MANUAL OF ISLAMIC SACRED LAW* 275 (Nuh Ha Mim Keller, ed. and trans., rev. ed. 1994) ("Giving voluntary charity is recommended at all times; especially during Ramadan and at all noble times and places ... (... such as Mecca or Medina)")

²⁵ *Torah*. (need a specific passage in the Torah that goes with this sentence.)

²⁶ *Mathew* 22:21.

²⁷ *Luke* 12:48.

²⁸ *Genesis* 14:18; see also Ahmad ibn Naqib al-Misri, *The Reliance of the Traveller: A Classic Manual of Islamic Sacred Law* (defining *zakat*, periodic payments obligatory on all Muslims).

²⁹ *Mark* 12:38-44.

³⁰ See *Mathew* 19:16-22 (Jesus's instruction to "rich young ruler" to sell all his possessions and give the proceeds to the poor); see also See Ahmad ibn Naqib al-Misri, *The Reliance of the Traveller: A Classic Manual of Islamic Sacred Law* 275 (Nuh Ha Mim Keller, ed. and trans., rev. ed. 1994) ("It is recommended to give away in charity everything that is in excess.... Provided one can be patient with the resultant poverty").

³¹ *The Code of Maimonides (Mishneh Torah)*, Book VII, The Book of Agriculture 91-93 (Isaac Klein, trans., 1979). See Ahmad ibn Naqib al-Misri, *The Reliance of the Traveller: A Classic Manual of Islamic Sacred*

The Internal Revenue Code itself contains a host of comparative measures of charity, both implicit and explicit. That most cabalistic of all its arcana, Section 170, places a plethora of quantitative limits on the deductibility of contributions, according to a wide range of factors. The “pay-out” requirement for private foundations clearly, if crudely, tries to ensure that these organizations do a minimum of grant-making each year,³² thus explicitly favoring at least this much present over future spending. Perennial disputes over appropriate levels of private foundations’ administrative expenses bespeak the continuing quest for measures of what we will call productive efficiency, “bang for the buck.” (Closely parallel issues arise outside the Code in the very different context of charitable solicitations; their resolution has required repeated interpretation of our fundamental law by our highest court³³).

The basic income tax exemption itself³⁴ has at its very core an implicitly graduated test. Whatever an organization’s charitable virtues, if it engages in more than an insubstantial amount of non-charitable activity, it simply ceases to be a charity in the contemplation of the Code. Thus, in the law of charity as in the law of nature, quantitative changes can become qualitative differences. At zero Celsius, water stops getting colder and becomes ice; so, too, though at an admittedly less precise tipping point, a charity engaged in too much non-charitable activity forfeits its entire exemption. Less explicitly, a similar “state-change” must lurk behind the “relatedness” test for exempting business income; as anyone who has ever read copy in a museum catalogue can attest, the nexus between merchandise offered and mission to be accomplished can wear remarkably thin, but at some point the attenuation exposes the charitable vendor to tax liability.³⁵

Law 266-74 (listing eight categories of proper recipients of *zakat*, periodic payments mandatory for all Muslims, *id.* at 246).

³² I.R.C. § 4940.

³³ *Vill. of Schaumburg v. Citizens for a Better Env’t*, 444 U.S. 620 (1980) (striking down municipal ban on in-person solicitation of charitable donations to organizations that did not use at least 75% of their receipts for charitable purposes); *Riley v. Nat’l Found. of the Blind*, 487 U.S. 781 (1988) (striking down, among other things, state-imposed percentage limits on professional fundraisers’ fees).

³⁴ I.R.C. § 501(c)(3).

³⁵ Cite example from recent catalogue.

Even in the notoriously glacial-paced development of charitable trust law, a distinctly quantitative test is emerging. The threshold for altering charitable purposes under the cy pres doctrine has inched forward from the common law's rigid standard of "impossible or illegal," past the more malleable "impracticable," to the potentially fluid "inefficient." We still have, here, no precise definition of efficiency.³⁶ But at least a binary, all or nothing, standard is giving way to a more relativistic, quantitative measure.

Both proper budgeting for charity and proper performance monitoring of charity are all the more imperative in times of economic crisis (not to mention heightened political scrutiny). Budgeting and monitoring, in turn, both require comparisons, not only between organizations, but also over time.

B. Dual Perspectives.

In all the assessments we make of philanthropy, we take one of two basic perspectives. We look at charity from above, as designers, describers, or evaluators of its role in our social system more generally. Or we look at charity from within, as individuals involved with charity as members of our society. Although these perspectives are conceptually distinct, they are by no means functionally separate. To know how much to contribute to philanthropy, we must know how much "work" our society assigns, by design or by default, to philanthropy, and how well philanthropy is doing that work. We need to know where need is greatest, and we need to know how best to meet it with the means at hand. And yet, even as we make these decisions, we must bear in mind that they, in their turn, shape as well as reflect philanthropy's role.

These two perspectives, from "inside" and from "above," recall two complementary aspects of classical normative analysis: the political and the ethical. In the following

³⁶ Rob Atkinson, *Reforming Cy Pres Reform*, 44 Hastings L.J. 1111 (1993).

analysis of philanthropy, we will see that, even as in Plato and Aristotle's analysis of society generally, personal virtue and political justice are intimately linked.³⁷

And we will ask whether philanthropy might be that link, and more besides.

C. Summary.

As individuals and as a society, we must make multiple comparative judgments about philanthropy: What is its role vis-à-vis other sectors? How well is a particular philanthropy performing its assigned task? How much of our resources, personal and public, should we commit to any given charity, or to the cultural sector as a whole? All these questions point us back to a more basic one: What, exactly, are we comparing?

II. Theories of Philanthropy's Function and their Implications for Its Assessment: Four Complementary Sectors, Multiple Incommensurate Metrics.

Order gives due measure to the members of a work considered separately, and symmetrical agreement of to the properties of the whole.

Vitruvius, *The Fundamental Principles of Architecture*.³⁸

In all sciences and arts the end is a good, and the greatest good and in the highest degree a good in the most authoritative of all – this is the political science of which the good is justice, in other words, the common interest.

Aristotle, *Politics*.³⁹

Aristotle famously, if unsuccessfully, accounted for all forms of matter in terms of two qualities, temperature and moisture, whose polar extremes, in combination, produced four basic elements: earth (cold and dry), air (hot and wet), fire (dry and hot), and water (cold and wet).⁴⁰ Not to be outdone by the elegance of his example (or chastened by its failure), modern social theorists have offered a structurally similar macrocosmic model.

³⁷ PLATO, THE REPUBLIC 44 (proposing to derive a definition of justice in individuals from a definition of justice in the city); ARISTOTLE, POLITICS 167 ("We showed at the commencement of our inquiry that the virtue of the good man is necessarily the same as the virtue of the citizen of the perfect state.").

³⁸ *The Ten Books of Architecture* 35, Book 1, Chapter 2, The Fundamental Principles of Architecture, Paragraph 2.

³⁹ ARISTOTLE, POLITICS 149 (Benjamin Jowett, trans., Modern Library ed. 1942).

⁴⁰ ARISTOTLE, DE GENERATIONE ET CORRUPTIONE 40 (C.J.F. Williams, trans., 1982) (II.3.330b).

This model accounts for all social organizations in terms of two qualities, one economic, the entitlement of an organization's individual constituents to its net profits, and the other political, the mode of including the organization's constituent individuals. An organization is for-profit if some set of its individual constituents are ultimately entitled to its net assets; non-profit if they are not. An organization is voluntary if its members choose to join; involuntary if their inclusion is automatic. As for Aristotle, the intersection of these qualities in pure form produces four basic organizational possibilities: for-profit (for-profit and voluntary), governmental (nonprofit and involuntary), cultural (nonprofit and voluntary), and household (for-profit and involuntary).⁴¹

Aristotle, much to his credit, understood the limits of precision in human, if not physical, sciences. He begins his studies of both ethics and politics with a warning against expecting more precision in these matters than the subjects permit.⁴² Modern theorists' four-quadrant chart of our social world, for all its obvious flatness, gives us at least a very good start in situating both the cultural sector as a whole and charitable organizations in particular. Without ignoring Aristotle's dictum on achievable precision, this part adds a bit more topographic detail to the standard account. The effect will be to make that account more adequate for the task at hand, overlaying measures of charitable performance onto the generally accepted account of charity's function.

Before we can appreciate the model's promise, then, we need a general survey of its basic contours; that is the job of the first section of this part. Against that background, the second section outlines the four-sector model's account of the functions of each sector. Following the lead of the standard model, we start with the for-profit sector and proceeding through the governmental to the cultural. We will first identify each sector's basic function, each of which implies the measure of its own performance. We then

⁴¹ See Matthew Turnour and Myles McGregor-Lowndes, *From Charity to Civil Society: Sketching Steps to an Alternative Architecture for the Common Law* at 12, Figure 5, 2007 ARNOVA Conference, Session D10 (Atlanta, Georgia, 15 November 2007) (copy on file with author) (modeling society is a tetrahedron, with a face assigned to "business," "government," "family," and "charity.")

⁴² *Nicomachean Ethics*, *supra*, at 170 ("Our discussion will be adequate if we are content with as much precision as is appropriate to the subject matter."); see also *Politics*, *supra*, at 93 ("perfection in everything can hardly be expected," with particular reference to Socrates's political ideas).

consider each sections limitations or “failures.” Addressing these failures, according to the standard model, is the function of the other sectors.

The order in which we consider the sectors, we will see, is quite significant. As the sequence itself implies, the four-sector model takes the function of the cultural sector to be essentially residual. Its functions are those that none of the other three sectors does well. But this sequencing is tendentious, and its implications for sectoral functions is dubious. To this why is so, we will need, in the third section, to consider sectoral functions and failures not seriatim, but simultaneously.

Having identified the complementary functions and failures of the four sectors in sequence, we will re-consider them together as they apply to two significant services, elementary education and property protection. These examples will focus our analysis on a critical fact. With those services as with many others, our society has considerable flexibility in resolving two related issues: which sector best provides the service, and how provision of that service should be financed. We have public schools, private schools, and for-profit schools, and many parents “home-school.” Many parents pay full tuition; most parents pay taxes; some parents make donations. Our society provides elementary education, in other words, in all four sectors, financed in several fundamentally different ways. This example thus raises two further points generally obscured by the standard for-sector account. First, our choice of sectoral service provider and mode of finance may have much less to do with inherent advantages of the sectors themselves and much more to do with the kind of society we choose to have. Second, our fundamental criteria for making these choices come from the cultural sector itself.

Taken together, these last two points imply a radical inversion of perspectives on the relationships among the four sectors of our society. Starting from the conventional view that the function of charity is to correct failures of institutions in the other sectors, our analysis in this part concludes that the most distinctive function of the cultural sector may be to provide global metrics for measuring the performance of all sectors. And some charities, we shall see, take upon themselves an even more ambitious function; they

provide models for transforming all of society in their own image. These two charitable functions – providing global metrics and alternative social arrangements – together form a principled basis for the claim, often voiced but seldom argued, that the cultural sector is not the third or fourth, but the first. The net effect of our analysis, then, will be a paradox: In looking for the measure of charity in the short-comings of the other sectors, we will find that the unique functions of charity are providing the over-arching measure for all sectors, even the model for society as a whole. What we set out to measure will turn out to provide our metric.

A. Overview of the Four Sector Model of Charity’s Function.

For all its explanatory power, the four-failure theory has several implicit limits that we need to identify at the outset, then remedy as we apply that model to charity. These are the limitations in need of attention: It omits the household sector, at least as it is generally presented; it tends to suggest that the non-profit sector is subordinate to the other sectors; it emphasizes sectoral failure over sectoral function; it does not make explicit the teleological nature of its norms or the cultural and temporal limits of its scope. This section addresses each of those limits; once they have been identified, we shall see, they pose no real problems. Indeed, identifying these limits makes the model more rather than less useful for our purposes.

With one notable exception⁴³, in virtually all of its applications to charity, the four-sector social model gives short shrift to the household sector. If charity proverbially begins at home, it attracts our analytic attention only when it steps out into the wider world. In defense of the model, this omission may be a kind of backhand concession that this “fourth” sector is too basic, or too complex, for fuller discussion, at least in the context of charity. Whatever the reason, the omission is general, so general, indeed, as to be reflected in the more widely used name of the theory itself; the “three failure” theory of charity refers to failures and functions of the for-profit, governmental, and cultural

⁴³ See Matthew Turnour and Myles McGregor-Lowndes, *From Charity to Civil Society: Sketching Steps to an Alternative Architecture for the Common Law*, 2007 ARNOVA Conference, Session D10 (Atlanta, Georgia, 15 November 2007) (copy on file with author).

sectors, thus leaving the household sector entirely out of account,⁴⁴ with only occasional mentions more or less in the margins.⁴⁵ To correct those slights here would, alas, require more time and space than is warranted by the additional light that the corrections would shed on charity, which is our main topic and itself something of a sectoral step-child. So this theory of charity, like its predecessors, will relegate the household sector to relevant footnotes and sidelights in the discussion of its sectoral siblings. Here, at very least, the slight is not without apology.

A second aspect of the four-sector theory is, for purposes of our analysis, more serious. That account is generally, and unfortunately, called a failure theory⁴⁶; as this naming implies, the cultural sector is explained in terms of failures in the other two (or three) sectors. This negative name unfortunately implies both a dubious chronology of sectoral development and a subordinate role for the cultural sector. As generally presented, the model begins with the for-profit sector, treats the governmental sector as primarily functioning to correct various market failures, and assigns any functions left over to the cultural sector⁴⁷. It thus suggests that the cultural sector developed last, as a sort of stop-gap response to failures in the other sectors, thus assigning the others both a logical and a chronological priority, with the cultural sector a rather distant third.⁴⁸

⁴⁴ See, e.g., Richard Weisberg, *Economic Theories of Nonprofit Organizations*, in *THE NONPROFIT SECTOR: A RESEARCH HANDBOOK* 117 (Walter W. Powell and Richard Steinberg, eds., 2006).

⁴⁵ See JON VAN TIL, *MAPPING THE THIRD SECTOR: VOLUNTARISM IN A CHANGING SOCIAL ECONOMY* 87 (1988) (describing three-sector model and noting the possibility of identifying an additional “household” or “informal” sector); James Douglas, *Political Theories of Nonprofit Organizations*, in Powell, *THE NONPROFIT SECTOR* 43, 46 (1st ed. 1987) *supra*, at 43 (“Private nonprofits are subject to competition for survival from three other forms of social organization – the family, commercial for-profit firms, and government-run services.”).

⁴⁶ See Weisberg, *Economic Theories*, *supra*, at 119 (referring to “the stream of literature that has become known as the ‘three failure theory’”).

⁴⁷ See Weisberg, *Economic Theories*, *supra*, at 119-127 (summarizing the “three failure theory” in the conventional order); *id.* at 120, Figure 5 (“Schematic of Three-Failures Theory” with markets at the top, government in the middle, and nonprofits at the bottom); see also Burton A. Weisbrod, *The Nonprofit Economy* 33-41 (assessing the relative merits of for-profit firms, then government, and finally nonprofits) 16-25 (1988).

⁴⁸ See Lester M. Salamon, *Partners in Public Service: The Scope and Theory of Government-Nonprofit Relations*, in *THE NONPROFIT SECTOR: A RESOURCE HANDBOOK* 99, 111 (Walter W. Powell, ed.) (faulting prior theories for “explain[ing] the existence of the voluntary sector in terms of failures of the market system

This implies a simplistic answer to a “chicken-and-egg” question that is both silly and serious: Which sector comes first?⁴⁹ The order of standard treatments suggests that a happily autonomous set of householders created government by mutual assent to protect their pre-existing rights to property and their liberty to trade those rights in a generally Edenic “state of nature.” This is, of course, quite reminiscent of John Locke’s account of the origin and function of the state.⁵⁰ Hobbes, Bentham, and Calhoun, to name but three, present a considerably less sanguine view of the state of nature; for them, humankind under the state and its laws is much closer to *Paradise Regained* than *Paradise Lost*.

We need not take a position on that dated, if not dubious, debate, which modern political theory studiously attempts to skirt.⁵¹ We need only be aware that the four-sector model, in its application to charity, has a distinctly Lockean bias. This is not a necessary implication of the theory, and we will correct for it later.⁵² What’s more, we can already see that bias, not as evidence of any libertarian agenda on the part of the theory’s original proponents, but rather as an accident of their timing and an artifact of the model’s structure. Any cyclical theory or three-dimensional model must be explained linearly; to move from the model’s two- or three-dimensional depiction to its verbal explanation, one must start at some point in the system and work one’s way, as it were, “around.”⁵³ As a matter of intellectual history, theories of the nonprofit sector developed relatively late; accordingly, its theorists did in fact begin with existing theories of the other sectors and

and of government,” with the result that “the voluntary sector is thus seen as derivative and secondary, filling in where other systems fall short.”) (1987).

⁴⁹ REA: Does this ordering raise Arrow-paradoxes as well?

⁵⁰ JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 289 (Peter Laslett, ed. 1988) (Second Treatise).

⁵¹ E.g., JOHN RAWLS, *A THEORY OF JUSTICE* 11-12 (1971) (setting out the conditions of the hypothetical “original condition” as “correspond[ing] to the state of nature in the traditional theory of social contract” and distinguish it from both “an actual historical state of affairs” and “a primitive condition of culture”).

⁵² Part II.c, *infra*, shifts from the standard model’s sequential sachema to a more synoptic perspective. See also Smith and Gronberg, *Government-Nonprofit Relations* [*infra*] at 234 (describing theories that trace the role of the philanthropic sectors of various national cultures to historical roots).

⁵³ Weisberg, *Economic Theories*, [*infra*], at 127 (noting that “[t]hree-failures theory does not presume any sector is ‘first’ and the other sectors react to its failures,” but “rather, the approach arranges the three sectors around a circle, with each reacting to the failures of its neighbors,” although admitting that the standard presentation, beginning with the for-profit sector “perhaps falls short in developing our intuition about the whole circle.”)

add their theories onto those.⁵⁴ Our own starting point is, accordingly, somewhat “path-dependent.” In describing and elaborating our predecessors’ composite model, we will follow their lead without any great harm, so long as we bear in mind that what appears to be a chronology of sectoral evolution is in fact an accident of intellectual history.

The third unfortunate feature of the current model, its focus on sectoral “failure,” is closely related to the second. The focus on sectoral “failure” tends to heighten the risk, just identified, of confusing order of theoretical explanation with order of sectoral development. Thus, as we follow the general contours of the four-sector model in the following section, we will shift our focus from sectoral failure to sectoral function. There is no “failure in the abstract,” but only failure at something, failure to produce a product, accomplish a purpose or, more generally, perform a function. Function thus logically precedes failure. We accordingly, will focus primarily on the functions of the various sectors, and only secondarily on their “failures”; we will see the respective sectors more as performing complementary functions and less as correcting sequential “failures.”

Whether we focus on function or failure, we need to make explicit a deeply buried assumption of the four-sector model: Its principal norms are implicitly teleological, or consequentialist.⁵⁵ “Function” and “failure” both imply norms, even as Aristotle would say. A thing’s virtue is doing what it is supposed to do well; its vice, doing it badly, or not at all. This teleology has both advantages and disadvantages. On the negative side, it means that the model fits considerably less well with a major strand of western normative theory, the deontological, which focuses, to use a standard shorthand, primarily on the “rightness” of actions and only secondarily, if at all, on the “goodness” of their

⁵⁴ See Steinberg, *Economic Theories*, supra, at 118 (tracing the developments of the “three failure theory”).

⁵⁵ This is also true of newer models that “tend to be much less concerned with efficiency and the provision of public goods than they are with other important goals such as responsiveness, freedom, cooperation, legitimacy, individual and community responsibility, citizen participation, obligation, and social capital.” Smith and Gronberg, *Government-Nonprofit Relations* [infra] at 229. See also Weisberg, *Economic Theories*, supra, at 129 (“work in the nonprofit sector is not just about doing” but also “about making statements and being with others.”) With the possible exception of “obligation,” these additional desiderata are all themselves either virtues or goals.

consequences.⁵⁶ The obverse of that, of course, is a considerable advantage; the four-sector model meshes quite nicely with two equally ancient and honorable strands of normative theory, consequentialism, which focuses on the results of acts, and virtue ethics, which focuses on the character of the agent.⁵⁷

Once we see its basic consequentialist structure, we can see a related advantage; the four sector model's functionalism necessarily implies comparisons, of two important kinds. First, and most obviously, if the virtue of a thing is its performance of a function, then it makes perfect sense to ask, not merely whether it is performing well or badly, but how well or how badly. Beyond that, it makes perfect sense to ask how well a particular thing is performing a function relative to other things. Consider this example. If one function of an elementary school is to teach children to read, you will want to know, not just whether a particular charitable school does that, but also how well it does. And we will want to assess "how well" in two related ways: In terms of both the out-of-pocket costs of getting the job done at that particular school and the comparable costs of other schools, including schools in the other sectors.

This inherently comparative perspective is important for a less obvious reason: It helps redress a tendency in all teleological thinking to assume that everything has an end, or function, and a single end or function at that. As we observed at the outset, this may not be true at two levels of analysis vitally important to our inquiry: Individual human beings and human society as a whole. The prospect that neither individuals nor society has a "natural" or "essential" function suggests yet another implicit feature of the four-

⁵⁶ See William David Ross, *The Right and the Good* (1930). That said, the theory has more than adequate room for deontological considerations as "side-constraints": Performance of charity's proper functions, to produce its proper ends, could be constrained by requiring certain deontological values like honesty and forbidding some deontological vices like lying and stealing. See KANT, *FOUNDATIONS OF THE METAPHYSICS OF MORALS* (arguing for the wrongfulness of lying and stealing as entailing non-universalizable motives). We will, that is to say, be focusing on philanthropic ends, but that is not to say that the "goodness" of those ends always justify dubious "right" means.

⁵⁷ See, e.g., William A. Galston, *Introduction* to *VIRTUE*, 34 *Nomos* vii (Joseph W. Chaprman and William A. Galston, ed., 1992) (noting a "revival of scholarly interest in the virtues" following "mounting dissatisfaction with moral discussions bounded by debates between utilitarianism and deontology"). See also Alasdair McIntyre, *After Virtue* (2d ed. 1984) (setting out a neo-Aristotelian theory of virtue ethics).

sector model: Functions, their corresponding virtues, and the measures of those virtues are all relative to the kind of individual and society in question.

Both Plato⁵⁸ and Aristotle⁵⁹ are very clear about this; the four-sector model, much less so. What counts as good, Aristotle and Plato point out, varies with the regime being assessed. Like classical political theory, the analytic structure of the four-sector model could be superimposed upon any real or proposed society. What we must bear in mind is that, as the four-sector theory has in fact been applied to explain the function of charity, it takes existing institutions in all four sectors as given: liberal democracy in our governmental sector, market capitalism in our economic sector; Western nuclear families in our household sector; pluralism in our cultural sector. Proponents of the four-sector model have applied their analytic apparatus to contemporary Western -- even more particularly, American -- society, taking that society, and each of its constituent sectors, more or less as they have found them.⁶⁰ To use a standard distinction, the four-sector theory is descriptive, rather than normative; more precisely, it takes the “ends” of the society under analysis as given, and evaluates that society’s component institutions and organizations as means to those ends.

This is fine, as far as it goes; it does, however, pose two related hazards, into both of which its adherents, if not its architects, occasionally fall. The most obvious of these hazards is to lose sight of the distinction between description and prescription or -- again, more precisely -- between what we might call categorical and hypothetical prescription. Thus, for example, it is one thing to say that, if charity is to redresses problems of market failures and supra-majority demand, it should be structured in a particular way; it is quite another to say that charity’s “real” or “proper” function is to redress these particular

⁵⁸ PLATO, *REPUBLIC*, at 222 (Allan Bloom ed. and trans.) (“Do you know... that it is necessary that there also be as many forms of human characters as there are forms of regimes?”)

⁵⁹ ARISTOTLE, *POLITICS*, at 149 (“The goodness or badness, justice or injustice, of laws varies of necessity with the constitutions of states.”).

⁶⁰ See BURTON WEISBROD, *THE NONPROFIT ECONOMY* 27 (“If the nonprofit sector exists to respond to diversity of demands for collective goods, its size relative to government should differ across nations.”). See also Smith and Gronberg, *Government-Nonprofit Relations* [infra] at 234 (identifying four different types of regimes, the liberal, the corporatist, the social democratic, and the statist, classified according to the relative size of their government’s social welfare spending and philanthropic sectors).

forms of “market” or “government” failure.⁶¹ As we shall see, these are not the only ways in which charity can, and arguably should, complement the political and economic sectors.

That brings us to the second hazard posed by the four sector model’s descriptive mode as it has been applied to charity: It tends to obscure, if not exclude, alternative arrangements. Charity has clearly operated differently in early phases of western history, and may again; what is more, charity clearly operates differently in other contemporary western societies. Among those societies, in fact, Anglo-American charity is more the exception than the rule, playing a much larger role vis-à-vis the governmental sector. Not only, as we have seen, is there a tendency to take this exceptionalism as normatively superiority; there is a deeper tendency simply to ignore alternative arrangements altogether.⁶²

That the four-sector model succumbs to these two hazards – confusing description with prescription and ignoring alternative social arrangements -- is especially ironic with respect to charity. From the beginning of recorded history in the west, the cultural sector has not merely served to fill gaps or meet failures in other social sectors; it has also sought to transform those other sectors, and society as a whole, sometimes quite radically. Contrary to the implications of the “three failure” theory, not all charities serve simply to improve the function of the other two sectors; some serve to show that these institutional arrangements themselves as fundamentally flawed.⁶³ Charity in forms closely analogous to our own existed before our modern society, and this charity may well survive that form of society. What is more, one could argue that notions of charity have significantly shaped modern society in its own image; we shall in fact argue that an important function of

⁶¹ See Smith and Gronberg, *Government-Nonprofit Relations* [infra] at 229 (noting that market and government failure theories “imply important normative assumptions about the role of government and non-profit organizations, especially in the provision of public goods”).

⁶² Smith and Gronberg, *Government-Nonprofit Relations* [infra] at 233-38 (describing a group of “regime and neo-institutional. perspectives” that are redressing this parochial tendency in earlier models, including the four sector model).

⁶³ Smith and Gronberg, *Government-Nonprofit Relations* [infra] at 231 (“[N]onprofit social movements have a deliberately conflictual relationship with government; indeed, the entire raison d’être of many social movements is to change government policy.”); Weisberg, *Economic Theories*, at 129 (Although “[e]fficiency is defined with respect to preexisting consumer preferences”.... “the stated mission of many nonprofits is to change those preferences.....”).

today's charity is, in fact, precisely to make our society more charitable. In that sense, then, the function of charity is not so much the "default mode" of correcting the failures of the other sectors, but rather the "primary mode" of transforming those other sectors by an ideal that they themselves cannot even produce.

As we turn, in the next section, to the conventional four-sector model's account of charity, then, we must bear in mind several peculiarities of that account. It tends to ignore the household, or fourth, sector almost entirely; more significantly, it tends to distort the role of the cultural, or third, sector vis-à-vis the other two. Its generally salutary dependence on functional norms poses two related pitfalls: mistaking actual for ideal social institutions and, from among actual institutions, focusing on the contemporary American status quo to the virtual exclusion of alternatives.

B. Four Sector Model and Philanthropy's Function.

With these reservations in mind, this section applies the four-sector model to American charity in the now-conventional order: For-profit, governmental, and cultural. With respect to each sector, we will identify its function, extrapolate from that function a metric of performance, and identify the sector's failures in measuring up to its own standards. At each step we will also identify the standard model's limitations and adjust for them.

1. The For-Profit, Voluntary Sector: Our Capitalist Market Economy.

We will first identify the basic function of the capitalist market economy and the means it employs to accomplish that function. These means, we shall see, imply two metrics useful for our narrower purpose, measuring the performance of charity. We shall also see, however, that both the basic function of market capitalism and its characteristic means impose their own limitations; to transcend those limits while preserving the basics of market capitalism, our society must assign critical functions to other sectors.

a. **The Market's Function and Basic Metrics: Maximum Consumer Satisfaction (At Minimum Cost).**

Stated most strictly, the function of the market capitalism is to provide consumers the most of what they want, at the lowest possible prices, relative to the other three sectors: the household, the governmental, and the cultural.⁶⁴ Several significant implications flow from market capitalism's basic function. The first implication is this: Producers are subordinate to consumers. A capitalist market economy is primarily about consumer satisfaction and only secondarily about producer profit. Maximum return to capitalists' investment is not an end in itself, but merely the means by which investors are induced to finance production of what consumers want, at the lowest possible price.

This basic function, as we would expect, also implies metrics of performance. Two, in particular, will prove extraordinarily useful, but by no means wholly adequate, to our task, measuring the merits of charity. The first of these metrics is both the most basic and the most widely applicable: getting the job done, whatever the job is, at the least possible cost. This is "bang for the buck," "outputs-for-inputs" efficiency. Since this metric compares the output of goods and services with the inputs required to produce them, a handy shorthand is "productive efficiency." This is the sense of "efficiency," for example, in Kenneth Karst's classic article, *The Efficiency of the Charitable Dollar*⁶⁵. It is by this metric that we generally think the governmental sector inefficient, relative to other sectors, in producing

⁶⁴ See Weisbrod, *The Nonprofit Economy*, at 18 ("The main strength of private enterprise is its efficiency in meeting consumer demands at minimum costs.") Although specification of this maximum production at minimum cost goal works well enough for economic purposes, it can be faulted, from a political perspective, as intermediate rather than ultimate. The ultimate economic goal of market capitalism, from that perspective, ensuring the optimal measure of citizen freedom from government. See F.H.A. Hayek, *THE ROAD TO SERFDOM* (linking political and economic freedom). For reasons of economy (not to mention politics), the textual discussion omits these possible refinements. Later, we will suggest, more in line with classical political theory, that maximum satisfaction of existing wants dubiously ignore both production of better goods than consumers want and distribution of production to others than those able to pay market prices. See *infra*, Part II.b.2.b., Extra-Sectoral Problems: Shortfalls of the Market by Measures Other than Its Own.

⁶⁵ Kenneth L. Karst, *The Efficiency of the Charitable Dollar: An Unfulfilled State Responsibility*, 73 Harv. L. Rev. 433 (1960); see also Burton A. Weisbrod, *The Nonprofit Economy* 33-41 (1988) (comparing for-profit, governmental, and nonprofit providers primarily in terms of "cost efficiency" and "production costs").

goods and services; this was the sentiment President Obama was instinctively reflecting in his “it’s the Post Office with the problems” gaffe⁶⁶.

This measure is so basic as to almost escape notice; it is so deeply imbedded in our commonsense as to seem temptingly inevitable or essential.⁶⁷ But, profoundly helpful though this notion of productive, “output-to- input” efficiency will prove, it will not provide us with anywhere near enough for our purposes.

We can already begin to see why this is so when we consider the other measure implied in the function of market capitalism: Consumer satisfaction. This second performance measure is less generally applicable, more specifically tailored to the function of the market economy itself. It involves producing not just more, relative to input, but more relative to a very different standard: What consumers want. This is a matter, not solely of productive efficiency, but also of what economists specify by their confusingly similar term

⁶⁶ Cite “town meeting comment.” There, of course, a good deal more to be said here. As to the Postal Service in particular, *see, e.g.*, Weisbrod, *The Nonprofit Economy*, at 36 (“[D]iscussions of the comparative efficiency of the U. S. Postal Service and the private United Parcel Service typically fail to consider differences in the number of free pickup points, the variety of sizes of articles accepted, and the geographic distribution of delivery points.”); as to the general difficulty in assessing the relative productive efficiency of government, for-profit, and nonprofit providers, *see infra* at Part III.?

⁶⁷ This “more bang for the buck is better” metric seems not only what we actually *do* prefer, as a matter of commonsense, but also what we *should* prefer, as a sort of moral imperative. But this last is not quite so clear. True, it seems to operate at a nearly evolutionary level of significance and cosmic scope: human societies that are wasteful will be relatively less likely to survive; if we are not reasonable careful in the husbanding of our resources, we may eventually make our home planet itself uninhabitable.

But, when we reduce the productive efficiency standard to this level, we notice an odd but profoundly significant condition: If you want human beings to survive, you cannot be but so extravagant, or so wasteful. It is possible, although very odd, to reject this condition: A very profound misanthropist – or a very aggressive millenarian – could want humanity to suffocate under its own waste, the one because we are a bad lot, the other because that way the Kingdom comes sooner. James Watt as Secretary of the Interior, remember, professed indifference to environmental degradation in view of the eminence of the eschaton; remember, too, efforts to provoke Armageddon, from the time of the Zealots in their Dead Sea caves down to the present day.

This peculiar insight will bedevil both parts of our search: for the good of charity itself, as well as its measure. Counterintuitive though this “more is less” perspective is, it, too, is deeply embedded in our very most basic self-understandings: “One person’s meat is another’s poison”; so, too, veganism and animal husbandry are both charitable purposes. “Less is more” makes little sense – until we qualify what we are quantifying, until we specify more or less of *what*.

of art, economic efficiency, or allocative efficiency.⁶⁸ These two different kinds of efficiency, related though they assuredly are, are not reducible to each other, a lesson that many a bankrupt manufacturer has learned to its chagrin. It is small comfort to become the lowest-cost producer of SUVs, just at the moment when consumers are all switching to subcompact hybrids.

Here, however, we must be very careful. Although economic efficiency is economists' standard gauge of consumer satisfaction, actual consumer satisfaction is notoriously difficult to measure. It would require determining consumers' true state of mind, a task difficult in practice if not impossible in principle, at the individual, much less aggregate, level of analysis. This is, of course, a problem that has long bedeviled the currently most popular form of consequentialism, hedonistic utilitarianism, which takes maximizing pleasure to be the supreme good. Bentham's long-promised "felicific calculus" has, alas, yet to be delivered.

Faced with this problem, economists have hit upon a radically simplifying, if admittedly distorting, assumption: Equate how much satisfaction consumers really derive from a product with what they are willing and able to pay for it, then aggregate those amounts to determine "wealth." Economically appropriate outcomes – results that maximize consumer satisfaction – will be those that move resources into the uses that consumers are willing and able to pay most for. This, as two generations of economic analysis of law has proved, is an amazingly powerful, though woefully limited, metric. We take up the most serious of these problems in the next subsection, on the functions of government; now we must turn to a final implication of market capitalism's function.

That final implication is perhaps the more important, at least for our purposes: The measure of for-profit performance is, at its very core, comparative. In identifying that function at the outset, we attached a critical condition: the for-profit sector is to perform

⁶⁸ See, e.g., Steinberg, *Economic Theories*, at 119 ("Markets can be inefficient because they waste resources by using the wrong production processes (productive inefficiency), but they can also be inefficient because they waste resources by producing the wrong mix of goods and services (allocative inefficiency)."); see also Weisberg, *Nonprofit Economy*, at 18 ("The attraction of profit is a powerful incentive for managers to seek lower production costs and products that more fully meet demands.").

its function better than the other three. This is not, again, to say that the market sector has any logical or chronological priority; indeed, once we introduce the comparative element, we can see that, looked at in another way, the market is, in fact, a response to the governmental, household, and cultural sectors' failure to provide particular goods or services as well or better themselves. We cannot, that is, either define the market's function or assess its performance without reference to the other sectors⁶⁹.

Consider, again, our example of primary education. Like many other goods and services, people could resort to household production; parents can, and do, literally home-school their children. But parents well might do better – in economic terms, get more of what they want, more cheaply – by trading with their neighbors. This is my plan, which I plan to propose to you at a backyard barbecue at my place:

I read remarkably well and widely (if I do say so myself), but my handwriting is illegible and I can't even count without the aid of my fingers (and toes); you've told me you have a reading disorder so profound that you can't add a simple column of single-digit numbers, but I can see, from your RSVP, that your handwriting is virtually calligraphy; just between you and me, Jones down the block really sucks at hand-writing, like me, and at reading, like you, but he seems to solve simultaneous quadratic equations without resort pen and paper, much less pocket calculator. Here's what I'm getting at: I'll happily teach our children reading, if you'll teach them to write; let's see if Jones won't "do the math."

Even if you think my plan is an improvement on home-schooling in the strictest sense of each family educating its own children at home, we neighbors may be able to do better still. We three parents might find room for specialization by comparative advantage well beyond those offered by our own respective abilities, we may well discover economies of scale unavailable to us at home, all by the simple expedient of sending our children to school. The school teachers may be better in all three basic subjects than any of us, and each of them may be able to teach a dozen children in a classroom in addition to mine and yours and Jones's. In selecting a suitable school, we would face three basic options: Public, private, and for-profit. All things being equal – an assumption we will, of course,

⁶⁹ See Weisbrod, *The Nonprofit Economy*, at 14 ("Every type of institution fails to be efficient under some circumstances.").

have to question in due course – we would choose the school that provided, as we have already suggested, the highest mastery of the three “R’s” for the lowest cost.⁷⁰ Graded on that simple scale, a for-profit school might well score highest.

Here’s why: The proprietors of the for-profit school get to keep any excess of revenues over expenditures; this gives them a direct economic incentive of their own to operate at maximum “productive efficiency,” to get the most educational output for their inputs of teacher labor, bricks-and-mortar, and the other factors of educational production.⁷¹ They get to keep the profits that result from cost-minimizing production, to spend on their favorite consumer goods or re-invest in still more production, and profit; we parents get to keep the savings from their lower cost tuition to spend on our own favorite consumer goods or invest in our own profit-maximizing enterprises. By seeking the most “bang” for our educational buck – they in production, we in consumption – we all come out ahead, in our own terms. The proprietors maximize profits; we parents, satisfaction. On this highly simplified scenario, then, the for-profit school functions best, measured by the market’s two related metrics, productive efficiency and economic efficiency.

But, of course, the market might not work nearly so well as we have imagined. We now need to consider some of the general problems that might upset our little red, white, and blue schoolhouse, problems that suggest why our society needs to augment our capitalism market economy with the functions of other sectors.

⁷⁰ To ensure that we bear those costs directly, and thus avoid an obvious problem of externalities, we can assume that our village has a generous voucher system.

⁷¹ See Weisberg, *Nonprofit Economy*, at 18 (“The attraction of profit is a powerful incentive for managers to seek lower production costs and products that more fully meet demands” as compared with both governmental and nonprofit providers.).

b. Market Problems⁷² and their Measurement.

The function of market capitalism, we have just seen, is to maximum aggregate consumer “satisfaction” or “wealth,” defined as the aggregate of what consumers are willing and able to pay. Wealth-maximizing allocations of resources are by definition “economically efficient,” the basic metric of the for-profit sector’s performance. Against that background, we can now turn to matters closer to our purpose: the limitations and failures of our economic sector. These, according to the four-sector theory, call for other sectors, even as limitations and failures in those sectors, in their turn, mandate the market itself. We can identify four such problems, two in terms of the system’s own function and metrics and two that imply other functions, with their own metrics. These distinctions are vitally important to a proper understanding of charity; failure to draw them has been a major failing of the four-sector model’s account of the cultural sector.

(1) Intra-Sectoral Problems: Shortfalls of the Market by Its Own Metric.

The first set of problems with the market have this is common: They take both the function and the metric of the capitalist market economy as given. They grant, that is, these basic premises: We want our economy to give consumers what they want, we will measure their wants by their willingness and ability to pay for goods and services, and we will calculate the satisfaction of those wants by the metric of economic efficiency. The two kinds of problems we examine here, then, are problems with the market in its own terms, failures of the market to measure up to its own metric.

a) The Market’s Foundations.

The most basic limitation of market capitalism is its inability to create and sustain the essential conditions for its own existence. Although the extent of these conditions are much debated, only the most optimistic anarchists deny that they must include a legal regime with these three correlated features: Recognition of private entitlements to

⁷² The non-technical term “market problems” is meant to capture phenomena beyond the scope of the technical terms “market failures” or “market imperfections,” which I reserve for special treatment in Part II.b.1.a.ii, Classic Market Failures. For a parallel list of “market shortcomings, see Weisbrod, *The Nonprofit Economy* at 21- (noting that “the shortcomings of the private market can occur in any of three areas – the choice of goods and services produced, production processes, and the distribution of outputs”).

resources, provision for voluntary exchange of entitlements, and protections against non-consensual interference with entitlements. These are, of course, the three main divisions of private law: property, contracts, and torts. As even the most thoroughly libertarian of theorists admit, these are not institutions that can be achieved by private arrangements in any state of nature; law, and with it property, requires a state.⁷³

To appreciate this point, consider two radically different perspectives on the same “state of nature” situation, someone’s killing of a deer. According to Locke, this clenched his case for a natural, pre-social, right to private property: “Thus this Law of reason makes the Deer, that Indian’s who hath killed it; ‘tis allowed to be his goods who hath bestowed his labour upon it, though before, it was the common right of everyone.”⁷⁴ But, as Bentham pointed out, even this intuitively appealing case for property in the state of nature poses a problem:

The savage who has killed a deer may hope to keep it for himself, so long as his cave is undiscovered; so long as he watches to defend it, and is stronger than his rivals; but that is all. How miserable and precarious is such a possession! If we suppose the least agreement among savages to respect the acquisitions of each other, we see the introduction of a principle to which no name can be given but that of law. A feeble and momentary expectation may result from time to time from circumstances purely physical; but a strong and permanent expectation can result only from law. That which, in the natural state, was almost an invisible thread, in the social state becomes a cable.⁷⁵

As both Locke and Bentham implicitly agree, life in the “state of nature,” real or imagined, need not be as “mean, nasty, brutish, and short” as Hobbes famously insisted. And, for all we can prove, humans in that state may well have “natural rights” to their own labor and whatever they can collect with that labor from the common store of previously uncollected stuff, even as Locke assumed.⁷⁶ But Bentham’s critical point still

⁷³ See RICHARD EPSTEIN, *TAKINGS*, at 3-4.

⁷⁴ JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 289 (Peter Laslett, ed. 1988) (Second Treatise, Chapter 5, Property, Paragraph 30, lines 11-14).

⁷⁵ JEREMY BENTHAM, *THEORY OF LEGISLATION* 112-13 (4th ed. 1882).

⁷⁶ That said, the term in inverted commas drove Bentham to paroxysms of distraction: “Natural rights are nonsense; natural and imprescriptible rights, nonsense on stilts.” See *Anarchical Fallacies; Being an*

stands: To be secure, as a practical matter, in the enjoyment of what they collect, humans must have socially enforced property norms, protection of their labor and its fruits, by force if necessary, by some collective body. That body, whatever it is, is the rudimentary state; its mode of protection, be it ever so humble, is recognizable law. And law, as Bentham brilliantly saw and even latter-day Lockeans concede⁷⁷, cannot be created by contract: Agreement presupposes a pre-existing regime of recognized rights, including the right to enforce agreements.⁷⁸

To return to our education example, consider this hypothetical about a private proprietary school, from a very old common law case: “But suppose Mr. Hickergill should lie in the way with his guns, and frighten the boys from going to school, and their parents would not let them go thither; surely that schoolmaster might have an action for the loss of his scholars.”⁷⁹ What holds true for Locke’s deer holds all the more true for our school master’s pupils: Without law, anyone is free to take them with impunity, by any means at hand, fair or foul, force included. And so, too, without law our schoolmaster will lose, not only his students, but quite likely his schoolhouse, even his liberty, or his life. This, then, is the first and most basic problem of the market: It cannot create and sustain the fundamental conditions for its own existence and operation; for that, the market must have the state and its laws.

b) Classic Market Failures.

Even with its legal foundations in place, market capitalism, left to its own devices, does not do as well as it might, measured by its own special metric, economic efficiency. Sometimes markets fail, for predictable reasons, to produce efficient outcomes, the

Examination of the Declarations of Rights Issued During the French Revolution, in 2 WORKS OF JEREMY BENTHAM 501, col. 1 (1843). Please confirm quote, which is from memory so not likely perfect.

⁷⁷ See RICHARD EPSTEIN, TAKINGS: PRIVATE PROPERTY AND EMINENT DOMAIN at 15 (1985) (“To make the Lockean conception [of the state’s origin] viable, it is necessary to abandon the idea of tacit consent as a source of contractual obligation.”)

⁷⁸ EPSTEIN, TAKINGS, at viii (“C’s right to enter into a contract with D cannot be acquired by a contract between themselves.”).

⁷⁹ *Keeble v. Hickergill*, 11 East 574, 103 Eng. Rep. 1127 (Queen’s Bench 1707) citing 11 Henry IV 47 (1490).

allocation of goods and services dictated by what consumers are willing and able to pay. For our purposes, the sources of the most significant “market failures” are twofold: information asymmetries⁸⁰ and externalities⁸¹. Our elementary education example nicely illustrates both forms of market failure.

(i) Information Asymmetries.

In our original example, all three of us parents – you, Jones, and I – were willing and able to pay for our children’s elementary education. We want what is best for them, and we know that education is a real “leg up” in our society. But, alas, we may not really know it when we see it, except in the crudest possible way, when it may be too late. Here the for-profit school poses a very real problem: Since its proprietors, as we have seen, get to keep any excess of revenues over expenditures, they have a perverse incentive – by the standards of the market itself – to trade on we parents’ difficulty in measuring mastery of the three Rs. If they can skim on input expenditures – by hiring fewer or inferior teachers, for example – they can “over-charge” us for an inferior product. Public and private schools, by contrast, have no such incentive to skim and thus may – assuming they avoid their own perverse incentives⁸² – offer more education for our tuition dollar.

There are, of course, other ways to address this particular form of market failure: state regulation of primary education; non-profit “watch-dog” groups like the PTA; inculcation in teachers, by the state or by institutions of the cultural sector, of a professional ethos.⁸³ The point here is that, on account of for-profit suppliers’ incentive

⁸⁰ See Weisbrod, *The Nonprofit Economy*, at 19 (“Lack of information is a major source of dissatisfaction with the proprietary form of institution.”).

⁸¹ See Weisbrod, *The Nonprofit Economy*, at 19-20 (“The market mechanism also fails...when consumers demand collective-type services or when production or consumption of a commodity has ‘external’ effects – on persons other than the buyers and sellers; profit-motivate firms will not take into account any effects of their activities that do not influence their revenues or costs.”).

⁸² On the comparable limitations of nonprofit and governmental suppliers, see *infra*, Parts II.b.{?}. See also Weisbrod, *The Nonprofit Economy*, at 15 (“In nonprofit and governmental organizations, because sharing in organizational profit is restricted, profit is not the lure to efficient behavior that it is in the for-profit economy.”).

⁸³ See Michael Krashinsky, *Transaction Costs and a Theory of the Nonprofit Organization*, in *THE ECONOMICS OF NONPROFIT ORGANIZATION* 114, 116-17 (K. Clarkson and D. Martin, eds) (alternatives to nonprofit organizations as responses to market failure include professionalism, government regulation, and

to trade on information symmetries – consumers’ relative disadvantage in evaluating the product – the market, without some kind of correction, may under-perform by its own standard, maximizing consumer satisfaction. By trading on our relative ignorance about primary education, our for-profit school may well give us less than we are paying for, and thus perform inefficiently.

(ii) Externalities.

And the market may under-perform by its own metric for a very different reason. Some of the costs or benefits of a product may not fall on its consumers. Economists call these costs and benefits “externalities” because they are external to the individual consumer’s calculation of satisfaction; they are costs the consumer does not have to bear, or benefits the consumer does not get to enjoy. To see why externalities can cause the market to fail – again, by its own metric, economic efficiency -- consider, again, our shopping for an elementary school.

We all know that our children will be better off if they master the basic skills, reading, writing, and arithmetic; they will be better-remunerated producers when they grow up, and thus they will command higher incomes with which to seek their own satisfactions in the marketplace. By the same token, however, we as conscientious parents might well be less enthusiastic about, even skeptical of, other elementary school offerings: Civics or Social Studies, let’s say.⁸⁴ The problem with these courses, from us parents’ child-benefit perspective, is this: They seem designed, not primarily to provide our own children with skills they can market, but with virtues that make the public at large, rather than our children themselves, better off. These latter benefits are spread widely over the

various for-profit arrangements such as franchising) (1980); *See also* Hansmann, *Role*, 89 Yale L. J. 835, 868-72 (noting alternatives to nonprofits); Hansmann, *Economic Theories of Nonprofit Organizations*, in *THE NONPROFIT SECTOR* 27, 30 (Walter Powell, ed., 1987) (same); Hansmann, *Rationale*, 91 Yale L.J. 54, 70-71 (noting that for-profits could be “outlawed entirely” “or at least put under severe regulatory restraint” in industries where they are prone to exploit consumers); *see infra*, Part {?}.

⁸⁴ Even learning the three Rs is likely to produce external benefits, as we shall see later; a literate worker is a likely to be a more productive employee, even as a literate voter is a likely to be more discerning citizen. But more of the benefits of elementary education are likely to be “internal” to the student, at least as compared to civics (although, quite likely, the students themselves will also benefit from that course, too, if not as much as from the others).

economy and polity as a whole; the parent who pays for them sows, as it were, where he or she will not reap – or, alternatively, missing an opportunity to reap where we have not sown. If we as a society want an optimal level of investment in civics and social studies education, we may well have to look for it beyond the level likely produced in private market transactions between for-profit schools and tuition-paying parents.

In its own terms, then, the market falls short in two distinct ways. Most basically, it cannot create and sustain its own foundation, a legal system of tradable property rights. What is more, even when that system is “up and running,” it cannot, on its own, avoid inefficient allocations of resources on account of two classic kinds of market failure: information asymmetries and externalities. And these shortfalls, serious though they are, are only the beginning.

(2) Extra-Sectoral Problems: Shortfalls of the Market by Measures Other than Its Own.

Both of the problems we have just identified, the market foundation problem and the market failure problem, accept the basic goal of the capitalist market system, satisfying consumer demand, as sound; they also take its measure, economic efficiency, as appropriate. Another set of problems arises as soon as we look at that system in terms of two other, widely accepted social goals: equity of wealth distribution and optimum development of human potential. These two goals are quite explicitly defined out of economists’ focus by the two basic conditions of economic efficiency: Consumer (1) ability and (2) willingness to pay the market price of goods and services. Once we look behind these intuitively appealing conditions, we find two eminently plausible functions that a market economy, even functioning at its most efficient, cannot perform on its own: redistributing wealth and promoting excellence.

a) The Consumer “Ability to Pay” Criterion and the Market’s Indifference to Wealth Distribution.

The function of market capitalism, we have repeatedly seen, is to satisfy consumer demand for goods and services. Here we need to examine more closely a peculiar aspect

of what economic analysis takes consumer demand to be. Consumers demand, for economists, what they are both willing and able to pay for. As we have seen, to avoid hopeless complications in determining what consumers “really” need or want, economists make the simplifying assumption, essentially, that consumers put their money where their mouth is. This technical notion of consumer demand is both intuitively appealing and analytically useful; we ourselves have already used it to show both strengths and weaknesses of the market’s provision of goods and services like elementary education.

Here we need to note a very peculiar feature of that definition, absolutely vital to understanding the role of charity vis-à-vis the for-profit sector. To cast that peculiarity in highest relief, consider this corollary of economic analysis: Starving children have no demand for bread. Under economic analysis, rigorously applied, it is better – again, more economically efficient – for a wealthy bird-lover to feed day-old bread to pigeons in the park than for that bread to feed starving children about whose fate the world’s wealthy are indifferent. Wealthy bird-lovers demand for bread is measured by whatever price they are willing and able to pay for it; starving children’s demand is measured by the same standard. The problem is that economists must count the children’s demand at zero, because the children have no money, and thus no ability to pay. Although we intuit that the children would be willing to pay more than bird-fanciers, on account of their hunger, their need counts for nothing in economic terms if not conjoined with the other condition of measurable demand, ability to pay. And thus we prove, by economic analysis, the odd proposition that puzzled us at the outset. Starving children have no demand for bread, because demand must include ability to pay. *Quod erat demonstrandum.*⁸⁵

Of course, to be fair, the world’s wealthy are not entirely indifferent to the plight of starving children, and economic analysis duly notes that concern. If the wealthy who are concerned about starving children are willing to pay more for day-old bread than the wealthy who fancy birds, the bread will go to the feeders of children rather than the feeders of birders, as it should. It is not, in other words, that starving children do not

⁸⁵ See Weisberg, *Economic Theories*, supra, at 128 (“It [efficiency] says nothing about how the pie is shared by consumers, about distributional justice.”).

count in economic analysis; it is, rather, that they count only as much as the relatively wealthy care to make them count. On their own, again, starving children have no demand for bread. On the supply side, as it were, market capitalism gives us supermarkets, fast-food emporia and gourmet restaurants, but no soup kitchens or “second harvests” because there is, strictly speaking, consumer demand for the one, but not for the other. In turns of economic efficiency, this is as it should be.

Starving children may, we should note, have one thing going for them besides the sympathy of the wealthy. Depending on the regime under which they live, they may be entitled to the market value of their labor. An enterprising waif might, for example, be able to sell his or her labor and use the proceeds to buy bread. He or she might be able to cut out the middleman, as it were; in imitation of indigent adults, he or she might successfully advertise “Will Work for Food.” With that stated willingness and a legally-protected entitlement to pay with his or her own labor, the starving child can re-enter the market for bread (and re-enact the plot an Oscar-winning movie).⁸⁶ Not to put too fine a point on it, our enterprising child might, borrowing a page from Adam Smith, specialize by comparative advantage; Bangkok, for example, has a highly developed range of niche markets.

But enough about Asia. Let’s return, with our education example, to a less disturbing domestic setting. As Progressive social engineers long ago argued, and as our Supreme Court has recently re-affirmed, elementary education has much to recommend it as an alternative to child labor.⁸⁷ As we have seen, parents who are concerned about the welfare of their children typically pay, willingly enough, for their primary education. But, of course, even if we assume all parents are willing to pay – an assumption we will remove soon enough – some parents are obviously unable. What goes for bread and poor children starving goes the same way for education and indigent child illiterates: They have

⁸⁶ See *SLUMDOG MILLIONAIRE* (Warner Bros. 2008).

⁸⁷ Or, more precisely, child labor in factories owned by strangers; the Supreme Court itself has certified child labor on family farms as salubrious, especially as compared to public schools. *Wisconsin v. Yoder*, 406 U. S. at 224 (“the Amish accept the necessity for formal schooling through the eighth grade level, but continue to provide what has been characterized by the undisputed testimony of expert educators as an ‘ideal’ vocational education for their children in the adolescent years.”)

no demand, discernable by economists' technical measurement, for the goods and services other modes of analysis – not to mention basic instincts of human empathy -- suggest they need. The market, in any obvious sense, fails to meet that need; that failure is not, technically speaking, a “market failure.” But, again, if we want to meet that need, if we want to provide the poor with things they cannot afford, including basics like education, even food, we cannot rely on the market alone.

b) The Consumer “Willingness to Pay” Criterion and the Market’s Indifference to the “Goodness” of Goods.

The other side of the economists' dual criterion of consumer demand, “willingness to pay” presents a problem of its own. Like its “ability to pay” twin, this criterion offers an intuitively appealing solution to a very real problem, a problem that lies very near the core of our inquiry. The former criterion, as we have seen, deals with a quantitative problem: How much satisfaction are consumers actually getting? The answer, as we have seen, is basically however much they can (willingly) buy. This latter criterion, by contrast, addresses a qualitative problem: Which satisfactions are better than others? The economists' answer to this question of kind, we need to see now, is the same as their answer to the question of amount: The better satisfactions, like the greater satisfactions, are none other than those that consumers are willing (and able) to pay most for.

This profoundly plutocratic answer, straightforward on its face, has a less obvious but probably more important corollary: No satisfactions are, as a matter of economic analysis, better than others. In adopting this starkly egalitarian standard, economic analysis avoids a problem that has long bedeviled utilitarianism, its consequentialist cousin: Are all pleasures created equal? Jeremy Bentham, founder of the school, thought they were; John Stuart Mill begged to disagree with the master, famously declaring “It is better to be a human being dissatisfied than a pig satisfied; better to be Socrates dissatisfied than a fool satisfied.”⁸⁸ Contemporary economic analysis, knowing the problems that Mill's approach introduces, emphatically sides with Bentham and, by implications, with pigs and

⁸⁸ JOHN STUART MILL, *UTILITARIANISM* 14 (Oskar Priest, ed., 1985).

fools, with the refinement that their “ability to pay criterion” both separates the pigs from the fools⁸⁹ and gives them a ready substitute of Bentham’s “felicific calculus.”⁹⁰

The example of Socrates could not be more apt for our purposes.⁹¹ Consider, again, our elementary school example. Left to their own preferences, most children would profoundly prefer not going to school at all; I’m writing this sentence near the middle of August. We their parents, of course, tend strongly not to indulge that preference; that’s what paternalism is all about. Some of us, of course, like to think of this, not as imposing our own preferences, but rather as deferring to own longer-term preferences of our children themselves, what they themselves will want when they, too, are adults. Attending school, though it involves a huge deferral of gratifications, more than makes up for this frontend loading of costs with increased benefits later, not least (or “if only”) through a higher cumulative earning capacity.

The point to see here is that some of us parents – myself emphatically included – embrace, more or less enthusiastically, a much more robust paternalism. We have come to believe, with Socrates, that an unexamined life is not worth living and that, to look on the brighter side, the fullest human flourishing requires the widest and deepest possible exposure to what we call, with extravagant self-confidence if not condescension, the humanities. We predictably pay a lot to give our children what we call “liberal education.” We disdain the Dixie Chicks in favor of Dvorak (although, truth be told, we did “dig” their “dissing” of “W”). To paraphrase the Hebrew National Packing Company, we answer to authorities higher than our appetites, standards above the market; we, with Socrates, scrupulously avoid the porcine (if not always the pork).

⁸⁹ Only, to be fair, with metaphorical pigs; Richard Posner, scornful of classical utilitarianism, mocks the pleasures of animals. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (7th ed. 2007). A great strength of economic analysis, in his view, is that the ability to pay criterion takes animals out of the market – more precisely, out of the demand side of the market. At least some utilitarians, Peter Singer chief among them, are willing to go pretty much “whole hog” in counting animal’s feelings, especially their pain, very much in the market. See *Animal Liberation*.

⁹⁰ See Leff, *Some Realism about Nominalism*, Va. L. Rev. (review of POSNER, *ECONOMIC ANALYSIS OF LAW*).

⁹¹ As a recent *Atlantic Monthly* retrospective on Mill points out, he was one of those irritating people who turn out, sooner or later, always to have been right. (Cite?)

The market, we must be careful to note, is quite capable of accommodating our *soi-disant* superior tastes. It offers Volvos as well as Fords (even though, somewhat to our embarrassment, Volvo is now owned by Ford); it ensures that, somewhere down the street from every Toyota, Nissan, and Honda dealer, we will find, under separate management, respectively, the Lexus, Infiniti, and Acura franchises. The market, again, is more than willing to indulge our “higher” tastes (as long as we can afford them).

And so it is with education, too. We can insist that our children’s elementary school offers art and music as well as the three “Rs,” even as we can insist that law school cover jurisprudence, legal history, and the economic analysis of law, not just the black letter of the common law, the modern codes, and the Constitution. Those additions will necessarily make education more expensive; some of us think it is worth it. We believe it enables our children to be more fully realized people, that it compels our lawyers and judges to face questions of justice, not merely legality.

What the market cannot do is give us any guidance of its own in matters of higher tastes and superior satisfactions. By its basic “willingness to pay” criterion, again, all goods and services are worth exactly what we are willing and able to pay for them, not a penny more or less. The capitalist market gives us for our marginal dollar exactly and only what we want; it cannot, consistent with its own function and that function’s basic metric, direct us to anything higher or better. No metric derived from the market can tell us whether, in a budget crisis, we should drop music or football from our school’s offerings, whether, in our assessment of law schools, we should look to factors other than placement statistics and bar passage rates.

The same limitation, we should also note, applies to the supply side, albeit derivatively. If Spiderman VII outsells Sundance prize-winners (not to mention *cinema verite* classics), that’s what the profit-maximizing multiplex will offer on the big screen; the same considerations determine what the networks, cable, and satellite offer on the small screen. And so it will be with our for-profit school, to the extent that its curriculum is set by parental preferences, and for the expanding ranks of proprietary law schools.

Capitalists, as capitalists, put their capital where it generates the highest returns (discounted for risks), anywhere and everywhere in the world. From the perspective of the four-sector model, the for-profit sector's function, as we have already seen, is not to make investors richer, but to induce them to give us what we want. The point to see here is simply that what they are to give us is precisely what we are willing and able to pay most for, not what they think we should have, or want. As to that, nothing in market capitalism offers capitalists any better insights than it offers consumers. The market, functioning optimally, rewards producers if and to the extent that they satisfy us; it is totally indifferent to whether they improve us (by any standard but our own). The market, in other words, is as indifferent to excellence as it is to need; if either is not backed by consumer dollars, it simply does not count. And so the market is very likely to leave Socrates dissatisfied, even as it leaves penniless children hungry.

c. The For-Profit Sector's Function and Failings: The Balance Sheet.

According to the four sector theory, the for-profit sector, our capitalist market economy, performs a highly specific function, satisfying consumer demand for goods and services at the lowest possible cost. That function, in turn, implies two metrics, productive efficiency and economic efficiency. Under those metrics, in the production of a more or less wide range of goods and services, the for-profit sector outperforms all the other sectors.

Left to its own devices, however, the for-profit sector has its limits. It cannot create and sustain its own foundations, the legal regime of private property, and it cannot prevent inefficient production in the face of two basic kinds of market failures, information asymmetries and externalities. Nor can it advance two arguable social goods wholly outside its basic mission and beyond its metric: ensuring equitable distribution of wealth and encouraging the production of excellent, as opposed to popular, goods and services. If we are to transcend these limits of the for-profit sector, we must look to other sectors. Following the four-sector theory, we will consider first the governmental sector, then the cultural sector.

2. The Nonprofit, Non-voluntary Sector: Our Liberal Democratic State.

Our expanded four sector model sees the general function of the governmental sector as offering solutions to each of these problems in the market sector (as well as yet-to-be identified problems in the other two sectors); each of these solutions implies a specific function of government. Earlier versions of the model tended either to lump these functions together or to ignore some of them entirely.⁹² Isolating them gives both a better sense of government's functions and better metrics of its performance. This is important because the functions of government, like that of the market, are themselves subject to distinctive kinds of limitations or "failures," each of which in turn calls for "solutions" in other sectors, or, seen more positively, points to the functions of other sectors.

It is helpful to see these various functions of government in tiers of increasingly "big" government. Starting with the smallest and most basic, we can identify four levels of government function: Establishing the minimum legal conditions for market capitalism, regulating the market to ensure its efficient operation, redistributing wealth, and promoting excellence.⁹³ These four functions, we shall see, are cumulative: the second includes the first, even as the third includes both the second and the first, and the fourth, all the other three. We can, accordingly, think not only of functions of government, but also of forms. As a mnemonic, think of these forms or functions of government as the Four Rs: the Ricardian,⁹⁴ the Regulatory, the Redistributive,⁹⁵ and the Aretist, or Aristotelian.⁹⁶

⁹² See, e.g., Weisbrod, *The Nonprofit Economy* at 21- (noting that "the shortcomings of the private market can occur in any of three areas – the choice of goods and services produced, production processes, and the distribution of outputs" and that government may encounter difficulties in correcting each problem, but explaining the role of nonprofits mainly as a response to the undersatisfied demand of supra-majority voters); see also James Douglas, *Political Theories of Nonprofit Organizations*, in POWELL, *THE NONPROFIT SECTOR* 43, 46 (1st ed. 1987) (outlining a similar supra-majority rationale for the philanthropic sector).

⁹³ REA: Need note distinguishing wealth from welfare; see FSU symposium, article I commented on. Also note: welfare can be defined in terms of what people want, or what they should have.

⁹⁴ From David Ricardo, the classical economist. This may not be entirely fair to Ricardo, but his admirers have surely done his reputation much more harm than this eponym will. "Randian," from Ayn Rand, would be a bit too narrow; the position I'm outlining shares her enthusiasm for minimal government, but not her antipathy toward private charity. Ricardo himself was, by all accounts, quite a public-spirited fellow. See ROBERT L. HEILBRONER, *THE WORLDLY PHILOSOPHERS* 101 (4th ed. 1972) (quoting Sir James Mackintosh's naming Ricardo among "the three best men I ever knew"). "Richard Epsteinian" or "Robert Nozickean"

The common bases of all four distinctly governmental functions are these two essential attributes of the modern state: It is nonprofit, and it is involuntary.⁹⁷ Because it is nonprofit, it can, and does, undertake various operations without regard to whether they will produce the highest net return on investment. Because it is an involuntary association, the state makes rules that all its citizens must obey.⁹⁸ There are no exceptions to the state's laws (except as provided in those laws). Charles II may deign to doff his hat to Friend Penn, reversing the usual protocol, but both knew the king had waived a rule he might have enforced. No person, and no group, can be a "law unto itself;" a "state within a state" is, by definition, another state. Only a state is, as a matter of law, legally autonomous;⁹⁹ for all their differences, this was doubtlessly a point on which the Branch Davidians and the Department of Justice, like the Confederates and the Unionists before them, completely agreed.

The unique autonomy of the state has two important corollary: to ensure that its will be done, the modern state has a monopoly over the use of force in its territory; conversely, no entity without that monopoly is, by definition, a state. All states command, then, and all states coerce obedience; no other entity in modern society may do either, without the state's consent. And the purpose of states' commanding and coercing is not

would perhaps be the most strictly accurate eponyms, but the "R" alliteration would obviously be, in both cases, a bit of a stretch, which I save for the Aretist function.

⁹⁵ "Robin Hoodian" would work nicely here, but, again, as with Epstein and Nozick, the R alliteration would be a bit of a stretch. And it might strike some as tendentious; we need to remember that Robin Hood is not everyone's favorite folk hero. See AYN RAND, *ATLAS SHRUGGED*, at 577: According to Ragnar Danneskjold, Rand's reverse Robin Hood, "Until men learn that of all human symbols, Robin Hood is the most immoral and the most contemptible, there can be no justice on earth and no way for mankind to survive."

⁹⁶ This one is the trickiest. Aretist is exactly the right term, but not, alas, a term in wide use outside philosophical circles. It derives from the classical Greek word for virtue, "arête," and that is precisely what this function is designed to promote. "Aristotelian," though much more familiar, is not nearly as precise; Aristotle was certainly an aretist, but many aretists are not Aristotelians.

⁹⁷ See, Weisbrod, *The Nonprofit Economy* at 41 ("Its [government's] strength lies in its power of compulsion – to regulate and to tax.")

⁹⁸ This is not to say that laws are only commands of the state; distinguish "crude" legal positivism.

⁹⁹ See Evelyn Brody, *Of Sovereignty and Subsidy: Conceptualizing the Charitable Tax Exemption*, 25 J. Corp. Law 585 (1998) (distinguishing between charity role as complementing, as opposed to competing with, the state).

always, or even primarily, to maximize return on investment; the governmental sector has four other functions.

That is not to say – thankfully! – that all states are created equal. The particular state on which we are focusing here, the United States, is both liberal and democratic, a balance between protecting individual interests and advancing majority interests. At the behest of the majority, such states both command and coerce, but always subject to legal limits designed to protect the liberties of individuals and minorities. Commanding and coercing, then, are the prerogatives of all states; majority rule and individual rights are the particular parameters of the liberal democratic state.

Before turning to the details of our analysis, we should recall, again, Aristotle’s warning: We can only be as precise as our subject allows. Conversely, we need only be as detailed as our object requires: We seek, not a full theory of the state, or even the liberal democratic state, but only enough of an outline of the latter to show how it relates to the function of charity. In faulting the “government failure theory” of charity for being too sketchy, this analysis must not err in the other direction. With another nod to Aristotle¹⁰⁰, we must try to find the mean between too much detail and too little.

a. The Four Functions of Government.

We will consider the functions of the liberal democratic state in increasing order of scope, from the minimalist, Ricardian night-watchman function on the right, through the Regulatory function in the middle to the maximalist Redistributivist and Aretist functions on the left. These four functions, for our purposes, fall into two groups: two that involve making the market work better by its own metric, economic efficiency, and two that involve altering the outcomes of even an optimally functioning market. Each of these functions, in its turn, implies a metric for measuring performance. Coordinating these

¹⁰⁰ Nicomachean Ethics.

functions and making their metrics commensurate poses serious, if not insurmountable, problems for liberal democracy.¹⁰¹

(1) The Ricardian Function: Securing the Foundations of Markets.

As we saw in the last section, the very existence of market capitalism necessarily implies one basic governmental function: Recognizing and protecting private interests in property. Law, particularly property law, is the foundation of market capitalism that the for-profit sector can neither establish nor sustain beneath itself. If we are to have market capitalism, then, we must have at least this kind of minimalist, night-watchman state.

This function implies two basic and complementary metrics, one to measure how much government must do, the other to measure how well government is doing it. The first measure is a minima: If a society wants a capitalist market economy, its government must provide no less legal infrastructure than the operation of a capitalist market requires. Put that way, this is admittedly a most peculiar metric; it seems almost tautologically obvious, and it would be practically impossible to specify with any precision. But that metric, precisely because of its peculiarity, underscores a point of absolutely critical importance for our inquiry: In very few cases is the provision of a particular good or service the special province of a single social sector. To the contrary: Sectoral functions are, except at a very small core, largely fungible. Only the state, we have seen, can establish a regime of legal entitlements to resources. When it comes to enforcing that system, however, the state can be more or less expansive; the state can rely to a greater or lesser extent on other sectors.

For a capitalist market to exist at all, theft must be illegal; to keep your shop safe from theft, the state can, of course, put a police patrol on your block. Alternatively, you can look for protection to other sectors: you and your family can guard your store with stick-and-stone implements of your own construction, a household sector solution; you can invest, more or less heavily, in locks, guns, and security guards, a for-profit sector

¹⁰¹ See James Douglas, *Political Theories*, supra at 43 (concluding that “the economic good, for all its ultimately unquantifiable aspects, remains a much tidier concept than the political good” because “there is no similar single measure that can be applied to political institutions”).

solution; you and your neighbors can form a neighborhood watch, a cultural sector solution. Again, our four sectors overlap extensively in the provision of goods and services.

More to the present point, the night-watchmen state can be very chary in providing actual night-watchmen. Laws on the books without police on the beat would not be entirely a sham; the Ricardian state needs little more than laws on the books to define entitlements, courts on the bench to apply the laws to particular cases, and (maybe) law enforcement waiting in the wings to execute court orders (and an army at the border to prevent invasions).¹⁰² Prevention of harm to property, criminal as well as tortious, could be left, at least in theory, in private hands – in our store example, your family’s hands, or those of your hired agents, or of you and your neighbors. (So too, perhaps, with the enforcement of court orders; once you have your writ, you could hire your own agent, licensed but not employed by the state, to enforce it; if this seems far-fetched, think of it as a kind of post-hoc combination of process-servers and bounty hunters.)¹⁰³

The first metric – how much infrastructure should the state supply -- is thus a peculiar minimum: provide at least as much legal infrastructure as capitalism requires, but not, by this metric, any more.¹⁰⁴ The second metric – how well is the state doing that – takes us back to our familiar, virtually universal criterion of productive efficiency: The

¹⁰² To quote the prophet’s prophet, Ayn Rand’s fictional hero John Galt: “A proper government is only a policemen, acting as an agent of man’s self-defense.... The only proper functions of a government are: the police, to protect you from criminals; the army, to protect you from foreign invaders; and the courts, to protect your property and contracts from breach or fraud by others, to settle disputes by rational rules, according to *objective* law.” RAND, *ATLAS SHRUGGED*, 1062-63 (1957) (speech of John Galt).

¹⁰³ Notice, significantly, that this leaves us a long way from anarchism. For our private-sector crime-prevention mechanisms to work, the state’s judges must be waiting at the courthouse, even if its police are not patrolling the precinct. If, for example, our shopkeepers decide to hire night-watchmen of their own, that arrangement will only work if the state stands ready to enforce the contract in a lawsuit for its breach. Similarly, if another shopkeeper decides to rely for protection on guns and locks, he or she will also be relying on the state to award damages or other legal relief if those items do not perform as promised. The night-watchman state, in other words, may be able to rely on for-profit methods to prevent the theft of property, but that market method itself will require state remedies for breach of contract.

¹⁰⁴ See Michelman and Kennedy on self-policing; note Seidenfeld’s answer about loss of leisure. As we shall see, Ricardians, consistent with their own principle of minimalist government, may prefer the loss of leisure to the expansion of government.

state, like everyone else, should get as much “bang” for its buck as possible, in market-infrastructure as all other outputs. That, of course, raises an important practical and theoretical question: How are we to know if the state is, in fact, getting the most “bang” for its “buck”? One obvious way would be to compare the performance of other states; here Brandeis’s “laboratory of experiment” theory of federalism comes to mind.¹⁰⁵

More important for our purposes, however, is a very different comparison: Provision by other social sectors. We have seen that only the state can, by command and coercion, establish a property regime; we have also seen that other sectors can, with the state’s blessing, provide basic property protection. What we need to see here is that the state is not limited to “authorizing” or “licensing” agents in these other sectors to protect property; it can also pay them to do it. All things being equal, that is, the state, under the metric of productive efficiency, should not put a policeman on your block if putting a lock on your door (or, yes, a gun under your counter) would accomplish the same amount of protection at lower cost. Notice, finally, that it does not matter, at this point in our analysis, whether the state pays for the lock (or gun) or requires you to buy it yourself; what matters, under the metric of productive efficiency, is that the state choose the most cost-effective method. Remember the “Massachusetts plan” for universal health coverage: not state provision of insurance, but state mandate of insurance.

(2) The Regulatory Function: Correcting Classic Market Failures.

The first, “Ricardian” function of the state in a society with a market economy, then, is to supply at least the minimum infrastructure of property law and enforcement. An appealing next step is to attempt to correct classic market failures. This step is, of course, actually taken by all modern liberal democratic governments, including our own. Market failures, as we have seen, undermine economic efficiency, the very getting of goods and services to those willing and able to buy them that is the basic mandate, and metric, of the market. These failures come in two basic forms, information asymmetries

¹⁰⁵ Cite case where Brandeis makes this point.

and externalities, and the state has a wide array of corrective means at its disposal for correcting both.

Any measure the state takes to improve the efficiency of the market is, analytically speaking, beyond the pale of the minimalist, Ricardian state. So, as we saw in our example, if the market can function with shopkeepers hiring their own night watch men, then the night watch man state should not, by its own minimalist metric, be in the business, as it were, of crime-prevention. This point is important, because we need to see that the night watchman state's role is to produce minimal, not optimal, conditions for market capitalism; that critical distinction is the line between the Ricardian and the Regulatory state.

In deciding whether the state should more actively intervene in the market, beyond merely establishing property entitlements and monitoring their exchange, we have to ask a very different question: Would the efficiency gains from the intervention exceed the costs of that intervention? More precisely, would gains in efficiency attributable to the state's corrective measure exceed the sum of the costs of that measure, including transaction costs? Consider, again, the situation of our shopkeepers. Should the state place police on the beat, to supplement or supplant private vigilance (or vigilantism)? This is, notice, merely a special application of the market's own metric: Any resource allocation, whatever the means of that allocation, is appropriate if and only if its effect is to increase net efficiency, that is, to get more goods and services into the hands of those willing and able to pay for them. By this standard, the state should supply police if and only if it can thus achieve a higher level of property protection than by other means, at equal or lower costs.

Why might the state's intervention out-perform the market in protecting our shopkeepers? Police protection involves external benefits. A security guard posted outside a store tends to deter crime several doors down almost as well; thus, if you and I pay to put guards outside our places of business, we're conferring an external benefit on Jones's shop down on the corner. Government's regulatory role addresses precisely this problem of the

for-profit sector (and, as we shall see, its household and cultural sector corollaries). With its command-and-coerce power, the state can make Jones pay for public goods at a level well beyond the limits of his neighborly inclinations.

And, of course, the state doesn't just tax and spend for police protection. That example nicely illustrates the line between the minimalist Ricardian state and the more ambitious regulatory state, but it nowhere near exhausts either the range of market failures that the regulatory state may address or the means of redress it has at its disposal. The failures, as we have seen, are basically of two kinds, information asymmetries and externalities; the state's means of redress run along a kind of sub-spectrum within our larger spectrum of government functions. Just as some government functions are more extensive than others, so, too, some modes of regulation are more intrusive or coercive.¹⁰⁶ To see how this is so, consider the product Jones sells down at his corner shop: Alcoholic beverages.

This particular product involves both information asymmetries and externalities. Many people apparently did not know, until fairly recently, that alcohol consumption is exceedingly bad for the human fetus. As a result, some pregnant women surely consumed more alcohol than they would have, had they known of the dangers. Presumably friends don't let friends drink pregnant, but some friends may not know the danger themselves. Pregnant women and their friends might well be willing and able to pay for this valuable information, but they may not know to look for it. And getting the message out to the public at large involves huge external benefits; so huge, in fact, as to make this information essentially a public good, which no private company can profitably supply.

The government, on the other hand, does not face this problem, because it does not depend on sales of the information to finance its public education campaign. It can spend part of its tax revenues on a public ad campaign. How much, under the criterion of economic efficiency, will depend on how much those getting the information would be

¹⁰⁶ This outline follows Robert Ellickson, *Spectrum of Land Use Controls*, U. Chicago L. Rev. See also Weisbrod, *The Nonprofit Economy*, supra, at 20-23 (outlining range of government's market-correcting options).

willing and able to pay for it; whether to do the campaign in-house or contract it out would depend, under the criterion of productive efficiency, on whether the government or suppliers from another sector could do the job more cheaply. With respect to the effects of alcohol on fetuses, the government does indeed have an ad campaign, and it has in fact contracted most of the actual advertising out to private companies. This is government at very nearly its least intrusive market-correcting mode: Just getting the word out, albeit at the public's expense, and letting consumers make up their own minds.

A bit more coercively, the government can, and does, command the producers of alcoholic beverages to disclose the harms of alcohol on the labels of their products. Every retail container of alcoholic beverage now carries just such a warning, as a matter of federal law. This is more coercive than the advertising campaign in two ways. First, and most obviously, the law compels the producers to carry the warning on their labels; no one has to pay attention to the government's own educational campaign. Second, and more subtly, the cost of the labeling falls, at least initially, on the producers, not, as with the ad campaign, upon the entire tax-paying public. If the public does not want to underwrite the campaign, they can remove it by majoritarian means. The alcohol producers have no such option; they are, almost by definition, a political minority.

And, of course, the government's hand can get heavier still. A classic regulatory response is the Pigouvan tax: placing a tax on the over-consumed product, set at a level designed to equal the external cost of that product. The effect, in theory, is to bring consumption down to the efficient level by having the product's price reflect its true economic cost. This obviously would not work particularly well with the fetal alcohol problem, which is more a matter of information asymmetry than external costs. But over-consumption of alcohol, of course, is bad for everyone, not just fetuses. And the effects of over-consumption are not all borne by the excessive drinker. The chronic health problems of alcoholics cost us all, one way or another: Higher health insurance rates, increased Medicare and Medicaid costs, lost productivity, loved ones damaged or dead.

Drinking too much alcohol has terrible cumulative health effects; drinking even small amounts of contaminated alcohol can kill or maim immediately. A single run of cheap liquor admixed with [poison] caused an epidemic of paralysis and death in the 1920s, the notorious “Jake-Leg”¹⁰⁷; moonshine condensed through car radiators and other lead-soldered coils is a notorious source of lead poisoning.¹⁰⁸ The Ricardian state lets buyers beware, with legal remedies for tort and breach of contract if their judgment fails; the regulatory state strikes preemptively with the likes of the Food and Drug Administration. This is classic “command and control” intervention, what we might call regulation proper. Relative to the other methods we have discussed, regulation can be quite intrusive. It can mandate, for any product it regulates, both in-put procedures and out-put standards, which in turn may require an extensive enforcement apparatus.

And, as the Prohibition Experiment reminds us, the state can be even more intrusive; it can, and does, ban production of some goods (and services¹⁰⁹) altogether. Even more aggressively, in some respects, the state itself can take over production and marketing of a product. An early and long-lived alternative to Prohibition was state monopoly on the sale of alcoholic beverages. For producers not under contract to supply the state, this has the same effect as Prohibition; for the state itself, this involves actually taking on functions otherwise performed by for-profit firms, a kind of “retail” socialism, socialism in a single industry.¹¹⁰

The regulatory state’s means of correcting market failures thus covers a wide spectrum, running from minimal market intervention like public information campaigns to the state’s complete displacement of for-profit firms in a particular industry. The state may merely put out its own information; beyond that, it can compel producers to make disclosures, it can impose Pigouvian taxes to approximate true costs; it can impose “command and control” regulations on production. It can even ban production altogether

¹⁰⁷ See, e.g., Smithsonian magazine article.

¹⁰⁸ Cite.

¹⁰⁹ Prostitution, for example, with limited exceptions like Nevada.

¹¹⁰ By contrast, “wholesale socialism” would be the displacement of private by state production in all industries; this is what we generally mean, of course, by socialism.

or, most ambitiously, take over production itself. In deciding which method to deploy, however, the regulatory state's basic function implies that it should deploy a single metric, borrowed from the market itself: Maximize efficiency. As applied to regulation, that means spend as only as much on regulation as produces a net return in consumer wealth, the production of goods and services consumers are willing and able to buy.

As Jones would be the first to point out, taxing and spending presents its own set of problems. We will take those up in due course; for the most part they involve some sort of governmental malfunction, or "failure." But one problem is important to consider now, because it leads us nicely to the next function of government, redistribution. Even if government regulation is working at its best, ensuring efficient production and consumption and thus maximizing social wealth, there is an almost inevitable element of what might, from a non-market perspective, be called unfairness. At bottom, the problem is this: The regulatory state, and its wealth-maximizing metric, are indifferent about who bears the burden, or enjoys the benefits, of its market-enhancing function. That function is maximum wealth production, not equitable wealth distribution.

To see why this presents problems, consider, again, the position of Mr. Jones, the proprietor of our local liquor store, who objected to paying higher taxes for more policeman. Our earlier analysis implied, perhaps unfairly, that Jones was some sort of libertarian crank or misanthrope.¹¹¹ We were at pains, at that point in our analysis, to distinguish the minimalist Ricardian state from the more expansive regulatory state. As a fan of the former, Jones may well have disliked the additional police protection available from the latter. He might, in other words, have been criticizing the policy from the right, as an expansion of the state beyond its minimal night watchman role.

On closer inspection, we might find that his objection comes, not from the far right of the regulatory state, but from the center-left. If we asked why he opposed our plan for more police, he might respond with two questions of his own: What else might the state

¹¹¹ As my libertarian friend and colleague Fernando Teson frequently reminds me, sometimes a bit crankily, not all libertarians are cranks; from their own perspective, libertarianism is not a form of misanthropy, but the truest form of philanthropy.

be doing with that money, and where does that money come from in the first place? It comes, of course, not from the tax payments of our little retail street, but from the city's general revenues. Compared with us, some of our tax-paying fellow citizens are doubtlessly better off, some worse. But the city's tax burden falls on us all, probably without much regard for our relative ability to pay; it may, to be sure, be based on the value of the real property a citizen owns, but that is a pretty crude proxy for net wealth, itself perhaps not an ideal base for ability to pay.

It is important to note that this indifference is not an artifact of any particular tax system, but a basic element of the efficiency metric itself. To be more precise, that metric is Kaldor-Hicks efficiency, not Pareto optimality. The latter is too strict for practical usefulness; the only redistribution that meets the Paretian standard is one in which everyone is better off in his or her own terms. The former, designed to avoid that restrictiveness, only requires that those who benefit from a measure gain more than those who bear the costs lose. In other words, Kaldor-Hicks efficiency requires that the winners be able to compensate, with their winnings, the losers' losses. But it does not require actual compensation, and it is indifferent as to whether the losers were less well off before as well as after the transaction.

Some of our fellow citizens, we might point out to Jones, may pay no taxes at all, but that would most likely not be responsive to his objection. From his perspective, their tax exemption is not the conferring of a privilege, but the recognition of a harsh reality: they are poor. And that brings us to his first question, what our city's tax revenues might be buying besides more policeman on our commercial block. Here is the core of his problem, which takes us back to a basic peculiarity of the market and its metric: The needs of the poor do not get counted; demand requires, by definition, ability as well as willingness to pay. It may be economically efficient to put another police patrol in our neighbor, but that money might also have been spent on education, even bread, for our less fortunate fellow citizens in their less affluent neighborhoods. Putting another policeman on our street may literally mean taking a loaf of bread off their table or closing

their neighborhood school. To deal with the market's indifference to inability to pay, we must turn to another of the state's functions, wealth redistribution.¹¹²

(3) The Redistributive Function: Addressing the Market's Indifference to Wealth Distribution.

Virtually all government activity is redistributionist, in the sense that it involves benefiting some at the expense of others. As we have just seen, this is true even of the state's Ricardian and regulatory functions. There, however, the redistribution is secondary; the primary purpose of the government action is to accomplish other tasks: establishing the conditions of the market economy and enhancing the market's own function, efficient allocation of resources. In that context, as we have just seen, the metric of economic efficiency is indifferent as to whether, as a result of the government's action, those who benefit were, before or after, the richer or the poorer.

Here we take up a more basic feature of the efficiency metric, its more general indifference to the distribution, as opposed to the aggregate amount, of social wealth. As we have seen, the poverty of the poor is simply invisible to economic analysis; if you cannot pay for goods or services, you have, as a matter of definition, no demand for them. The government's redistributionist function addresses that anomaly; it involves the transfer of wealth either as an end in itself or a means to some end other than establishing markets and making them more efficient. This "redistribution proper" is thus distinguishable from the redistribution that is incidental to merely (1) make markets possible and (2) correct market failures.¹¹³

¹¹² *Maybe add another efficient regulatory outcome with bad distributional effects: Fine wine quality control commission, funded by general revenues.*

¹¹³ These conditions are important, because, paradoxically enough, economic analysis *offers not just one possible metric for wealth redistribution, but two. What's more, each is quite elegant in theory, if wholly impracticable in fact. Although dividing wealth may seem an odd way to multiply it, here, then, are two ways – okay, models – in which it very well might work. The first is more obviously consistent with maximizing efficiency, but ultimately less appealing. Redistribute as much as the people are willing and able to pay; as much, that is, as the well-off want. [Hansmann's cites this measure, which I discuss in BCLRev.] The second is a bit more counter-intuitive, but at bottom more consistent with the basic goal of wealth maximization. Redistribute wealth, not to the extent that people are willing and able to pay for, but to the extent that the redistribution actually increases wealth. [Need an example where aggregate wealth might be greater with redistribution, even if the currently wealthy as a class were worse off. This could occur in any*

In a very simple case, the state might undertake to ensure that every citizen has at least a minimal income, enough, that is, to purchase the basic necessities of life: food, shelter, and clothing. This is, of course, the function Robin Hood famously performed, with this important difference: When the state takes from the rich and transfers to the poor, the taking is, by definition, not highway robbery, but wealth redistribution.

Nor, it is important to note, is wealth redistribution necessarily leftist; Robin Hood, remember, was himself a monarchist, even a legitimist. Although the Redistributionist State lies, as a conceptual matter, to the left of the Regulatory State, it is, as an historical matter, quite centrist. Richard Nixon, no Robin Hood re-incarnate, famously favored a negative income tax. For those earning below a certain threshold, the government would not take money from them, in the form of the familiar income tax, which is “positive” from the state’s perspective; instead, the state would pay money to the under-earners themselves, a “negative” tax from, again, the state’s perspective. The intended effect was to put some of wealthier people’s money into poorer people’s hand; at the time, this was a mainstream Republican approach to poverty relief – or, more likely, welfare reform.

On the example of Nixon’s negative income tax, then, it is fair to say that redistribution does not begin on the Left; still and all, as Nixon well knew, redistribution can run a very long way in that direction. The Redistributionist state can be quite

of several ways. Sometimes relatively wealthy people are in the aggregate better off if the state taxes them to provide others with certain goods and services that they cannot pay for themselves. Thus, for example, it is cheaper for the relatively wealthy to be taxed to inoculate the relatively poor against deadly diseases than for the relatively wealthy to risk losing all that cheap labor to a deadly pandemic. Similarly, it may be cheaper for the relatively wealthy to pay taxes to prevent the poor from catching certain vaccination-proof diseases – TB, AIDs – than it is for the relatively rich to protect themselves from these diseases in other ways – wearing protective masks or condoms, living, not in gated communities, but in collective quarantine “bubbles.” In my neighborhood example, “homeless people” may well be bad for business; paying them to leave confers external benefits. And educated laborers may make more production-efficient workers than employers can afford to provide themselves. These wealth-worse-off example may depend on “wealth effects” (I think); there may be no limits to the different possibilities here; ask Seidenfeld.]

For our purposes, the efficiency metric of redistribution has a basic problem: It takes the present distribution of wealth as given, if not as normatively justified, and takes as its sole goal the increasing of aggregate wealth.

aggressive; it can undertake anything from Nixon's own modest, if not minimalist, plan¹¹⁴ to Lyndon Johnson's full-blown War on Poverty. The parameters of our liberal democratic polity and capitalist market economy permit a wide range of redistributive goals: prevention of emiseration, provision of opportunity, equalization of wealth, promotion of productivity, encouragement of excellence. Each of these would, predictably, imply its own metric, with its own optimal and minimal level of redistribution. As we shall see, choosing among these competing redistributive goals, each with its own metric, poses a serious problem for liberal democracy.

Here we need to notice another problem, which leads to the state's fourth and final function. Nixon's objection to the Great Society was not just the size of its redistribution, but also its method. The Great Society involved, not just larger wealth transfers than Nixon's negative income tax, but also transfers of a very different kind. Many Great Society transfers were in kind rather than in cash. Thus, for example, the Great Society did not give the poor money to spend on bread; it gave them Food Stamps, which they could spend on nothing else. And notice, again, that this is not merely a preference of the Left; at the other end of the political spectrum, advocates of educational vouchers are not calling for distributions of cash. Thus, on both the political right as well as left, there is something more than merely the amount of redistribution at issue; government, as these examples indicate, does not merely redistribute wealth, it also decides how that wealth is to be spent. That is the state's fourth, aretist function; depending on one's perspective, it is either "promoting the general welfare" or paternalism, imposing the preferences of some on others, generally at the expense of still others.

(4) The Aretist Function: Addressing the Market's Indifference to the "Goodness" of Goods.

The market's provision of goods and services, as we have seen, involves two basic criteria of consumer preference: ability to pay and willingness to pay. Government's

¹¹⁴ Nixon plans might plausibly be seen as an effort to relieve of some measure of real destitution; less charitably, it might be seen as a sapping operation against what were then well-entrenched institutions of the Great Society, and thus the first phase in what would eventually become the Republican Right's sustained crusade against the War on Poverty itself.)

redistributionist function addresses perceived problems with the “ability to pay” criterion, most basically, that the penniless have no demand for bread. The government’s aretist function addresses perceived problems with the market’s other criterion: consumer willingness to pay.

The second problem is basically this: Given the ability to pay, some people may buy what others believe are the wrong goods and services. That is, of course, the deeper message of the homeless person’s hand-lettered sign: *Will Work for Food*. The bearers of that sign deeply suspect of us our deep suspicion of them: If we give them our money, they will buy, not food or shelter or clothing, but alcohol, tobacco, or other drugs. This suspicion is the foundation of the aretist state. The redistributionist state simply makes some people richer; they can do with their new wealth whatever they want. The aretist state means to make them better, by a standard other than their own preferences.

The redistributivist state, we might say, reflects our fraternal instincts; it makes us our brother’s keeper, at least in the sense that it responds, more or less generously, to the Depression-era request: Brother, can you spare a dime? The aretist state goes a critical step further; it imposes at least some measure of supervision. To be sure, it gives its wards an allowance, but it also insists on a say in how they spend it. Thus the aretist state is, functionally speaking, not Big Brother, but Big Father, who, of course, presumes to know better, if not best. At a minimum, the aretist state protects us from ourselves; ideally, it makes us better people. It always operates on the premise “this is for your own good,” even if that message sometimes becomes “this hurts me more than it hurts you.” Paternalism, of course, is not a word with entirely positive connotations; the aretist state is what Margaret Thatcher derided as “the Nanny State.”

This role of the state as super-ego need not be as insidious as it sounds. Here again, as with the redistributivist function, the state can operate anywhere along a very wide spectrum. All but the most aggressively Ricardian state must be at least minimally

paternalistic; only in some sort of Szaszian¹¹⁵ sub-minimalist state would a declaration of insanity lie outside the proper scope of state power.¹¹⁶ Deeply imbedded in the common law of property itself, as a matter of both historical fact and necessary principle, is the notion of competence. The legally incompetent cannot form contracts, transfer property, or direct agents. So, too, the market's basic price mechanism involves a willing buyer and a willing seller, each of whom is, implicitly, sane, at least in the sense of being capable of rationally assessing the opportunity costs of any given transaction. To function in a market economy, one needn't have a Harvard MBA, but one has to be able to tell a hawk from a handsaw.

In performing the aretist function, all liberal democracies, including our own, demand much more than just minimal competence. Both Food Stamps and school vouchers impose consumption restrictions on fully competent adults. And these examples, it is important to see, are only the most obvious, and basic, of aretist measures, the thinnest end of the aretist function's wedge between our wealth and what we are allowed to do with it.

The means at the disposal of the aretist state are essentially the same that we saw earlier with respect to the regulatory state; they run from educating people about alternative choices through making those alternatives more or less expensive, up to the point of legal sanctions, through government provision of preferred products. The distinction between the regulatory state and the aretist state is not the means, but the end. The regulatory state seeks to maximize consumer satisfaction by correcting market failures; the aretist state seeks to produce a mix of production and consumption somehow

¹¹⁵ See Szasz, *Ideology and Insanity* 233 ("What began modestly as medical psychiatry in eighteenth- and nineteenth-century Europe, with its view of man moved by physiochemical processes inside his brain, may yet become, perhaps in the United States, a tyranny based on neurological scientism and psychoanalytic historicism.").

¹¹⁶ Which is not to say, of course, that that prerogative has not been horribly abused. Equating political heresy with mental instability is a Stalinist stand-by. And, of course, even liberal democracies are not immune. Consider the haunting words of Justice Holmes in the case involving involuntary sterilization of "imbeciles": Three generations of idiots is enough." Cite also Solzenizen novel, if possible.

superior to that of even a perfectly functioning, fully efficient market.¹¹⁷ The state's regulatory function is to ensure proper prices, to include benefits and costs otherwise external and avert exploitation of information asymmetries; the function of the aretist state is to lower or raise costs "artificially," thus making consumers buy more or less of certain products than, left to their own devices, they would want. The regulatory state seeks to give people what they are willing and able to pay for; the aretist state seeks to give people what they should have, the goods and services that make them better.

Consider, again, the case of alcoholic beverages. As we have seen, their production and consumption may include costs or benefits not reflected in the market price; the regulatory state seeks to get that price right or, failing that, to produce the optimal market outcome by other, more market-intrusive, means. The aretist state, by contrast, may see recreational consumption of any alcohol as a vice, as such, even as it may see sacramental consumption of some alcohol as a virtue. Precisely that seems to have been the perspective embodied in the Prohibition Amendment: Produce and consume no alcohol (except for sacramental purposes).

b. Common Features of the State's Market-Supplanting Functions.

If the aretist state, like the regulatory state, is long on means to its ends, it is also long, like the redistributive state, on possible ends themselves. For both the redistributive and the aretist state, this wide range of possible ends is very much an embarrassment of riches. As the redistributive state, in seeking to enable people to buy more of what they actually want, raises the question of "how much more," so the aretist state, in seeking to encourage people to consume something more or less than they actually do want, raises the question "what else"?

With the state's aretist function, as with its redistributive function, the answer will depend on the end, and neither the redistributive nor the aretist function, in contrast to both the regulatory and Ricardian functions, implies a single end with its own metric. As

¹¹⁷ Both can also try to change their preferences, making them willing to buy more, or less, at existing prices. But the market does this to increase profits; the state, for other ends.

we have seen, the redistributionist state that seeks equality of opportunity will foster a different measure of redistribution from the redistributivist state that favors equality of outcome. So, too (to take a much less lofty example) the aesthetist state that favors connoisseurship of fine wine will have a very different policy toward viticulture from the aesthetist state that favors total abstention from alcohol. Compare, in this regard, the wine policy of France, irrespective of regime or era, with those of today in the Kingdom of Saudi Arabia, the Islamic Republic of Iran, and the “dry” counties of Alabama and Kentucky.

At this point it is useful to notice that these two functions, redistribution and aesthetism, are fundamentally related. Every decision to redistribute wealth involves an implicit decision that some allocation is more desirable than what the market would otherwise provide; every aesthetist plan involves a measure of redistribution in favor of some allocation of resources other than what the market would produce.¹¹⁸ In other words, every aesthetist plan involves a decision to do some measure of redistribution above zero; every redistributionist plan involves a choice of recipients who are in some identifiable sense “better” or more deserving than those who would benefit under purely market-based metrics. Both functions, the redistributivist and the aesthetist, aim to produce better outcomes than the market; the aesthetist aims to produce, beyond that, better outcomes than individual people on their own. All aesthetism is redistributionist, and all redistribution is aesthetist, at least toward the market.

The fact that aesthetism is, in a sense, parasitic on redistribution permits us to derive a useful metric of both aesthetism and redistribution from a more general dependence of the governmental sector itself upon the for-profit sector. To the extent that the state takes the wealth that it redistributes from the for-profit sector, the state should operate under a rational redistributive ceiling. This ceiling involves little more than a refinement of folk

¹¹⁸ Possible exceptions: Consider “pure” prohibition, like a ban on bear-baiting. But even this should involve some re-distribution, from those who enjoy the sport to those who want it banned. There would be no re-distribution only if the anti-baiters were willing and able to pay nothing for the ban, which seems unlikely, and would, in any case, be a Kaldor-Hicks efficient redistribution of entitlements. Notice, though, that such a ban, even if thus redistributive, need not be progressive: poor people might enjoy bear-baiting; wealthy might oppose it.

wisdom: “Don’t kill the goose that lays the golden egg.”¹¹⁹ Market capitalism is, as we have seen, the state’s goose, the golden eggs are the goods and services it produces. From that store of wealth the state can draw the funding for its redistribution.¹²⁰ In drawing from that store, however, the state should exercise at least this much restraint: Do not extract so much of capitalism’s bounty as to deprive capitalists of all incentive to produce that bounty in the first place. Taking more than that maximum for redistribution today will leave nothing to take for redistribution tomorrow. To borrow another barnyard metaphor, that is the fate of those who eat their seed corn (and also the fate of the fleas who become too numerous for their dog).

Significantly, this redistributive maximum is only a ceiling. The redistributive function gives no guidance below the ceiling, and it implies no floor of its own,¹²¹ no minimum, as opposed to maximum, level of redistribution. In terms of our barnyard proverb, this metric does not tell the redistributivist how many golden eggs to take from the capitalist geese, or to whom to give them, and it does not tell the artist what to buy, or to require the recipients to buy, with the golden eggs taken.

To find these measures, we would need to interpolate from that the redistributive maximum an optimal level of redistribution, the level of the last *appropriate* dollar of redistribution, as opposed to the last *possible* dollar of redistribution. Recalling our other metrics, productive efficiency and economic efficiency, we could call that more finely calibrated, marginal metric “**redistributional efficiency**.” We could doubtlessly give it a more abstract, algebraic form, but its essence would be this: Redistribute wealth precisely to the point at which the good of the last dollar redistributed exactly offsets the good that

¹¹⁹ It can, as you would guess, be stated with much more mathematical rigor. See, e.g., Frank Michelman, *Property, Utility, and Fairness*, 80 Harv. L. Rev. 1165, 1212-15 (1967).

¹²⁰ Note: revenues can come from any of the other three sectors, all subject to the same principle, though likely with different effects. Household and for-profit are closely linked here in function, and share the same for-profit criterion. But funding from cultural sector is quite different, because voluntary; see below, section on intersectoral comparisons.

¹²¹ The Ricardian functions provides a floor on government expenditure, but this need not involve redistribution; the state could, that is, make finance the capitalist infrastructure with some sort of user-fee on capitalists. Cf. EPSTEIN, *TAKINGS*, at 4 (“...the state will not obtain the resources needed to operate by voluntary donation or exchanges”; “[i]f these sources of revenue and power were sufficient, then the state would raise no problem that a system of ordinary markets could not solve.”)

that dollar would have done in the hands of its original holder. So Robin Hood must have directed his Merry Men: Take from the rich and give to the poor exactly to the point at which the poor are no longer made better off than the rich are made worse off.

Even with that admittedly informal statement, we can see serious problems with this standard as a measure of both pure and aretist redistribution. With respect to both, we would need to interpolate another factor: The extent to which, at any given level of redistribution, the “haves” are discouraged from future production; this is, in effect, an interpolation of what we have already identified as the redistributive ceiling. At that level, as we saw, we have taken so many of its golden eggs that the capitalist goose simply stops laying. But, of course, that would be a cumulative effect; at each lower level of redistribution, there would predictably be a corresponding level of production lost on account of that particular redistribution. In weighing the gains to those who receive redistributions against the losses to those who pay for the redistribution, we would need to account for that “demoralization factor”¹²² as well. This factor, to say the least, would be complex to calculate in practice, though by no means in principle impossible.

The real problem comes in deciding what counts as a loss to those who pay and a gain to those who get paid, the “winners” and “losers” in redistribution. As to pure redistribution, we would need to know a much-discussed number, the marginal utility of money, essentially how much more satisfaction an additional dollar buys for a relatively poor person as compared to a relatively rich person. At the extremes, this phenomenon has obvious intuitive appeal: The dollar with which a starving child buys a loaf of bread surely provides more satisfaction than the dollar a billionaire spends on seeds for pet parakeets. As we leave these extremes, however, the difference becomes increasingly less clear. What is more, we would then face an even more difficult issue: How close to actual equality of satisfaction do we really want to come?

With the aretist function, the problems are even more severe. Before we can measure the good lost by the “payers” against the good gained by the receivers, we have to

¹²² From Michelman’s demoralization costs.

define “good” in terms of something other than the satisfaction of either in their own terms. But, to know what that is, we would have to know what goods are better than others – that metric, of course, is exactly what we are looking for. As Aristotle reminds us, we cannot quantify the good until we know what it is.

With both aretism and redistribution, then, our posited goal of redistributive efficiency turns out to be a bit of a will o’ the wisp, if not a vicious circle. Majoritarian democracy offers something of a way out, as we will see shortly. It can give us not only the level of redistribution that the majority wants, but also the kinds of goods and services that the majority thinks best to encourage. But both those majoritarian measures pose at least as many problems as they solve, as we shall see a bit later, when we turn to the general problems of “government failure.”

Before taking up government’s failures, let’s briefly review its functions. We have just seen four basic ways the state “complements” the market, deals with “market failures.” Most basically, a capitalist market cannot “boot-strap” itself into existence; if there is to be a capitalist market at all, the state must provide the legal infrastructure of the market, the basic system of transferable property rights, which the market cannot establish and operate for itself. This is the state’s Ricardian function. Beyond that, the state can correct a number of technical “market failures” that would lead the market to produce results short of economic efficiency, particularly with respect to information asymmetries and externalities. This is the state’s regulatory function.

The state can also address two problems implicit in the market’s notion of efficiency itself, the twin criteria of ability and willingness to pay. With respect to the first criterion, ability to pay, the state can redistribute wealth, making some more able to pay than they were before; that is the redistributive function. With respect to the second criterion, willingness to pay, the state can choose to promote forms of production and consumption other than what people would choose themselves, even if they had the money to pay for them. The state, that is, may choose to make people not only wealthier, but also “better,” in terms other than their own. Food stamps are for food, not cigarettes;

school vouchers are for education, not beer. Drawing these distinctions, and a wide range of others, is the state's aretist function.

As the examples in this section have shown, our particular liberal democratic government exercises all four functions: the Ricardian, the Regulatory, the Redistributive, and the Aretist. We now need to examine the ways that the state itself "fails," the problems it encounters in performing these functions. These are, to put the matter more positively, the ways that the state itself depends upon the complimentary functions of other sectors.

c. Government "Failure."

Like our capitalist market economy, our liberal democratic state has obvious limitations¹²³; otherwise, our society would need but a single sector, the governmental. For our purposes, we need to examine four particular kinds of "government failure," two species in each of two genera. The first two species are based on our definition of the state in our model: The modern state is nonprofit, and its membership is involuntary.¹²⁴ The second two are based on the particular kind of state we have: Our state is liberal and democratic. This section takes up the problems attributable to each aspect of our state, beginning with the most fundamental, those shared by all modern states, then turning to the special problems of liberal democracies. As we shall see, liberal democracy addresses very deep problems of the modern state, but not without creating problems of its own.

(1) Generic Problems of the Modern State.

As we saw at the outset, the governmental sector has, in our model, two basic aspects: It is nonprofit, and it is involuntary. Each aspect is essential to the state's performance of its four functions, some of which involve redistributing, rather than

¹²³ See Weisbrod, *The Nonprofit Economy*, at 26 ("The undersatisfied demand for collective-type goods is a governmental 'failure' analogous to private market failures."); *id.* at 41 ("Its [government's] handicaps are its political entanglements and the weak incentives it provides for efficiency").

¹²⁴ These are not inherent limits in the meaning of "state," but rather the critical element of "state" in our model. One could imagine states that were voluntary and states that were "for-profit."

creating, wealth, and some of which require coercion. Now we need to see how both aspects, the nonvoluntary and the nonprofit, pose problems of their own.

a) **The State as Nonprofit: *L'état n'est pas le roi*.**

Our state, like all modern states, liberal democratic or not, is nonprofit. Louis XIV's megalomania notwithstanding, he was not the state, nor did he own it. North Korea may well be a dysfunctional family business, as a matter of fact, but it cannot be a sole proprietorship or father-and-son partnership, as a matter of law. Under international law, citizens are not the property of their state or its rulers; they have certain rights of their own (although these rights are, admittedly, honored more in the breach than in the observance). North Korean, then, is not some sort of national plantation where everything, including the people, are the property of the state; it is, legally speaking a kleptocracy, a government of thieves. (Not to speak harshly only of our national enemies, our Saudi Arabian allies could be similarly analyzed.)

On the other hand, even as citizens are not the private property of the state, so the state is not, in any meaningful sense, the private property of its citizens. In contrast to firms in the for-profit sector and households in the household sector, no private individuals are the residual beneficiaries of its net revenues, any more than they are of the net revenues of a charity.¹²⁵ The modern state is thus more like a trust than a for-profit corporation, and more like a charitable trust than a private trust (although, as we shall see shortly, the terms of that trust are very vague indeed).

As relevant to our analysis, this has two obvious consequences. The first is the most obvious: The absence of residual "owners," any group of people entitled, in their private capacity, to the net worth of the operation. This obviously undercuts a major incentive to the lowest-cost production, the profit motive or, more precisely, the proprietor's entitlement to pocket the excess of revenues over costs. We have already encountered this limitation when we compared the performance of schools in the for-profit,

¹²⁵ Note that Steinberg, NP Sector, suggests possibility of seeing citizens as residual owners. But there is, significantly, no legal means of liquidation and distribution of assets at the beneficiaries' demand. More, again, like a trust (with the world community as settlor, in the place of God?).

governmental, and cultural sectors. Here we simply need to situate that problem in the very structure of the state and to warn against over-generalizing from that single example.

The lack of proprietary profit motive does not necessarily imply that government is always less cost-efficient than alternative suppliers, even for-profit suppliers. Sometimes government agents may, on account of motives other than profit, out-perform their counterparts in other sectors, including the for-profit sector. Mercenary armies, for example, are notoriously unreliable, at least as compared to armies motivated by cause or country. But the problem nonetheless pervades the state's provision of any good or service, always threatening productive efficiency. James Q. Wilson puts the problem bluntly: "given the fact that bureaucrats cannot (for the most part) benefit monetarily from their agencies achievements, it would be surprising if they were not [productively] inefficient."¹²⁶

The first aspect of the state's nonprofit status, the non-distribution constraint, is a prohibition; no class of "owners" may distribute net revenues to themselves. The second aspect is a mandate. Alongside the state's absence of residual owners are affirmative functions inconsistent with for-profit enterprises' profit-maximizing mandate. The state, as we have seen, also redistributes wealth and promotes well-being. Our state is concerned, not just with how much money is made, but also with how it is spent; in that respect, again, it is less like a for-profit corporation and more like a trust.¹²⁷ This makes one easy metric, maximum net profit, impossible.

b) The State as Involuntary Association: Automatic Membership and Coercive Method.

Citizenship, or membership in a modern state, is doubly involuntary: In the normal course of things, everyone is born a citizen of at least one state, and, even though one generally may, as an adult, choose to be a citizen of a different state, no one can choose to be "stateless." This necessarily implies a serious problem: It is highly unlikely that any

¹²⁶ WILSON, BUREAUCRACY, at 318.

¹²⁷ See Atkinson on dual functions of trusts, private and public.

state will be able to please all its citizens all the time.¹²⁸ And this problem is, of course, compounded by a feature common to all states, a second element of its “involuntary” character: the power to coerce its citizens to obey (limited, more or less effectively, by international human rights law). States will almost certainly include people are not satisfied with how the state is performing its various functions.

In A.O. Hirschman’s classic dilemma, some citizens may choose “exit,” which, in this context, means emigration (or secession); others may choose “voice,” efforts to change the state itself.¹²⁹ But neither method will ever produce total satisfaction. Those who choose “voice” over “exit” will almost inevitably find themselves in the minority on some issues, some of the time. Those who choose “exit” over “voice” will have to go to another state or form one of their own,¹³⁰ neither of which will itself be entirely to everyone’s liking. Whether citizens go or stay, then, they will always be in one state or another, and they are not likely always to convince their state to do things their way.¹³¹

(2) Liberal Democratic State and Its Specific Problems.

Every modern state, as we have seen, faces two kinds of problems, traceable to states’ two essential features: states are nonprofit, and states are nonvoluntary. Liberal democracy can be seen as an effort to mitigate both problems or, more precisely, both aspects of both problems. As we shall see in this section, however, the solutions offered by liberal democracy create, in their turn, additional problems.

The two aspects of the state’s nonvoluntariness problem, as we have seen, are obligatory membership and mandatory obedience. Liberal democracy provides a way of

¹²⁸ James Douglas refers to this as government’s “categorical constraint” and sees this as the political analogue of market failure in the for-profit sector. See Douglas, *Political Theories*, supra, at 46.

¹²⁹ A. O. Hirschman [cite].

¹³⁰ Note that moving among political subdivisions helps here, but not wholly. See D&K for studies of this kind of “equilibrium.”

¹³¹ [maybe mention, at least in fn, “fraternity” problem: involuntary membership seems to imply lack of “coziness.” Argue that this need not be so, or at least no so in any absolute sense. Some gov is small and can be left easily; some NGOs are huge. Also, gov. could take it upon itself to promote “fraternity.”]

resolving disagreements, majority vote, with protections for dissenters and minorities, individual rights. Liberal democracies can, and do, strike this balance differently. Some are more democratic, more deferential to majority will; others are more liberal, more protective of individual and minority interests. But, no matter how the two elements are balanced, each creates problems of its own, with respect to the state's performance of all four of the functions we have identified. And, as we shall see, plausible efforts to check the most serious problems of the one run us directly into problems with the other.

Liberal democracy also gives us a way of addressing, at least in principle, two problems associated with the state's nonprofit status. The state's agents are not, as we have seen, motivated by the economic reward of residual profits, but they may, perhaps, be motivated by its political analogue, re-election. Similarly, the nonprofit functions of the state, redistribution and artism, have no inherent metric, no equivalent of economic efficiency. Democracy, with the mechanism of majority vote, offers a measure. Just as the majority can monitor wasteful government managers, so it can impose positive measures of artist redistribution: how much to spend, and for what. And liberalism, to the extent that it protects against uncompensated taking of private property for public purposes, can give legal force to the redistributionist ceiling, preventing a redistributionist electorate from killing its golden geese.

For all the basic problems of the state as state, then, liberal democracy offers, if not perfect solutions, then at least ameliorative measures. But the liberal democratic state has problems of its own. We will consider the problems with democracy first, then the problems with liberalism; as we will see, modern liberal democratic states, including our own, are primarily democratic and only secondarily liberal; that is perhaps their most basic problem.

a) The Democratic Dilemma: The Majority's Will or the Common Weal?

On matters of ordinary legislation, it is the marginal voters in a liberal democracy who get what they want, subject, as we have said, to the more or less aggressively liberal constraints of their constitution. This necessarily implies that those who want more from

the state (or less) are left dissatisfied. Early theorists of the nonprofit sector saw the democratic state's inability address this dissatisfaction as its primary failure, to which nonprofit organizations were a plausible response. If some of our shop-keepers want more protection than their fellow citizens literally elect to provide through the police force, those citizens with a higher demand for security can form a neighborhood watch. Similarly, if the parents of some school children want more or better education than the public schools provide, they can form PTAs to encourage better public education, or they can form private, nonprofit schools of their own.

This government failure account of cultural sector organizations is plausible, and probably true, as far as it goes. But it does not go nearly far enough, in two related respects. First, the problem of supra-majority demand has several identifiably different aspects, having to do with the various state functions we have outlined. Second, each of these functions has a quantitative dimension. Democracy, government failure theorists point out, leaves supra-marginal voters dissatisfied. We need to see that it also leaves all citizens, majority and minority alike, with no guide at all, either qualitative or quantitative. Majoritarianism tells all citizens which ones of them won the vote on a proposed deployment of one of the state's functions, but it tells no one how to vote on that proposal in the first place; democracy provides a post hoc tie-breaker, not an ex ante policy guide. Liberalism, as we shall see, provides some significant constraints on majoritarianism, but almost no positive criteria or metric of its own.

The basic problem is this: Democracy gives us neither state purposes nor measures of state performance other than providing what the majority wants. In this respect, democracy is very closely analogous to market capitalism. Both are equally indifferent to what the enfranchised "buy," with votes on the one hand or dollars on the other. Indeed, democracy is, if anything, more problematic. Economics, as we have seen, gives us a neat minimum, the legal conditions of capitalism, and two more quite viable metrics: "productive efficiency" and "economic efficiency." Democracy gives us a measure analogous to the functional measure of the Ricardian state, the minimum conditions for democracy. What is more, the metric of productive efficiency is applicable, in principle,

to all the state's functions, and we can derive, on the analogy of economic efficiency, the metric of democratic efficiency. But that last metric is quite peculiar. It can override all the metrics we might import from the for-profit sector to measure the state's market-supplementing functions. Even more seriously, democratic efficiency gives us no independent guidance for the state's two other functions, re-distribution of wealth and promotion of welfare; all it tells us, at bottom, is give the majority what it wants. If we try to produce additional guidelines by democratic means, we run afoul of liberal limitations.

(i) Democratic Failure and the State's Market-Supporting Functions.

Market capitalism, as we have seen, poses for itself two problems it cannot, by its own means, solve: Producing its own infrastructure of property law, and correcting its own intrinsic failures, principally information asymmetries and externalities. But its own functional standard, economic efficiency, both identifies these problems and provides a metric for measuring their magnitude. A significant function of government in our system is to address these two problems, to provide the legal regime of market capitalism and to regulate that system so as to overcome its inherent problems. We now need to see that, in addressing both sets of problems, liberal democracy poses a serious problem of its own: Its majoritarian metric can, and probably often does, supersede and undermine the market's own metrics.

Economics itself, as we have seen, gives us a minimal measure of government involvement in the for-profit sector: creation and maintenance of minimum conditions of capitalism. This is a hypothetical imperative: If you want market capitalism, your state must provide this infrastructure. What we need to note here is that democracy does not guarantee the selection of either the major or the minor premise. The appeal of the first, as we have seen, is instrumental: this is the best way, or at least a very good way, of getting consumers what they want. The choice of means follows, as a matter of instrumental logic, from the first: If you want capitalism, this is what it requires. But notice that neither choice follows from democracy: A majority can choose a non-capitalist economy, perhaps because it favors something above maximum production, perhaps because it believes, rightly or wrongly, that capitalism does not provide maximum

production. That question, real though it is, need not concern us here; our society has chosen market capitalism, and we have taken that choice as a given in our analysis. We have granted, that is, the major premise of the hypothetical imperative: We do, in fact, want market capitalism.

Our concern is with the imperative part of the hypothetical: A polity that has chosen market capitalism should provide at least its minimally adequate institutional infrastructure. Quite possibly, a majoritarian polity may choose capitalism but not adequately fund its essential institutional infrastructure. That would be instrumentally irrational, but not undemocratic.¹³² (One could make a very good case that this is precisely what happened in the recent economic crisis.)

A similar analysis applies to the state's regulatory function. A majority of voters could, in principle, reject this function entirely, in favor of a truly minimal state: No more government than absolutely necessary to preserve private property and market economy. Anything beyond that is, by definition, the regulatory state, a state that functions, not just to make markets possible, but to make them more efficient. A majority of voters might well decide not to fund the government's regulatory function up to the level of that we have identified as regulatory efficiency, the level at which the last dollar spent on regulation produces exactly one dollar more in economic efficiency.

The problem with respect to the first two market-corrective functions of the state, then, is the democratic metric of majority rule may, and sometimes does, override the metrics that economics provides. Only one of these overrulings, however, is, strictly speaking, irrational, the democratic decision to have a capitalist economy without the minimum infrastructure. The other two overrulings – not to have a market economy at all, or not to ensure maximum economic efficiency – are not based on capitalist criteria, but they are not necessarily irrational. They could reflect the application of other criteria. The point to see is that democracy provides no such criteria, except the tautological one:

¹³² Note that liberalism's substantive due process constraint of "minimum rationality" is not much help here; it forbids the demonstrably stupid, but it does mandate the demonstrably sensible.

what the majority wants. It gives no reason for the majority to choose one way over another.

Democracy, then, is subject to under-providing both the necessary infrastructure of market capitalism and the optimal level of market-correcting regulation. It can, that is, fall short under the appropriate metrics of its Ricardian and regulatory functions, respectively. Might democracy not also err in the opposite direction, providing either more than enough infrastructure or too much regulation? More than minimal infrastructure, as we have seen, may be necessary for maximum efficiency. More regulation than necessary for maximum efficiency, on the other hand, is a much more serious problem. It can simply mean that the majority has poorly applied the criterion of economic efficiency, that it has the state playing the regulatory game at levels or in arenas where that game is not worth the candle that it costs or the likely “winnings” to be had in greater economic efficiency.

But what looks like over-regulation by those market-based metrics may be something else entirely. Democracy may be using the means of regulation for very different ends, either redistribution or aretism. Thus the majority might ban fortified wine, not as a response to information asymmetries or external costs associated with its consumption, but to give a greater share of the alcoholic beverage market to beer manufacturers or to give the Temperance Movement a level of sobriety beyond what its members could expect from even a perfectly functioning market. But why would the state want to transfer wealth to beer producers or to make the citizenry more virtuous in the eyes of tee-totalers? More generally, what standards does democracy give for the state’s redistributivist and aretist functions?

(ii) Democratic Failure and the State’s “Market-Supplanting” Functions.

The regulatory state operates under this hypothetical imperative: If you want to maximize economic efficiency (and if you have no competing social goals), regulate capitalist markets so as to overcome their technical failures (and do not otherwise interfere!). A majority of citizens might refuse to grant this condition in either of two

essentially opposite ways. On the one hand, as we have seen, they may opt against maximizing economic efficiency in favor of keeping government small, closer to its Ricardian minimum. On the other hand, we need to see now, a majority of voters might opt against single-mindedly devoted to economic efficiency; they might, that is, choose to advance other, competing, social goals, goals that are at odds with each of economic efficiency's basic requirements, willing and ability to pay.

This is, of course, very much what our own citizens have chosen. We do not fully grant the ability to pay criterion. We vote for a measure of wealth redistribution; even Nixon, remember, had his negative income tax. Nor do we fully grant the willingness to pay criterion. We want to ensure, at least to some extent, that people get, not just what they want, but also what they need, what it is better for them to have; Food Stamps are for food, not beer and cigarettes. The state's redistributive and aretist functions, we have seen, offer a wide range of options. But that very range also poses a problem. How much redistribution are we to have, and what "goods" are we to consider "better"?

We have already seen that neither the redistributionist nor the aretist function provides its own metric. Here we need to see that democracy does not offer much help. This "government failure" with respect to market-supplanting functions of the state is even more fundamental than with respect to market-supplementing functions. With respect to these latter functions, as we saw in the last section, the majority may override the market's own intrinsic metric, economic efficiency, but at least there is a metric to override, a measure of the cost the majority's "mistake" or the price of its non-efficiency preference. With respect to redistribution and aretism, however, the market gives no metric of its own, precisely because these two state functions are intended to supplant features inherent in the market functioning in accord with its own metrics, willingness and ability to pay. Democracy itself provides virtually no independent criteria of its own. Thus, with respect to redistribution and aretism, democracy is very nearly totally without normative guidance.

Market capitalism, as we have seen, imposes upper and lower limits on the state's redistributive function. The Ricardian function implies the essential floor of state redistribution: If you are going to have a capitalist market economy, the state must provide a minimal regime of private property rights. On the other hand, if market capitalism is to survive, you can't take from it, in the form of taxes, beyond a certain ceiling. We have, of course, described an upper limit, the maximum rational level of redistribution, beyond which any state in effect kills off its capitalist tax base. Between that floor and that ceiling, however, we have no guide other than the metric of the regulatory function, economic efficiency. Redistributive efficiency, as we have seen, is a vacuous, question-begging concept.

Majoritarian democracy, especially representative majoritarian democracy, produces perverse incentives to violate even the basic, barnyard logic of these ceilings and floors. The problem is that this rationality operates only at the systemic level, not at the level of individual voters. For individuals, two other principles apply: *Après moi, le deluge*, and don't pick up the check. It makes sense, at the systemic level, not only to refrain from killing the goose that lays the golden egg, but also to feed it. At the individual level, however, it makes good sense not to feed the goose, if you can pass that bill to someone else (or if someone else will pick it up). Similarly, at the individual level of analysis, it makes very good sense to kill the goose, if you get to eat all the goose yourself, but only a pro rata share of the eggs; it makes all the more sense if your goose-eating is today, and your egg-sharing tomorrow. The problem, to summarize it aggressively, is the union of politics and economics, the critical insight of public choice theorists. From their perspective, the problem is not that majoritarianism leaves supra-majority demand unsatisfied, the "government failure" hypothesis used to explain the function of charity. Rather, the problem is that of rent-seeking, efforts to transfer wealth to oneself, not to make the economy bigger, the goal of wealth maximization, but to increase one's own share at as little cost as possible.

Even if the perverse incentives of individual voters and their representatives do not lead to starving or slaughtering the goose that lays golden eggs, there are other problems,

between the redistributive floor and ceiling. In setting those parameters and in trying to identify the chimeric metric of optimal, or efficient, redistribution, we have been taking the Robin Hood perspective: How much should we take from the rich to give to the poor? Similarly, in setting the level of economically efficient redistribution, we took what was, or should have been, the perspective of Good King Richard and his conscientious clerks: What kinds and levels of redistribution will make the realm, as a whole, richer? But we have overlooked the perspective of Bad Prince John and the Sheriff of Nottingham: How much can I take from rich and poor alike, to keep for myself? That is essentially what public choice theorists mean by rent-seeking. In a democracy, everyone is free to join the party of the Prince and the Sheriff, to form majority coalitions that siphon off the wealth of others for the benefit of members, only.

To see this latter problem more clearly, we must reconsider our original examples of government redistribution, food and education for the poor. Both, we now need to see, implicitly involved two appealing but adventitious elements we now need to remove: The redistribution in each example was both progressive and aretist. Most people think of the government's redistributive function as properly progressive, moving money or other forms of wealth from the richer to the poorer, like Robin Hood. And our redistributive measures, most would agree, made the recipients better off: better fed, better educated.¹³³ Neither, we now need to notice, need be true; democratic redistribution is inherently neither progressive nor aretist.

To highlight these problems with purely democratic redistribution, let's consider an example that removes both of the tendentiously appealing elements of our earlier examples. Consider, then, this admittedly grim prospect. In a pure democracy, the

¹³³ *Qualitative problems with redistribution; move above or into fn:* Nor, we should notice, is progressivity of redistribution to be automatically equated with any obvious form of social progress. As anyone who has agonized in the subway before a panhandler has realized, your handout may as likely buy alcohol as wholesome food. At a more general level, the cycle of dependence created by the traditional welfare system is not wholly a chimera conjured up by the hard-hearted and tight-fisted. [note that this introduces an element of Aretism; this may be the place to say that it imposes no more limits on democracy than does redistribution – except as to foundations of democracy itself.

wealthier fifty-one percent majority decide to totally expropriate the wealth of the less wealthy forty-nine percent minority and, for good measure, to reduce that poorer minority to slavery. The majority, that is, can in principle play the part of a very aggressive Sheriff of Nottingham.

What democracy permits, of course, it does not require – nor, *a fortiori*, do its proponents recommend. Few, if any, proponents of redistribution have anything quite so purely democratic in mind, probably because they have either a higher view of their fellow citizens or a lower view of absolute democracy than my example implies. We expect the majority of our fellow citizens to be at least a little less selfish, or we expect our constitution to be a bit more protective of minority interests. We tend to think of wealth redistribution, that is to say, as something unselfish, rather than self-aggrandizing, as principled, where the principle isn't hedonistic individualism.

But, as the enslavement example illustrates, it need not be so. The point is not that voters in a democracy cannot act in a principled, even altruistic way; they can, and perhaps often they do. The point, again, is that democracy does not, itself, provide those principles, altruistic or otherwise. Democracy is, in principle, open to principled voting; it simply lacks its own principles for voting – *as a matter of principle*.

Democracy can, of course, place anti-majoritarian limits upon itself; democracy can make itself more or less liberal. Thus, in our own system, the constitution affords fundamental rights and suspect classes a panoply of substantive protections against majoritarianism. More generally, it prohibits wholly irrational legislation and imposes a parallel set of “rule of law,” procedural due process protections. Some combination of these would, in the first instance, stop both the expropriation and the enslavement in my “soak the poor” example.

But there are two critical points to notice here. First, these liberal principles are universally recognized as counter-majoritarian; they do not flow from democracy, but rather constrain democracy. Second, because they themselves rest themselves on the democratic principles of popular sovereignty, they can be removed by democratic means.

In our legal regime, the relationship of democracy and liberalism is not that of the chicken and the egg; democracy comes both first and last. There is, in our liberal democracy, no liberal principle that cannot be democratically removed. Every provision of the Bill of Rights, every other Amendment, even the Constitution itself, is subject to amendment. “We the People” can, in principle, literally do what we will, have what (or who) we want.

Thus the liberal limits in our Constitution would slow, but not stop, a “soak then enslave the poor” program. Its enactment would require three conceptually distinct steps: first, amending the constitution to remove the Fifth Amendment’s requirement of compensation for the taking of private property and the Thirteen Amendment’s prohibition of slavery; second, amending the constitution to permit legislation by referendum; finally, a popular vote for the radically pro-majority redistribution. In a liberal democracy like the United Kingdom, with absolute Parliamentary sovereignty and an essentially unicameral legislature, this should be possible in a single vote of the legislature elected on the “redistributionist” platform.¹³⁴ The United Kingdom is thus more democratic than the American Republic.

This is not to say, however, that democracy implies no redistributive metric of its own. Our earlier comparison of market and government failures suggests another, more basic comparison, which, in turn, provides an important exception to democracy’s general absence of a positive metric for redistribution. Capitalist markets, as we have seen, require some measure of institutional infra-structure, the law of private property, that the state must supply. To supply this infra-structure, the state must undertake a measure of redistribution; it must tax and spend to establish and maintain a legal system.

The maintenance of democracy, not surprisingly, implies a similar kind of institutional infrastructure.¹³⁵ Democracy and market capitalism both come with a hypothetical imperative: If you want this system, political and economic, you must ensure the essential “infra-structure,” and some of this infrastructure, the legal institutions of the

¹³⁴ Subject now, most likely, to an appeal to the EU Court of Human Rights.

¹³⁵ Weisberg’s analysis tends to overlook this problem: it assumes the routine functioning of a liberal democratic state, even as market failure theorists tend to overlook the “infrastructural” problem of markets.

market and the political system, must come from the state, since only the state has the necessary coercive power to enforce and finance them. This hypothetical imperative, then, gives democracy, like the market, at least a minimum metric of artist redistribution, a measure of how much the democratic state must spend, and for what, if it is to be at least minimally democratic.

As market capitalism depends on a legal system of private rights to use and exchange property, so a democracy depends on a legal system of individual rights to vote, elections to record votes, and governmental machinery to carry out the people's will as expressed in elections; if democracy is to be representative rather than direct, it must also provide the infrastructure for a legislature. Whether direct or representative, democracy must also have an executive to carry its laws into effect and a judiciary to ensure at least minimal compliance.

It is thus possible to speak of the minimum of redistribution and artistism necessary for a democratic government, even as it is possible to speak of a "Ricardian" minimum for market capitalism.¹³⁶ May we press this parallel between democracy and market capitalism a step further? We saw, with market capitalism, that we can envision, not just a minimum, but also an optimum; the function of the regulatory state, as we outlined it, is to produce just such an optimally-functioning market capitalism, one that maximizes economic efficiency. Might we not, by parity of reasoning, imagine an optimally, not just minimally, functioning democracy? Couldn't we derive from "minimal democracy" a standard of "optimal democracy"? That would allow us, with democracy as with market capitalism, to speak in the comparative degree, even the superlative, not merely the positive – about democracy that is better than the minimum, even the best.

This parallel to optimal market capitalism, appealing though it is, is not particularly promising for our purposes. Once we identify its analogue of market capitalism's

¹³⁶ As we shall see, [CR to final section of this Part] democracy, like capitalism, also implies cultural, not just legal, conditions.

optimizing metric, economic efficiency, we can see that it gives very little more help with our basic question: how much redistribution is appropriate, and for what.

On the analogy of economic efficiency, the market's giving consumers more of what they are willing and able to pay for, we can postulate a metric of democratic efficiency, giving voters more of what they are willing and able to vote for. Most basically, the state could provide optimal, not merely minimal, enforcement of election laws, even as it could move toward optimal, not merely minimal, enforcement of property laws; more police on the beat, more "watchers" at the polling booths. Beyond that, the state could take steps to eliminate the electoral equivalent of "market failures" and externalities. It could sponsor debates among the candidates, subsidize their election campaigns, even supply its own information about the hidden "costs" of their proffered "products," the planks of their political platforms.

We could even reform the state's own structure to make it more democratically efficient. Our respective states have done just that, with such measures as initiatives, referenda, and recall elections, all the darlings of early twentieth century Progressives of both political parties. In the same era, and in the same democratizing spirit, the ?? amendment to the federal constitution replaced the election of US senators by state legislatures with direct election by the people. Another step toward democratic efficiency would be to replace the cumbersome old electoral college with the direct election of the president and vice president.

We could "cut out the middleman" even more radically, eliminating legislatures altogether in favor of some sort of direct, electronic democracy. Robert Paul Wolff outlined a version of this two generations ago¹³⁷; computer technologies would make this immanently doable today.¹³⁸ For something even more radical, we could graft Wolff's electronic democracy onto the very roots of Western democracy, to try cases, not before petit juries of a dozen or so citizens, but before truly grand juries of the entire population.

¹³⁷ *In Defense of Anarchism*.

¹³⁸ NYTimes article on "Electronic Athens," Sunday 20 September 2009.

We could, in short, make our entire polity much more “democratically efficient,” much more capable of giving the people what they want (at lowest in-put cost).¹³⁹

But here we have to be careful. If we try to expand “more democratic” beyond merely making it easier for people to express their preferences among the available options, in the direction of something like “more meaningful participation,” we approach a problem: if that means making people somehow better than they are, or currently want to be, then we are applying some measure of “better” other than what the people want, and thus taking our democratic reforms beyond democracy itself. We will have come full circle: We turned to democracy, remember, for guidance on the state’s aretist function, how to make its citizens better; now we would be invoking some aretist standard to improve democracy itself.

Even if we resist that move to make democratic participation “more meaningful,” democratic efficiency is circular in another sense. When we turn it to questions of redistribution and aretism, how much wealth the state should redistribute, and for what goods and service, we get a peculiar answer: Whatever the majority of the voters want. At best, this redefines our questions about redistribution and aretism; at worst, it begs them. Appropriate redistribution, qualitatively and quantitatively, becomes precisely what the people want, and nothing more; that is what democratic efficiency is, by definition.

In that respect, it is the perfect government sector equivalent of its for-profit sector twin, economic efficiency. Democracy gives voters no more direction about how they should vote than market capitalism gives consumers direction about what they should buy. More “efficient” democracy, in other words, does not give any direction as to government’s market-supplanting functions, no measure of how much wealth to

¹³⁹ If “more” democracy is to mean “more enduring,” then we have imported a “right to democracy” that itself constrains democracy.

No such thing as “more democratic,” without begging very critical questions, at the root of democracy and at the intersection of democracy and liberalism. “More democratic” likely means “less liberal.” Cf. *what democratic state “must” do, in practice or in principle, with what it “may” do.*

redistribute, or what to redistribute it for – beyond, again, what it takes to make all government functions deliver, at lowest cost, what the majority wants.

In making voter preference, like consumer preference, sovereign, democratic efficiency is quite the twin of economic efficiency. But our example should remind us that they are fraternal, not identical twins. In one important respect, democracy is Jacob to market capitalism's Esau. Though capitalism is clearly the older sibling, democracy can, if it will, have the upper hand. Capitalism, as we have seen, is fundamentally a creature of law; in democracy, law is, at bottom, the servant of the people's will. If, in their sovereign power, the people decide to kill the goose that lays the golden eggs, that is entirely within their prerogative. Expropriation, remember, is always only two steps away: First the repeal of the just compensation clause, then the enactment of the confiscatory statute. And, so, remember, is enslavement. The people are not only entitled to expropriate the capitalists; they are equally entitled to enslave both the capitalists and the workers. They can as easily repeal the Thirteenth Amendment's guarantee of freedom as the Fifth Amendment's protection of property.

This is the basic failure of democratic government with respect to the state's redistributionist and artist functions: Once we ask a government, as a democracy, to give people more than they earn in the market place, by a measure other than what the majority chooses to give, individually as gifts or collectively through state redistributions, then we are asking more than a democratic government can, on democratic principles, be made to deliver. We are asking, in effect, not for the people's will to be done, but for some vision of the public good to be served. That is not the task of even a perfectly efficient democracy; that is the task of an artist republic, a state devoted, not to doing the people's will, but to serving the public good, or, in more old-fashioned terms, the common weal. The important thing to notice here is that democracy, in and of itself, offers no such supplementary value, no terms in which to state, much less standard by which to measure, the public good.

d. Democracy and Governmental Functions.

Democracy itself offers little guidance, at either the systemic or the individual level of analysis, to guide the state in its various functions. It cannot hold the state to the metrics that the capitalist market implies for its Ricardian and Regulatory functions, either for minimal market infrastructure or for maximum economic efficiency. More seriously still, it offers only the most minimal metric for its other two functions, the redistributionist and the aretist, nothing beyond what is necessary to maintain a system in which citizens can express their preferences politically and have those preferences carried out.

Democracy can, of course, easily accommodate such values as expressed in the preferences of a majority of voters. The majority can be altruistic as well as self-aggrandizing. But the preferences of voters can produce, in theory and in practice, very peculiar redistributions, if tested against any criterion other than voter preference itself. Think only of our hypothetical, hyper-democratic program: “Soak the poor, then enslave them.”

Liberalism, as we have seen, offers real constraints on these scary popular preferences. But, as we have also seen, liberalism is, in our legal arrangements, a choice of the people that they could choose to change. And there is more bad news, which we will take up in the next subsection. This is the bottom line: Even if democracy leaves liberalism in place, liberalism offers democracy very little of what we are looking for, guidance as to government’s redistributive and aretist functions.¹⁴⁰

(1) Liberalism’s Limits: Limited Guidance – and Limits on Guidance – from the State.

If we look to liberalism to guide the democratic state in performing its four functions, we come upon a paradox: Depending on where we look, we find either too little guidance, or too much. To unpack this paradox, we will need to draw several distinctions within liberalism itself. First, we must distinguish Constitutional liberalism,

¹⁴⁰ REA: *Need to add more on democracy’s lack of any substantive guidance for the individual voter, like capitalism for the consumer.*

the liberalism embodied in our constitutional order, which is essentially classical, negative liberalism, from theoretical liberalism, which covers a much wider spectrum.

Constitutional liberalism, we shall see, permits our democracy a wide range of options in directing redistribution and aretism, the two government functions for which we have yet found only minimal metrics. This accounts for the first half of the paradox: It is Constitutional liberalism that provides too little guidance.

What, then, of theoretical liberalism? Along the spectrum of liberal theory, we will need to distinguish right liberalism, which is essentially the libertarianism of our minimalist, Ricardian state, from left liberalism, which is something like the social democracy of the European-style welfare state.¹⁴¹ There is, of course, a wide range between these poles. What is more, theoretical liberalism's right and left poles gives us almost diametrically opposed positions on the two government functions for which we particularly need more precise metrics, redistribution and aretism. The libertarian right would ban all aretist redistribution beyond the minimum necessary for a liberal democratic polity and a capitalist market economy; the social democratic left would require a welfare state of at least Scandinavian size and scope. And the long spectrum that runs between these left and right poles offers an almost infinite array of intermediate positions on aretism and redistribution. This accounts for the second half of the paradox: It is theoretical liberalism that provides too much, an embarrassingly rich range of measures for government's four functions, some radically at odds with others.

But is there no way to bring the two halves together? Here we reach the crux of our paradox. Our democracy cannot choose among the various forms of theoretical forms of liberalism without violating the terms on which all liberals, left to right, agree. Very near the essence of theoretical liberalism is the neutrality principle, its insistent that the state impose no vision of the ultimate human good. The one thing all shades of liberalism

¹⁴¹ See Phillip Pettit, *REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT* 9 (1997) ("I distinguish between left-of-centre liberals, who stress the need to make non-interference an effective value, not just a formal one, or who embrace values like equality or the elimination of poverty in addition to the value of non-interference, and right-of-centre liberals – classic liberals or libertarians [citation omitted] – who think that it is enough to establish non-interference as a formal, legal reality.").

take umbrage at is the state's imposing any ultimate truth, even one of liberalism's own, as the permanent constitutional order. But to take a position on the state's redistributive and aretist functions is to move very much in that direction. Those functions, remember, operate to make citizens better, or better off; if the state were to be too insistent on what better is, it would have violated the neutrality principle, and thus ceased to be liberal. Theoretical liberalism embraces various aretist positions; to ensconce any kind of aretism in the Constitution is, for theoretical liberalism, to approach a contradiction of its own terms.

To approach, of course, is not to overstep; our Constitution could, arguably, embrace some measure of aretism. On a fairly flexible reading of the neutrality principle, that would not be to impose a particular view of the good, since the Constitution can always be amended. In that sense, our Constitution does indeed embrace one form of government, representative democracy, as "best." But we are looking for aretist guides for democracy, and here our Constitution contains only prohibitions, not positive mandates.

a) The Limits of Constitutional Liberalism: The Absence of Two Positives.

Constitutional liberalism gives democracy essentially no positive guidance in the way of either politics or ethics, the two principle realms of classical normative philosophy. This is because Constitutional liberalism is a species, though not the only species, of classical liberalism,¹⁴² and classical liberalism is essentially negative, in two related ways. Most obviously, it tells the state what it cannot do to the individual; in its own terms, it recognizes individual liberties, or rights. Less obviously, the classically liberal state declines to tell individuals much about how they should exercise their liberty; it is, in other words, virtually silent about ethics, how individuals should operate in the sphere of freedom that it guarantees them.

¹⁴² See Isaiah Berlin, *Two Concepts of Liberty* (1958); see also Pettit, *REPUBLICANISM*, supra at 8-9 ("...liberalism has been associated over the two hundred years of its development, and in most of its influential varieties, with the negative concept of freedom as the absence of interference....").

(i) Constitutional Liberalism's Limited Politics: Negative vs. Positive Liberty.

Classical liberalism famously favors of negative, rather than positive, liberty.¹⁴³ Its motto is “Ask not what your country can do for you; ask what your country can’t do *to* you.” The majority of your fellow citizens can vote to tax and spend to help you if they like, just as those wealthier than you can, without the prompting of compulsory laws, give you the crumbs from their table, even invite you to sit at their feast. But nothing in a liberal democratic polity, any more than in a capitalist market economy, compels any such concern for others, unselfish or otherwise. Nor does either sector necessarily require more of the other in the way of redistribution. A capitalist market economy, as we have seen, requires only a night watchman state (and not even a liberal or democratic one at that); a liberal democracy requires only an economy that satisfies the median voter. As we have just seen, that economy need not maximize economic efficiency, much less redistribute wealth, one way or another.

Our current constitutional regime is, strictly speaking, one of negative liberty, not positive liberty. As we have seen, our Constitution contains many liberal restrictions, substantive and procedural, on what the government can do to you; it contains virtually no mandates of what our government must do for you. To be sure, our democracy has been more or less generous, some times more than others; we have had both the New Deal and the Great Society. But all these programs are matters of grace, not right; all of them have been questioned as illiberal in theory¹⁴⁴, even as many have been attacked, sometimes successfully, in fact. Our fundamental law does not mandate even minimal care for our fellow citizens, much less brotherly love.¹⁴⁵

That said, even “negative liberty” implies some important positive pre-conditions. Just as we have identified the minimum redistributionist and aretist actions necessary for a

¹⁴³ Cite Pettit, REPUBLICANISM, on “non-interference” as basic notion uniting all schools of liberal thought.

¹⁴⁴ See, e.g., Epstein, TAKINGS.

¹⁴⁵ [cite concurrence in Yoder on absence of requirement of public schools; note possible response to Goldberg v. Kelly due process, i.e., drop welfare, and same for desegregated schools.]

minimal market economy and a minimally democratic state, so we can sketch them for a minimally liberal state. As we have seen with democracy, however, the demands this makes on the state are remarkably small; in the case of Constitutional liberalism, the necessary minima are only a little more generous. Constitutional liberalism implies a judicial apparatus in which citizens may assert that the state has violated the civil and political rights that Constitutional liberalism guarantees them; this judiciary need be no “bigger” than required to guarantee the minimum property rights essential to market capitalism and the electoral rights essential to democracy.

Our Constitution liberalism does, of course, mandate one positive guarantee, but that single exception tends to prove the general rule. If a citizen cannot afford a lawyer to defend against the state’s criminal charges, the state must provide one at its own expense.¹⁴⁶ So, too, in a civil proceeding the state brings to have a citizen incarcerated as insane.¹⁴⁷ In each case, the citizen’s right to positive assistance from the state is only triggered when the state attempts to interfere with the citizen’s basic liberty, and only then in the most intrusive of ways. The state can, in routine civil matters, sue to take your property with compensation; it is up to you to challenge that taking as improper or the proffered compensation as inadequate, with legal counsel only if you are able to pay for it yourself. Thus our Constitution’s only positive guarantee is merely an adjunct of its prohibition of governmental over-reaching. As long as our state chooses to leave its citizen alone, Constitutional liberalism provides them nothing else. Efforts to find in our Constitution a positive guarantee of even minimum sustenance have repeatedly failed.¹⁴⁸

(ii) Constitutional Liberalism’s Minimal Ethics: The Paucity of Passive Virtues.

Constitutional liberalism, we have just seen, has decidedly limited implications for our government’s four functions. Here we need to note a distinct but related vacuum:

¹⁴⁶ *Gideon v. Wainwright*, 72 U.S. 335 (1963).

¹⁴⁷ [Case on right to counsel in civil incarceration; add any other right to counsel cases, like loss of parental rights.]

¹⁴⁸ Cite cases rejecting Constitutional claims to basic necessities as fundamental rights, and declining to recognize poverty as a suspect class.

Classical liberalism, which our Constitutional liberal most resembles, has little to say about how citizens, even citizens committed to liberalism, live within the liberal state (and market economy).¹⁴⁹ Classical liberalism is thus a political theory in the strict sense, and it does not imply a corresponding moral theory. It does not, in fact, even imply that, in their individual lives, its adherents do much, if anything, to advance liberal political arrangements. If they do, it may be good for liberalism, but it is not good by any standard internal to liberalism (except, perhaps, systemic self-preservation, which is perhaps at odds with liberal neutrality).

Our government can, of course, encourage certain virtues, and so it does. Thus we have, as we saw in Part II, mandatory primary education, to ensure that future citizens can support themselves in our capitalist market economy and liberal democratic polity. So, too, the state can include in that curriculum civics and social studies courses, courses designed not only to help future citizens do well for themselves, but also to encourage them to “work and play well with others.” But here our state approaches a significant limit of Constitutional liberalism, a limit that is, in turn, grounded in theoretical liberalism’s neutrality principle.

(iii) The Presence of a Negative: Constitutional Limitations on the State’s Promotion of “Life-Plans.”

As we turn from Constitutional liberalism’s extremely limited positive guidance for the democratic state to its limits on that state’s promotion of life-plans, we encounter, at the very outset, an apparent paradox. Although Constitutional liberalism limits the state in its promotion of life plans, it nevertheless allows the state a robust artist function. As we have seen, our state can, and does, impose all sorts of value-preferences upon its citizens, in all kinds of ways. Every redistribution, as we have seen, involves an implicit preference for one allocation of wealth over another. Anti-pollution laws express a preference for cost-internalization, if not ecological integrity; expenditure on highways comes at the expense of mass transit. Taxing the wealthy to benefit the poor implies a preference for the latter; limiting the poor to food stamps, lest they buy alcohol and

¹⁴⁹ REA: see Pettit’s last chapter, “*Civilizing the Republic*.”

cigarettes, expresses a preference for nutrition over addiction. This kind of “retail aretism” is essential to all but the stingiest night watchman state, and entirely consistent with all but the farthest-right liberal principles.

The problem for Constitutional liberalism is aretism that is not “retail,” but “wholesale.” Constitutional liberalism allows a majority to impose all sorts of preferences *among* the preferences that all citizens act upon; what it discountenances is the majority’s imposition upon all citizens of preferences *about* preferences. To see this distinction more clearly, consider the case of addictive substances: cigarettes, alcohol, and other drugs. The liberal state can ban them, and has; the liberal state can impose discouraging high taxes upon them, and has. More to our present purpose, the liberal state can “speak” against these substances, in several ways. Most basically, it can inform its citizens of their disfavored legal status, in order to improve compliance with the law.¹⁵⁰ Thus the liberal state can certainly say “Sales of alcohol and cigarettes to minors is illegal”; “driving while drinking is a serious offense.” Having mandated that drivers wear seatbelts, the state may then post this billboard: “Buckle up; it’s the law.” Indeed, the state must make all of its commands available to its citizens somewhere, as a corollary of the basic rule-of-law requirement that there can be no offense in the absence of a law: *Nullum crimen sine lege*.

Beyond that, the liberal state can inform its citizens that consumption of these substances has extra-legal effects of which they may be unaware, and which they may want, in their own interest, to avoid. Hence the standard wording on cigarette packages “Warning: The Surgeon General has determined that smoking is hazardous to your health”; thus, too, the far from over-easy old television spot: “This is your brain; this is your brain on drugs.” The state thus takes a position on a range of human conduct, as a means of encouraging or discouraging it.

Cases like this, though, have a distinctly limited form; they recommend or condemn conditionally: If you’re concerned about your health, then you shouldn’t smoke;

¹⁵⁰ Note new case by tobacco companies against “warnings” with graphic descriptions; see NYTimes article quoting Floyd Abrams.

if you want a healthy baby, then you shouldn't smoke or drink while pregnant. They pose, that is, hypothetical imperatives, and hypothetical imperatives of a fairly limited scope. They tend not to proffer the way to be a good citizen, much less to be a good person or to have a good or meaningful life. In a sufficiently bland, "have a nice day" form, some such message might be permitted by our Constitution and adopted by one of our democratic legislatures. If the message became particularly pointed, however, it would run afoul of the current constitution doctrine¹⁵¹, itself grounded in basic liberal principle: The state cannot compel fundamental personal commitments.

Precisely how restrictive this principle should be is hotly contested, both in American constitutional law and in liberal theory. This should come as no surprise: It involves a liberal limit on democratic government, and thus a trade-off between liberalism and democracy that neither alone, nor the two together, can resolve absolutely. Depending on the vigor of one's liberalism, relative to one's democracy, one will draw the limit more or less strictly. Here we need to see where Constitutional liberalism places that line; later we will examine how contested that line is in liberal theory.

Constitutional liberalism clearly allows the state to mandate that its citizens' children study the basic skills and work habits necessary to support themselves, as adults, in our economy and polity. The state can mandate, not merely offer, training in the values and skills of the liberal democratic state and, by extension, the economic system it has chosen to adopt.¹⁵² The state may thus undertake to bring all of its citizens up to the starting line, in both the polity and the economy, at least minimally enabling all to "play the game(s)." *"Give a person a fish and you've provided a meal; teach a person to fish and you've provided a living."* The principle is intensely pragmatic: If the state does not see that each child is taught to fish, or at least cut bait, the state may well find itself feeding all too many of those children when they grow up.

¹⁵¹ E.g., cases on "compelled speech" in mandatory bar organizations.

¹⁵² See *Wisconsin v. Yoder*, 406 U.S. at 213 (There is no doubt as to the power of a State, having a high responsibility for education of its citizens, to impose reasonable regulations for the control and duration of basic education.)

This involves a dramatic “artist” decision in favor of something like “equality of opportunity.” It could also involve a fairly large measure of redistribution, in the form of state-subsidized education for those unable to afford it,¹⁵³ at least enough to ensure mastery of the three Rs adequate for political dialogue and economic bargaining.

Constitutional liberalism also allows the majority to go a significant step further: They may require that citizens’ children be taught, not only the skills and values necessary to succeed in a liberal democratic state with a capitalism market economy, but also the belief that this kind of polity and economy are themselves good.¹⁵⁴ A fortiori, it can require its teachers to teach these beliefs.¹⁵⁵ This belief in the virtue of America’s current social institutions is, essentially, the take-home lesson of much of what is called “civics education” in the United States today. The federal Congress subsidizes the inculcation of these beliefs fairly generously, and state and local governments include various forms of them their mandatory curricula, albeit in a haphazard and much-debated way.

But beyond this teaching of skills and values Constitutional liberalism draws a very clear line: The state cannot require anyone, teacher or student, to accept these beliefs as his or her own. Constitutional liberalism, in other words, distinguishes sharply between requiring the teaching that our system is good, on the one hand, and requiring personal affirmation of that teaching, on the other. The state, that is, can require that all student be taught that our system is good, in the hope that the students will adopt that belief, but it cannot require them to adopt that belief as their own. Thus the children of Jehovah’s Witnesses cannot be required, over their and their parents’ objections, to pledge allegiance to the national flag, or to the belief-system of the nation for which that flag stands.¹⁵⁶ As Justice Jackson wrote for the majority in that case,

¹⁵³ This does not imply public schools; vouchers for other schools could do the job. As we shall see, the criteria for making this choice are quite significant for our analysis.

¹⁵⁴ See *West Virginia v. Barnette*, 319 U.S. 624, 641 (1943) (“National unity as an end which officials may foster by persuasion and example is not in question.”).

¹⁵⁵ Cite references to “patriotic teachers” in *Pierce v. Society of Sisters*.

¹⁵⁶ *West Virginia v. Barnette*, 319 U.S. 624 (1943) (overruling *Minersville School District v. Gobitis*, 310 U.S. 586 (1940)).

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.¹⁵⁷

Nor is that the only limit that Constitutional liberalism imposes on this critical aspect of the state's aretist function, its effort to make its citizens' children better, as defined by a political majority. Although, as we have seen, the state can insist that all children be prepared for adult life, the limit on the preparation it can mandate, over parental objection, is pretty severe. Quite literally, it is the kind of education required to function on a nineteenth century family farm¹⁵⁸; more specifically, the Three Rs and the sort of civics we have already mentioned, up to but not through high school.¹⁵⁹ And the state cannot require that even this be taught in its own schools; parents can meet the state's requirement of this level of education at schools of their own choice,¹⁶⁰ even at home,¹⁶¹ subject to state certification.

It is important to bear in mind that even this "equality of opportunity," appealing though it is as a liberal and democratic criterion of aretist redistribution, is not required by either democracy or liberalism (and, as we shall see, is in considerable tension with the latter's neutrality principle.) Quite the contrary: even this level of education is a concession that Constitutional liberalism makes to democracy and a benefit democracy confers upon its citizens only because a majority wills it; it is compelled by neither Constitutional liberalism nor democracy.

¹⁵⁷ *Barnette*, 319 U.S. at 642; see also *Barnette*, 319 U.S. at 646 ("Any spark of love for country which may be generated in a child or his associates by forcing him to make what is to him an empty gesture and recite words wrung from him contrary to his religious beliefs is overshadowed by the desirability of preserving freedom of conscience to the full.").

¹⁵⁸ But note: this limit seems to apply only to religious objections; see *Yoder*, 402 U.S. at 215: A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations; to have the protection of the Religion Clauses, the claims must be rooted in religious belief.

¹⁵⁹ See *Wisconsin v. Yoder*, 402 U.S. 205, 211 (1925) ("Formal high school education beyond the eighth grade is contrary to Amish beliefs, not only because it places Amish children in an environment hostile to Amish beliefs with increasing emphasis on competition in class work and sports and with pressure to conform to the styles, manners, and ways of the peer group, but also because it takes them away from their community, physically and emotionally, during the crucial and formative adolescent period of life.")

¹⁶⁰ *Pierce v. Society of Sisters*, 268 U.S. 510, 534 (1925); *Mayer v. Nebraska*.

¹⁶¹ Cite home schooling case.

Thus, even in so obviously an important matter as inculcating our society's value in the next generation, a matter of fundamental importance to classical political philosophy, Constitutional liberalism is absolutely silent. Nor does its silence end there: Constitutional liberalism is also silent on whether citizens be given any positive assistance at all. Our Constitutional liberalism is long on liberty and equality, in the strictly negative sense of protecting citizens from state intrusions into their lives and the state's own invidious discrimination in conferring any benefits the majority may decide to offer. But Constitutional liberalism is completely lacking in fraternity, in requiring our state to lend its citizens any sort of guiding, much less helping, hand.

b) Theoretical Liberalism: The Embarrassment of Riches.

America's Constitutional liberalism, of course, nowhere nearly exhausts the possibilities of liberalism writ large. It is the legal instantiation of but one particular set of possible positions on the long spectrum of liberal theory. That spectrum runs, as we have seen, from libertarianism's night watchman state on the right to social democracy's welfare state on the left. What we need to see here is that, on the question of guidance for the state's optimal exercise of its redistributive and aretist functions, theoretical liberalism leaves us with quite the opposite problem from that of Constitutional liberalism. Even as Constitutional liberalism gives too little guidance, so, we shall see, theoretical liberalism gives too much.

Before examining that embarrassment of riches, however, we need to briefly note an ironic reversal of positions between Constitutional and theoretical liberalism. On the related issue of the liberal state's minimum level of aretist redistribution, theoretical liberalism requires less, not more. The basic reason is this: Theoretical liberalism, unlike Constitutional liberalism, need not involve democracy.

(2) The Minimal Liberal State: Less Democracy Means Smaller Government.

Liberalism, we need to remember, does not necessarily imply democracy. In fact, as the lessons of recent elections in the Middle East should remind us, democracy can

produce quite illiberal results. Conversely, distinctly undemocratic regimes can be quite liberal. Although our national mythology tends to obscure the fact, an “enlightened monarch” may be more easily kept within the bounds of liberal law than a fanatical democracy, whatever the source of its fanaticism, even as the ancients foresaw.¹⁶² Gibbon makes this point with particular eloquence about the Roman emperors:

The forms of the civil administration were carefully preserved by Nerva, Trajan, Hadrian, and the Antonines, who delighted in the image of liberty, and were pleased with considering themselves as the accountable ministers of the laws. Such princes deserved the honor of restoring the republic had the Romans of their days been capable of enjoying rational freedom.¹⁶³

In both the Classical world and the Enlightenment, Gibbon reminds us, the substance of liberty was valued more highly, in theory as well as in practice, than the forms of democracy.

In contrast to a democracy, a liberal state need have no electoral machinery; an absolute monarch, with full executive and legislative powers, could, in theory, be limited by liberal principles. As Gibbon implies, the principal institutional constraint on such a non-democratic liberal state is the law. The job of the judiciary, as in Marshal’s vision in *Marbury*, would be to declare what the law is, to keep both the legislative and executive powers, whether elected or not, within the bounds of the liberal constitution. It would have to guarantee that the laws promulgated by the monarch were implemented in an even-handed, rule-of-law way; it would also have to guarantee the basic negative rights of liberalism. And, of course, the liberal state, like every state, would have to provide basic internal order and external defense. But a minimalist liberal state would need only a monarch, a judiciary, an army, and a police force; none of this implies much in the way of wealth redistribution, aristocracy or otherwise.

¹⁶² Cite Plato’s *Republic* and Aristotle’s *Politics* on the dangers of democracy.

¹⁶³ Cite Gibbon. In many important ways, the late Habsburg Empire was just such an undemocratic liberal state. To cite a particularly poignant example, when Jewish refugees from the first World War were denied accommodations by the people of Vienna, Franz Josef offered to house them in the Schonbrun Palace.

(3)The Optimal Liberal State: More Guides Mean Less Guidance.

Liberal theory, as we have seen, covers a wide spectrum, from the libertarian right to the social democratic left. With respect to the two market-supplanting functions of government, the redistributionist and the aretist, this produces an equally wide range of possibilities. Indeed, much of what determines how “right” or “left” a liberal theory is comes down to how much wealth redistribution it calls for, and how much encouragement of a theory of the good it countenances. This wide range of liberal positions amounts, from the perspective of the four failure theory, to no guidance at all.

a) Wealth Redistribution: Anywhere from Almost None to Very Much.

The libertarian right wing of liberal theory calls, as we have said, for nothing more than the Ricardian, night watchman state. The only justifiable redistribution, on this theory, is the minimum required for the most barest-boned skeleton required to sustain a capitalist market economy and a liberal democratic polity.¹⁶⁴ By contrast, at least some left-liberal theories call for major redistributions of wealth, in order to achieve goals like equality of opportunity or at very least to supply basic human needs. What is more, some left-liberalism may allow even more redistribution than they require, perhaps beyond what we have identified as the redistributive ceiling, the point at which redistribution kills, or starves, the productive capacity of its capitalist geese. Thus to look to liberalism for guidance on the state’s redistributive function is find, not too little, but too much.

That said, theoretical liberalism, even on its left, commends aretist redistribution with a measure of awkwardness, if not embarrassment. As modern republican theorists have observed, all liberalism, including the farthest left liberalism, has a problem generating positive functions for, as opposed to negative limitations upon, the state.¹⁶⁵ In part, this may derive from liberalism’s core commitment to non-interference; on this view, “[i]f liberals are concerned with issues of poverty, ignorance, insecurity and the like, as many are, that is usually because of commitment independent of their commitment to

¹⁶⁴ See Richard Epstein, *TAKINGS*; ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974).

¹⁶⁵ Pettit, *REPUBLICANISM* at 9.

freedom as non-interference: say, a commitment to the satisfaction of basic needs, or to the realization of a certain level of equality between people.”¹⁶⁶

But the problem may lie deeper still. Liberalism’s commitment to non-interference may not only imply little if any redistribution; it may, more seriously, more or less seriously restrict such redistribution. The reason for this has to do with liberalism’s neutrality principle, to which we need now to turn.

b) Liberal Aretism: From Oxymoron to Neo-Aristotelianism.¹⁶⁷

The ambivalence of liberal theory, even on the left, about mandatory wealth redistribution lies in one of liberalism’s defining principles, neutrality toward life-plans, basic conceptions of the good.¹⁶⁸ For a political theory to have a positive, mandatory program for wealth redistribution, it must have an account of what purposes wealth redistribution is to serve, what good it is to do. As we have seen, all wealth redistribution is, at bottom, aretist; if it is to be minimally rational, it must be designed to make the post-redistribution world in some identifiable way better than the pre-redistribution world. Economists thus call for redistributions of wealth to support a regulatory regime that ensures economic efficiency, or wealth maximization. Democracy, similarly, calls for those redistributions of wealth that a majority of voters vote for. Liberalism, as we have seen, can in principle, and does in our own law, restrict majoritarian redistributions. To call for its own redistributions, however, liberalism would have to embrace what it essentially eschews: A particular vision of the good.

Liberal theories’ limits on aretism, like its limits on redistribution, run along a very wide range, depending on how strictly the particular theory interprets the basic neutrality principle. In its purest and most aggressive form, the neutrality principle would permit no state intervention whatsoever in the marketplace of ideas about the good life. In these

¹⁶⁶ Pettit, *REPUBLICANISM* at 9.

¹⁶⁷ For a more general analysis of the problems raised in this section, see the essays collected in Chapman and Galston, *Virtue*, Part III, *Liberalism, Neutrality, and Liberal Virtues*.

¹⁶⁸ See Stephen Macedo, *Charting Liberal Virtues*, in Chapman and Galston 204, 211 (“The distinction between public and private spheres of life, like the allied beliefs in the fundamentality of disagreement and in neutrality, is apt to close off the possibility of liberal virtues.”).

matters the state would have to remain strictly neutral. On this view, the liberal state could, for example, ban cigarettes and, beyond that, tell its citizens that cigarettes are bad for their health. It could not, however, urge its citizens to choose a healthy, tobacco free life-style. To go beyond informing citizens to the point of urging them to improve themselves by the state's own view of the good life would be to take a non-neutral position toward what the good life is. By extension, the liberal state could not urge upon its citizens that liberalism itself is good.

At the farthest right, the reason is this: There is no common good, as such; there is only the aggregate of what goods individual citizens seek. Thus the state can have no aretist function; there is no "better" for its citizens to be, except as they individually decide to be, by what lights they themselves choose to see, and follow. For the state to suggest otherwise is either for it to talk nonsense or, worse still, for it to press the naked preferences of a majority against the individual wills of its other citizens.¹⁶⁹

At the opposite end of the liberal spectrum, left-liberalism's less pure and aggressive version of the neutrality principle would allow at least the state at least as much intervention into the marketplace of ideas about the good as Constitutional liberalism.¹⁷⁰ The state could thus, as we have seen, take quite active steps not only to enable citizens to live what the majority believes to be the good life, but also to encourage citizens to believe that a particular social system is itself good. It could, for example, promote market capitalism and liberal democracy. The outer limit, again, would be requiring citizens to profess belief in any such system, upon pain of legal penalty.

Thus theoretical liberalism's positions on aretism, the state's role in making its citizens better in terms other than their own, runs from libertarian right-liberal prohibition of any state activity in the marketplace of ideas to the rather robust recruitment campaigns

¹⁶⁹ See Pettit, *REPUBLICANISM*, at 9 ("Self-described libertarians tend to think of the people as an aggregate of individuals – an aggregate without a collective identity – and they represent the state as ideally nothing more than an apparatus for accommodating individuals in the pursuit of their atomized concerns.")

¹⁷⁰ See JOHN RAWLS, *A THEORY OF JUSTICE* (1971) (adopting an Aristotelian conception of the good).

of the liberal left. Here again, as with wealth redistribution, theoretical liberalism gives too much, rather than too little, guidance.

e. Liberalism and Governmental Functions.

Redistribution and aretism, as we have seen, are closely correlated functions. All redistribution entails the implicitly aretist premise that the market's own distribution can be improved upon. Conversely, any program to make citizens better off will almost certainly entail redistributions of wealth. On the critical matter of guiding redistributive aretism in the democratic state, liberalism comes up quite short; how short depends on how rigorously one interprets its neutrality principle. The strictest version would call for something like laissez-faire capitalism; the most permissive would press toward socialism itself.

f. The Governmental Sector's Functions and Failures: The Balance Sheet.

The governmental sector complements the for-profit sector in four distinct ways; these are its Ricardian, Regulatory, Redistributive, and Aretist functions. The first two functions provide the essential foundations of market capitalism and help the for-profit sector overcome market failures, failures of the market to meet its own internal metric, economic efficiency. Even here, however, liberal democracy poses a problem of its own: a majority of voters may choose to ignore the internal metrics of market capitalism. They may fail to provide the minimum infrastructure that capitalism requires, or they may decline to regulate up to the point of maximum economic efficiency.

This latter may reflect, not the majority's lack of economic savvy, but its embrace of other values. The state's other two functions, the redistributive and the aretist, allow it to produce outcomes other than those toward which the market implicitly aims: Giving consumers what they are willing and able to pay for. The redistributive function allows the state to transfer wealth from the haves to the have nots, increasing the latter's "ability to pay," with an eye toward distributive equity, as opposed to allocative efficiency. And the aretist function allows the state to encourage production of goods and service that are desirable on a standard other than simply what consumers want.

But these last two functions, redistribution and aretism, unlike the first two, the Ricardian and the Regulatory, imply no precise metrics of their own, and none can be derived from the two distinctive features of our governmental sector, democracy and liberalism. Indeed, in its redistributive and aretist functions, the liberal democratic state can potentially undercut market capitalism itself, starving or killing the goose that lays its golden eggs.

Economics gives us a very clear function for its sector, the for-profit: Maximize consumer satisfaction, and a very precise metric for assessing performance, economic efficiency. That is the perspective of economic failure theorists. Political science¹⁷¹ gives us an even simpler standard for its sector, the governmental: meeting majority demand (within the constraints of Constitutional liberalism). That is the perspective of government failure theorists. But both those metrics leave us with essentially the same question: Can we find a vision of the common good, and a measure of the aretist redistribution needed to advance that good, other than aggregate consumer demand and median voter preference?

The very posing of that question points to a possible source of answers. To ask how the combined performance of the for-profit and governmental sectors might be enhanced by a metric other than their own implies that we are already looking elsewhere for both goals and measures. We are, that is, already looking toward another sector, the cultural sector.

3. The Nonprofit, Voluntary Sector: Our Pluralistic Culture.

The traditional four-sector model sees the cultural sector as addressing market and governmental failures, but conceived much more narrowly than set out above. In the traditional model, market failures only involve economic efficiency, and government failures only involve failures to meet supra-majority demand or optimal productive

¹⁷¹ By this I mean the descriptive side of modern politics, as opposed to its normative side, political theory.

efficiency.¹⁷² The market, that is, only fails to produce the optimal level of goods that consumers are willing and able to pay for; the government only fails to supplement that production at levels that satisfy citizens who want more than the majority votes for, or produces those levels with more inputs than are strictly necessary.

Our analysis has considerably expanded the notion of both market and government failure. We have shown that the market can be said to need supplementing in four ways: not just to correct classic “market failures,” but also to guarantee its essential infrastructure, to redistribute wealth, and to encourage excellence. These short-comings of the market, in turn, give rise to four governmental functions: the Ricardian, the regulatory, the redistributive, and the artist. Our particular state, in turn, has four short-comings of its own, weaknesses traceable to the same sources as its strengths; our state is nonprofit, non-voluntary, democratic, and liberal. This ordering of analysis tracks that of the traditional model and suggests, like that model, that the cultural sector might perform those functions that both the for-profit and governmental sectors perform less well.

As opposed to the capitalist market’s one function and metric, and the liberal democratic state’s four functions, all subject to majority preferences, the cultural sector would need, on this analysis, is to offer a backstop to all failing functions, with its own metric for the performance of each. That, obviously, is a very tall order.

In filling that order, the cultural sector doesn’t so much disappoint as confound. On the one hand, the cultural sector provides many goods and services undersupplied by the other sectors, and it offers finely calibrated metrics for its performance. On the other hand, these twin advantages produce an embarrassment of riches. The cultural sector offers both multiple and inconsistent visions of both which sectors should provide which goods and services and correspondingly varied metrics of functional performance. This brings us to the fundamental problem of the four-sector model: The choice among sectors

¹⁷² See Richard Steinberg (?) (sociologist) (note that charges of government “inefficient” may be tendentious; it may refer to “red-tape” restrictions that reflect value choices, and that are applicable to other sectors.)

to do various jobs often involves a judgment, not about how well a sector does that job, but about what that job is, and whether a particular sector should be doing it at all.

This section begins by following the trajectory of the four-sector model, tracing the function of the cultural sector as meeting the failures of the other two sectors. More specifically, it shows how the cultural sector can supplement those short-comings of the market that the state itself fails adequately to address, principally artist redistribution, on account of liberal democracy's own functional limitations. We then examine the functional limitations of the cultural sector itself. Like those of the for-profit sector and the governmental sector, these limitations, we will see, are the correlates of the cultural sector's essential characteristics: its membership is voluntary; its mode of operation, nonprofit. This is why the cultural sector speaks with many voices, none of which need be heeded and all of which are likely to be under-funded.

a. The Cultural Sector's Functions: Supplementing the State's Supplementing of the Market.

Our capitalist market economy has four limitations that the state's four functions address. When the state fails in any one of these functions, the cultural sector can, and often does, step in to make up the difference, pick up the slack. Following our earlier analysis, we will examine first the state's two market-supporting function, the Ricardian and the Regulatory, then its two market-supplanting functions, the Redistributionist and the Artist.

(1) The Cultural Sector and the State's Market-Supporting Functions, Providing Infrastructure and Correcting Classic Market Failures.

Market capitalism, as we have seen, has two significant internal problems: most basically, it cannot provide its own institutional pre-conditions; beyond that, it sometimes fails to provide efficient allocation, primarily on account of externalities and information asymmetries. Though market capitalism cannot solve these problems, it gives for each a viable, if by no means simple, metric: on both, spend until the last "corrective" dollar produces exactly one dollar more in net "efficiency."

To see how nonprofits may help with both these problems, infrastructure and inefficiency, let's consider two particular sets of goods and services, elementary education and the protection of property. Let's begin with property protection, which seems at least on first face, the most basic, the "product" on which capitalism most depends. Only the state, as we have seen, can create the legal institutions of private property; without that, there is no property, and no capitalism. But, as our shop-keeper example illustrated, enforcement of the law is another matter. People can protect their own property, thus relying on the household sector, or they can hire guards, relying on the for-profit sector. But hiring private guards, we saw, produces external benefits; the guard you post outside your shop will discourage theft at my neighboring shop as well. Private guards, accordingly, will likely be under-supplied in the for-profit system. Here, as we saw, the government can step in, taxing the entire community to pay for an umbrella of police protection that covers, and thus benefits, the whole community.

But, as we have also seen, a democratic government may choose not to provide the appropriate level of police protection, either to sustain the minimal property protection for a capitalist economy to exist or the likely higher level of police protection necessary for that economy to operate efficiently. Here the cultural sector can step in and supplement both the market and the state. That, in effect, is what neighborhood watches do. And, of course, citizens' groups are not limited to watching out for street crime; they can also "watch the watchers," monitoring the performance of the government itself.¹⁷³ One way to improve the performance of public schools, we have seen, is for parents to form Parent Teacher Associations.

Public education is, of course, is itself, of course, a governmental sector response to perceived undersupply of a vital service by the for-profit sector. As we have seen, an educated workforce is a more productive workforce; the literate and numerate make both more skilled workers and more sophisticated consumers. Knowing the three Rs is thus

¹⁷³ Smith and Gronberg, *Government-Nonprofit Relations [infra]* at 231 (noting that "voluntary associations can promote transparency and accountability in government and thus improve the quality and effectiveness of government services") (citation omitted).

good not only for the educated themselves, but also for all of the rest of us; elementary education, in that sense, confers external benefits. For that reason, it is unlikely that the market alone will provide enough education for a fully efficient market. This, again, would be an appropriate place for the state's intervention but, here again, the democratic state might fall short. This would be another place for the cultural sector to provide a correction to both market and government failure. If, as is likely, private individuals do not buy enough education in the market, and if the state does not adequately tax and spent to make up the difference, then the cultural sector can make up the difference with voluntary contributions of money, labor, or other critical in-puts.

This meeting of market failures that government itself fails to meet, under the market's own criteria of economic efficiency, is an important aspect of what the four-sector theory sees as the function of the cultural section. This is, in fact, the dual role identified by the complementary market and government failure theories: They provide goods and services that are undersupplied by for-profit firms on account of classic market failures and that the state supplies only up to the level that satisfies the majority of voters.

Nonprofits thus offer significant advantages in meeting the “infra-structural” and “efficiency” problems of the market that the government has problems addressing.

(2) The Cultural Sector and the State's Market-Supplanting Functions, Redistributing Wealth and Promoting the Common Good.

Markets, as we have seen, can also be said to fail – or, less pejoratively, need supplementing – for very different reasons: Not because they cannot produce their own infrastructure or always ensure the most efficient allocations, but because sometimes those very allocations are inadequate by other criteria than efficiency. Efficiency, remember, is giving those who can pay what they want at the lowest possible price; sometimes we want goods to go to those who can't pay, and sometimes we want goods not sufficiently appealing to the private consumer. These concerns call for the state's other two functions, redistribution and aetism.

But, as we have seen, here the liberal democratic state meets its most severe limits: Democracy's function is to provide what the majority wants, and liberalism provides no clear guidance on telling the majority what to want. What's worse, the liberal democratic state has no obvious metric for artist redistribution beyond sustaining the minimal conditions of market capitalism and liberal democracy. Any available metric could be ignored by democratic majorities; any effort to restrict majoritarian preferences by such a metric would run afoul of liberal limits on the state's promotion of ultimate value systems.

Here again, the cultural sector has much to offer – too much, as we shall soon see – as a supplement to both the government and for-profit sectors. The cultural sector is not only a means by which our society supplements the levels of production that the market and state alone would provide; it also provides metrics by which to assess the appropriate levels of social production. Every citizen, functionally speaking, is a member of the cultural sector as well as a consumer in the for-profit and citizen in the governmental sector. As a member of this third sector, as we have seen, every citizen can contribute to making up deficiencies in the provision of goods or services by the market and the state, using the market's metric of efficiency.

Here we need to see something quite different that the cultural sector offers. The citizen can also acquire from the cultural sectors standards by which to measure both the appropriate level of social spending on such goods as property protection and education, and the appropriate level for him or her to contribute to make up any deficiencies. And other individuals and organizations of individuals in the cultural sector can, and of course, do, provide just such standards. Many religions, for example, urge their members, and others, to give a certain amount of their resources to meet social needs; so, too, many cultural sector organizations, secular as well as religious, provide their members with standards of how much – or little – to expect the state to provide where the market fails, and how much (or, again, how little) other social institutions should provide when the market and the state both fail.

Thus, we might say, the cultural sector involves the production and transfer of standards that supplement those of the market on the one hand and the government on the other. But why are these standards the peculiar province of the cultural sector? Precisely because of the market and governmental failures we have identified. Individuals, we have said, “acquire” these standards in the cultural sector; individuals and institutions in the cultural sector “provide” them. The mode of transferring these standards is important, for it points to a vital aspect of the cultural sector’s role. These standards are not typically available from for-profit suppliers, because they are public goods.¹⁷⁴ And they are not typically available from the liberal democratic state, because that state is doubly constrained. As a democracy, it is not likely to promote ideas seriously at odds with those of a majority; as a liberal state, it is limited, to a greater or less extent, in promoting any particular vision of the good ordering of society or the good living of individual lives, and that is precisely what these standards entail.

On this analysis, then, the cultural sector both fills a critical gap left by both the market and the liberal democratic state and finds a function uniquely its own: Providing a vision of the common good beyond aggregate consumer demand on the one hand and the preferences of the marginal voter on the other. What’s more, the cultural sector can also provide quite precise measures of how well that common good is being served.

All that, of course, should be very good news: here is a source for the qualitative standard and quantitative metric we have been looking for; here, too, are a kind of organization that provide ordinary goods and services in ways that avoid at least some of the limitations of both for-profit firms and governmental entities. But, as I’ve forewarned, that’s only half of the story; now the other shoe must fall. The nonprofit sector provides not just one such uber-metric, but many.

¹⁷⁴ See Weisberg, *Economic Theories*, supra, at 129 (noting that, although “[g]overnment and for-profits also play roles in seeking to change preferences,” “much more research should be conducted on the distinctive roles best played by each sector.”)

b. The Cultural Sector's Limitations.

Organizations in the cultural sector are voluntary and nonprofit. These defining characteristics, as we have just seen, combine to give them certain advantages over for-profit organizations and governmental entities. Because they are nonprofit, they can provide goods and services under-supplied by the market, owing to garden variety market failures. Because they are voluntary, they need not heed either the demands of majoritarian politics or the constraints of liberal constitutionalism. They can offer goods and services that the majority undervalues, like education, and they can offer “products” that the liberal state cannot supply, like religions and other “holistic” value systems.

But that is only half the story; a complete analysis of the cultural sector reveals that the glass is half empty as well as half full. The very sources of its relative advantages – nonprofit operation and voluntary membership – also impose serious limitations, relative disadvantages vis-à-vis the for-profit and governmental sectors. These are the sources of “nonprofit failure.”¹⁷⁵

(1) Nonprofit Limitations.

We have already encountered one problem of nonprofit status in our analysis of that aspect of the governmental sector: Without the inducement to increase net revenues they can distribute to themselves, those who control nonprofits lose an important incentive to both minimize production costs and innovate in the goods and services they produce.¹⁷⁶ Although nonprofit organizations can and do use various strategies to reduce this problem¹⁷⁷, none can eliminate it entirely. What is more, loss of the possibility of

¹⁷⁵ Also known as “voluntary failure”; see Salamon, *Partners in Public Service*, at 111. Salomon summarizes the philanthropic sectors failings this way: “It is limited in its ability to raise an adequate level of resources, it is vulnerable to particularism and the favoritism of the wealthy, it is prone to self-defeating paternalism, and it has at times been associated with amateur, as opposed to professional, forms of care.” *Id.* at 113.

¹⁷⁶ See Hansmann, *Economic Theories*, at 38; Hansmann, *Role*, at 878; Weisbrod, *The Nonprofit Economy*, at 14-15. See also Richard Steinberg, *Nonprofit Organizations and the Market*, in *THE NONPROFIT SECTOR*, *supra*, at 118, 127-30 (noting mixed empirical data on the extent to which nonprofit managers succumb to this problem). See also Fama & Jenson, *Agency Problems and Residual Claims*, 26 J.L.&Econ. 327 (1983) (noting mechanism nonprofit firms have developed to address this problem).

¹⁷⁷ See, e.g., Weisbrod, *The Nonprofit Economy*, at ____ (“[I]f managers of nonprofits derive relatively greater personal satisfaction than their proprietary counterparts do from providing a particular service, then

private profit costs nonprofit organizations an important source of capital in the first place: the prospect of receiving positive returns on investment. And, along with that source of incentives and investors, they lose a monolithic goal; hence the perennial question of nonprofit production: If not for profit, for what? Even as they lose an easy definition of function, so they forfeit an extraordinarily easy metric of performance: maximizing the difference between production cost and sales price. Once an organization takes upon itself any purpose other than maximizing a profit, it must find another metric for measuring how “well” it is doing that particular “good.”

(2) Voluntarism’s Limitations.

As their nonprofit status places cultural sector organization at a several disadvantages over against for-profit firms, so their voluntary status places them at several disadvantages over against the state. Unlike citizens of the modern state, members of nonprofits are not born; they have to be recruited. And, even after they have been recruited, they are free to leave, on terms of exit they agreed to upon entry. This is a particular problem with nonprofit finance: Unlike the state, charities can only tax those who, in effect, choose to be taxed, and only at the level each member determines to be satisfactory. As a result, nonprofits are profoundly hampered in their capacity to redistribute wealth.

Voluntariness also imposes real limits on nonprofits in advancing their particular vision of the public good. With respect to those outside their membership, their methods are purely persuasive; they cannot make nonmembers listen, much less obey. What’s more, the fact that their membership is voluntary means not only that charities cannot force members in; it also means that the state cannot, in effect, keep cultural sector organizations from forming, for virtually any legal purpose. This must, under our own Constitutional liberalism, include forming to promote whatever view of the public good that members can agree on among themselves, no matter how distasteful this is to the majority of voters. This has meant, in a nation first populated by dissenters and dissidents

there would be an incentive for nonprofit managers to be efficient even though they cannot benefit financially.”).

and repeated infused with more of the same, our cultural sector offers a wide range of competing visions of the public good.

c. The Cultural Sector's Functions and Failings: The Balance Sheet.

The cultural sector, like its for-profit and governmental siblings, has, relative to the other two sectors, both strengths and weaknesses. Indeed, we can see with the cultural sector, as we saw with the other two sectors, that its very strengths are, in essence, the sources of its weaknesses. What sets it apart from the for-profit sector, the nondistribution constraint that is the core of nonprofit status, allows its constituents to overcome the kinds of market failure that beset for-profit firms in the production of a wide range of goods and services, particularly those that involve information asymmetries and positive externalities. On the other hand, that same nondistribution constraint comes at considerable costs in both operational directions and production incentives.

Similarly, the very voluntariness that sets cultural sector organizations apart from the state and its sub-units also seriously limits their effectiveness. They lack the state's power to aggressively redistribute wealth by the classic method, taxing and spending. And cultural sector organizations produce, not a single, if constrained, definition of social problems and solutions, but a cornucopia of competing visions of the public good, and bad. Even as liberal democracy cannot produce a coherent and consistent vision of the way ahead, the cultural sector cannot but produce many such visions, which point us in all the directions of the political compass. Here, in essence, is the problem: In our society, the cultural sector is uniquely suited to assigning and assessing sectoral functions, but in our society the cultural sector does not give a unique set of criteria, but many, and many of them are radically inconsistent with each other.

d. Closing the Four Sector Circle Without Begging the Basic Questions?

In our survey so far, when we reached the problems posed by a particular sector, we turned to another for solutions, first the for-profit, then governmental, and now the cultural. When we reach the limits of the cultural sector, however, we have come full circle; for solutions to those problems, we will have to look back to the other two

sectors¹⁷⁸. It is not that we have started in the wrong place; it is, rather, as we said at the outset, that we will find, wherever we start, that we are describing, not a linear function, but an essentially closed system. Had we begun, as some have done, with a different social sector, we would have described much the same cycle.

Consider, for example, starting with the cultural sector¹⁷⁹, assuming that, in the absence of some problem, charities provide all goods and services, financing that provision with either donations or sales. From that perspective, the government's fiscal functions could be seen as themselves meeting a kind of "nonprofit failure": the government coerces payment only as needed to make up for short-falls in what charities receive as gifts or purchases. This would be the answer to the bumper-sticker prayer: May I live long enough to see the government hold bake-sales to buy battleships (and spend taxes on schools). Democracy offers the tie-breaker among choices, qualitatively as well as quantitatively: we indulge the preferences of the majority in matters of artism and redistribution (and, for that matter, in the Ricardian and regulatory functions as well) exactly as much as the majority wants above charitable provision.

Constitutional liberalism serves to maintain a kind of "peaceful coexistence" among competing cultural ideologies, forbidding them to use force among themselves and forbidding the state to exercise too great a preference, for its part, among the competitors. As for goods and services that neither the state nor the cultural sector produces particularly well, we leave them to the for-profit sector, with its greater sensitivity to individual consumer preferences and its stronger inducements to productive efficiency.

From this perspective, the governmental sector thus responds to "cultural sector failure," even as the for-profit sector responds to a re-defined form of "government

¹⁷⁸ See Steinberg, *Economic Theories*, *supra*, at 127, "Closing the Circle: Reacting to Voluntary Failure" ("[W]e need now to specify how the other two sectors respond to this voluntary failure.")

¹⁷⁹ See Lester M. Salamon, *Partners in Public Service: The Scope and Theory of Government-Nonprofit Relations*, in *THE NONPROFIT SECTOR: A RESOURCE HANDBOOK* 99, 111 (Walter W. Powell, ed.) ("turn[ing] this discussion [of sectoral functions] on its head, to reject the view that the voluntary sector is merely a residual response to failures of government and the market and to see it instead as the *preferred mechanism* for providing collective goods.") (original emphasis).

failure,” failure of the government to provide what the cultural sector failed, in the first place, to provide. Thus the for-profit sector, not the cultural sector, becomes the residual, rather than the primary, sector. As one scholar mused long ago (with a lyricism he now finds more than a little embarrassing), “on this view, the invisible hand of the market, operating without regard to need, is not the ideal, but a necessary stopgap where the helping hand of altruism, implementing conscious concern for need, has not yet reached.”¹⁸⁰

In traversing a sphere, all routes come back, eventually, to where they began. Think back to fifth-grade social studies. Toward the turn of the fifteenth century, the major powers of western Europe sought a route to the luxury trade of the Far East; at least a little counter-intuitively, they sought those routes in every direction but East, the route dominated by the Venetians. The Portuguese, pressed by Henry the Navigator, sailed southeast around Africa, then northeast up to India and on to Japan. Columbus and Magellan for Spain, like the Cabots for England, sailed West; Magellan eventually reached the same ports of call in Asia as the Portuguese. His way home was their way out.

Columbus, of course, was correct; you can reach east by sailing west, and vice versa, even as we can describe the same cycle of sectors starting with any one we choose. But the scenery is very different along the way, and the way initially taken has profound effects on the future: Portugal’s route planted its colonies all along the coast of Africa, India, the Spice Islands off southeast Asia, even the Chinese mainland. Spain’s westerly route gave it the bulk of Latin America; England, France, and Holland’s search for the Northwest Passage gave them overlapping claims to North America.

The four-sector account of the role of charity is, by contrast, essentially a-historical. It generally fails to take account of path-dependence¹⁸¹, of the significance, historically speaking¹⁸², of which sector actually did undertake first the provision of a particular good or service. Charitable hospitals came before for-profits, with effects we still feel today.

¹⁸⁰ Rob Atkinson, *Altruism in Nonprofit Organizations*, 31 B.C. L Rev. 501, 638.

¹⁸¹ Cite on path dependence.

¹⁸² And the parallel game-theoretical problem of the Arrow Paradox.

Also, in the assignment of various goods and service to particular sectors, as in the assignment of colonies in the Western and Southern hemisphere, priority has significant normative implications; we tend to think, rightly or wrongly, that earlier claimants are not only chronologically, but also normatively, prior¹⁸³. Finally, and not least significantly, we tend to think of some claimants themselves as inherently superior to others, often on what are, at best, insufficiently examined grounds. Remember that the European explorers' planted their sovereign's flags and crosses, not in unoccupied lands, but in lands not occupied by Christian Europeans.¹⁸⁴ Something similar, we might imagine, lies behind the fate of the "public option" in the current health insurance debate.

All this suggests the advantage of a synoptic perspective, a way of seeing the relations of the various sectors not sequentially, but simultaneously.¹⁸⁵ At very least, seeing the various sectors simultaneously suggests that their respective functions are less about correcting failures and more about achieving optimal complementarity. But I suspect a change in perspective will reveal much more. Considering the function of one sector first may imply that that sector is, indeed, primary, and that proper recourse to other sectors is only by default, and, even in default, in the order presented, from secondary to tertiary. What is more, a seriatim treatment of sectoral alternatives may also tend to obscure the fact that the goods and services we seek from particular sectors do not flow from the respective sectors' inherent strengths or weaknesses, but rather from very real decisions, perhaps made in the forgotten past or unconsciously in the present, about how we want our social world to be. From this perspective, we will see that sectoral assignments are not found, but made, and that, accordingly, they involve a good deal more choice, present or past, conscious or not, than the four sector theory has implied. We will also see that, in ways the four-sector model tends to obscure, the bases of these choices ultimately lie in the cultural sector.

¹⁸³ See *Johnson v. M'Intosh* 21 U.S. 543 (1823) (John Marshal) (stating international law of territorial acquisition as discovery followed by occupation).

¹⁸⁴ *Johnson v. M'Intosh*, 21 U.S. 543 (1823).

¹⁸⁵ I am by no means the first to see the significance of this shift in perspective. See, e.g., Richard Steinberg offers his own outline of an "integrated theory," in Powell, 2d ed.

e. **Toward a Global Perspective: Assessing the Four Sectors Simultaneously.**¹⁸⁶

This section views the four sectors of our society, not *seriatim*, as a series of answers each sector gives, in its turn, to failings of the others, but simultaneously, as alternative providers of any given good or service. From this perspective, we will first notice that all three sectors depend, for their very existence, on the other sectors; to use a term we have already employed in examining the for-profit sector, each sector provides essential infrastructure for the other two, even as each relies on the other two for its own infrastructure.

Against that background of mutual dependence, we will then re-examine the provision of two exemplary products, property protection and primary education, by each of the three sectors. We will notice that these assignments involve measures other than those that the four-sector model suggests, measures that must come, themselves, from the cultural sector. We will, in effect, “get behind” what consumers pay for and what citizens vote for, tracing their preferences in both the marketplace of the for-profit sector and the voting booth of the governmental sector to the core of the cultural sector, the “marketplace of ideas.” We will, in that sense, sketch a much-abbreviated cultural history onto the four-sector model’s generally a-historical account.

Finally, we will take our synoptic level of analysis to a higher level of resolution; we will notice that the cultural sector gives us, not just measures of the what goods and services should be produced by which sectors, but also whether we should have our present sectoral arrangement at all. At least some cultural organizations, as we shall see, do not just tell us what role the cultural sector is to play in a capitalism market economy and liberal democratic polity; beyond that, they ask us to question the current foundations of those very sectors themselves.

¹⁸⁶ For a survey of similar efforts to supplement the four sector model with a more synoptic approach, see Smith and Gronberg, *supra*, especially their summary of two other theoretical approaches, “Model II: Civil Society and Social Movements,” *id.* at 229-33 and “Model III: Regime and Neo-Institutional Perspectives,” *id.* at 233-38, each with at least two significant subdivisions of their own. See also Steinberg, *Economic Theories*, *supra*, at 129-34 (noting the inadequacies of the “three failure” theory and outlining his own “integrated approach,” building self-consciously on the work of still others).

(1) Sectoral Interdependence: Each Sector's Providing the Others' Infrastructure.

Starting our initial survey of the four sector model with the capitalist market economy, we noticed that it depended, quite utterly, on the governmental sector to provide its essential infrastructure, a functioning legal system of property entitlements and their protection and exchange. We are now in a position to see, more broadly, that all sectors of our society depend on each other in corresponding ways. We will flesh this out with the for-profit sector, then with the governmental and cultural sectors.¹⁸⁷ Our emphasis will be on the reliance of all three sectors on the cultural sector. This is our emphasis, not because the cultural sector is in any absolute sense the most important, but because it is both the focus of our particular inquiry and the sector most often under-appreciated.

What we will have, in other words, will be the four-sector equivalent of those peculiar maps of the world made mostly in Australia, with the South Pole at the top and the North at the bottom. From this perspective, Australia and New Zealand come out “on top” of Europe and North America (even as the South of our own country comes out on top of the North). Even as that change in the orientation of the map does not change the “facts on the ground,” so reversing the orientation of our four-sector model may change nothing about the respective functions of the three sectors of our society.

On the other hand, those “upside down” antipodal maps are not drawn up for nothing, nor do proponents of the third sector chafe for no reason at the suggestion that the cultural sector is, in some real sense, in third place, an after-thought in the standard sequencing of the four-sector account. How we orient the model does not change the world, but it does reflect how we look at the world. In geography, that may not matter much; there is, in a very real sense, no ultimate “up” or “down.” But in politics and

¹⁸⁷ Here again, the household sector must get short shrift: On the one hand, all sectors obviously depend on households to produce the individuals who are its producers and consumers, its citizens and officials, and its members; on the other hand, households obviously depend on the other sectors for economic sustenance, legal protection, and cultural development.

economics, as in culture, the orientation of the model may matter a lot; when it comes to the cultural sector, that is much of what we are mapping.

a) The For-Profit Sector.

We have already seen how the for-profit sector depends on one of its sibling sectors, the governmental: The legal regime of private property is fundamental to a capitalist market economy. Less obviously but perhaps equally importantly, the for-profit sector also depends on the cultural sector. At least since Weber's controversial thesis about the relationship between modern capitalism and Protestant theology¹⁸⁸, scholars have noted that capitalism rests on a certain set of values that capitalism itself does not produce and that capitalism, left to its own devices, may not be able to sustain.¹⁸⁹ In terms of the four sector model, we can see this "culture of capitalism" as the product of a symbiotic relationship between the for-profit and cultural sectors.

b) The Governmental Sector.

Even as the for-profit sector depends for its legal infrastructure on the state, so the state depends, as a matter of historical fact, largely on the for-profit sector for its financial support. To recall our earlier metaphor, the for-profit sector is the goose that lays society's golden eggs. In our society, the liberal democratic state subsists largely on revenues generated, directly or indirectly, by the capitalist market economy.

We are now in a position to see, as many others have observed¹⁹⁰, that the liberal democratic state also depends on the cultural sector and that this dependence is even greater. Most obviously, a sufficient number of citizens must understand the basic "rules

¹⁸⁸ MAX WEBER, *THE PROTESTANT ETHIC AND THE "SPIRIT" OF CAPITALISM* (Peter Baehr and Gordon C. Wells, ed. and trans., 2002).

¹⁸⁹ See KENNETH BOULDING, *THE ECONOMY OF LOVE AND FEAR* 28 (1973) (citing Joseph Schumpeter, *Capitalism, Socialism, and Democracy* (1942)); see also ROBERT L. HEILBRONER, *THE WORLDLY PHILOSOPHERS* 308-11 (summarizing Schumpeter's theory that capitalism would eventually undermine the entrepreneurial society that created and sustained it) (4th ed. 1972).

¹⁹⁰ Macedo, _____ at 229 ("Thinkers as diverse as Friedrich Hayek, Irving Kristol, and Jurgen Habermas argue that the legitimacy and stability of liberal regimes is parasitic on the lingering presence of precapitalist and preliberal

of the game” well enough to participate in democracy, to make the system work.¹⁹¹ As we have seen, this is the stuff of basic civics, the fundamental democratic knowledge that the liberal state can, and often does, insist that all its citizens learn.

But knowing “the rules of the game,” no matter what the game, is never enough; proper play always depends on something like “sportsmanship” as well. For democracy to survive, much less thrive, a majority of the voting population must be committed to democracy itself. This commitment must occur at two distinct levels: commitment to “play by the rules” in each election and commitment to keep the rules in place from election to election. These commitments rest on culture rather than law, because the law cannot create them by fiat or coercion. The liberal state, as we have seen, can mandate the teaching of liberal democracy’s virtues, but it cannot compel belief in those virtues. Good citizenship, like good sportsmanship, is something the referee cannot inculcate alone.

Similarly, a liberal democracy can both forbid and prevent behavior that disrupts or corrupts elections — intimidation and fraud, for example. But democracy in principle does not require even that its electoral system function. A political majority might fail to provide adequate infrastructure; that would just seem like the expression of a majority desire not to have democracy, or to have very shoddy democracy. The democratic minima, like the market capitalist minima, is a hypothetical imperative: If you want this form of government (like that form of economy), you must provide at least this much infrastructure.

And, even with the electoral infrastructure in place, there is a deeper problem. A liberal democracy cannot, consistent with liberal principles, require participation. If the polls are open, but no one shows up to vote, then democracy has failed. This prospect points to an even deeper cultural commitment that law cannot ensure in a democracy: long-term commitment to democracy itself. The problem of citizens’ boycotting elections has a more aggressive, affirmative twin: showing up at the polls and voting against democracy itself. That, of course, is the point of the slogan: One person, one vote — one

¹⁹¹ Cf. Jefferson on literacy, in Pettit on Liberalism (or Rawls).

time. A fundamentally democratic government – a government that rests, ultimately, on the people’s will as expressed in elections – also rests, even more deeply, on a culture of commitment to just such a system.

A liberal democracy is thus radically contingent on the culture of that state’s population. If that population is itself committed to liberal democratic values, the state can be small indeed, and relatively inactive. It would little more than the libertarian night watchman state’s independent judiciary to “watch the watchmen,” at the behest of aggrieved citizens, to prevent the stealing of public elections. The stronger a state’s liberal traditions, the deeper its liberal culture, the less that state need depend on its laws; so deep is liberal democracy in the United Kingdom, nominal monarchy though it is, that it functions as a model of liberal democracy without a written constitution.

But, of course, the converse is also true: If its citizenry is not committed to liberal values, then the state would have to be very active indeed. So weak was liberal democratic culture in post-war Germany and Japan that liberal democratic constitutions had to be imposed from outside and guaranteed by occupying armies. Surely this is at least one lesson we have learned in Iraq and Afghanistan, the West Bank and Gaza. Nor need we go nearly so far afield to learn – or re-learn – that lesson. The states of the Old Confederacy accepted the liberal civil war amendments – African Americans’ freedom, citizenship, and enfranchisement – only at bayonet point (and only for as long as the bayonets were literally pointed). I say this most sadly, as a child of South Carolina, the last state to come into nominal compliance, only after the notoriously compromised Presidential election of 1876.

This historical and cultural reality poses a real problem for liberal theory. Under some circumstances, liberalism is only possible where its values are imposed by force on an unwilling population, not least a population accustomed to, or promised, majoritarian democracy. This points up, in practice, a deep paradox in liberal theory: the need to maintain commitment to even the most basic of liberal institutions, equality before the

law, without violating the most fundamental of liberal principles, neutrality among competing visions of the good.

The liberal democratic state is thus dependant, in the final analysis, upon a liberal democratic cultural sector. Indeed, the more serious the liberal state is about its neutrality principle, the core liberal commitment not to favor one set of fundamental values over another, the less the liberal state will allow itself to instill its own values even in its own citizens, and thus the more dependant it will be on the cultural sector for that very function. The liberal state may inherit its liberal culture by historical accident; more likely, liberal culture is the liberal state's parent rather than its patrimony, its creator and not merely its precondition. In a sense, this dependence of the liberal state on the cultural sector parallels the for-profit sector's dependence; just as for-profit sector cannot create and sustain the ethos of market capitalism, but must rely upon the cultural sector's engendering of the basic entrepreneurial values like honesty, thrift, and deferred gratification, so the liberal state must rely for on the cultural sector's engendering of basic liberal values like human equality and the rule of law.

c) The Cultural Sector.

As the for-profit and governmental sectors both depend on the cultural sector for the skills and values essential to their proper functioning, so, in turn, the cultural sector depends, albeit in different ways, on both of them.¹⁹² Speech and belief need to be free from both private violence and public coercion.¹⁹³ Without laws protecting freedom of expression and assembly, our cultural sector's essential "marketplace of ideas" would be no more possible than a literal marketplace without parallel protection of private property. Protection of citizens from physical assault by their fellows and from repression by the state itself is to the cultural sector what protection against private theft and public confiscation are to the for-profit sector.

¹⁹² See Smith and Gronberg, at 222 ("Perhaps not surprisingly, this [three failures] model presupposes the presence of a dominant market economy supported by democratic institutions.").

¹⁹³ See Smith and Gronberg, *supra*, at 228 ("Thus authoritarian regimes can destroy civil society by reducing the ability and willingness of individuals to organize for mutual benefit of political purposes.").

Less obviously, perhaps, the cultural sector also depends on the for-profit sector.¹⁹⁴ Financial support for the cultural sector comes, directly or indirectly, from the capitalist market economy. Donations to cultural sector organizations originate in earnings from the market; government support comes largely from taxes on income in the for-profit sector; there cultural sector organizations conduct their own profit-making operations as well.

Each of our society's three sectors – the for-profit, the governmental, and the cultural – is thus dependent, for its barest existence as well as its optimal function, on both of its sibling sectors. In turn, each sector provides the other two with vital infrastructure that they cannot provide for themselves. But this is all too easy to overlook with respect to the cultural sector, so firmly has it laid and maintained the foundations of both our liberal democracy polity and our capitalist market economy. In the next section we will see an equally significant, and equally often overlooked, contribution of the cultural sector: The blueprints we use to erect social institutions within all three sectors.

(2) Intersectoral Comparisons in the Production of Two Exemplary Goods.

We have just seen that the four sectors of our society are mutually dependant. We saw in the prior section that each sector has advantages and disadvantages vis-à-vis the others in providing various kinds of goods and services. We also saw in that section that each sector has its own metric by which to judge performance. The for-profit sector measures success by the metric of economic efficiency, the governmental sector by majority vote, subject to liberal constitutional constraints. For-profit firms must, and voters may, apply the measure of productive efficiency as well: getting the most output relative to input, most bang for the buck. What we need to see now is that the social assignment of the provision of goods and services among sectors, and among organizations within sectors, is a much more complex matter than our four-sector analysis has yet

¹⁹⁴ See Smith and Gronberg, *supra*, at 223 (“Wealthy, developed, diversified economies provide a very different context for the nonprofit sector than that of developing societies dominated by subsistence agriculture and barter exchanges.”).

indicated. Beyond that, we need to see that the reason for this complexity lies largely in the multiple orderings and metrics of value that the cultural sector gives us.

Returning to two of our earlier examples, primary education and property protection, will help us see why this is so. These examples work nicely here for several related reasons: Both primary education and property protection are part of the infrastructure of each sector; both of these services can, to a very large extent, be either financed or produced by any of the three sectors; and both services implicate many of the factors that go into choosing among the sectors, as well as the metrics for measuring performance.

Let's first reconsider property protection; as we have seen, it is obviously an essential service to all three sectors. In our prior survey, we noted that it can be provided by the state, through its police force; by the for-profit sector, through the hiring of private security guards; by the household sector, through arming oneself and one's family; or by the cultural sector, through forming a neighborhood watch.¹⁹⁵ As we saw before, property protection is likely to be undersupplied by the for-profit sector, on account of its positive externalities; the security guards that you and I hire for our shops will also make our street safer for Jones, down on the corner, without his having to pay. The state can address this problem: putting out more police by making Jones pay his fair share. If the state declines to take this step, you and I and other more community-minded neighbors can provide the extra protection we want with our neighborhood watch. We won't be able to overcome free-rider problems posed by Jones and his ilk to the same extent as the state can, but we can do a more economically efficient job together than apart.

But now we are in a position to ask a further question: Why doesn't the state, given its obvious advantage in terms of economic efficiency, provide the optimal level of police protection itself? The answer must have something to do with citizens like Jones; they seem too dumb, or too socially parasitic, to vote for the common good. But there is

¹⁹⁵ See Weisbrod, *The Nonprofit Economy*, at 26 (noting that "[u]ndersatisfied demanders for collective-type services can turn to the private market for substitutes for the governmentally supplied outputs" and that "[u]ndersupplied demanders can also turn to the private nonprofit sector").

more to be said: Perhaps Jones and others who favor lower levels of police protection than economic efficiency dictates have more positive reasons for their preference. They may affirmatively favor small government over the larger government that economic efficiency calls for here. They may be principled libertarians, people who want only a minimal, Ricardian state. Or they may be the products of a culture where the police are not sources of security, but fear. In what we ourselves call a police state, citizens do not generally think, as we do here, of the police as their friends; some of our citizens lived their formative years in such places. And, as we have seen, Jones may be willing to trade an increase in the police force for more or better public schools in poorer neighborhoods¹⁹⁶, or his own.

By adding this layer to our analysis, we can thus look behind the level of governmental provision that satisfies the government failure theory's marginal voter, and ask why that voter does not want more, when more is warranted by economic efficiency. In answering that question, we must look to the cultural sector. But notice that, even in giving our cultural sector account for the votes of Jones and his fellow favorers of small police forces, we have only said why they voted as they did. We cannot say whether that decision was right or wrong, without transgressing the limits of descriptive analysis. To say whether an inefficiently small police force is right or good, that is, we would ourselves have move from describing the norms offered by the cultural sector to evaluating those norms.

This problem becomes even more apparent when we re-consider our second exemplary case, elementary education. You, Jones, and I, remember, began with a neighborly discussion about educating our own children. We saw that each of us could do the job separately, at our respective homes; I suggested that we specialize among ourselves by comparative advantage, with each of us teaching the "R" we know best to all our children, in a kind of cooperative school. Or we could send all our children to any one of several kinds of schools operated by others: private, public, or for-profit. When we first

¹⁹⁶ Cross-reference to earlier treatment.

considered these options, we took into account only our own satisfaction as consumers, which in this case meant getting our children the best of the three Rs for our parental bucks.

On the one hand, the for-profit school has a real incentive to minimize production costs: its proprietors can keep any difference between production costs and selling price as profit, the market returns to their capitalist investment. On the other hand, the for-profit school's proprietors have, for the same reason, a perverse incentive to cut corners, trading on our inability either to monitor their provision or to fully evaluate their product, and thus to over-charge us. And we consumers ourselves, we saw, would likely be the source of another market failure, positive externalities. To the extent that elementary education, or at least certain elementary school topics like civics, involve benefits to others than ourselves and our children, we might well be inclined to spend too little to produce an economically efficient level of production. Both state and nonprofit schools lack the for-profit incentive to short-change us, and both state and nonprofit schools can give us tax- or donation-subsidized "discounts" that encourage us to buy more elementary education generally, or more publically-beneficial offerings particularly, than we ourselves otherwise would.

Nonprofits and state schools also offer a way to address two other problems with home-schooling and for-profit schooling, problems invisible to the market's metric of economic efficiency: Our poorest neighbors might not be able to afford either home-schooling or for-profit schools, and even families who can afford such schooling may omit certain "extra-curricular" courses, not because they hope to free-ride on the efforts of others, as with civics classes, but because they have little or no interests in those fields either for their own children or for society as a whole: music, say, or art. Here again, nonprofit and state schools can nicely supplement the market: They can provide free or below-market elementary education to the poor, and they can offer "culturally uplifting" "enrichment" courses like art and music at below-market rates to everyone. These are aspects, as we have seen, of the state's redistributive and artist functions, which the cultural sector can supplement.

Now we need to look more closely at several aspects of this arrangement that we have not yet examined. Most obviously, there is no free-lunch, any more at school than elsewhere. The full production costs of elementary education, like that of every other good and service, have to be borne by someone. Our example implied that the costs of for-profit school would be paid by parents, the costs of public school by taxes, and the cost of private school either by parents as tuition or by others as donations. And it further implied that our schools' relative advantages in economic efficiency were linked with their sources of finance. If you want to maximize productive efficiency, you choose for-profit schools; if you want to avoid information asymmetries and underproduction of external benefits, you choose nonprofit or state schools; you chose between these latter, too, if you want to ensure redistribution of educational opportunity and "higher-brow" cultural offerings like art and music.

Notice, now, that these implied linkages between the provider of education and the funder of education are not essential.¹⁹⁷ This is the insight on which voucher systems rest: The state can subsidize education not only by "producing" education in its own public schools; it can also give parents vouchers to purchase education from either for-profit or nonprofit schools. This makes it possible, in an important way, to have one's cake and eat it, too: The productive efficiency of for-profit schools along with the provision of education to children whose parents can't afford tuition. Who pays and who provides, then, can be re-combined to best advantage in various ways.

Nor is this the only linkage implied in our example that is not essential. To see another, recall the downside of for-profit schools: they may trade on information asymmetries to overcharge parents not well-positioned to assess the teaching standards of different schools. To prevent that, our example offered state and nonprofit schools, which lack that perverse underside of the profit motive. Now we need to notice other possibilities: We can, and do, impose state regulations on for-profits schools, even as we

¹⁹⁷ See Salamon, *Partners in Public Service*, supra, at 110 ("The central problem with the theory of the welfare state as it has been applied to the American context is its failure to differentiate between government's role as provider of funds and direction and government's role as a deliver of services.")

do on for-profit suppliers of other difficult-to-evaluate services, like health care and legal advice. And, as we have seen, we can rely on nonprofit monitors like charitable accreditation associations to supplement or replace state regulation. Here again, we can consider a range of options, with an eye toward the most cost-effective, or productively efficient, combination.

This brings us to a much more basic point. We need to remember that the criterion of productive efficiency, standing alone, is fundamentally question-begging. We only consider whether a particular supplier is cost-effective after we have determined that we want the product that it is supplying, and that we will accept that product from that supplier. With respect to elementary education, both these assumptions are deeply problematic: Some parents may not want it at all; some want it only from certain suppliers; some only want it financed from certain sources. And, as others have noted, this is true across the entire front: “government-nonprofit relations are deeply immersed in political ideologies about the proper role of government, preference for market structures, and priorities accorded to values of fairness, equity, equality, choice, and/or opportunities.”¹⁹⁸

We also need to remember that, even as the state can extract payment for education involuntarily, through the tax system, so it can, and does, compel the consumption of education, through mandatory attendance policies. The state, that is, is not limited, as our example has so far implied, to offering subsidized education to make it available to the poor and more attractive to the rest of us; it can, and does, compel us to educate our children through primary school, whether we want to or not. As we have seen, Constitutional liberalism does not permit the state to mandate education at government schools; parents are constitutionally entitled to educate their children at alternative schools, even at home. But the constitution does permit the state to mandate much of the content of primary education, and the mandatory curriculum may include not merely the three “Rs,” but also those subjects like civics, art, and music that, as we have seen, some

¹⁹⁸ Smith and Gronberg, *supra*, at 222.

parents may see as less than obviously useful. What is more, and for our analysis much more serious, some parents may see these subjects not as frills, or even frivolities, but as positively harmful.

And, from their own most profound beliefs about the well-being of their children, they may well be right. Teach children to fish, we have said, and you have fed them for a lifetime. Teach the children of the Old Order Amish to fish with monofilament line in an aluminum reel on a fiberglass rod, and you have tempted them to sin, to transgress the accepted ways of their elders, to threaten their ancestral way of life.¹⁹⁹ The state can, with the grudging permission of both their parents and the United State Supreme Court, insist that Amish children complete elementary school:

The Amish do not object to elementary education through the first eight grades as a general proposition because they agree that their children must have basic skills in the 'three R's' in order to read the Bible, to be good farmers and citizens, and to be able to deal with non-Amish people when necessary in the course of daily affairs. They view such a basic education as acceptable because it does not significantly expose their children to worldly values or interfere with their development in the Amish community during the crucial adolescent period. While Amish accept compulsory elementary education generally, wherever possible they have established their own elementary schools in many respects like the small local schools of the past.

But high school, public or private, is too much to ask, much less mandate; Old Order Amish parents for whom the Supreme Court invalidated such a mandate “believed that by sending their children to high school, they would not only expose themselves to the danger of the censure of the church community, but, as found by the county court, also endanger their own salvation and that of their children.” A post-secondary liberal arts education would, *a fortiori*, be anathema: “In the Amish belief higher learning tends to develop values they reject as influences that alienate man from God.”²⁰⁰ In the Amish

¹⁹⁹ See *Yoder*, 406 U.S. at 209 (citing the belief of Old Order Amish parents, which the state stipulated to be sincere, that for them to send their children to high school would “endanger their own salvation and that of their children.”)

²⁰⁰ *Yoder*, 406 U.S. at 209. According to expert testimony for the Amish parents, on which the Supreme Court majority evidently relied,

belief, bear in mind, higher learning means high school, and a woman's proper occupation is housewife to her farmer husband, in a kitchen with neither electricity nor running water.

In light of the Yoder case, consider, again, our civics or social studies class. Many parents, as we have seen, might be less than enthusiastic about paying for this course, seeing it as a not worth their money or their children's time. The liberal democratic state can nonetheless compel their children to take such a course, on the theory that the students themselves, and our society as a whole, will be the better for their being informed about their own culture and those of other countries.²⁰¹ Beyond that, though, the content of the course could be much more controversial. Should the children be told that, to succeed in our society (assuming that's what they and their parents want), they must study hard and stay in school? As we have seen this very semester, President Obama was excoriated for telling public school children very little more than that.²⁰² Should school children be taught that all societies are equally valid, and valuable, that lives of

Amish objection to formal education beyond the eighth grade is firmly grounded in these central religious concepts. They object to the high school, and higher education generally, because the values they teach are in marked variance with Amish values and the Amish way of life; they view secondary school education as an impermissible exposure of their children to a 'wordly' influence in conflict with their beliefs. The high school tends to emphasize intellectual and scientific accomplishments, self-distinction, competitiveness, worldly success, and social life with other students. Amish society emphasizes informal learning-through-doing; a life of 'goodness,' rather than a life of intellect; wisdom, rather than technical knowledge, community welfare, rather than competition; and separation from, rather than integration with, contemporary worldly society.

Formal high school education beyond the eighth grade is contrary to Amish beliefs, not only because it places Amish children in an environment hostile to Amish beliefs with increasing emphasis on competition in class work and sports and with pressure to conform to the styles, manners, and ways of the peer group, but also because it takes them away from their community, physically and emotionally, during the crucial and formative adolescent period of life. During this period, the children must acquire Amish attitudes favoring manual work and self-reliance and the specific skills needed to perform the adult role of an Amish farmer or housewife. They must learn to enjoy physical labor. Once a child has learned basic reading, writing, and elementary mathematics, these traits, skills, and attitudes admittedly fall within the category of those best learned through example and 'doing' rather than in a classroom. And, at this time in life, the Amish child must also grow in his faith and his relationship to the Amish community if he is to be prepared to accept the heavy obligations imposed by adult baptism. In short, high school attendance with teachers who are not of the Amish faith-and may even be hostile to it-interposes a serious barrier to the integration of the Amish child into the Amish religious community.

406 U. S. at 210-11.

²⁰¹ Something from *Wisconsin v. Yoder* line of cases.

²⁰² Obama speech; criticism of speech; criticism of critics of the speech.

dependency are no less worthy than lives of productivity? Or that our liberal democratic and capitalist market system is the best of all,²⁰³ but that others should be tolerated? That our system is better, and should be exported, but only by peaceful means? Or by any means necessary, including “pre-emptive” war or “wars of liberation”?

For some citizens and consumers, then, any amount of publicly subsidized education is too much. This is a corollary of limiting the state to its Ricardian function alone. On this view, the state should not be redistributing wealth, even if the intended recipients are allowed to decline the proffered benefit; it is wrong to rob the rich, and perhaps inappropriate to importune the poor. Others, of course, see free public education as minimally necessary to equality of opportunity, and thus to even a modicum of social justice. On the far political right, some consider compelled education an inappropriate state intrusion into the household or cultural sector, whatever the content; many nearer the center believe it to be the foundation of a viable and vibrant liberal democracy and market economy; some on the far left consider it inappropriate for precisely the same reason, for supporting a political and economic order they find oppressive.

Even if government provision could be shown to be more, rather than less, efficient, productively as well as economically, some citizens would still prefer other suppliers; some, that is, do not eschew government provision because it is productively inefficient; they choose productively inefficient providers in other sectors because they are nongovernmental.²⁰⁴ For cost-effective government provision comes, from the perspective of some, at one cost that is always too high: It proves that government can provide at least some benefits to its citizens cost-effectively.²⁰⁵ Thus it undermines the

²⁰³ Maybe another Presidential speech to school children, e.g., Bush or Reagan.

²⁰⁴ Smith and Gronberg, *Government-Nonprofit Relations* [*infra*] at 228 (“The dominance of this particular ideology [holding that government crowds out initiatives in the other two sectors] is evident in the extent to which arguments to privatize government and reduce taxes carry the day in political discourse and public-opinion polls.”).

²⁰⁵ See Smith and Gronberg, *supra*, at 228 (“[T]he contract system [of government out-sourcing to providers in other sectors] makes it more difficult for citizens to know that they benefit from government activities ... and thus undermines the legitimacy of taxes.”) (embedded citation omitted); see also Salamon, *Partners in Public Service*, *supra*, at 117 (“reliance on nonprofits to deliver publicly financed services can undermine public objectives and inflate costs.”).

joke: “I’m from the government, and I’m here to help you.” Stated nakedly, that position may sound paradoxical, even churlish; it counts what looks like a gain, governmental efficiency, as a loss. But, as the examples of elementary education and property protection illustrate, that position is often very highly principled. In the choice among sectors to provide even services as basic as these, one’s meat is decidedly another’s poison, all the more dangerous because all the more fundamental.

And, of course, religious opinion is no less polarized than political opinion, and the two are, at root, inseparable. Some among the Amish, as we have seen, believe that for the state to fully enable their children to participate in a modern secular society would, over time, be tantamount to destroying their traditionally religious way of life; others see the undermining of exactly these “family values” as an entirely appropriate effect, even purpose, of public education: If the Amish children decline to go back to their fathers’ farm once they have seen their fellow citizens’ city of liberty, equality, and fraternity, so much the better.²⁰⁶ In every nineteenth century French village were two antipodal life-paths: the way of the parish priest and the way of the Republic’s schoolmaster. In the banlieux of Paris today, the madrassas and the public schools stand even more obviously opposed. In one the boys and girls of France sit in the same classes, study the same curriculum, prepare for the same careers. No one wears a head scarf; perhaps more significantly, no one displays the cross of Christ or the Star of David. In many of the schools of the Prophet, of course, a different order obtains, even as different values are imparted. So, too, with schools devoted the Savior and the Torah, in the United States as well as in the French Republic.

Most of us embrace the wisdom of the Proverb, even if we have never heard its precise words: “Raise up a child in the way that is right and, when he is old, he will not depart from it.”²⁰⁷ But what the Philosopher said on the point is hardly as widely accepted as he himself believed: “That education should be regulated by law and should be an

²⁰⁶ Robert Atkinson, *Reviving the Roman Republic: Remembering the Good Old Cause*, 71 *FORDHAM L. R.* 1187 (2003).

²⁰⁷ Cite Proverb.

affair of the state is not to be denied....”²⁰⁸ And even Aristotle conceded the point that we need to underscore:

Mankind are by no means agreed about the things to be taught, whether we look to virtue or the best life. Neither is it clear whether education is more concerned with intellectual or with moral virtue.²⁰⁹

And he also implicitly makes another point, every bit as important to our analysis: We must address these issues not just as parents, as individual citizens and consumers within a given society, but also as legislators and theorists, attempting to analyze and improve that society itself. When we move from level of the individual within the system to the level of system evaluator, we find essentially the same confusion, an identical normative cacophony.

Precisely here, of course, the parameters of both our theory and our law are radically different from Aristotle’s. As we have seen, our law, being fundamentally democratic and only negatively liberal, does not necessarily compel any measure of public education at all; what (little) we have is a matter of majority preference, not constitutional mandate, because the liberalism of our constitution is almost entirely negative. Among the most basic of its prohibitions is mandatory embracing of fundamental values, the very values that would help us determine whether we should have public schools, and what they should teach.

Nor is our theory, at least the theory that underlies the four-sector model, any more helpful. It purports to be explanatory, not evaluative. It tells us what functions the various sectors are to serve, in order to advance certain ends; it even tells us how to measure how well those ends are being advanced. But it explicitly eschews telling us which ends are themselves worthy of our choice, and, without knowing which ends we are to choose, we never reach the question of how well our institutions are working.

²⁰⁸ POLITICS 321 (Book VIII, section 2); *see also* POLITICS 320 (Book VIII, section 1) (“No one will doubt that the legislator should direct his attention above all to the education of youth; for the neglect of education does harm to the constitution.”); *see also* Plato, *The Republic* 95 (“... it is fit to be sure about what we were saying a while ago, that they [the ideal city’s rulers] must get the right education, whatever that is....”).

²⁰⁹ POLITICS 321 (Bk. VIII, section 2).

Here, then, a value-neutral, classically social scientific analysis must stop. It can deal in hypothetical imperatives, and it can explain preferences, even ideologically-based preferences, tracing them back to their sources in the cultural sector and its institutions' impact on individual lives. But it cannot, in its own terms, recommend preferences. It can tell us what we have done, and even why we have done it. But it cannot tell us if we have done well, except in terms of our expressed preferences. Most importantly, it cannot tell us what to do next. It can, however, reveal one final feature of our society that is critical to understanding the role of the cultural sector.

(3) The Cultural Sector as Formative and Fundamental.

At the beginning of this section, we saw that all three sectors are essentially inter-dependent; each provides critical infrastructure for the other two. In particular, we saw how both our capitalist market economy and our liberal democratic state rest upon values derived from and sustained by our cultural sector. We have just seen how the cultural sector profoundly influences our choices about what goods and services to seek from which of the sectors; this built upon our earlier observation that the cultural sector's perhaps distinct product are visions of the good, for both individuals and society.

Here we need to notice a dynamic aspect of the cultural sector's value-forming role. Before, our analysis implied that voters and citizens "acquire" guidance in their political and economic decisions from the culture sector, as if they were the consumers of its products. To some extent, that is doubtlessly true. The culture sector provides not only alternative producers of most of the goods and services available from the for-profit and governmental sectors, but also directions as to which products, and which providers, to prefer. Now we need to notice another role of the cultural sector, the obvious fact that citizens and consumers are themselves the products, as well as the consumers, of their culture. We have seen one aspect of this already, in the acculturating role of elementary schools; civics classes are, at least in part, about making students better, not just better-informed, citizens.

As that example suggests, the liberal democratic state also plays a critical role, alongside the cultural sector, in advancing values and forming character. And so, too, does the for-profit sector, through its ubiquitous advertising campaigns. Ads do not merely entreat us to buy Marlboro cigarettes or Ralph Lauren outfits; they also enticed us to live the rugged, active life of the American West or the elegant, leisurely life of the English gentility, if only in the mode of Walter Mitty. But for-profit firms are limited to changing preferences in order to increase profits, and our government is limited both by shifting majorities and by Constitutional liberalism in forming and pressing full-blown normative schemes upon its citizens. Organizations in the culture sector know no such limits; for some of them, shaping individuals' preferences – in classical terms, forming their characters – to serve shared social goals is their *raison d'être*. They give us the belief systems that shape us, the symbols and signs we rally to. Under one of their signs, Constantine conquered, like David before and Mohammed after; under signs of their own, so too would Hitler and Stalin and Mao.

The demonstrable success of cultural organizations in their character-shaping enterprise points to another refinement we must make in the four-sector model: membership in the cultural sector organizations is voluntary, in a legal sense, but it is hardly unconditioned, in a psychological sense. This is, of course, especially true of children; that is the uncontested premise of the Yoder case. One need not embrace the full Calvinist doctrine of predestination to appreciate that I did not, in any real sense, choose to join the Presbyterian Church as an infant; we Presbyterians baptize early and teach the catechism along with the primary colors, well before the alphabet.²¹⁰ (The Young Pioneers, the Red Guards, and the *Wandenvogel* all began a bit later, but did their best to make up for lost time.)

And, although Presbyterians are among the solidest of our citizens today, loyal liberal democrats and enterprising market capitalists, it is worth remembering that the

²¹⁰ See Robert Atkinson, *Problems with Presbyterians: Prolegomena to a Theory of Voluntary Associations and the Liberal State*, in Charles Mitchell and Susan R. Moody, eds., *FOUNDATIONS OF CHARITY* (Hart Publishing, 2000).

Kirk and the state have not always been on such easy terms. The majority of the Long Parliament was Presbyterian, too, and the Long Parliament led the first phase of the Puritan Revolution that deposed the Stuarts and their notions of divine right monarchy. The Presbyterian Party balked, for better or worse, at the king's execution, but their fellow Calvinists under Cromwell established, albeit only briefly, an entirely new form of government, "a commonwealth or free state, without any king or House of Lords."²¹¹ Patrick Henry had precisely this in mind, in the less remembered lines of his liberty or death speech: "Caesar had his Brutus; Charles I, his Cromwell – and George III would profit by their example." As Michael Waltzer has observed, Geneva and Rome were the Moscow and Washington of their day; Calvinists and Jesuits were the easily identifiable antecedents of our own highly disciplined radical political parties.²¹²

To account for such developments, from the establishment of the Roman Republic to that our own, and beyond, we must add another element to our understanding of the role of the cultural sector. Earlier in this section, we saw that role as largely supportive, providing the critical infrastructure of liberal democratic and capitalist market values. That supporting role is certainly true of our cultural sector as a whole, but it is not true of each of our cultural sector's constituents. Quite the contrary; some call, more or less insistently, for radical alterations in all four sectors, including the cultural sector itself.

The cultural sector, then, is more than an under-appreciated continent at the antipodes of our social world, long due a turn at the top of an inverted globe. The cultural sector is better seen as something like the crust of the entire social world, the common stuff of all its land masses, even the floors of its oceans. We experience that crust as reassuringly solid in its support of our present political and economic sectors, but in fact there is always subterranean motion, and sometimes violent eruption, if mostly in places far from our points of observation. Once those apparently solid points were themselves molten and fluid; even now they imperceptibly drift on a permanently Protean substrate.

²¹¹ Cite Parliamentary Declaration.

²¹² Michael Waltzer, *The Revolution of the Saints*.

The cultural sector, on this view, does not merely perform the residual functions of the other sectors, thus ranking appropriately after them. Instead, it shapes the values that motivate candidates as well as voters, producers as well as consumers; it gives us both our ethics and our politics. If the cultural sector is, in any real sense, on the bottom of our cultural model, that is because, properly understood, it is the foundation of our social world.

f. From Descriptive to Normative Analysis: Turning the Four Sector Model Upside Down (or Inside Out).

We came to the four-sector model looking for the function of philanthropy in our society, and hoping to derive from that function a measure of how well philanthropy is doing. We have found more than we were looking for, perhaps more than we want, an embarrassment of riches. Social scientists of each sector of our society, we have seen, consign philanthropy to the periphery of their own discipline's focal functions. From the economists' perspective, the function of philanthropy is to maximize economic efficiency, albeit in those odd corners of the market where for-profit production predictably fails. From the political scientists' perspective, philanthropy's job is to meet supra-majority demand, to "top-up" government's satisfaction of the majority's preferences. Both accounts are plausible, as far as they go.

But neither account went, for our purposes, far enough. To see why people might want more than either wealth-maximizing or majority-mandated kinds or quantities of production, we had to look to the cultural sector, something in the manner of sociologists or cultural anthropologists. From that perspective, we saw that the cultural sector's function may be, not the residual, gap-filling functions assigned it by economists and political scientists, but a much more significant role: Defining norms for assessing all three sectors and, beyond that, providing models for entirely different social orders. The four-sector model, as generally used, implies that we are looking for a liberal democratic, capitalist market measure of philanthropy. We found that there is none, other than what consumers are willing and able to pay for, and what the majority of citizens elects. Our modification of that model has shown us, in addition, many philanthropic measures, not

only of philanthropy, but also of market capitalism and liberal democracy. That addition gives us a much more satisfying descriptive model.

At the same time – and largely for the same reason – our expanded descriptive model leaves us with a normative embarrassment of riches. As a descriptive matter, we can say why some people want production set by standards other than economic efficiency or marginal voter preference. But, as a normative matter, we cannot say which level is right without, ourselves, adopting one of the value systems in the cultural sector. That is a line that modern social science, for the most part, declines to cross²¹³, the frontier of normative ethics and politics.

On the other hand, social science itself is not ultimately “above” the cultural sector, absolved of taking one of its normative sides. The cultural sector offers, among its many perspectives, the descriptive mode of science, both social and natural. Social science, that is, does not in any sense “prove” the superiority of its “neutral” stance toward normative systems; it simply takes that position for granted – or, in attempting to defend it, invokes values necessarily borrowed from somewhere in the cultural sector itself.

If social science thus implicitly eschews recommending value preferences, the state’s provision of advantages to certain organizations over others entails precisely such preferences. Analysis of those advantages could itself be strictly descriptive. Such an analysis would tell us what those advantages are designed to favor, what they actually do favor, and both how well and how much. But, as we shall see in the next part, analyses of the favorable tax treatment of philanthropy have gone further: They have either recommended what kinds of organizations to favor, or at very least offered norms in terms of which that treatment could be evaluated.

These tax advantages loom large, in theory and in practice. They themselves involve large amounts of funds the state or its citizens might use for other purposes, and they also bring a host of other benefits in their wake, as a matter of fact if not always

²¹³ See Max Weber, [article or monologue on value-free social science].

logic²¹⁴. Perhaps for these reasons, the tax advantages afforded charity have attracted the primary normative attention of legal and economic scholars. As we shall see, these theories frequently rest, consciously or not, on various aspects of the descriptive model we have just set out. With that descriptive model as background, we can now turn to normative theories of our tax system's apparent preference for philanthropy.

III. Merits, Metrics, and the Special Income Tax Treatment of Charity.

This part reviews the normative theories of the exemption of charities' income and the deductibility of taxpayers' charitable gifts. Following not just these theories, but also the Internal Revenue Code itself, this overview gives precedence to charities' income exemption, treating donors' gift deduction as subordinate, if not derivative. Without too much tugging and hauling, both exemption and deduction theories fit into a quasi-Hegelian sequence of thesis, antithesis, and synthesis: the traditional subsidy theory, the antithetical definition of income theory, and the synthetic meta-benefit theories.

All of these theories are basically qualitative; they address the question of what "virtue" of charity (if any) warrants favorable tax treatment. But each, as we shall see, has important quantitative implications as well. Some theories imply quite robust metrics; others logically negate the need, even the very possibility, of any metric at all. Here we will also see an interesting interplay between qualitative theories and their quantitative implications: The implications that each of our theories of charitability has for measuring the goodness of charity will, in turn, tell us a great deal about the good of that theory itself.

A. Thesis: The Traditional Subsidy Theory.

The thesis of the conventional wisdom about the Code's treatment of charity is more often quoted than questioned, even today²¹⁵: The charitable income exemption and gift deduction are two sides of the same coin, an indirect subsidy of the public benefits that charities, and donors through charities, provide, things like health care, education, and

²¹⁴ See Harvey Dale's "battleship's wake" notion, *supra*.

²¹⁵ See, e.g., NYRB review of education.

relief from poverty or disaster. The implicit rationale runs like this: Charitable organizations, charitable donors, and the government are all in the business of benefitting the public. It makes sense, then, for the government to help charities and their donors do their good works with a subsidy to both through the tax system.

This approach, for all its problems, has both deep intuitive appeal and, as we shall see, something approaching pragmatic genius. For one thing, it maps nicely onto the two functions with which liberal democratic governments have the most trouble, the redistributive and the aretist, and yet to which our state, like all its modern counterparts, is committed. The benefits provided by charities, on this view, fall nicely into two general groups: ordinary, garden variety goods like food, clothing, and shelter to the especially needy, and especially good goods like art and education to anyone.²¹⁶ Both these purposes, helping the needy and providing especially good goods, parallel the redistributivist and aretist functions of the state.

What is more, the kinds of activities recognized as charitable by the traditional subsidy theory also correspond quite nicely to both the Code and the common law's definitions of charity, which themselves generally reflects our society's sense of what charity really is, and does. Indeed, this correspondence is built into both definitions. The common law definition of charity lists a number of specific headings, then a general catch-all category of other purposes "beneficial to the public."²¹⁷ The Code definition has the same structure; its residual category is simply "charitable," which the courts have held to incorporate the common law's "beneficial to the public" standard.²¹⁸

But, for all its intuitive appeal, the traditional subsidy theory presents several severe problems: the tension between state support of religion and the Constitution's the Establishment Clause, a question-begging definition of charity, and a distinctly indirect means of supporting charity. We need, then, to take up each of these problems in turn.

²¹⁶ Atkinson, Stetson L. Rev. at ??.

²¹⁷ *Commissioners for Special Purposes of the Income Tax v. Pemsel*, [1891] App. Cas. 531, 583 (H.L.).

²¹⁸ *Bob Jones Univ. v. U.S.*, 461 U. S. 574 (1983).

Recognizing religion as a charity poses this dilemma: On the one hand, religion is a traditional charitable purpose under the common law; on the other hand, the First Amendment's establishment clause severely restricts all levels of our government in their support of religion. If, as traditional theory assumes, the charitable exemption and deduction are subsidies, then they are in considerable tension with the limits of the establishment clause. As a matter of law, the Supreme Court has eliminated this dilemma: Even if these special tax treatments are subsidies, this kind of subsidy does not violate the Establishment Clause.²¹⁹ As a matter of both law and theory, however, the basis for this conclusion is anything but clear.²²⁰

The vagueness of the traditional theory's general definition of charity is a much bigger problem, in both principle and practice. It neither tells us what makes the specific, listed purposes publicly beneficial nor gives us any criterion for determining what additional purposes might qualify under the catch-all category of "beneficial to the public." It reflects, that is, the problem we have already identified with the state's redistributive functions: They do not imply their own qualitative criteria, and, without some such criterion, we cannot develop any useful quantitative standards.

The basic flaw seems to be this: the traditional theory assumes a monolithic view of the public good. Given the common law origins of the legal definition of charity, this would be an easy mistake to make. Both the common law definition and the supplementary Statute of Elizabeth were products of a state that was neither democratic nor particularly liberal and a culture that was much less pluralistic than ours. "Public benefit," in that context, would likely have been associated with natural law philosophy, Christian theology,²²¹ or statist politics; the public benefit could either be rationally demonstrated or, more likely, simply associated with the good of the state.

²¹⁹ *Walz v. Tax Comm'n*, 397 U.S. 664 (1970). As Simon, Dale, and Chisolm point out, however, similar issues may yet arise under the equal protection clause. *Federal Tax Treatment*, supra, at 276.

²²⁰ *Id.* at ____ (Douglas, J., dissenting) (insisting that exemption is a subsidy). See also *Regan v. Taxation with Representation*, 461 U.S. 540 (1983) (noting that exemption and direct subsidies are not "in all respects identical," but ignoring the difference for purposes of deciding the case).

²²¹ Cite old prerogative case, diverting a bequest for a yeshiva to a Christian school.

As the special case of religion nicely illustrates, however, that approach cannot work well in our pluralistic culture and liberal democratic polity. Unlike Tudor England, we have no national church. What is more, our legal definition of charity clearly distinguishes, more generally, between state purposes and the larger category of publicly beneficial purposes.²²² Nor, as a democracy limited by liberalism and a culture committed to pluralism,²²³ do we equate public benefit with majority interests.²²⁴ But if public benefit is not either of these, neither relieving the burdens of government benefit nor serving purposes the majority embraces, then what is it?

Both Treasury Regulations and recent cases refer us to the evolving common law concept of charity,²²⁵ but that begs rather than answers the question. Unless we are to return to the ad hoc applications of the chancellor's foot, the evolution of the common law concept of charity must itself be guided by an identifiable and articulable standard of public benefit. As we have seen, both liberal economic theory, which is agnostic as to the “goodness” of particular goods, and liberal political theory, which is neutral to competing conceptions of the social good, offer little help in identifying public benefits. To cloak the exemption in the garb of “public benefit” without saying more about the cloth from which it is cut invites the suggestion that the Code’s exemption categories are nothing more than naked political preferences or a crazy-quilt of unprincipled, ad hoc determinations.

And even if the traditional subsidy theory could deliver a general definition of publicly beneficial, it would then face another problem: It proves too much.²²⁶ If

²²² See *Bob Jones Univ.*, 461 U.S. at ____ (Powell concurrence); see also Treas. Reg. § 1.501(c)(3)-1(d)(2). [are these the “treas regs” you are citing? see n. 11, *infra*.] (discussing “relieving the burdens of government” as a distinct charitable purpose).

²²³ With all proper respect for our predecessors, we can nonetheless acknowledge that, when the traditional subsidy theory was first articulated, [cite Filer Commission Report], legal academia was then a less theoretically sophisticated enterprise, and America a substantially less diverse culture. Organizations were fairly routinely denied charitable status simply for espousing and advocating views outside what was then a substantially narrower cultural mainstream [cite gay rights organizations]; traditional subsidy theory took little if any notice of this anomaly.

²²⁴ See Charles Reich, *The New Property*, 73 Yale L.J. 733, ____ (1964) (describing the “great error” of equating public interest with majority interest).

²²⁵ See *Bob Jones Univ.*, 461 U.S. at 574; Treas. Reg. § 1.501(c)(3)-1(d)(2).

²²⁶ And it proves too little, for calling the exemption a subsidy makes it difficult to account for the exemption of religious organizations, a large and historically central component of the charitable world,

particular goods and services are publicly beneficial and thus worthy of subsidization through tax exemption, why shouldn't the subsidy extend to for-profit producers of the same products?²²⁷ The closest the traditional theory comes is to suggest that charitable provision of goods and services promotes a second kind of public benefit, a kind of “meta-benefits.” These secondary benefits derive not from either what product is produced or to whom it is distributed, but rather from how a product is produced or distributed. Traditional theory pointed, always a bit vaguely, at such “meta-benefits” as “diversity,” “pluralism,” “innovation,” and “efficiency.”²²⁸ But to point to these meta-benefits is to raise an obvious question: Are those not precisely the values served by a capitalist market economy, supplemented by a liberal democratic polity?

The problem of the general definition of charity, like the problem of favorable treatment of religion, is a problem of charity's purpose, defining legitimate ends for charity to serve, and the state to subsidize. The final problem with the traditional subsidy theory has to do with the means by the state is to advance these ends, favorable tax treatment. This is a problem of what we might call **fiscal efficiency**. The traditional theory assumes that charities' special tax treatments are, in effect, government subsidies. As such, they amount to “tax expenditures,” public payments, albeit indirectly, for the

without running afoul of the Establishment Clause. See Harvey H. Dale, Rationales for Tax Exemption 4 (Feb. 1, 1988) (unpublished manuscript on file with Author) (criticizing the traditional theory on this ground); Leonard Joblove, *Special Treatment of Churches Under the Internal Revenue Code*, Yale Program on Nonprofit Organizations, Working Paper No. 21 (1980).

²²⁷ See Hansmann, *Rationale*, at 67-68. See also Weisbrod, *The Nonprofit Economy*, at 30 (“There is no necessary reason that subsidies should work only through nonprofit organizations.”).

²²⁸ For examples of these views, see Lawrence M. Stone, *Federal Tax Support of Charities and Other Exempt Organizations: The Need for a National Policy*, 1968 U.S. Cal. Tax Inst. 27, 45 (“objectives of pluralism and diversity”); BRUCE R. HOPKINS, *THE LAW OF TAX-EXEMPT ORGANIZATIONS* 6-7 (1987) (charities foster “voluntarism and pluralism” and decentralized, efficient decision-making and resource allocation); LEWIS M. SIMES, *PUBLIC POLICY AND THE DEAD HAND* 133-34 (1955) (commending the pioneering element in charitable trusts); Albert M. Sacks, *The Role of Philanthropy: An Institutional View*, 46 VA. L. REV. 516, 524 (1960) (citing “initiative of thought and action,” “diversity of views and approaches,” and “experimentation in new untried ventures”); Chauncey Belknap, *The Federal Income Tax Exemption of Charitable Organizations: Its History and Underlying Policy*, in 4 Commission on Private Philanthropy and Public Needs, *Research Papers* 2035-36 (1977) [hereinafter Filer Commission Papers] (“preference for private activity and diversity”).

This view is related to the defense of private foundations as “charitable entrepreneurs,” the most innovative and counter-majoritarian of charities. See, e.g., John G. Simon, *Charity and Dynasty Under the Federal Tax System*, 5 PROB. LAW 1 (1978); MARION R. FREMONT-SMITH, *FOUNDATIONS AND GOVERNMENT* 49-53 (1965) (discussing “Foundations in a Pluralistic Society”).

goods and services charities provide. Viewing exemption and deduction as tax expenditures raises a troubling question: Could we not get more “bang” for our revenue “buck” by making the subsidy to charity directly, as a true subsidy, rather than indirectly, as a tax expenditure?²²⁹

And, even if a tax expenditure were more appropriate than direct subsidy in the case of charity, the current system of exemption and deduction would still seem a pretty poor fit. Neither the exemption nor the deduction is particularly well correlated with amount of “good” charity does, whatever that “good” is.²³⁰ Hansmann points out that a subsidy by way of income exemption is proportional to retained earnings, and questions whether that linkage is justified under the traditional subsidy theory. In his view, “there is no reason to expect a positive correlation between the amount of a nonprofit's retained earnings and the factors ... that might justify a subsidy.”²³¹ Harvey Dale captures this point nicely in a parable he tells the graduate tax mavens at NYU (a pearl he generously, if not wisely, cast in my direction as well): Suppose someone in the market for legal advice came upon two equally qualified lawyers and offered to pay them based upon their respective net worths. This would strike us as odd, because net worth has little correlation with the services to be performed—as little, the parable suggests, as a subsidy to charities through the tax system has with the social benefits charities provide. And the point of the parable is all the more penetrating when backed by the force of arguments about the fiscal inefficiency of tax subsidies.

Traditional subsidy theory addresses the fit between ends and means rather indirectly, sometimes suggesting that tax exemption is the only politically feasible or practically administrable form of subsidy to charity, sometimes, perhaps making a virtue of necessity, hailing the very indirectness of the subsidy as a salutary stimulus to pluralism

²²⁹ See generally STANLEY SURREY, *PATHWAYS TO TAX REFORM: THE CONCEPT OF TAX EXPENDITURES* (1973); STANLEY SURREY & PAUL R. MCDANIEL, *TAX EXPENDITURES* (1985).

²³⁰ See Hall and Colombo.

²³¹ Henry B. Hansmann, *The Rationale for Exempting Nonprofit Organizations from Corporate Income Taxation*, 91 YALE L.J. 54, 71 (1981).

and decentralized decision-making.²³² This seems rather too glibly to discount the importance of the fit issue. But to be glib is not necessarily to be wrong. I shall argue below that, after all the arguments for a tighter fit are given their due, looseness of fit may be an inevitable, if not entirely desirable, element of the exemption, pretty much as the traditional subsidy theory assumed.

This brings us to a more general point. All these questions, those of the means of special tax treatment and those of identification and measurement of the publicly beneficial ends of charity itself, can be answered within the framework of the traditional subsidy theory. Before we turn to those answers, however, we need to examine the ways that scholars have tried to avoid both sets of questions about traditional subsidy theory. In retrospect, the antithetical technical definition theory can be seen as an effort to dodge the question of means, even as the synthetic metabenefit theories can be seen as efforts to dodge the question of ends. Once we see why both efforts are unsatisfactory, we can return, with greater appreciation, to the answers the original subsidy theory can offer.

B. Antithesis: Technical Definition Theory.

The antithetical technical definition theories seek to supplant the intuitive appeal of the subsidy thesis with clever corollaries of the Haig-Simon definition of income. On this view, though the charitable exemption and deduction look at first like indirect subsidies of “motherhood and apple-pie” charitable staples, both these code provisions prove, upon closer examination, to be no more than artifacts of properly defining the income of charities and their donors, respectively. Properly understood, charities have no income, even as the gifts taxpayers give them are not properly includable in the givers’ taxable income in the first place.

After canvassing the early legislative history, Bittker and Rahdert conclude that charities and other nonprofits had been exempted primarily because the income tax could

²³² See BRUCE R. HOPKINS, *THE LAW OF TAX-EXEMPT ORGANIZATIONS* 7 (1987) (charities foster “voluntarism and pluralism” and decentralized, efficient decision-making and resource allocation); John G. Simon, *The Tax Treatment of Non-profit Organizations*, in *THE NONPROFIT SECTOR*, 67, 70 (Walter W. Powell ed. 1987).

only logically be levied on activities undertaken for profit.²³³ Bittker and Rahdert accept this nascent rationale as essentially sound, and elaborate it into a full-blown exemption theory. They identify two fundamental problems with taxing the income of such organizations: first, their net income cannot be made to fit under any workable tax definition of income, and second, even if it could, no appropriate tax rate could be applied to them.²³⁴

Bittker and Andrews, in separate but almost simultaneous articles, applied a parallel analysis to donors' income. Both conclude that donations to charity belong to a class of payments like health care that are not truly discretionary and that thus should not be counted as income subject to taxation.²³⁵ Thus charitable donations, though formally deductible by donors, are more properly seen as technical exclusions from personal income, not as policy-based preferences for charitable purposes.

This re-characterizing of the exemption and deduction as technical artifacts of properly defined charities' and individuals' income is nothing if not ingenious. This single move side-steps all the problems of the traditional subsidy theory. If the exemption and deduction are not subsidies, then, at the most general level, we don't need to figure out what they subsidize, and the problem of the Code and the common law's vague definition of charity simply disappears. What's more, removing the qualitative question of what charity is also removes, a fortiori, the daunting quantitative question of how charitable any particular organization is. Similarly, if the exemption and deductions are not subsidies, then they are not tax expenditures, and the question of superior alternative means of supporting charity also disappears. So, too, does the problem of government subsidization of religion.

²³³ See Boris I. Bittker & George K. Rahdert, *The Exemption of Nonprofit Organizations from the Federal Income Taxation*, 85 YALE L.J. 299, 302-04 (1976).

²³⁴ See *id.* at 307-16.

²³⁵ William Andrews, *Personal Deductions in an Ideal Income Tax*, 86 Harv. L. Rev. 309 (1972); Boris Bittker, *Charitable Contributions: Tax Deductions or Matching Grants*, 28 Tax L. Rev. 37 (1972). [REA: confirm rationales for exclusion.]

For all its brilliance, however, the technical definition theory suffers two serious deficiencies of its own. The first goes to the very root of the theory itself; the second makes that theory, even if sound in principle, extremely limited in application. The first, and more fundamental problem is this: Upon closer inspection, each step in the derivation of a supposedly technical reason for special treatment of charities' revenues and donor's payments to charity turns out to involve substantive issues, all of which the theory answers in demonstrably tendentious ways.²³⁶ Resolution of each of these issues takes us back, at bottom, to the basic question that the technical definition theory is designed to avoid: What is special about charitable organizations? That turns out always to be a normative, rather than merely a technical, question, and a normative question that the technical definition theory repeatedly begs.

The strength of Hansmann's critique of Bittker and Rahdert's theory is to point out that all the questions they raise about the definition of charities' income are technically answerable on fairly straightforward analogies to the income of for-profit firms. This might require a degree of complexity, even convolution, but these would hardly be novelties to the tax code. Thus, if we are not to extend ordinary principles of income taxation to nonprofits, we must look for a normative, rather than merely a technical, reason. Tiffany's net income available for distribution to its stockholders is arguably different from the Red Cross's distributions of donations to flood victims, but the two could be made subject to tax with roughly equal convenience. But again, that only poses the normative question: Should we make this extension? What is it about charities that warrants according them special treatment?

The inevitability of policy choices at this point can be illustrated in another way. Even if Bittker and Rahdert are right, and the charitable exemption is necessary as a matter of tax base definition, the issue of worthiness comes in through the back door. Their theory of its own force applies to all nonprofits, yet, with respect to charities, they

²³⁶ Henry B. Hansmann, *The Rationale for Exempting Nonprofit Organizations from Corporate Income Taxation*, 91 YALE L.J. 54, 96 (1981). A parallel argument can be made with equal force as to the deduction. [find parallel critique of Andrew's on deduction.]

somewhat arbitrarily limit its scope to the present reach of 501(c)(3).²³⁷ They give us no reason, consistent with their own theory, to think that these limits are appropriate. They themselves seem content with the policy choices reflected in current law. But one of the reasons they give for seeking an alternative to current law is that the asserted virtues of charity are difficult to prove.²³⁸ Unless they are prepared to extend their theory, and the scope of the charitable exemption, to cover all legitimate nonprofits, they will leave us with one of the very problems they set out to avoid: how to identify the aspects of charity that make it worthy of special treatment.

The second problem with the technical definition theory goes, not to its technical correctness, but to its practical applicability. The theory is not, even by its own terms, a normative account of charity at all, but an explanation of the special treatment of charity in the Internal Revenue Code. Thus, although the theory purports to remove questions of charitability, both qualitative and quantitative, from the tax code, it does not even attempt to address those questions in other critical areas. We as a society would still need to know which charities warrant special treatment in other areas of law, many of which simply tax an organization's tax status as determinative;²³⁹ we as individuals would still need to know what charities to support with our private resources, and to what extent.

The technical definition theory thus leaves us, with respect to all aspects of charity except its income tax treatment, precisely where we began: Looking for what is distinctively good about charity in the first place and then, beyond that, for a means of measuring that goodness.²⁴⁰ And these are, of course, questions on which the tax treatment of charity itself depends, since the Code's definition of charity, as we have seen, tracks that of the common law. In addition to its list of particular charitable purposes,

²³⁷ See Boris I. Bittker & George K. Rahdert, *The Exemption of Nonprofit Organizations from the Federal Income Taxation*, 85 YALE L.J. 299, 331-32 (1976).

²³⁸ See *id.* at 332-33, 342.

²³⁹ Harvey H. Dale, Rationales for Tax Exemption 4 (Feb. 1, 1988) (unpublished manuscript on file with Author) (discussing the "wake effect" of the 501(c)(3) "battleship")

²⁴⁰ See John Simon, Harvey Dale, and Laura Brown Chisolm, *The Federal Tax Treatment of Charitable Organizations*, in *THE NONPROFIT SECTOR* 267, 275 (Walter Powell and Richard Steinberg, ed., 2006) ("Within a tax-base-defining construct, the process of identifying the ideal tax base is neither easy nor value-neutral.").

remember, the Code itself incorporates into its catch-all category of “charity” the common law’s own undefined residual category, “other purposes beneficial to the public.”

C. Syntheses: Meta-Benefit Theories.

Hansmann’s critique of Bittker and Rahdert shows that exemption is not a matter of technical necessity. It could be eliminated without doing violence to the structure of the tax system, and therefore its retention requires a substantive, not merely a formal, justification. Yet our examination of the traditional subsidy theory revealed that such a justification cannot be in terms merely of providing especially “good” goods or ordinary goods to especially worthy people, or it will prove too much and cover for-profit providers of the same goods. And, even if this problem is surmountable, the problem of subsidies through tax system would remain. These two problems have shaped the next round of exemption theory, in which theorists have looked to the metabenefits charities provide, either uniquely or especially well, as the policy basis for their favorable tax status.

Predictable, the synthetic theories had to be even more arcane than their predecessors; they must both destroy what came before and rebuilt something recognizable from the wreckage. That said, the basic structure of all these theories is essentially simple. First, the synthetic theories reject the premise of both the technical definition theory and the traditional subsidy theory. The exemption and deduction are not mere technical refinements of charity and donor income, but neither are they simply subsidies of the goods and services that charities provide. Having throw out the bathwater, the synthetic theories then try to rescue the baby, salvaging an insight from each rejected theory. Although the exemption and deduction are in fact subsidies, what they subsidize is not quite what traditional subsidy theory maintained. The traditional theory focused on what synthetic theories indentified as “primary benefits” -- ordinary goods to the needy, especially good goods for anyone else. What the exemption and the deduction actually subsidize, according to the synthetic theories, are “meta-benefits,” the normatively appealing ways that charities provide those primary benefits. Exemption and deduction are means of promoting not *what* charities do, but *how* they do it. This third approach thus shifts focus from the primary benefits like health care, education, and relief

work to “meta-benefits” like efficiency, innovation, diversity and other socially desirable modes or aspects of charitable provision of goods or services.

Typical of their time, theorists of this third, synthetic school saw these meta-benefits first through the lens of neo-classical economic analysis, then through criticism of that mode of analysis. For the economic analyst, Henry Hansmann, the defining benefit of charity is the efficient satisfaction of the demands of their patrons, those who donate to charities or purchase from them, under conditions when efficient provision by for-profit firms would predictably fail. Drawing from political and moral theory (not to mention personal consternation), Hansmann’s critics saw his lumping together of those who give to charity and those who purchase from them as peculiar, if not perverse. In their view, the essence of charity lies in the very fact that Hansmann theory obscures, the fact that donors give, through charities, to others.

1. Hansmann’s Capital Formation Theory.

Hansmann’s rationale for the charitable tax exemption as an appropriate means to encourage their accumulation of capital rests on his descriptive account of the function of nonprofit firms in a capitalist economy in which for-profits are the norm. Hansmann argues that nonprofits tend to arise as the most economically efficient suppliers of goods and services when the normal for-profit provision fails for a particular set of reasons. Economic theory tells us that consumers usually know what goods and services they want to buy, that they are usually able to tell whether they got what they paid for, and that competition among for-profit suppliers usually ensures that they paid the lowest possible price.

But sometimes these conditions are not met; sometimes the market fails. Hansmann suggests that “nonprofit enterprise is a reasonable response to a particular kind of ‘market failure,’ specifically the inability to police producers by ordinary contractual devices.” His generic term for this problem is “contract failure.”²⁴¹ Hansmann identifies three basic

²⁴¹ See Henry B. Hansmann, *The Role of Nonprofit Enterprise*, 89 YALE L.J. 835, 845 (1980) [hereinafter *Nonprofit Enterprise*].

forms of market failure that nonprofit firms help their patrons avoid: information asymmetries in the market for complex goods and services and in the provision of ordinary goods to distant third parties and positive externalities associated with certain goods and services like public broadcasting.²⁴² Nonprofit providers help their patrons avoid these special market failures, which Hansmann calls contract failures, because all nonprofits operate, by definition, under the nondistribution constraint: nonprofit firms cannot pay out net profits to a class of owners or controllers. Thus, in each of the three forms of contract failure he identifies, Hansmann maintains that the nonprofit form, with the nondistribution constraint as its essential characteristic, gives consumers the assurance that their difficulty in evaluating output will not be exploited to enhance distributable profits.

From this descriptive analysis it is tempting to draw the normative conclusion that nonprofits should be encouraged by the indirect subsidy of a tax exemption to develop in industries that exhibit contract failure. Hansmann insists, however, that this inclination not be indulged without further analysis:

[I]t is not obvious why a subsidy is needed to encourage nonprofits even where their development seems appropriate as a response to contract failure. Why can consumers not be trusted to select nonprofit rather than proprietary producers on their own in those situations in which nonprofits are to be expected to offer more reliable service? And, if there are cases in which consumers cannot in fact be trusted to make such a decision wisely, is not a tax subsidy a remarkably indirect response to the problem? Should not proprietary producers be outlawed entirely--or at least put under severe regulatory restraint--where they are obviously unsuitable but are likely

²⁴² See *id.* at 845-72. Hansmann does not treat these three kinds of contract failure as exhaustive; indeed, he identifies two others--voluntary price discrimination and implicit loans. See *id.* at 854-62. He uses the former to explain patrons' contributions to performing arts organizations and the latter to explain alumni donations to colleges and universities.

Hansmann has been criticized on the grounds that these two other forms of contract failure tend to diminish rather than enhance the contract failure theory's explanatory power. See JAMES DOUGLAS, *WHY CHARITY?* 98 (1983) (stating: "Hansmann decorates this basic theme with subsidiary [sic] arguments that are often insightful but occasionally over-ingenious"). Voluntary price discrimination, however, is a particular instance of the public goods problem. Implicit loans, on the other hand, do seem to lack the common characteristic of contract failure, an information asymmetry that suppliers may exploit to the disadvantage of their patrons.

to attract consumers nonetheless?²⁴³

Hansmann identifies a less immediately apparent, but ultimately more satisfactory, reason for exempting the net revenues of such nonprofits from income taxation. This encouragement is needed because nonprofits, by definition forbidden to distribute net profits, are barred from a primary source of capital for expansion, equity investment. Moreover, they are likely to be unable to expand to an optimal size using either borrowed capital, donated capital, or retained earnings.²⁴⁴ The exemption of their income from taxation is an appropriate and effective form of encouragement, since it helps offset this disadvantage in access to capital by increasing nonprofits' ability to retain net earnings for expansion.²⁴⁵ If this is how nonprofits will use their enhanced net revenues,²⁴⁶ and if we accept the implicit normative premise that, other things being equal, efficient allocation of resources is to be encouraged, then this is an entirely appropriate conclusion. Although

²⁴³ *Exempting Nonprofit Organizations*, *supra* note __, at 70-71 (footnote omitted); *see also* Mark A. Hall & John D. Colombo, *The Charitable Status of Nonprofit Hospitals: Toward a Donative Theory of Tax Exemption*, 66 WASH. L. REV. 307, 374 (1991) [hereinafter *Charitable Status*].

²⁴⁴ *See Exempting Nonprofit Organizations*, *supra* note __, at 72-74. In a similar vein, Powell and Friedkin suggest, on the basis of several empirical studies, that "the fundamental difference between nonprofit and for-profit organizations does not turn so much on intrinsic differences in organizational form or capability, or even on legal criteria that distinguish nonprofits from for-profits, as on differences in the availability of resources and the constraints associated with their acquisition." Walter W. Powell & Rebecca Friedkin, *Organizational Change in Nonprofit Organizations*, in THE NONPROFIT SECTOR 180, 181 (Walter W. Powell ed. 1987). On Hansmann's view, however, the limits on availability of resources to nonprofits is not an independent factor, but rather a function of the nonprofit constraint, the essential legal and economic difference between for-profits and nonprofits.

Empirical research on the effect of capital constraints on the responsiveness of nonprofits to changes in demand is inconclusive. *See* Henry B. Hansmann, *Economic Theories of Nonprofit Organizations*, in THE NONPROFIT SECTOR 27, 38-39 (Walter W. Powell ed. 1987) [hereinafter *Economic Theories*]; Richard Steinberg, *Nonprofit Organizations and the Market*, in THE NONPROFIT SECTOR 118, 133-34 (Walter W. Powell ed. 1987).

²⁴⁵ *See Exempting Nonprofit Organizations*, *supra* note __, at 72-75; *cf.* *Utah County v. Intermountain Health Care, Inc.*, 709 P.2d 265 (Utah 1985). In *Utah County*, in response to the dissent's argument that denial of property tax exemption to two components of nonprofit hospital network would result in higher costs to patients, the majority argued that "[t]he far more logical assumption is that growth of the IHC system would possibly be slowed." *Id.* at 276 (emphasis in original).

²⁴⁶ Hansmann himself has provided empirical evidence in support of his capital formation hypothesis. Analyzing state tax exemptions, he found that the market shares of nonprofit firms tend to be greater where the value of their tax exemption; i.e., the rate at which they would be taxed if not exempt, is greater. *See* Henry B. Hansmann, *The Effect of Tax Exemption and Other Factors on the Market Share of Nonprofit Versus For-Profit Firms*, 40 NAT'L TAX J. 71 (1987) [hereinafter *Effect of Tax Exemption*]. [the following refers, I believe, to a section of your other paper that you could cite directly for the "but see" proposition: *But see* Section III.C.2.a.]

Hansmann only applied his capital formation theory to the exemption, parallel considerations weigh in favor of the deduction as well. Just as the exemption helps undercapitalized charities retain earnings, so the deduction should help raise capital by subsidizing donations.

Hansmann's theory has several obvious strengths. Most obviously, it puts some starch into the claim of traditional subsidy theory that nonprofits sometimes are more efficient than alternative, for-profit suppliers. He has, accordingly, identified a metabenefit that warrants subsidizing nonprofits with a tax exemption while explaining the denial of that benefit to for-profits in the same industry. For-profits do not labor under the same capital constraints, and, furthermore, owing to the very market failures that give rise to nonprofits in some industries, for-profits might be able to siphon off the subsidy in the form of higher profits rather than pass it on to consumers in the form of higher output or lower prices.

Hansmann rationale for the exemption also gives a plausible link between the amount of the exemption's indirect subsidy and the subsidized charity's need for capital. Where demand for a good provided by a nonprofit is rising, its retained earnings will also rise,²⁴⁷ and thus a subsidy tied to net revenues is scaled to the need for expansion. Another appeal of Hansmann's theory is its implications for comparing, not just identifying, charities. It incorporates the basic metric of economic efficiency; that metric, as we have seen, is widely, some would say universally, applicable, not sector, much less industry, specific. And that metric is intrinsically quantitative and calibrated in a common currency; as a measure of consumer satisfaction, economic efficiency counts only the dollars that consumers actually have and are willing to spend.

Finally, since both parts of Hansmann's theory, the descriptive and the normative, focus on correcting market failures, his theory maps nicely onto the state's regulatory function. His three forms of contract failure, as we have seen, are special cases of standard market failures, information asymmetries and externalities. If the state wants to encourage

²⁴⁷ See *Exempting Nonprofit Organizations*, *supra* note ___, at 82-84.

economically efficient charity, it can include, among its many other market-correcting mechanisms, the exemption of charitable income as a sensible form of assisting their accumulation of capital. This, in turn, will bring charitable firms “on-line” faster to provide the goods and services of which the nondistribution constraint makes them the most economically efficient suppliers

For all its elegance, however, there are three disquieting features of Hansmann’s theory.²⁴⁸ In the first place, it suggests a radical narrowing of the present exemption. Hansmann concludes that the exemption should apply to only those nonprofits that arise in response to the kind of market failure he has identified. Hansmann concedes that “[i]f nonprofit firms could be demonstrated to have important efficiency advantages over for-profit firms under identifiable conditions other than contract failure, similar reasoning could justify granting tax exemption to nonprofit firms in those circumstances as well.”²⁴⁹ Despite his concession that there may be other forms of “efficient” nonprofits than those he has recognized, the tenor of his writings suggests that he believes the canon is essentially closed.

He himself is willing to concede that some traditionally exempt charities that do not fit his efficiency criteria--in particular, those providing education, hospital care, nursing care, and day care--should continue to be exempt because, in “a significant fraction of these industries , . . a substantial subset of consumers feels more comfortable patronizing a nonprofit.”²⁵⁰ Hansmann would, however, continue the exemption only “until we have better data suggesting that these consumers are mistaken.”²⁵¹ In thus implying that a defense of the charitable exemption can only be made in terms of

²⁴⁸ Although Hansmann and others originally directly these objections to the exemption, they apply with equal force to the deduction. For both brevity and fidelity to the original discussion, the following text speaks only in terms of the exemption.

²⁴⁹ *Exempting Nonprofit Organizations*, *supra* note ___, at 87 n.92.

²⁵⁰ *Id.* at 89.

²⁵¹ *Id.* More recently, Hansmann seems less inclined to give such nonprofits the benefit of the doubt. See *Exempting Nonprofit Organizations*, *supra* note ___, at 634; see also Henry B. Hansmann, *The Evolving Law of Nonprofit Organizations: Do Current Trends Make Good Policy?*, 39 CASE W. RES. L. REV. 807, 822-24 (1988-89) (urging continued contraction of the scope of nonprofit tax exemption) [hereinafter *Evolving Law*].

economic efficiency, Hansmann ignores the possibility that other asserted metabenefits of charity might justify the exemption subsidy on other, perhaps broader, grounds

Second, by Hansmann's own admission, the need for state assistance to charity capital formation, through tax exemption or other means, is not very great. Here the robustness of his descriptive theory, charities as an economically efficient consumer response to contract failure, undermines its normative counterpart, tax exemption as a response to charities' limited access to capital. His descriptive models suggest that, even in the absence of tax exemption, nonprofit suppliers would probably come to dominate industries in which they are the most efficient suppliers.²⁵² At most, then, the exemption's indirect subsidy accelerates an optimal outcome that will occur eventually, though more slowly, without state intervention. And offsetting even this advantage is the fact that the exemption will allow modestly inefficient nonprofit firms to compete with more efficient for-profits, perhaps successfully enough to dominate entire industries.²⁵³

Furthermore, even as the need for the exemption subsidy is slight under Hansmann's analysis, so the link between tax exemption as a means and encouraging capital formation as an end is loose. Nonprofit managers may choose to increase present production rather than expand.²⁵⁴ If they do, the subsidy will not work as intended.²⁵⁵ More fundamentally, the tax exemption is not nicely calibrated to subsidize only those nonprofits that are in fact

²⁵² See *Exempting Nonprofit Organizations*, *supra* note ___, at 83-84.

²⁵³ See *id.* at 83. See also *Charitable Status*, *supra* note ___, at 388 (criticizing Hansmann's failure to show why tax subsidy is better than grants or tax-exempt bond financing).

²⁵⁴ Hansmann recognizes this possibility. See *Exempting Nonprofit Organizations*, *supra* note ___, at 80-81. And there's still a gloomier prospect: waste. Nonprofit managers, who are not subject to scrutiny by equity owners, may exert themselves less than their counterparts in for-profit firms to minimize costs. See Evelyn Brody, *Agents Without Principals: The Economic Convergence of the Nonprofit and For-Profit Organizational Forms*, 40 N.Y.L. SCH. L. REV. 457 (1996); see also Weisbrod, *The Nonprofit Economy*, at 14 ("noting that "restrictions on their freedom to pay out profits" undermines an important motive for productive efficiency); Lack of information is a major source of dissatisfaction with the proprietary form of institution."). Nonprofits are thus preferable on efficiency grounds to for-profit alternate suppliers only when this efficiency loss is more than offset by the efficiency gains the contract failure theory predicts. See *id.* at 70 n.57; *Nonprofit Enterprise*, *supra* note ___, at 878.

²⁵⁵ But note that the exemption will make expansion relatively more attractive *if* we assume that in a world without the exemption, expenditures for increased current production go untaxed. See *Exempting Nonprofit Organizations*, *supra* note ___, at 82.

undercapitalized.²⁵⁶ Hansmann admits that, for the tax exemption to serve as an effective capital formation subsidy, it should apply only to organizations that meet two criteria: (1) they are more efficient than producers of alternative for-profits, and (2) they are undercapitalized.²⁵⁷ The first criterion is met by limiting the exemption to organizations in industries beset by contract failure, but the second criterion is, by Hansmann's own admission, not feasible to measure.²⁵⁸

His response is to argue that the second factor usually correlates with the first, that nonprofits arising in response to contract failure usually experience undercapitalization.²⁵⁹ But even if this is true as to industries, it may not be true as to particular entities within an industry. As Hall and Colombo point out, a problem with using income as a proxy for capital need is that “one organization with heavy capital needs may have little income (and hence a small subsidy), while another with slight needs may have a large income.”²⁶⁰ Hansmann, to his credit, candidly concedes that tax exemption is, at best, “an extremely crude mechanism for dealing with the problems of capital formation in the nonprofit sector.”²⁶¹

The most disquieting aspect of Hansmann's theory lies deeper, in his descriptive account of the role of nonprofits. To see more concretely what Hansmann's theory omits, we need to examine his conflation of donations and purchases, a revealing peculiarity in the way he explains nonprofits as a solution to contract failure. This peculiarity is most apparent in Hansmann's discussion of relief organizations like CARE, his prototypical case of contract failure.

Somewhat counterintuitively, Hansmann speaks of those who finance CARE's overseas relief operations as “customers,” rather than, as ordinary usage would suggest, as “contributors” or “donors.” Hansmann's choice of terms is not accidental. As he says in

²⁵⁶ See Dale, *supra*, note ___, at 8.

²⁵⁷ See *Exempting Nonprofit Organizations*, *supra* note ___, at 86.

²⁵⁸ See *id.*

²⁵⁹ See *id.* at 87 n.93; *id.* at 88 n.98.

²⁶⁰ *Charitable Status*, *supra* note ___, at 388.

²⁶¹ *Exempting Nonprofit Organizations*, *supra* note ___, at 92.

discussing another relief organization, the Red Cross:

[t]he contributor is in effect buying disaster relief. And the Red Cross is, in a sense, in the business of producing and selling that disaster relief. The transaction differs from an ordinary sale of goods or services, in essence, only in that the individual who purchases the goods and services involved is different from the individuals to whom they are delivered.²⁶²

It is both accurate and instructive to point out structural similarity between contributions and purchases, but it is something else again to dismiss the significance of who gets the goods. A physicist can, with equal accuracy, describe all music as a series of vibrations; a philistine can reduce violin music to a horse's tail on a sheep's gut. In both descriptions, however, something critical is missing, at least to the aficionado. So, too, in the cases of CARE and the Red Cross. Economic efficiency gives us a very precise mechanism for measuring how good a particular charity is, but the measure of that good reminds us of how very odd that good itself is: giving society's "haves" more of what they want, precisely because it is what they want. A theory that literally denies the relevance of starving person's need for bread and focuses, instead, on how much others are willing and able to pay to supply the bread is, at very best, a deeply counterintuitive account of charity (to say nothing of justice). And yet that is, after all, quite precisely what the meta-benefit of efficiency comes down to.

What is missing in Hansmann's analysis of gifts to relief organizations like CARE is what appears, before we examine these gifts through the lens of economic analysis, to be their most salient feature: the kind of selfless regard for others that we associate with the core of charity. Moreover, the case of CARE offers the prospect of a proxy, even a metric, for what may be the quintessence of charity: one person's conferring of a benefit on another without the expectation of a material reward. Two recent theories have tried to give these insights greater clarity and rigor. These theories attempt to re-focus the rationale for the charitable exemption on the disinterested generosity of their donors.

²⁶² *Exempting Nonprofit Organizations*, *supra* note ___, at 61 (footnote omitted); *see also Nonprofit Enterprise*, *supra* note ___, at 872-73.

2. The Meta-Benefits of Giving: Putting Charity Back into the Analysis.

Hall and Colombo offer an argument within the framework of economic analysis for subsidizing donative organizations as economically efficient; I offer an argument outside economic analysis for exempting a wider range of nonprofit organizations as the institutional embodiments of various forms of altruism. Although both theories, following Hansmann, focus on the exemption, both, like Hansmann's theory, could be extended to the deduction.²⁶³ Because Hall and Colombo answer Hansmann in his own terms, economic analysis, let's consider their theory first.

a. Hall and Colombo's Donativity Theory.

To see how Hall and Colombo justify their donative theory in economic terms, we must return to Hansmann's argument that the greater efficiency of nonprofits in some industries is not itself a sufficient reason to warrant treating them more favorably under the tax laws than their for-profit counterparts. His reason for requiring something more is summed up in the rhetorical question "Why can consumers not be trusted to select nonprofit rather than proprietary producers on their own in those situations in which nonprofits are to be expected to offer more reliable service?"²⁶⁴ A critical assumption here is that, with the problems of contract failure redressed by nonprofits through the nondistribution constraint, their customers will purchase the amount of goods and services from them that maximizes their marginal utility, and hence a socially optimal level of production will occur. Patrons quite literally get what they pay for, and thus can be depended upon to buy as much as, and no more than, they want.

Hall and Colombo nicely isolate a flaw in this reasoning: Although it may be true of

²⁶³ For an extrapolation of my exemption theory to the deduction, see Chapter 15, *Theories of the Special Tax Treatment of Nonprofit Organizations*, in Frances R. Hill and Barbara L. Kirschten, *FEDERAL AND STATE TAXATION OF EXEMPT ORGANIZATIONS* 15-27 (Warren Gorham & Lamont, 1994). Gergen has made the economic case for the contributions deductions that parallels H&C's exemption theory. Gergen, like H&C, points out that truly disinterested, public-spirited gifts are subject to free rider problems; a subsidy of such gifts through the donation deduction should help ensure a more nearly efficient supply of the goods and services for which they are given.

²⁶⁴ *Exempting Nonprofit Organizations*, *supra* note ___, at 70; see also *Charitable Status*, *supra* note ___, at 374.

commercial nonprofits, those financed by the sale of goods and services to those who consume them, it is probably not true of donative nonprofits, those through which patrons are buying goods or services to be consumed by strangers or by the public at large. Donative nonprofits may not produce an optimal level of output because wealth redistribution, an integral component of their output, is in some respects a public good. To the extent that donors' utility is tied to the receipt of benefits by others, rather than the act of giving itself, donors will be tempted to free-ride on the gifts of other donors. Accordingly, what the donors are really interested in buying—the provision of goods or services free or below cost to others--will probably be chronically undersupplied. Thus, in the case of donative nonprofits, Hall and Colombo conclude that subsidization is economically justified.²⁶⁵

Hall and Colombo's analysis produces a justification for the tax exemption that is significantly narrower than Hansmann's with respect to both donative and commercial nonprofits. This is somewhat surprising with respect to donative nonprofits, since Hall and Colombo's theory covers all donative nonprofits, not just those that are undercapitalized. This greater theoretical breadth is not likely to make their theory broader in application, however, for three reasons. First, Hansmann argues that most donatively financed organizations are likely to be undercapitalized.²⁶⁶ Second, Hansmann concedes that in practice undercapitalization could not be made an administrably feasible criterion for exemption.²⁶⁷ Third, in describing the implementation of their theory, Hall and Colombo insist that even donative organizations, in order to continue to qualify for the exemption, would have to receive an average of one third of their annual support from donations.²⁶⁸ This condition would bar the exemption of most private foundations, both operating and grant-making, and perhaps many heavily endowed and fee-supported public charities like museums and schools.

²⁶⁵ See Mark A. Hall & John D. Colombo, *The Donative Theory of the Charitable Tax Exemption*, 52 OHIO ST. L. REV. 1379, 1389-98 (1991) [hereinafter *Donative Theory*].

²⁶⁶ *Exempting Nonprofit Organizations*, *supra* note ___, at 72.

²⁶⁷ See *id.* at 75.

²⁶⁸ See *id.* at 104.

With respect to commercial nonprofits, the donativity theory calls for an even greater narrowing, compared both to Hansmann and to existing law. Hansmann would extend the exemption to a potentially large class of commercial nonprofits that supply complex goods and services that a substantial number of customers feel more comfortable buying from nonprofits on account of the difficulties of directly assessing quality themselves. Hall and Colombo, on the other hand, see no evidence of donations in the case of such commercial nonprofits, and thus find no room for them in an exemption designed to overcome the free-rider problems associated with donative financing.²⁶⁹

Hall and Colombo offer an elaborate economic explanation of why the charitable exemption fits their proffered basis for exemption, the organization's support by donations. I cannot even begin to do justice here either to their own argument or to my reservations about it. But even if their theory is right on this point, its implementation produces a paradox. The more donative support an organization receives, and thus the more deserving it is of subsidy in terms of the likely undersupply of the good it produces, the greater will be its ratio of donative to other income and hence the less helpful the subsidy will be. Why less helpful? Because gifts are not ordinarily included in income anyway, and even if they were, they could be offset by an operating expense deduction if they were disbursed.²⁷⁰

b. Atkinson's Altruism Theory.

My own rationale for the exemption shares Hall and Colombo's focus on donations but differs in its scope and its ultimate rationale. To take the former first, I, unlike Hall and Colombo, find a donative element in commercial nonprofits, even in commercial

²⁶⁹ James Bennett and Gabriel Rudney propose an analogous exclusion of commercial organizations. They would tax receipts from the sale of any product unless (1) more than 50% of the cost of production is financed by gifts or grants, as opposed to sales receipts or investment income, and (2) the subsidized product is "directed at a specific recipient group or purpose deemed charitable." James Bennett & Gabriel Rudney, *A Commerciality Test to Resolve the Commercial Nonprofit Issue*, 36 TAX NOTES 1095, 1097-98 (1987). The first requirement would mean that virtually all commercial nonprofits would be subject to tax on their exempt function income. Moreover, with respect to all nonprofits, "[a]ll investment earnings except exempt interest [presumably under provisions applicable to all taxpayers] are taxable revenues under the commerciality test." *Id.* at 1097.

²⁷⁰ I owe the identification of this paradox to Hall and Colombo themselves. *See Donative Theory, supra* note ___, at 1445, 1453 n.224; *see also Charitable Status, supra* note ___, at 403 n.342.

nonprofits that supply garden variety goods,²⁷¹ not just those goods that Hansmann identifies as complex and difficult for the consumer to evaluate. To find an element of donativity (or, as I prefer to call it, altruism) here, we must look on the supply side. How does capital get into such firms? If pooled by buyers, the resulting organization is a mutual benefit nonprofit or a cooperative, an organization in which the consumer-members are primarily interested in helping themselves.

But if the capital is provided by non-purchasers, that provision itself is altruistic. Whenever an organization with the potential to return profit to its founders²⁷² is set up on a nonprofit basis, the founders have necessarily forgone that potential profit. The net revenues that otherwise would have been distributable to its founders are now committed to the purposes for which the organization was created. Moreover, as long as the organization continues to abide by the nondistribution constraint, its potential profits are available for subsidizing the purchases of its patrons. Thus, the founders' initial contribution of their potential earnings has an ongoing aspect; the organization embodies their altruism. As long as it remains nonprofit, this element of altruism remains, even if all other factors of production must be purchased at market prices. This makes for an exemption that is extremely, perhaps shockingly, broad; broader not only than Hansmann and Hall and Colombo, but also than present law.

How can such breadth be defended? Here we reach the second difference between me on the one hand and Hall and Colombo on the other, the divergent grounds on which we would favor altruistic organizations. Hall and Colombo ground subsidy of donativity on the metabenefit of its economic efficiency; in their view, it combats free rider problems associated with donations, thus moving donations up to more economically efficient levels. What the exemption does, on my theory, is to grant advantageous tax status to organizations that exhibit altruism either as donative nonprofits or as the kind of altruistic

²⁷¹ My favorite example, *Presbyterian & Reformed Publ'g Co. v. Commission*, 743 F.2d 148 (3d Cir. 1984), involves books.

²⁷² This is a critical, and not always easily monitored, condition. See Atkinson, *supra* note *, at 554; *Donative Theory*, *supra* note ___, at 1419-21.

commercial nonprofits that I have identified. My rationale is that altruistic supply of a good or service—any good or service—is a metabenefit worthy of consideration for tax preference. The metabenefit of charity, in my view, is not that they meet patron demand efficiently, but that they supply the wants or needs of others, including the public, altruistically.

I doubt, however, that this difference is very deep. I would be happy to be persuaded that subsidizing altruism promoted economic efficiency. I like both altruism and economic efficiency, but I like the former independently of, and even if it comes at some cost in, the latter.²⁷³ On this point I doubt that Hall and Colombo would disagree, though they are more sanguine than I that no trade-off will be necessary.²⁷⁴

c. The Gift Theories' Paradoxical Embrace of Hansmann's Focus on Donors Instead of Donees.

Hall and Colombo and I balked at Hansmann's treatment, in both his descriptive and normative theory of charity, of donations as purchases. True, donations are paying for goods and services, but sometimes they are buying those goods and services for others. In reaction to Hansmann, we emphasized this difference, the inherently donative or altruistic aspect of gifts. In so doing, however, I'm now afraid we followed Hansmann's lead at least as much as we departed from it. We missed a fundamental, and I now think unfortunate, similarity of our theories and his: All our theories focus on donors, not donees. Hall and Colombo and I failed to see that, even as we insisted on distinguishing gifts from purchases, we left the focus on the giver, not the receiver, and not the gift. In making the donor's lack of a material quid pro quo the essence of charitable giving, we put the helper ahead of the helped. Like Hansmann, we focused on the donor, not the donee.

²⁷³ That said, I have realized, since first saying it, that I like justice a good deal better than either.

²⁷⁴ Much the same can be said of my disagreement with Hall and Colombo over whether a preference for altruism need be grounded in political theory. Compare Atkinson, *supra* note ___, at 628-30, *with Donative Theory*, *supra* note ___, at 1422. Here again, I would happily be persuaded that subsidizing altruism is consistent with, or even conducive of, prevailing liberal democratic values, as Hall and Colombo have cogently argued. But if prevailing political theory were, say, libertarian, I would be inclined to trade rugged individualism for charity at a pretty steep discount. Compare this with Hall and Colombo's effort to reconcile charitable exemption with Nozickian libertarianism. *See id.* at 1428-30.

This is at least a little odd. Logically, the donee's need must come before the donor's satisfaction of that need. And normatively, the fact that the gift actually satisfies a real need, not the fact that the giver receives no material *quid pro quo*, must be the essence of the gift's merit. Having faulted economists with being indifferent as to whether bread goes to hungry birds or starving children, we committed at least an equal normative oversight: We treated donations to the charities that feed birds as no different from donations to charities that feed children.

Thus, in their agnosticism about the merits of the objects of the gifts, the altruism and donativity theories take us back, ironically, to the perspective of the very economic theory that these theories were supposed to supplant. Although these theories focus on what givers give to others, not the satisfaction the gift gives the givers themselves, they nonetheless ignore what receivers get. It is at least a little ironic for theories that focus on altruism, selfless consideration for others, to ignore how much benefit these others actually get.²⁷⁵

Looking back, I think the reason for our oversight was this: Focusing on the donor's gift, rather than the donee's need, gave us a readily quantifiable metric. Donors give dollars, or property with readily obtainable market valuation; if the gift is not in cash or pretty readily appraisable kind, there is no question of deduction for the donor and, on the other side, no question of income for the organization. But need knows no such easy metric. A loaf of bread (more likely, a liter of glucose) can save a child's life, and the price of bread (and glucose, too) is easy to state in dollars and cents. What the child's life is worth in hard, cold cash is harder, and colder, to say.

²⁷⁵ And, as Teresa Odendahl's work revealed, at least to me, what we see when we actually do focus on donors not as an abstraction, "the supply side," but as individuals and as a social class, what we see may not be altogether lovely. *See* TERESA ODENDAHL, *CHARITY BEGINS AT HOME : GENEROSITY AND SELF-INTEREST AMONG THE PHILANTHROPIC ELITE* (Basic Books 1990). *Cf.* Robert Maynard Hutchins's point: we want your money, not your ideas.).

We missed, to take a less pointed example, the wisdom of the proverb we have cited before: Give a child a fish, and you've fed them²⁷⁶ for a day; teach a child to fish, and you've fed them for a lifetime. Of course, it would be better still – perhaps twice as good – to teach two children to fish, even as it would be to give two children a loaf of bread each. But it is much harder to quantify the difference between any given teaching and the alternative of feeding. And it would doubtlessly be harder still to quantify the difference between teaching a child to fish and teaching a child to teach another child to fish.

On the other hand, it is important not to sell Hansmann's economic theory, and Hall and Colombo's refinement of it, short. At this most critical point, we need to remember something distinctive about economic theory generally, which will allow us to see Hansmann's theory, and Hall and Colombo's corrective, as vitally different from both my own metabenefit theory and the technical definition theory. Economics, as we have seen, specifies a single value, consumer satisfaction, and measures that value in consumer in terms of willingness and ability to pay. We have focused primarily on the limitations of that approach, its indifference to two of the state's four functions, redistributing wealth and promoting excellence. But this weakness is also, from another perspective, a great strength: it radically simplifies the analysis; the point of abstracting away considerations of need and excellence, like putting blinders on a draft horse, is to focus attention on an admittedly narrow task.

In that sense, Hansmann's and Hall and Colombo's theories nicely fit the state's regulatory, wealth-maximizing function (which, as we have seen, necessarily incorporates its Ricardian, property-protecting function). Hansmann has given us a very precise theory for the regulatory function as applied to charity. By treating gifts as purchases, a counter-intuitive perspective of real cleverness, and working out the implications, he has given us an amazingly clear blueprint of charity as a part of our society's economic sector, and of

²⁷⁶ For grammatical purists, I know, "them" is not tolerable with a singular antecedent like "child": one must use the cumbersome "him or her" or the traditionally "him." But even the late William Safire gave some ground on this one, in the name of both simplicity and an admittedly awkward gender neutrality. Cite NYTimes magazine column.

how the state, as regulator, should treat it. His contract failure descriptive account and his capital formation normative account is just what we would need if we were to concern ourselves solely with the state's regulatory function, maximizing economic efficiency. And, as a refinement of that theory, Hall and Colombo's donativity theory fits nicely here as well.

And, again, this theory is, in its very essence, quantitative. At least in principle, we can measure how much more economically efficient charities are than for-profits and how much their restricted access to capital inhibits their expansion to an appropriate market share, then calibrate the exemption accordingly. Similarly we can (again, in principle) calculate how much the free-rider phenomenon dampens charitable donations and adjust the deduction to correct for the problem. In both cases, in determining the proper level of complexity, we could take account of the problem of diminishing returns: beyond some point, more complexity in the regulatory system will cost more than it increases the efficiency of outcomes. Thus theories based on economic efficiency could give very real and quantifiable direction to the structuring of both the exemption and the deduction.

At our other level of analysis, that of individuals operating within the system, the guidance from economic analysis is a bit less clearly helpful. It is hard to imagine that many donors to charity, for example, will want to direct their gifts so as to maximize the economic efficiency of the economy as a whole. More likely, individual donors will want to contribute where they can do, for want of a better word, the most good. On that point, the criterion of economic efficiency is no help at all; it is designed to measure to what extent those who are willing and able to pay get what they want, not to tell them what to want. This absence of guidance to individual donors is simply the converse of a cardinal virtue of economic theory, indifference as to kinds of satisfaction. What makes efficiency appealing is its very capacity to avoid qualitative measures of consumers' preferences.

Seen in this light, what troubles us about economic theories of charity is that they ignore the state's other two functions, the redistributionist and the aretist. By emphasizing

the goodness of giving as such, not merely as the source of yet another market failure, my altruism theory was, in effect, trying to move beyond the state's regulatory function, trying not to reduce the virtue of charity to a species of economic efficiency. By treating altruism as an independent virtue, I was (quite unknowingly) offering an aretist theory of charity.

But, by making altruism the sole virtue of charity, I offered a very peculiar aretism indeed. By extending charity to cover all genuinely nonprofit activities, thus making the donor's choice of charitable objects a matter of normative indifference, I stumbled into exactly the liberal democratic counterpart of Hansmann's and Hall and Colombo's capitalist market theories of charity. My altruism theory, I now regret to realize, is the perfect picture, normative and descriptive, of charity in a society where everyone's opinion about the public good, like everyone's dollar in the marketplace, is of absolutely equal value. My aretism is perfectly democratic: Whatever cause any giver gives to is good, by virtue of the very fact that it is a gift.

In effect, my theory gives givers exactly the recognition, in ethics and politics, that givers want for their gifts, and one thing more: a tax subsidy. As we shall see in the next section, that was a neat intuition.²⁷⁷ It gives us the basis for making a virtue of what seems to be a necessity of defining charity in a liberal democracy: omitting any standard by which to judge some visions of the public good to be better than others. This negative virtue, failure to make comparisons among particular primary goods, lies at the root of all the charitable metabenefits that the traditional subsidy theory always asserted but never elaborated: pluralism and diversity, efficiency and innovation. What looks, from any other perspective, like a serious weakness of the traditional subsidy theory thus becomes, from the perspective of liberal democracy, its defining strength. The next section unpacks that paradox.

²⁷⁷ But, as I shall argue later still, a terribly bad idea.

D. Revisiting Traditional Subsidy Theory.

What we need, as a matter of political theory, is a similar way to avoid comparing voters' preferences. As it happens, we have just such a system: that is, essentially, what our current exemption and deduction systems do.

The traditional subsidy theory, as we have seen, presents three basic problems:

no substantive definition of charity, no convincing justification of subsidizing charity through the tax system, and the dubious propriety of state subsidy of religion. On closer inspection, however, we can see that the traditional subsidy theory, reexamined through the lens of two schools of criticism we have identified, the technical definition theory and the meta-benefits theories, proves surprisingly sensible. On the one hand, the special tax treatment may best be seen, as the technical definition theory suggests, as something other than a subsidy, although not, at the same time, as a purely technical artifact.²⁷⁸ On the other hand, the very standardlessness of the traditional theory's definition of charity may prove to be a virtue, if only a virtue born of necessity²⁷⁹, a virtue functionally related to our liberal democratic political system.²⁸⁰ Given that our fiscal system rests on an income tax, and given that our political system is a liberal democracy, we may have arrived at something very like the ideal tax treatment of charity.

This neo-traditional theory will have important quantitative implications as well, paradoxical though they may at first appear. It may not be possible to measure the relative benefits of charity at the highest level of analysis, which we identified as that of political theory. But it may be quite possible at the other level, ethical theory, the level of

²⁷⁸ See Simon, Dale, and Chisolm, *Federal Tax Treatment*, *supra*, at 275 ("Whether exemption and deductibility are subsidies or whether they are functions of an accurately defined tax base, Congress surely must specify which entities are taxed and which are not.").

²⁷⁹ See Simon, Dale, and Chisolm, [infra] at 279 ("Yet it is plausible to contend that what some perceive as the evil of privatization is the necessary corollary of a decision to leave some judgments about what constitutes the public interest to a robust, independent, and pluralistic charitable sector instead of committing all such determinations to the majoritarian processes of government.")

²⁸⁰ See Simon, Dale, and Chisolm, *Federal Tax Treatment*, *supra*, at 275 ("A system that provides for diverse decentralized decision making about which visions of public benefit merit support is well suited to a heterogeneous society, where many citizens prefer a supply of public goods – like culture, health, welfare, and protection of civil rights and the environment – that exceeds what majoritarian political processes will provide.") (citing Weisbrod, *The Nonprofit Economy*).

individual citizen's choice about what causes to support and to what extent. And that may be, not an accident or an anomaly, but a defensible fiscal and political arrangement, as consistent with our liberal democratic political system as the income tax exemptions and deductions are with our income-based fiscal system. Seen in that light, the current system has much to commend it, as a complement both to our tax system and to our political system. To see how we reach this admittedly peculiar conclusion, let's look first at charity's position in our tax system, then more broadly at the place of both in our political system. Once we have sketched out the promise of this neo-traditional theory, we will be able to address its problems.

1. Synthesizing the Syntheses: Neo-Traditional Subsidy Theory.

As we have seen, the appropriateness of subsidizing charity through the income tax system is widely criticized. It is not well linked with that charity's particular virtues (whatever they are), and tax subsidies as a general matter are thought to be fiscally inefficient. I have suggested earlier —“tentatively, with trepidation” --that the fit issue may, in important respects, be an illusion. Now I want to suggest, much more strongly, that it is something of an advantage, and in any event not an embarrassment. The indirectness of the subsidy through tax exemption is not, as I formerly feared, primarily a matter of political expediency, the result of inability to secure more direct subsidies. It may better be seen as partly a matter of political preference and partly an artifact of the present tax system.

a. The Form: Tax Base Exclusion, Not Indirect Subsidy.

Let's take the artifact aspect first. Recall the central point of the fit question: What does the level of an organization's income have to do with the degree to which it should be subsidized? This question can usefully be turned around: What relation does the level of an organization's (or an individual's) income have to do with the extent to which it (or he or she) should bear the costs of government? I suggest we turn the question around this way for two related reasons. First, it points up an implicit assumption about the fit issue, namely, that there is something natural or inevitable or correct about financing

government operations with an income tax geared to net revenues. If the history of this country up until this century and the current tax systems of other liberal democracies may be admitted into evidence, there is not. Turning the question around thus reveals that the question of fit cannot be avoided by eliminating the charitable exemption. It makes as much sense to seek the fitness of a tax on income as it does to seek the fitness of a subsidy based on income. And it has never been clear that, in the broader context, the fitness question has been compellingly answered.

A basic question of a general revenue tax is how to allocate its burden among taxpayers fairly.²⁸¹ Benefits received from expenditure of general revenue levies are notoriously difficult to measure,²⁸² leaving ability to pay as the most widely accepted criterion.²⁸³ Choosing ability to pay as the base raises the next question, the best method of measuring that capacity. Here there are three basic options: income, consumption, and wealth.²⁸⁴ Income, of course, is the mainstay of the federal tax system, but the case for choosing income has a long line of careful and cogent critics. Moreover, even those who accept income as on balance the better measure of ability to pay generally admit that income is hardly the perfect measure, particularly when debate moves from theory to implementation.²⁸⁵ Here is the first light that general tax theory sheds on the fit issue of charitable tax exemption: Those who seek a particularly close fit between the purpose of the exemption and its beneficiaries' net income without showing any such fit between income and ability to pay, the very target of the income tax itself, are oddly holding an

²⁸¹ See MUSGRAVE & MUSGRAVE, PUBLIC FINANCE IN THEORY AND PRACTICE 225, 227 (Mitchell & Koblin, eds., 4th ed. 1989) (hereinafter Musgrave & Musgrave); KLEIN ET AL., FEDERAL INCOME TAXATION (7th ed. 1987) (hereinafter Klein).

²⁸² Musgrave & Musgrave at 228-232. Where benefits received or costs incurred by the taxpayer are not too difficult to measure, a change on the basis has much to recommend it, in terms of both efficiency and fairness. *Id.* at 230. Furthermore, exemption of nonprofits in such circumstances may be less easily justified, as discussed below in connection with the Federal Unemployment Tax Act. See *infra* ¶ 15.05[3].

²⁸³ Klein 17; GOODE, THE INDIVIDUAL INCOME TAX, 17-19 (rev. ed. 1976) (hereinafter Goode); Musgrave & Musgrave at 232.

²⁸⁴ Brazer, *The Income Tax in the Federal Revenue System*, in BROAD-BASED TAXES: NEW OPTIONS AND SOURCES 3, 4 (ed. Richard A. Musgrave, 1973) (hereinafter Brazer); Goode at 12; Musgrave & Musgrave at 238.

²⁸⁵ For summaries of the debate over the relative merits of net wealth, income, and consumption based taxes, particularly the latter two, see Klein at 18, 32-35; Brazer at 4-6; Goode at 21-26; Musgrave & Musgrave at 232-240.

exception to the general rule of income taxation to a higher standard than the rule itself seems capable of meeting.

But, it might be objected, once an income-based system is chosen as a generally superior measure of ability to pay, fairness and consistency require that the base should be as inclusive as possible, to ensure that those equally able to pay share the burden equally.²⁸⁶ Neither fairness nor consistency, however, makes the case for taxing charities. The income of charities can be excluded from the base of a perfectly sensible, internally consistent income tax system. The factors that make income a good tax base in general may not dictate including the particular income of nonprofit organizations in that base.

All taxes fall ultimately on individuals or households; the relevant “ability to pay” is really the ability of individuals to pay.²⁸⁷ Whatever the means chosen to measure ability to pay –income, consumption, or wealth–the measure works best when applied directly to individuals and households. At the level of application, the tax cannot be shifted²⁸⁸ and can best be calibrated to take into account factors relevant to individuals’ ability to pay.²⁸⁹ Conversely, taxes levied on entities are problematic under the ability-to-pay standard because their ultimate incidence is unclear.²⁹⁰

Applied without qualification, of course, this line of reasoning proves more than necessary for present purposes, if not too much; it counsels in favor of eliminating income tax on all entities, not just charitable organizations. As previously discussed, however, it is possible to distinguish charities from for-profits by the way the former provide goods and

²⁸⁶ See Musgrave & Musgrave at 233-234.

²⁸⁷ Brazer at 3-4; Musgrave & Musgrave at 223-224.

Not Everyone agrees that entities have no “ability to pay” relevant to tax purposes. See Hansmann, “*Rationale for Exempting*,” at 64. But even if they do, the text argument for distinguishing nonprofit organizations applies.

²⁸⁸ Klein at 29 (much of the advantage of the individual income tax as a measure of ability to pay rests on the widely shared belief that its incidence cannot be shifted); Goode at 60 (citing usual view that direct taxes on personal income, consumption, and wealth cannot be shifted).

²⁸⁹ See Goode at 11; Musgrave & Musgrave at 223.

²⁹⁰ Klein at 29 (“it seems generally to be recognized by economists who have examined the problem thoughtfully that the incidence of the corporation income tax is wholly uncertain....”); Bittker & Rahdert at 314-316.

services, even if those goods and services themselves are distinguishable from those provided by for-profit firms. The identification of the secondary benefits associated with charities is crucial here, because it allows one to go behind a fundamental goal of any system based on ability to pay, horizontal equity. Tax theorists, following widely shared notions of fairness, maintain that all those equally able to pay should pay equally.²⁹¹ This position rests, however, on the implicit assumption that all else is equal. It assumes, in other words, that potential taxpayers are otherwise indistinguishable, or, more precisely, that in general no qualitative judgments about worthiness to pay can fairly or meaningfully be drawn among those of quantitatively equal ability to pay.²⁹² But that assumption does not hold in the context of charity. Charities can plausibly argue that they are qualitatively suited for exclusion from the tax base, on account of the secondary benefits that they confer. Indeed, ignoring these differences may undermine equity; treating unequals equally is no virtue. The poet Blake put the matter more pointedly: “One law for the lion and the ox is oppression.”²⁹³ From this perspective, the critical question becomes not whether net income should be the base for a subsidy, but whether the net income of charities should be included in the tax base or excluded to relieve them of the burdens of the government.

Turning the question of fit around that way also suggests that, if charities were taxed on their net income, the fit question would not be eliminated; we would encounter it again, albeit running in the opposite direction. But, you will object, coming from that direction it is the same for charities as for other tax-payers, namely, is net income a proper basis on which to allocate the burdens of government? True enough. I would suggest, however, that even if that question is generally to be answered in the affirmative, a significant subquestion remains: Are there any potential tax-paying entities that ought to be relieved of bearing the burdens of government?²⁹⁴

²⁹¹ Musgrave & Musgrave at 232; Klein, at 20.

²⁹² See Klein at 17 (discussing need for objective, as opposed to subjective, means for measuring ability to pay); Musgrave & Musgrave at 244 (dismissing the question “whether it is desirable to define the tax base in terms of virtue” in rejecting the idea, traceable to Hobbes, that saving is morally superior to consumption).

²⁹³ WILLIAM BLAKE, *THE MARRIAGE OF HEAVEN AND HELL* (Dover 1994).

²⁹⁴ Those of you who have not tired of the metaphysics metaphors will tolerate a final parallel. My theory does to Bittker and Rahdert's theory what Marx and Feuerbach did to Hegel's: stand it on its head. Bittker

We are back, of course, to Bittker and Rahdert's tax base defining argument, but with a twist, and a twist that I hope to show you is part of an upward spiral rather than a circle, or worse. Hansmann's critique of Bittker and Rahdert showed that the income of charity *could* be taxed, as a matter of technical feasibility, but not that it *should* be taxed, as a matter of policy preference. If we define charity out of the tax base it is not, as Bittker and Rahdert suggest, because we have no other choice, but because, I want to suggest, we have so chosen. Either way, however, the fit issue is defused. It is a useful, but dangerous, shorthand to describe the tax exemption as a subsidy. It is, if I am right, more properly understood, and defended, as an exclusion from the tax base.²⁹⁵

Whatever you call it, of course, the exemption costs money, the revenues that would in its absence have been collected from the organizations within its scope.²⁹⁶ It is this fact, I think, that inclines us to look for a tighter fit than we have yet found between the revenues foregone and the activities promoted.²⁹⁷ It would be intellectually satisfying (not to mention politically useful) to be able to say that the charitable exemption and deduction are wonderfully well-suited ways to subsidize what we think are the virtues of charity, but it need not be disastrous to concede that it aren't.

and Rahdert, you will remember, argued that the charitable exemption is not a subsidy because the income tax cannot logically be levied on nonprofit organizations; I argue that charities should be granted what I admit to be a favorable tax status precisely because operation as a nonprofit involves an element of altruism worthy of favorable status.

²⁹⁵ See Hopkins, *supra* note ___, at 13:

Congress is not "giving" such organizations any "benefits"; the exemption (or deduction) is not a "loophole," a "preference," or a "subsidy"--it certainly is not an "indirect appropriation." Rather, the various Internal Revenue Code provisions comprising the tax exemption system exist basically as a reflection of the affirmative policy of American government to not inhibit by taxation the beneficial activities of qualified exempt organizations acting in community and other public interests.

Id.

²⁹⁶ See Weisbrod, *The Nonprofit Economy*, at 161 (noting that "substantial revenue loss is one result" of the current deduction).

²⁹⁷ See *Charitable Status*, *supra* note ___, at 329.

b. The Function: The Majority's Subsidizing Individual's Ideas about the Public Good.

The neo-technical, tax base defining theory of the special tax treatment of charity, like its income-defining predecessor, inevitably presses us back to the more basic, substantive question: What is it about charity that warrants especially favorable tax treatment in the first place? In answering that question, as we have seen, the traditional theory fails rather badly, as do the various meta-benefit theories. But, from their very focus on meta-benefits – the way charities provide goods and services, not the goods and services themselves – we can find the contours of a different meta-benefit theory with a distinct (if conditional) appeal.

This new meta-benefit theory looks neither at the products charities provide, nor at anything special about the way they provide them, beyond the fact that they are provided by cultural sector organizations that are, by definition, forbidden to distribute net profits to any owning or controlling group. Instead, this theory focuses on the way those goods and services are chosen by those who support their provision; that way of choosing is, in a word, individually. Citizens decide for themselves what charities to give to and, more basically, what charities to found. This very individualism is the focus of Tocqueville's oft-quoted observations²⁹⁸ about the Americans' inclination to form associations for what they take to be publicly beneficial functions:

In no country in the world has the principle of association been more successfully used or applied to a greater multitude of objects than in America. Besides the permanent associations which are established by law under the names of townships, cities, and counties, a vast number of others are formed and maintained by the agency of private individuals.

... If a stoppage occurs in a thoroughfare and the circulation of vehicles is hindered, the neighbors immediately form themselves into a deliberative body; and this extemporaneous assembly gives rise to an executive power which remedies the inconvenience before anybody has thought of recurring to a pre-existing authority superior to that of the persons immediately concerned. If some public pleasure is

²⁹⁸ See Steven Rathgeb Smith and Kirsten A Gronberg, *Scope and Theory of Government-Nonprofit Relations*, in *THE NONPROFIT SECTOR* 229 (Powell & Steinberg, ed.) (noting that "In the twentieth century, this Tocquevillian perspective was the basis for renewed attention by scholars and policy-makers.").

concerned, an association is formed to give more splendor and regularity to the entertainment. Societies are formed to resist evils that are exclusively of a moral nature, as to diminish the vice of intemperance. In the United States associations are established to promote the public safety, commerce, industry, morality, and religion. There is no end which the human will despairs of attaining through the combined power of individuals united into a society.²⁹⁹

On this view, individual Americans, acting in voluntary collaboration, both define social problems and offer solutions to those problems.³⁰⁰ Americans define the good, that is, not by a nationally shared sense of “goodness,” nor by the national recognition of social need, but rather by their joint action in voluntary associations. From this observation we can derive a Tocquevillian definition of charity: Whatever nonprofit activity citizens say is in the public interest and puts their time, money, or other resources into. As a matter of liberal principles, this kind of associational activity cannot be discouraged,³⁰¹ unless the ends themselves can be made illegal.³⁰²

But to say that the state cannot ban such associational activity is not to say that it should encourage it; to define Tocquevillean charity is not to prove that it is good. And so, too, the question of whether to relieve such public-spirited private initiatives from the burden of taxation, and further to relieve their donors to the extent of their donations is, necessarily, a normative question. Another critical feature of the Tocquevillean

²⁹⁹ De Tocqueville, 1 *Democracy in America*, Ch. 12 (UVA. Online). In another place, he says much the same thing:

The political associations that exist in the United States are only a single feature in the midst of the immense assemblage of associations in that country. Americans of all ages, all conditions, and all dispositions constantly form associations. They have not only commercial and manufacturing companies, in which all take part, but associations of a thousand other kinds, religious, moral, serious, futile, general or restricted, enormous or diminutive. The Americans make associations to give entertainments, to found seminaries, to build inns, to construct churches, to diffuse books, to send missionaries to the antipodes; in this manner they found hospitals, prisons, and schools. If it is proposed to inculcate some truth or to foster some feeling by the encouragement of a great example, they form a society.

De Tocqueville, 2 *Democracy in America*, Ch. 5 (UVA. Online).

³⁰⁰ See Steven Rathgeb Smith and Kirsten A. Gronberg, *Scope and Theory of Government-Nonprofit Relations*, in *THE NONPROFIT SECTOR* 229 (Powell & Steinberg, ed.) (“From a civil society perspective, the nonprofit sector is regarded as the embodiment of certain values that are crucial to democracy and good government.”)

³⁰¹ But cf. those forms of liberalism, cited in Frug’s article about cities, that dislike intermediate associations. [Do you have more to go on for this one? He has a bunch:

<http://www.law.harvard.edu/faculty/directory/index.html?id=22>]

³⁰² Cf. charitable limit of illegality; cf. charitable purpose of changing the law.

understanding of charity is this: The majority's decision on the normative question is conclusive. Thus its functional definition of charity – whatever nonprofit project anyone wants to undertake in the public interest – is matched with its normative justification: A majority of citizens believe that this kind of social action, even by political minorities, is good in general, and also worthy of particular favor in the tax system. In a democracy, as democracy, there is no other measure of the good. A majority can decide to grant this favor, or not; ours has granted it, and therefore it is good. The people in a democracy are, in principle, like God in a theocracy: Their word is law, and the law is right and good.

Our democracy, of course, has subjected itself to the liberal restraints contained in our constitution. Thus government favors, including special tax favors, cannot be applied in a way that discriminates against suspect classes or fundamental rights, nor in a way that imposes unconstitutional conditions on the receipt of those favors. Beyond that, a majority of citizens can choose to support, not only particular goods or services they themselves favor, but also those that their neighbors, even their neighbors in a minority, favor. This is, in effect, what it means, in the context of the special tax treatment of charity, to say that it promotes the values, or meta-benefits, of “pluralism” and “diversity.”

This Tocquevillean account also helps give meaning to the traditional subsidy theorists' claim that charities provide two other related metabenefits, “innovation” and “efficiency.” The willingness of a majority of citizens to grant special tax advantages to their fellow citizens' preferred nonprofit projects reflects, not only respect for their fellow citizens' choice of ends, even if those ends lack majority support, but also a confidence in their choice of means, even as to ends the majority have already chosen to advance through the state itself. With respect to means, the majority implicitly believes one of two things: either that groups of fellow citizens will respond to public needs more innovatively, or with greater productive efficiency, than instrumentalities of the state, or that any loss in the meta-benefits of efficiency and innovation are more than offset by gains in pluralism and diversity, which latter benefits are established by the very fact that the program in question is being run by a voluntary association of citizens, not by the state.

The majority's tolerance, of course, is not unlimited. On relatively rare occasions, they will remove the exemption of an entire "industry," as in the case of health insurance.³⁰³ Or they will remove the exemption from an entire class of charities' activities, like the active conduct of an unrelated trade or business.³⁰⁴ Sometimes the majority will be even more severe, punishing engagement in any amount of some activity at all, like political campaigning, or too much of an activity, like lobbying, with loss of an organization's entire exemption³⁰⁵ and, along with it, its donors' entitlement to donation deductions. Perhaps most significantly, sometimes the people become impatient with charities that are too far from the people, too close to elites of either wealth or expertise, plutocrats or bureaucrats. Hence the rigorous private foundation regime enacted with manifest populist motivation in 1969.

And there are, of course, questions of exemption at the margin, which the people leave, generally to their satisfaction or at least indifference, to the IRS and the courts. The Service and the courts operate under one plausible exception, more or less of their own making, to the general rule of generous exemption eligibility: Although the exemption generally extends to whatever nonprofit activity a citizen believes will benefit the public, it does not extend to activities that are deemed³⁰⁶ harmful to the public. Thus meta-harms like racial discrimination have been held, in effect, to negate the usual meta-benefits of pluralism, efficiency, and innovation, and even primary benefits like education.³⁰⁷ If the

³⁰³ Tax Reform Act of 1986, Pub. L. No. 99-514, § 1012(a), 100 Stat. 2085, 2390-2391 (adding current IRC § 501(m), which denies charitable status under IRC § 501(c)(3) and social welfare organization status under IRC § 501(c)(4) to organizations like Blue Cross and Blue Shield that provide "commercial-type insurance"). See Hansmann, *Evolving Law* at 823 (citing IRC § 501(m) as an example of the "fencing out" approach).

³⁰⁴ Revenue Act of 1950, ch. 994, § 301, 64 Stat. 906, 947-953; Tax Reform Act of 1969, Pub. L. No. 91-172, § 121, 83 Stat. 487, 568-584; IRC § 511.

³⁰⁵ 26 U.S.C. § 501(c)(3) (2008).

³⁰⁶ I use the passive construction – "are deemed" – advisedly, to cover the convolution of that process. It is often the courts that initially determine what fundamental public policy is, and what violates it. So it was, for example, in the case of racial discrimination. But recall, again, that it is ultimately the people who decide; every provision of our constitution, remember, is subject to amendment. The Equal Protection clause is part of the Fourteenth Amendment; in making African Americans citizens, the Fifteenth Amendment overturned the Supreme Court's contrary ruling in the *Dred Scott* case.

³⁰⁷ *Bob Jones Univ. v. U.S.*, 461 U. S. 574 (1983).

courts or the Service are too generous or too chary in granting exemptions, the people's representatives in Congress can always override them.³⁰⁸

The traditional subsidy theory's odd inability to provide a substantive definition of the public benefit that it holds to be the basis of the exemption and deduction can thus be seen, not as a failure, but as a virtue, a bow toward Tocquevillean philanthropy. Something similar can also be said about traditional subsidy theory's apparent failures both to provide a means of comparing charities, either among themselves or with institutions in other sectors, and to correlate tax subsidies with either the quality or quantity of the good or service provided, once that good passes the low threshold of charitability. When we shift the focus from particular products and the way in which they are provided, however, these weaknesses begins to look very much like strengths. If the exemption is seen as an artifact of tax-base defining, rather than as a subsidy, then the problem of "fit" disappears.

The deduction, on the other hand, is a deduction, and it is nicely tailored to what we want to favor, individual donations to what they themselves believe are publicly beneficial causes. And it has other advantages as well. It gives us a means of ensuring that people put their money where their mouths are, and it has the added individualist virtue of letting each citizen decide, at least to some extent, how public resources are used. We can, and do, adjust that with the deduction's percentage-of-income limits; we could also tailor the deduction to favor the gifts of the poor as much as, or more than, the gifts of the rich, perhaps by replacing it with a credit.³⁰⁹

2. Toward a New Antithesis: A Brief Critique of Tocquevillean Philanthropy.

The people's will in a democracy, we have conceded, is like God's will in a theocracy: Whatever it is, is right; whatever it seeks, good. But we need to remember that not all are democrats, even as not all are theists (nor, as we shall see, are all deities arbitrary dictators, any more than all democracies are indifferent to merit and excellence). We can ask of what the people want, even as Socrates asked of what the gods love: Is it

³⁰⁸ [example? Blues?]

³⁰⁹ Cite proposals along these lines, perhaps from Filer Commission Reports.

good because they favor it, or do they favor it because it is good? A majority of Americans, at some level, must favor our Tocquevillian system of charitable tax exemption and deduction; they are entirely entitled to change it whenever they like, and presumably, if they disliked it enough, they would.

But that still leaves open the question: Is our system of exemption and deduction *really* good, good for any reason other than its having been democratically chosen? Unless one is a radically reductionist kind of democrat, one can question its merits, in whole or in part. Here we simply raise some of those questions, by taking a deeper look at some of Tocquevillian democracy's less salient, but profoundly significant, features.

a. Implicit Bias Toward Charitable Over Governmental Providers.

As to comparisons among charities, and between charity provision and other provision, the current system, again, offers no guidance to individual donors or voters. From a liberal democratic perspective, that silence may be golden. The point to note is simply that it leaves a normative gap here, as is the tendency of liberal democracy in general, under the liberal principle of neutrality toward life-plans. And here that silence is nearly total, which puts the liberalism reflected in our tax treatment of charity near the libertarian, minimal-state, pole of the spectrum of liberal theory. Libertarians, as we have seen, prefer the state to be silent on the relative merits of citizens' individual ethical systems.

And this libertarian tendency of Tocquevillian charity is at least as evident in two other respects. It embodies unmistakable preferences on two very important issues we have raised before. We noticed, in our global survey of the four sector account of charity, that the for-profit, the governmental, and the cultural sectors are, to a very large extent, capable of producing the same goods and services. Thus we saw, for example, that organizations in each sector can and do operate elementary schools. So, too, we saw that, in general, funding for subsidized goods and services can come from voluntary contributions or coerced transfers, primarily taxes. Schools for those who cannot afford tuition can thus be funded by taxes or by gifts (or cross-subsidies). Tocquevillian charity

embodies a strong preference for non-governmental provision³¹⁰ and a strong preference for donative financing.³¹¹

These libertarian leanings are, in fact, deeply rooted in the meta-benefits at the foundation of the Tocquevillian account of charities' special tax treatment, "efficiency" and "innovation," "pluralism" and "diversity." In the case of all four values, the special tax treatment of charity assumes that charitable provision of a good or service is superior to governmental provision in one of these four ways.

Pluralism is the most apparent: the mere fact that a charity provider is not a governmental provider is, in effect, taken to be conclusive proof of pluralism; this is nothing if not a circular proof. In a region where most well-off white children attend white-flight academies, the appearance of yet another white-flight academy, rather than a racially integrated public school, is hardly a triumph of pluralism by any less circular definition. Similarly, the opening of a NATO-sponsored secular school in Afghanistan would appear to promote pluralism in a very different way from the opening of yet another fundamentalist madrassa sponsored by the pet philanthropy of a member of the house of Saud. The automatic equation of charitable provision with increases in pluralism is thus a very tendentious metric indeed.

"Innovation" is almost equally biased. In his classic defense of private foundations, my mentor John Simon famously argues for their favorable tax treatment in terms of their tendency to innovate. And he cites several famous examples: **The "Green Revolution" in third-world agriculture**³¹². But, as the saying goes, anecdotes are not data. We do not know whether the foregone tax revenues left in the hands of even highly innovative private foundations (much less the mill run) produced more public benefits than

³¹⁰ See Salamon, *Partners in Public Service: The Scope and Theory of Government-Nonprofit Relations*, in Powell, *THE NONPROFIT SECTOR* (1st ed.), *supra*, 99, 110 (noting that the phenomenon of "third party government," provision of publicly financed goods and services through non-governmental suppliers, "reflects ... the conflict that has long existed in American political thinking between the desire for public services and hostility to the governmental apparatus that provides them").

³¹¹ And, even with respect to the donative financing, it is not especially sympathetic with cross-subsidization; recall UBIT and note current criticism of high college tuition.

³¹² Simon, *supra*, at ?

government entities would have produced with the same funds. Government agencies, remember, include the Centers for Disease Control, the National Endowment of the Arts, and the National Endowment for the Sciences, not to mention every state and municipal college and university in the nation.

And, of course, Simon's examples are not randomly chosen; they are cherry-picked from private foundations' most salient success stories. Surely even the best foundations sometimes fail in their humanitarian objectives; some do not even pretend to be in the game. Unlike the Rockefeller Foundation's motto, for the good of humanity³¹³, many private foundations, like many public charities, devote themselves quite single-mindedly to the glory of God, and at least some of their projects seem rather remotely related to helping His creatures here below.

What's more, charity has two distinctly anti-innovation elements build deeply into its basic structure. As Hansmann has indicated, charities' lack of access to equity investment slows its entry into areas of increasing consumer demand.³¹⁴ Hansmann has also demonstrated a parallel problem in the other direction, when demand for their goods and services are declining. In industries marked by diminishing demand, the locking of charitable assets into the original purpose to which they were dedicated can make the movement of their capital out of that industry and into another quite slow and expensive. This means that, in a dynamic economy, charity responds relatively slowly – in economic terms, inefficiently – to shifts in consumer demand.³¹⁵

The case for charity's superior innovativeness, though often asserted, is yet to be proved. As others have noted,

it is plausible to celebrate nonprofits as a major source of social innovation It is less clear whether nonprofits (other than perhaps social movement organizations) actually do serve that function.³¹⁶

³¹³ Confirm motto.

³¹⁴ Hansmann, *Rationale*, *supra*.

³¹⁵ See Henry Hansmann, Daniel Kessler, and Mark McClellan, *Ownership Form and Trapped Capital in the Hospital Industry*, in *The Governance of Not-for-Profit Organizations* 45 (Edward L. Glaeser, ed., 2003).

³¹⁶ Smith and Gronberg, *Government-Nonprofit Relations*, *supra*, at 224.

It is more than a little odd to begin a paragraph with “the voluntary sector has fulfilled the role of experimenter and initiator with distinction in the past,” only to conclude it with, “we need much firmer empirical evidence before we can determine how the sector is fulfilling its initiating and experimental role in social policy.”³¹⁷

This points to a much larger problem: claims for charitable efficiency are even more dubious than claims for charities’ innovativeness. Sometimes, as we have seen, charities are demonstrable more efficiency, either productively or economically, than alternative producers.³¹⁸ Teaching orders of religious institution may attract more devoted teachers; in the provision of products involving various forms of market failure, as Hansmann has shown, nonprofit suppliers predictably outperform their for-profit counterparts. Notice that this latter advantage is relative to for-profit suppliers, not to government; as Hansmann concedes, government provision of a good or service is, at least in theory, another alternative to contract failure in the for-profit sector.³¹⁹ His theory is not meant as a means of making the comparison between government and charitable suppliers.

Even in the comparison of charitable to for-profit suppliers, Hansmann notes a serious problem.³²⁰ The nondistribution constraint, which tends to ensure the greater economic efficiency of charities in industries exhibiting contract failure, also tends to discourage productive efficiency across the board. With no residual owners eager to increase profits by lowering costs, charities are especially susceptible to shirking. Any economic efficiency gains may thus be lost to productive efficiency losses. We cannot know *a priori* which tendency will prevail. But, under the current tax regime, the question is never asked. A charity need neither prove its superior efficiency in advance nor demonstrate it in operation in order to qualify for the exemption of its income; a charity is

³¹⁷ James Douglas, *Political Theories*, *supra*, at 48-49.

³¹⁸ See Salamon, *Partners in Public Service: The Scope and Theory of Government-Nonprofit Relations*, in Powell, *THE NONPROFIT SECTOR* (1st ed.), *supra*, 99, 110 (“the extensive pattern of governmental support of nonprofit institutions ... permits a degree of diversity and competition in the provision of publicly funded services that can improve efficiency and reduce costs”).

³¹⁹ See Hansmann, *Rationale*, *supra*, at ???

³²⁰ See Hansmann, *supra*, at ???

simply presumed to be more efficient, economically or productively, than government provision.³²¹

Nor is that the end of the matter, or the worst. A closer look at the asserted efficiency of nongovernmental suppliers in general, and nonprofit suppliers in particular, reveals a most peculiar means of reckoning efficiency. James Q. Wilson makes this point nicely with the example of Donald Trump's reconstruction of Central Park's ice-skating rink in the face of the city's apparently excessive delays. By a simple measure of productive efficiency, Wilson notes, Trump's private enterprise was clearly superior to the city's own efforts: "If the valued output is a rebuilt skating rink, then whatever process uses the fewest dollars or the least time to produce a satisfactory rink is the most efficient process."³²² But, Wilson points out, this approach "assumes that there is only one valued output, the rink," when in fact "government has many valued outputs, including a reputation for integrity, the confidence of the people, and the support of important groups."³²³ Thus "a government that is slow to build rinks but is honest and accountable in its actions and properly responsive to worthy constituencies may be a very efficient government, *if* we measure efficiency in the large by taking into account *all* of the valued outputs."³²⁴

Burton Weisbrod expands this point to include nonprofit suppliers:

When proprietary, governmental, and nonprofit sellers coexist, they are likely to produce systematically different types of services or distribute them in different ways, but when costs are compared, the private firm is considered the standard of comparison. Nonprofit and governmental organizations may provide more outputs in forms that the private market does not reward. If society wants to encourage

³²¹ Sometimes this focus on institutional form as a proxy for superior output is appropriate, as, for example, where the transaction costs of directly monitoring output are prohibitively high. See Weisbrod, *The Nonprofit Economy*, *supra*, at 47 (identifying this general situation). But no such calculation has actually been made in the case of tax exemption and deduction as to either philanthropy as a whole or particular kinds of philanthropy.

³²² JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT 317 (Basic Books 1989).

³²³ Wilson, BUREAUCRACY, at 317; see also James Douglas, *Political Theories*, at 46 ("the state's distribution of benefits must not only be equitable; it must also be *seen* to be equitable.") (original emphasis).

³²⁴ Wilson, BUREAUCRACY, at 318.

production of these outputs, these institutional alternatives to the private market have a place.

But calculating this “efficiency in the large,” Wilson points out, entails two serious problems. In the first place, we have no satisfactory means of measuring these other, secondary outputs, a problem that Weisbrod also identifies³²⁵.

Much more seriously, we do not all agree that these other outputs are, in fact, good in the first place.³²⁶ Lester Salomon has shown that at least some of the supposedly superior efficiency of charities compared to government trades on precisely these problems.³²⁷ Much of what proponents of charitable efficiency count as costs of government “red-tape” and other inefficiencies are actually the kind of secondary outputs Wilson identifies: civil service protections for employees and procedures designed to implement “process values” like transparency. As even its proponents recognize, arguments about charitable avoidance of “red tape,” “the term has been used to indicate almost anything from a generalized dislike of any form of regulation to specific cases of maladministration.”³²⁸

From this perspective, what presents itself as a preference for productive efficiency may be something else entirely. It may, instead, be a bias against secondary output of government provision; government soup kitchens and schools supply not only bread and education, but also workers with civil service protection, pensions, and other publicly-approved working conditions. What is more, public schools tend to be “soft” on subjects like evolution and human sexual activity and preferences. This latter observation leads to

³²⁵ See Weisbrod, *The Nonprofit Economy*, at 46 (“It is difficult to gauge the success of governmental and nonprofit organizations in providing services with hard-to-measure attributes.”).

³²⁶ Wilson, *BUREAUCRACY*, at 318. Cf. Weisbrod, *Nonprofit Economy*, at 41 (“we care not only about producing janitorial services and coal, but also about providing decent employment opportunities and earnings rather than welfare or unemployment insurance.”).

³²⁷ Salomon, *Partners in Public Service: The Scope and Theory of Government-Nonprofit Relations*, in Powell, *THE NONPROFIT SECTOR* (1st ed.), *supra*, 99, 110-11. See also Smith and Gronberg, *supra*, at 229 (“Ultimately, the transactional model [of Salomon and others] may also raise questions about the extent to which government contracting of services effectively amounts to a diversion of government power to providers and whether providers are subject to all the constraints about equity and fairness that apply to government.”) (citation omitted)

³²⁸ James Douglas, *Political Theories*, *supra* at 50.

a more general point: Preferences for charity may be a bias in favor of secondary outputs of charitable provision. Charitable providers can say, “We feed the hungry and educate the poor, not on the third principle of modern republicanism, *fraternite*, but in the name of the Holy Trinity.” Or, more generally, preference for charity may simply be a bias against government itself: “We, the providers of this bread, are not they, the servants of the republic.”

Against this background, “diversity” can be seen as similarly circular; according to one commentator, “The voluntary sector achieves diversity through the very diversity of its institutions.”³²⁹ In order to ensure innovation and find more efficient means of providing goods and services, the argument implicitly runs, we encourage a diversity of alternative providers. This is rather like Brandeis’s notion of the states as “laboratories of experiment” in the solution of social problems. As applied to the favorable tax treatment of charity, however, these are laboratories whose protocols are seldom announced, and whose results are never tested. State experiments in social reform sometimes fail; the voters are free to switch to another approach. Charitable experiments may similarly fail, and donations may dry up. But the charity will never have its exemption questioned by the Service, much less removed, for any such failure. The present system of tax preferences gives us no metric for it, and no remedy for it.

In many systems, of course, redundancy is a virtue; it is built into many organisms by evolution itself.³³⁰ But redundancy is expensive, and it surely pays diminishing returns. What is more, many supporters of charity do not see themselves that way at all. They are not “fail-safe” mechanisms, but “governments in exile,” working to undermine the provision of goods and services by the state, no matter how much more productively efficient state provision may be. Many hands may well make light work – but only if they are all lifting the same burden and hauling it in the same direction.

³²⁹ James Douglas, *Political Theories*, *supra* at 50.

³³⁰ See Weisbrod, *Nonprofit Economy*, *supra*, at 17 (“Different institutional forms have different effects on society; a healthy pluralism is a continuing goal of public policy.”).

All these preferences for charity over the state, of course, shape our culture; if we get what we cannot find or afford in the market from charity rather than the state, we come to expect it from charity rather than from the state. Thus the charitable sector grows, qualitatively and quantitatively, at the expense of the state. Predictions of the superiority of charity – its greater efficiency, its higher quality – become self-fulfilling prophecies. It can hardly be an accident that most of America’s great public universities are mostly in West and South, not in the Northeast. De Tocqueville, in recounting Americans’ aversion to government, seems not to have noticed the role of the state in the early development of some of the most “Ivy” of our universities, not least Harvard and Yale.³³¹ Surely he was aware of similar synergies and hybrid origins in the histories of all of the great universities of Europe – Oxford, Cambridge, Edinburgh, the Sorbonne.³³² (And most of them, it is worth noting, developed outside of, and often in tremendous tension with, the established church, Protestant or Catholic, in their jurisdiction; they are, for the most part, products of either recovering cities or consolidating monarchies, in both cases outside the order of the feudal past.³³³)

b. Implicit Bias Toward Financing with Private Contributions Instead of Taxes.

The tax system’s preference for charitable provision of goods and services, then, reflects demonstrably anti-statist, even libertarian, tendencies, tendencies not wholly apparent on its face but profoundly important in its cultural implications. And the tax system’s preference for voluntary financing is, if anything, even more troubling. The basic problem is this: Financing of essential public services through contributions amounts, in

³³¹ Thus, as Lester Salamon points out,

In colonial Massachusetts, for example, the commonwealth government not only enacted a special tax for support of Harvard College but also paid part of the salary of the president until 1781 and elected the college’s Board of Supervisors until after the Civil War. The state of Connecticut had an equally intimate relationship with Yale, and the state’s governor, lieutenant governor, and six state senators sat on the Yale Corporation from the founding of the school until the late 1800s.

Partners in Public Service: The Scope and Theory of Government-Nonprofit Relations, in Powell, *THE NONPROFIT SECTOR* (1st ed.), *supra*, 99, 100.

³³² Need citation.

³³³ Need citation. [*“See id.”*]

effect, to a tax on civic virtue and, conversely, a subsidy of social shirking.³³⁴ Consider, again, the case of public elementary schools. Every fall, in schools across the land, the call goes out, from individual teachers and from central administrations, for basic school supplies, or the money with which to buy them. Presumably, those who respond to the call are those who can afford to; so far, so good.

Let's focus, instead, on those who do not respond. Some, of course, are simply too poor; others are quite able to respond, but not especially forthcoming. They are, in effect, free-riding on the parents who do, in fact, pay. Those paying parents are, then, paying twice: not just their "share," but also the share of parents who are able but not willing to pay (or thrice, if we count the share of those parents who cannot afford to pay). If, by contrast, the schools' necessary supplies were paid for with tax revenues, the poor could be exempted and the burden placed on all parents who are able, whether or not they are willing. Voluntary financing shifts the burden to parents both willing and able; it is thus a peculiar, if not perverse, surtax on their civic virtue.³³⁵

Such examples could, of course, be multiplied almost at will; it does not strain credulity too much to imagine that the same parents who supplied chalk and construction paper yesterday are the ones shipping body armor today to their sons and daughters in Iraq (and, at least a little ironically, through "town meetings" to protest the "public option" in health care provision). These are not, however, worst-case scenarios; Both these cases, involve at least some measure public provision. Few openly doubt we should have a public army³³⁶; a vocal minority questions whether we should have public schools.³³⁷

³³⁴ This notion of charitable financing of public services as a surtax on donors' virtue is the generalization of my critique of pro bono publico legal services as the preferred means of meeting the legal needs of the poor. See Atkinson, *Pro Bono Publico Representation of the Poor: The Good as Enemy of the Best*, 9 JOURNAL OF GENDER, SOCIAL POLICY, AND THE LAW 129 (2001) (symposium issue).

³³⁵ This is the generalization I made earlier in the particular context of pro bono legal services to the poor. Robert E. Atkinson, *Pro Bono Publico Representation of the Poor: The Good as Enemy of the Best*, 9 JOURNAL OF GENDER, SOCIAL POLICY, AND THE LAW 129 (2001) (symposium issue).]

³³⁶ Although few seem disturbed at the extent to which even military functions are contracted out to private suppliers, Blackwater's role in Iraq being the most salient example. [Do you need a "Blackwater" article?]

³³⁷ Find some anti-public school stuff.

If you doubt that these doubters of public schools will ever amount to much, consider the historical case of Prince Edward County, Virginia. Faced with federal court orders to desegregate their county schools, the white majority of citizens hit upon an ingenious alternative: Close the county schools.³³⁸ For years, relatively affluent white children went to a segregated private school; relatively poor white children and virtually all the African American children either did not attend school or attended a second private school, staffed mostly by volunteers and funded by donations. Strictly speaking, the “Free School” of Prince Edward County is a textbook example of both “market failure” and government failure.” All demand for public schools was “supra-majority”; the white majority of the county’s citizens unmistakably (and unabashedly) preferred no public schools to integrated public schools. And donors to the Free School found a nonprofit to be the best vehicle from which to meet their demand for the education of African American students.

The sorry tale of Prince Edward County’s schools may, of course, be the exception that proves the rule. The question is: Which rule? All across the South, in counties with white majorities and large African American minorities, a more or less similar pattern repeated itself. Affluent white parents formed private schools, leaving poorer whites and most African Americans in poorly-funded public schools. The new academies were often formally segregated, but not always; at most, the ones that were nominally non-discriminatory could expect to enroll a tiny handful of African American children from relatively affluent professional or entrepreneurial families.

In the North, of course, the pattern was different, as it was in much of the urban South. Segregation above the Mason-Dixon Line, and eventually in larger Southern cities, was generally geographic, not legal; the problem there became “inner city schools.” Not to put too fine a point on it, the Kennedys and their ilk sent their kids to Choate and Exeter, then Harvard and Yale, shaking their heads, if not wagging their fingers, at Southern bigotry; their less economically fortunate fellow Bostonians wrote the saga of

³³⁸ *Griffin v. County School Board of Prince Edward County*, 377 U.S. 218 (1964)

Roxborough bussing. And so, today, when we read admiring reports that newly-nominated Supreme Court Justice Sotomayor graduated from New York City public schools, we do not much doubt that our own admiration is meant to run, with the authors', more to the graduate than to her alma maters. And when we read, in the same accounts, that she went on from those public schools to Princeton University and then to Yale Law School, we might also wonder: Would her credentials have been quite so impressive if she had gone to college at Berkeley or Texas, to law school at Michigan or Virginia?

It is hard to forget the vintage film footage of James Meredith entering the University of Alabama with an armed escort; other inequities in the higher education of his day are considerably less salient. To be reminded that all the Ivy League universities imposed "Jewish quotas" well past the middle of the last century, you will have to read a book (or ask a relative).³³⁹ For the fact that Dean Joshua Marion Morse sustained the newly-integrated, virtually de-funded University of Mississippi Law School with grants from New York-based private foundations, you'll have to read well into the footnotes (or join me for lunch with Josh)³⁴⁰.

The federal court order that admitted James Meredith to the University of Alabama, like the GI Bill that funded my father's veterinary studies and flooded the Ivy League with students far more diverse than their pre-War Yankee clientele, were, in one sense, distinctly egalitarian: They struck down or at least diminished, directly or indirectly, distinctions of race, creed, ethnicity, and even wealth. And, in one sense, they were basically democratic. The GI Bill distinctly so; it was passed by the national Congress. The federal desegregation of Alabama and Ole Miss, much less obviously so; it was under the orders of the courts, our government's counter-majoritarian branch. But the troops were National Guardsmen, not federal marshals, they were ordering in by the

³³⁹ Cite book on "Jewish quotas."

³⁴⁰ Cite book on integration of U. Miss.

elected President, not appointed judges.³⁴¹ And we must remember even the federal judges could not have legally withstand popular discontent that was as wide in the nation as it was deep in the South. A majority of Americans can always amend the constitution and thus overrule the courts.

And yet, in an even deeper and more significant sense, the GI Bill and the desegregation orders were neither egalitarian nor democratic, but aristocrat and republican. The doors that they opened, literally and figuratively, were the doors of universities. Even after the invidious, extraneous bars of race, religion, and poverty had been removed, one essential, salutary bar remained: individual merit. To attend the college of their choice, James Meredith, my father, and your parents or grandparents had to pass more or less rigorous admissions requirements. In that sense, universities are distinctly undemocratic; no adult citizen can be denied a vote in a liberal democracy, but many are regularly denied seats in our public universities. Even after admission, a student's success depends on non-democratic, as well as non-market, criteria. The student body does not vote on the curriculum, nor are individual students entirely free to choose what courses in the curriculum they will take. They follow a prescribed course, a course traditionally set to include at least a basic knowledge of the culture of the West, all the way back to the beginning.

That tradition of liberal education, of course, has been gravely damaged by the cultural radicalism of the 1960s and 1970s, and the fundamentalism and multiculturalism of the 1980s and 1990s; it may well succumb to the consumerism and fiscal crises of the 2000s and 2010s. But, at least for now, the great bulk of our universities, public and private, secular and religious, are recognizable as the lineal descendants of Plato's academy and Aristotle's lyceum, of either Jefferson's University of Virginia or the Puritans' Harvard and Yale Colleges. Our universities, that is to say, have long been supported, quite generously until relatively recently, by a majority of our citizens, including many who never had the ability or the opportunity to attend university themselves.

³⁴¹ Need to confirm that this correct; if there were federal marshals, they were supported by troops under federal executive authority.

De Tocqueville wrote *Democracy in America* in the 1830s, fully a century before the New Deal, not to mention the GI Bill and the *Brown* decision; he cannot fairly be faulted for failing to foresee these later developments. By his lights, America was, in its very essence, a democracy, without the mixed blessings of England's hereditary nobility or France's always powerful, sometimes terrible, state apparatus.³⁴² And ours, of course, was not a very liberal democracy at that: Women were disenfranchised, African Americans were enslaved, states had established religions. De Tocqueville's praise of the central role of associations in American culture was grounded, critically, in the premise that America would always be democratic, not that it should be. He saw America's dependence upon private associations, not as the best imaginable social order, but the best that America could possibly achieve. In that, his thinking was implicitly Aristotelian; his virtues were functions of the institutional arrangements he thought we could not transcend.³⁴³ He knew that the "ought" implies the "can," that *le mieux est l'ennemi du bon*.

Behind what he remarked to be Americans' astonishing inclination to form associations as the response to the full range of perceived social problems, de Tocqueville noted a distinctive element of the American national character:

The citizen of the United States is taught from infancy to rely upon his own exertions in order to resist the evils and the difficulties of life; he looks upon the social authority with an eye of mistrust and anxiety, and he claims its assistance only when he is unable to do without it. This habit may be traced even in the schools, where the children in their games are wont to submit to rules which they have themselves established, and to punish misdemeanors which they have themselves defined. The same spirit pervades every act of social life.³⁴⁴

³⁴² See de Tocqueville, 2 *Democracy in America* Ch. 5 ("Wherever at the head of some new undertaking you see the government in France, or a man of rank in England, in the United States you will be sure to find an association."). See also _____ ("[S]ocieties with very centralized political structures such as France or the United Kingdom will have very different government-nonprofit sector relations than countries with decentralized political systems such as the United States.").

³⁴³ See Aristotle, *POLITICS* (each state must have the political system best suited to it, along with the virtues implied by it).

³⁴⁴ De Tocqueville, 1 *Democracy in America*, Ch. 12 (UVa. Online).

It was this engrained sense of self-reliance and distrust of government that made the promotion of private associations, in de Tocqueville's view, critical to American democracy:

Nothing, in my opinion, is more deserving of our attention than the intellectual and moral associations of America. The political and industrial associations of that country strike us forcibly; but the others elude our observation, or if we discover them, we understand them imperfectly because we have hardly ever seen anything of the kind. It must be acknowledged, however, that they are as necessary to the American people as the former, and perhaps more so. In democratic countries the science of association is the mother of science; the progress of all the rest depends upon the progress it has made.

Among the laws that rule human societies there is one which seems to be more precise and clear than all others. If men are to remain civilized or to become so, the art of associating together must grow and improve in the same ratio in which the equality of conditions is increased.³⁴⁵

Given American culture's entrenched dislike of government, and American law's Constitutional rejection of a hereditary aristocracy, promoting private associations was, in his view, America's only way out of a kind of Cyclopean semi-barbarism. Reliance on private associations, then, was just not America's best way to become, or remain, civilized; it was our only way, a Hobson's choice, not a Utopian alternative.

And there is another, equally significant, sense in which de Tocqueville's vision of the role of private associations in American democracy is Aristotelian. As we have seen, he sees private associations as the only way for our country, given its historically conditioned bias against public institutions, "to remain civilized or to become so." This latter phrase necessarily implies that de Tocqueville has an end in view, a goal for all societies, including our democratic society, which is not to be reduced, even in our democracy, to what the people, or the majority of the people, want. For de Tocqueville, child of the Enlightenment and the Classics that he could not but be, that end is civilization. In giving

³⁴⁵ De Tocqueville, 2 Democracy in America Ch. 5.

that end content, he most assuredly looked beyond American democracy, back to Europe, and back to Europe's past, particularly to its classical, Greco-Roman past.³⁴⁶

Perhaps, we can now appreciate, de Tocqueville should have looked ahead as well. He wrote, remember, in the era of Jackson's racist and rowdy democracy³⁴⁷, scornful of both Hamilton's Bank of the United States and Marshal's principle of judicial review. From that populist slough de Tocqueville could not see ahead to Lincoln the Whig, advocate of an activist government, state and national, much less Lincoln the Republican, public opponent of popular sovereignty on the question of slavery (and probably private opponent of popular sovereignty *tout court*). His Grand Army of the Republic neither defended America against foreign invaders nor secured its independence from a distant prince; it crushed the effort of the legally enfranchised voters of the Southern states to establish, by majority vote, an independent nation of their own, even as their forebears and Lincoln's had done.

His may have been a vision of government "of the people, by the people, and for the people," but not without serious qualifications. He meant, not to follow popular whim, but to lead the people to a higher sense of themselves, individually and collectively. On the eve of the Union's unconditional triumph, in his second inaugural address, he commended the people to "the better angels of our natures." To ensure that the Union triumphed, and triumphed unconditionally, Lincoln's administration suspended the writ of habeas corpus, aggressively suppressed the rival press, and dispatched troops to New York and other northern cities to press reluctant citizens into the Grand Army of the Republic.

³⁴⁶ Thus, in commending the study of classical literature to America writers, and to modern writers generally, de Tocqueville said:

All who aspire to literary excellence in democratic nations ought frequently to refresh themselves at the springs of ancient literature; there is no more wholesome medicine for the mind. Not that I hold the literary productions of the ancients to be irreproachable, but I think that they have some special merits, admirably calculated to counterbalance our peculiar defects. They are a prop on the side on which we are in most danger of falling.

2 Democracy in America, Chapter XV, THE STUDY OF GREEK AND LATIN LITERATURE IS PECULIARLY USEFUL IN DEMOCRATIC COMMUNITIES.

³⁴⁷ Confirm with cites to new biography of Jackson.

And Lincoln the Republican, remember, was not only the author of the Emancipation Proclamation and the savior of the Union. He was also the signer of the Morrill Act, which established the land-grant college system. Remember, too, that the land grant colleges now count among their number not just my grandfather's Clemson and my brother-in-law's N.C. State, but also our friend Harvey Dale's Cornell. Designed to focus on agricultural and mechanical subjects, very much as de Tocqueville would have recommended³⁴⁸, all land grant colleges eventually developed liberal arts majors and required humanistic courses even for students in their more "practical" programs. Nor did this development cost them their popular support or public subsidies.

My point? Democracy need not be indifferent to merit, even excellence. Our democracy, in our parents' time if not our own, has proved itself capable of promoting a most undemocratic, non-consumerist institution, the traditional Western university. And that gives us reason to hope, if not expect, that our democracy, properly prompted by "the better angels" of our cultural sector, may yet choose still further to distance itself from Jacksonian democracy, yet more fully to re-make itself in the image of Lincoln's republicanism.

3. Toward a New Synthesis.

The traditional subsidy theory offered no means of comparing the relative goodness of one charitable purpose with another, or of comparing charitable providers of a good or

³⁴⁸ De Tocqueville's views on education in a democracy were hardly what we would call democratic:

It is evident that in democratic communities the interest of individuals as well as the security of the commonwealth demands that the education of the greater number should be scientific, commercial, and industrial rather than literary. Greek and Latin should not be taught in all the schools; but it is important that those who, by their natural disposition or their fortune, are destined to cultivate letters or prepared to relish them should find schools where a complete knowledge of ancient literature may be acquired and where the true scholar may be formed. A few excellent universities would do more towards the attainment of this object than a multitude of bad grammar-schools, where superfluous matters, badly learned, stand in the way of sound instruction in necessary studies.

2 Democracy in America, Ch. XV.

service with alternative supplies in the for-profit or governmental sectors. It simply accepted that all charity, whatever that was, was good, and deserving of favorable tax treatment. It made no effort either to identify the common goodness or distinguish the distinctive goodnesses of particular charitable purposes. Faced with the question of why such ill-defined goodness merited favorable tax treatment, over against for-profit suppliers of the same goods, traditional subsidy theory pointed vaguely to several meta-benefits: pluralism and diversity on the one hand, innovation and productive efficiency on the other.

Later theorists took this to be embarrassingly sketchy, if not dangerous politically. It seemed to pose a dilemma: Either show what “goodness” about charity warrants government subsidy, or be prepared to relinquish the legitimacy of charity’s favorable tax status. Two sets of answers emerged, each seizing one of the horns of the dilemma. Technical definition theorists took on the subsidy side; metabenefit theorists, the merits of charity’s case.

Bitker and Rahdert and Andrews tried to obviate both the need for a qualitative definition of charity and a justification of its special tax treatment by arguing that that treatment was not a conscious preference for what charities did, but rather an artifact of the technically proper definition of their income. Meta-benefit theorists seized the other horn of the dilemma, arguing that we should focus, not on the particular goods and services charities provide, but on something distinctive about the way they provide them. Hansmann and Hall and Colombo identified this meta-benefit as economic efficiency. By making charity a means of satisfying donor demand, and by making the exemption and deduction a means of encouraging economic efficiency, they neatly removed the need to compare charitable purposes. The charitable exemption and deduction, on this view, are simply one aspect of the state’s general regulatory function, making markets more economically efficient.

My own meta-benefit theory, by contrast, focused on the presumed virtue of altruistic provision of goods and services, whatever those goods and services might be.

Mine was, then, an implicitly aretist theory. What made charity especially good was the virtue of selfless giving, not the special goodness of what was given, or to whom.

By joining my aretist theory to Hansmann and Hall and Colombo's efficiency theory, we can give the current income tax treatment of charity a plausible normative foundation, majoritarian pluralism. In its Ricardian and regulatory functions, the state subsidizes charity to promote the capitalist market goal of maximum efficiency; in its redistributive and aretist function, the state subsidizes all altruistic nonprofits the purposes of which the majority, within the constraints of liberalism, does not explicitly approve. Thus, in our politics as in our economics, our state subsidizes charity to give the people more of what they want.

It is one thing, however, to map out a system's normative foundations, and quite another to recommend them as sound or to praise what has been built upon them as satisfactory. Here again, we have what amounts to a hypothetical imperative: If you want to promote a form of charity well matched to our current economic and political arrangements, here is one way to do it. Once again, we can approach that conditional recommendation from two quite different perspectives: that of an individual within the system, making decisions about what charity to support, and to what extent, and that of an evaluator or designer of the system, looking at it, as it were, from outside and above.

With respect to this latter perspective, from above the system, one could, of course, simply embrace the present system, not merely as what is, but also as what it right.³⁴⁹ One could, that is, be quite satisfied with the place of charity vis-à-vis our for-profit and governmental sectors, even as one could be satisfied with both our capitalist market economy and our liberal democratic polity as well. And one could, of course, be more or less enthusiastic. At one extreme, one could see it as the best of all possible worlds; at the other, as a barely tolerable alternative that cannot, alas, be improved upon.

³⁴⁹ From the perspective of some – Alexander Pope and Professor Pangloss, to name but two -- what *is* what's right; one need not be quite so Panglossian, of course, to accept our current social arrangements. *See, e.g.,* Rawls (discussing reasonably just state).

This last position shades into a quite different perspective; here again, quantitative changes can produce qualitative shifts. As water can freeze, so it can boil over. So, too, as we have seen, one can wonder whether the normative judgments implicit in the present system are superior to some attainable alternative arrangement. If one concludes that we can, and should, do better, then another range of possible positions opens up. One can work, more or less aggressively, and more or less respectfully of the current regime, toward a better one. Not to put too fine a point on it, one can fly fuel-laden passenger liners into skyscrapers, or one can study and explain, or one can sigh in despair or sneer in cynicism. And so one's politics will come back around to one's ethics.

This brings us to the second, insider, position, that of an individual citizen and consumer within our society as it is. Here it is important to notice an odd corollary of majoritarian pluralism's latitudinarian approach to what counts as charitable: it offers very nearly no guidance. It says that you can support whatever vision of public good you like, within very wide parameters, but it offers no criteria for deciding which among them is better, and by how much. In that respect, it is very like the more value-neutral forms of liberalism. And this is, of course, no accident: Majoritarian pluralism is, as we have seen, a way of accommodating liberal value-neutrality toward society's ultimate good in the context of defining particular charitable purposes. In the particular as in the general, the right wing of liberal political theory tends toward more or less thorough agnosticism about an identifiable public good.

Some charities, as we have seen, offer very precise guidance here; that, again, is precisely what we would expect from our pluralist cultural sector. In a liberal democracy, which of the proffered ways one chooses, if any, is entirely one's own prerogative, as a matter of fundamental law. As Sartre once said, the way you go will vary a lot depending on whom you ask directions from; his examples, apparently chosen to accentuate the distance between them, were a Catholic priest and an existentialist philosopher.³⁵⁰

³⁵⁰ JEAN PAUL SARTRE, *EXISTENTIALISM IS A HUMANISM* ____ (Carol Macomber, trans., Yale Univ. Press 2007) (1945).

To complete our analysis of charity, it would be useful to examine the contours of one such alternative system; that is the task of Part Four. The system outlined there, Abrahamist Republicanism, falls somewhere between the value-agnosticism of Sartre and the supposed value-certainty of his Catholic priest, even as it falls somewhere between the value-agnosticism of de Tocquevillean democratic charity and the traditional subsidy theory's posited, but unproved, belief in especially good goods and especially worthy people. On many matters, we shall see, Abrahamist Republicanism is closer to Sartre's position; like him, it is firmly grounded in the post-Enlightenment skepticism about not only traditional religion, but also all "natural" norms and "supra-human" values.

On the other hand, on the question of how fully free individual choice among value systems really is, Abrahamist Republicanism is firmly on the side of the priest. With him,³⁵¹ it embraces the wisdom of the proverb: Raise up children in the way that is right, and, when they are old, they will not depart from it. Beyond that, it holds, with the priest, that being raised up in the right way (and, conversely, the wrong way as well) cannot have been one's own choice; it has to have been through the agency of some other, whether that agent is a she-wolf, or one's biological parents, or Hillary Clinton's "village," or the guardians of Plato's Republic, or God Almighty. Being raised right, in a word, requires grace, the unmerited favor of someone more favored.

Abrahamist Republican rests that insight. In theology, it is the Augustinian tenet that salvation is by grace alone; in philosophy, it is Plato and Aristotle's belief that living the best life requires getting the best education. Stripped of all theological and philosophical trappings, it comes to this: Abraham Lincoln was not born in a log cabin he built with his own hands. The function of philanthropy is to ensure that every child born on earth has a chance – ideally, a chance better than Lincoln's -- to become the leader of the greatest power in the world.

Pending further specification, we can call that power the Republic. As the heir of post-Enlightenment liberalism, the Republic can have no established religion and must be

³⁵¹ To gender-neutralize here, in the name of justice, would, alas, seriously distort current reality.

suspicious of all supernatural claims. But, having evolved through the West's entire recorded history, the Republic will have its cultural roots in the faith of Abraham, the common heritage of Jews, Christians, and Muslims and, through them, all the peoples of the West, and the world. In the final part of this paper, we will examine, though only in outline, this Abrahamist Republican vision of philanthropy.

All critiques of the traditional subsidy theory shared one common feature: scrupulous refusal to say how some goods and services are normatively better than others. This seems, on its face, to be a serious deficiency, if not an outright vice. On closer inspection, however, we have seen it to be an odd virtue, borne of the necessity to fit our understanding of charity to our capitalist market economy on the one hand and our liberal democratic polity on the other. That necessity, of course, is conditional: we need not conform our charity to the two-sided mold of our current economics and politics. Borrowing from deep traditions in our cultural sector, we can, instead, see this mold as a procrustean bed, deeply damaging to what we believe best in both our society and ourselves. The function of philanthropy, from that perspective, is not to conform to this world, but to transform this world into its own image, to give both market capitalism and liberal democracy a human face and a humane spirit.

IV. A Faith and Philosophy for Philanthropy: Questioning Today's Orthodoxies, Re-Affirming Yesterday's Foundations.

It is our duty to be more careful in the performance of the commandment of almsgiving than in that of any other positive commandment, for almsgiving is the mark of the righteous man who is of the seed of our father Abraham....

Maimonides³⁵²

Well, then, Socrates, I should say that righteousness and piety are that part of justice which has to do with the careful attention which ought to be paid to the gods; and that what has to do with the careful attention which ought to be paid to men is the remaining part of justice.

Plato, *Euthyphro*³⁵³

³⁵² *The Code of Maimonides (Mishneh Torah)*, Book Seven, The Book of Agriculture 89 (Isaac Klein, trans., 1979).

Let's begin this final part with a brief review of where our analysis has taken us. We saw, in Part II, that the four-sector model of our society implicitly raises an intriguing question -- What is the proper function of society as a whole? -- and gives an implicit answer: Do more of the same, or better, by today's standards; give those with money more of whatever they'd like to but, and enact the will of the majority into law as quickly and cheaply as possible. We have observed that it may be misleading to ask for the function of society as a whole; it is surely circular to answer, even if only implicitly, "more of the same." But the ancient question still tantalizes, even though our modern question-begging answer is doubly understandable, given the premises of the model.

That model is only meant to account for philanthropy in our present society; our society's liberal democratic polity can take no vision of the ultimate good as given. Accepting our capitalist market economy and liberal democratic polity as given, the four sector theory tries to derive the function of the third, or philanthropic, sector from the failures of the other two to properly perform their own. But that approach, helpful though it was, led us to an impasse. One of the public sector's critical functions, artist redistribution, must either collapse into the majoritarianism of the governmental sector and the consumerism of the for-profit sector or borrow supplementary standards from the philanthropic sector. And our philanthropic sector, as we saw, provides not just one such set of standards, but many, each with its own metric.

In Part III, we saw that failure to address that multiplicity of standards undermined all three phases of theorizing about the charitable exemption and deduction. In their place, we offered a modification of the traditional subsidy theory, majoritarian pluralism. That, we saw, is an exemption nicely suited to our present polity and economy as given, a truly Tocquevillean philanthropy for a fundamentally democratic America. As to both politics and economics, it implies a kind of Panglossian Progressivism: Whatever is, is right -- or can be improved by making the status quo conform more closely to its own standards. And it takes an almost equally embracing view of philanthropic purpose and

³⁵³ Plato, *Euthyphro* 15-16 (F.J. Church, trans., 2d revised ed. 1956) (speech attributed to Euthyphro).

effectiveness: Whatever legal purpose anyone wants to pursue through a truly nonprofit organization, no matter how productively inefficient or morally offensive, is not only permitted under the general law of nonprofit organizations, but also eligible for what amounts to a tax subsidy based on its own income and its donor's contributions.

Our philanthropy is thus like a public garden of “grow your own” plots, with a peculiar restriction: you can grow pretty much whatever you like – flowers or fruits or vegetables – as long as you do not take the produce home with you (and as long as you don't grow something really dubious, like marijuana). If you prefer, you can tell other people what to grow, and how to grow it, or why growing stuff is a bad idea compared to other things you might be doing; our philanthropists' garden, like London's Hyde Park, has a hallowed “speakers' corner.” As Part II concluded, perhaps the most distinctive function of philanthropy is to provide visions of the good, the ideal for human individual and social life, what the Classics called ethics and politics, what the Scriptures call the Way, or the Law.

Here the four-sector model and one of the sectors it models begin to work at cross purposes. That model is essentially descriptive; its method is to take the social world as it finds it, dissect its component parts, and assess how well they are performing their current functions. Recognizing that these functions are more chosen than given, more the product of human than natural selection, it treats their implicit norms as hypothetical imperatives: if you want a purely capitalist economy, then you should give consumers the most of what they want at the lowest price; if you want a purely democratic liberalism, you should treat government as a market where the currency is the ballot, and the common good is the majority will.

That model's radically accepting assessment of the status quo is hardly the only perspective that our philanthropic sector offers. Deeply embedded in both its secular philosophy and its traditional religions is a radically different perspective, which insists that we never take any economic or political system as sacrosanct, but always hold both up

to critical evaluation under standards outside themselves, standards given by philosophy on the one hand and faith on the other.

As we saw in Part II, the cultural sector gives no single standard of the good. But some are better grounded in our shared Western culture than others; some, indeed, are better seen as the foundation on which that culture itself has been built. This final part examines one such standard. To acknowledge its dual inheritance from Athens and from Jerusalem, its dual foundations in Greco-Roman philosophy and in the religions of Judaism, Christianity, and Islam, I call that alternative perspective Abrahamist Republicanism. That perspective promotes a very different ideal for our society, with a very different relationship among the four social sectors.

The first section of this Part sketches out the Abrahamist Republican perspective, noting its sources in Classical philosophy and Western monotheism, its compatibility with the traditional meaning of philanthropy, and its implicit metric for the virtues of philanthropy. The second section extends that metric beyond assessing philanthropy to assessing the whole of our society. It outlines an ideal Abrahamist republican society, including philanthropy's role in that society (though not, I'm afraid) an ideal income tax treatment of philanthropy. The final section brings us back "home," as it were, to address perhaps the most tricky metric of all, the theory of the second best: How to move from the world we have toward a more nearly ideal one, a commonwealth of philanthropy. Here we encounter a problem of proverbial difficulty: The best is the enemy of the good. The basic answer can come as no surprise: There are no substitutes for the love of wisdom and humanity, philosophy and philanthropy.

A. The Outline of Abrahamist Republicanism.

Abrahamist Republicanism rests on these twin tenets: the ideal function of human society is to produce fully flourishing human beings; the highest aspiration of fully flourishing human beings is to order their society so as to make full human flourishing a viable opportunity for all citizens. That implies two coordinate roles for philanthropy in particular and society in general: Enable every citizen to flourish fully, and encourage the

highest human excellence. To borrow from the current idiom, though admittedly not without obvious irony: Leave no child behind; be all that you can be. In an older idiom, philanthropy's literal meaning, love of humanity, thus has two aspects: humanitarian relief and humanistic aspiration.

This section first shows how each of these goals is deeply rooted in both Classical Western philosophy and Abrahamist religion, although their relative emphases admittedly seem different. Against that background, we will see that the dual functions of Abrahamist Republican philanthropy map nicely onto the two basic headings of traditional philanthropy, providing the needy with necessities and promoting excellence for everyone. Finally, this section offers a metric for the dual functions of Abrahamist Republican philanthropy.

1. Athens and Jerusalem: Classical Philosophy and Abrahamist Faith.

Classical normative philosophy and Abrahamist faith both embrace the two halves of human flourishing we have identified, helping the least well off and aiming for the highest human achievement. To be sure, Abrahamist faith emphasizes the plight of the least well off and classical philosophy focuses more on human excellence. In their different emphases, however, the two sources of Abrahamist philanthropy are complementary rather than contradictory. To see how this is so, let us look first at philosophy, then at religion.

a. Classical Philosophy.

In both Plato and Aristotle, the highest human good is the highest human faculty performing at its best, and that highest faculty is reason. Both are ambivalent about what the object of the highest human reasoning should be; both, it is fair to say, are a bit torn between politics, the ordering of human affairs, and philosophy, the seeking of the highest truth, between achieving justice and acquiring wisdom.³⁵⁴ But it is also fair to say that

³⁵⁴ Cite Marcus Aurelius, *Meditations*, Book VIII, 26, "A man's joy is to do what is proper to man, and man's proper work is kindness to his fellow man, disdain of the movements of the senses, to discern plausible imaginations, to meditate on Universal Nature and the work of her hands." (Everyman). Cite also Pliny's debate with the philosopher.

both Plato and Aristotle see the coordination of these goals in the role of the philosopher-king, who works justice through wisdom. The most fully flourishing person, then, is the one who governs wisely to advance justice.

The classical tradition is a good deal less emphatic, however, that justice is to include what we would call “equality of opportunity.” With rare exception, classical philosophers were pretty well-off white men with astoundingly elitist, even anti-democratic, perspectives. It is important to recall, however, that their elitism, though radical, was also radically meritocratic. What is more, in Plato at least, this meritocracy was radically egalitarian. The “big lie,” for which *The Republic* is regularly reviled, addressed precisely this point: The fundamental myth of the just regime had to be that, in every class of humans, there might be children capable of becoming philosopher-kings. Souls of gold and silver are to be found even among the children of iron and bronze; the city of justice must cultivate all its children, then, with the utmost care.³⁵⁵ The education of philosopher-kings, therefore, operated under this familiar mandate: No child left behind. What is more, these children emphatically included girls as well as boys. The hardest “sell” in establishing the “city of justice” were two that Socrates insisted upon: Girls have to be educated along with boys, because the rulers of the Republic have to include women as well as men. The classical tradition, then, quite comfortably accommodates the dual mandate of Abrahamist Republicanism-- equality of opportunity and encouragement of excellence – although admittedly with more emphasis on the excellence than equality.³⁵⁶

b. Abrahamist Faith.

A parallel case can be made for this dual mandate in the Abrahamist religious tradition, with two important qualifications. First, both mandates are admittedly less firmly grounded in the original texts of the Abrahamist religions than in those of classical philosophy. Second, as between the two mandates, the emphasis of the Abrahamist religions, as compared with classical philosophy, is reversed: more on relieving the plight

³⁵⁵ *Republic*.

³⁵⁶ See also John Rawls, *A Theory of Justice* (tracing his theory of the good back to Aristotle).

of the poor, less on achieving human excellence. As Lon Fuller has argued, Judea-Christian morality is more a “morality of duty”; Greco-Roman morality more a “morality of aspiration.”³⁵⁷

The Scriptures of Jews, Christians, and Muslims fairly resound with calls to care for the poor (although, that said, they hardly approach Plato’s emphasis on upward social mobility, much less full sexual equality). On the other hand, they also call for the cultivation of excellence, and they give high priority to wisdom, although their wisdom tends to be a good deal more practical and pious than abstract or political. Their model humans, Moses and David, are rulers and lawgivers, literal and figurative shepherds; the latter is, in addition, a poet and a musician, father of Solomon, scholar and philosopher, the wisest of men and the most just of judges.

Beyond their original Scriptures, all three Abrahamist faiths come much closer to the Classics on both mandates, the humanistic as well as the humanitarian, no doubt because, in all three communities, the Classics came to enjoy a very high standing in their own right. It was, after all, Abrahamist scholars who preserved the classical texts and tradition after the collapse of the Roman Empire in the West. It was no small boast of the medieval church that the best and brightest of believers, be they but shepherd boys, had, under its tutelage, become rulers, the popes before whom kings, even emperors, had to bow. The emperor Constantine had, to be sure, conquered under the sign of the Cross, but the Knights of Christendom also welcomed into their Nine Worthies the pagans Caesar, Alexander, and Hector. And it is no great surprise that, by that time, the Church’s scholars had enthusiastically embraced Aristotle, if only to keep pace with their Islamic competitors. In the efforts of all three faiths to reconcile the pagan Classics with their own Scriptures, it is hardly unfair to say that, at least for important strands in all three traditions, the accommodation was more by way of moving Jerusalem toward Athens than in the other direction.

³⁵⁷ Lon Fuller, *The Morality of Law*.

c. The Admitted Unorthodoxy of Abrahamist Republicanism.

Abrahamist Republicanism, then, can plausibly be placed on its twin foundations, in the classics and the scriptures of the West. Even so, as I conceded at the outset, it is an unorthodox reading of both classical philosophy and Abrahamist religion. It is important to see the most important aspects of its unorthodoxy with respect to each. In the case of each, we can see the basic difference as the same: the foundations of those foundations.

What distinguishes Abrahamist republicanism from both of the traditions on which it is founded is its attitude toward the foundation of its twin goals, equality of opportunity and encouragement of excellence.

In the standard reading of classical republicanism, that goal is rationally derivable as good from either the nature of human beings or the nature of the cosmos as a whole. Classical republicanism, that is, is generally thought to rest on a natural law foundation, an assumption that reason can derive the imperative “ought” from the descriptive “is.” Abrahamist Republicanism accepts this possibility, but deeply doubts it; Abrahamist Republicanism takes seriously Hume’s skepticism on this point. It is deeply suspicious that classical republicanism, as traditionally understood, commits what modern ethicists call “the naturalistic fallacy.” Following the method of Socrates in the Platonic dialogues, Abrahamist Republicanism is satisfied when it finds, not necessarily external foundations or free-standing proofs, but agreement among conscientious participants in dialogue.³⁵⁸ Abrahamist republicanism takes its twin goals as both capable of being desired and possible of realization, but as neither inherently desirable nor sure of accomplishment. To use an admittedly fraught word, it takes them as matters of faith. Abrahamist republicanism thus does to classical natural law what Kant did to “natural theology”: accepts the limits of reason, and thus makes way for faith.

And the nature of that faith, on the other hand, is what distinguishes Abrahamist Republicanism from traditional Western monotheism. Even as Abrahamist Republicanism is agnostic about the possibility of grounding the goals of classical philosophy in rationally

³⁵⁸ See esp. *Gorgias* and the *Republic*, Book IX.

proved norms, so it is agnostic about the traditional foundation of those norms in Western monotheism: God. But agnosticism is not atheist; to doubt is not to deny. Just as Abrahamist Republicanism holds itself open to the possibility of rationally proved norms, even as it declines to rely upon them, so it is open to the existence of God, though without requiring belief in God as an article of faith. Abrahamist Republicanism is thus a humanism, not a theism, though it is a humanism that is not inconsistent with Western monotheism, a humanism completely open to theists (and, of course, God).

This is, of course, a paradox, but it is not without precedent in the Abrahamist Scriptures themselves; indeed, those Scriptures themselves show an avenue of reconciliation. In the Torah, the Gospels, and the Qur'an, there are two great commandments: Love God; love thy neighbor as thyself.³⁵⁹ The priority of the first in the Abrahamist tradition is essential, not merely sequential; love of neighbor flows from love of God. Abrahamist republicanism, by contrast, omits love of God altogether in favor of the love of humanity, philanthropy. This is, obviously, a major difference.

But, even in the Abrahamist scriptures, we are told the second command is “like unto the first.” As they present him, God himself is very much a humanist, in the sense that human welfare is his primary concern. He is said to love Israel³⁶⁰ and the Church³⁶¹ as a husband loves a bride; he is (in a somewhat awkwardly parallel metaphor) the father of his people Israel³⁶² and his new people, the church³⁶³. (In the Gospels he loves his needier adopted children more than his proper and perfect son, whom he sacrifices for their benefit³⁶⁴; in Islam it is the outcaste Ishmael, the son of Abraham’s handmaid Hagar,

³⁵⁹ *Deuteronomy* 6:4-5 (“Hear, O Israel: The Lord our God is one Lord, and you shall love the Lord your God with all your heart, and with all your soul, and with all your might.”) (RSV); *Leviticus* 19:18 (“You shall love your neighbor as yourself: I am the Lord”); *Mathew* 22: 34-40 (Jesus’s recitation of these commandments and declaration that “on these two commandments depend all the law and the prophets”); *Qur’an* 76:8-9 (“They give food, out of love for Him, to the poor, the orphan, and the slave, saying: We feed you only for Allah’s pleasure – we desire from you neither reward nor thanks”).

³⁶⁰ Hosea 1:2; 2:16-20; 3:1.

³⁶¹ REA: Cite Pauline letter.

³⁶² Hosea 1: 10; 11:1.

³⁶³ REA: Cite Pauline letter.

³⁶⁴ John 3: 16.

not his wife, who becomes the forebear of the Prophet.) The God of Abraham is the Good Shepherd, ready to lay down his life for his sheep.³⁶⁵

The clear implication is that God, like a lover and a father, loves others more than he loves himself; if we are to be like him, we are to love others, especially the neediest of others, not only more than ourselves but also, like God, more than God. Thus, in the Abrahamist Scriptures, God is sometimes, if not always, seen as more concerned that his followers care for their fellows, especially the least well off among them, than attend to worshipping him, even acknowledging him. The Hebrew prophets are emphatic about God's preference for human justice over divine worship: *I hate, I despise your sacrifices.... Let justice roll down like waters, and righteousness like an everlasting stream.*³⁶⁶ The Gospels are at least equally emphatic:

“Inasmuch as ye have not done these things unto the least of these my brethren, you have not done them unto me.”³⁶⁷

The God of the Prophets and the Gospels demands that his followers do justice, not that they do justice in his name, much less worship him; his true followers are precisely those who do justice, though they have never known him, and no others, no matter what other claims they make upon him.

In leaving the things of God aside to concern itself with the needs of our fellow humans, then, Abrahamist Republicanism is not only consistent with Abrahamist faith; it may be that faith's ideal form. At the risk of offending the more orthodox of all three faiths, we could thus call Abrahamist Republicanism the Republican Torah, or Gospel, or Way. This is no more radical than John F. Kennedy's declaration, meant to be thoroughly orthodox nearly half a century ago: “On earth God's work must truly be our own.” It is a paradox the medieval rabbis unpacked: God Himself, who creates nothing without

³⁶⁵ Good shepherd (a deal less purely other-regarding; one has to worry about the flock being fleeced, or worse); 23rd Psalm's image of human flourishing; “I have come that you may have life, and have it more abundantly.”

³⁶⁶ Amos; see also Isaiah 29: 13, quoted in Matthew 15: 8-9.

³⁶⁷ Mathew 25: 31-46, esp. 45.

purpose, must have a purpose even for atheists, to help the needy when the faithful look only to Him.

Our religion and our reason, our faith and our philosophy, are both a double embarrassment and a dual opportunity. For the conventionally religious, the problem is our reason, in opposition to revealed truth. Having read the Scriptures, we believe that the God of Abraham would have to be toward us as a father is toward his children; so we cannot see how he would ask anyone, least of all Abraham, to kill his son without giving a reason, even as he commands us to love our neighbors as ourselves. For modern secularists, the problem is rationally grounding our knowledge of the good. With Socrates, we hold a paradoxical belief that all we know is that we know nothing about the things that really matter. But we also believe, on no basis but the example of our master and his disciples, that the unexamined life is not worth living, and that the examined life leads us to his republic, the City of Justice in which piety and justice are one, and that one is philanthropy.

But the Scriptures tell us God stayed Abraham's hand; may not the lesson be, not the virtue of blind obedience, but the need to act on no mandate, even God's, not grounded in clear human good? And Socrates, for all his ironic ignorance, still built his city of justice, stopping at every step to ask the assent of his fellow philosophers, to gain their reasoned assent before moving on.

Nowhere is this point better captured than in a story from the Talmud.³⁶⁸ One day the rabbis were arguing over the ritual purity of an oven. Having exhausted all rational argument without persuading his opponents, Rabbi Eliezer, in evident frustration, resorted to a series of miraculous proofs: If I am right, let this marvel occur. And so they did: A carob tree uprooted itself, a stream ran backward, a wall of the school itself nearly fell. But, unimpressed with each marvel, the other sages all posed the same question: What has that to do with proof? Finally, in complete exasperation, Rabbi Eliezer invoked heavenly intervention: If I am right, let Heaven declare it. And Heaven did, indeed, declare him

³⁶⁸ *Tractate Bava Metzia* 59B, in 3 THE TALMUD 235-237 (Steinsaltz ed. 1990).

right. But Rabbi Yehoshua had the last word. Quoting a verse of Torah,³⁶⁹ he exclaimed, “The Torah is not in heaven!”

Subsequent commentators wondered among themselves how Rabbi Yehoshua had managed to get the better of God. Opinions varied, but one of them, attributed to a vision of the prophet Elijah, was this:

The Gemara relates that generations later Rabbi Natan met the Prophet Elijah Rabbi Natan asked Elijah about the debate between Rabbi Eliezer and Rabbi Yehoshua. He said to him: “What did the Holy One, blessed be He, do at that time when Rabbi Yehoshua refused to heed the heavenly voice?” In reply, Elijah said to Rabbi Natan: “God smiled and said: ‘My sons have defeated Me, My sons have defeated Me!’” God’s sons “defeated Him” with their arguments. Rabbi Yehoshua was correct in his contention that a view confirmed by majority vote must be accepted, even where God Himself holds the opposite view.³⁷⁰

Credo. Here is the creed, the core belief, of Abrahamist Republicanism.³⁷¹ If there is a better statement of the West’s faith and philosophy, I have yet to find it.

At the risk of detracting from its perfection, I must venture a few observations to put its message more precisely into the context of our present study. Most basically, this Talmudic case, like our inquiry, is about virtue: for the rabbis, the proper condition of an oven; for us, the comparative worthiness of philanthropy. In both these matters, as in all others, the Talmud tells us to look to the Torah, the Law, for our metric. But, even in the Law, we ourselves must do the measuring.

³⁶⁹ Deuteronomy 30:12.

³⁷⁰ *Tractate Bava Metzia* 59B, in 3 THE TALMUD, *supra*, at 237.

³⁷¹ I am not, alas, in a position to say whether it is the core belief of Judaism, but I rather suspect not. I am in a much better position to say that it is decidedly not the position of Western Christianity, Catholic or Protestant. In current Catholic orthodoxy, the pope is, as earthly vicar of the second person of the godhead, infallible in matters of faith; God Himself takes no such place in Eliazar’s system for himself, much less for his surrogate. In the principal Protestant tradition, the one that traces itself back to Luther, the ultimate source of authority in all such matters is the individual believer’s interpretation of infallible Scripture, with no need either to be learned in that Scripture or to consult anyone who is. This seems very much the view of fundamentalist Islam, if I might venture an outsider’s tentative view; mainstream Islam seems much closer to Judaism in its veneration of scholarly consensus, and thus to Eliazar and Abrahamist Republicanism. It was, remember, the Prophet Himself who said, “The ink of scholars is more precious than the blood of martyrs.”

We ourselves, yes, but not just anyone; only those learned in the Law. The rabbis, like Socrates, listened only to the few, this few, never to the many. Nor to the One, either, unless the One was willing to give reasons grounded, not in His will, but in the Law, as authoritatively interpreted by scholars of the Law. On that, the Talmud teaches, we have the One's own word – even His smile -- at the lesson Rabbi Yehoshua and the others taught Him. The God of the Talmud apparently takes delight in the insight of Socrates: It is more beneficial to be corrected than to correct, to lose an argument than to win, for thus we become more wise. And wisdom is our proper virtue, the necessary condition for the perfect performance of our highest human function.³⁷²

In summary, then, Abrahamist Republicanism rests comfortably on the West's twin foundations, Jerusalem and Athens, if not quite precisely in the center of either. With respect to both its antecedent traditions, Abrahamist Republicanism emphasizes what might be called the "horizontal" over the "vertical." It focuses on the anthropocentric rather than theocentric aspects of the Abrahamist religions and on the moral and political rather than metaphysical and metaethical aspects of classical philosophy. On the other hand, its roof is wider than their foundations; Abrahamist Republicanism comfortably accommodates all those of narrower foundational beliefs who support its twin pillars, humanitarian relief and humanistic excellence, even if those with narrower beliefs as to foundations cannot return the welcome.

With Marcus Aurelius, we see the fault as more likely ours, and in any case not our neighbor's: "If he goes wrong, instruct him kindly and point out what is being overlooked; if you fail, blame yourself or, better, not even yourself."³⁷³ With both the pagan philosopher-czar³⁷⁴ and the Church father who forsooth his fallen city,³⁷⁵ we believe that our own belief is a matter of grace; something our parents and our teachers and their philanthropy have given us, not something we ourselves have earned.

³⁷² Plato, *Gorgias*.

³⁷³ Marcus Aurelius, *Meditations*, *supra*, at 64.

³⁷⁴ Marcus Aurelius, *supra*, Book I (offering thanks to ancestors, friends, teachers, and gods).

³⁷⁵ See Augustine, *The City of God*.

2. Defining Virtue: Abrahamist Republicanism and Traditional Charity.

It should thus come as no surprise that Abrahamist Republicanism maps quite nicely onto the basic contours of the legal definition of charity; charity is, after all, itself grounded in precisely the same two normative traditions. If we look closely at the traditional heads of charity, we can, without undue tugging and hauling, reduce them to these two: Providing basic goods to the truly needy – food, shelter, clothing -- and providing especially “good” goods to anyone – education, religion, art. We do not live by bread alone, but also by the Word.³⁷⁶ When we juxtapose those two categories of traditional charitable purposes with the twin goals of Abrahamist Republicanism -- provide the needy with the means to flourish, promote the highest forms of human flourishing – two points become immediately apparent.

First, the goals of Abrahamist Republicanism are actually specifications of the two basic purposes of charity; Abrahamist Republicanism tells both what basic needs are, even as it tells us what goods are especially good. Second, Abrahamist Republicanism coordinates the two basic purposes of charity under a common end: the goal of helping the needy is to enable them to flourish at the highest possible human level. That specification and coordination of the traditional heads of charity is no mean task; it is a major step beyond traditional legal doctrine, and it is a step that, for reasons we have seen, the four-function model is not able to take.

But that is only the qualitative aspect of our task; like other theories of charity, Abrahamist Republicanism must answer critical quantitative questions as well. We need to know who is neediest and what they need most; we need to be able to compare human excellences; most challengingly of all, we need to be able to make trade-offs between meeting basic needs and advancing highest excellence.

³⁷⁶ Cite Gospel.

3. Measuring Shades of Virtue: A Midrash on Maimonides.

Abrahamist Republicanism not only tells us what purposes are charitable, and how those purposes are functionally related; it also implies important standards of performance and comparison. Here as in the for-profit and governmental sectors, the standard of “productive efficiency” is obviously applicable; all things being equal, more bang for the philanthropic buck is better than less, whether it be in humanitarian aid or humanistic achievement. Beyond that basic point, matters become predictably more complicated.

The really challenging issues are these three: ranking goods under each of the two principal goals of charity, making trade-offs between the basic goals themselves, and choosing providers of particular goods for both goals from the three sectors – for-profit, governmental, and charitable. We consider the first two sets of issues here and the third in the next subsection. In all cases, the metric derives directly from the mandate: Enable everyone (capable of being made capable) to engage in the highest forms of human flourishing; encourage all those forms of flourishing. Coordinating these twin goals will require hard, even horrible, choices; here are the basic principles to consider in striking the balance.

Most basically, the two fundamental aspects of charity are admittedly incommensurable; they cannot be reduced, without remainder, to each other. But they can readily be related to one another, as foundation is related to structure. The higher we want to go, the more deeply and the more broadly we must build. Without continuous cultivation, the high forms of culture will soon wither; if we do not meet their most basic needs, the neediest will simply die. We are, in the words of the Prophet, the People of the Book; our highest calling, in the classics and in the Scriptures, is the study of the Law. Unless our children can read, our books are closed, and our law, lost.

Most broadly, because applicable to all sources of both philanthropic mandates, “everyone” means everyone in the whole world. Abrahamist Republican philanthropy,

like classical philosophy³⁷⁷ and Abrahamist faith,³⁷⁸ is universalistic, not nationalistic³⁷⁹. Its community of concern embraces the whole of humankind, with no distinction in principle between any one person and another. All have the same basic needs; all are capable of the same forms of excellence. With that universalism in mind, we can now turn to charity's two main headings. Here we can find no better guide than Moses Maimonides, the medieval Jewish Aristotelian who flourished in two Islamic centers, Alandalusia and Egypt (even as the new universities of Christian Europe clamored to catch up).

a. Relieving Distress: The Eight Degrees of Maimonides.

Maimonides, as we said at the outset, ranked alms-giving in eight categories, according to several implicit metrics, each quite instructive for an Abrahamist Republican philanthropy. The highest form of alms-giving for him, as it must be to Abrahamist Republicanism, is to rehabilitate, to get the downtrodden, the crushed, back on their feet, back to their proper functioning in society. This, for Maimonides, is not only explicitly first; it is also, at least implicitly, far ahead everything else. Indeed, so important is the rehabilitative goal for Maimonides that it may even supplant what is, for us, the sine qua non of personal charity, the absence of a quid pro quo. For M, rehabilitative philanthropy may be a loan as well as a gift (although the loan is presumably without interest); it may also involve finding work for the unfortunate or becoming their partner. The point is not the degree of sacrifice the giver makes, or the form of the help takes. The point is the purpose of the donor's help, its rehabilitative purpose: To put one's fellows back on their feet. Better to teach fishing, then, than to hand out fish. The converse should also follow: If rehabilitation is the goal of philanthropy, anything that increases dependency is, precisely to that extent, counter-productive.

³⁷⁷ Cite Socrates in Gorgias: Everyone is capable of sharing reason; no human experience is private or peculiar.

³⁷⁸ Covenant with Abraham: In thee shall all the nations of the earth be blessed; vision of Isaiah, "And the Torah shall go out of Zion...."

³⁷⁹ Hence we have to note the deep paradox in the change of our program's name, from the "NYU" to "National" Program on Philanthropy and the Law. How can an institution that is in its very name universal be narrower in scope than a single nation?

The following three categories make clear that the second most important consideration is maintaining the best possible relationship between the giver and the receiver. The ideal relationship, as we have seen, is the aim of the highest charity: restoration of full, though not necessarily equal, membership in their shared community. Anything else is decidedly second-best. As long as dependence remains, mutual anonymity was second-best; short of that, and therefore third, it was best for the donor not to know the donee.

The reason for this preference for double anonymity, and for donee- over donor-anonymity, is explicit: Lest the poor be “put to shame,” abased in the eyes of even a single one of their fellows (and, implicitly and less significantly, lest the generous be exalted).³⁸⁰ Maimonides was clear on this, as is the Gospel: the known giver falls on Maimonides’s scale; even as the Gospel declares that his publicity is his reward.³⁸¹ And Marcus Aurelius concurs: “When you have done good and another has been its object, why do you require a third thing besides, like the foolish – to be thought to have done good or to get a return?”³⁸²

This emphasis on priority of result, and assessment of result from the perspective of the needy, is underscored by the last four categories: the unasked donor, the ready donor, the stinting donor, and the grudging donor. “The donor who gives without being asked” lowers, we would now say, transactions costs; this, in turn, means more relief for the poor.³⁸³ And giving without being asked has other advantages, less obvious but perhaps more important. Donors who anticipate need have to have made their own assessment of that need, relative as well as absolute. Presumably, they make this assessment in light of several obvious factors: Most bang for the buck, benefits to as many as possible;

³⁸⁰ The other possible combination, donor and donee both knowing each other, is implicit in Maimonides’s fifth level: “he who hands the alms to the poor man before being asked.” 7 Code at 92.

³⁸¹ Cite Gospel.

³⁸² Meditations, Book VII, 73 (Everyman ed.).

³⁸³ This assumes asking is by third parties; if by the poor themselves, it would lack anonymity. But maybe that’s why this one is just below both single anonymities; that would give the forth possibility: known, not to neither party or to either, but to both. If so, it is bad for that reason alone. But it is also bad, even if third parties ask, because donor is then known to them, in addition to transaction cost problem, addressed in the text.

rehabilitation over mere relief, but more basic needs before less. A mind is surely a terrible thing to waste, but before we can begin anyone's education, we must secure air, water, food, shelter, basic physical and psychological health and safety.³⁸⁴

Donors who have to be asked, Maimonides's sixth level, lose the opportunity to make these assessments. But at least they can give what's needed in the particular case; that puts their philanthropy above the last two levels. And finally, even if they must stint, they can at least not begrudge. Only at the very bottom does Maimonides factor in the donor's motive or mental state: It is least worthy to give grudgingly. The Lord proverbially loveth a cheerful giver; the converse, Maimonides teaches, is also true: the grudging giver is least lovely of all.

Maimonides is much more concerned about the donee's mental state. He is quite clear, as we have seen, that the donee is not to be humbled, nor the donor exalted. Poverty is, for him, implicitly a no-fault condition, nothing, in and of itself, to have to apologize for or be ashamed of. But neither is a state to be desired by individuals or valued by society; contrary to some branches of Christianity, Maimonides sees poverty, not as bringing one in any way closer to God, but simply as separating one from one's proper human function. Poverty is not a sin and should not be made a shame, but neither is it a virtue; it is a condition to be remedied as quickly and completely as possible. And the remedy is getting the impoverished person back to a self-sufficient place in the community, the proper state of everyone.

Maimonides, we should note, is addressing individual philanthropists giving relief directly to distressed individuals. As his ranking of this mode of relief makes clear, this is not charity in its ideal mode. Much better, he makes clear at several points, is a system in which the distribution of charity is made by an appropriate social body. Doubly anonymous charity, the second highest, is like contributing "directly to the alms fund," which Maimonides found in every Jewish community. And the third best, anonymous

³⁸⁴ Maybe cite Maslov's hierarchy here.

gifts to directly to the needy, are especially appropriate “if those in charge of alms are not conducting themselves as they should.”³⁸⁵

If they were, several advantages would be achieved: Most obviously, as Maimonides implies in this last example, there is donor-anonymity. But there is also the possibility of collective wisdom, maybe even occupational expertise: the officers are in a better position than an individual donor to assess relative need and opportunity. Even if the donor knows most about a particular case, he cannot know most about all cases, and he can share his individual knowledge with the group.

And even publicly administered charity, his list makes clear, is itself only second best, a default from the ideal. In addition to the present system of officials in charge of the poor, in default of which individual charity becomes necessary, Maimonides also mentions an implicitly preferable system that is no longer extant. In that system, the poor helped themselves from the temple’s relief fund: There donors would give in secret to the public fund, from which the poor would withdraw in secret. Presumably the metric was “from each according to ability, to each according to need.” But the Temple, in Maimonides time, was no more; Israel was in exile, dispersed across three continents and living under the political power of others. His model of individual humanitarian relief, then, is but the third best. Before we turn to the first, we need to look at private philanthropy’s other principle object, promoting excellence.

b. Promoting Excellence: Maimonides’s Premium on Wisdom.

What Maimonides saw as the highest form of humanitarian philanthropy, putting others back on their feet, back in their proper social and economic place, points to private philanthropy’s second function, promoting excellence. If there is a choice among places to put our rehabilitated neighbor, the most appropriate is the best (taking costs, including opportunity costs, and risks into account). As compared with identifying and ranking basic needs, the focus of philanthropy’s first function, stating and measuring the optimal of human flourishing will obviously be harder. Here, as we have seen, even Plato and

³⁸⁵ 7 Code at 91.

Aristotle were at best a bit ambivalent themselves and not entirely in agreement with each other; here, then, there will necessarily be more room for conscientious disagreement even among properly schooled philanthropists.³⁸⁶

In the conclusion of his section on alms-giving, just three paragraphs after this famous eight-tiered ranking, Maimonides makes a startling pronouncement:

One should always restrain himself and submit to privation rather than be dependent upon other people or cast himself upon public charity, for thus the Sages have commanded us, saying, “Make the Sabbath a weekday rather than be dependent upon other people.” Even if one is a Sage held in honor, once he becomes impoverished, he should engage in a trade, be it even a loathsome trade, rather than be dependent upon other people. It is better to strip hides off animal carcasses than to say to other people, “I am a great Sage, I am a priest, provide me therefore with maintenance.” So did the Sages command us. Among the great Sages were hewers of wood, carriers of beams, drawers of water to irrigate gardens, and workers of iron and charcoal. They did not ask for public assistance, nor did they accept it when offered to them.³⁸⁷

This would seem, on its face, to place our second main head of charity, promoting excellence, below our first, humanitarian relief; those who manifest the highest form of human excellence, the Sages, are to forego public assistance in favor of the poor, even at cost of great personal loss.

But that is only half the story; Maimonides has already let the other shoe fall. We are to be more careful in performing the commandment of almsgiving, he tells us at the beginning of this chapter, because almsgiving is the very mark of the righteous man, the child of Abraham.³⁸⁸ In almsgiving, he has told us two chapters before (and, if we have been careful, presumably we will remember), there is one thing even more fundamental than poor relief:

The ransoming of captives has precedence over the feeding and clothing of the poor. Indeed, there is no religious duty more meritorious than the ransoming of

³⁸⁶ This is admittedly an important qualification; more important, perhaps, than first appears. Because our philanthropy is other-regarding, like that of Maimonides, the conversation will not comfortably include the Ayn Rand’s disciples; because it is universalistic, it won’t comfortably include anti-Semites or racists.

³⁸⁷ 7 Code 92-93.

³⁸⁸ 7 Code 89.

captives, for not only is the captive included in the generality of the hungry, the thirsty, and the naked, but is very life is in jeopardy.³⁸⁹

What is more, “he who turns his eyes away from ransoming him, transgresses” several specific the commandments of the Torah and “many other admonitions like these.” And so, “to sum up, there is no religious duty greater than the ransoming of captives.”³⁹⁰ Thus, if the citizens of a city have collected money to build a synagogue, even if they are mid-way into its construction – here Maimonides is lyrically detailed -- “Even if they have already brought in the stones and set them up, and the beams and planed them, and thus made everything ready for construction, they must nevertheless sell everything, but only for the ransoming of captives.”³⁹¹

Following that graphic example, Maimonides moves on to a series of highly technical matters: the proper ransom price, the problem of assisting captives’ escape, the status of bondsmen as captives, the propriety of ransoming women before men.³⁹² Then he raises the prospect of a truly tragic prospect, quite likely as tragic as Sophie’s Choice: “there are before us many poor people or many captives, and there is not enough in the alms treasury to feed or clothe or ransom all of them.” “The procedure is as follows:”

a priest takes precedence over a Levite, a Levite over an Israelite, an Israelite over a profaned priest, a profaned priest over a person of uncertain parentage, a person of uncertain parentage over a foundling, a foundling over a bastard, bastard over a Nathin, a Nathin over a proselyte... and a proselyte over an emancipated bondsman....³⁹³

This is, of course, essentially the social hierarchy of the society set out in the Torah. Maimonides has already seen one supervening principle: Women before men, in ransoming as in all other forms of relief. Only in the next paragraph, the final paragraph of the chapter, does Maimonides introduce one criterion that also takes precedence over

³⁸⁹ 7 Code 82.

³⁹⁰ 7 Code 82.

³⁹¹ 7 Code 83.

³⁹² 7 Code 83-84.

³⁹³ 7 Code 84. The reason for these last two priorities, Maimonides immediately explains, is this: “the Nathin has grown up with us in a state of holiness”; the bondsman “was once included among the accursed.” Id.

all the others. Having just set out the whole social hierarchy of Toranic society as the priority for ransoming captives, he then raises what seems, at first, a superfluous question: “When does this apply?” Here is how Maimonides answered the question he posed to himself:

When both are equal in wisdom. If, however, a High Priest is unlearned and a bastard is a disciple of the wise, the latter takes precedence. In the case of two scholars, the greater in wisdom precedes the other. If one of the poor or captives is a person’s teacher or father, and there is another poor man or captive greater in wisdom than one’s teacher or father, so long as the latter is a disciple of the wise, he takes precedence over the one who exceeds him in wisdom.³⁹⁴

Here, of course, he was but following the Scriptures of his faith, particularly the Proverbs of Solomon, son of David:

Get wisdom; get insight. Do not forsake her, and she will keep you; love her, and she will guard you. The beginning of wisdom is this: Get wisdom, and whatever you get, get insight. Praise her highly, and she will exalt you; she will honor you if you embrace her. She will place on your head a fair garland; she will bestow on you a beautiful crown.³⁹⁵

According to the Writings, when God told Solomon to ask what he would, Solomon asked only for wisdom³⁹⁶; God, pleased with this request, gave him what he asked, “a wise and discerning mind, so that none like you has been before and like you shall arise after you,” and also what he did not ask, “both riches and honor, so that no other king shall compare with you, all your days.”³⁹⁷

Of Maimonides, Moses ben Maimon, it was traditionally said, “from Moses to Moses, there is none but Moses.” In Islam, the Prophet himself, Reciter of Allah’s own law, made the same point, much more pointedly: *The ink of scholars is more precious than the blood of martyrs.* (A point apparently lost, of late, on his martyrs.) One could multiply at will the same point in both Plato and Aristotle; the priority of wisdom in the

³⁹⁴ 7 Code 84.

³⁹⁵ Proverbs 4: 5b-9.

³⁹⁶ 1 Kings 3: 9.

³⁹⁷ 1 Kings 3: 10-13.

very reason they called themselves and their followers philosophers. (I have yet to find the parallel passages in the New Testament or the Fathers of the Church.)³⁹⁸

The Hebrew Scriptures, the Qur'an, and the Classics clearly concur: Wisdom, especially the wisdom gained in the study of those texts themselves, knows no higher good. Marcus Aurelius mused to himself that "no other calling in life is so fitted for the practice of philosophy as this in which you now find yourself"³⁹⁹; still, he knew which was the higher calling: "Alexander, Julius Caesar, Pompeius, what are they compared with Diogenes, Heraclitus and Socrates?"⁴⁰⁰ In the realms of the Prophet, no small ruler in his own right, his scholars studied the philosophers, especially Aristotle and Plato, along with the Scriptures, in the company of the other People of the Book. Maimonides, our guide to philanthropy, studied Aristotle in Arabic in Islamic Spain; the universities of Europe would find Aristotle from the same source.

The reason for the priority of scholarship among the excellences of Abrahamist Republican should be clear: The Scriptures and the Classics are the foundations of Abrahamist Republican philanthropy, and both of its foundational traditions place the seeking of wisdom at the very apex of their personal virtues. Law, too, must rank near the top, and rest on the same foundations. This is the foundation of philanthropy, even as it is the infrastructure of both our polity and our economy. In the Abrahamist Republic, it is also more: Philanthropy is the end of law itself.

B. Philanthropy and the Law.

In the last section we looked at Maimonides's understanding of private philanthropy in a kind of isolation that this section will reveal as distorting rather than splendid. Here we will first place Maimonides's system of private philanthropy in its proper setting, then map out the implications of that setting for the relationship between

³⁹⁸ Cf. Paul's First Epistle to the Church at Corinth 13: 13 through 14:1: "So faith, hope, love abide, these three; but the greatest of these is love. Make love your aim, and earnestly desire the spiritual gifts, especially that you may prophesy." The word translated "love" here is, in the King James Version, "charity."

³⁹⁹ Marcus Aurelius, *Meditations* at 74.

⁴⁰⁰ Marcus Aurelius, *Meditations* at 49.

private philanthropy and the state in an Abrahamist Republic. The Christian and Christian and common law foundations of Anglo-American charity make the relationship of philanthropy and the law especially fraught, in contrast both to the other Abrahamist religions and to the civil law systems of Continental Europe. From the perspective of Abrahamist Republicanism, the current role philanthropy in the English-speaking world is hardly the best of all possible. From that sad state of affairs, this imperative must emerge: The job of our philanthropy must be to make our society more philanthropic

1. Philanthropy and the State in the West: A Very Brief History.

In his account of private alms-giving to the poor, as we have seen, Maimonides repeatedly points to two better alternatives. The second-best was rather like our private foundation or community chest, alms-distributions by a committee of experts. But the ideal was a tax system with generous provision for both the poor and for the system's own scholarly administrators, a system set out in the Torah itself.

In that regime, we must note, poor relief was primarily mandatory, not voluntary. This helps explain what at first seems strikingly odd about Maimonides's account of alms-giving: its placement in his treatise on agriculture, and very near the end of that treatise. To account for that peculiar placement, we must recall that the Israel of the time of the Torah's writing was essentially agrarian. Its primary capital was land; its principal products, crops and herds. Maimonides's account of agriculture, accordingly, was the foundation of the Israelite fiscal system. From the fruits of the land, the Torah, and in its interpretation, Maimonides, sets out an elaborate system of wealth redistribution. In that system, we can mark unmistakable elements of each of the four governmental functions we have identified: the Ricardian, the regulatory, the redistributive, and the artist.

The Torah placed the maintenance and regulation of the economy, along with the performance of religious ritual, in the hands of a hereditary priesthood, the house of Aaron⁴⁰¹, the brother of Moses, the receiver of the law, with assistance from the entire

⁴⁰¹ Exodus 29 (instructions for ordination of Aaron and his sons as priests); Leviticus 8 (ordination and investiture of Aaron and his sons).

tribe of Levi. All other families received as their heritage agricultural lands; the Levites' patrimony was in forty-eight walled cities⁴⁰², the centers of cultic observance and civil administration. To them, as pillars of the Law, ritual⁴⁰³ and administrative,⁴⁰⁴ went the basic revenues, the annual tithe of ten percent of crops and of first-born animals.⁴⁰⁵ And the revenues of their own capital assets, urban land, was tax-exempt.⁴⁰⁶

The other principal levies went to the poor: every third year's tithe, to be shared with and administered by the Levites⁴⁰⁷, and a specific portion of each year's crops in the field.⁴⁰⁸ And these mandates were not merely "statutory," subject to revision in routine electoral and legislative politics, nor were they, in their pre-democratic era, merely the

⁴⁰² Numbers 35: 1-8.

⁴⁰³ Numbers 3 and 4 (duties of the Levitical priesthood); Numbers 18: 1-7 (recitation of Levite's priestly function).

⁴⁰⁴ Deuteronomy 17: 8-12 (appellate courts of "one judge and several priests" established in Levitical cities); Deuteronomy 19 (16-17) (special interlocutory appeals); Deut. 17: 18-19 (Levitical priests to retain custody of the official book of the law, to be copied out by each king, at the beginning of his reign, under Levitical supervision, and read by him daily); Deut. 21: 1-9 (establishing special procedures in cases of unsolved murders and recited Levitical priests appointment as judges in all cases involving property and injuries). See also Deut. 20: 2 (Levitical priests' charge to troops before battle); Deut. 10: 8-9 (Levites given custody of the ark of the covenant, containing the tables of the law); Numbers 27: 21 (Joshua instructed to consult Eleazar, Aaron's son and successor as high priest, for instructions from God before battle); Lev. 13- 14: 32 (priests' role in treatment of "leprosy") (Deut. 24: 8 (recitation of priests' role in treatment of "leprosy"); Lev. 14:33- 53 (priest's role in treatment of household "mildew"); Lev. 27: 1-25 (priest's valuation of ritual gifts of slaves, animals, houses, and agricultural land).

⁴⁰⁵ Numbers 18: 14-32 (Levites' entitlement to annual tithe, ten percent of crops and of first-born animals and five silver piece head tax on first-born sons, as compensation, subject to a ten percent surtax for religious sacrifice). See also Numbers 18: 8-20 (Levites' share of sacred gifts and animal sacrifices); Deut. 18: 1-8 (reciting Levites' entitlement to first fruits and select parts of all animal sacrifices); Lev. 27: 30-33 (reciting annual tithe of ten percent of harvest); (Deut. 26: 12-13 (same).

⁴⁰⁶ Cite Torah, maybe from Hopkins.

⁴⁰⁷ Deut. 14: 28-29; Deut. 26: 12-13.

⁴⁰⁸ Leviticus 19: 9-10 (mandating edges of fields be left unharvested and fallen grain and grapes be left for the poor and foreigners); Lev. 23: 22 (same); Deuteronomy 24: 19 (forgotten sheaves to be left for the poor, including widows, orphans, and resident aliens); Deuteronomy 24: 20-21 (second and subsequent harvests of olives and grapes to be left for the poor). See also Deut. 24: 22 (reminding Israelites of their own delivery from poverty in Egypt); Deut. 14: 18 (same); Deut. 15: 1-11 (commanding interest-free loans and other forms of generosity to the poor, with reference to the poor as relatives); Lev. 19: 33-34 (forbidding mistreatment of foreigners, with reference to Israel's captivity in Egypt); Leviticus 25: 35-38 (mandating fair treatment of the poor and foreigners, forbidding selling them food a profit or lending them money at interest, and discouraging their eviction, with reference to Israel's delivery from Egypt into Canaan); Deut. 24: 14-15 (mandating daily payment of wages to poor, resident aliens as well as Israelites, in view of their exigent needs); Lev. 19: 13 (mandating daily payment of wages); Deut. 14: 17 (mandating fair treatment of orphans and foreigners and forbidding taking security interest in widows' clothes, with reference to Israel's slavery in Egypt).

decrees of an earthly monarch, even David and descendants. These levies were, in effect, constitutional, even meta-constitutional. They were, again, part of the Torah itself, reputedly delivered by God Himself through Moses and hence, presumably, not subject to amendment.⁴⁰⁹ Like the entire Torah, however, they were, of course, subject to binding scholarly interpretation. Upon these passages, Maimonides built out an elaborate and detailed system of poor relief, specifying the percentages of field edges and corners to be left for the poor to harvest.⁴¹⁰

Islamic law makes strikingly analogous provisions for both poor relief and legal administration generally. Set down at least a millennium and a half after the Torah, in a desert region much more reliant on commerce than agriculture, Islamic law's mandatory payments have a much wider base. But they have this in common with Maimonides's law: the basic obligations are legally, not just morally, binding. The payment of zakat, one of the five pillars of Islam, is not, as is often said, the giving of charity; it is, rather, the payment of taxes. Like Maimonides's Torah-based Code, analogous Islamic legal compilations based on the Qur'an provide for voluntary, philanthropic gifts; for both, however, these are supplemental poor relief grounded in the ultimate law itself; they are not its primary source. And even the "voluntary" gifts are morally obligatory, not supererogatory.

The contrast with Christianity here is quite striking: Christianity has no analogous body of Scriptural civil law. Jesus himself clearly acknowledged his own obligations to the whole of Jewish law, civil and fiscal as well as strictly ceremonial.⁴¹¹ But the first generation of his followers believed themselves exempt from all such Jewish laws, at least to the extent that they were not themselves within the territorial jurisdiction of Jewish legal authority. Their civil law was the law of the Roman Empire. Jesus, like his fellow Jews in Roman occupied Palestine, accepted Roman law, generally quite begrudgingly. Hence his entirely orthodox answer to the scribes and Pharisees, pointing to the emperor's

⁴⁰⁹ In principle, perhaps, they were subject to amendment by their author, God. But see Talmud, *supra* ("What has God to do with the interpretation of Torah?").

⁴¹⁰ Cite Mishnah Torah.

⁴¹¹ Cite Gospel.

profile on the coin of the realm: “Render unto Caesar the things that are Caesars, and to God the things that are God’s.”⁴¹²

Paul, a Roman citizen as well as a Jew, accepted Roman authority much more comfortably, more than once invoking it to his advantage: He appealed from a Jewish civil court in Palestine to the Emperor in Rome; he thoroughly rattled a jailer who had just beaten him with the assertion of his right, as a Roman citizen, not to be punished without a trial. And he clearly saw civil authority as divinely ordained, to restrain humanity’s descent into a kind of Hobbesian chaos. But for him civil law lacked the more positive role in both functions we have identified as philanthropic: relieving distress and promoting excellence.

The Emperor of Rome, of course, eventually embraced the religion of Paul. But Christianity, at least in the West, never quite got past its alienation from the secular law, an alienation that is itself alien to both Islam and Judaism. What is more, by the times the monarchs of what became the nations of Western Europe had consolidated their kingdoms and become Christian, a very different social and economic order prevailed from that of Paul’s time, in both church and state. The church of the apostles was the model for Marx: All goods were held in common; from each according to ability and to each according to need. And the law of the empire recognized essentially one class of citizens, citizens.

The medieval church, of course, dropped apostolic communism, doubtlessly for the better. The western kingdoms after the collapse of the Empire reconstituted themselves, with the imprimatur of the church, into the familiar three orders of feudalism: those who pray, those who fight, and those who work. In that order, it was possible, perhaps even inevitable, to look upon the poor as social, even ethnic, inferiors, not just as fellow citizens suffering temporary and remedial economic embarrassment. In the three orders of medieval Europe, the poor clearly did not belong to the first two, the nobility or the clergy, and hence they must be of the residual and amorphous third order, the workers. Work itself, in anything other than those occupations reserved to the higher two orders,

⁴¹² Cite Gospel.

was itself stigmatizing; the poor could thus be seen as doubly denigrated, unsuccessful members of the lowest order. In England after the Norman Conquest, the new nobility could regard the poor as racially as well as socially inferior, folk of conquered Saxon or Celtic stock. They might be Christian brothers and sisters, and relieving the extremities of their distress might be a moral or religious obligation. But their rehabilitation to full and equal civil status, the goal of Maimonides's Torah-based private philanthropy, need hardly be the goal. And the feudal civil law, unlike the explicitly egalitarian law of Jews and Muslims, had more to do with keeping the lower orders in their place than lifting them up.

In the bourgeois economic and political revolutions that of the late eighteenth and nineteenth centuries (after a less thorough start in England in the late seventeenth century), the Third Estate famously became the Nation⁴¹³; all three orders were "leveled down" to the status of legally equal citizens, with the same rights before the law. But this, as we have seen, was the age of negative liberty, limits on what the state could do to citizens, not positive liberty, citizen entitlement to positive state assistance. And, because the state was secular, there was no borrowing of affirmative state obligations from the Abrahamist Scriptures.

Even such borrowing had been permitted, the nations of the West were Christian, and Christianity, alone among the three Abrahamist faiths, lacks a secular legal program, a program of aristocrat redistribution, for the state. Thus, in the West, as Anatole France pointedly put it, the new liberal state could, with pride rather than embarrassment "in its munificent equality forbid the rich as well as the poor to sleep under bridges,"⁴¹⁴ without making any alternative arrangements to shelter the latter. The minimalist Ricardian state, the night watchman state of today's libertarians, though totally alien to the Torah and the Qur'an, was quite comfortable in the new secular states of Christendom.

This was even more likely to be the case in the English realm, the heartland, of course, of Anglo-American charity. There the ancient law of the Romans, foundation of

⁴¹³ See Abbe Sieyès, *Qu'est-ce que le Troisième État?*

⁴¹⁴ Anatole France [cite].

all secular law on the Continent, never really took much root (outside the church). The common law thus lacked even the faintest trace of Roman notions of free and universal citizenship, the citizenship that Apostle Paul enjoyed, first as Jew, then as Christian. The common law was built on feudal, not classical, roots; its students, quite significantly, trained in their own occupational schools in the precincts of the royal courts, under no obligation, or even expectation, to be schooled in the Greek or Latin classics, much less the Greek and Hebrew (not to mention Arabic) Scriptures. For a Continental lawyer, trained in the original universities, not to know the Latin of the law, which was also the Latin of the Church and the Classics, was unthinkable. For the Common lawyer, it was probably more common than not.

Look where that leaves us. As we turn to sketching the ideal role of philanthropy and the state, it thus seems that we find ourselves, in our own American society, the most alien soil in all of the modern West. And this is, in part, quite true. The absence of a positive role for the state in the distinctly Christian Scriptures, the feudal origins of the common law, and minimal-state and value-neutrality of classical liberalism all combine to suggest a much narrower role of the state's redistributionist and aretist functions than the Abrahamist Republican ideal.

But that is, alas, only half the story; the grass is no greener on the only available alternative site for Abrahamist Republicanism, the social democratic societies of Continent Europe. To be sure, they offer a much more activist state in general, and a much more relief-oriented welfare system in particular. But they do not match the gains they thus offer in "fraternalism" with parallel gains in the promotion of *arête*. To hazard an even more truncated social history, the problem there is this: The "socialism" of European social democracy is an unenviable and unstable compromise with both feudalism and capitalism.

As every serious commentator since de Tocqueville has seen, Europe, despite its late eighteenth and nineteenth century liberal revolutions, even its twentieth century "communist" revolutions, still labors under a burden of feudal detritus unimaginable in America. Some of its most advanced social democracies have nominal monarchies;

notions of nobility survive even in republican France. Indeed, French Republic celebrates its Bastille Day with an ambivalence about the revolution it launched that has no equivalent on our own Independence Day. High culture in France, as in much of the rest of social democratic Europe, tends to be a matter for the remnants of a feudal aristocracy and their arriviste bourgeois imitators, a realm quite apart from both traditional “folk art,” rooted in peasant life and orthodox religion, and post-industrial “workingclass culture,” centered on sport, drink, and second-hand American pop-culture.

In that sense, state subsidization of haute culture is regressive, supporting with the taxes of all citizens the tastes of a begrudgingly acknowledged, mostly self-replicating elite. As the recent riots in the *banlieus* of Paris reminded us, the *grand ecoles* and the *carrieres ouverte au talent* that they represent are, in fact, the province of the children of their technocratic alumna, all but closed, as a practical matter, to the working classes, especially immigrants. Xenophobia, if not outright racism, boosted lower-class support for the current president, himself the son of European immigrants, who had, as Interior Minister, denounced the rioters, most of North African and Islamic extraction, as “trash.”

Nor is European Social democracy’s accommodation with capitalism much better. Although all social democratic countries boast generously public-funded education and health care systems, in all but the most advanced, differences between the rich and the poor are both noticeable and entrenched. Partly owing to a heritage more trade-unionist than revolutionary, social democracy tends to stress income equality more than social mobility. In Denmark, whose citizens are reportedly the happiest on earth, the salaries of medical doctors and sanitation workers are not markedly different, their social status officially equal. This is obviously deeply “un-American”; it is, more to the point, deeply un-aretist as well. Even if talent could be drawn to more intellectually demanding occupations without incomes as large as America offers, it would hardly be appropriate, on aretist principles, not to acknowledge, and encourage, higher levels of human achievement.

2. Philanthropy and the Abrahamist Republic.

If we are to sketch a viable Abrahamist Republic for our own time, we must imagine it somewhere between European social democracy and American consumerist democracy. We must not call down a plague on both their houses; we must combine the best of both worlds. On the one hand, we need to accept a strong European-style state, ready to regulate the excesses of capitalism and redistribute an appropriate amount of the wealth it produces for the common good. And we need to encourage an elite culture oriented to the standards of the classical past, though ready, even as ready as Nietzsche, to transcend that past, on its own terms, by its own metric. On the other hand, we need to foster America's vibrant, innovative entrepreneurial spirit, and America's deeply egalitarian culture, with its commitment to social mobility (admittedly honored, of late, more in the breach than in the observance) and its distaste of state-sponsored religion. We need – with yet another bow to Aristotle – a mean between the Atlantic culture's East and West.

The Abrahamist Republic, like all modern western states, would happily acknowledge its mutual dependence on a capitalist market economy. It would aggressively undertake the Ricardian function, maintaining the legal infrastructure of the market; in particular, it would police, with far more vigor than contemporary governments in either Europe or America, the kind of financial brinksmanship that produced the current recession by systemically unsustainable shifting of private risks onto the public. It would regulate with an eye toward optimal efficiency, seeking to spend on regulation up to exactly the point of diminishing returns. The Abrahamist Republic, then, would be guided in its Ricardian and Regulatory functions by the metrics those functions imply: productive and economic efficiency.

For that ambitious regulatory role, the Abrahamist Republic would depend on a highly-educated, highly-paid, highly-respected civil service. At all levels of government – federal, state, and local – the higher levels of the civil service would have to pass the most rigorous of civil service examinations. These examinations would test for two basic kinds of knowledge: mastery of modern social science and appreciation of the West's history and

traditional values, moral, political and aesthetic. They would have to know, most fundamentally, the Scriptures of the three Abrahamist faiths and the classics of Greece and Rome; the test of their mastery would be called the Definitive Academic (and Administrative) Legitimacy Exam, or DA(A)LE.

Mamas in the Abrahamist Republic would not let their babies grow up to be cowboys (or listen to country music). With generous state assistance, they would see that the better of them became bureaucrats and judges, leaving the less talented to the private practice of law and medicine. But the best, on the model of Solomon, the wisest of kings, and Marcus Aurelius, the emperor who read Aristotle and Plato in his campaign tent, would become Guardians of the Republic. And the best of the best, on the model of our model, Maimonides, would become scholars and teachers of the law.

(I must confess I hesitated to draw this last conclusion, logically inevitable though it is, lest I be hoist with my own petard, swept away (to switch metaphors in mid-tsunami and add a parenthetical parenthetical) by a rising tide of scholarly talent in the wake of the Republic's seismic shift in educational policy. But then, trained and practiced in tax law as I have been, I remember the solution: Transition Rules. On the one hand, current rules about tenure could protect present legal academics like me from displacement by the tsunami of talent that the Republic's earth-shaking educational program. On the other hand, generous new retirement packages could be structured to dead wood out of the new wave's way at the optimal rate.)

Unlike Solomon and Marcus Aurelius, the Guardians of the Abrahamist Republic would, of course, be elected. The Republic could not likely roll back the universal adult franchise; most importantly, it would not need to. By making education in the Scriptures and the Classics universally available, it would produce wiser citizens. These wiser citizens would elect wiser leaders; it is not impossible to imagine that the President of the Abrahamist Republic might, some day, be a professor from an elite law school. Thus our Republic would not really need to impose the pre-requisite for voting that Jefferson

recommended for his: Literacy in the common tongue.⁴¹⁵ Free public education through the university level, on the Jeffersonian model that had his beloved University of Virginia at the apex, should be enough.

And the leaders elected by these classically educated citizens would likely make the passing of the DA(A)LE a requirement for posts beyond the higher social service. It could easily be extended to the office corps of all branches of the military through the service academies. And, as part of long-promised, late-delivery reform of the financial system, every officer of every publicly-traded company could be required to pass the DA(A)LE, along with a majority of all members of their boards of directors.

Although the Republic, as we have seen, would take aggressive steps to ensure its efficient operation, it impose only an absolute minimum of artist restrictions production, and these few could be expected to disappear over time. Consumers, then as now, would buy essentially whatever they wanted. But, having been educated in the Scriptures and the Classics, they would want, and buy, better things. As better-educated voters give their metaphorical ballot-dollars to better leaders, so, as better-educated consumers, they will give their literal dollars to the producers of better products. If I were Rush Limbaugh, I wouldn't invest in a professional sports franchise on the eve of the advent of the Abrahamist Republic. "Willingness to pay" will remain the order of the economic realm; what will change is what consumers are willing to pay for.

The market's "ability to pay" requirement would also remain fully in place. The Republic would ensure that the basic needs of the least well off were adequately met, mostly in kind rather than in case. As this latter condition suggests, the Republic would be more Dutch Uncle than Sugar Daddy; those who cannot find employment in the private sector will indeed work for food, not beer-and-cigarette money. Mindful of the Torah's warnings, the Republic will not begrudge the poor, but neither will it be so generous as to create the underclass of idlers endemic to all European social democracies. The Republic will have lots of shovel-ready, CCC-style projects. For all the able-bodied, it will follow

⁴¹⁵ Cite Pettit, Republicanism.

the basic mandate of John Winthrop and Illich Ulyanoff: If you don't work, you won't eat, although perhaps stated in a bit more comradely terms. For care-givers with small children, it will offer kindergartens of the finest imaginable caliber, the envy of the most kibitzing Kibbutznik.

The fiscal effect of all these programs, particularly universal education and public works employment, will be a very big budget. As the Republic spends, so also shall it tax. In all likelihood, the Republic's initial tax levies will be at the margin we have identified as the redistributive ceiling, the point at which any further increase leads to an offsetting loss of production. But two factors will work in favor of the Republic's finances in the long run, probably even in the short. On the one hand, as more children read the Torah and the Qur'an in the Republic's schools, more citizens will appreciate that taxes are not just necessary, but good. As they realize this, they will feel less resentful over paying taxes, and that diminished resentment will reduce the "demoralization costs" of taxation, thus raising the redistributive ceiling itself. On the other hand, as the Republic's rehabilitative relief program, modeled on Maimonides, gets more and more needy citizens "back on their feet," back into productive work, and as its educational program makes them more productive workers, tax revenues should rise, even as rehabilitative expenses fall. In this virtuous cycle – actually, a virtuous double spiral – the Republic will experience increasing budget surpluses.

These surpluses, in their turn, will most likely be allocated for foreign aid. Once a nation that is receiving foreign aid reaches an appropriate level of development, measured by the proportion of its citizens who have passed the DA(A)LE, it will be invited to join the Republic. Up until that point, any of its citizens who pass the DA(A)LE will be offered citizenship in the Republic, entitled, as a consequence, to hold any office (except, with apologies to the Governor of California, the Presidency). The model, of course, would be the extension of classical Roman citizenship, in the Empire as well as in the Republic; even

so weak an emperor as Claudius pointed to that system, which opened even the Senate to the foreign-born, as the pillar of the Roman regime.⁴¹⁶

In the fullness of proverbial time, the entire world will become one literally cosmopolitan Abrahamist Republic, “indivisible, with liberty and justice for all.” North Korea will likely be the last to come aboard; in the meantime, the Republic will continue to feed its starving people, even as it negotiates peace with its Great Leaders. Instead of full integration, nations with predominantly Muslim populations may elect affiliate status as “Islamic Republics”; the modifier will by then neither distinguish nor offend. Israel may remain a Jewish state, if Jews so choose, with Jerusalem as its capital, with the absolute guarantee of the Abrahamist Republic and all its allied Islamic Republics. But the places in Israel that are holy to any of the three Abrahamist faiths will most likely have to be put under Republican administration; that will be the status of the sacred precincts of Mecca and Medina, the Parthenon at Athens, the Pantheon at Rome, and all other sites voted to be of World-Historical Significance by a super-majority of DA(A)LE Registrants (Drs), Those Who Have Passed (through) the DA(A)LE. Vatican City may well remain outside the Republic as a non-allied but Autonomous Neighborhood of Rome. And Rome itself will become at last, as it was in the beginning, the Republic’s capital, the place to which all roads will lead once again.

The Abrahamist Republic will be radically different from the society that the last decades have brought us Americans sadly to accept, radically different, too, from our European allies’ uninspired social democracy; and radically different from the warring world-visions of the fundamentalists of all three Abrahamist faiths. It will incorporate all the values that our best sages, religious and secular, have always taught us to desire most deeply. In building that society, our philanthropy need abandon neither our liberal democracy nor our capitalist market; instead, well within their framework, our philanthropy’s virtues can furnish the Abrahamist Republic of our forebears and our children.

⁴¹⁶ Cite Tacitus.

You may have noticed that this vision of the Abrahamist Republic seems to have omitted two critical things: Art and private philanthropy. Let's consider first art, the easier of the two apparent omissions to explain. Anyone who knows that part of the Hebrew Scriptures traditionally called "the Writings" will know that poetry will have its place in the "core curriculum" of all schools, at all levels, in the Republic. And, unlike Maimonides, the schools of the Republic will not feel the need to teach that the Song of Songs, Which is Solomon's, is to be read metaphorically, as a figure of the love of God for Israel (or, even less plausibly, of Christ for the Church). The Song of Songs will be read for what it seems clearly to be: a highly erotic, completely graphic depiction of physical love, and love-making. So, too, the poems of Sopho, sadly fragmented though they are.

Book X of the Plato's *Republic*, with its supposed banishing of the poets, will not stand in our way here. Our scholars will have noticed that the ban was, at worst, only conditional. Plato has Socrates ask only that the case for poetry be made philosophically; his own student made the case in *The Poetics*. And Plato, of course, knew the poets himself; the influence that gave him most anxiety was none other than Homer; the Republic itself is, perhaps, the Poem to End All Poems. Ignoring Plato's strictures about the dangers of drama, Marcus Aurelius reflected on the relative merits of drama, old and new, comic as well as tragic, as he encamped along the farthest marches of the Roman realm.⁴¹⁷ So, too, we can safely assume, will both the Republic's President and its Joint Chiefs of Staff.

David, of course, was not merely a writer of psalms and songs; he also sang to his own accompaniment on the lyre. In his last days, Socrates himself took to "practicing music," as his muse had always directed. He admitted to having long thought of music as only a metaphor for philosophy; at the end, he says he came to take it literally.⁴¹⁸ And so, for the schools of their republics, Plato and Aristotle emphatically included music in the

⁴¹⁷ Meditations 73-74.

⁴¹⁸ *Phaedo*?

“core curriculum.”⁴¹⁹ And so, too, did they prescribe “gymnastic”; the ideal of the sound mind in the sound body was no innovation to them.

Nor will the Republic forget the visual and plastic arts. Solomon himself commissioned the greatest builder of his day, Hiram, King of Tyre, to make the First Temple of the most perfect proportions, to frame it and panel it with the cedars of his native Lebanon, to cover its walls with gold and finest gem. So, too shall the Cultural Ministers of the Republic, and their prefects in all its provinces, see to the construction of our public works. Our architects will know, not just Vitruvius and Palladius, but also I.M. Pei and le Corbusier (and, yes, even Gropius and Gaudi). By the time they study Albert Speer, they will know, too, to tremble, and to weep.

The Abrahamist Republic may be Philistine, but it will be the philistinism of Hiram of Tyre, architect for Solomon himself. No art ever known to the sages of the West, and no art ever knowable by those trained in their wisdom, will be under-funded, much less forgotten, in the Abrahamist Republic. But, if you have read that commitment carefully, you will have noticed the condition: Plato will have his due; art will have to prove itself to scholars. It may well be that it is for its own sake alone; it may even be that its sake is higher than philosophy itself. But philosophers will be the judges (and well-paid judges, make no mistake).

That brings us to what may be the most astonishing aspect of Maimonides’s account of philanthropy. Even as he said scholars should eschew public funding to support themselves, if need be, by the meanest of labors, he made a most subtle but significant point, a point implied rather than asserted: The source of this rule of scholarly self-restraint, he said with absolutely no fanfare, was the Sages themselves. At the very outset of his great work, he had announced a great departure from traditional scholarly commentary: Although he would take scholarly authority as definitive on the Torah, he would not identify individual scholars by name. He knew them by heart, and we would have to take his word for what they had said. Of this there is no mistake: He meant for

⁴¹⁹ *Republic and Politics*.

the Mishneh Torah to be read along with the Torah itself, without recourse to other commentary. Of course, he himself studied and taught all the other authorities. But that was the work of scholars. For everyone else, Maimonides and the Torah were enough.

This is breathtakingly audacious. By comparison, John Marshall's invention of judicial review in *Marbury v. Madison* pales into modesty. Marshall's great case may well have been moot, but it least it was a case, a controversy brought into a court of proper jurisdiction by a real plaintiff against a real defendant alleging violation of a specific law. No one asked Maimonides to write the Mishneh Torah, and no one told him, in commenting on the Torah, that he would be, in effect, regulating virtually every aspect of Jewish life for all time. But that is what he did; that is not the least reason we must become students of Maimonides, maybe make him the patron saint of the Abrahamist Republic.

Scholars of Maimonides have long debated why he, alone among the other codifiers of Jewish law, gave detailed attention to Toranic laws that could have had no application in his day.⁴²⁰ The land law, in particular, which was the foundation of his elaborate system of poor relief and administrative finance, had long fallen into desuetude, if it indeed it had ever been fully operative at all. And Maimonides, writing in Cairo to a Jewish readership mostly in the Diaspora themselves, was quite clear that all these provision applied only in the Land of Israel itself.⁴²¹ Perhaps, some have said, he simply did this for the sake of scholarly comprehensiveness; perhaps, others have said, he hoped for a restoration of Israel in Israel itself.⁴²²

But this much is clear: His rules of alms-giving were to be operative law for all Jewish communities everywhere. He was careful to note that every Jewish community he knew had an alms-fund⁴²³; he went to great pains to mandate the appointment of alms-collectors and to provide precise rules for the assessing, collecting, and distributing of

⁴²⁰ Isaac Klien, Introduction, 7 The Code of Maimonides xxiii; Joel L. Kraemer, Maimonides 323.

⁴²¹ 7 Code at 74, 99-100.

⁴²² Isaac Klien, Introduction, 7 The Code of Maimonides xxiii; Joel L. Kraemer, Maimonides 323.

⁴²³ 7 Code 85.

alms.⁴²⁴ We might well imagine that, in his day as in ours, alms-collecting was no easy task. Quite likely, then as now, donors tended to see the giving of alms as something of an option. Maimonides made sure they knew they were wrong about that; he carefully distinguished alms from “free-will offerings,” and made separate provision for their collection. But, before any of that, there was this:

He who refuses to give alms, or gives less than is proper for him, must be compelled by the court to comply, and must be flogged for disobedience until he gives as much as the court estimates he should give. The court may even seize his property in his presence and take from him what is proper for him to give.⁴²⁵

We cannot really know whether that was the law before Maimonides wrote; we only know that it was the law when he wrote it.

Man, the sophomoric old Sophist Protagoras said in his dialogue with Socrates, *is the measure of all things*. For Socrates, that measure is clearly not just anyone, but only the wise, and so justice can only come when philosophers, lovers of wisdom, are kings. Maimonides doubtlessly knew the *Republic*, but he did not wait for the fulfillment of its pre-condition. He simply became the ultimate arbiter of law on the authority of his own interpretation of the ultimate authorities, the scholars of the law, the only court to whom his rulings can be appealed. That is the principle of Eleazar in the Talmud; that is the foundation of the Abrahamist Republic. To lay and build upon that foundation to practice a very high art indeed.

But art is only one of the two important things our account of the Abrahamist Republic seemed to omit and, as I have said, it is the easier omissions to account for. The other is private philanthropy, which brings us to what is maybe the most difficult, even painful, prospect for us to consider: In the Abrahamist Republic, functioning at its very best, at its most virtuous, private philanthropy as we know it today may very well have virtually no role at all. The state, as we have seen, will be massively engaged in artist redistribution; its goal there will be literally philanthropic: out of the highest love of

⁴²⁴ 7 Code 84-89.

⁴²⁵ 7 Code 79.

humanity, to lift the whole of humanity as high as humanly possible. Philanthropy, then, will not have disappeared; it will, at long last, be seen for what it was: in Maimonides' word, a seed. We will have seen that seed take root, flourish, and bear its proper fruit: the Abrahamist Republic. Its scholars will study what Maimonides wrote: not philanthropy *and* the law, but philanthropy *as* the law.

C. What Shall We Do Now?

The first section of this Part identified the twin goals of Abrahamist Republican philanthropy, enabling and encouraging human excellence, then grounded those goals in our general cultural tradition and our particular understanding of charity. Finally, following Maimonides, it gave a metric for Abrahamist Republican philanthropy, a means of balancing its twin goals. The second section of this Part sketched an Abrahamist Republic, an ideal ordering of our political, economic, and cultural sectors. But, of course, we are not in that world.

This final section, accordingly, addresses an obvious question: How do we get there from here? It first poses the central paradox, the problem of the second best: The kind of actions that would best in an ideal world may well move us, under present conditions, away from that world. It then indicates, in very general terms, a way out of the paradox, admittedly at some risk of creating another. Finally, it suggests, if we are to get all this right, we must go back to the sources of our philanthropy, the Classics and the Scriptures.

1. The Problem of the Second Best.

Our current practice of private philanthropy, for all its problems, is vital to the continuation of its two main functions: caring for the very neediest in our society and encouraging our very best. In the Abrahamist Republic, as we have seen, these functions would not disappear, they would be assumed, by and large, by the Republic itself. In particular, an equitable system of taxation would replace our currently perverse system of financing philanthropy, a system in which the generous are, perversely, double-taxed, forced, in effect, to pay, not only their fair share of philanthropy's cost, but also that of

social slackers. In this light, private philanthropy's providing for the poor and promoting excellence displaces the state in those very functions, functions that, on Abrahamist Republican principles, are the state's primary responsibility.

That poses a paradox: If the philanthropic give more, they move us away from, rather than toward, the ideal of a larger philanthropic role for the state. But if the philanthropic give less, the short-term short-fall will come at the cost of those least suited to bear it, those who are poorest, who need our help most, and those who are doing what we value most, whose work our whole society needs most. For philanthropists to cut back on their giving in the hope of forcing the state to pick up its proper share of these functions would be to play a kind of "chicken" with social slackers, where the philanthropic take our society's neediest and most deserving as hostages. It is an unseemly and unacceptably dangerous game. Philanthropists can hardly expect social slackers to be much moved by the prospect that those who they are refusing help will be harmed. Like the rulers of rogue states faced with international economic sanctions, social slackers are not likely to give in before the burden of the sanction on their poorest citizens becomes unacceptable to the sanctioners themselves. In philanthropists' game of "chicken" with social slackers, the latter are not likely to be the first to flinch.

2. The Best as Ally of the Good.

To get out of this dilemma, we must go back to first principles; we must, in particular, take a second look Maimonides's lowest order of philanthropy. His very lowest giver, remember, is the grudging giver. To move closer to a more just placement of the burdens of philanthropy, toward more taxing of all those who are able to pay and less "dunning" of the most generous among them, we may all need to become more grudging givers.

This is not to say that we give less; we cannot, lest we harm philanthropy and its objects. It is, rather, to say that, as we give, we explain why our giving is not the best way, but the second-best. This, in effect, lets us have it both ways: We continue, as donors, to do our share, the double-share that is both ours and that of social slackers. But, even as

we continue thus to give, we open a dialogue, every time we give, about a better world, a world that is more nearly an Abrahamist Republic. This is no abstraction: When the children trick or treat at your house, give them some money for UNICEF, give them some (wholesome?) candy for themselves, thank them for their work – and put in a few good words for the Abrahamist Republic: Wouldn't it be nice if people had to pay without your having to ask them?

In opening that dialogue, we will produce a paradox that Maimonides, I believe, would approve of, if not delight in. The grudging giver, his worst, will have become the educating giver, which is surely the best of his best, the giver who rehabilitates. If the dialogue we open about the proper mode of philanthropy moves us toward the Abrahamist Republic, where philanthropy is the law, and rehabilitation one of the law's two main aims, then we will have helped rehabilitate, not merely the immediate objects of our giving, but our whole society as well. Surely the old scholar would be intrigued, if not delighted.

3. Keep Consulting the Sages.

What would surely delight Maimonides would be this: the very fact that we have wondered what he would think of our philanthropy, our effort to make it both more Abrahamist and more Republican. If we are going to succeed in our meta-philanthropic project -- measuring the virtues of philanthropy itself and then applying that measure to the whole of our world – we must consult our sages, even as Maimonides did in his writing his great codification of the Law and living his philanthropic life. If our philanthropy is to measure up to his standards, we must test those standards themselves, as he did, by the Scriptures and by the Classics, in constant conversation with their sages.

If I am to keep faith with Maimonides, then, I cannot ask you to adopt what I think is his view of philanthropy, the way most consistent with Abrahamist faith and Republican philosophy. I must, instead, ask you to talk with me about it. I have, I hope you will believe, done my very best to get it right. But we both know I may have failed. Either

way, I must affirm the teaching of Socrates, who was even Maimonides's master: Being corrected about the things that really matter is not the worst thing, but the best.

Conclusion: Philanthropy as Justice, Justice as Adjustment.

We end, then, where we began; we have found a way forward for philanthropy by looking back, through the lenses of contemporary scholarship, to our two deepest cultural traditions, the faith of Abraham and the philosophy of Socrates. We have been reminded, I hope, that we must do what philanthropy, resting on its dual foundation of philosophy and faith, has always taught us to do: Help the least well off; encourage the highest forms of human excellence.

But we have not gone in a circle, nor have we wasted our time. We have, I hope, come to appreciate more fully where we really are, and what we really value, how to count our time as well as our money wisely spent. That is a point even T.S. Eliot could not muddle:

We shall not cease from exploration
And the end of all our exploring
Will be to arrive at where we started
And know the place for the first time.⁴²⁶

But we can, I think, also see how badly Eliot did muddle another, equally important, point. Though we may be "all Puritans, all Cavaliers," all citizens of both Jerusalem and Athens, yet all ways are not the same ways. All the roads in our deeply divided world do not lead to the same reconstructed Rome. Eliot, remember, preferred a kingdom with an established Church and a hereditary ruling class to our admittedly Tocquevillean democracy; the hope philanthropy holds out is to make that democracy an Abrahamist Republic "with liberty and justice for all" (and "under God" a matter for individual consciences).

To get there, we ourselves have had to take a very circuitous route, through not only Athens and Jerusalem, but also Chicago. And we must do a great deal of highway maintenance and bridge repair if, as we all believe, everyone who comes after us is to be

⁴²⁶ Little Gidding (or Burnt Norton?).

able to follow us. If we maintain and expand the way we have followed, if we give all the pilgrims who come after us the help they need on their way, even as we preserve and promote the best of what lies in the city toward which our way climbs, then we will have done our philanthropic due.

And we may have done more as well. If the prophets are to be believed, we will have done justice and loved mercy and walked humbly with God himself.⁴²⁷ According to them, that is all he expects of us. Inasmuch as we have served the least of our fellow folk in these ways, we have also served him; even if we never know him as our God, he will nonetheless recognize us as his people, and welcome us into his kingdom (even as he banishes the ceremonial religious but socially indifferent).⁴²⁸ If the Heavenly Kingdom of the Scriptures, the New Zion, comes to this, we will also recognize it as the secular Republic of the classical philosophers. The invitation we already know, from the Prophet Isaiah: *Come, let us reason together.*⁴²⁹ What Plato implied, our response can prove: Piety and justice are one, and that one is the most careful concern for our fellow folk.⁴³⁰ We will have found what Maimonides sought: A measure of philanthropy that rests squarely on the philosophy of Aristotle and the faith of Abraham.

With his measure, and theirs, let us build our philanthropic city; let us, like him, make their law its law, and ours.

“I understand,” he said. “You speak of a city whose foundation we have been describing, which has its being in words; for there is no spot on earth, I imagine, where it exists.

“No,” I said; “but perhaps it is laid up in heaven as a pattern for him who wills to see, and seeing, to found a city in himself. Whether it exists anywhere or ever will exist, is no matter. His conduct will be an expression of the laws of that city alone, and of no other.”

“That is likely enough, he said.”⁴³¹

Amen.

Vive la Republique!

⁴²⁷ Cite Micah.

⁴²⁸ Cite Gospel.

⁴²⁹ Cite Isaiah.

⁴³⁰ Plato, *Euthyphro*.

⁴³¹ Plato, *The Republic*, 280-81 (Lindsay, trans.).