Dear Columbia Readers,

What follows is a very preliminary draft of an article on libertarianism and the charitable tax subsidies (It might look further along than it is since I footnote as I go along). At this stage in the project, I am simply trying to get a handle on the nuances of the libertarian philosophy literature and starting to brainstorm about the possible implications of that literature for the charitable tax subsidies. (I do hope to improve the ratio of lit review to analysis in the next stage of the paper). To that end, I hope you will brainstorm along with me about the implications of the literature I have discussed. I also welcome your thoughts concerning framing and the initial organization of the paper, and am curious how much/little I should talk about the other Articles in this Series. And of course, if you have any particular knowledge of libertarian philosophy, please let me know if I have missed anything or have misunderstood anything.

I look forward to seeing you all soon.

Best,

Miranda
LIBERTARIANISM AND THE CHARITABLE TAX SUBSIDIES

MIRANDA PERRY FLEISCHER

Very preliminary thoughts – Please do not quote or circulate
2013 Columbia Tax Scholars’ Workshop

I. INTRODUCTION

Although many Americans claim to subscribe to libertarian theories of justice, tax scholarship is largely silent about what libertarian principles suggest for the structure of our tax system. \(^1\) This is not surprising, for what springs to mind when a legal academic hears the word “libertarianism” is Robert Nozick’s argument that taxation is slavery. \(^2\) If all taxation is indeed theft, then why bother analyzing libertarian principles for insights into our tax system? But this ascribes too much to Nozick’s argument and ignores the diversity of libertarian thought. \(^3\) To that end, this Essay mines the nuances of libertarian theory for insights into one feature of our tax system: the charitable tax subsidies.

In so doing, it rounds out a series of articles examining what each theory of distributive justice common to legal scholarship suggests for the charitable tax subsidies. The goal of the series is two-fold. First, it argues that even though the charitable tax subsidies are inherently redistributive, existing scholarship on the topic (which focuses on efficiency and pluralism) generally ignores serious discussions of distributional issues. \(^4\) This oversight leaves key questions unanswered in both current law and scholarship: Should charities that receive tax benefits be required to help the poor? How valid are common criticisms that subsidized groups do “too much” for the wealthy and “too little” for the poor? How should we evaluate the distributional impact of various proposals to reform the tax benefits given to the sector? Second, the Series explores how each theory of distributive justice common to tax scholarship (equality of opportunity theories, utilitarianism, and libertarianism) provides insights into those questions. \(^5\)

To that end, this Essay explores the nuances of libertarian theory, albeit from a slightly different angle. Prior articles first assumed the existence of the

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\(^1\) Notable exceptions include work by Richard Epstein and Milton Friedman.

\(^2\) Robert Nozick, ANARCHY, STATE AND UTOPIA 169 (Basic Books 1974)

\(^3\) For a discussion of the term “libertarianism,” see Part III.


charitable tax subsidies as but one part of government efforts to engage in a given type of redistributive activity, and then explored structuring the charitable tax subsidies to effectuate that redistribution. That starting point was used because both utilitarianism and equal opportunity theory accept a large role for the government in redistribution and in the provision of public goods. I thus sidestepped the difficult task of determining whether such goals would be better effectuated solely by the state, or by a combination of state and charitable activity. Instead, I reasoned that the valuable non-distributive goals of pluralism and efficiency suggested that subsidized charitable activity would supplement state efforts, and then proceeded from there.

But because the libertarian baseline concerning the proper scope of government is much different, however, this Essay does not initially assume the existence of any governmental redistribution efforts or state provision of public goods. Instead, it starts by asking to what extent each strand of libertarian theory countenances any redistribution or public goods, and then proceeds to ask what charitable tax subsidies designed to assist in those goals would look like. That is, once some redistribution is justified, it assumes that the goals of efficiency and pluralism would suggest using the charitable tax subsidies as one means of providing that redistribution. That assumption is especially justified in the case of libertarianism, I think, given that while the charitable tax subsidies coerce some individuals (non-donors), they are part of a system to enhance voluntary actions on the part of others. Lastly, I note that I set aside the question of whether the charitable tax subsidies would be the only justifiable means to these ends under libertarianism, or whether the state could also engage in these activities.

As this Essay shows, exploring the nuances of libertarian theory yields a surprising result: Charitable tax subsidies narrowly targeted to provide a safety net to the very poorest emerge as the most common interpretation of libertarian theory. How so? First, it should be noted that some strands of libertarian thought suggest that the charitable tax subsidies are in and of themselves illegitimate, for they forbid any redistribution and anything but the most minimal provision of public goods needed to protect life and property, such as defense. Yet several other strands do see a role for the state to engage in a varying amount of redistribution and to provide varying amounts of public goods. On one spectrum are interpretations that admit that the state should play a role in providing a safety net to the very poorest but no more, and on the other are interpretations (such as one version of left-libertarianism and classical liberalism) that would support something akin to our current structure. Since the latter would include subsidies for the former – but not vice versa – it seems that under an overlapping consensus analysis, aid to the very poor would be prioritized somehow.

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6 See Part II. On the other hand, one fear that libertarians might have is that subsidization via the tax code would mean more government regulation of what would be purely private, voluntary activity without subsidization.
Interestingly, this conclusion mirrors that of utilitarianism and equality of opportunity theory, the other two theories common in tax scholarship. Take utilitarianism: Although viewing any single interpretation of utilitarianism in isolation is problematic, viewing them together highlights a commonality: Donative organizations that help the poor likely enhance welfare under all of the common welfare-based theories of justice. Regardless of the extent to which each theory would subsidize activities in addition to helping the poor, all would help lower-income individuals. And lastly, however else one might identify the “least-advantaged” for purposes of the leximin (which prioritizes the least-advantaged), the financially poor would be included.\(^7\) Interestingly, this coincides with the equality of opportunity theories.\(^8\) Take resource egalitarianism, the equal opportunity theory most commonly invoked by tax theorists. Regardless of how one would treat expensive tastes and talent-pooling, the various strands of resource egalitarianism would all assist the poor.\(^9\) This overlap suggests that competing views of distributive justice can be integrated into charitable giving policy by focusing on what the various theories have in common. The types of activities for which there is the most overlap are programs that help the very poor, suggesting that such organizations merit some type of priority.\(^10\)

This Essay proceeds as follows. Part II provides background information on the charitable tax subsidies, their theoretical justifications, and the existing questions about which the Series as a whole is concerned. Part III briefly addresses what “libertarianism” means. Part IV explores the set of libertarian theories that are grounded in Locke’s notion of self-ownership and private property rights, including Nozick’s theories and those of the left-libertarians. Part V explores the classical liberalism of Richard Epstein, Milton Friedman, and Friedrich Hayek. Part VI will analyze contractarian arguments for libertarianism from Jan Narveson, Loren Lomasky, and David Gauthier. Part VII concludes.

**II. THE CHARITABLE TAX SUBSIDIES: THEORETICAL JUSTIFICATIONS AND UNRESOLVED ISSUES**

Although this Essay does not always take the existence of the charitable tax subsidies as a given, a sense of the theoretical justifications for the subsidies – and the unanswered questions that remain – is helpful to understand the Series as a whole and this Essay’s contribution. Namely, a number of distributional questions are unresolved by current law and scholarship. This

\(^7\) See Fleischer, *Utilitarianism*, supra note ___.

\(^8\) See Fleischer, *Equality of Opportunity*, supra note ___.

\(^9\) Some strands would also subsidize an array of other groups, but again, an area of commonality emerges.

\(^10\) For a discussion of how we might prioritize such groups as a practical matter, see Fleischer, *Equality of Opportunity*, supra note ___, at ___; Fleischer, *Utilitarianism*, supra note ___, at ___.
Series seeks to determine whether some type of overlapping consensus among the most common theories of distributive justice -- including libertarianism -- can help answer those questions. And second, it is interesting to consider to what extent libertarianism supports or contradicts current justifications for the subsidies, for such an understanding could help policymakers assess the current structure.

A. Why Subsidize Charity?

Academics and policymakers widely agree that sections 170(c) and 501(c)(3) serve as subsidies for the charitable sector.\footnote{Although in the minority, a few academics justify these provisions on measurement grounds. See William D. Andrews, \textit{Personal Deductions in an Ideal Income Tax}, 86 Harv. L. Rev. 309 (1972) (discussing the charitable deduction); Boris I. Bittker & George K. Rahdert, \textit{The Exemption of Nonprofit Organizations from Federal Income Taxation}, 85 Yale L. J. 299 (1976) (analyzing tax exemption).} That said, less agreement exists as to why the sector should be subsidized.\footnote{To see how the charitable deduction subsidizes charities, imagine a taxpayer in the 35\% bracket who makes a $100 donation and receives a $100 deduction. The deduction lowers her tax bill by $35, reducing the net cost to her of her transfer to $65. The government has subsidized her gift by $35. The subsidy is thought to increase taxpayer incentives to make such contributions, in turn enhancing the size and scope of the charitable sector. Tax exemption subsidizes charities by leaving them with more funds to use for their charitable programs than in a world where they are taxed. To illustrate, a taxable organization with net revenues of $100,000 would face a 35\% tax bill, leaving it with only $65,000. But a tax-exempt organization with net revenues of $100,000 pays zero tax (ignoring the UBIT) and thus has all $100,000 to use for more charitable activities the next year. The $35,000 not collected from the exempt groups equals its subsidy.} The oldest explanation (the “traditional subsidy theory”) is that subsidizing the sector is “good” because of the benefits it provides: Charities often relieve the government of burdens it would otherwise bear, such as poverty relief. Charities offer diverse and creative solutions to societal problems, and offer competing viewpoints in the arts and culture. And lastly, a vibrant non-profit sector is thought to counter governmental power and enhance pluralism.

Economic theory provides the newer (and more accepted) justification for subsidizing charities. This “economic subsidy theory” posits that subsidizing charities helps them provide public goods that suffer from market and governmental failures. Such goods are often subject to market failure due to free rider and informational problems. And at the government level, our majority-rule democratic process tends to supply public goods only at the level demanded by the median voter.\footnote{Although majority preferences do not always prevail, the literature generally uses such a model for simplicity.} This means that the government funds the public goods favored by the majority (for example, national defense) but not the minority (perhaps a museum). Some public goods, however, remain unfunded. Enter the charitable tax subsidies. They represent an implicit bargain among minority interests favoring under-supplied public goods who
agree to provide partial funding (via a subsidy) for each other’s preferred minority projects. The subsidies thus allow individuals with minority interests to redirect some part of the funds otherwise flowing to the federal fisc toward their vision of the public good.

B. The Benefits of Subsidizing Charity through the Tax System: Efficiency, Pluralism and Deservedness

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

Later work building on the economic subsidy theory fills that gap by identifying a number of benefits from using the tax system to subsidize public-benefiting projects. Some focus on efficiency, arguing that tax deductions (or credits)\(^{14}\) are more efficient than direct governmental grants.\(^{15}\) This is so because tax deductions allow the cost of a given project to be allocated among individuals in proportion to the value each places on it.\(^{16}\) Direct grants, in contrast, would require across-the-board tax increases – which would almost certainly not reflect how much a given taxpayer values the project in question.\(^{17}\)

Others highlight how having individual taxpayers identify which projects deserve subsidies enhances pluralism. Most notably, Saul Levmore describes the charitable deduction as allowing individual taxpayers to “vote” on which projects merit subsidies and at what level.\(^{18}\) According to Levmore,

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\(^{14}\) Scholars debate, however, whether a tax deduction or a tax credit is more efficient. Compare Jeff Strnad, The Charitable Contribution Deduction: A Politico-Economic Analysis, in THE ECONOMICS OF NONPROFIT INSTITUTIONS at 265, 272-76 (supporting a deduction), with Harold M. Hochman & James D. Rodgers, The Optimal Tax Treatment of Charitable Contributions, in THE ECONOMICS OF NONPROFIT INSTITUTIONS at 224, 236 (supporting a credit).

\(^{15}\) See Mark P. Gergen, The Case for a Charitable Contributions Deduction, 74 VA. L. REV. 1393, 139-1406 (1988) (summarizing the works of Hochman, Rogers, and Weisbrod – on both the deduction and exemption).

\(^{16}\) Id. at 1402. This is so because high-demanders pay “more” by making a voluntary donation to the project, while low-demanders pay “less” by refusing to contribute but being forced (through the tax system) to indirectly pay something. This forced payment is thought to reflect the fact that low-demanders do receive some benefit (even if small) from the subsidized project.

\(^{17}\) Id. at 1402 (“People who desire more of a collective good, but who do not place great value on the increase, may refuse to support a subsidy because they fear that they will bear a disproportionate share of the tax cost.”).

\(^{18}\) Saul Levmore, Taxes as Ballots, 65 U. CHI. L. REV. 387, 405 (1998). When someone donates to charity and takes the corresponding deduction, she “votes” for that charity to receive a federal subsidy equal to the foregone tax revenue. See id. (“[E]ach individual taxpayer’s choice, deduction, or ‘ballot,’ . . . . triggers a matching government contribution in
letting taxpayers “vote” in this manner matches the size of the subsidy to taxpayer enthusiasm for a given project. In addition, he further posits that taxpayers who have a voice in deciding which projects to fund will be more committed to such projects, be more active volunteers and monitors, and tolerate higher levels of redistribution and government funding of public goods. David Schizer has similarly argued that giving individual taxpayers leeway in choosing which projects to fund enhances generosity and monitoring.

The “donative theory” developed by John Colombo and Mark Hall identifies two benefits of having taxpayers determine which activities to subsidize by making donations. First, the donations signal that the recipient’s services are undersupplied by the market and government, showing that the project needs a subsidy. Second, the contributions demonstrate that the public believes the services are beneficial to the community, showing that the project deserves a subsidy. Colombo and thus reason that donations signal worthiness for both the deduction and tax exemption.

C. Linger ing Questions

Although existing scholarship provides many valuable insights into the charitable tax subsidies, several questions linger. Namely, neither existing law nor current scholarship provides much guidance as to prioritizing which projects deserve subsidies. Sections 170 and 501 contain a list of purposes which are vague and broadly construed, and the heavy reliance on negative prohibitions (such as commerciality or private inurement) does little to clarify why some projects but not others merit subsidy.

One might wonder why this breadth is troublesome in our pluralistic society. Given that citizens have many differing conceptions of the good,
shouldn’t we allow a wide range of groups to qualify for the charitable tax subsidies? Why take to the time to explore the interaction of distributive justice and the charitable tax subsidies? This section briefly reiterates a point I have extensively addressed elsewhere: Considering distributive justice – in addition to pluralism and efficiency – is necessary for a full understanding of the charitable tax subsidies.

1. Current Law Is Confused

First, current law is inconsistent as to when organizations must help the poor to qualify for the subsidies. Groups serving enumerated purposes other than the catch-all “charitable” purpose (such as educational and religious organizations) are not required to help the poor; schools, for example, need not offer any scholarship assistance at all to qualify for the charitable tax subsidies. This is so even though the Supreme Court has held that such organizations must be “charitable,” and “charitable” organizations are sometimes required to help the poor. There is no explanation for distinguishing among the statutory purposes in this manner. Moreover, only some “charitable” groups must assist the poor to qualify for subsidies. For example, organizations that provide housing assistance must do so. Helping middle-class families to live in a given area (even if expensive, like Manhattan) isn’t enough, unless the families are racial minorities or the neighborhood is decaying. In contrast, arts organizations do not need to help the poor to receive subsidies. And the law concerning whether health-care organizations must offer reduced-cost services to the poor is a mess: Technically, hospitals do not have to do so, on the theory that promoting the health of the community is enough of a benefit. That said, many scholars believe that hospitals are

25 Theorizing, supra note __, at 508 (“While identifying these advantages is a necessary and important contribution to our understanding of charitable giving policy, avoidance of distributive justice concerns ignores the very purpose of charity: voluntary redistribution.”).
27 John Simon et al., The Federal Tax Treatment of Charitable Organizations, in THE NONPROFIT SECTOR: A RESEARCH HANDBOOK 267, 277-78 (Walter W. Powell & Richard Steinberg eds., 2d ed. 2006) (discussing how some subsidized groups but not others are required to help the poor); John D. Colombo, The Role of Redistribution to the Poor in Federal Tax Exemption, Nat’l Ctr. on Philanthropy & the Law, Shades of Virtue: Measuring the Comparative Worthiness of Charities (2009)(manuscript at 4-13) (on file with author) (discussing the changing standards used by courts and the IRS to determine whether groups are eligible for the subsidies).
29 Rev. Rul. 69-545, 1969-2 C.B. 117 (hospitals can qualify for exemption without offering inpatient care to indigent patients if they offer an open emergency room); Rev. Rul. 83-157, 1983-2 C.B. 94 (specialized hospitals without emergency rooms offering no free or reduced cost services to the poor may qualify for exemption). That said, several states have begun challenging whether hospitals that do not offer free or reduced cost services to the poor are eligible for property-tax exemptions. See, e.g., Provena Covenant Med. Ctr. v. Dep’t of Revenue, 925 N.E.2d 1131, 1136 (Ill. 2010) (upholding the revocation of a hospital’s property tax-exemption); John D. Colombo; Provena Covenant: The (Sort Of) Final Chapter, 65 EXEMPT ORG. TAX REV. 489 (2010).
effectively required to help the poor, by either offering an open emergency room or accepting Medicaid. Further, IRS rulings and court opinions essentially require other health organizations (like HMOs and pharmacies) to offer free medical care for the poor.\textsuperscript{30}

This confusion manifested itself quite publicly right after the attacks of September 11, when donors showered disaster relief groups such as the Red Cross with over two billion dollars. In the past, such organizations were allowed to only help financially-needy victims. The Service thus initially hesitated when such groups stated they would help families of all the victims, regardless of their financial circumstances. Public outcry ensued, causing the Service to soften its stance and allow aid to non-needy families if made “in good faith using objective standards.”\textsuperscript{31}

2. \textit{Current Events Raise Distributive Concerns}

A number of current events further highlight the need to address distributive justice directly. First, such issues have begun attracting the attention of various policymakers. The question of helping the poor has come up in several recent Congressional hearings,\textsuperscript{32} with both lawmakers and

\textsuperscript{30} See, e.g., IHC Health Plans, Inc. v. Comm’r, 325 F.3d 1188, 1198 (10th Cir. 2003) (denying exempt status to an HMO that did not offer free or below-cost medical services); Fed’n Pharmacy Serv., Inc. v. Comm’r, 625 F.2d 804, 809 (8th Cir. 1980) (denying exemption to a pharmacy that sold drugs and other items at cost to the poor and elderly); John D. Colombo, \textit{The Failure of Community Benefit}, 15 HEATH MATRIX 29, 30-37 (2005) (detailing various rulings denying tax exempt status to HMOs). In contrast, art galleries and community theaters need not reduce fees to the poor in order to qualify, Goldsboro Art League v. Comm’r, 75 T.C. 337, 344 (1980), yet groups that provide other recreational facilities for adults (such as health clubs) are generally required to do so. \textit{See} John D. Colombo, \textit{The Role of Access in Charitable Tax Exemption}, 82 WASH. U. L.Q. 343, 358-60, 384 (2004) [hereinafter Colombo, \textit{Access}]. In at least one instance, however, an ice rink received exempt status with little more than vague plans to offer some sort of program for disadvantaged children. I.R.S. Priv. Ltr. Rul. 05-32-058 (May 18, 2005) (“A . . . Program shall be offered to provide disadvantaged youth in the local area the opportunity to learn to skate and to attend a day program at the Ice Arena.”). In that case, the Service held that simply providing recreation on a nondiscriminatory basis promoted social welfare, thus meriting a subsidy. \textit{Id.}


\textsuperscript{32} \textit{Tax-Exempt Charitable Organizations: Hearing Before the Subcomm. On Oversight of the H. Comm. On Ways and Means, 110th Cong. 4-5, 18-21 (2007)} (one goal of the hearings will be to “review charities’ efforts to assist diverse communities”); \textit{To Examine Whether Charitable Organizations Serve the Needs of Diverse Communities: Hearing Before the Subcomm. on Oversight of the H. Comm. on Ways and Means, 110th Cong. 4} (2007) (statement of Rep. John Lewis, Chairman, Subcomm. on Oversight of the H. Comm. on Ways and Means) (“[T]he resources of the charitable community do not exactly match our needs. Sadly those with the greatest need are not always served.”).
witnesses suggesting that incentives to help the poor should be increased.\textsuperscript{33} Outside of Congress, several commentators have echoed these concerns. Former Labor Secretary Robert B. Reich, for instance, has argued that the charitable sector should do more to help the less fortunate and promote equality.\textsuperscript{34} The current debate about university endowments also reflects these concerns, as do state challenges to property tax exemption for non-profit hospitals: In Illinois, the Supreme Court recently revoked the state property tax exemption of a prominent non-profit hospital on the grounds that it did not provide adequate charitable care.\textsuperscript{35} And early versions of the Affordable Care Act required hospitals to offer charity care, although such standards were removed from the final bill.

Second, a number of proposals to reform the charitable deduction are currently circulating: replacing the deduction with a credit, implementing a floor (such as 2\% of AGI) under which contributions would not be deductible, or limiting all itemized deductions (including the charitable deduction) to 28\%, regardless of a donor’s bracket. Any such change would likely cause some individuals to donate more, and others to donate less.\textsuperscript{36} Because donors of different income levels tend to support different causes, these changes would likely affect the level of funding flowing to various types of charitable organizations. These changes will thus create both winners and losers, and we need a way to evaluate whether the pattern of winners and losers is acceptable.

\section*{3. Existing Scholarship Is Incomplete}

Existing scholarship, unfortunately, provides little guidance on these questions, as it generally ignores distributive concerns. This is largely purposeful. Scholars turned to efficiency in the 1970s and 1980s out of frustration with the vagueness of the traditional subsidy theory, hoping to create objective tests for the charitable tax subsidies.\textsuperscript{37} In the 1990s and later, scholars refined these tests by integrating pluralism concerns.\textsuperscript{38} Together,

\begin{thebibliography}{99}
\bibitem{33} See \textit{id.} at 57 (statement of Rep. Xavier Becerra, Member, Subcomm. on Oversight of the H. Comm. on Ways and Means) (“So, you could probably incent noble activity by providing a better return for your contribution . . . if they are directed at the general welfare, or direct general welfare of serving those who are in need.”).
\bibitem{35} Provena Covenant Med. Ctr. v. Dep’t of Revenue, 925 N.E.2d 1131, 1146-51 (Ill. 2010).
\bibitem{36} See \textit{Congressional Budget Office, Options for Changing the Tax Treatment of Charitable Giving} (2011).
\bibitem{37} \textit{Theorizing}, supra note 1, at 530.
\bibitem{38} \textit{Id.}
\end{thebibliography}
existing scholarship provides the following test for determining whether to subsidize a given project: (1) it must be a pure or impure public good, (2) it must suffer from market and government failures, (3) it cannot directly benefit the donor, and (4) it must have some threshold level of support from people other than the donor.39

Unfortunately, this body of scholarship is necessary but not sufficient for a full understanding of the charitable subsidies.40 As an initial matter, these tests do not help us prioritize among the many projects meeting their objective criteria. On the broadest level, what do we do when resources are scarce?41 How do we evaluate reform proposals that have winners and losers? And more narrowly, how do we know if a given project really is a “public good”? After all, there are certain activities (like religion) that some consider “public goods” but that others consider “social costs.” Does a voluntary donation necessarily demonstrate the project’s worthiness? To borrow from David Schizer, “[W]hy does the fact that a group of people want a ketchup museum justify subsidizing it?”42 More significantly, what should we do when the project in question isn’t harmless (like the ketchup museum), but one that almost everyone agrees is harmful, such as racially-segregated schools?

In light of these unanswered questions, distributive justice is a logical place to turn for guidance for several reasons. First, the charitable tax subsidies are inherently redistributive. This is obvious with respect to the charitable giving that the charitable deduction seeks to incentivize: one person (the donor) parts with money or property, and another (the charity’s patron) benefits in the form of charitable goods or services.43 And with respect to both donative and non-donative organizations (groups that charge for their services, such as day cares and health organizations) taxpayers pay more than they would otherwise so that the group in question can receive a subsidy. In short, the subsidies are part of the tax system,44 and the importance of distributive justice is unquestioned in many other tax policy debates.45 To that end, this

39 Id. at 531.
40 See generally id.
41 Several states, for example, have proposed limiting the tax benefits offered to non-profits in light of the economic downturn. Terry Schwadron, To Tax or Not to Tax? Cities Ask the Billion-Dollar Question, N.Y. TIMES, Nov. 12, 2007, at H30 (“Despite a long tradition of waiving taxes for charitable nonprofit groups, communities are feeling more pressure to eliminate property-tax exemptions... as communities struggle over diminishing revenue.”).
42 Theorizing, supra note __, at 532.
43 John K. McNulty, Public Policy and Private Charity: A Tax Policy Perspective, 3 VA. TAX REV. 229, 247 (1984) (“Any analysis of philanthropy and its related tax allowances must consider that both its purpose and consequence is the redistribution of resources. Indeed, at an elemental level redistribution seems to be what philanthropy is.”).
44 See, e.g., Thomas D. Griffith, Theories of Personal Deductions in the Income Tax, 40 HASTINGS L.J. 343, 345 (1989) (“[A] satisfactory tax policy must make its underlying ethical assumptions and distributional goals explicit.”)
45 See, e.g., Joseph Bankman & Thomas Griffith, Social Welfare and the Rate Structure: A New Look At Progressive Taxation, 75 CAL. L. REV. 1905, 1907 (1987); Blum & Kalven,
Essay is part of a series that seeks to compare and contrast the three most common theories of distributive justice to see if doing sheds light on any of the unresolved questions. It shows that the types of activities for which there is the most overlap among the various distributive theories are programs that help the very poor, suggesting that there is something special about these organizations.

III. A BRIEF WORD ABOUT “LIBERTARIAN” POLITICAL THEORY AND TERMINOLOGY

Quite generally, libertarianism celebrates individual rights to be free from coercion, the primacy of the free market, and the idea that the market’s resulting distributions are just and should not be disturbed. What exactly this means, however, is contested. Most legal academics, for example, associate libertarianism with Robert Nozick, who famously asserted that only “a minimal state, limited to the narrow functions of protection against force, theft, fraud, enforcement of contracts, and so is justified” and that “taxation is on par with forced labor.” Nozick, however, is but one libertarian thinker along a spectrum. Some theorists disagree with Nozick that any state is justified at all, arguing that voluntary associations can provide the desired protection. Other libertarians believe that the government can legitimately provide a minimal safety net to the destitute, or some type of “basic income” to all, even though they oppose the greater redistribution favored by utilitarians or resource egalitarians. And still others (“left libertarians”) believe an even greater amount of redistribution is justified, on the grounds that initial natural resources should be considered as owned by all -- instead of owned by no one, as Nozick argues.

“Wait!” you might say. “Doesn’t the acceptance of anything more than the night watchman state mean someone isn’t a ‘libertarian?’” A minority

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As explored in Sections IV through VI, three separate arguments tend to motivate libertarians: self-ownership, contractarianism, and freedom. I borrow this typology from Will Kymlicka.

Robert Nozick, ANARCHY, STATE AND UTOPIA ix (Basic Books 1974)

Id. at 169.

This Essay sets aside these libertarian anarchist views and does not discuss them further. If they oppose even Nozick’s minimalism state, they would certainly oppose a state with taxes and tax subsidies for charitable purposes.
of philosophers would have you think so, and the philosophy literature does contain some debate about who “counts” as a libertarian or not.\(^{50}\) And even Richard Epstein, who many legal academics consider a “libertarian,” calls himself a “classical liberal.”\(^{51}\) (To be clear, though, many philosophers include “classical liberals” within the line of thought considered to be “libertarian.”) While that debate is fascinating, we can generally set it aside. What matters for our purposes is that there is a set of beliefs distinct both from utilitarianism and from the type of liberal egalitarianism envisioned by Rawls and the resource egalitarians. These beliefs have much in common with each other (individuals should be free from coercion, the free market should be left undisturbed to the extent possible, and large-scale redistribution of the type in modern welfare states is unjust), even if they differ in their rigidity.\(^{52}\) Many who hold these beliefs call themselves “libertarians” and are often referred to as such by others, even if the most rigid among them seek to limit the term “libertarian.” It thus seems plausible to group these theories together, just as there is room in resource egalitarianism for both those who do and do not believe in talent-pooling. This Essay thus follows scholars who group them together, though I recognize that some may prefer the term “classical liberal” to describe the more moderate views.

IV. THE NATURAL RIGHT OF SELF-OWNERSHIP, LIBERTARIANISM AND THE CHARITABLE TAX SUBSIDIES

Because most legal academics associate libertarianism with the discussions of natural rights in private property by John Locke\(^{53}\) and Robert Nozick, this Essay shall begin there. As this Section shows, an initial read of Locke and Nozick implies that any charitable tax subsidies are unjust – and certainly not the broad array of groups currently subsidized. Other readings of these theorists, however, suggest that charitable tax subsidies for very targeted purposes – much narrower than under current law – are justified. And lastly, the left-libertarian theories that start from Locke but proceed very differently might support a broader set of subsidies similar to current law.

\(^{50}\) Rothbard paper.


\(^{52}\) It is likely that while some of these differences in absoluteness stem from philosophical differences, others stem from a recognition that we are already in a “non-ideal” libertarian world. Given that we are already beyond the night watchman state discussed by Nozick, what types of rules and institutions would most closely replicate the more absolute libertarian ideals? In making his case for “classical liberalism” as a less stark version of libertarianism, for example, Epstein identifies several features of modern states that pre-date the rise of the modern welfare that would be opposed by hard core libertarians (takings for extreme necessity, prohibitions on cartels) but that the believes are justified and require explanation. Epstein, supra note __, at 7.

\(^{53}\) Although many libertarian theories stem from Locke’s writing, some scholars argue that Locke is not a libertarian.
A. Locke, Nozick and “Right Libertarians”54

The genesis of much libertarian thought (including left-libertarianism, discussed in Section IV.C.) lies in John Locke’s justification of private property rights, so this Essay shall begin there.55 Locke’s two starting points are that (1) land and other natural resources are “common to all men,”56 and (2) that “every man has a property in his own person … the labour of his body, and the work of his hands, we may say, are properly his.”57 Locke thus posits that mixing one’s labor with land or other natural resources gives that person property rights to that resource.58 This only holds true, however, if two conditions are met. The first is the spoilage limitation, which requires that one shouldn’t appropriate more resources than can be used before they spoil. Second, Locke requires that an individual may appropriate natural resources for herself only if “enough, and as good” is left for others.59 (This is known as the “Lockean proviso” or the “sufficiency requirement” and is discussed further below).60

Locke thus believed that if an individual’s initial acquisition of material resources through his labor satisfies these limitations, then “no man but he can have a right to” such material.61 This strong statement of individual property rights– and Locke’s silence with respect to the duty of charity in his treatment of property rights in the Second Treatise – seems to lead to the conclusion that all redistributive taxation, therefore, is unjust in Locke’s view.

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54 “Right libertarianism” refers to the argument that self-ownership leads to private ownership of natural resources, which is the most well-known libertarian strand. While this overlaps on many economic matters with “right” political doctrines (for example, opposition to most governmental economic regulation), it often parts with the political right when it comes to social policies. Most “right libertarians,” for example, support policies such as drug legalization, equal rights regardless of sexual orientation, and abortion rights, while opposing programs such as the death penalty and prayer in schools. To that end, Matt Zwolinski has suggested that a better term is “market” libertarians. See Matt Zwolinski, Classical Liberalism and the Basic Income, forthcoming, BASIC INC STUD. In contrast to right libertarianism, left libertarians argue that even if one assumes a right of self-ownership, that right does not lead to private property rights in what were previously commonly-owned natural resources. In their view, redistributive taxation is justified to compensate non-appropriators for their lost use rights. See Section IV.C. for a longer discussion of left libertarianism.
55 xii [Locke’s] ideas have been an essential foundation for libertarian thought. . . . “).
56 JOHN LOCKE, SECOND TREATISE OF GOVERNMENT Ch. 5, Section 27 (ed. C.B. Macpherson 1980).
57 Id.
58 Id.
59 Id. at Section 33.
61 Id.
Robert Nozick’s entitlement theory builds upon Locke’s thought. Nozick articulates three principles that form the core of his theory: justice in acquisition, justice in transfer, and the rectification of past injustice in holdings. Under these principles, if Alice justly acquires a holding, she can do with it whatever she wants. If she freely transfers it to Ben, then Ben’s ownership of that holding is just and cannot be interfered with. On the other hand, if Alice’s acquisition of the holding was unjust, or the transfer to Ben was somehow unjust, then some type of compensation is due whoever was harmed.

This, of course, raises the question of what constitutes justice in acquisition and justice in transfer. Nozick explicitly ties his theory of just acquisition to Locke. He argues that Alice’s appropriation of a given object is just (therefore giving her property rights in it) if it satisfies the Lockean Proviso, meaning that “the position of others no longer at liberty to use the thing is [not] worsened.” Nozick interpreted this to mean that others are not made worse off overall, even if they are made worse off in that they can no longer use or appropriate for themselves what Alice has taken for herself. To borrow an example from Will Kymlicka, Alice may thus appropriate a field previously farmed by many individuals, if enough other farmland is left for the others, or if Alice’s appropriation of the field leaves the others in a similar or better position. Perhaps, for example, Alice employs Charlie to farm the fields, and the wage Alice pays Charlie allows him to live as well or better than when he farmed the fields for himself. Both instances would satisfy the Lockean proviso.

The principle of justice in transfer focuses on whether Alice’s later actions with respect to her holdings are voluntary. If Alice freely gives her holdings to Ben, or freely transfers them to Ben in exchange for other holdings or his labor, the principle of justice in transfer is satisfied, giving Ben rights to the object. In contrast, if Ben steals from Alice or defrauds her, justice in transfer is not satisfied. Not only is Ben not the rightful owner, now will anyone to whom Ben later transfers the holding.

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62 To be clear, however, Nozick rejected part of Locke’s argument, specifically the idea that simply mixing one’s labor with natural resources gives rise to ownership.
63 Nozick does recognize the need for some limits on what Chloe can do with her property in times of catastrophe. If she owns an island, for example, Nozick admits that she cannot force a ship-wrecked castaway to leave. Nor can she charge monopolistic prices if she owns the only waterhole in a desert. Nozick at 180. In a sense, use has its own “Lockean Proviso, for Chloe cannot use her property in a way that makes other worse off as compared to
64 Nozick at 178.
65 Many scholars believe this interpretation is consistent with Locke’s view of the sufficiency requirement, given a later passage in which he argues that the worse-off person in the market-oriented English economy is better off than a “King” in the Americas, where natural resources were still in abundance. Locke, SECOND TREATISE, Ch. 5 Section 41.
66 Id. at Ch. 5, Section 37.
67 WILL KYMLICKA, CONTEMPORARY POLITICAL PHILOSOPHY: AN INTRODUCTION 115-17 (2d. ed. 2002)
Nozick illustrates these principles with his famous Wilt Chamberlain example, whereby one million people each drop a quarter into a box each time they see Chamberlain play basketball. At the end of the season, he has $250,000, more than anyone else. Nozick uses this example to argue against “time-slice” principles of justice that only look at end results. In his view, if the initial holdings of the audience members are just and they freely transfer their quarters for the thrill of watching Wilt Chamberlain play basketball, then nothing is unjust about the result even if money is now unequally distributed. Thus, taxing Chamberlain in order to achieve some other pattern of distribution (for example, one based on utilitarianism or resource egalitarianism) violates his justly achieved property rights.

A bit later in Anarchy, State, and Utopia, Nozick offers another argument against taxation. He imagines that requiring “unemployed hippies to work for the benefit of the needy” would be opposed on the grounds that such a requirement would be forced labor. If forcing someone to work five hours for the needy is forced labor, he reasons, then so too is taking in taxes the fruits of five hours of work. Both interfere with one’s right to self-ownership, rendering taxation for redistributive purposes illegitimate on two grounds.

Together, Locke and Nozick’s theories of property rights undergird the common understanding of libertarianism, which is that all redistributive taxation is unjust. At the same time, however, Locke, Nozick and most other libertarians stress the importance of private charity. But they are silent (understandably so in the case of writers before the 20th century) about the state subsidization of private charitable activity.

1. The initial take on Locke, Nozick and the charitable tax subsidies

So, what might this interpretation of libertarianism say about the charitable tax subsidies, which provide partial public funding to private charity? Take the charitable deduction, which reduces Diane’s taxes when she gives to the soup kitchen (if she donates $100, her tax bill drops by $35). Looking solely at Diane, the deduction seems consistent with libertarianism: the $35 less that Diane pays in taxes is $35 less the government takes from her and redistributes to others against her will. But this ignores the fact that the cost of the charitable deduction is borne by many people, namely other individuals who pay higher taxes or individuals for whom services are reduced. The charitable deduction, therefore, is better understood as another mechanism by which governmental redistribution is enforced. Diane acts as

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68 It should be noted, however, that some ardent libertarians, including Ayn Rand, oppose even private charity.

69 See Eric M. Zolt, Tax Deductions for Charitable Contributions: Domestic Activities, Foreign Activities, or None of the Above, 63 HASTINGS L. J. 361, 374 (2012).

70 By redistribution, I do not mean solely redistribution from the better- to the worse-off. I mean any redistribution that occurs from one person to another, as occurs when individuals are taxed to pay for collective goods enjoyed by others.
the government’s agent by deciding (with her $100 donation) which charity will get $35 from other taxpayers. And it is the latter transfer that should concern libertarians. Diane’s gift is not coerced by the government,\textsuperscript{71} while the transfer from other taxpayers is coerced.\textsuperscript{72}

Seen in this light, the redistribution inherent in the charitable tax subsidies appears to violate the basic principles of libertarianism, for it involuntarily takes from non-donors to give to charitable recipients. And it is likely that Nozick, among others, would hold this view. In his discussion of philanthropy, he rejects the notion that government assistance is necessary to overcome free-rider and other problems that some argue accrue to purely private charity.\textsuperscript{73} But is this the only reading that these works support? The rest of Section III.A. discusses two possible interpretations of Locke and Nozick that might support two distinct sets of very limited charitable tax subsidies: the duty to provide a minimal safety net and the principle of rectification.

2. Locke’s Duty of Charity and the Provision of a Safety Net

First, many scholars believe that Locke himself recognized a duty of charity to the extremely destitute – those willing but unable to work who would otherwise perish. On the other hand, it doesn’t seem that Locke would support the broader state provision of education and the arts.\textsuperscript{74} If so, this would support narrow charitable tax subsidies designed for the purpose of providing a minimal safety net to the “deserving poor” but not for the broader purposes we recognize today.

Thus, given the starring role that libertarians ascribe to Locke, it is worth revisiting his views in more depth. The idea that Locke would allow a safety net stems from a statement from Locke’s First Treatise (which was actually written after the Second Treatise, though published simultaneously):\textsuperscript{75}

God the Lord and Father of all, has given no one of his Children such a property, in his peculiar Portion of the things of this World, but that he has given his needy Brother a Right to the Surplusage of his Goods; so that it cannot justly be denied him, when his pressing Wants call for it. . . . As Justice gives every

\textsuperscript{71} Although some might argue she is “coerced” in other ways, such as peer pressure or a desire to make fundraisers go away, those are not the concern of libertarians.
\textsuperscript{72} Taxpayers at large are also one source of the subsidy inherent in tax-exemption.
\textsuperscript{73} Nozick at 265-68. Daniel J. Mitchell, of the libertarian think tank Cato Institute, has also argued that the government has no business subsidizing charitable gifts. See Daniel J. Mitchell, \textit{Should We End the Tax Deduction for Charitable Giving? Yes: We Don’t Need It}, Dec. 12, 2012 Wall St. J. at also
\textsuperscript{74} This is what my research to date leads me to believe, but I could be mistaken if further research shows otherwise.
\textsuperscript{75} Waldron, \textit{supra} note ___, at 93.
Man a Title to the product of his honest Industry, and the fair Acquisitions of his Ancestors descended to him; so Charity gives every man a Title to so much out of another’s Plenty, as will keep him from extream want, where he has no means to subsist otherwise.\textsuperscript{76}

The precise meaning of this passage, and how to reconcile it with Locke’s writings on property in the Second Treatise, are the subject of debate among philosophers. Although some theorists believe Locke only countenanced an “imperfect duty” (that is, a duty that is left to one’s discretion to perform) others believe Locke’s statements support a stronger duty of charity, one that endorses an extremely minimal government safety net.\textsuperscript{77} These theorists focus on Locke’s phrase that “charity gives every man a Title to so much of another’s plenty,” interpreting use of the word “title” to grant such men a positive right to subsistence aid.\textsuperscript{78} Some scholars base this interpretation in the historical context in which Locke was working, noting that he was writing in response to earlier thinkers’ conceptions of the duty of charity.\textsuperscript{79} To others, the fact that Locke constrained the right to private property with the spoilage and sufficiency provisions shows that Locke did not intend the right to private property to be utterly absolute.\textsuperscript{80} And yet others emphasize passages elsewhere in Locke’s writings that discuss the preservation of mankind, or decry price gouging.\textsuperscript{81}

For a variety of reasons, therefore, a number of scholars believe that the right of a man in “extream want” to subsistence thus need not contradict the private property rights those with a surplus.\textsuperscript{82} And if this right legitimizes the provision of a minimal safety net by the government, it should also legitimize

\textsuperscript{76} John Locke, FIRST TREATISE ON GOVERNMENT Section 42, cited in Jeremy Waldron, Nozick and Locke: Filling the Space of Rights, ___ SOC. PHIL. & POL. 91 (2005).
\textsuperscript{77} Some also believe that Hobbes supported the state provision of a minimal safety net. See, e.g., Steven J. Heyman, Foundations of the Duty to Rescue, 47 VAND. L. REV. 673, 705 (1994) (“As Hobbes puts it, those who by unavoidable accident ‘become unable to maintain themselves by their labour … ought not to be left to the Charity of private persons; but to be provided for, (as far-forth as the necessities of Nature require,) by the Lawes of the Commonwealth.”)
\textsuperscript{78} Jeremy Waldron, Nozick and Locke: Filling the Space of Rights, ___ SOC. PHIL. & POL. 91 (2005).
\textsuperscript{79} See Robert Lamb & Benjamin Thompson, The Meaning of Charity in Locke’s Political Thought, insert cite 8-10 for a concise description of the conclusions of Tully, A. John Simmons, and Jeremy Waldron on this point.
\textsuperscript{81} See, e.g., Steven J. Heyman, Foundations of the Duty to Rescue, 47 VAND. L. REV. 673, 701-02 (1994) (also believing this duty is enforceable).
\textsuperscript{82} One could argue, of course, whether these undercut the characterization of Locke as a “libertarian.” (And in fact, some theorists posit that his theory of property rights is at essence utilitarian in nature). Without getting into that debate, however, the point is that modern libertarians often point to Locke as their source, yet seem to overlook this aspect of Locke’s writings.
subsidizing charity to the extremely destitute who would otherwise perish.\textsuperscript{83} (To be clear, in using the word “charity,” Locke was not envisioning charity as the subsidized provision of an array of public and quasi-public goods as we understand it today. To him, “charity” meant aid to the poor.)

The extent to which Locke endorses any type of safety net, however, is extremely limited. First, Locke’s writings repeatedly emphasize the deserving poor, meaning those who are willing to work but due to circumstances beyond their control find themselves without enough to survive. The interpretations discussed above do not support providing for those who are voluntarily idle and unable to support themselves.\textsuperscript{84} Along those lines, Locke elsewhere discusses the value of work, and proposes that instead of financial assistance, the poor should be given jobs. And lastly, the type of assistance envisioned is extremely minimal – Locke refers to “subsistence” levels that can prevent perishing.\textsuperscript{85}

Lockean thought would thus support only extremely limited redistribution via the charitable tax subsidies. Most importantly, this would likely not support the broad array of activities that we currently subsidize via the charitable tax subsidies.\textsuperscript{86} In contrast, it suggests limiting the charitable tax subsidies to basic aid to those truly unable to support themselves at a subsistence level through no fault of their own.\textsuperscript{87} This would support aid to the disabled, children, and the elderly, but not to the able-bodied unless the latter was structured as some type of “workfare.”\textsuperscript{88} (In some respects, narrowing beneficiaries in this manner overlaps with some of the insights of luck egalitarianism, though luck egalitarianism supports a far greater amount of redistribution and to a greater number of people).\textsuperscript{89} And while such aid would likely include soup kitchens, homeless shelters, emergency medical care, and basic provisions such as clothes and toiletries, it would likely not include other goods and services to the truly destitute, such as recreation programs, access to the arts, and the like. What is less clear is whether, in today’s world, this vein of Lockean thought would subsidize programs that go beyond basic

\textsuperscript{83} See Robert Lamb & Benjamin Thompson, The Meaning of Charity in Locke’s Political Thought, insert cite 2-3 (“It has become increasingly accepted that one of the most crucial conditions that Locke places on ownership is a universal and unconditional entitlement to subsistence provisions, a right that actually trumps established rights of justly owned private property…” ); Steven J. Heyman, Foundations of the Duty to Rescue, 47 Vand. L. Rev. 673, 705 (1994) (noting that “Locke agrees that ‘common charity teaches, that those who be most taken care of by the law, who are least capable of taking care for themselves.’”).

\textsuperscript{84} Waldron, supra note ___, at 96-97.


\textsuperscript{86} Although Locke at times mentions a duty to improve mankind and education and the arts, scholars seem to agree that this does not justify taxation for those purpose.

\textsuperscript{87} Locke expresses concern about laziness and disincentives to industry.

\textsuperscript{88} Waldron.

subsistence but enable the industrious to provide for themselves in the future – activities such as child care that enabled parents to work, and job training and other educational programs that would enable them to learn marketable skills.

a. A Negative Duty of Charity?

The foregoing treats the duty of charity both as a perfect duty and as a positive one; the latter meaning that the well-off have an affirmative duty to provide subsistence to the very poor. If this duty is affirmative, it easily legitimizes the state provision of such subsistence, either directly or indirectly via the charitable tax subsidies. In contrast, however, some scholars regard Locke’s duty of charity to be negative, meaning that the wealthy simply have a duty not to resist when the poor take their property for subsistence. What does this interpretation say about the charitable tax subsidies? One could argue that this also countenances government subsidies for the extremely poor, on the theory that the government is acting as the indigent’s agent in taking from the wealthy to fund basic subsistence. This would be true whether the wealthy are taxed to fund the direct provision of subsistence by the government, or whether the wealthy are taxed more heavily than otherwise to support charitable tax subsidies to groups providing such subsistence. On the other hand, perhaps these scholars might argue that taxation is akin to forcing non-donors to provide charity to the poor, which contradicts this understanding as a negative and not a positive right. But it is hard to see in today’s world how the negative right would play out – perhaps not kicking a homeless man out of your garage or not harming him if he takes tomatoes from your garden. But given the way our society is set up, seems more plausible to view the government as an agent.

b. What if this duty is imperfect?

As mentioned, however, some theorists disagree that Locke’s writings would support the government provision of a safety net. They argue that Locke viewed the duty of charity as “imperfect,” that is, an act that is morally obligatory but left to the duty holder’s discretion as to whether or not to fulfill it. (Modern Kantian philosophers generally also conceive of charity as an

90 Waldron, supra note ___, at 95 (“It is not a question of forcing the rich to do anything: it is enough that they be compelled simply to stand back and let the poor take what (on account of their “Pressing Needs”) is rightfully theirs.”)

91 See, e.g., Bruno Rea, John Locke: Between Charity and Welfare Rights, __ J. SOC. PHIL. 18 (year). Some scholars, however, argue that complying with imperfect duties isn’t optional. In their view, imperfect duties simply allow one to choose when and how to comply, but not whether to comply in the first instance. See David E. Ohreen & Roger A. Perry, Imperfect Duties and Corporate Philanthropy: A Kantian Approach, J. BUS. ETHICS 374 (2011) (Subsidizing charitable aid to the poor is thus consistent with this interpretation of imperfect duties: Individuals give to a homeless shelter fulfill their duty when they choose to make that contribution. Non-donors are also making a choice about how to fulfill their duty of charity. Instead of directing their dollars to a specified organization, they are essentially choosing to have a very minimal amount of their tax dollars directed to charities chosen by others.

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imperfect duty). No legal consequences attach to the failure to carry out imperfect duties, only moral ones. Such duties are in a sense voluntary, and an imperfect duty of charity does not give the extremely destitute any right to assistance. A strict construction of imperfect duties would likely not support the charitable tax subsidies, since they essentially coerce non-donors into carrying out the duty of charity.

One recognized problem with imperfect duties, however, is that they can lead to moral laxity. Because charity to the poor is an imperfect duty, it is up to each of us on any given day whether to help someone, whom to help, and how much. But we can always choose not to help as well. So we may wake up one day and find, looking back over the course of our lives, that we have not been charitable at all, even though we never intended to not carry out this duty. Moreover, the very voluntariness of an imperfect duty may discourage us from fulfilling our duty: we may fear free-riders, we may seek assurance others will also contribute to charity, or we may decline to act charitably because we think that our actions will be more effective only when coordinated with others’ actions. If charity is an imperfect duty, it thus may not be provided at a level sufficient to keep those in extreme need from perishing.

To that end, perhaps the charitable tax subsidies can be viewed as a means of (putting it quite generally) nudging individuals to carry out imperfect duties. The deduction may do so on several levels. First, it might incentivize Diane to contribute more to the soup kitchen down the street than otherwise, since it lowers the cost of so doing. Second, Diane may be much more likely to contribute to the soup kitchen if she knows that others cannot totally free ride off of her, since the charitable deduction forces other taxpayers to pick up part of the cost of his contribution. And last, even if Diane is unconcerned with free riding per se, she may be more inclined to contribute if she knows

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92 A note to Columbia readers: a rich literature discusses the Kantian duty of beneficence, the concept of imperfect duties, and what it means for the beneficence to be an imperfect duty. I am not yet sure to what extent this literature is relevant for my project.
93 Put another way, charity falls within the realm of morality, not justice.
95 Buchanan, *supra* note 47.
96 Hobbes expressed a similar concern, writing that “as it is Uncharitableness in any man, to neglect the impotent; so it is in the Sovereign of a Common-wealth, to expose them to the hazard of such uncertain charity.” Thomas Hobbes, *Leviathan* ch. 30, quoted in Steven J. Heyman, *Foundations of the Duty to Rescue*, 47 VAND. L. REV. 673, 704 (1994).
97 See, e.g., *id.* (discussing the ways in which business organizations can act collectively to overcome the moral laxity associated with various imperfect duties).
98 The deduction may incentivize Dan even if he does not itemize and cannot take advantage of the deduction, if he believes that he is eligible for the deduction. Salience literature.
that her gift will be more effective because its magnitude will be multiplied (enabling, for example, economies of scale).

For these reasons, charitable tax subsidies might be justified under Lockeian thought even if charity is an imperfect duty. As discussed more fully in Section V, however, the extent to which tax subsidies such as the charitable deduction are necessary to overcome these types of problems in an empirical question that is up for debate. If it turns out that the subsidies do not have an incentive effect, then they couldn’t be justified if the duty of charity was considered imperfect.

3. The Principle of Rectification

In addition to the above reading of Locke, one aspect of Nozick’s entitlement theory itself might justify a limited set of charitable tax subsidies. Recall that for Nozick, the justice of the current distribution depends on not only whether the initial acquisition was just, but also whether later transfers were just. If existing conditions result from unjust acquisitions or transfers, then redistribution on the grounds of rectifying past injustice is justified. Nozick specifically notes this at the end of his chapter on distributive justice, when he refers to the principle of rectification and concludes that “past injustices might be so great as to make necessary in the short run a more extensive state in order to rectify them.”

To that end, Nozick admits the possibility that using “patterned principles of distributive justice” might, in some cases, roughly match up with what the principle of rectification requires.

This, of course, leads to the question of how this might apply to the United States today. Here, it is quite likely that Nozick would countenance some taxation to finance the rectification of past injustices in our society. As explained by Jeremy Waldron,

[Nozick] was never prepared to say that the historical-entitlement critique of equality and welfarism in his book amounted to a defense of actually existing market conditions . . .. On the contrary, he thought it undeniable that contemporary holdings would be condemned as unjust by any remotely plausible conception of historical entitlement. (The point of Nozick’s

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99 But see Jan Narveson, Present Payments, Past Wrongs: Correcting Impressions from Nozick on Restitution (arguing that rectification is incompatible with libertarian thought because it involves coercion of third-parties not involved in past injustices).
100 Nozick, supra note ___, at 231.
101 Id. Tebble has characterized this pattern as “to each according to their being no worse off at [rectification] than they would have been had any injustice against them not taken place.” Tebble, supra, note ___, at 100.
102 Scholars read Nozick as regarding rectification as a duty of the state and therefore financed by taxation. See, e.g., Tebble, supra note ___, at 93.
argument . . . was that egalitarians were condemning the existing distribution for the wrong reason—that is, as simply unethical—rather than on account of the violence, fraud, expropriation, ethnic cleansing, state corruption, and so on, involved in the history of most holdings of property in America). 103

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

a. Rectification and the Charitable Tax Subsidies: Initial Thoughts

What then, does rectification entail? In theory, it involves three steps: identifying past injustices, trying to figure out what distribution would result if those past injustices had not occurred, and then restoring the victims to a position as good as that which would have resulted without the injustices. 104 Some instances of past injustice 105 in our society are clear: our treatment of Native Americans, slavery, and past state-enforced discrimination against women. To illustrate, it is likely that Native Americans initially acquired much of North America in accordance with the Lockean Proviso – but then were deprived of their justly acquired holdings through theft, fraud, coercion, and physical force. Under Nozick’s principles, this injustice should be rectified. 106 Likewise, most African-Americans have suffered due to past injustices of forced labor (slavery), violence, and state interferences with their freedom to contract and so on. 107 And given past laws that interfered with women’s freedom to hold property and to contract, a good argument can be made that some rectification is also due to women.

103 Waldron, supra note ___, at 103.
104 Nozick, supra note ___, at 152-53; Lawrence Davis, Nozick’s Entitlement Theory 351, in Jeffrey Paul, ed., READING NOZICK: ESSAYS ON ANARCHY, STATE AND UTOPIA 344 (1981); Adam James Tebble, The Tables Turned: Wilt Chamberlain versus Robert Nozick on Rectification, 17 ECON. & PHIL. 89, 92-93 (2001). To be clear, rectification does not involve identifying the precise holding that was the subject of an unjust transfer and returning that “holding” to its proper owner. Id. at 349. Nor does it turn on inheritance rights of descendants of those previously subject to an injustice.
105 A victim who was still alive would likely be owed compensation of the type discussed in the first portion of Anarchy, State and Utopia. If the original wrongdoer and victim are dead, however, rectification is the process that would be used to set things right.
107 For an argument along these lines that libertarianism requires affirmative action, see Andrew Valls, The Libertarian Case for Affirmative Action, 25 SOC. THEORY & PRACTICE 299 (1999). Interestingly, Nozick alludes to this possibility when discussing rectification by citing to a book written by noted tax professor Boris Bittker, THE CASE FOR BLACK REPARATIONS (1973). Nozick at 344 n. 2.
Let’s assume that the charitable tax subsidies will be part of a scheme to provide rectification to individuals harmed by (for the moment) just these three injustices. The next step is trying to figure out what position these individuals would have been in without the past injustices. This, of course, entails numerous assumptions and counterfactuals. Let’s say, for example, that Indian Americans had not been defrauded out of their land, or that African Americans had immigrated voluntarily and were paid a market wage. To trace the holdings that would result, we would need to make assumptions about past individuals’ preferences concerning consumption versus saving, for that decision would affect the current distributional pattern. We’d also need to know what past individuals would have done with their holdings at death – give them to charity, or bequeath them to heirs? And lastly, we’d have to make some assumption about the growth rate of assets held in the past.

Any estimation of what a given individual would be owed, therefore, would be exceedingly imprecise. Moreover, identifying the precise individuals alive today who merit rectification raises its own set of questions. Take, for example, African Americans. Clearly, descendants of slaves deserve rectification. But would other African Americans, whose holdings are less not because their ancestors were directly subjected to injustice, but are less because of conditions in our society that arise from past injustice to others’ ancestors? Imagine, for example, poor educational opportunities for African Americans that stem from underfunded public schools, which stem from low tax bases, which stem from past injustices in wealth and state-sanctioned redlining practices. It is likely that many African-American children currently in these schools are not the descendants of slaves, or of individuals who were directly harmed by redlining, yet they still suffer from the effects. One could also argue that even financially successful members of these groups – say, and African American heart surgeon – are owed rectification, on the grounds that they might have been even more successful without the past injustices.

It seems plausible, then, that rectification should be due to all members of these identifiable victim groups, and not just to descendants of past victims. Given that conclusion, and given the difficulty of specifically

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108 Nozick recognizes the difficulty of precisely identifying this counterfactual, acknowledging that estimates and probability distributions will likely be used. Nozick at 152-53.
109 See Robert E. Litan, On Rectification in Nozick’s Minimal State, 5 POL. THEORY 233, 234-35 (1977); Tebble, supra note __, at 103
110 Valls, supra note __, at 312.
111 Some theorists read Nozick as requiring that a given individual actually trace her roots back to a victim and then establish that she would have somehow benefited from that victim’s holdings had there been no injustice, while others do not require a direct link. Cf Litan (requiring such a link)
112 Robert E. Litan, On Rectification in Nozick’s Minimal State, 5 POL. THEORY 233, 236 (1977) (recognizing that past unjust property transactions have likely influenced “the present distribution of family and social backgrounds”).
113 See, e.g., Litan, supra note __, at 242 (suggesting that one approach to rectification might “consist of identifying those characteristics of the present-day population that are most likely to
identifying the distribution that would have resulted without injustice, an easy but extremely imprecise solution appears: Perhaps one could just compare the current situations of the victim group to that of the non-victim group (African Americans and Native Americans to white Americans, and women to men), and chalk the difference up to past injustice.\footnote{See, e.g., Valls, supra note ___, for a more extensive elaboration of this reasoning. This of course, assumes not only that Native Americans, African Americans, and white Americans would have all made the same types of decisions concerning education and jobs in the absence of past injustices (which is likely) but also that women and men would have made the same types of decisions, which is more contested.} Next, one could plausibly think that any efforts to improve the position of the victim group, to close those gaps, would be justified under the principle of rectification.

The principle of rectification, then, could support subsidizing charitable organizations that helped improve the situation of these groups. For example, assuming that members of these groups have lesser educational and employment opportunities due to past injustices, then we would subsidize activities aimed at improving those: private schools in neighborhoods populated by these groups, tutoring programs, job skills training, and so on. But I think the principle of rectification would likely go further, and subsidize activities in any situation where the opportunities of the victim group fell short of the opportunities for white Americans or men. Take, for example, recreation. Many African American and Native Americans do not have the same recreational opportunities as white Americans (access to summer camps, swimming pools, sports leagues, etc). If that lack of access is due to past injustice, then the principle of rectification would suggest subsidizing such programs. The same would likely be true of cultural programs focused on the culture of victim groups, such as museums devoted to African-American art or music groups devoted to Native American music.\footnote{In some respects, by seeking to identify disparities due to past injustices but not those due to choice, this idea is similar to the choice/chance distinction found in both luck egalitarianism and left-libertarianism. None of these theories would remedy disparities due to choice. But because the comparative baseline is different, I think it is likely that rectification would suggest a different set of subsidies than the other theories. For example, luck egalitarianism would subsidize assistance to children born to poor families, on the grounds they should have an equal shot. Rectification would not do so, unless the differences were due to past injustices. Not just in terms of who would be subsidized, but what. I’m still working that out.} Put another way, then, the charitable tax subsidies could be used as an “in kind” complement to any direct financial resources that should be due under rectification.

\textit{b. Rectification and the Charitable Tax Subsidies: Some Complications}

Several glaring problems with designing the charitable tax subsidies to assist in rectification present themselves. Let’s start by continuing with the
assumption that all members of the above victim groups merit rectification (which I admit is a big assumption). A similar problem presents itself on the perpetrator side. In theory, rectification would only be due from those individuals whose positions are better off than they would be otherwise due to past injustices. This would clearly include, for example, perpetrators of such injustices and those who inherited holdings from past perpetrators. But an argument could also be made, for example, that even if a given white individual’s family didn’t own slaves, she is financially better off due to the past injustices of others. (This would be due, perhaps, to past injustices that reduced competition for jobs and comparatively increased educational and cultural opportunities for whites but not African Americans, thus improving her position).

Under this reasoning, we’d want rectification to be paid by white taxpayers. The problem is, however, that the charitable tax subsidies are borne by all taxpayers, not just white taxpayers. The only way out this quandary, I think, would be to impose some type of very small surtax on white taxpayers to finance the government subsidization of charitable programs designed to effectuate rectification. (While the goal of this paper is theoretical, I do think it’s worth noting that that would be politically impossible.) Without such an adjustment, rectification would be paid by many individuals in addition to those who had benefitted from past injustice.\footnote{116} (And even with such an adjustment, it is likely that the set of payers would be overbroad, as discussed below).

A second problem comes to identifying victims. As previously discussed, focusing on groups that aid say, any African Americans already makes quite a leap to assume that all African Americans have been harmed by past injustice. Thus, focusing on groups, and not individuals, make some assumptions that could likely be contested. Another complication emerges, however, when we want to identify groups in addition to African Americans and Native Americans who merit rectification. Which other groups should this be extended to? Perhaps Japanese Americans, because of the WWII Japanese internment camps. What about white people of European ancestry who immigrated as indentured servants, or other under arrangements Nozick would consider coercive because the state played some role\footnote{117} What about ethnic groups such as Asians, Hispanics, the Irish, and Jews that at some point encountered state-sanctioned discrimination in the U.S.?\footnote{118} It seems that almost every ethnic group, with the exception of wealthier white European settlers, has been the subject of past injustice by the state at some point. This illustrates both the difficulty of identifying past victims, but also the fact that

\footnote{116} Tebble, \textit{supra} note ___, at 101 n. 33;  
\footnote{117} Note that Nozick would not consider purely private discrimination – without theft or fraud--the grounds for rectification.  
\footnote{118} And what about individuals who were defrauded, stolen from, coerced, or subject to state coercion and discrimination in other countries before immigrating here?

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without the type of adjustment suggested above, many victims would also likely be paying for rectification as part of the broad group of taxpayers subsidizing charitable programs.\textsuperscript{119}

Interestingly, Robert Nozick briefly raises the question of whether Rawls’s difference principle could be used as a means of rough justice here, on the grounds that the least-advantaged in society are the most likely to be the victims of past injustice.\textsuperscript{120} While it’s noteworthy that he raises this possibility, I don’t find this to be a compelling means of identifying to whom rectification should be owed. Namely, it ignores deviations that are due not to past injustice but to individual choices (whether on the part of individuals who are currently the least-advantaged or their ancestors). Imagine, for example, a well-off European family who immigrated very early in our country’s history and was never subject to any injustice. Living individuals from the family likely occupy all walks of life right now – both due to their own choices about how much schooling to obtain, what jobs to pursue, whether to become drug addicts but also perhaps to the choices of their parents, grand-parents, and great-grand-parents’ choices. Thus, there may well be individuals from that family who are currently among “the least-advantaged” due to past voluntary choices and not due to past injustice.\textsuperscript{121}

\textbf{c. Final Thoughts on Rectification}

The problem with designing the charitable tax subsidies to effectuate rectification,\textsuperscript{122} then, is that it requires historical facts that are essentially unknowable: Who is a victim of past injustice? Who is a perpetrator? What would the country’s holdings look like if injustice had not occurred? In a sense, these unknowns undermine rectification in much the same way that implementing utilitarianism requires comparably unknowable information concerning an individual’s utility or the consequences of future actions. All that can be done is of a very rough justice. But what is noteworthy is that the concept of rectification would countenance some state-financed redistribution, unlike the more familiar take on Nozick that usually springs to mind.

\textbf{B. Non-absolute right libertarians}

Putting aside rectification, most modern right libertarians who share Nozick’s views on the primacy of individual property rights hold the absolutist view that any taxation beyond that necessary to fund the night watchman state is tantamount to theft. There are, however, exceptions such as the influential

\begin{enumerate}
\item \textsuperscript{119} See Litan, \textit{supra} note \textit{___}, at 243 (discussing the likelihood that any identification of past victims and wrongdoers would likely be incorrect).
\item \textsuperscript{120} Nozick, \textit{supra} note \textit{___}, at 153.
\item \textsuperscript{121} Again, we see some overlap with the choice/chance distinction of luck egalitarianism and left-libertarianism.
\item \textsuperscript{122} Or to prioritize groups that pursue rectification.
\end{enumerate}
libertarian philosopher Eric Mack. While Mack “confess[es] to a fondness for the dictum that all taxation is theft,” while arguing that rights-based libertarianism could support taxation that would “fund something like a minimal safety-net for individuals who would faultlessly find themselves in dire straits without that net.”

Simplifying a bit, Mack reasons as follows: Imagine a fully-prepared hiker on a well-planned trip who, through no fault of her own, encounters unforeseen fatally cold temperatures. The hiker stumbles across a locked cabin in the woods, with a fire and blankets that would save her life. The hiker, then, can save her life by violating the cabin owner’s property rights. Responding to this hypothetical, Mack thinks that “no plausible moral theory” would allow this faultless hiker to freeze to death. There are thus some instances in which property rights can be ignored.

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

What does this mean for taxation? Most of us, of course, won’t be faced with the issue of a freezing hiker breaking into a cabin. But a real world version of the freezing hiker would instead be someone on the verge of starvation who steals a pie cooling in our window or sleeps in our garage. Property owners, Mack reasons, have an incentive to pre-empt those types of incursions by providing a minimal safety net so that those in dire straits do not need to steal food or shelter from us. By minimizing the likelihood of individual excursions into property rights in this manner, Mack believes a safety net would thus strengthen those property rights. This, he argues, leads to the provision of a very minimal safety net for those who are faultlessly in dire straits.

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124 *Id.* at 119.
125 *Id.* at 129.
126 *Id.* at 133.
127 *Id.* at 134.
128 Mack at 138.
This means, therefore, that another version of Nozickean right-libertarianism\(^{129}\) (in addition to Locke) supports the government provision of a minimal safety-net. Mack is careful, however, to limit this to individuals whose dire straits are not their fault, much like Locke does. And like the Lockeans, Mack would impose some type of workfare requirement, on the grounds that those who ignore property rights due to extreme need should compensate affected property owners wherever possible. Lastly, Mack limits this assistance to items like food, clothing, and shelter, much like the Lockeans would.\(^{130}\) We can now see that two interpretations of “right libertarianism” potentially justify charitable tax subsidies providing basic needs to the very poor, but nothing else.

**C. Left-Libertarianism**

The strands of libertarianism just discussed reason that private ownership of previously un-owned natural resources necessarily follows from the concept self-ownership. In contrast, a set of “left libertarian” theorists challenge that reasoning, arguing that self-ownership does not necessarily translate into unconstrained private ownership of resources. These theorists concur in the notion of self-ownership\(^{131}\) but believe that prior to appropriation, natural resources should be considered as *commonly* owned (instead of un-owned). Due to this common ownership, left-libertarians interpret the Lockeans proviso more stringently than right-libertarians. Nozick, for example, interprets the proviso to mean that appropriators cannot make others worse off then they were before appropriation (Recall *Alice* and *Ben*, above). But according to left-libertarians, this sets the compensation too low, for it ignores the value those resources bring after appropriation.\(^{132}\) Left-libertarians also believe that revising the proviso to require that others be left some minimal or subsistence amount is too lenient. To illustrate, Vallentyne asks us to

> [s]uppose that there are enough natural resources to give everyone fabulous life prospects, and someone appropriates (or uses) natural resources leaving others only minimally adequate life prospects and generating ultra-fabulous life prospects for herself. It is implausible to hold that those who use or first claim a natural resource are entitled to reap all the benefits in excess of what is needed to leave others adequate life prospects.

\(^{129}\) Mack points out that Nozick off-handedly acknowledges that preventing moral catastrophe may justify ignoring rights, but then quickly dismisses those instances without discussion. Likewise, Mack notes that Ayn Rand admitted that emergencies might limit rights. Thus, Mack does not believe he is directly contradicting the libertarian theorists for whom self-ownership and property rights are paramount.

\(^{130}\) *Id.* at 140.


\(^{132}\) Otsuka at 23.
resources were not created by any human agent and their value belongs to all of us in some egalitarian manner.\textsuperscript{133}

As a result, an individual who appropriates more than her fair share of natural resources must compensate others.\textsuperscript{134} Notably, left-libertarians extend this fair share rule beyond initial acquisitions, arguing that it is an “ongoing requirement for continued ownership.”\textsuperscript{135} Imagine that Emma and Fred are the only two inhabitants on an island, and they initially divide the island’s resources fairly. If Georgia and Harry suddenly appear on the island, the existing allocation is not deemed fair simply because it was fair initially.\textsuperscript{136} Georgia and Harry merit a fair share of the island’s resources, too.

This of course, leads to the question of what a “fair share” in natural resources is. First, it should be thought of as a fair initial share. As with the liberal egalitarianism of Rawls, Dworkin and the luck egalitarians, left libertarians are unconcerned if holdings depart from a just initial distribution because of voluntary choices.\textsuperscript{137} Assume that Emma and Fred’s initial holdings are fair. If Emma sunbathes on the beach each day while Fred works hard to improve his holdings, leading to later differences in welfare, so be it. In the real world, of course, there is no one point of time that we can look at to determine whether or not fair initial shares exist. The real world consists of people of all ages, some of whom are just starting out, and some of whom are further along in their lives and careers. For the latter, their holdings are likely a mix of luck and their own choices. What one can do, however, is to apply this concept at the individual level and try to ensure that each person has a fair share at the start of his or her life.\textsuperscript{138}

Second, as in the liberal egalitarian literature, debate exists as to what counts as natural resources and what “fair shares” in those resources are. One interpretation (“equal share left-libertarianism”) is that appropriators must leave “an equally valuable per capital share of the value of natural resources

\textsuperscript{133} Vallentyne at 148. See also Otsuka, supra note ___, at 24.

\textsuperscript{134} See Peter Vallentyne, Left-Libertarianism and Liberty 147-48, in Thomas Christiano and John Christman, eds., CONTEMPORARY DEBATES IN POLITICAL PHILOSOPHY 136 (2009). According to left-libertarianism, this compensation is not unjust because individuals who take more than their fair share forfeit some of their rights to self-ownership, but only to the extent needed for compensation. Vallentyne at 142 (someone who takes an apple loses from another’s property loses self-ownership rights only to the extent that he owes the apple orchard owners compensation); Otsuka at 40. More radical versions of left-libertarianism argue that if natural resources are commonly owned, they can be appropriated only with the consent of all other individuals, but rejects this interpretation of common ownership. Vallentyne considers these “implausible,” id., at 146, and I shall not discuss them further.

\textsuperscript{135} Vallentyne at 147. This is necessary to account for later arrivals and brute luck changes in the total value of natural resources.

\textsuperscript{136} Vallentyne at 147.

\textsuperscript{137} See Otsuka, supra note ___, at 25 n. 39.

for others.” This distribution would be roughly equivalent to that of the more basic resource egalitarianism, one that does not take into account disabilities or other personal characteristics that influence one’s ability to convert resources into welfare. The more common (and somewhat more expansive) left-libertarian interpretation, however, is that initial shares should give each individual an equal opportunity for welfare. This conceptualization recognizes that innate differences in individuals affect their ability to generate welfare. The most obvious example is that of a person who can’t walk: because she needs funds to purchase crutches or a wheelchair, she needs more resources than an able-bodied person to achieve the same level of welfare. As discussed more below, however, some theorists also argue that individuals with expensive tastes (champagne) or below-average talents (a bad singing voice, for example) also merit extra resources so that they have the same shot at welfare as those with inexpensive tastes (beer).

This leads to a final question. Ideally, we could identify individuals who have appropriated more than their share (or who currently have more than what would be a fair share) and force only those people to compensate others who do not have a fair share. To some left libertarians (such as Michael Otsuka), this means that compensation would not be financed by universal taxation. In contrast, others like Philippe Van Parijs essentially argue that universal taxation is justified on the grounds that one’s income represents one’s ability to convert resources into welfare. Recall that the charitable tax subsidies invoke universal taxation, since Diane’s voluntary contribution elicits a match from the government. While it seems likely that Van Parijs and others who support limited taxation for the purposes of ensuring a fair share would thus support charitable tax subsidies for that purpose, what about stricter left-libertarians such as Otsuka? The answer is, “perhaps.” Otsuka has argued for a scheme whereby the “unjust” (prisoners) are taxed to pay compensation to the less-advantaged when voluntary contributions to the less-advantaged are insufficient to provide them with equal opportunity for welfare. In his view, the ideal of voluntary contributions can be supplemented with limited state measures. Given that that is exactly what the charitable tax subsidies do, perhaps Otsuka would allow them on the grounds they supplement (and perhaps incentivize) voluntary contributions.

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139 Vallentyne at 148. Henry George and Hillel Steiner are advocates of this interpretation. See, e.g., Hillel Steiner, The Natural Right to the Means of Production, 27 Phil. Q. 41, 49 (1977) (“Each individual has a right to an equal share of the basic non-human means of production”).
140 This is the interpretation favored by Vallentyne, see id at 149, and Otsuka, supra note ____, at 25.
141 See Otsuka at 27, 29. Notably, Otsuka concedes that a disabled person such as Tiny Tim merits a greater share to compensate for his disability even if, without compensation, his opportunity for welfare would be as great as the fully-abled (due to his sunny disposition). Id. at 27.
142 Otsuka at 41-53.
144 Otsuka at 41-53.
This Essay thus assumes that left-libertarianism countenances some state-financed redistribution to try to reach fair initial shares. Given that baseline, and the other benefits from having charities provide public goods in addition to the state, I assume for purposes of this section that the charitable tax subsidies would be part of such a scheme. Even if, for example, a society decided to provide money directly to those without a fair share, it is likely that such society would also want charitable activity directed to the same goal. What left-libertarianism therefore means for the charitable tax subsidies overlaps in many respects with what the resource egalitarianism of John Rawls, Ronald Dworkin, and the like suggests, a question I have addressed extensively elsewhere. I shall briefly highlight a few points here.

1. **Fair Shares of Material Resources**

As a starting point, both the “equal shares” and “equal opportunity for welfare” versions of left-libertarianism would support providing financial resources and their equivalent to children born into families few financial resources. Easy examples that spring to mind include the direct provision of resources in the form of programs such as pre- and post-natal care for poor mothers, health care for poor children, orphanages, adoption groups, tutoring programs and libraries, scholarship programs, private schools in poor areas, projects like the Harlem Children’s Enterprise Zone, and the like. With respect to training programs, it seems logical that skills that are obviously practical and relevant to entering the workplace should also be provided. This is so because poor children who do not have a chance to develop marketable skills due to unequal resources are at a disadvantage both in terms of resources and in terms of the opportunity to convert their personal endowments into welfare. This would include, for example, organizations such as reading skills programs, as well as groups that help children develop marketable practical skills (such as preparing inner-city children for careers in the culinary arts).

A somewhat harder case involves programs such as chess teams, golf classes or music camps for non-wealthy children, which may at first feel frivolous. How should we treat these organizations, which enable the poor to develop less marketable skills? Is helping a talented pianist who otherwise couldn’t afford music camp become a better musician – even if it has no impact on her later financial well-being – what we have in mind when we

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145 See Section II.
146 Such as Anne Alstott, Bruce Ackerman, Eric Rakowski, Richard Arneson, and G.A. Cohen.
147 Fleischer, supra note ___.
148 Recall the prior discussion of determining initial fair shares on an individual basis, by focusing on what resources and assets one has at birth.
149 Although my project is academic in nature (instead of prescriptive), a great deal of research exists analyzing the effectiveness of various programs in assisting less financially advantaged. To that end, delineating a list of programs that level up in this manner should not present policymakers who choose to follow this path with an insurmountable hurdle.
speak of ensuring that everyone has an equal opportunity for welfare? In other words, would a left-libertarian scheme of charitable subsidies treat the development (in children) of all skills and talents equally?

My instinct is that such a scheme would. First, it is important to remember that at this point, we are talking about ensuring that disadvantaged children have the same chance as better-off children to develop their talents, so that each can strive for her conception of welfare, whatever that may be. To that end, differentiating among talents at this stage would violate the principle of neutrality. We should not yet be concerned with the possible later financial rewards accompanying various talents, as so doing verges into debates about talent-pooling and expensive tastes. Who is not to say that although most children do not make a career in music, the child given a scholarship to music camp might be the next Bruce Springsteen?

Moreover, participating in these types of activities is beneficial even when they remain a mere “hobby” for the individual in question for two reasons. First, the left-libertarian goal is to ensure that all individuals have the same chance to pursue whatever conception of welfare (“the good life”) they may have. In some instances, this means helping an individual develop a non-marketable talent (in addition to simply providing her with material resources), if she views pursing that talent as part of her conception of the good life. Second, the very act of developing talents in these types of activities helps develop more practical life skills, such as patience and discipline.

\[a. \text{ Cultural Appreciation}\]

What about organizations that simply allow the poor and middle class to enjoy cultural benefits such as the arts? Organizations such as museums and community theaters likely allow the poor and middle class to enjoy a resource that would otherwise be out of reach for them; but is access to art a necessary resource when it comes to equal opportunity for welfare, or is it simply an “expensive taste”? My instinct is that opportunities to appreciate art should be considered a resource that may introduce children to interests and talents they might otherwise never know they have. It would seem to violate equality of opportunity for welfare, for example, for wealthy children with access to these cultural resources to envision a broader array of conceptions of the good life than less wealthy children. For example, children growing up in disadvantaged and isolated areas of rural Texas should know that there are many conceptions of the good life that do not involve playing professional football.

These insights thus answer one question not satisfactorily answered by current law or scholarship. A set of charitable tax subsidies
inspired by left-libertarianism would still subsidize groups such as the opera and the ballet, but only long as those groups offered free or discounted admission to the less advantaged (or other programs that help the less privileged develop their abilities).

b. Assistance to adults

The foregoing has focused on assistance to children, since it is easy to hold children unaccountable (in the choice/chance) since for their poor circumstances. The problem, of course, is that children do not live in a vacuum – they live with families, that is, with adults whose successes or failures in life reflect a mix of choice and chance. From the child’s perspective, however, the parent’s circumstances are pure chance. Take a poor family without health insurance in which the father is ill because he has smoked his entire life. Here, not helping the father (on the grounds that the father’s misfortune stems from his voluntary prior choices) harms the child. On the other hand, helping the father is in some sense compensating him for poor choices. In such a case, the benefit to the child by keeping her parents healthy very likely outweighs any possible negative incentive effects from the ex post equalization to her father. This suggests that we should subsidize groups providing basic necessities such as health care, food, clothing, and shelter for poor adults who are parents or guardians.

But what about assisting groups that provide similar services to needy adults who are not parents? One answer would counsel not assisting such adults on the grounds that their past choices led them to their current straits. This response, for example, suggests that disadvantaged adults should be held accountable for decisions such as dropping out of school or pursuing low-paying jobs. Redistributing to such people, one could argue, effectuates ex post equalization of welfare instead of ex ante provision of opportunities.

On the other hand, ongoing inequality in our society obscures the extent to which the plight of such individuals results from choice or chance. Is Ivan, who grew up in a poor area with lousy and crime-ridden public schools, never went to college, and was just laid off from an automobile factory a victim of chance, choice, or (as seems most likely) a combination of both? In large part, answering this reflects one’s views on whether society already offers some baseline level for equal opportunity for welfare. If, for example, one thinks that all public schools provide “enough” education for any talented child to go to college, and that there are likewise “enough” scholarships out there for poor children to do so, then Ivan’s plight seems of his own making. In contrast, if one believes that many public schools are ineffective and do not provide equal chances to develop one’s talents, then Ivan seems more a victim of chance who
deserves compensation for a lack of ex ante opportunities. Thus, this likely comes down to a matter of opinion about the current state of society.

c. Who merits assistance?

[This section shall address who would merit compensation, just the very poor or also the middle class?]

d. Leveling down?

[This section shall address whether left-libertarianism would require some “leveling down” aspect in order for a charitable transfer to be subsidized, and if so, how that could be accomplished. Luck egalitarianism would, so I assume left-libertarianism would as well.]

2. Physical and Mental Endowments and Equal Opportunity for Welfare

As mentioned previously, left-libertarians disagree as to whether one’s fair share of resources should be considered to be an “equal share,” or a share that provides one with equal opportunity for welfare. For the former, the charitable tax subsidies would likely be limited as discussed above to programs that are rough equivalents to distributing financial resources to individuals who are poor through no fault of their own. The latter, however, would likely support a somewhat expanded set of charitable tax subsidies. This section shall start by addressing disabilities. (From what I can tell, most left-libertarians draw a line between compensating for diminished physical and mental endowments, on one had, and compensating for expensive tastes and talent-pooling on the other).

If one interprets left-libertarianism in this manner, it also countenances subsidizing health organizations and groups that assist the disabled even if they do not offer free or reduced-cost services to the poor. This is so because among individuals with equal amounts of material resources, a disabled individual is at a disadvantage in terms of accessing welfare due to her lesser physical endowment. Providing that individual with medical care (even if she can and does pay for it) should thus be viewed as transferring to her a non-financial resource (in the form of better health, relief from pain, or a no-longer-broken leg). Put another way, the mere provision of health care should be viewed as a transfer of a nonfinancial resource, and something separate and apart from financial resources.

Still assuming a world of equal material resources, the question then becomes whether providing medical care for a cost should be considered “charitable” in the sense contemplated by the charitable tax
subsidiaries. Given that the disabled individual is paying for the service, how is providing medical services for a price any different than providing, say, plasma televisions at a price? Here, it is useful to remind ourselves of the contributions of the efficiency scholarship: activities that suffer from contract failure (such as medical care) form as nonprofits to overcome the information asymmetries, but at the same time, organizing as a nonprofit necessitates a governmental subsidy due to the resulting limitations on raising capital.\textsuperscript{150}

Thus, subsidizing medical providers is charitable in the following manner: disabled individuals are at a disadvantage vis-à-vis their able-bodied peers. Due to market failures, the good or service needed to remedy that disadvantage is not provided without a subsidy. Subsidizing the activity that allows the disabled individual to directly remedy her physical disadvantage (by, for example, fixing a broken leg) enhances equality of opportunity by reducing the inequality present in the sphere of physical abilities and endowments. Of course, once that individual has purchased the service, her material resources are diminished and she no longer has financial resources equal to her peers with which to pursue her vision of the good life (remember, thus far we have been assuming a world with equal initial financial resources).

Fully remedying the disadvantage would therefore require two steps: first, physically fixing the disability, and second, addressing the resulting disparities in financial resources.\textsuperscript{151} Put another way, a full remedy requires both a transfer of financial resources to the disabled individual \textit{and} structures that grant the individual access to the appropriate remedies. Why not, then, require subsidized medical providers to offer their services for free in order to tackle both steps at once? The simple answer is that such a requirement is not economically feasible: medical providers likely could not afford to provide their services for free (even with a subsidy), and requiring them to do so would likely result in an undersupply of medical providers who can address the initial physical disability. Instead of letting the perfect be the enemy of the good by requiring medical providers to offer their services for free, it seems better to minimize at least some inequality by ensuring that medical providers exist. Financial transfers to a disabled individual are ineffective without service providers who can mitigate the physical aspect of the disability.

\textsuperscript{150} See Hansmann, \textit{supra} note \text{____} at 69-71, 72-75 (discussing the advantages that non-profits have in responding to contract failure and the disadvantages they face in raising capital).

\textsuperscript{151} To be sure, some physical impairments may never be fully remedied. Even with implants and hearing aids, for example, some deaf individuals may never hear as sharply as hearing individuals. To that end, I use the words “remedy” and “fix” and “address” in a general sense to mean “limit disadvantages as much as possible.”
To that end, subsidizing medical providers furthers equal opportunity of welfare, in that ensuring such service providers exist is a necessary part of remedying the disadvantage from physical disabilities. It therefore seems that in a world with equal resources, hospitals and other health organizations would not be required to provide charity care (defined as free or reduced-cost services to the poor). Of course, any service provider that decided to offer free or reduced-cost services would be furthering equal opportunity to an even greater degree, and should likely merit an additional subsidy.

3. Expensive Tastes and Talent-Pooling

While most left-libertarians believe that one’s fair share should be adjusted to reflect internal differences in physical and mental endowments, what exactly this should encompass is contested. Several theorists believe, for example, that individuals with expensive tastes should be compensated. If my preference for expensive champagne is as arbitrary as my brown hair, then that preference impacts my ability to convert resources into welfare: My beer guzzling husband can afford much more of his preferred beverage than I can of mine given the same amount of resources.\footnote{I am pretty sure at least some left-libertarians would compensate for expensive tastes. This is so because they frequently cite to the works of luck egalitarians Richard Arneson and G. A. Cohen when discussing what “equality of opportunity for welfare” means, and these luck egalitarians support the notion of expensive tastes.} (On the other hand, most left-libertarians reject the notion of talent-pooling,\footnote{See, e.g., Otsuka at 27, Van Parijs. Briefly, the idea of talent-pooling is that our skill sets are a matter of luck. The fact that Michelle Wie has much more natural talent for golf than I do is as arbitrary as my brown hair. Thus, if I would prefer to be a professional golfer rather than a tax professor, I merit compensation for my arbitrary disadvantage. This is obviously quite controversial. See Fleischer, \textit{Equality of Opportunity} at 629-30, for a longer discussion.} so I shall not discuss it further).

Admitting the need to compensate for expensive tastes when seeking equality of opportunity for welfare would justify an even broader set of charitable tax subsidies. Consider, for example, the “high arts.” An individual who has a taste for the opera is worse off than one who has a taste for American Idol. This is so not only because the opera is costlier, but also because it suffers from market failure and therefore would not exist absent some state subsidization to overcome collective action problems. As interpreted in this manner, left libertarianism would thus subsidize groups like Harvard and the opera even if they did not provide assistance to the poor. If they did, however, they would merit an extra set of subsidies (like health care, just discussed).
VI. CLASSICAL LIBERALISM

As explored above, the “right libertarianism” of Nozick and the natural rights self-ownership tradition is pretty absolute. While some such libertarians accepts the legitimacy of a safety net for the extremely destitute, most believe that the only proper role of a state is to provide physical protection and enforce contracts, and nothing else. In contrast, those on the “classical liberal” portion of the libertarian spectrum believe that a slightly-more-than-minimal state can be justified. I say “slightly-more-than-minimal” because the classical liberals (like the absolutists) reject the implementation of large-scale welfare programs on utilitarian or egalitarian grounds, oppose most current government regulations, and strongly believe that government should be smaller than it currently is. On the other hand, classical liberals admit that in some instances, the government can legitimately do things such as provide public goods, reduce negative externalities, and prohibit monopolies.

Richard Epstein explains the difference quite nicely, writing that:

The missing . . . element of many classical libertarian theories is that they do not offer a comprehensive explanation of the role of forced exchanges in structuring a political system. The principle of autonomy never permits a draft in times of war. . . . The principle of freedom of contract cannot distinguish between an ordinary sale and a cartel arrangement. A categorical prohibition against taking does not recognize any privilege to take property of others in time of necessity. The . . . stripped-down libertarian theories . . . preclude the use of taxation, condemnation, and the state provision of infrastructure. These practices were part and parcel of government action long before the rise of the modern welfare state. Figuring out why these institutions are needed and how they should be designed and funded requires a major correction to the starker versions of libertarian theory, which is what the classical liberal approach seeks to supply.

Yet by the same token, the effort to respond to these difficulties does not require us to abandon the vision of limited government and fall into the deadly embrace of the welfare state. Even after all these adoptions are made, government would occupy a far smaller place than it holds under contemporary political theory and constitutional law. . . . 155

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154 See Section III for a brief discussion of this debate. For an illustration of some of the arguments levied by more absolute libertarians, see Murray Rothbard, *Milton Friedman Unraveled, THE INDIVIDUALIST 1971* (reprinted in J. LIBERT. STUD. 2002) (arguing that Milton Friedman should not be considered a libertarian).

Although classical liberals such as Epstein and others champion private property rights, their theoretical roots differ from Nozick’s deontological natural rights theory and are a bit harder to classify. Many (including Epstein, Milton Friedman, and Friedrich Hayek), incorporate consequentialist arguments about the benefits that flow from free markets and robust property rights, as well as the harms that stem from government. Hayek, for example, argues that due to the diffusion of knowledge across individuals, free markets – with their zillion individual choices – are superior to centralized planning.\(^{156}\) Epstein and others celebrate the ability of private property rights to solve problems such as the tragedy of the commons, while decrying the harmful incentives of large-scale government welfare programs.

Yet these theorists also rely on liberal arguments from the 18\(^{th}\) and 19\(^{th}\) century about individual rights to be free from coercion.\(^{157}\) These individual rights both limit what can be done to achieve the consequentialist goals they value (be it freedom or efficiency) and justify strong property rights and free markets (since free markets allow for the free expression of individual preferences). Milton Friedman, for example, argues that the free market is a necessary precursor to political freedom, meaning the ability of an individual to live his life free from coercion by others, free to resolve ethical problems how he sees fit, and generally free to do whatever he likes with his freedom.\(^{158}\) In contrast, government run economies interfere with freedom and entail coercion, since they force individuals to do what they wouldn’t otherwise. In Hayek’s famous words, government planning is “the road to serfdom.”\(^{159}\)

What might this school of thought mean for the charitable tax subsidies? As explored below, it almost certainly supports subsidies charitable programs that help the poor, and may or may not support a wider set of subsidies similar to our current structure.

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

It might surprise many (as it did me) to learn that many “classical liberal” libertarians support a minimal safety net.\(^{160}\) Take Freiderich Hayek,
who conceded such a net on several different occasions. In the *Road to Serfdom*, for example, he wrote that “[t]here can be no doubt that some minimum of food, shelter, and clothing, sufficient to preserve health and the capacity to work, can be assured to everybody.” And in the *Constitution of Liberty*, he notes that “All modern governments have made provision for the indigent, unfortunate, and disabled and have concerned themselves with health and the dissemination of knowledge. . . . There are common needs that can be satisfied only by collective action and which can be thus provided for without restricting individual liberty.” Interestingly, Hayek argues that these arrangements are in the interest of the non-needy by protecting them “against acts of desperation on the part of the needy.”

Importantly, Hayek carefully limits this provision to a minimum income that provides “security against severe physical privation” in contrast to assuring “a given standard of life . . . determined by comparing the standard enjoyed by a person or a group with that of others.” In his view, trying to achieve a “more even or more just distribution of goods” interferes with freedom in a way that providing a minimal safety net does not. Moreover, Hayek focuses on individuals such as the unemployed and “the sick, the old, the physically or mentally defective, the widows and orphans – that is all people suffering from adverse conditions which may affect anyone and against which most individuals cannot alone make adequate provision.”

Concern for poverty also appears in Milton Friedman’s negative income tax, which he viewed as superior to the current welfare system. In discussing poverty, Friedman first expresses a preference for voluntary charity. But he then proceeds to accept “governmental action to alleviate poverty; to set, as it were, a floor under the standard of life of every person in the community.” Notably for us, Milton comes to this conclusion because he thinks voluntary charity to the poor is insufficient due to free rider problems:

> I am distressed by the sight of poverty; I am benefited by its alleviation; but I am benefited equally whether I or someone

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Friedman, allowed for a social safety net, but opposed institutional mechanisms designed to promote social justice and fair equality of opportunity.”

163 Friedrich A. Hayek, *THE CONSTITUTION OF LIBERTY* 257 (1960). Hayek seems to ground this in the self-interest of the non-needy:
164 Constitution 285.
165 Constitution 285.
166 Constitution of Liberty 259.
167 Id.
168 Constitution at 286.
169 Id.
166 Constitution of Liberty at 286.
else pays for its alleviation. . . . To put it differently, we might all of us be willing to contribute to the relief of poverty, provided everyone else did. We might not be willing to contribute to the same amount without such assurance. In small communities, public pressure can suffice . . . . In the large impersonal communities that are increasingly coming to dominate our society, it is much more difficult for it to do so. 170

Given that free rider problems push Friedman to accept the state provision of a safety-net, it seems logical that the same free rider problems would nudge Friedman to accept state incentives for private charity – especially given his initial preference for charity. The work of Friedman and Hayek thus suggest that providing tax subsidies to charities that aided the very poorest, as discussed above, would be legitimate. 171

Discuss Zwolinsky.

B. Classical Liberalism and Broader Charitable Subsidies

Would classical liberals support a broader set of subsidies, one resembling our current system? Most likely, and in many respects, the existing justifications for our current system reflect a number of classical liberal values. Notably, Hayek and Friedman both acknowledge that government action can be justified when necessary to overcome collective action problems and market failures (what Friedman calls “neighborhood effects.”). Given that governmental action for these purposes is justified, classical liberals would almost certainly think that subsidized charitable activity is even better. Charitable activity represents the independent decisions of various individuals that Hayek celebrated, and the market for contributions in some respects mirrors the for-profit market. And classical liberals almost always believe that individuals are better than the government when it comes to making decisions about resource allocations. Take Friedman’s support for school vouchers – one way of thinking about the charitable tax subsidies is that they are like “charitable” vouchers. Moreover, the pluralistic justification for the current subsidies – that a vibrant charitable sector acts as a counterweight to governmental power – has classical liberal undertones.

To that end, classical liberals would support tax subsidies for activities that truly are public goods and that suffer from collective action problems. This would first entail demonstrating that collective action problems do indeed

170 Id. at 191 (emphasis in the original).
171 Matt Zwolinsky has recently made a classical liberal case for a basic income. In his view, our society must be justified to all members. To that end, he argues that while the better off would not accept a society with great redistribution, there must be some minimal standards of living so that the worst-off will accept our society. It is not yet clear to me whether some version of that argument is motivating Hayek and Friedman.
exist within the sector, a point that is disputed among libertarians. Dan Mitchell of the Cato Institute, for example, has recently argued that levels of charitable giving would be the same without the tax subsidies.\textsuperscript{172} He argues that the driving factor in the level of charitable giving is the economy, and that a collection of forces such as status and the warm glow of giving motivate giving. If it is true that collective action problems don’t exist, then there seems to be little need for the tax subsidies under classical liberal theory.

Assume then, that some collective action problems do exist. The next step would be to narrow the activities currently subsidized to make sure that they are public goods that suffer from collective action problems. Churches might not be subsidized, for example, on the grounds that their club-like nature mitigates against free-riding.\textsuperscript{173} And with new technology, things like public radio and public television might no longer be subject to free riding.

The tougher problem is that this still begs the question of what should count as a public good. It seems likely that classical liberals wouldn’t insist on the pure economic definition, which focuses on indivisibility and non-exclusivity. Otherwise, projects such as museums wouldn’t be funded. But we still need an answer to David Shizer’s (now) famous question about the ketchup museum. Why does the fact that someone wants a ketchup museum justify subsidizing it? The answer can’t lie in the bargain that Colombo and others rely on.\textsuperscript{174} For classical liberals would argue that a number of current government programs – even if approved by a majority – are unjustified. There must still be some way of determining what a “public good” is, and distinguishing why certain activities (museums) merit government subsidies while other activities currently undertaken by our government do not.

[I am still trying to figure out how a classical liberal might answer this question.]

VI. MUTUAL ADVANTAGE LIBERTARIANISM

[Another strand libertarianism that I have not yet explored, “mutual advantage libertarianism,” makes the case for a minimal state on contractarian grounds. This section will examine whether that strand suggests a role for any state subsidization of charitable activity. The most well-known of these (such as Jan Narveson) would likely oppose such subsidization, though there is some debate about whether this type of libertarianism supports a duty to rescue or not, which could be relevant to my project.]

VII. CONCLUSION

\textsuperscript{172} Room for Debate in the Wall St. J. This point is contested.
\textsuperscript{173} See Gergen.
\textsuperscript{174} See Section II.
[Coming soon!]