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THEORIZING THE CHARITABLE TAX SUBSIDIES: THE ROLE OF DISTRIBUTIVE JUSTICE

MIRANDA PERRY FLEISCHER*

ABSTRACT

Distributive justice plays a starring role in many fundamental tax policy debates, from the marginal rate structure to the choice of base to the propriety of wealth transfer taxes. In contrast, current tax scholarship on the charitable tax subsidies generally either ignores or explicitly disavows distributive justice concerns. Instead, it focuses on the efficiency and pluralism-enhancing advantages of having charities provide public goods instead of or in addition to the government. 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. After all, it's called the charitable deduction, not the public goods deduction.

As a result, the current body of work on the charitable tax subsidies is incomplete: it purposely under-theorizes what is "good" for society in order to avoid making value judgments about which projects should be subsidized. Although this sounds appealing, completely avoiding such judgments is both impossible and counterproductive. Current scholarship thus excessively under-theorizes the good, creating confusion about the charitable tax subsidies in both theory and practice.

Explicitly addressing distributive justice—in addition to pluralism and efficiency—will enhance our understanding of the subsidies for three reasons. First, existing scholarship is incomplete and inconsistent for

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generally ignoring distributive justice issues. It is incomplete because it does not adequately identify which projects deserve a subsidy; it is inconsistent because it implicitly contains value judgments that have distributive justice implications but that are unacknowledged (and often disavowed) by their proponents. Second, popular criticisms of the charitable tax subsidies raise distributive justice issues that have not been adequately addressed. And lastly, the law governing the charitable tax subsidies is itself confused on the role of distributive justice.

Extending our understanding of the subsidies in this manner has three benefits. First, it will help the efficiency- and pluralism-minded scholars better address how to structure the tax subsidies to best promote efficiency and pluralism. Second, a better understanding of distributive justice will help us assess existing justice-related criticisms of the subsidies. And lastly, because our society currently spends a great deal of resources subsidizing charity, such a discussion will help us allocate our resources in a more systematic fashion.

A cynic is a man who
Knows the price of everything
And the value of nothing
—Oscar Wilde

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I. INTRODUCTION

Distributive justice plays a starring role in many fundamental tax policy debates, from the marginal rate structure¹ to the choice of base² to the propriety of wealth transfer taxes.³ In contrast, most current tax

1. See, e.g., Joseph Bankman & Thomas Griffith, *Social Welfare and the Rate Structure: A New Look at Progressive Taxation*, 75 CAL. L. REV. 1905 (1987); Walter J. Blum & Harry Kalven, Jr., *The Uneasy Case for Progressive Taxation*, 19 U. CHI. L. REV. 417 (1952); Lawrence Zelenak & Kemper Moreland, *Can the Graduated Income Tax Survive Optimal Tax Analysis?*, 53 TAX L. REV. 51 (1999).

2. See, e.g., William D. Andrews, *Fairness and the Personal Income Tax: A Reply to Professor Warren*, 88 HARV. L. REV. 947 (1975); Barbara H. Fried, *Fairness and the Consumption Tax*, 44 STAN. L. REV. 961 (1992); Edward J. McCaffery, *A New Understanding of Tax*, 103 MICH. L. REV. 807 (2005); Alvin Warren, *Would a Consumption Tax Be Fairer Than an Income Tax?*, 89 YALE L.J. 1081 (1980).

3. See, e.g., Anne L. Alstott, *Equal Opportunity and Inheritance Taxation*, 121 HARV. L. REV. 469 (2007); Lily L. Batchelder, *What Should Society Expect From Heirs? A Proposal for a*

scholarship on the charitable tax subsidies⁴ generally either ignores or explicitly disavows normative distributive justice concerns.⁵ Instead, it focuses on the efficiency and pluralism-enhancing advantages of having charities provide public goods instead of or in addition to the government.⁶ 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.⁷ After all, it is called the *charitable* deduction, not the public goods deduction.⁸

Comprehensive Inheritance Tax, 63 TAX L. REV. (forthcoming 2009); Michael J. Graetz, *To Praise the Estate Tax, Not to Bury It*, 93 YALE L.J. 259 (1983); Edward J. McCaffery, *The Uneasy Case for Wealth Transfer Taxation*, 104 YALE L.J. 283 (1994); Eric Rakowski, *Transferring Wealth Liberally*, 51 TAX L. REV. 419 (1996).

4. The main federal subsidies include tax exemption for charitable organizations under I.R.C. § 501(c)(3) (2006), the deductions for charitable contributions under I.R.C. §§ 170, 2055, and 2522 (2006), and the ability to issue tax-exempt bonds under I.R.C. § 145 (2006). In addition, many states grant charities exemption from property, income, and sales taxes; provide tort immunity; and exempt charitable trusts from the Rule Against Perpetuities.

5. For a concise and readable explanation of distributive justice, see HARRY BRIGHOUSE, *JUSTICE* (2004).

6. See *infra* Part II.B (discussing the works of, e.g., Saul Levmore, David Schizer, and Mark Gergen). To be clear, some valuable and important work on distributive justice and charitable giving does exist—just not enough such work, and not enough recent work. For example, Professor John Simon has very carefully and thoughtfully written about the interaction of the estate tax charitable deduction and egalitarian considerations. John G. Simon, *Charity and Dynasty Under the Federal Tax System*, 5 PROB. LAW 1, 30–33, 56–85 (1978). Indeed, one point of this Series is to urge others to follow in Simon's footsteps and continue this type of inquiry. In addition, a number of economists have attempted to assess—as a descriptive matter—the distributional impact of the charitable tax subsidies. See, e.g., *WHO BENEFITS FROM THE NONPROFIT SECTOR* (Charles T. Clotfelter ed., 1992) [hereinafter Clotfelter] (compiling studies analyzing the beneficiaries of various categories of nonprofits by income). While this work is valuable, it does not address the more fundamental normative questions that are the domain of legal scholars: How much weight, if any, should policymakers give to distributive justice considerations when crafting charitable giving policy? Which theories of distributive justice should be given consideration? How should charity be defined to effectuate those considerations?

7. John K. McNulty, *Public Policy and Private Charity: A Tax Policy Perspective*, 3 VA. TAX REV. 229, 247–48 (1984) (“Indeed, at an elemental level redistribution seems to be what philanthropy is.”); John Simon, Harvey Dale & Laura Chisolm, *The Federal Tax Treatment of Charitable Organizations* 267, in *THE NONPROFIT SECTOR: A RESEARCH HANDBOOK* at 267 (Walter W. Powell & Richard Steinberg, eds., 2d ed. 2006) (noting that one purpose of the charitable tax subsidies is “[t]o bring about . . . a degree of fairness or redistribution of resources and opportunities, or at least a discouragement of unacceptable forms of discrimination”). This avoidance is all the more striking when one considers that distributive justice issues are an accepted part of the discourse in other areas of tax policy. See *supra* notes 1–3. Given the fact that charity has always been at least partly rooted in notions of redistribution, this area of tax scholarship cries out for consideration of such issues.

8. Of course, the legal definition of “charitable” (loosely meaning anything that benefits the community at large) is much broader than the popular and colloquial definition (meaning helping the poor). JOINT COMM. ON TAXATION, 109TH CONG., *HISTORICAL DEVELOPMENT AND PRESENT LAW OF THE FEDERAL TAX EXEMPTION FOR CHARITIES AND OTHER TAX-EXEMPT ORGANIZATIONS* 61–64 (2005) [hereinafter *HISTORICAL DEVELOPMENT HEARING*]. This distinction illustrates one of the

As a result, the current body of work on the charitable tax subsidies is incomplete. It purposely under-theorizes what is “good” for society in order to avoid making value judgments about which projects should be subsidized. Although this sounds appealing in our diverse society, completely avoiding such judgments is both impossible and counterproductive. Most current scholarship thus excessively under-theorizes what is considered beneficial to society, creating confusion about the charitable tax subsidies in both theory and practice.

The little scholarship on the charitable tax subsidies which does attempt to define what is good for society also under-theorizes it. For example, older scholarship arguing that charity should be subsidized because of the various benefits it provides to society uses standards which are too vague to be helpful⁹ (of course, this flaw largely motivated the body of work seeking to avoid such standards). More recently, a few scholars have criticized the charitable tax subsidies by arguing that “too much” charitable giving benefits the middle and upper classes of society and does “too little” to help “the poor.”¹⁰ These criticisms are also incomplete, for they do not engage the fundamental questions of distributive justice theory: “What should be redistributed?” and “What is a just distribution?”¹¹

Addressing distributive justice issues explicitly and more completely will enhance our understanding of the charitable tax subsidies on both a theoretical and a practical level.¹² This is so for three reasons. First,

mismatches between the charitable tax subsidies and the public’s understanding of them: although the average layperson thinks of charity as meaning helping the poor, that is not the legal definition. Yet the lingering layperson conception contributes to much of the controversy surrounding the subsidies (in, for example, Congress and the media). Compounding this controversy is the fact that before 1959, Treasury and the IRS used the narrower, more colloquial definition by limiting the term “charitable” to poor relief. *Id.* at 65–68. At any rate, both the history and the mismatch between the legal and popular sense of the term “charitable” highlight the need to more explicitly address whether and how distributive justice should inform our understanding of the tax subsidies: just because the current definition ignores distributive justice issues does not answer the question whether those concerns should be ignored.

9. See *infra* Part III.A.1.

10. See *infra* Part III.C. Many also criticize the charitable sector for abusing its status and benefiting private individuals instead of the public good. This, however, is a separate question from whether a charity that benefits public (not private) interests is providing the “correct” type of public benefit.

11. Recently, a few other scholars have begun to urge that current scholarship should pay more attention to such normative questions. See, e.g., Simon, et al., *supra* note 7, at 278 (noting that assessing the desirability of requiring charities to assist the poor would require a return to the “fundamental issues relating to the primacy of redistributive norms in American law”); David E. Pozen, *Remapping the Charitable Deduction*, 39 CONN. L. REV. 531, 547 (2006).

12. I emphasize that this Article’s goal is not to argue that distributive justice should be the *only* consideration in determining what is considered charitable. Rather, my argument is that too little

existing scholarship is incomplete and inconsistent: it is incomplete because it does not adequately identify which projects deserve a subsidy, and it is inconsistent because it implicitly contains value judgments that have distributive justice implications but that are unacknowledged (and often disavowed) by their proponents. Second, popular criticisms of the charitable tax subsidies raise distributive justice issues that have not been adequately addressed. And lastly, the law governing charities and exempt organizations is itself confused on the role of distributive justice.

This Article is the first of a series seeking to reintroduce distributive justice concerns into our understanding of the charitable tax subsidies. This first part makes the case for considering distributive justice issues alongside efficiency and pluralism and quickly previews some of the implications of so doing. The rest of the series will analyze in more detail such implications, by exploring the most common accounts of distributive justice used by tax theorists (utilitarianism, the difference or maximin principle, the capabilities approach, various forms of egalitarianism, and libertarianism) and considering what each account adds to our understanding of the charitable tax subsidies.¹³ To be clear, this Series is not necessarily advocating narrowing the subsidies to those organizations that help the poor (as is often assumed when the terms “redistribution” or “distributive justice” are heard).¹⁴ As those more familiar with political philosophy know, there are a number of strands of distributive justice, many of which do not involve redistribution to the less fortunate. In fact, one of my goals is to mine those *other* strands for insights into the charitable tax subsidies.

Extending our understanding of the charitable tax subsidies in this manner has three advantages. First, a more nuanced understanding of what charities should do will help the efficiency- and pluralism-minded scholars better address how to structure the tax subsidies to best promote those benefits.¹⁵ Second, a deeper understanding of distributive justice will help

attention is currently paid to such issues, and that considering distributive justice *in addition to* such factors as efficiency and pluralism would be beneficial.

13. Although the main goal of this project is to explore which types of organizations and transfers might be subsidized under various distributive justice approaches, the latter part of the Series may also analyze the intersection of distributive justice considerations and the structure of those subsidies (that is, whether a credit is preferable to a deduction, whether private foundations and § 501(c)(4) organizations should be subject to different rules, the treatment of overseas charities, and similar questions).

14. *See, e.g.,* Pozen, *supra* note 11, at 562 (conflating distributive justice with redistribution to the poor, which represents the maximin view of distributive justice championed by John Rawls).

15. A related benefit stems from the fact that the rules governing tax exemption and the charitable deduction have, over time, become the main regulatory regime for charitable activity more

us better assess existing justice-related criticisms of the subsidies. And lastly, because our society currently spends a great deal of resources subsidizing charity, such a discussion will help us allocate our resources in a more systematic fashion.

This Article proceeds as follows. Part II provides a brief description of the tax benefits for charities and their theoretical justifications. Part III makes the case for reintroducing considerations of distributive justice into our thinking about the charitable tax subsidies. Part IV quickly previews some of the possible implications of doing so, and Part V concludes.

II. AN OVERVIEW OF THE CHARITABLE TAX BENEFITS AND THEIR THEORETICAL FOUNDATIONS

Charities have enjoyed a special tax and legal status since biblical times, when Joseph exempted the land of the priests from his declaration that “Pharaoh should have the fifth part” of the land of Egypt.¹⁶ Many other ancient civilizations similarly exempted religious organizations from tax, reasoning that such organizations belonged to the gods, far beyond the realm of mortals.¹⁷ In medieval England, churches initially were not taxed because they *were* the taxing authority, while during the time of the Reformation, exemption was expanded to secular charities precisely to undermine the power of the churches.¹⁸

The 1601 Statute of Charitable Uses (which continues to influence much current thinking about charity) reflected this expansion.¹⁹ It conferred special benefits²⁰ for a wide range of activities—including aid to the aged, the impotent, the poor, sick and maimed soldiers, orphans, prisoners, and unmarried women; schools, universities, and scholars; and public-works projects such as repairing bridges, causeways, and highways.²¹ The Statute of Charitable Uses was enacted in conjunction

broadly. Because the subsidies are so valuable, most charitable organizations structure their activities so that they qualify for the subsidies. As a result, the tax rules (such as those governing lobbying, unrelated business activities, and private inurement) are much more important than say, state laws, in terms of regulating charitable activity generally. A better understanding of the tax rules applicable to charities can therefore yield a better understanding of the broader regulatory regime applicable to charities.

16. JOHN D. COLOMBO & MARK A. HALL, *THE CHARITABLE TAX EXEMPTION* 3 (quoting *Genesis* 47:24).

17. *Id.* at 4.

18. *Id.*

19. *See id.* at 33–34.

20. For example, many of the strict conveyancing requirements applicable to private trusts were relaxed by the Statute of Charitable Uses. *Id.* at 33–36.

21. *Id.* at 34.

with the Elizabethan Poor Laws, which placed more responsibility for caring for the poor on localities.²² Because of this tie, some scholars believe that a fundamental purpose of the Statute of Charitable Uses was to encourage private charity to the poor to help ease the burden on the localities.²³

As the American colonies were developing their tax systems, exemption often occurred either randomly due to the ad hoc nature of the tax scheme or, in the case of some churches, on the grounds that it was pointless for the colonies with official churches to tax an arm of their own government.²⁴ As colonial tax systems matured, a system of exemption modeled on England's became fairly standard.²⁵ The federal tax system has granted exempt status to charities since 1894,²⁶ and most (if not all) states exempt them from the corporate income tax, state sales taxes, and state property taxes.²⁷

Simply because taxing income (as opposed to land or property) is a much more recent development in tax history,²⁸ allowing individuals to deduct charitable contributions from their income is a more recent innovation than tax exemption. That said, the Internal Revenue Code has contained an income tax charitable deduction since 1917—only four years after the 16th Amendment made the income tax a permanent fixture in our tax system.²⁹ Additionally, the Code also allows deductions for charitable transfers from the estate and gift tax bases.³⁰

As codified today, tax exemption under § 501(c)(3) of the Code and the ability to receive tax-deductible contributions under § 170 apply to a much broader range of organizations than those providing religious benefits and relief to the poor. Quite generally, to qualify for these benefits, an

22. *Id.* at 46, 58 n.5 (citing An Act for the Relief of the Poor, 1601, 43 Eliz. 1, c. 2, reprinted in 7 STAT. AT LARGE 30 (Eng. 1763)).

23. *Id.* at 46–47. *But see* James J. Fishman, Encouraging Charity in a Time of Crisis: The Poor Laws and the Statute of Charitable Uses of 1601 28 (Dec. 14, 2005) (unpublished manuscript, available at <http://ssrn.com/abstract=868394>) (arguing that the primary purpose of the Statute of Charitable Uses was to increase accountability by trustees of charitable assets).

24. COLOMBO & HALL, *supra* note 16, at 4–5.

25. *Id.*

26. *Id.* at 5.

27. *Id.* at 20.

28. KLEIN, BANKMAN, SHAVIRO & STARK, FEDERAL INCOME TAXATION 8–11 (15th ed. 2009).

29. JAMES J. FISHMAN & STEPHEN SCHWARZ, TAXATION OF NONPROFIT ORGANIZATIONS 652 (2d ed. 2006).

30. I.R.C. §§ 2055, 2522 (2006). For an exploration of which charitable contributions should be deductible in an ideal estate tax, see Miranda P. Fleischer, *Charitable Contributions in an Ideal Estate Tax*, 60 TAX L. REV. 263, 267–68 (2007) (arguing that the social goal one uses to justify the estate tax determines which types of charitable contributions should be deductible).

organization must be formed “for religious, charitable, scientific, literary, or educational purposes.”³¹ “Charitable purposes” has been broadly interpreted to include a wide variety of goals: preserving the environment, providing traditional legal aid as well as cause-oriented public interest litigation, furthering public health, supporting the arts, and so on.³² As a general rule, such organizations must provide some type of “community benefit” in the form of fulfilling needs unmet by the private market.³³ Precisely what counts as a community benefit, however, is unclear. In some cases, the poor must be benefited (for example, a health club for middle-class people would not count but community recreation centers with programs for the poor do).³⁴ In other cases, no benefit for the poor is required (for example, education, the arts, and many health services).³⁵

Most scholars agree that these tax benefits have contributed to the size and success of the charitable sector. As of 2004, there were over a million organizations qualifying for tax-exempt status as charities under § 501(c)(3).³⁶ These groups play an important role in our economy: in 2001, for example, their revenues comprised almost ten percent of gross domestic product, and their assets measured over two trillion dollars.³⁷ The

31. I.R.C. § 170(c)(2)(B) (2006). Organizations eligible to receive tax-deductible contributions under I.R.C. § 170 generally are also eligible for tax exemption under § 501(c)(3) (which offers exemption to organizations operated for “religious, charitable, scientific . . . literary, or educational purposes . . .”). To that end, analytical interpretations of such purposes for § 170 generally apply to § 501(c)(3), and vice versa. It should be noted that a number of other kinds of organizations are tax-exempt under § 501 but are not eligible to receive deductible contributions. Although the treatment of these organizations raises its own set of interesting questions, my focus is on those organizations eligible for both sets of subsidies—that is, those organizations considered to be “charitable.”

32. HISTORICAL DEVELOPMENT HEARING, *supra* note 8, at 122–47; FISHMAN & SCHWARZ, *supra* note 29, at 101–47. This interpretation, which defines the purposes and activities eligible for the charitable tax subsidies broadly and vaguely, is long-standing. This means, of course, that any attempted narrowing of eligible activities based on distributive justice (or, for that matter, any other) concerns would disrupt the status quo and therefore likely trigger substantial political opposition. Although I take these political considerations seriously, I do not believe they should discourage us from at least *thinking* critically about the subsidies. It may be the case that certain organizations (maybe churches, for example) would continue to enjoy subsidized status due to political considerations no matter what. Even so, we would still get closer to resolving many of the questions identified in this Series by looking at distributive justice and attempting to craft tax subsidies that meshed with such considerations—even if such attempts are not fully achieved—than by doing nothing.

33. John D. Colombo, *The Role of Access in Charitable Tax Exemption*, 82 WASH. U. L.Q. 343, 345 (2004).

34. *See* Part III.D.

35. *See id.*

36. HISTORICAL DEVELOPMENT HEARING, *supra* note 8, at 19. This number excludes churches (which are not required to file returns with the IRS for First Amendment reasons) but includes private foundations (groups that do not conduct their own charitable activities directly, but instead make grants to other charities that do operate direct charitable programs). *Id.*

37. *Id.* at 18–20.

sector has over ten million paid employees, representing over seven percent of the paid workforce.³⁸ In addition, about three-quarters of American families make charitable donations each year, and over half of American families perform volunteer work of some kind.³⁹ These benefits have not come free, however: the charitable deduction alone, for example, is estimated to have cost the federal fisc approximately \$228 billion between 2005 and 2009.⁴⁰

Despite the large role that charities play in our society and the long history of these provisions, no consensus exists as to the purpose of either tax exemption or the charitable deduction. Some scholars believe that exemption is justified because it would be impossible to measure the income of a charity, or that the deduction is necessary to accurately measure the income of someone who donates to charity. Other scholars, however, believe that the provisions have nothing to do with measuring income and instead are justified only as a subsidy for charitable activity. These theories—and why distributive justice can help our understanding of them—are briefly described below.⁴¹

A. The Measurement Theories

One school of thought holds that exemption and deductibility are theoretically required as a matter of accurately measuring income in order to tax income.⁴² On the tax exemption side, Boris Bittker and George Rahdert have argued that charities should be exempt from the corporate income tax because it would be difficult to measure their income

38. FISHMAN & SCHWARZ, *supra* note 29, at 17.

39. ARTHUR C. BROOKS, WHO REALLY CARES: THE SURPRISING TRUTH ABOUT COMPASSIONATE CONSERVATISM 3–4 (2006).

40. HISTORICAL DEVELOPMENT HEARING, *supra* note 8, at 45.

41. Although the subsidy theories are probably more accepted by scholars than the measurement theories, this Series takes no position in that debate. Rather, it takes the existence of both types of theories as a given and argues that distributive justice can add to our understanding of each. Moreover, this Series takes the very existence of the charitable tax subsidies as a given. In contrast, it may be the case that in ideal theory, some of the theories of distributive justice touched on herein might counsel against the existence of such subsidies at all. In other words, this Series works within non-ideal theory. For explanations of the difference between ideal and non-ideal theory, see generally JOHN RAWLS, A THEORY OF JUSTICE 7–8, 215–16, 308–09 (1999); Lawrence B. Solum, *Constitutional Possibilities*, 83 IND. L.J. 307, 309–11 (2008). In contrast, later work in this Series may explore the extent to which explicitly considering distributive justice issues can help us analyze the desirability of rules such as those differentiating public charities and private foundations, the prohibitions against lobbying and political activities, the private benefit rule, and the unrelated business income tax.

42. In contrast, to my knowledge, nobody has attempted to explain the ability to issue tax-exempt bonds in measurement terms. In other words, scholars appear to agree that that facet of non-profit taxation can be justified only on subsidy grounds.

satisfactorily⁴³ (in contrast to a for-profit corporation, where taxable income roughly equals gross income from investments or sales of goods or services less the costs of earning that income). As an initial matter, should the charity be considered a non-taxable conduit between donors and recipients? Or should the charity be considered taxable itself? If so, how should its income be measured? Should donations to the group be considered income of the charity? How should dues from members be treated? Should expenditures for the group's designated purpose (say, meals provided to the poor) be considered deductible expenses, or are they nondeductible gifts? What tax rate should apply—the corporate rate, or the varying rates of all the individual beneficiaries of the charity?⁴⁴

This focus on measuring income is mirrored on the deduction side by William Andrews, who proposed that a deduction for charitable transfers is necessary to measure personal income accurately.⁴⁵ This theory starts from the Haig-Simons definition of the ideal income tax base as accumulation plus consumption,⁴⁶ and argues that charitable expenditures should be excluded when determining an individual's consumption (and therefore income) for the year.⁴⁷ Andrews first explained that for tax purposes, "consumption" should include only the "private consumption of divisible goods and services whose consumption by one household precludes their direct enjoyment by others."⁴⁸ He then reasoned that in contrast, charitable contributions divert resources away from private use and toward common goods that can be enjoyed regardless of one's contribution.⁴⁹

Andrews noted as examples that

a wealthy man cannot purchase and enjoy the sound of a new church organ without conferring a benefit on his fellow parishioners

.....

43. Boris I. Bittker & George K. Rahdert, *The Exemption of Nonprofit Organizations from Federal Income Taxation*, 85 YALE L.J. 299, 307–14 (1976); see also Henry B. Hansmann, *The Rationale for Exempting Nonprofit Organizations from Corporate Income Taxation*, 91 YALE L.J. 54, 59–62 (1981) (offering a thoughtful critique of this theory).

44. Bittker & Rahdert, *supra* note 43, at 307–16.

45. See William D. Andrews, *Personal Deductions in an Ideal Income Tax*, 86 HARV. L. REV. 309, 314–15 (1972). For an analysis of whether a similar argument might apply to the estate tax charitable deduction, see Fleischer, *supra* note 30, at 267–68.

46. Robert M. Haig, *The Concept of Income—Economic and Legal Aspects*, in THE FEDERAL INCOME TAX 1, 7 (Robert M. Haig ed., 1921); HENRY C. SIMONS, PERSONAL INCOME TAXATION: THE DEFINITION OF INCOME AS A PROBLEM OF FISCAL POLICY 50 (1938).

47. Andrews, *supra* note 45, at 344–75.

48. *Id.* at 346.

49. *Id.*

... [and] [a]ttendance at church on a particular Sunday, use of the town library, or listening to a symphony orchestra broadcast will not immediately prevent someone else from doing the same thing.⁵⁰

Under this reasoning, since a charitable donor must necessarily share with others any benefit she receives, charitable contributions should not count as consumption.⁵¹ In other words, such expenditures should be excluded from the ideal income tax base.⁵²

Although Andrews has drawn his share of criticism,⁵³ he is not the only scholar to advance tax-base theories for the deduction.⁵⁴ Writing at about the same time as Andrews, Boris Bittker similarly proposed that charitable donations should not be considered consumption because they “discharge [a] moral obligation.”⁵⁵ More recently, Johnny Rex Buckles has argued that individuals should be allowed to deduct charitable contributions since assets donated to charity should more properly be considered “community income” and that the community itself should be exempt from income.⁵⁶ And although not couched as such, Evelyn Brody also proposes a theory that in many respects reflects tax-base ideals:⁵⁷ she has suggested that the

50. *Id.* at 357–58.

51. *Id.* at 346.

52. *Id.* at 314–17. As Mark Gergen has pointed out, the characteristics that Andrews argues preclude these expenditures from being personal consumption are the same characteristics that define public goods. Mark P. Gergen, *The Case for a Charitable Contributions Deduction*, 74 VA. L. REV. 1393, 1397, 1416 (1988).

53. See, e.g., Gergen, *supra* note 52, at 1397, 1416 (re-characterizing Andrews’s thesis as simply another argument for subsidizing public goods); Thomas D. Griffith, *Theories of Personal Deductions in the Income Tax*, 40 HASTINGS L.J. 343, 345, 375–77 (1989) (criticizing Andrews for lacking a “coherent normative principle”); Mark G. Kelman, *Personal Deductions Revisited: Why They Fit Poorly in an “Ideal” Income Tax and Why They Fit Worse in a Far From Ideal World*, 31 STAN. L. REV. 831, 849–51 (1979) (criticizing Andrews’s contention that charitable giving is not consumption in part because donors receive deference, respect, and attention); Stanley A. Koppelman, *Personal Deductions Under an Ideal Income Tax*, 43 TAX L. REV. 679, 707 (1988) (conceptualizing an ideal income tax as taxing the power to consume and concluding that spending cash or property on charitable purposes “represents a clear personal benefit to the donor”).

54. Writing soon after Andrews, John Simon offered a similar rationale for the estate tax charitable deduction. See Simon, *supra* note 6, at 23.

55. Boris Bittker, *Charitable Contributions: Tax Deductions or Matching Grants?*, 28 TAX L. REV. 37, 58–59 (1972).

56. Johnny Rex Buckles, *The Community Income Theory of the Charitable Contributions Deduction*, 80 IND. L.J. 947, 952 (2005).

57. See Evelyn Brody, *Of Sovereignty and Subsidy: Conceptualizing the Charity Tax Exemption*, 23 J. CORP. L. 585, 586 (1998). In fact, Brody specifically argues that the sovereignty approach explains the current legal landscape for charities better than either the base-measurement or subsidy approach. I have included her argument here, however, because I believe that her argument has more in common with tax-base arguments than subsidy arguments: to me, arguing that a given sector is not an appropriate base for taxation, much like other countries are not appropriate targets of taxation, is closer to a measurement theory about what *can* and *cannot* be taxed than it is to a subsidy theory about

current tax status of charities (including both the deduction and tax exemption) is best explained by conceiving of the charitable world as its own sovereign sector, receiving the same federal tax treatment as other sovereigns such as foreign, state, and local governments.⁵⁸

B. The Subsidy Theories

The more common view,⁵⁹ however, is that the income of charities could be measured as a technical matter,⁶⁰ and that an individual's charitable donations should constitute consumption (and therefore be taxed) in a pure Haig-Simons world.⁶¹ Under this view, tax exemption, the charitable deduction, and the ability to issue tax-exempt bonds are justifiable as tax expenditures to subsidize charity generally.⁶²

what *should* or *should not* be taxed in order to encourage certain behavior. In some respects, however, the dilemma over which type of theory Brody's is closest to represents the fact that at the end of the day, the subsidy and measurement theories may not be that far apart after all. *See, e.g.,* Gergen, *supra* note 52, at 1416.

58. Brody, *supra* note 57, at 587. That said, Brody also argues that the sovereignty approach should not guide lawmakers going forward. In other words, her point is a descriptive argument, not a normative one.

59. Pozen, *supra* note 11, at 552–53 (“In Congress, the courts, the media, and now academia, the deduction is widely viewed not as a means to reify the ideal tax base . . . but as a tax expenditure used to promote charitable giving and thereby the ultimate well-being of society. That is, the deduction is widely viewed as a government subsidy . . .”).

60. For a detailed critique of Bittker and Rahdert's base-measurement theory for exemption, see Hansmann, *supra* note 43, at 59–62.

61. *See supra* note 46.

62. The deduction is thought to subsidize charity in the following manner. Imagine a taxpayer in the 35% bracket who donates \$100 to charity and receives a \$100 deduction. This deduction reduces her tax bill by \$35, meaning that she has transferred \$100 to charity at a net cost to her of \$65. The government has subsidized her transfer to the tune of \$35. By lowering the price of making charitable gifts, the subsidy is thought to increase taxpayers' incentives to make them. This increased giving in turn enhances the scope and activity of the charitable sector. Tax exemption likewise subsidizes charity by providing charities with more funds to operate their programs than in a world where they pay tax. Imagine a charity that had net revenues in a given year of \$100,000, after expenses for that year's activities. If the charity had to pay tax, it would only have \$65,000 left (assuming charities would be subject to the 35% corporate rate) to use for more charitable activities the next year. Free of tax, however, the charity has the full \$100,000. In other words, the tax revenue not collected from the charity is equal to its subsidy. Lastly, the ability to issue tax-exempt bonds subsidizes charities because it allows them to issue bonds with lower rates of returns than their taxable counterparts. Imagine, for example, that the average pre-tax rate of return is 10%. An investor in the 35% bracket, however, would receive a post-tax rate of return of only 6.5%. That investor, therefore, should be indifferent between a taxable bond with a return of 10% and a bond yielding tax-exempt interest of only 6.5%. While the extent to which tax-exempt bonds fully capitalize this difference is open to debate, Boris I. Bittker, *Equity, Efficiency, and Income Tax Theory: Do Misallocations Drive Out Inequities?*, 16 SAN DIEGO L. REV. 735, 738–42 (1979), few dispute that non-profits are able to issue bonds with lower rates than they otherwise could. This ability to borrow money more cheaply constitutes a subsidy. Interestingly, the tax expenditure budget list includes the deduction and tax-exempt bonds, but not tax exemption (despite the scholarly consensus that exemption is also a subsidy). STAFF OF JOINT COMM.

1. *The Building Blocks: Why Subsidize Charity?*

A variety of arguments abound as to why charity should be subsidized. The traditional explanation is that subsidizing charities is “good” because of the benefits charities provide.⁶³ Some such theories focus on the fact that charities relieve the government of burdens it would otherwise have to bear (for example, poverty relief).⁶⁴ Others emphasize the role that charities play in providing creative and diverse solutions to society’s problems, in offering alternative viewpoints in the arts and culture, and in countering governmental power and enhancing pluralism and experimentation.⁶⁵ Lastly, Rob Atkinson has argued that charitable groups should be subsidized because the “altruistic provision of . . . good[s] and service[s] [is] inherently desirable”⁶⁶

Because these traditional subsidy rationales rest on a normative assessment of the “goodness” of charities’ activities, they necessarily entail value-based judgments about which activities merit a subsidy. In contrast, most recent scholarship displays a reluctance to engage in normative assessments of the value of various activities.⁶⁷ Instead, the

ON TAXATION, 110TH CONG., REPORT ON ESTIMATES FOR FEDERAL TAX EXPENDITURES FOR FISCAL YEARS 2008–2012 (Comm. Print. 2008).

63. For a typical example of how courts invoke the traditional subsidy argument, see *Green v. Connally*, 330 F. Supp. 1150 (D.D.C. 1971).

64. See, e.g., COLOMBO & HALL, *supra* note 16, at 45 (discussing and critiquing); Bittker, *supra* note 55, at 39; Nina J. Crimm, *An Explanation of the Federal Income Tax Exemption for Charitable Organizations: A Theory of Risk Compensation*, 50 FLA. L. REV. 419, 430–31 n.34 (1998) (citing H.R. REP. NO. 75, at 19 (1938)); Hansmann, *supra* note 43, at 66; Paul R. McDaniel, *Federal Matching Grants for Charitable Contributions: A Substitute for the Income Tax Deduction*, 27 TAX L. REV. 377, 390 (1972). It should be noted that I.R.C. § 170(c)(1) provides a charitable contribution deduction for contributions to states and localities, a result that mirrors the deduction for state and local taxes. For purposes of this Series, however, I take such rules as a given; my focus is on the tax treatment of organizations other than governments and contributions thereto.

65. See Rob Atkinson, *Altruism in Nonprofit Organizations*, 31 B.C. L. REV. 501, 605 n.291 (1990); Bittker, *supra* note 55, at 39; McDaniel, *supra* note 64, at 390–91; Simon, *supra* note 6, at 68–69. In a similar vein, David Brennen has recently argued that the value of diversity justifies the charitable tax exemption and that normatively, diversity requires a consideration of both public and private interests (such as the type of consideration offered by critical race theory) to determine the scope and contours of the charitable tax subsidies. David A. Brennen, *A Diversity Theory of Charitable Tax Exemption—Beyond Efficiency, Through Critical Race Theory, Toward Diversity*, 4 PITT. TAX REV. 1 (2006).

66. Atkinson, *supra* note 65, at 635. To Atkinson, the mere fact that a donor is subsidizing another’s consumption is enough to trigger a subsidy for the organization in the form of tax exemption. See generally *id.*

67. In addition to the economic arguments explored in this part, the measurement theories outlined in the prior part also arose from a desire to avoid value-based judgments. As explained *infra* Part III.A.2, this reluctance usually stems from either (1) suspicion that the current tax subsidies cannot be descriptively justified on the basis of such normative assessments, (2) the avoidance of

newer (and probably more accepted) explanations for subsidizing charity seek to avoid these value-based judgments.⁶⁸ These theories are grounded in economics: quite generally, they theorize that subsidizing charities is necessary to assist them to provide goods or services that would otherwise be under-produced due to various market and governmental failures.⁶⁹

Henry Hansmann was among the first to articulate such an economic subsidy-based argument for tax exemption,⁷⁰ building upon his prior work on the non-distribution constraint.⁷¹ In his seminal piece on tax exemption, Hansmann recognized that while the non-distribution constraint protected consumers in transactions susceptible to contract failure, it simultaneously undermined the ability of non-profit firms to raise capital and obtain loans.⁷² Exemption, he argued, helped non-profit firms overcome this

substantive normative judgments that is associated with traditional law and economics, or (3) a belief that avoiding such judgments furthers pluralism or better reflects citizens' preferences.

68. As argued *infra* in the text accompanying notes 196–226, however, these analyses implicitly contain their own set of value judgments.

69. See, e.g., COLOMBO & HALL, *supra* note 16, at 100–08 (discussing the underlying economics of the donative theory); Gergen, *supra* note 52, at 1396–1406; Burton A. Weisbrod, *Toward a Theory of the Voluntary Nonprofit Sector in a Three-Sector Economy*, in *THE ECONOMICS OF NONPROFIT INSTITUTIONS* 21 (Susan Rose-Ackerman ed., 1986).

70. Hansmann, *supra* note 43, at 54. Professor Hansmann's article addressed only tax exemption, and, in fact, he specifically distinguished the issues raised by the charitable deduction. He noted, for example, that exemption under § 501(c) extended to a variety of organizations not eligible to receive deductible contributions under § 170 and that exemption is largely irrelevant for many organizations that rely mainly on donations and spend most of their income. *Id.* at 72. In contrast to these organizations, Hansmann sought to identify a rationale for subsidizing non-profits that regularly accumulated income. *Id.* at 71–72. Although Hansmann may be correct that tax exemption is irrelevant for many charities, I believe that his broader point is in fact relevant to all the tax subsidies: such organizations deserve subsidized assistance—regardless of the specific form—to increase the efficient provision of goods and services subject to contract failure. Thus, for purposes of this Article, I see no reason to separate the broad arguments for the deduction from the broad arguments for tax exemption.

71. Henry B. Hansmann, *The Role of Nonprofit Enterprise*, 89 *YALE L.J.* 835 (1980). In his prior work, Hansmann posited that the non-distribution constraint protects purchasers (whether donors or consumers) of goods and services likely to suffer from contract failure by reassuring them that non-profit providers will use payments for the designated purposes instead of converting them to personal profits. This reassurance, he reasoned, made non-profits more efficient providers in areas otherwise susceptible to contract failure. He emphasized two specific contract failures. The first occurs where the donor cannot judge the extent to which her payment was used for the promised service. This can happen in a variety of contexts. Perhaps the donor lives in the United States and has given money for the assistance of earthquake victims in Haiti. Because of the separation between the two, the donor cannot verify that her payments were used at all to assist the earthquake victims or how well they were used. Alternatively, perhaps the donor contributed to an organization providing public goods, such as public radio, or purchased a ticket to the opera. Because of the nature of the good purchased, the donor has no way of knowing whether her contribution increased either the quantity or quality of the radio programming or the opera. The second type of contract failure occurs when the purchased good or service is too complex for the consumer to be able to judge its quality on her own—for example, medical care. *Id.* at 846–58, 862–68.

72. Hansmann, *supra* note 43, at 72.

detriment by serving as a subsidy.⁷³ In his view, the efficiency gains from increasing the non-profit provision of these goods and services outweighed the cost of tax exemption, thus justifying the subsidy.⁷⁴ Hansmann further argued that since most organizations providing public goods or otherwise redistributing wealth “in a socially desirable manner” suffered from contract failure, there was no need to further justify exempting such organizations from tax.⁷⁵ Moreover, he reasoned that if merely providing public goods or subsidizing aid to the poor justified a tax subsidy, there would be no theoretical reason to limit the subsidy to non-profit firms.⁷⁶ Yet for-profit firms likely would not need a tax subsidy to survive, thus underscoring to Hansmann the necessity for requiring contract failure (as opposed to looking at the merits of the good or service provided) as a trigger for obtaining a subsidy.⁷⁷

Like Hansmann, the next wave of economic-based scholarship recognized the crucial role that market failure played in justifying the charitable tax subsidies.⁷⁸ This literature, however, also weaved in public-choice theory to flesh out why the charitable subsidies were implemented through the tax system (as opposed to other subsidy mechanisms).⁷⁹ More specifically, this work posits that charitable tax subsidies are warranted because a democratic process dependent on majority preferences only supplies public goods at a level demanded by the median voter.⁸⁰ This majority thus supplies “some public goods (for example, a lighthouse or national defense) but not others (perhaps a community theater).”⁸¹

73. *Id.* More recently, Nina Crimm has articulated a related argument that exemption compensates non-profits for the risk inherent in providing public goods and services, thus justifying the subsidy. Crimm, *supra* note 64, at 439.

74. Hansmann, *supra* note 43, at 72–74.

75. *Id.* at 91.

76. *Id.* at 91–92.

77. *Id.*

78. Although many of the early works that focused on the economic subsidy theory (such as those of Hansmann and Hall and Colombo) explicitly addressed tax exemption, later pieces on the deduction (such as those of Gergen, Levmore and Schizer) specifically built upon these exemption works. As Colombo and Hall have recognized, analytical interpretations of one generally apply to the other. COLOMBO & HALL, *supra* note 16, at 20.

79. Although Hansmann touched on the relative pros and cons of non-profit versus government provision of services susceptible to contract failure, Hansmann, *supra* note 71, at 894–95, and briefly noted that “bureaucratic mechanisms . . . and [other] constraints and influences” might affect the feasibility of governmental subsidies other than tax subsidies, Hansmann, *supra* note 43, at 92 n.113, he did not address in any detail the pros and cons of administering the subsidy through the tax system or why the government would agree to subsidize activities that the median voter had failed fully to fund.

80. Miranda P. Fleischer, *Generous to a Fault? Fair Shares and Charitable Giving*, 93 MINN. L. REV. 165, 185–86 (2008).

81. *Id.* at 168.

Individuals who support the under-supplied public goods, however, unite to form a “new majority” that provides partial funding (via a tax subsidy) for each other’s preferred minority projects.⁸² In that manner, the charitable tax subsidies allow individuals whose preferences differ from those of the classic majority⁸³ to redirect a portion of funds otherwise flowing to the federal fisc toward their visions of the public good.⁸⁴

2. *Refinements of the Basic Economic Subsidy Theory: Efficiency, Pluralism, and the Donative Theory*

Building on the economic subsidy theory outlined above, a number of scholars have offered refinements that focus on the benefits stemming from structuring subsidies for public-benefiting projects in this manner:⁸⁵

82. *Id.* at 168–69; *see also* COLOMBO & HALL, *supra* note 16, at 107–08; Weisbrod, *supra* note 69, at 36.

83. Although majority preferences do not always prevail due to intrinsic characteristics of our legislative system, the existing literature generally uses such a model for simplicity. *See* Fleischer, *supra* note 80, at 167–68 n.10.

84. Because the subsidies flow through the tax system, they essentially allow individual taxpayers to decide how to allocate federal funds. Take the charitable deduction, for example. A taxpayer who donates \$100 to the opera and receives a \$100 deduction reduces her taxes by \$35 (assuming a 35% marginal tax bracket). This means that although the opera receives \$100, she is only out of pocket \$65. The federal government is out the remaining \$35. In effect, she has directed \$35 of federal funds to a project she has deemed worthy of federal funds. Although the matching element is less obvious, both tax exemption and the ability to issue tax-exempt bonds also allow individuals (instead of the government) to decide which specific projects receive a government subsidy: all that is necessary is for one or more individuals to form an organization that qualifies for § 501(c)(3) (tax exemption) or § 145 (exempt bonds). In this manner, it is up to a given individual or group of individuals to decide whether to start an art museum, a hospital, or a tutoring program. *See, e.g.*, Bittker, *supra* note 55 (comparing the charitable deduction to a matching grant system); Saul Levmore, *Taxes as Ballots*, 65 U. CHI. L. REV. 387, 405 (1998); McDaniel, *supra* note 64, at 379–80, 390–94, 396–99 (arguing that the charitable deduction has many characteristics of a matching grant system but that an actual matching grant system would better serve the goal of pluralism without increasing government intrusion or decreasing incentives to make contributions).

85. In addition to the work discussed above that justifies the charitable tax subsidies as a theoretical matter, a large and important body of scholarship considers the narrower (but also important) question of what rules should apply to charities in order to ensure that they play the role envisioned for them in society. *See* Evelyn Brody, *Charities in Tax Reform: Threats to Subsidies Overt and Covert*, 66 TENN. L. REV. 687, 688–93 (1999); C. Eugene Steuerle & Martin A. Sullivan, *Toward More Simple and Effective Giving: Reforming the Tax Rules for Charitable Contributions and Charitable Organizations*, 12 AM. J. TAX POL’Y 399, 401–02 (1995). Specific issues include (1) whether (and if so, to what extent) charities should be allowed to engage in lobbying and political activity, *see, e.g.*, Miriam Galston, *Lobbying and the Public Interest: Rethinking the Internal Revenue Code’s Treatment of Legislative Activities*, 71 TEX. L. REV. 1269 (1993); Lloyd Hitoshi Mayer, *What is This “Lobbying” That We Are So Worried About?*, 26 YALE L. & POL’Y REV. 485 (2008); Donald B. Tobin, *Political Campaigning by Churches and Charities: Hazardous for 501(c)(3)s, Dangerous for Democracy*, 95 GEO. L.J. 1313 (2007); (2) the appropriate treatment of commercial activity by charities, *see, e.g.*, John D. Colombo, *Commercial Activity and Charitable Tax Exemption*, 44 WM. & MARY L. REV. 487 (2002); Ethan G. Stone, *Adhering to the Old Line: Uncovering the History and*

enhancing efficiency, promoting pluralism, and determining deservedness. These bodies of work generally attempt to avoid making value-based judgments as to what activities should count as “charitable” and, in some cases, explicitly extol the virtues of not engaging in such judgments. This is not to say that distributional questions are wholly absent from these works: in the 1970s and 1980s, many scholars debated replacing the tax deduction with a tax credit or a matching grant, in part due to distributional considerations.⁸⁶ While that work suggests distributional questions matter for the technical structure of the subsidies (that is, credit versus deduction versus grant), it stopped short of analyzing how the same questions might affect the subsidies’ definitional structure (that is, what should qualify for the subsidies). As argued in the next part, however, making such judgments is unavoidable—rendering the following refinements of the economic subsidy theory necessary but not sufficient for a full understanding of the charitable tax subsidies.

a. Efficiency

One such refinement (specifically addressing the deduction, as opposed to exemption) argues that subsidizing public goods through a tax deduction⁸⁷ is more efficient than so doing via direct governmental grants.⁸⁸ Namely, structuring the subsidy as a deduction (or credit) allocates the cost of subsidizing a given charitable project among individuals in proportion to the value each places on that project.⁸⁹ Those

Political Function of the Unrelated Business Income Tax, 54 EMORY L.J. 1475 (2005); (3) the appropriate balance between spending and saving and the role of endowments, *see, e.g.*, Evelyn Brody, *Charitable Endowments and the Democratization of Dynasty*, 39 ARIZ. L. REV. 873 (1997); Henry Hansmann, *Why Do Universities Have Endowments?*, 19 J. LEGAL STUD. 3 (1990); (4) the continued usefulness of the non-distribution constraint, *see, e.g.*, Anup Malani & Eric A. Posner, *The Case for For-Profit Charities*, 93 VA. L. REV. 2017 (2007); and (5) anti-abuse rules for private foundations, *see, e.g.*, Richard L. Schmalbeck, *Reconsidering Private Foundation Investment Limitations*, 58 TAX L. REV. 59 (2004); Thomas A. Troyer, *The 1969 Private Foundations Law: Historical Perspectives on Its Origins and Underpinnings*, 27 EXEMPT ORG. TAX REV. 52 (2000).

86. *See, e.g.*, Bittker, *supra* note 55; Griffith, *supra* note 53; McDaniel, *supra* note 64; *see infra* Part III.C.

87. Debate still lingers, however, over whether a deduction or credit is the most efficient way of subsidizing charity through the tax system. Compare Jeff Strnad, *The Charitable Contribution Deduction: A Politico-Economic Analysis*, in THE ECONOMICS OF NONPROFIT INSTITUTIONS, *supra* note 69, at 265, 272–76 (supporting a deduction), with Harold M. Hochman & James D. Rodgers, *The Optimal Tax Treatment of Charitable Contributions*, in THE ECONOMICS OF NONPROFIT INSTITUTIONS, *supra* note 69, at 224, 236 (supporting a credit).

88. Gergen, *supra* note 52, at 1399–1406 (summarizing the works of Hochman and Rodgers and Weisbrod).

89. *Id.*

with a high demand for a charitable project pay “more” for that project by making a donation out of their own pocket.⁹⁰ Persons with a low demand for a given project pay less by not making a voluntary contribution, but indirectly pay something (through the tax system) for that project to reflect the fact that they still receive some benefit (even if small) from the project.⁹¹ In contrast, direct grants would require that the government increase taxes across the board, and it is highly unlikely that the increase in a given individual’s taxes would be proportional to how much she values the good being subsidized.⁹² In this manner, tax subsidies approximate a Lindahl solution,⁹³ where the marginal benefits received by a given individual (whether or not a voluntary contributor) equal her marginal costs (including both voluntary contributions and cost-shifting from taxes necessary for the subsidy).⁹⁴

Proponents of this refinement (such as Gergen, who focused on the charitable deduction) and proponents of the original economic subsidy theories (such as Hansmann, who focused on the exemption) argue that focusing on economic explanations allows one to judge whether a given charity deserves a subsidy without getting into messy questions about the moral value of its activities.⁹⁵ Instead, one only need ask non-value-based, empirical questions: does an organization provide either public or quasi-public goods,⁹⁶ and is it subject to the type of free-rider problems that cause market failure? If so, it deserves a subsidy; if not, it does not deserve a subsidy.⁹⁷ Under this view, for example, churches would not merit a

90. *Id.*

91. *Id.* For a discussion of whether it is morally “fair” to force low-demanders to partially subsidize such goods, see *id.* at 1401 n.27. Gergen reasons that here, the bargain is “fair” because everyone has either the possibility of channeling federal funds to his or her project or the possibility of benefiting from others’ projects as a recipient of charitable goods and services. *Id.*

92. *Id.* at 1402.

93. As Mark Gergen explains:

In a Lindahl solution [or benefits pricing], a collective good is funded at the level where the sum of the incremental benefits individuals derive from the last unit of the good equals the marginal cost of that unit, and each individual contributes an amount equal to her marginal benefit from the last unit of the good times the number of units provided.

Id. at 1400 (footnotes omitted).

94. See *id.* at 1400–06 (summarizing the works of Hochman and Rodgers and Weisbrod on this point); Hochman & Rodgers, *supra* note 87, at 228, 233–35 (arguing that a credit approximates a Lindahl solution); Strnad, *supra* note 87, at 269–76 (arguing that a deduction better approximates a Lindahl solution than a credit).

95. See, e.g., Gergen, *supra* note 52, at 1396; Hansmann, *supra* note 43, at 66 (rejecting the existence of “beneficial externalities” as a justification for tax exemption).

96. That is, goods that are not pure public goods yet are still subject to free-rider problems or other market failures.

97. Gergen, *supra* note 52, at 1396.

subsidy because the club-like nature of the group minimizes free-riding.⁹⁸ Nor would public radio deserve a subsidy, since modern technology makes market provision possible.⁹⁹ The economic subsidy theory for the deduction therefore makes no explicit claims about the substantive moral value of the various goods and services provided by charities (although, as explained below, it does make claims about the moral value of individuals' preferences about subsidizing charities).¹⁰⁰

b. Pluralism

Also building on the public goods economic-subsidy argument, a second group of scholars has focused on the pluralism-enhancing benefits of having individual taxpayers determine which projects merit subsidies.¹⁰¹ In that respect, these scholars have somewhat married the economic efficiency analysis with the more traditional values-based analyses by celebrating values other than pure efficiency. This marriage has limits, however, as even these scholars generally avoid value-based claims about “what” is being subsidized, continuing to focus on value-based claims about “how” the subsidies are structured. These scholars, therefore, forego any normative value judgments about the particular goods and services being subsidized, instead emphasizing the values that flow from subsidizing public goods as a class via the charitable deduction and tax exemption.

98. *Id.* at 1438.

99. *See id.* at 1444 n.176.

100. *But see infra* Part III.B.2.

101. Unfortunately, it is somewhat unclear exactly what these theorists mean when they invoke “pluralism” and related terms (such as “diversity”). Often, it seems they believe our society should affirmatively seek to encourage numerous views in order to promote a counter-weight to government power, experimentation in the way public goods are produced, a rich debate, a marketplace of ideas, and the like. Another take on pluralism, however, is that we live in a pluralistic society where individuals have differing conceptions of what is beneficial to society and that, in the interests of neutrality, the tax subsidies should not differentiate among them. Pluralism can thus encompass either a positive duty to promote alternative viewpoints *or*, more simply, a duty not to discriminate among various viewpoints. Both understandings of “pluralism” seem to be present in discussions of the charitable tax subsidies. With respect to the former, by subsidizing non-governmental groups in the first instance, they promote a counterbalance to government power and allow for experimentation in the ways that problems are attacked (for example, attacking poverty not only with programs like WIC but also with groups like Dress for Success); this seems to be the more common use of the concept in the current literature. With respect to the latter, once a goal has been deemed desirable for purposes of the subsidies (such as religion or public-interest litigation), the subsidies do not discriminate among religions, or between left-leaning and right-leaning cause-oriented legal groups. This Part interprets the current literature as focusing mainly on the first interpretation, although the implications of the distinctions between the two understandings are explored in the text accompanying notes 148–50.

Professor Saul Levmore, for example, has characterized the charitable deduction as a mechanism for allowing individual taxpayers to “vote” on which projects deserve federal subsidies and at what level.¹⁰² Qualitatively, Levmore posits that taxpayers who have a direct say in deciding which projects to fund (instead of being told by the government which projects are being funded) will develop a greater commitment to such projects, be more active volunteers and monitors, and be more tolerant both of redistribution and of greater government funding of public goods.¹⁰³ He also suggests that this direct taxpayer involvement may remove opportunities for “rent-seeking” that might otherwise occur during the legislative process for allocating subsidies.¹⁰⁴

On a quantitative level, Levmore has characterized the charitable deduction as an “ongoing vote” that allows taxpayers whose funding preferences depend on the preferences of others to receive information about others’ preferences before voting.¹⁰⁵ For example, some taxpayers may want to know that a given project has a certain amount of support from others before voting to allocate funds to it, while others might prefer to donate only to projects in which their contribution makes a “real difference.”¹⁰⁶ In both instances, however, the size of the governmental subsidy reflects the enthusiasm of taxpayers for a given project.¹⁰⁷

Building on the foregoing, Professor David Schizer has recently explored how institutional design affects the extent to which the charitable deduction achieves a number of value-based goals that are extrinsic to the specific goods and services being subsidized (encouraging generosity,

102. Levmore, *supra* note 84, at 405. This is so because when someone makes a charitable contribution and takes a corresponding deduction, she has just “voted” for that charity to receive a federal subsidy equal to the foregone tax revenue. For example, by making a \$100 donation, a taxpayer has voted for that charity to receive a \$35 subsidy. This structure draws two common criticisms, both of which Levmore acknowledges. First, allowing taxpayers to vote in this manner could be compared to a “poll tax” because any given individual must make a contribution out-of-pocket in order to trigger the subsidy. *Id.* at 405–06. Second, structuring the subsidy as a deduction gives more “votes” to higher-bracket taxpayers, *id.*, because of the “upside down effect” inherent in any deduction. *See infra* notes 235–38, and accompanying text for an explanation of this effect. The latter criticism could be addressed by replacing the deduction with a credit, although the poll-tax criticism would remain even with a credit.

103. Levmore, *supra* note 84, at 406.

104. *Id.* at 408. Although Levmore is not entirely convinced by this “optimistic” view of legislative behavior, neither is he entirely convinced by the contrary, pessimistic view that the costs to Congress for retaining control over these decisions outweigh the benefits. *Id.*

105. *Id.* at 411.

106. *Id.* at 412.

107. *See id.* at 411–12; David M. Schizer, *Subsidizing Charitable Contributions: Incentives, Information and the Private Pursuit of Public Goals* 9–10 (Columbia Working Paper Series, Paper No. 327, 2008), available at http://papers.ssrn.com/paper.taf?abstract_id=1097644.

reflecting popular preferences about public benefiting projects, and promoting the monitoring of quality).¹⁰⁸ Schizer emphasizes that each of these goals has different implications for the optimal design of the subsidies, requiring trade-offs among these goals.¹⁰⁹ For example, he argues that the goal of encouraging generosity in order to increase donations suggests that the subsidies should be focused on higher-bracket donors, who are more responsive to tax subsidies.¹¹⁰ Such a focus, however, would likely lead to the over-representation of the views of the wealthy in the funding process, thus undercutting the second goal of reflecting popular preferences.¹¹¹ On the other hand, taking steps to enhance the extent to which the subsidies reflect popular preferences (such as capping the subsidies given to the wealthy or limiting the subsidy to causes with broad support) would impede the goals of encouraging generosity and monitoring by donors.¹¹² Similarly, encouraging donors to target their gifts to fewer causes (in order to make it easier to keep tabs on each one) would enhance monitoring but might not reflect popular preferences well.¹¹³

In this analysis, Schizer largely ignores value-based questions of “what” is being subsidized. Although he notes that increasing the substantive limits on the subsidy might better reflect popular preferences or minimize allocation errors,¹¹⁴ he rejects such limits on the grounds that they would inhibit donor generosity and overly complicate the structure of the subsidy.¹¹⁵ In his view, giving donors the widest latitude possible in

108. *Id.* at 2.

109. *Id.* at 3.

110. *Id.* at 15–16. Additionally, Schizer argues that the goal of encouraging generosity suggests increasing the subsidy made available through the charitable deduction and decreasing the subsidy made available through tax exemption (which is not directly tied to receiving donations). *Id.* at 17–18.

111. This, Schizer argues, is simply the “price we must pay” for the advantages that stem from the flexible nature of the deduction. *Id.* at 33. Schizer assumes that “charity tends to be redistributive,” and therefore assumes that the charitable deduction promotes voluntary redistribution. *Id.* at 16. Because of these assumptions, his main concern about targeting subsidies to the wealthy is whether this gives them disproportionate influence over which public goals are pursued. *Id.* Even here, however, Schizer notes that if wealthy donors under-invest in projects that represent broader preferences, “the government is free to pick up the slack,” and he recognizes but does not address the opposite concern of donors who invest in “idiosyncratic projects of little social value.” *Id.* at 32. In my view, Schizer underemphasizes the latter concern and assumes too much about the redistributive effect of charity.

112. *Id.* at 3, 43–44.

113. *Id.* at 53–55.

114. *Id.* at 37–38.

115. *Id.* at 38–39. He rightly notes, for example, that determining the extent to which charities meet certain intrinsic substantive goals can be difficult. *Id.* For example, if poverty relief is favored, he wonders whether a law school will qualify “by offering financial aid for poor students and clinical programs for indigent clients” and how law school expenses should be allocated to these projects. *Id.* at 38. I do not minimize the difficulty of these questions. Indeed, my goal in this Article is to

choosing projects (subject to the constraint that the project actually be charitable rather than a disguised purchase of goods or services) best serves the dual goals of enhancing donor generosity and encouraging monitoring.¹¹⁶ The one constraint Schizer appears to favor is imposing participation limits whereby a donor can claim a deduction only if a certain number of other people also contribute to the project in question.¹¹⁷

c. The Donative Theory

A third refinement, termed the “donative theory” by proponents John Colombo and Mark Hall in their work on tax exemption, likewise focuses on the benefits of having individual taxpayers determine which activities deserve a subsidy.¹¹⁸ They propose that only organizations receiving a “substantial level of support from the public” merit subsidies via tax exemption and the ability to receive deductible contributions.¹¹⁹ Building upon the market- and government-failure theories proposed by earlier scholars, Colombo and Hall argue that the existence of voluntary donations to an organization is itself a signal that the organization’s activities are undersupplied by the market or government—thus demonstrating the organization’s need for a subsidy.¹²⁰ They further reason that such voluntary donations demonstrate that the public at large considers the goods or services beneficial to the community—thus demonstrating the organization’s deservedness of a subsidy.¹²¹

Like much of the other economic subsidy work, Colombo and Hall argue that their test enables one to determine whether an organization merits a subsidy by asking a simple empirical question: does the group receive a threshold amount of donations from the general public or not?¹²² While Colombo and Hall contend that this test both better describes current law and better comports with historical conceptions of charitable

demonstrate that even in spite of these difficulties, addressing these questions will improve our understanding of the charitable tax subsidies.

116. *Id.* at 34–35.

117. *Id.*

118. COLOMBO & HALL, *supra* note 16, at 99.

119. *Id.*

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

121. *Id.* at 163.

122. *Id.* at 193–218. Specifically, the general test proposed by Colombo and Hall would limit subsidies to organizations receiving at least one-third of their revenue from donations. *Id.*

activity than prior subsidy theories,¹²³ their test still attempts to set aside questions about the intrinsic value of the activity subsidized. Although Colombo and Hall (unlike many other theorists) explicitly address moral theory concerns, they do so only to argue that the donative theory is consistent with the leading theories of distributive justice.¹²⁴ They do not, however, address what such theories might tell us about what should be considered charitable.

III. A FULL UNDERSTANDING OF THE CHARITABLE TAX SUBSIDIES REQUIRES AN EXPLICIT CONSIDERATION OF DISTRIBUTIVE JUSTICE

As this Part argues, explicitly considering distributive justice—alongside the issues currently highlighted—is necessary for a clearer understanding of the charitable tax subsidies¹²⁵ on both a theoretical and a practical level.¹²⁶ This is so for three reasons. First, existing scholarship—which generally ignores distributive justice issues—is incomplete and inconsistent for so doing: it is incomplete because it does not adequately identify which projects deserve a subsidy and the amount of that subsidy; it is inconsistent because it implicitly contains value judgments that have distributive justice implications but that are unacknowledged (and often disavowed) by their proponents. Second, popular criticisms of the charitable tax subsidies raise distributive justice issues that have not been adequately addressed. And lastly, the law governing charities and exempt organizations is itself confused on the role of distributive justice.

123. Colombo and Hall mention, among others, Henry Hansmann's "capital subsidy theory," *id.* at 83–86, Rob Atkinson's "altruism theory," *id.* at 87–90, and the "public trust variant" theory, *id.* at 90–92.

124. *Id.* at 147–58.

125. As the reader will notice, the remainder of this Article focuses on the subsidy theories for tax exemption and the charitable deduction instead of the measurement theories. This is so because the former are widely regarded—both inside and outside academia—as the better explanation for the tax benefits given to charities. Pozen, *supra* note 11, at 552. That said, distributive justice concerns bear consideration even under the measurement theories. In a number of areas where a deduction is otherwise justified on measurement grounds, Congress has chosen to deny or limit the deduction for public policy reasons. Consider, for example, the prohibition against deducting fines in § 162(f) or the limits on deducting "excess" executive compensation in § 162(m). It may thus be the case, therefore, that even if tax exemption and the charitable deduction are justified as a general matter on measurement grounds, there may be distributive justice-related public policy considerations that warrant limiting exemption and deductibility.

126. As Simon et al., have noted, a puzzle exists as to "whether and how exemption or other beneficial treatment in the tax law should be conditioned on redistribution (particularly, redistribution to the poor."): Simon et al., *supra* note 7, at 277.

A. *Existing Scholarship Is Incomplete Because It Does Not Adequately Identify Which Projects Merit Subsidies*

As demonstrated above, most—but not all—recent scholarship theorizing the charitable tax subsidies attempts to avoid content-based definitions of what should be considered charitable.¹²⁷ The traditional subsidy theory is an exception, but the standards by which it defines charity are unhelpful. As a result, our theoretical understanding of what projects merit assistance under the charitable tax subsidies is wanting.¹²⁸

1. *The Traditional Subsidy Theories*

The traditional subsidy theory demonstrates this most clearly. Although it focuses on the “good” things charities do for society, it contains standards which, standing alone, are too vague to be useful. To say that charities do “good” things that “benefit society” is meaningless without some conception of what is “good.”¹²⁹ To say that charities should be subsidized because they relieve the government of burdens it would otherwise bear is largely meaningless without some sense of what government *should be* doing. To say that charities merit subsidy because they provide diverse and creative solutions to society’s problems is similarly meaningless without a sense of what counts as a problem and which problems *should be* solved. Lastly, asserting that the altruistic nature of charitable giving merits a subsidy does not answer the question of whether all altruistic acts are equally worthy of a subsidy. The traditional subsidy theories are therefore too vague to adequately identify which projects merit a subsidy.¹³⁰

127. Moreover, as explained in Part III.D, the legal requirements contained in §§ 170(c) and 501(c)(3) in effect forego determining eligibility based on the worthiness of an organization’s activities; instead they focus on procedural rules such as the private inurement doctrine.

128. As Colombo and Hall have recognized, we need more guidance when we are trying to identify “activities that deserve the financial support of society.” COLOMBO & HALL, *supra* note 16, at 38 (emphasis removed).

129. *See id.* at 6 (“[W]hile our society superficially agrees that certain ‘good activities’ are entitled to tax exemption, this superficial agreement masks considerable confusion over precisely what good activities qualify as charitable and why they are deserving of tax exemption.”).

130. The same is true of parallel definitions of charity that inform current tax interpretations of charity. For example, much of our understanding of what should be considered charitable for tax purposes comes from the law of charitable trusts. *Id.* at 33. The definition of “charity” from charitable trust law, however, is equally vague. For example, the Restatement of Trusts defines charitable purposes as including the following: “(a) the relief of poverty; (b) the advancement of education; (c) the advancement of religion; (d) the promotion of health; (e) governmental or municipal purposes; and (f) other purposes the accomplishment of which is beneficial to the community.” RESTATEMENT (SECOND) OF TRUSTS § 368 (2001). As Colombo and Hall have noted, however, under trust law,

2. *The Economic Subsidy Theory and Its Refinements*

Later scholars reacted to this vagueness by attempting to create objective tests for determining which projects should be subsidized. Some theorists (such as Mark Gergen, a proponent of the efficiency refinement) argue that objective tests are necessary because of the impossibility of defining charity in terms of the moral worthiness of various activities.¹³¹ Other theorists, such as pluralists Saul Levmore and David Schizer, seem to concede that one could distinguish among the worthiness of various projects based on their activities, but that so doing is undesirable.¹³² In their view, allowing individual taxpayers to determine which projects receive subsidies is itself valuable in our pluralistic society.¹³³

These bodies of work thus appear to successfully avoid defining charity in terms of normative assessments about the “goodness” of various charitable activities. The efficiency theorists would limit the subsidies to public or quasi-public goods that suffer from market and government failure due to free-riding, positive externalities, and the like.¹³⁴ The pluralism scholars would subsidize any project that is not self-benefiting and obtains support from some threshold number of others.¹³⁵ Proponents

virtually any substantive purpose will suffice. Charity is “broad enough to include whatever will promote, in a legitimate way, the comfort, happiness and improvement of an indefinite number of persons.” As the Supreme Court declared over a century ago, charity includes “anything that tends to promote the well-doing and well-being of social man.” Students of the law of charity acknowledge that “[n]early everything produced by . . . private industry—ranging from buildings and food to books and music—contributes to our welfare.” “In a sense, all legitimate economic activities are affected with a public interest.”

COLOMBO & HALL, *supra* note 16, at 38 (alterations in original) (citations omitted).

131. Gergen, *supra* note 52, at 1396. As Gergen argues, too many currently subsidized activities are either controversial or trivial, too few are morally privileged, and the risk that “some ‘wrongheaded’ people will support the wrong things (satanist [sic] churches or racist schools) and refuse to support the right things” is inevitable. *Id.* Gergen concludes that “[c]laims for the moral priority of charitable causes cannot justify a deduction in anything like its present form.” *Id.* Ironically, Gergen seems to be invoking moral judgments precisely to argue that the definition of charitable should eschew such judgments.

132. Levmore, *supra* note 84, at 408, 415 n.82; Schizer, *supra* note 107, at 36–39.

133. As explained in note 101, this seems to reflect a view that encouraging a variety of viewpoints (that is, affirmatively subsidizing pluralism) is itself good, rather than a view that non-discrimination among competing views of justice or the good is valuable. The distinctions are fine, however, and these scholars may well also value the latter understanding of pluralism.

134. Gergen, *supra* note 52, at 1396 (arguing that “these theories do not depend upon claims about the moral worth of what charities do. The case for a deduction on efficiency or equity grounds turns, at last, on empirical questions . . . that may be answered without regard to whether charities’ activities are themselves good or just.”); see also Hansmann, *supra* note 43, at 96 (“[E]xemption . . . should not be viewed simplistically as a subsidy for good works . . .”).

135. See, e.g., COLOMBO & HALL, *supra* note 16, at 99; Levmore, *supra* note 84, at 404–18; Schizer, *supra* note 107, at 14–15, 34–35.

of these works would thus have us believe that the only questions one needs to ask (depending on whether one is focusing on efficiency or pluralism, respectively)¹³⁶ are objective: Is the project a pure or impure public good? Does it suffer from market and government failure? Does the project somehow benefit the donor? Does it have the necessary support from individuals other than the donor?

Unfortunately, however, further questions remain. On the most practical level, we live in a world of scarce resources.¹³⁷ It may be the case that in an ideal world, we would subsidize all such projects. But if scarce resources force us to choose among a plethora of eligible projects, we need some method of determining which projects will ultimately be subsidized. How do we determine which projects are most worthy when we have to prioritize? With respect to private goods, markets measure preferences in such situations. In contrast, however, markets cannot measure preferences for pure public goods. Markets cannot tell us, for example, whether people want clean air, how much clean air they want, and at what price.¹³⁸ We therefore need some normative theory beyond Pareto efficiency¹³⁹ to justify subsidizing public goods in this manner.¹⁴⁰

a. Pluralism's Unanswered Questions

Moreover, the efficiency and pluralism scholars each face further questions stemming from the tests they proffer. Take the pluralists' argument that voluntary donations by a threshold number of individuals

136. To be sure, pluralism and efficiency are not either/or propositions, and many scholars seem to celebrate both goals.

137. See Schizer, *supra* note 107, at 26–27.

138. Economists sometimes answer such questions by referring to Musgrave's concept of "merit goods," which are goods that should be provided to society even if not specifically demanded. Richard A. Musgrave, *Merit Goods*, in 3 *THE NEW PALGRAVE: A DICTIONARY OF ECONOMICS* 452 (John Eatwell et al. eds., 1987). As later economists have noted, however, "The term merit good merely becomes a formal designation for the unadorned value judgment that [such projects] are good for society and therefore deserve financial support." HARVEY ROSEN, *PUBLIC FINANCE* 47 (6th ed. 2002) (citing Baumol and Blinder (1981)).

139. See, e.g., ROSEN, *supra* note 138, at 47 ("Despite its appeal, Pareto efficiency has no obvious claim as an ethical norm. Society may prefer an inefficient allocation on the basis of equity or some other criterion.").

140. Presumably, the efficiency-focused scholars would turn to some form of cost-benefit analysis in order to allocate scarce governmental resources. As traditionally applied, such an analysis monetizes all values being considered, although it leaves out certain intangibles. To that end, some scholars have started to favor a variation of cost-benefit analysis known as "well-being analysis" (which does take into account intangibles that significantly affect happiness). This analysis almost necessarily entails consideration of certain utilitarian issues, including the implications of the happiness research. This is just one example of how a more careful consideration of distributive justice could help allocate scarce resources in a manner that complements the work of the efficiency theorists.

signal that a project is worthy of a subsidy. On the most neutral level (borrowing an example from David Schizer), why does the fact that a group of people want a ketchup museum justify subsidizing it?¹⁴¹ Existing literature responds that tying the subsidy to the amount of donations means that groups with fewer supporters get less of a subsidy.¹⁴² But this does not answer the threshold question of why such an organization deserves *any* subsidy in the first instance.

This question becomes more acute in instances where the subsidized activity is not merely “silly” (like the ketchup museum), but one that strikes many as wrong or immoral (for example, a non-profit school that admitted only Caucasian students). Current law responds to this dilemma with the public policy requirement articulated in the *Bob Jones* case:¹⁴³ to receive the charitable tax subsidies, organizations may not engage in activities antithetical to established public policy.¹⁴⁴ But this, of course, invokes value judgments about what is and is not antithetical to public policy—not to mention the fact that the very notion of “public policy” invokes value judgments.¹⁴⁵ Resorting to *Bob Jones* therefore demonstrates that there must be some limits on what is subsidized.

At this point, one might respond that limits should be imposed only in extreme cases (such as *Bob Jones*) and that minimizing value judgments as much as possible is necessary to articulate the kind of expansive definition that best serves pluralistic values.¹⁴⁶ Under this view, an extremely broad conception of charity enhances pluralism by making room for many different conceptions of what is “good” for society without choosing among them.¹⁴⁷

141. See Schizer, *supra* note 107, at 9–10, 35. To return to the distinction articulated in *supra* note 101, should it be subsidized because it is valuable to have a rich marketplace of ideas, or should it be subsidized for non-discriminatory reasons?

142. COLOMBO & HALL, *supra* note 16, at 164–67; Levmore, *supra* note 84, at 409; Schizer, *supra* note 107, at 35.

143. *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983) (upholding the denial of tax exemption to schools engaging in racially discriminatory practices, even when such practices are religiously based).

144. *Id.* at 575.

145. See Simon et al., *supra* note 7, at 280–81 (discussing such questions in the context of *Bob Jones*).

146. This was certainly the reaction I received whenever discussing this project with other scholars, whether at formal workshops or informally.

147. As can be seen, once discussions turn from the technical structure of the subsidies (deduction, grant, credit, etc.) to their substantive content, the type of pluralism that is invoked seems to change from one of subsidizing a variety of viewpoints to one of value-neutrality. See *supra* note 101.

There are two problems with this response, however. First, it conflates the fact of pluralism (that is, that we live in a free and democratic society with room for several competing views of what is beneficial) with the normative claim that the charitable tax subsidies should themselves be pluralistic in nature. In other words, it confuses the concept of pluralism as allowing for a variety of viewpoints (pluralism as nondiscrimination) with the concept of pluralism as mandating that society is affirmatively better off when more, as opposed to fewer, viewpoints are heard (to use Anne Alstott's term, let's call this "mandated pluralism").¹⁴⁸ Wanting to respect the former might mean simply that we will not subsidize Catholic churches without also subsidizing Jewish synagogues, but it does not necessarily mean that we have to subsidize any places of worship in the first instance. It means that we cannot subsidize modern dance without also subsidizing classical ballet, not that we must affirmatively subsidize dance in the first place. In other words, it conflates the issue of wanting to act in a nondiscriminatory manner because we live in a pluralistic society with the issue of wanting affirmatively to promote (and not just tolerate) a variety of viewpoints.

To take another example, suppose that one group of citizens considers opera and poor relief to be good and bird-watching to be bad, while another group considers poor relief and bird-watching to be good, and opera to be bad. As a normative matter, why does pluralism suggest subsidizing all three activities instead of only the activity both groups consider to be good?¹⁴⁹ The latter is pluralistic in that it is nondiscriminatory; neither activity lacking complete support is subsidized. In contrast, the former is pluralistic in the mandatory sense by reflecting the idea that it is somehow beneficial to encourage (and not just tolerate) a range of viewpoints and activities.

Moreover, more narrowly defining which activities should qualify as charitable does not necessarily undercut the principles of either pluralism in fact or mandatory pluralism. For example, suppose that Congress narrows the charitable tax subsidies to include only organizations that provide goods and services to individuals under a certain income level. Because the subsidies, as currently structured, still allow for individuals to decide which groups helping the poor deserve aid, they allow such groups

148. E-mail from Anne Alstott, Manley O. Hudson Professor, Harvard Law School, to Miranda P. Fleischer, Associate Professor, University of Colorado School of Law (Mar. 6, 2009, 08:50 MST) (on file with author).

149. See Part II.B for a descriptive justification of having a broad definition of charity that is rooted in public choice theory.

to counterbalance government power and flood the marketplace of poor relief with a variety of ideas about the best way to do so. Some might provide job training, others might provide suits for interviews, some might give food directly, some might teach the poor to grow their own vegetables, and so on. In that respect, mandatory pluralism is still respected, even under a narrower definition of what is charitable.

The pluralists, therefore, need a normative justification for defining charity broadly—this may be fairness, it may be social harmony, or any number of reasons. But the point is that they must explicitly link the fact of pluralism to the normative case for an expansive definition of charity. In other words, they must link the nondiscriminatory aspect of pluralism to the mandatory aspect of it. And if the mandatory aspect is based on equality or on social welfare, why not also look to see how the content of the subsidies might affect those goals?

Lastly, suppose that the pluralists do have a persuasive normative justification for broadly defining charity. Even so, they would be well served to fold moral theory into their analysis in order to ensure that the legal definition of charity really does have room for competing views of the good. To illustrate, take four of the most common theories of distributive justice:¹⁵⁰ utilitarianism,¹⁵¹ the maximin theories,¹⁵² the capabilities approach,¹⁵³ and egalitarianism.¹⁵⁴

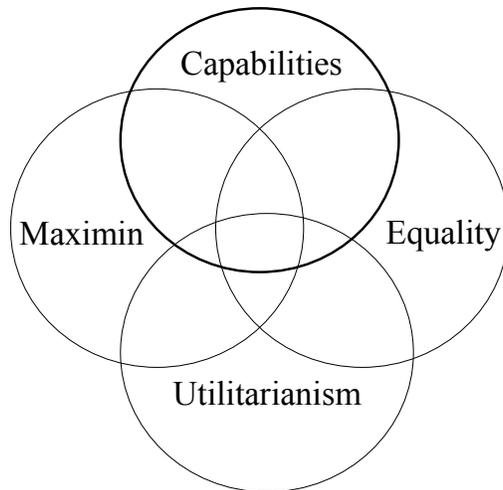
150. See, e.g., BRIGHOUSE, *supra* note 5, at vii (providing “an account of the main kinds of theories of justice prevailing in contemporary political philosophy”); WILL KYMLICKA, *CONTEMPORARY POLITICAL PHILOSOPHY: AN INTRODUCTION* 1 (providing “an introduction to, and critical appraisal of, the major schools of thought which dominate contemporary debates in political philosophy”); LIAM MURPHY & THOMAS NAGEL, *THE MYTH OF OWNERSHIP* 40–75 (2002) (describing the “issues in . . . political theory that bear most directly on the evaluation of tax policy,” including issues of distributive justice).

151. See *infra* Part IV.A.

152. See *infra* Part IV.B.

153. See *infra* Part IV.C.

154. See *infra* Part IV.D.



Next, assume that we want to define charity broadly, so as to include everything that would fall within any of these frameworks. A close look at each of these broad moral philosophies might suggest that the current definition of charity should be broader than it currently is. What if, for example, these four philosophies suggest that political donations should be subsidized? In other words, we need to make sure that everything within the Venn diagram above was included in the definition of charity. Alternatively, we might find that some activities currently considered charitable would not be so defined under all reasonable moral philosophies, and that the current definition should be narrowed in some respects. It could well be the case, for example, that there are other activities in addition to racial segregation which do not fall within any reasonable conception of the good. In other words, we need to make sure that the definition of charity does not include anything falling outside the above diagram. Explicitly considering what various strands of moral theory suggest for the charitable tax subsidies, therefore, is more helpful than blindly suggesting that “anything goes.”¹⁵⁵

155. Taking a more explicit look at distributive justice could also help us allocate scarce resources, even if we started with the broad definition of charity described above. Assume, for

b. Efficiency's Unanswered Questions

The efficiency theories also raise some unanswered questions beyond those relating to scarce resources. Take, for example, the argument that some projects should be subsidized because they generate positive externalities that are undervalued by consumers.¹⁵⁶ Many take for granted the fact that some such projects—such as education—produce positive benefits shared by society.¹⁵⁷ In contrast, however, whether other activities—such as religion—produce positive externalities is more controversial. In both cases, one cannot decide whether or not a given activity generates a “positive” externality without resorting to some underlying value judgments.¹⁵⁸ Why is education good? Why do some feel religion is good and others feel it is bad? Expressed in more technical language, there may be some activities that are considered “public goods” by some individuals but that are considered “social costs” by others. The fact that some are willing to make a charitable donation to an activity does not itself render that activity a public good.

Lastly, as explored in more detail below, the very act of emphasizing efficiency and/or pluralism represents a value judgment. It seems logical to ask whether a more specific definition of charity might further those goals more than the tests described above. For example, what if some activities actually undercut pluralism? What if subsidizing certain charities more than others was a Pareto-improving move?¹⁵⁹ In short, current scholarship leaves several essential questions unanswered. The theories these scholars identify, therefore, are necessary but not sufficient for our understanding of the charitable tax subsidies.

example, that we have come up with a definition of charity broad enough to encompass all the activities that the various moral theories in the diagram above suggest. We might still face a question of scarce resources, however. In that case, thinking about how the various theories overlap with one another may help allocate those scarce resources. We might decide, for example, to start by subsidizing those activities that fall within the reaches of all four moral theories. Then, resources permitting, we move onto those activities that fall within the overlap of three theories, then two, and so on. I thank Katie Pratt for this idea.

156. See, e.g., Gergen, *supra* note 52, at 1398.

157. But see Henry Hansmann, *The Changing Roles of Public, Private, and Nonprofit Enterprise in Education, Health Care, and Other Human Services*, in *INDIVIDUAL AND SOCIAL RESPONSIBILITY: CHILD CARE, EDUCATION, MEDICAL CARE, AND LONG-TERM CARE IN AMERICA* 245, 263–66 (Victor Fuchs ed., 1996) (questioning whether non-profit and public schools produce positive externalities).

158. Hochman & Rodgers, *supra* note 87, at 225.

159. That is, a move that “makes some people better off and no person worse off.” Gergen, *supra* note 52, at 1401 (citing A. Atkinson & J. Stiglitz, *Lectures on Public Economics* 509 (1980)).

B. A Fuller Understanding of the Charitable Tax Subsidies Requires an Analysis of Distributive Justice

As the foregoing suggests, although avoiding moral judgments about which activities merit subsidies based on their intrinsic worth may be attractive, it is unrealistic. At some point, addressing the “goodness” of various charities becomes inevitable, as difficult as that may be. Why look to distributive justice as one means of so doing?¹⁶⁰ First, the very roots of charity are grounded in notions of redistribution.¹⁶¹ Second, the justifications for subsidizing charity under the traditional subsidy theory invoke distributive justice issues.¹⁶² Third, distributive justice analysis is a logical complement to the work of those efficiency scholars who truly are concerned solely with wealth maximization (and not its distribution); and it is a necessary extension of the work of the efficiency and pluralism scholars whose work contains implicit and unacknowledged judgments about distributive justice issues. Lastly, scholarship on the charitable tax subsidies which does address distributive justice issues is insufficiently deep, for it does not engage the fundamental questions of distributive justice theory: what should be redistributed, and what is a just distribution?

1. Distributive Justice and the Traditional Subsidy Theories

As explained above, the traditional subsidy theories contain extremely vague justifications for the charitable tax subsidies: that charities do “good” things that “benefit society,” that they relieve the government of burdens it would otherwise bear, that they provide diverse and creative solutions to society’s problems, and that the act of altruism is itself meritorious.¹⁶³ Determining what is good for and beneficial to society, what government should be doing, and which of society’s problems should be solved inevitably raises distributive justice issues. Is anything that

160. Just as this Article argues that the pluralist- and efficiency-focused works are a necessary but not sufficient contribution to our understanding of the subsidies, it likewise argues that distributive justice is another necessary—but not sufficient—component of this analysis. In other words, this Article suggests that distributive justice should be looked at, but not necessarily in a vacuum. It may well be the case that other moral theories (such as communitarianism) can help extend our understanding of the subsidies even further. For example, David Brennen offers a thought-provoking argument that critical race theory should be used to complement existing scholarship on the tax subsidies. Brennen, *supra* note 65.

161. McNulty, *supra* note 7, at 247–48.

162. See Part III.B.1.

163. See Part III.A.1.

increases happiness good? Are poverty and inequality problems that should be addressed? If so, why? For those who subscribe to the traditional subsidy justification, a fuller understanding of distributive justice and its implications is necessary.¹⁶⁴

For example, it is generally undisputed as a traditional matter that one legitimate aim of charity is to help the poor.¹⁶⁵ As explained previously,¹⁶⁶ this conception of charity has deep historical roots, dating at least as far back as the Statute of Charitable Uses¹⁶⁷ and appearing in the early days of our nation's history.¹⁶⁸ It also comports with what the average lay person generally considers charitable.¹⁶⁹ Thus, a better understanding of who should be considered poor or disadvantaged, and what our duties to such persons are, can help us better allocate those philanthropic dollars dedicated to helping "the poor."¹⁷⁰ A close look at each of the common strands of distributive justice can help provide this understanding, thus fleshing out the traditional subsidy theories.

2. *Distributive Justice and the Economic Subsidy Theories*

Distributive justice is also a necessary tool for extending the work of those theorists who focus on efficiency and pluralism. This is true whether these theorists are agnostic about distributional questions (that is, recognize their importance but choose not to address them themselves) or

164. See COLOMBO & HALL, *supra* note 16, at 6 ("[W]hile our society superficially agrees that certain 'good activities' are entitled to tax exemption, this superficial agreement masks considerable confusion over precisely what good activities qualify as charitable and why they are deserving of tax exemption.").

165. To be sure, charity may also serve other goals, but few, if any, would argue that helping the poor is not a main goal. For example, religious organizations have long received the benefits accorded other "charities." Historically, this stemmed from one of two varying conceptions of the church: either it was an arm of the state itself, in which case it should not be taxed because the state does not tax itself, or it was thought of as a sovereign organization (much like a foreign government) that the state had no right to tax. Chauncey Belknap, *The Federal Income Tax Exemption of Charitable Organizations: Its History & Underlying Policy*, in IV RESEARCH PAPERS SPONSORED BY THE COMMISSION ON PRIVATE PHILANTHROPY & PUBLIC NEEDS 2025, 2027–28 (1977).

166. See *supra* notes 19–23 and accompanying text.

167. The Statute of Charitable Uses exempted "charitable, religious, and educational" trusts from the traditional constraints of trust law. Belknap, *supra* note 165, at 2027. The word "charitable" in the listing of excepted gifts has been traditionally interpreted to mean poor-relief, which merited an exception because it relieved the government of a burden. COLOMBO & HALL, *supra* note 16, at 47.

168. Belknap, *supra* note 165, at 2027–30 (describing state tax conceptions of charity).

169. COLOMBO & HALL, *supra* note 16, at 6.

170. This may be especially true when the political climate advocates curtailing government benefits and instead encouraging more private aid to the poor. That is, if our society relies on charity in lieu of direct governmental aid, then a deeper understanding of what counts as "charity" is necessary. McNulty, *supra* note 7, at 230–31.

seemingly hostile to such questions (that is, in search of value-neutral ways of thinking about the subsidies).¹⁷¹

a. The “Agnostic” Subsidy Theories

The argument that distributive questions should play some role in the overall legal scholarship on the charitable tax subsidies is least controversial if one views the subsidy theorists as working within the context of normative economics as it is traditionally understood—that is, as being concerned with wealth maximization (the size of the pie) and not its distribution.¹⁷² This appears to be true of some of the efficiency-focused scholars (such as Hansmann and Hochman and Rodgers).¹⁷³ It may also be true with respect to those pluralism scholars (such as Schizer) who have argued that wide donor choice increases the quality and efficiency of the activities subsidized.

If so, then the very parameters of normative economics highlight the need for additional scholarship that does address distributive justice head-on. Those parameters suggest that the efficiency scholars have done their job by identifying both the best justification for the tax subsidies and the best *initial* method of sorting through which projects do or do not merit a subsidy. They further suggest that normative distributional questions are not irrelevant, but simply not within their bailiwick.¹⁷⁴ It is therefore not inconsistent with the efficiency scholarship to argue that additional scholarship is needed to pick up where the former leaves off in order to evaluate, as a normative matter, the distributional questions raised by the charitable tax subsidies.¹⁷⁵ Indeed, the work of economists Harold Hochman and James Rodgers (part of the efficiency-focused school)

171. See, e.g., ROSEN, *supra* note 138, at 47 (arguing that welfare economics provides the tools necessary to describe the distributional consequences of a given policy but that value judgments are necessary to determine the desirability of those consequences).

172. See, e.g., DANIEL M. HAUSMAN & MICHAEL S. MCPHERSON, *ECONOMIC ANALYSIS, MORAL PHILOSOPHY, AND PUBLIC POLICY* 145 (2d ed. 2006) (arguing that under common views of economic efficiency, “[e]conomists should be concerned to enlarge the pie and should leave its division to politicians and moralists”); LOUIS KAPLOW & STEVEN SHAVELL, *FAIRNESS VERSUS WELFARE* 5 (2002) (noting that “[u]nder a common understanding of normative economic analysis, legal rules are assessed by reference to wealth maximization or efficiency, criteria that many construe as . . . ignoring distributive concerns.”); Edward J. McCaffery, *Slouching Towards Equality: Gender Discrimination, Market Efficiency, and Social Change*, 103 *YALE L.J.* 595, 636 (1993).

173. See *infra* note 176 and accompanying text.

174. See KAPLOW & SHAVELL, *supra* note 172, at 5.

175. See, e.g., MURPHY & NAGEL, *supra* note 150, at 51 (“If efficiency were the only standard, there would be no way to choose between two policies neither of which was at least as good for everybody as the other.”).

explicitly acknowledges the need for distributional value judgments by others about the subsidies.¹⁷⁶

Moreover, a small but important body of descriptive empirical work by economists buttresses this point by openly recognizing that distributive justice considerations should play some role in policy discussions. As economist Charles T. Clotfelter stated, “Although few would argue that redistribution is the most important justification for maintaining nonprofit institutions, distributional impact remains one significant consideration, as it is in most areas of public policy.”¹⁷⁷ To that end, a number of economists have attempted to assess—as a descriptive matter—the distributional impact of the charitable tax subsidies.¹⁷⁸ The most comprehensive analysis is a compilation of empirical studies, edited by Clotfelter, that contains sub-sector-by-sub-sector analyses of the benefits that each sub-sector produces and their distribution across households of various incomes.¹⁷⁹

Although this work is descriptive in nature, it assumes that policymakers have an underlying normative premise regarding how such benefits should be distributed. Indeed, the very existence of this work invites the asking of the more fundamental normative questions that are the domain of legal scholars: How much weight, if any, should policymakers give to distributive justice considerations when crafting charitable giving policy? Which theories of distributive justice should be given consideration? How should charity be defined to effectuate those considerations?

176. See, e.g., Hochman & Rodgers, *supra* note 87, at 233, 239 (stating clearly that the authors “in no way den[y] an ultimate need, from a social perspective, for a distributional value judgment” but noting that economic discussions of whether a credit or deduction is the optimal treatment for voluntary contributions is not the place for such judgments). Interestingly, Hochman and Rodgers assert that using efficiency as a tool to study the structure of the subsidy avoids “the strong value judgments implicit” in using equity-based arguments (such as the upside-down subsidy argument) about the structure. *Id.* at 238. As demonstrated in the next part, however, even their study of the structure contains implicit distributional claims.

177. See, e.g., Clotfelter, *supra* note 6, at 3 (compiling studies analyzing the beneficiaries of various categories of nonprofits by income).

178. See, e.g., William S. Vickrey, *One Economist’s View of Philanthropy*, in PHILANTHROPY AND PUBLIC POLICY 31, 44–55 (1962) (concluding that most beneficiaries of philanthropy are “only a moderate distance down the scale” from philanthropic donors, “rather than at the bottom”); Jeffrey Schaefer, *Philanthropic Contributions: Their Equity & Efficiency*, 8 QUARTERLY REVIEW OF ECONOMICS 25, 30 (1968).

179. Clotfelter, *supra* note 6, at 9. The studies’ general conclusion is that distributional impact differs by subsector, and that there is neither an overall pro-poor or pro-rich tilt to the beneficiaries. *Id.* at 3.

b. The “Hostile” Subsidy Theories

Next, suppose that current scholars are not ignoring distributional questions simply because such questions are outside their domain, but because they truly think such questions can be avoided.¹⁸⁰ As this part argues, not only is this unrealistic, but it is inconsistent: existing scholarship in this area is rife with unacknowledged—and insufficiently extended—value judgments.¹⁸¹

First, these scholars ignore the fact that the subsidies in question are, at their core, redistributive.¹⁸² The government takes from some individuals (in the form of reduced services from foregone revenue, increased taxes, or a mix of both) and gives to others (those who benefit from charitable activities, whether as a donee, employee, patron, or otherwise).¹⁸³ Moreover, the charitable tax subsidies are not a stand-alone government program, but rather are part of the *tax* system—a system which by its very nature raises distributive justice issues in determining how the benefits and burdens of our society are to be apportioned. The government taxes some individuals to fund programs that benefit others.¹⁸⁴ Sometimes this redistribution is from the rich to the poor, such as the redistribution resulting from the increasing marginal rate structure. Other times, it is from people engaging in one activity to people engaging in another, such as from savers to those making favored business expenditures. In any event, the charitable tax subsidies have redistributive effects, and that alone means that the desirability of these subsidies turns (at least in part) on an assessment of those effects.

180. See Griffith, *supra* note 53, at 345 (criticizing earlier scholars for lacking “a coherent normative principle”); see also Pozen, *supra* note 11, at 547, 558, 562.

181. Griffith, *supra* note 53, at 345 (arguing that “a satisfactory tax policy must make its underlying ethical assumptions and distributional goals explicit.”).

182. McNulty, *supra* note 7, at 247 (asserting that “[a]ny 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.”). As McNulty points out, this redistribution has multiple levels: from donors to donees and managers, from the public sector to the private, from the private sector to charities, and to and from various taxpayers due to a redistribution of the tax burden and after-tax wealth. *Id.* at 247–48.

183. To be sure, it is not always easy to identify who benefits from the subsidy. See RICHARD SCHMALBECK & LAWRENCE ZELENAK, FEDERAL INCOME TAXATION 417–18 (2d ed. 2007). Despite this difficulty, some generalizations can be made, and those generalizations have use for us.

184. Of course, some of an individual’s taxes likely benefit that individual in some way. There is no link, however, between taxes paid and benefits received, and the view that benefits received justifies taxation is generally disfavored. See, e.g., Walter J. Blum & Harry Kalven, Jr., *The Uneasy Case for Progressive Taxation*, 19 U. CHI. L. REV. 417, 451–55 (1952).

The necessity of making value-based judgments with respect to distributive justice issues goes unquestioned in other areas of tax scholarship, such as in seminal works discussing the rate structure, consumption taxes, the estate tax, endowment taxation,¹⁸⁵ and so on.¹⁸⁶ Because the charitable tax subsidies are part of an inherently redistributive tax system, it seems contradictory not to consider the redistributive effects of those subsidies when structuring them.¹⁸⁷ This does not require tax scholars themselves to choose a single theory of distributive justice that provides the “best” anchor for the charitable tax subsidies, but a consideration of distributive justice issues can help policymakers think more carefully about the subsidies.¹⁸⁸

Interestingly, some of the economic-subsidy scholars seem to acknowledge that the charitable tax subsidies inevitably raise distributional issues that should be addressed, but they gloss over these questions without adequately addressing them. For example, pluralists Levmore and Schizer each express concerns about the greater voice given to the wealthy,¹⁸⁹ and efficiency-focused scholar Mark Gergen voices concern about the upside-down subsidy effect.¹⁹⁰ Moreover, many of these scholars seem to endorse redistribution as desirable, but do not specify what they mean by redistribution or why they endorse it.¹⁹¹

When the efficiency theorists do acknowledge distributive concerns in more detail, their analysis is insufficient. For example, efficiency-focused

185. See, e.g., Daniel N. Shaviro, *Inequality, Wealth, and Endowment*, 53 TAX L. REV. 397 (2000), and sources cited, *supra* notes 1–3.

186. In discussing the progressive rate structure, Joseph Bankman and Thomas Griffith argued that, “[t]o determine the desirability of a tax structure, it is necessary to have a theory of distributive justice that determines whether, and how much, to weigh the particular consequences of that structure.” Bankman & Griffith, *supra* note 1, at 1910; see also McCaffery, *supra* note 2, at 830 (“[F]airness is central to tax [T]he reason to have a tax system, especially an individuated tax system, is to finance the needs of the state in a fair and just manner.”).

187. Griffith, *supra* note 53, at 394–95.

[A] satisfactory theory of personal deductions must be grounded on appealing normative principles.

. . . Further research is needed to evaluate the tax implications of nonwelfarist principles and to examine welfarist taxation under more plausible assumptions. Such scholarship has substantially greater potential for advancing our understanding of the ideal system of personal deductions than research that leaves its normative assumptions unstated.

Id.

188. See, e.g., Griffith, *supra* note 53, at 385 (“Tax scholars have no special expertise in resolving the thorny problem of choosing among normative principles. They can, however, help analyze how alternative ethical principles might be reflected in a tax structure.”).

189. Levmore, *supra* note 84, at 405–06, 417–18; Schizer, *supra* note 107, at 32–33.

190. Gergen, *supra* note 52, at 1405–06.

191. See, e.g., Gergen, *supra* note 52, at 1434; Levmore, *supra* note 84, at 406; Schizer, *supra* note 107, at 5, 16.

Jeff Strnad criticizes the Lindahl equilibrium sought by Hochman and Rodgers on the grounds that it might not necessarily be neutral with respect to the distribution of the surplus generated by the subsidization of public goods.¹⁹² Strnad himself attempts to solve this problem by assuming that one's preference for subsidizing a given public good reflects one's views on the likely distribution of that good if subsidized.¹⁹³ But by folding distributional questions into preferences, Strnad seems to be invoking a kind of preference-satisfaction version of distributive justice. (My point is not to criticize Strnad, for this is a fairly common move. Rather, my point is to emphasize the unavoidability of distributional questions.)

Once we agree that work on the distributional issues raised by the charitable tax subsidies is a necessary complement to the efficiency- and pluralism-based scholarship,¹⁹⁴ there are two ways of proceeding. First, we could analyze the implications of various distributive justice theories without attempting to distill any values other than efficiency and pluralism from the work of such scholars. In other words, we could skip the task of asking why these scholars care about efficiency and pluralism, and simply move on to the distributive justice questions.

Although moving immediately to such questions implies distributional issues are somehow separate, or separable, from the values of efficiency and pluralism, it would still enhance our understanding of the tax subsidies beyond our current level. This can be useful regardless of whether we feel distributive justice is subordinate or prior to the values of efficiency and pluralism. For example, we could use distributive justice as a tool to help us identify which under-supplied public goods should be subsidized if

192. Strnad, *supra* note 87, at 271.

193. *Id.* at 268.

194. The case for looking at distributive justice is less strong if one subscribes to the base-measurement theory, although two plausible reasons exist for so doing. First, even explaining the benefits' existence as a form of base-measurement does not answer the further question whether a departure from that base might be warranted on philosophical grounds. Take, for example, the measurement theories for the deduction. Bittker's moral obligation theory does not answer whether all donations discharge moral obligations of equal value. And even under Andrews's theory, perhaps some charitable transfers should not be deductible—even if they measure income accurately—much like a tax penalty. Think of *Tank Truck*, in which the Supreme Court held that fines paid by a trucking company for exceeding highway weight limits were not deductible as business expenses—even though they were incurred in the ordinary course of business—on public policy grounds. *Tank Truck Rentals, Inc. v. Comm'r*, 356 U.S. 30, 36 (1958). If fines that are clearly a cost of doing business are not deductible, then maybe there is room for moral theory to suggest that some charitable transfers should not be deductible, even if we do not consider them consumption under Haig-Simons. Second, Andrews argues that the goals of the tax system should affect the choice of base. If one goal of the tax system is redistribution, then shouldn't the extent to which a charitable transfer redistributes matter? See, e.g., Griffith, *supra* note 53, at 368 (criticizing Andrews on this point).

forced to choose (thus subordinating distributive justice). Alternatively, we could view the efficiency- and pluralism-based works as delineating the best way of subsidizing activities that our notions of distributive justice have already deemed worthy of subsidizing.¹⁹⁵ If, for example, our notion of distributive justice counsels us to assist “the poor” and helps to define who is considered poor, then the pluralism and efficiency theories can help us determine the best way of structuring subsidies for activities that help the poor, thus prioritizing distributive justice.

We could do even better, however. Instead, we could seek to unearth the values motivating the efficiency and pluralism scholars—that is, determine why one values efficiency and/or pluralism in the first instance. If we do so, it may be the case that the values motivating a particular scholar will be enhanced even more once distributive justice issues are explicitly considered. This might, for example, counsel us to make distinctions among potentially subsidizable activities in order to best further whatever underlying value efficiency or pluralism serves for a given scholar.

Sometimes, identifying a theorist’s normative underpinnings is simple: scholars occasionally explicitly state their normative motivations. Pluralist David Schizer, for example, is upfront about the fact that he adopts a welfarist framework.¹⁹⁶ But even Schizer does not fully explore the implications of adopting this framework, for he does not sufficiently address whether differentiating among charitable activities might enhance welfare (Schizer flirts with this idea and then rejects it as being outweighed by the benefits of giving donors wider leeway to choose their projects).¹⁹⁷ More often, however, scholars working in the economic-subsidy area do not explicitly identify their normative underpinnings. Ironically, this is true even when these scholars explicitly flag distributional issues, such as the upside-down subsidy argument.¹⁹⁸

To begin, efficiency-based scholars are generally silent as to why they value efficiency (other than as a potential tool for avoiding messy value judgments). As Ed McCaffery has explored, one likely cares about efficiency for any of three reasons: welfarism, liberalism, and libertarianism.¹⁹⁹ Of those three, it seems that welfarist concerns are

195. Hochman and Rodgers seem to take this approach. See Hochman & Rodgers, *supra* note 87, at 238.

196. Schizer, *supra* note 107, at 6–7.

197. *Id.* at 36–39.

198. See, e.g., Hochman & Rodgers, *supra* note 87 at 238–39; Levmore, *supra* note 84, at 405, 417–18; Stmad, *supra* note 87, at 265–69.

199. See McCaffery, *supra* note 172, at 639–40 (asking why we care about efficiency).

motivating most of the efficiency-based scholarship on the charitable tax subsidies. A number of works, for example, use Paretian concepts of efficiency to argue that the charitable tax subsidies are desirable.²⁰⁰

To illustrate, efficiency scholars Strnad, Hochman and Rodgers have all argued that the tax subsidies are desirable because they make high demanders (those who make voluntary contributions to a given activity) better off without making low demanders (those who do not voluntarily contribute but who pay involuntarily through the tax system) worse off.²⁰¹ This analysis assumes, however, that low demanders enjoy enough of a benefit from the subsidized projects to outweigh the decline in their welfare from increased taxes. In other words, it assumes that the low demanders would prefer a world with the subsidies over one without.

This assumption is, not surprisingly, contested:²⁰² it assumes that it is “fair” to force the low demanders to make involuntary payments. Some other efficiency scholars, such as Mark Gergen, attempt to resolve that dilemma and the justice-related issues it raises by invoking Kaldor-Hicks.²⁰³ Under this standard of efficiency, the desirability of a policy is judged by whether the “winners” collectively gain enough to (hypothetically) pay off the “losers” and still be ahead (actual payment is not required, however).²⁰⁴ Individual gains (such as the concrete benefits enjoyed by the recipients of charitable goods and services and the intangible pleasure donors receiving from giving) and losses (for example, from the increased taxes imposed on low-demanders) are important only because they comprise the collective societal gains and losses. Gergen flags but does not address questions about the fairness of *this* standard (as opposed to the Paretian norms he rejects).²⁰⁵ Instead, he skips over the “ethical question whether it is right to take from one person to enrich others more” by simply noting that “Kaldor-Hicks is a commonly accepted standard of efficiency.”²⁰⁶ Even if this is true, it begs the question whether

200. Hochman & Rodgers, *supra* note 87, at 224–25 (Pareto optimality); Strnad, *supra* note 87, at 266–67. Strnad disagrees, however, with Hochman and Rogers about whether a deduction or credit better effectuates this norm. Compare Strnad, *supra* note 87, at 272–76, with Hochman & Rodgers, *supra* note 87, at 236. See also McCaffery, *supra* note 172, at 636–39 (offering a succinct explanation of Pareto superiority).

201. Gergen, *supra* note 52, at 1401.

202. Compare Richard J. Arneson, *The Principle of Fairness and Free-Rider Problems*, 92 ETHICS 616 *passim* (1982), with ROBERT NOZICK, ANARCHY, STATE AND UTOPIA, 93–95 (1974). See also Gergen, *supra* note 52, at 1401–02 n.27.

203. Gergen, *supra* note 52, at 1412.

204. See McCaffery, *supra* note 172, at 636–37.

205. Gergen, *supra* note 52, at 1413.

206. *Id.*

all Kaldor-Hicks moves are normatively desirable when all relevant considerations, including those of distributive justice, are brought to bear.

As a number of scholars have pointed out, both Pareto and Kaldor-Hicks efficiency are inherently welfarist²⁰⁷ because they look to individual well-being to determine the desirability of a given policy.²⁰⁸ Endorsing such standards reflects value judgments by (1) deciding that well-being matters, (2) defining well-being, and (3) determining how to aggregate well-being.²⁰⁹ Much of the efficiency scholarship, for example, seems to endorse utilitarian principles: Gergen often invokes utility and pleasure when applying Kaldor-Hicks;²¹⁰ Strnad and Hochman and Rodgers all focus on preference satisfaction,²¹¹ and much of the work addressing whether the deduction should be replaced with a credit also seems to invoke utilitarian principles.²¹²

It seems, then, that the efficiency scholars have not, after all, avoided moral questions²¹³ in their analysis of the charitable tax subsidies.²¹⁴

207. I mean “welfarist” in the sense that welfare economics is welfarist—that is, encompassing a variety of methods of using individual well-being to determine a policy’s desirability. I do not use the term “welfarist” in the sense of specifying one particular social welfare function.

208. HAUSMAN & MCPHERSON, *supra* note 172, at 64–65, 144–45, 217; KAPLOW & SHAVELL, *supra* note 172, at 56.

209. See HAUSMAN & MCPHERSON, *supra* note 172, at 97–155; KAPLOW & SHAVELL, *supra* note 172, at 16, 25–27 (“[A] method of aggregation is of necessity an element of welfare economics, and value judgments are involved in aggregating different individuals’ well-being into a single measure of social welfare. The choice of a method of aggregation involves the adoption of a view concerning matters of distribution . . .”) (footnotes omitted).

210. See, e.g., Gergen, *supra* note 52, at 1407, 1412–13, 1425. According to McCaffery, this type of move “collapses Kaldor-Hicks efficiency into utilitarianism,” which to him “misses the point of the Kaldor-Hicks test, which is to avoid interpersonal utility comparisons.” McCaffery, *supra* note 172, at 641. Whether McCaffery’s accusation is true, however, is beside the point for purposes of this Article. Even if something other than utilitarianism is motivating the use of Kaldor-Hicks, *something* is motivating its use, and that *something* has distributive justice implications.

211. Hochman & Rogers, *supra* note 87; Strnad, *supra* note 87.

212. This is so because those who criticize the deduction for undermining the progressive rate structure, see, e.g., McDaniel, *supra* note 64, are implicitly criticizing it for violating utilitarian principles. And by responding that the deduction increases progressivity “by transferring funds from rich taxpayers to those in more moderate circumstances,” scholars like Bittker are implicitly defending the structure on utilitarian grounds. Bittker, *supra* note 55, at 55. To be sure, one might favor redistribution from rich to poor for non-utilitarian reasons. See *infra* Part IV. But by grounding these arguments specifically in progressivity, they are implicitly making a utilitarian argument for redistribution.

213. As described in the text accompanying notes 131–36, *supra*, a variety of reasons may explain why the efficiency scholars hope to avoid moral questions about what should be subsidized: it is quite likely that they feel such questions are important but that they themselves have little to say on the subject, or perhaps they have individual thoughts on a “just” distribution of income but believe that public policy should remain agnostic for political economy reasons. Or, perhaps, some truly believe that moral questions about the worth of various charities can be avoided. Regardless, much current legal work on the tax subsidies interprets the efficiency-based scholars as hoping to avoid such questions, and this Article’s analysis proceeds from that characterization (while acknowledging that

adopting a welfarist framework for the evaluation of tax policy is not value-neutral. Within the consequentialist tradition itself, for example, many theorists reject preference-satisfaction as a measure of well-being. Moreover, welfare-based theories are themselves substantive theories of value: adopting them entails rejecting the values prized by theories outside of the consequentialist tradition, such as deontological and aretaic theories (which reject the notion that efficiency is a proper standard for the evaluation of public policy).²¹⁵

For the most part, welfarist standards also seem to implicitly motivate the pluralism and donative scholars (Schizer even makes this explicit).²¹⁶ For example, Levmore's "taxes-as-ballots" idea focuses on the advantages of using the charitable deduction as a means of measuring and aggregating citizens' preferences.²¹⁷ Hall and Colombo (of the donative theory) similarly argue that voluntary donations to given projects should determine deservedness,²¹⁸ thus implying that the revealed preferences of donors are what determine well-being. Lastly, Schizer's concern about giving the wealthy a greater voice in determining which projects receive funding reflects a fear that the preferences of the wealthy "may not adequately represent the preferences of society as a whole."²¹⁹ This implies that aggregate preference satisfaction enhances well-being, which is, of course, welfarist.²²⁰

the efficiency scholars may not be as hostile to value judgments as they have been interpreted as being).

214. KAPLOW & SHAVELL, *supra* note 172, at 25–26.

In several different respects, the approach of welfare economics involves value judgments. First, value judgments underlie the assumptions that social welfare depends on individuals' well-being, that this dependence is positive, and that factors unrelated to individuals' well-being are irrelevant. In other words, to adopt welfare economics is to adopt the moral position that one should be concerned, positively and exclusively, with individuals' well-being.

Id. (footnotes omitted).

215. See Parts IV.C and IV.D for brief descriptions of such theories.

216. Schizer, *supra* note 107, at 6–7. As with the efficiency scholars, the pluralist scholars may have a variety of reasons for hoping to avoid judgments about the moral worth of activities being subsidized, including (particularly) a desire for agnosticism for political economy reasons.

217. Levmore, *supra* note 84, at 388–89, 411–12. Further, Levmore also seems to imply that informed preferences are what matters, by suggesting that voters might take their votes more seriously if they have to pay for them in part. *Id.* at 411.

218. See Part II.B.2.c.

219. Schizer, *supra* note 107, at 32.

220. Ironically, this both is and is not pluralist. In one sense, it is pluralist, for it accounts for the plurality of preferences. In another sense, however, using preference-satisfaction as the standard of value is the opposite of pluralism: preference-satisfaction-based welfarism is only one of many theories of the good in our pluralistic country, and privileging that theory while ignoring others actually undermines the value of pluralism in this second sense.

To be clear, my goal here is not to “out” these scholars as not really being pluralists, or as being secret utilitarians, or what have you. It could be the case, for example, that these scholars care about wealth maximization on welfarist grounds other than utilitarianism,²²¹ or even on deontological grounds.²²² And it is also quite plausible that the pluralism scholars can normatively justify caring about pluralism on equality or other grounds. And in fact, some of the scholars who appear to be welfarist at times also seem to care about egalitarianism. For example, Levmore, Schizer, and Strnad object to the upside-down subsidy effect on the grounds that it violates the one-person, one-vote principle.²²³

The point, however, is to emphasize the necessity of looking at distributive justice in addition to pluralism and efficiency.²²⁴ If such scholars care about those values on, say, utilitarian grounds, why invoke utilitarianism only to justify the existence and general structure of the tax subsidies? Why not also explore what utilitarianism might mean for the content of the subsidies: that is, which activities are eligible for subsidies, and should all activities receive the same amount of subsidy? It might be the case, for example, that some activities are more utility-enhancing than others and therefore should be favored. Further, it might be the case that the activities we wish to subsidize differ depending on how one defines utility: Wealth? Happiness? Preference satisfaction?²²⁵ Lastly, it may be the case that the pluralism- and efficiency-enhancing aspects of the nonprofit sector are so strong that any adverse distributional consequences stemming from the current structure are “worth it.”²²⁶ But we do not know whether there are any such consequences, or whether they can be overlooked, without a better understanding of how distributive justice and the charitable sector interact.

221. See KAPLOW & SHAVELL, *supra* note 172, at 5 n.8; Bankman & Griffith, *supra* note 1, at 1913 (stating “the concept of economic efficiency carries normative force only when tied to the welfare of individuals.”).

222. See McCaffery, *supra* note 172, at 643–48.

223. See *supra* Part II.B.2.

224. Of course, I recognize that folding distributive justice questions into the equation is a difficult task. First, as a number of scholars have recognized, identifying precisely who benefits from non-profit activity can be difficult. SCHMALBECK & ZELENAK, *supra* note 183, at 417–18; Clotfelter, *supra* note 6, at 9–10. Second, fully considering the distributive justice implications of subsidizing charities requires a counterfactual: identifying the distribution in the absence of subsidized charities, which is almost impossible to do. Clotfelter *supra* note 6, at 12. And lastly, importing the insights that distributive justice might shed into the public policy arena may be quite difficult as a political matter.

225. See KYMLICKA, *supra* note 150, at 13–20 (discussing the most common definitions of utility).

226. See, e.g., Henry Hansman, *Nonprofit Enterprise in the Performing Arts*, 12 BELL J. OF ECON. 341 (1981).

C. Scholarship Which Does Explicitly Address Distributive Justice Issues Is Too Shallow

A second reason for analyzing the relationship between distributive justice and charity in more detail is that it enables us to better respond to the many critiques of the charitable subsidies that raise distributive justice issues.²²⁷ One school of criticism focuses on the distributional aspects of the projects funded by the subsidies, suggesting that current subsidies do not do enough to further distributive justice. Stanford political science Professor Rob Reich, for example, has argued that instead of promoting equality of opportunity, the charitable deduction does exactly the opposite.²²⁸ He maintains that charitable dollars disproportionately benefit the already-better-off in society, thus widening the gap in opportunity between the better- and worse-off.²²⁹ Think, for example, of charitable dollars flowing to schools: most go to private schools with generally wealthier students or to support public schools in well-off areas, thus increasing the head-start of these students over poorer students.²³⁰

Similarly, Teresa Odendahl has criticized much current giving for mainly benefiting the already-privileged in society.²³¹ She focuses on the giving patterns of the very wealthy, which tend to favor elite colleges and universities and cultural institutions like museums and operas.²³² In her

227. Although this Part focuses on scholarly critiques of the charitable tax subsidies, many debates in the media and the political arena echo these points. Congress, for example, has recently held several hearings to determine whether nonprofit hospitals should be required to provide free or reduced cost care to the poor; as of summer 2009, this requirement had found its way into discussions of President Obama's health care reform initiatives. John D. Colombo, *The Role of Redistribution to the Poor in Federal Tax Exemption*, Nat'l Ctr. on Philanthropy & the Law Annual Conference 10 (Oct. 29, 2009) (unpublished manuscript, on file with author). Former Labor Secretary Robert B. Reich (not to be confused with Stanford professor Rob Reich), has also invoked distributive justice considerations in discussing the charitable tax subsidies, arguing that donations to organizations helping the poor should receive more favorable treatment than contributions to other organizations. Robert B. Reich, Op-Ed., *Is Harvard Really a Charity?*, L.A. TIMES, Oct. 1, 2007, available at <http://articles.latimes.com/2007/oct/01/news/oe-reich1>. "If the donation goes to an institution or agency set up to help the poor, the donor gets a full deduction. If the donation goes somewhere else—to an art palace, a university, a symphony or any other nonprofit—the donor gets to deduct only half of the contribution." *Id.* In addition, the public debate over university endowments also echoes these concerns. Colombo, *supra*, at 13–14.

228. Rob Reich, *Philanthropy and Its Uneasy Relation to Equality*, in *TAKING PHILANTHROPY SERIOUSLY: BEYOND NOBLE INTENTIONS TO RESPONSIBLE GIVING* 27–49 (William Damon & Susan Verducci eds., 2007).

229. *Id.*

230. *Id.*

231. TERESA ODENDAHL, *CHARITY BEGINS AT HOME: GENEROSITY AND SELF-INTEREST AMONG THE PHILANTHROPIC ELITE* 3 (1990).

232. *Id.*

view, most such giving simply augments the social status of the already well-to-do in society and does little to help the poor.²³³ This pattern bothers Odendahl on two levels: first, because of the lack of resource redistribution to the non-wealthy, and second, because she believes this pattern augments power already held by the wealthy.²³⁴

Odendahl's latter concern is akin to another common criticism of the charitable tax subsidies: that their structure disproportionately benefits upper-income taxpayers due to their "upside-down" nature.²³⁵ Take the charitable deduction. Because deductions reduce taxable income, they are more valuable to higher-bracket taxpayers than lower-bracket taxpayers. To illustrate, a taxpayer in the 35% bracket saves thirty-five dollars from a one hundred dollar reduction in taxable income, while a taxpayer in the 15% bracket would save only fifteen dollars. Put another way, a taxpayer in the 35% bracket receives a thirty-five dollar subsidy from a one hundred dollar charitable deduction while a taxpayer in the 15% bracket receives a subsidy of only fifteen dollars. Some scholars argue that this is troubling because it allows higher-bracket taxpayers to control more subsidy dollars, giving them a disproportionate influence over public policy.²³⁶ Other scholars are troubled by the distributional impact of the dollar value of the tax benefits²³⁷ received by upper-bracket taxpayers as compared to lower-bracket individuals.²³⁸

At first glance, the arguments of Reich, Odendahl, and the critics of the upside-down subsidy are appealing. They have deep historical roots.²³⁹ They correspond to the common layperson's notion of charity as aid to the poor.²⁴⁰ And they complement the prior generation of scholarship on the charitable tax subsidies,²⁴¹ while highlighting the omissions in more recent

233. *Id.* at 4–5, 11.

234. *Id.* at 3–4, 9, 11; *see also* Simon, *supra* note 6, at 56–61, 66–85 (acknowledging that the charitable deduction grants more decision-making power to the wealthy but nevertheless concluding that it is fair).

235. *See, e.g.*, COMM'N ON PRIVATE PHILANTHROPY AND PUBLIC NEEDS, GIVING IN AMERICA: TOWARD A STRONGER VOLUNTARY SECTOR 109 (1975) [hereinafter COMM'N REPORT]; STANLEY S. SURREY, PATHWAYS TO TAX REFORM 21–22, 36 (1975); Gergen, *supra* note 52, at 1405; Kelman, *supra* note 53, at 833 n.7, 856–58; McDaniel, *supra* note 64, at 383. *But see* Griffith, *supra* note 53, at 363; Strnad, *supra* note 87, at 268–69.

236. *See* Levmore, *supra* note 84, at 405–06; McDaniel, *supra* note 64, at 391; Schizer, *supra* note 107, at 32–33.

237. That is, the value of a given exemption or deduction.

238. *See, e.g.*, COMM'N REPORT, *supra* note 235, at 108; Kelman, *supra* note 53, at 858.

239. *See supra* Part II.

240. HISTORICAL DEVELOPMENT HEARING, *supra* note 8, at 61–68 (2005) (stating “the ordinary sense of the term [charity] . . . generally means the relief of the poor and distressed.”).

241. *See supra* text accompanying notes 63–66.

scholarship²⁴² and the confusion in current law.²⁴³ That said, a better sense of what the various accounts of distributive justice suggest for the charitable tax subsidies is necessary to fully assess these critiques.

Take the upside-down subsidy claim, for example. Discomfort with allocating larger tax benefits to higher-bracket taxpayers must stem from some sense of what a “fair” distribution of tax benefits and burdens is. The same is true of the argument that the tax subsidies unfairly give the wealthy a disproportionate say in public policy. Does this criticism stem from an egalitarian concern about what constitutes a “fair” distribution of power?²⁴⁴ Or does it come from a concern that the voices of the wealthy do not represent the preferences of the whole?²⁴⁵ It is unclear, therefore, exactly which conception of distributive justice those who levy this criticism are building upon, and this critique might carry more or less weight depending on which conception of justice is used to judge the subsidies. To that end, critics of the charitable deduction would be well-served to spell out more explicitly their conceptions of fairness.

The same holds true for defenders of the deduction; existing responses to the upside-down subsidy claim can be enhanced by a more detailed exploration of distributive justice.²⁴⁶ As previous scholars have accurately noted, the true extent of these upside-down effects cannot be judged without factoring in potential benefits received by non-itemizers and lower-bracket taxpayers as recipients of charitable goods and services.²⁴⁷ For example, Boris Bittker has posited that regardless of the upside-down effect, the overall effect of the deduction is to promote voluntary redistribution.²⁴⁸ John Simon has similarly argued, with respect to the estate tax charitable deduction, that “it is doubtful that the charitable deduction results in a less egalitarian distributional pattern than . . . in a world without deductions” and that the less advantaged benefit from the intangible benefits of a vibrant non-profit sector (such as increased flexibility and experimentation and the diffusion of power).²⁴⁹ Simon then

242. See *supra* Part III.A.

243. See *supra* Part III.D.

244. See Simon, *supra* note 6, at 26 (linking the upside-down subsidy with the dispersion of power in an inequalitarian manner).

245. See, e.g., Simon et al., *supra* note 7, at 279 (noting that current scholarship raises both as possible causes of concern).

246. See, e.g., Griffith, *supra* note 53, at 354–63 (discussing additional ways of assessing the distributional impact of tax expenditures and whether the “upside down subsidy” argument has merit).

247. Bittker, *supra* note 55, at 55–56.

248. *Id.* at 55–56.

249. Simon, *supra* note 6, at 33, 78.

concludes that the charitable tax subsidies therefore do not implicate equal opportunity concerns.²⁵⁰

Bittker's response concerning voluntary redistribution and Simon's reply concerning egalitarianism, however, are incomplete without a more nuanced understanding of what is meant by "redistribution" and "egalitarianism." Simon's article, for example, extensively discusses the question of whether the charitable tax subsidies violate equality norms by using a four-part test inspired by Rawls's difference principle.²⁵¹ While this is likely the most nuanced discussion to date of the interplay between the charitable tax subsidies and distributive justice theory, it discusses but one such theory. It may be the case, therefore, that both Simon's and Bittker's responses adequately address the upside-down subsidy argument under some versions of distributive justice but not others.

The same holds true for the arguments of Reich and Odendahl; one cannot fully assess their criticisms without understanding the range of accounts of equality and justifications for helping the poor. What does it mean to be "poor" or "disadvantaged"? Should we consider only one's material assets, or other factors as well? If the latter, which additional aspects? If our goal is to enhance equality, what, exactly, are we trying to equalize? Should all transfers benefiting the poor be treated the same way? Does simply giving a materially disadvantaged unemployed person food, clothing, or money assist him in the same manner as teaching job skills so that he can earn his own keep?

These questions illustrate that even if we assume that the purpose of charity is to help the poor, without a more grounded notion of who is "poor" and "disadvantaged" and what our duties to such persons are, we cannot determine what charitable activities should be encouraged in our society. For example, it may be the case that the current subsidies are too narrow under some views of equality and too broad under others. Alternatively, perhaps other interpretations of equality or helping the poor countenance a broad definition of charity similar to the current one. Moreover, these criticisms assume that the redistribution of resources resulting from the charitable tax allowances is justified only if the poor (however defined) are benefited or equality is enhanced. It may be the case, however, that some theories of distributive justice justify charitable subsidies on other grounds. Thus, we cannot satisfactorily address justice-based criticisms of the charitable tax subsidies without a more detailed

250. *Id.* at 30–33.

251. *Id.* at 56–84.

exploration of the interaction between distributive justice and those subsidies.

D. The Law Governing the Charitable Tax Subsidies Is Confused

Given the lack of theoretical guidance about what activities should qualify for the charitable tax subsidies, it is not surprising that the law governing those subsidies is a bit schizophrenic when it comes to distributive justice issues. Namely, there seems to be no rhyme or reason concerning whether or not a given organization must somehow serve the poor in order to qualify,²⁵² and there is little concrete guidance as to the reason for subsidizing groups that do not help the poor.²⁵³

Quite generally, to qualify for the charitable tax subsidies under Sections 170 and 501(c)(3) of the Code, an organization must be formed for “religious, charitable, scientific, literary, or educational purposes.”²⁵⁴ The term “charitable purposes” has been broadly interpreted to include not only aid to the poor, but also a wide variety of additional goals deemed to have a “community benefit.”²⁵⁵ A few such goals include, for example,

252. In contrast, the United Kingdom recently added a requirement to its charitable laws that organizations may not exclude those who are less well off from benefiting from the organization’s activities. CHARITY COMM’N, CHARITIES AND PUBLIC BENEFIT: THE CHARITY COMMISSION’S GENERAL GUIDANCE ON PUBLIC BENEFIT 22–27 (2008) (guidance from the U.K.’s Charity Commission concerning the requirement in Part 1 § 3 of the 2006 U.K. Charities Act that charities offer a “public benefit”).

253. See generally FISHMAN & SCHWARZ, *supra* note 29, at 101–218; Simon et al., *supra* note 7, at 277–78 (discussing Congress’s inconsistency in requiring some institutions but not others to help the poor in order to qualify for the charitable tax subsidies); Colombo, *supra* note 227, at 4–13 (discussing the changing standards used by courts and the IRS to determine qualification for tax exemption). Scholars have lamented this fact for years, searching in vain for a way to make sense of the doctrinal mess created by Treasury, the IRS, and the courts. See, e.g., John D. Colombo, *The Role of Access in Charitable Tax Exemption*, 82 WASH. U. L.Q. 343, 343 (2004). Recently, Congress has also taken an interest in the problem. See *Tax-Exempt Charitable Organizations: Hearing Before the Subcomm. on Oversight of the H. Comm. on Ways and Means*, 110th Cong. (2007).

254. I.R.C. §§ 170(c)(2)(B) and 501(c)(3) (2006). Although the statutory language seems to differentiate between the specifically enumerated purposes (e.g., religious, educational, or scientific, and the like) and the catch-all “charitable purpose,” the Supreme Court has held that the common-law standards of charity apply to all organizations seeking to qualify for the charitable tax subsidies. *Bob Jones Univ. v. United States*, 461 U.S. 574, 598–99 (1983). Thus, religious and educational organizations, for example, are not *per se* exempt; rather, they must be *charitable* religious or educational organizations.

255. Treas. Reg. § 1.501(c)(3)—1(d)(2) (as amended in 2008); HISTORICAL DEVELOPMENT HEARING, *supra* note 8, at 63. Although the colloquial meaning of the word “charitable” generally relates to helping the poor, the legal definition, which stems from charitable trust law, is much broader. See HISTORICAL DEVELOPMENT HEARING, *supra* note 8, at 61–68.

preserving the environment, providing cause-oriented public interest litigation, furthering public health, supporting the arts, and so on.²⁵⁶

In large part, the Code and regulations determine which organizations provide the requisite community benefit indirectly, via the requirement of an appropriately indeterminate charitable class of beneficiaries²⁵⁷ and the prohibitions against quid pro quos,²⁵⁸ commerciality,²⁵⁹ private benefit,²⁶⁰ and private inurement.²⁶¹ These rules (which also apply to organizations qualifying under the enumerated purposes) therefore work in the negative: the idea seems to be that by attempting to ensure that if an organization does not benefit specific individuals or act “too much” like a for-profit commercial enterprise, then the organization must be doing something good for the community at large.

As numerous scholars have lamented, not only are these rules extraordinarily vague and underdeveloped, but the very act of defining the good by prohibiting the bad creates a number of problems.²⁶² Simply because an organization is undertaking activities that do not benefit specific individuals does not mean that those activities necessarily benefit the community at large. The rules, therefore, may be necessary for defining whether certain activities deserve subsidies, but they are not sufficient.

More specifically, confusion arises because it is unclear precisely what constitutes the community benefit required of groups formed for “charitable purposes” and whether such groups must offer any type of assistance to the less-fortunate. In contrast, it is well settled that groups formed for enumerated purposes do not need to assist the needy to qualify for the subsidies, although there is no coherent explanation for this

256. See HISTORICAL DEVELOPMENT HEARING, *supra* note 8, at 64; FISHMAN & SCHWARZ, *supra* note 29, at 105–43, 357–62.

257. The requirement of a charitable class (which is not explicitly identified as such in the Code or regulations) stems from the idea that if an organization is formed to benefit specifically identified individuals or a group that is “too small,” then it is not doing something beneficial for the community at large. See HISTORICAL DEVELOPMENT HEARING, *supra* note 8, at 63; BRUCE R. HOPKINS, *THE LAW OF TAX-EXEMPT ORGANIZATIONS* 180–81 (9th ed. 2007).

258. Treas. Reg. § 1.170A-1(h) (as amended in 1996).

259. Treas. Reg. § 1.501(c)(3)-1(e) (as amended in 2008). See HISTORICAL DEVELOPMENT HEARING, *supra* note 8, at 51.

260. Treas. Reg. § 1.501(c)(3)-1(d)(1)(ii) (as amended in 2008). See HISTORICAL DEVELOPMENT HEARING, *supra* note 8, at 55–56.

261. I.R.C. § 501(c)(3) (2006) (in order to qualify for tax exemption, “no part of the net earnings . . . [can] inure[]to the benefit of any private shareholder or individual”); Treas. Reg. § 1.501(c)(3)-1(c)(2) (as amended in 2008); HISTORICAL DEVELOPMENT HEARING, *supra* note 8, at 54–55.

262. See, e.g., John D. Colombo, *In Search of Private Benefit*, 58 FLA. L. REV. 1063 (2006).

either.²⁶³ Moreover, this is true even though the Supreme Court has held that common-law standards of charity apply to the latter as well as to the former.²⁶⁴ Thus, not only is there confusion as to whether groups qualifying under the “charitable purpose” prong must benefit the poor, but also as to why “charitable” seems to be interpreted one way for the “charitable purpose” requirement but another way when applied as a requirement for the specifically enumerated purposes.²⁶⁵

To give but a few examples, hospitals need not offer any free or reduced-cost services to the poor, on the grounds that promoting the health of the community is a benefit.²⁶⁶ Modern IRS rulings and court opinions, however, seem to make free care for the poor a virtual requirement of exemption for other health organizations (such as HMOs and pharmacies).²⁶⁷ Similarly, art galleries and community theaters need not reduce fees to the poor in order to qualify,²⁶⁸ yet groups that provide other recreational facilities for adults (such as health clubs) are generally required to do so.²⁶⁹ At least in one instance, however, an ice skating rink attained tax-exempt status with nothing more than vague plans to offer some sort of program for disadvantaged children.²⁷⁰ In that case, the IRS held that simply providing recreation on a non-discriminatory basis promoted social welfare and therefore qualified for the subsidies.²⁷¹

This confusion also exists with respect to groups providing more tangible financial assistance to beneficiaries. An organization that provided merit-based pay and college loan reimbursements to police officers qualified for the subsidies without being required to tie those

263. See Colombo, *supra* note 253, at 343.

264. See *Bob Jones Univ. v. United States*, 461 U.S. 574 (1982).

265. For a very readable account of the doctrinal confusion, see Colombo, *supra* note 227.

266. Rev. Rul. 69-545, 1969-2 C.B. 117 (hospitals can still qualify for tax 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 indigent patients may qualify for tax exemption). That said, a number of states have started to challenge whether hospitals that do not offer free or reduced cost services to the poor are eligible for state property-tax exemptions. See, e.g., *Provena Covenant Med. Ctr. v. Dep’t of Revenue*, 894 N.E.2d 452 (Ill. App. Ct. 2008); Debra Pressy, *Provena Covenant to Have its Tax Exemption Case Heard*, CHAMPAIGN NEWS-GAZETTE, Aug. 31, 2009. Thus, state law would also be aided by a more explicit consideration of distributive justice issues.

267. See, e.g., *IHC Health Plans, Inc. v. Comm’r*, 325 F.3d 1188 (10th Cir. 2003); *Fed’n Pharmacy Serv., Inc. v. Comm’r*, 625 F.2d 804 (8th Cir. 1980), *aff’g*, 72 T.C. 687 (1979) (denying exemption to a pharmacy that sold drugs and other items at cost to the poor and elderly); John D. Colombo, *The Failure of Community Benefit*, 15 HEALTH MATRIX 29, 30–37 (2005).

268. *Goldsboro Art League v. Comm’r*, 75 T.C. 337 (1980).

269. See Colombo, *supra* note 253, at 358–60, 384.

270. I.R.S. Priv. Ltr. Rul. 05-32-058 (May 18, 2005).

271. *Id.*

particular programs to need.²⁷² In contrast, a somewhat similar organization that provided housing down payment assistance was denied qualification on the grounds that it assisted anyone qualifying for an FHA or HUD loan, with no additional income criteria.²⁷³ Groups that provide various forms of community-development-oriented housing assistance must either serve the poor or members of minority groups in order to qualify.²⁷⁴ Simply assisting middle-class families, even if those families would be otherwise unable to find housing in a given area, is not enough (unless those families are racial minorities or the neighborhood is in decay).²⁷⁵

The problems created by this confusion became particularly acute in the aftermath of the September 11, 2001, terrorist attacks, when over a billion dollars flowed to disaster relief groups such as the Red Cross and the Twin Towers Fund. Traditionally, such groups were required to identify and assist only victims in dire financial need. As a result, the Service initially balked when such groups announced plans to assist the families of all victims, whether financially needy or not. After some outcry, however, the Service relented and allowed distributions to the non-needy if made “in good faith using objective standards.”²⁷⁶

Given the vast resources Americans spend on charity, the confusion identified above is untenable. In order to better spend our charitable dollars on activities “beneficial” to society, we need a more coherent notion of what is considered “beneficial.” As previously discussed, this cannot be done without considering distributive justice in addition to pluralism and efficiency. Using distributive justice as a tool, therefore, has practical, in addition to theoretical, benefits.²⁷⁷

272. I.R.S. Priv. Ltr. Rul. 08-19-023 (Feb. 14, 2008).

273. I.R.S. Priv. Ltr. Rul. 08-21-038 (Feb. 28, 2008).

274. Rev. Rul. 70-585, 1970-2 C.B. 115.

275. *Id.*

276. I.R.S. Notice 2001-78, 2001-50 I.R.B. 576; FISHMAN & SCHWARZ, *supra* note 29, at 143-47; see also David Barstow & Diana B. Henriques, *I.R.S. Makes an Exception on Terror Aid*, N.Y. TIMES, Nov. 17, 2001, at B1; David Barstow & Diana B. Henriques, *Victims' Funds May Violate U.S. Tax Law*, N.Y. TIMES, Nov. 12, 2001, at B1.

277. See, e.g., Simon et al., *supra* note 7, at 278. It may also be the case that explicitly considering distributive justice can help us better assess the desirability of, or best structure for, certain rules currently governing subsidized organizations, such as the prohibitions against lobbying and political activities, the private benefit rule, and the unrelated business income tax.

IV. A PREVIEW OF THE IMPLICATIONS OF USING DISTRIBUTIVE JUSTICE AS AN ADDITIONAL TOOL

The foregoing parts have argued that we would be well-served to use distributive justice—in addition to the tools of efficiency and pluralism—in our assessments of the charitable tax subsidies. Although the rest of this Series shall explore in depth the effects of doing so, a short preview of some of these potential implications may be beneficial at this point. To that end, this Part will briefly explore some consequences of applying those theories of distributive justice most commonly invoked in discussions of tax policy: utilitarianism, the maximin principle, the capabilities approach, and resource egalitarianism.²⁷⁸ In so doing, this Part will highlight some of the ways distributive justice can enhance our understanding of the subsidies: in some cases, a given theory might justify a structure similar to the current one, and thus help us respond to the critics of the subsidies. In other cases, a theory might narrow, or broaden, the scope of what we consider charitable (or simultaneously do both). And in some instances, explicitly identifying our normative theory can help elucidate whether a given activity must help the financially disadvantaged to merit a subsidy.

A. Utilitarianism

Although utilitarianism²⁷⁹ has fallen into disrepute in other areas,²⁸⁰ it exerts a strong influence on current tax policy²⁸¹ and its progressive

278. Of course, each of these broad strands of distributive justice has many variations. As a mere consumer of philosophy (and not as an actual philosopher), I do not intend to critique or defend these theories. Nor can I address each possible variation of these theories, though numerous sub-strands have scholarly support in the philosophical literature. Instead, by focusing on the essentials of those theories with the most scholarly support in this Series, I hope to start a conversation about how to integrate a more nuanced view of distributive justice into our discussions of charitable giving.

279. KYMLICKA, *supra* note 150, at 10; MURPHY & NAGEL, *supra* note 150, at 51; RAWLS, *supra* note 41, at 20. Readers familiar with the philosophical debates concerning utilitarianism will, of course, know that no single definition of utility exists in the philosophical literature. *See, e.g.*, HAUSMAN & MCPHERSON, *supra* note 172, at 100–01; KYMLICKA, *supra* note 150, at 13–20. This spurs many scholars to ignore, for public policy purposes, subjective measures of utility (such as individual preferences) and to instead focus on objective measures (such as the distribution of goods and evils that influence happiness). MURPHY & NAGEL, *supra* note 150, at 52–53. For example, two such measures are liberty and money, which are considered useful regardless of one's specific preferences, because they enable people to satisfy their individual preferences, whatever those may be. KYMLICKA, *supra* note 150, at 19–20.

280. McCaffery, *supra* note 172, at 643 n.167.

281. *See, e.g.*, Richard A. Musgrave, *Equity and the Case for Progressive Taxation*, in *TAX JUSTICE: THE ONGOING DEBATE* 9, 14 (Joseph J. Thorndike & Dennis J. Ventry Jr. eds., 2002); Nancy C. Staudt, *The Hidden Costs of the Progressivity Debate*, 50 *VAND. L. REV.* 919, 939–49 (1997)

nature.²⁸² As applied to tax policy, theorists use it to argue that the best tax system redistributes income from those with “more” in order to help those with “less”.²⁸³ The initial take on utilitarianism and charitable giving is that any giving that redistributes from the wealthy to the less-wealthy is consistent with utilitarian principles.²⁸⁴ Most likely, this would require identifying organizations that, as a general matter, effectuate downward redistribution. This would justify subsidizing organizations such as museums, theaters, and universities, where many attendees (even if middle or upper-middle class) are less wealthy than the benefactors.²⁸⁵ Here, explicitly identifying one’s baseline theory of distributive justice helps to better evaluate existing arguments that such groups should not be subsidized because they do not “help the poor.”²⁸⁶

Using utilitarianism as our baseline would also render charitable certain activities that are not considered charitable under current law, and vice versa. For example, current law does not consider financial redistribution to the non-poor to be charitable unless some other non-financial benefit is also created,²⁸⁷ and controversy surrounds whether and to what extent the poor must be given free or reduced-cost services in

(stating “utilitarianism has been the primary ethical foundation of the tax laws throughout the twentieth century . . .”).

282. That is, a rate structure in which a higher rate of tax applies to the last dollar earned by a taxpayer than to her first dollar. For example, in 2009, someone’s first dollar of taxable income is taxed at a rate of 10%, while one’s last dollar can be taxed at rates as high as 35%.

283. The traditional application of utilitarian theory to tax policy makes three assumptions. The first is that measuring income or wealth is the best proxy for measuring utility. The second assumption is the declining marginal utility of resources (the theory that each additional dollar an individual has is worth subjectively less than the previous dollar). As applied to a given individual, this suggests that an extra dollar is subjectively more valuable to someone with an income of \$10,000 than to someone with an income of \$100,000. The final assumption is that all individuals have identical utility curves (that is, all individuals with an income of \$10,000 value their 10,001st dollar equally; all individuals with an income of \$100,000 value their 100,001st dollar equally, and so on). Bankman & Griffith, *supra* note 1, at 1946–47.

284. To implement this as precisely as possible, however, would require identifying with some precision who should be considered benefactors versus beneficiaries of said redistribution, SCHMALBECK & ZELENAK, *supra* note 183, at 417–18, as well as determining their relative income levels. But, what if we used the idea of downward redistribution as a general guide, without requiring technically-perfect compliance? What might that suggest?

285. *See generally* Clotfelter, *supra* note 6 (collecting empirical studies examining the distributional aspects of non-profits in the health services, education, religious organizations, social services, and arts and culture subsectors).

286. *See supra* Part III.C.

287. For example, groups that subsidize housing for the middle class in expensive neighborhoods do not qualify for the charitable tax exemption. Rev. Rul. 70-585, 1970-2 C.B.115, in FISHMAN & SCHWARZ, *supra* note 29, at 136–37. Such groups can, however, qualify if they improve racial diversity in those neighborhoods. *Id.* at 135–36. And until clarification after the terrorist attacks of September 11, it was unclear whether material assistance to the non-poor in the form of disaster relief was considered charitable. *Id.* at 143–47.

other contexts (such as health care and recreation centers).²⁸⁸ Under a utilitarian-centered theory of charitable giving, those questions would be resolved: so long as subsidizing a given activity results in downward income redistribution, it does not matter where along the income spectrum that redistribution occurs. On the other hand, focusing on downward redistribution would also mean that organizations whose benefactors are of roughly the same income class as their beneficiaries would not be subsidized. This would have the greatest impact in the case of churches and other houses of worship,²⁸⁹ and *might* also impact some social service organizations.²⁹⁰ Using utilitarianism to delineate the contours of the charitable tax subsidies would thus result in a different set of subsidies than under current law. Without more information on the distributional aspects of various charities, however, those contours remain unclear.²⁹¹

Utilitarianism could lead to potentially greater changes if we rejected using wealth as a proxy for utility and instead defined utility as happiness. Recently, a growing body of work has attempted to help us better understand happiness by identifying a number of attributes associated with happiness.²⁹² The implications of these insights on the interaction of utilitarianism and charitable giving also merit attention. For example, much work has found a link between religion and happiness, which suggests that subsidizing churches and other places of worship that promote the practice of religion would be beneficial.²⁹³ While this is not a

288. See *supra* Part III.D.

289. Much evidence suggests, for example, that churches are highly segregated by income. This implies that most redistribution within churches is “horizontal” instead of vertically downward, which would not increase utility in the sense discussed above.

290. This is so because evidence suggests that donative support for these groups tends to increase as one’s income decreases. Gerald E. Auten, Charles T. Clotfelter, & Richard L. Schmalbeck, *Taxes and Philanthropy Among the Wealthy* 403–06 in *Does Atlas Shrug?* at 392 (Joel B. Slemrod, ed.) (2000). We can imagine, for example, a youth baseball team in a lower-middle-class area where donors to the team are financially comparable to the families whose children play on the team. Under a redistribution-focused application of utilitarianism, this would no longer merit a subsidy. To that end, most mutual non-profits would lose their tax exemption, since the mutual status implies the donors are the same as the beneficiaries.

291. Although such information is somewhat scarce at the moment, it can be obtained (as demonstrated by the work compiled by Charles Clotfelter in the 1980s). See *generally* Clotfelter, *supra* note 6.

292. While current research sometimes suggests a causal connection, at other times only a correlation can be shown. Let’s assume, however, for purposes of our thought experiment, that causation could actually be shown with respect to the attributes discussed below.

293. ARTHUR C. BROOKS, *GROSS NATIONAL HAPPINESS: WHY HAPPINESS MATTERS FOR AMERICA—AND HOW WE CAN GET MORE OF IT* 41–56 (2008); Ed Diener & David G. Myers, *Who Is Happy?*, 6 *PSYCHOL. SCI.* 10, 16 (1995). More specifically, people who actively practice a religion, whether by attending services or praying on their own, tend to be happier. BROOKS, *supra*, at 43–46. This holds true regardless of the religion practiced, and does not vary with age, sex, or education.

new proposition, these subsidies often draw heavy criticism.²⁹⁴ Applying a happiness-variant of utilitarianism, therefore, helps us assess one of the most common criticisms of the current charitable tax subsidies.

Another implication is that happiness-based utilitarianism might call for an emphasis on groups that enhance friendships and relationships and encourage hobbies. A number of studies have suggested that people with several close relationships are happier than those without such ties and that a lack of such ties increases depression.²⁹⁵ Moreover, another contributor to happiness is active participation in hands-on meaningful activities that absorb one's attention.²⁹⁶ One rough rule of thumb, therefore, would be to subsidize more heavily non-profits that enable people with similar hobbies and interests to engage in those activities together in a shared community setting.²⁹⁷ While many such groups already qualify for tax exemption, not all (such as country clubs and participatory sports leagues) qualify for tax-deductible contributions.²⁹⁸ Thus, applying a utilitarian analysis in this context might expand the set of organizations eligible to receive deductible contributions. Moreover, this suggests that non-profits providing non-participatory goods and services (such as the opera) would not be subsidized as much as other organizations, but for reasons other than those articulated by past scholars. (This is not to say that watching an opera does not bring one happiness, just that so doing might not maximize the bang for one's happiness buck).

B. *The Maximin Principle*

A second welfarist approach to distributive justice commonly invoked by tax theorists is the maximin criterion, under which a just system of distribution maximizes the well-being of the least-advantaged.²⁹⁹ Such an

Although current research has found a correlation between religion and happiness, whether the former causes the latter is still unclear. For purposes of our thought experiment, however, suppose that future happiness research does find causation. What would that suggest subsidizing?

294. See, e.g., Gergen, *supra* note 52, at 1434–43.

295. BROOKS, *supra* note 293, at 73–74; Diener & Myers, *supra* note 293, at 14. To some extent, this is circular—happier people are also more likely to make friends in the first instance than unhappy people. That said, evidence does suggest a causal link between friendship and happiness and that additional friends increase happiness. BROOKS, *supra* note 293, at 73–74.

296. Diener & Myers, *supra* note 293, at 15.

297. One difficulty, of course, would be creating a definition that differentiates between groups formed by people who are already friends (yet create a non-profit just to have their activities subsidized) and between non-self-serving organizations that are trying to strengthen old or foster new friendships among third parties.

298. See HOPKINS, *supra* note 257, at 433–36.

299. See, e.g., Bankman & Griffith, *supra* note 1, at 1949–50; Zelenak & Moreland, *supra* note 1,

approach would likely result in a narrower deduction than under a pure utilitarian model and clear up a recurring confusion in current law: it suggests that groups that assisted the middle class would not merit a deduction, but that groups assisting the least-advantaged would.³⁰⁰

One wrinkle in this approach is that it would require determining how to treat organizations that benefit the least-advantaged and the already-advantaged simultaneously. For example, many private universities primarily cater to the wealthy, but do provide some help to the least-advantaged in the form of scholarships, community outreach programs, and even employment opportunities. It is likely that a subsidy is still warranted because of the great marginal benefit to those who do need such assistance. A Harvard education will have a much greater impact on a poor student from rural Kentucky or inner-city Baltimore than a fourth-generation Harvard graduate. Thus, the small marginal benefit to those already privileged may be justified by the much larger marginal benefit to the less-privileged, along the lines of Rawls's difference principle.³⁰¹ Such groups, therefore, should merit at least a partial subsidy. What would differ from current law, however, is the insistence that such groups should engage in a substantial amount of assistance to the needy.

at 53. Many tax scholars associate this criterion with Rawls's difference principle, which tolerates social and economic inequalities only if they benefit the least-advantaged. *See, e.g.*, MURPHY & NAGEL, *supra* note 150, at 134; HARVEY S. ROSEN & TED GAYER, *PUBLIC FINANCE* 266 (8th ed. 2008); JOSEPH E. STIGLITZ, *ECONOMICS OF THE PUBLIC SECTOR* 102 (3d ed. 2000); Bankman & Griffith, *supra* note 1, at 1949–50; Linda Sugin, *Theories of Distributive Justice and Limitations on Taxation: What Rawls Demands from Tax Systems*, 72 *FORDHAM L. REV.* 1991, 1993 n.9, 1994 (2004); Zelenak & Moreland, *supra* note 1, at 53. Although the difference principle itself is complex and subject to a variety of interpretations, *see* David Kamin, Note, *What is a Progressive Tax Change? Unmasking Hidden Values in Distributional Debates*, 83 *N.Y.U. L. REV.* 241, 269–70 n.70 (2008), Rawls himself has not only endorsed the maximin criterion as one reasonable understanding of the difference principle but also allowed that its application to tax theory is reasonable. John Rawls, *Concepts of Distributive Equity: Some Reasons for the Maximin Criterion*, 64 *AM. ECON. REV.* 141 (1974).

300. While the above discussion uses financial resources as a measure of advantage, it is quite likely that a maximin principle that used other metrics to measure advantage would yield an entirely different set of subsidies. For example, as discussed *supra*, in Part III.D, the propriety of assisting financially well-off victims of disasters has been questioned. If, however, one turns to other metrics of well-being, it seems quite plausible to consider families fleeing Hurricane Katrina or reeling from the death of a loved one after the September 11 attacks (to name but two examples) as among our country's least-advantaged. Similarly, it may be the case that the unhealthy should be considered disadvantaged, regardless of their income or wealth. Again, we see that a more nuanced consideration of distributive justice might help us better assess common criticisms of the charitable tax subsidies.

301. *See* Fleischer, *supra* note 30, at 303–07.

C. *The Capability Approach*

A third consequentialist concept is the capability approach championed by Sen and Nussbaum. Under this model, society's duty is to ensure that each individual enjoys a minimal level of certain basic capabilities.³⁰² These basic capabilities include:

- “Life” (“being able to live to the end of a human life of normal length”)
- “Bodily Health” (having good health, including adequate nourishment and adequate shelter)
- “Bodily Integrity” (freedom of movement, security from assault and violence, sexual choice and opportunity)
- “Senses, Imagination, and Thought” (using the senses to think, imagine, reason, and create, and having the education necessary to do so)
- “Emotions” (having “attachments to things and people” and being able to love and experience other emotions)
- “Practical Reason” (“[b]eing able to form a conception of the good”)
- “Affiliation” (“[b]eing able to live with and toward others . . . [and] engage in . . . social interaction” as well as being treated as an equal of dignified worth)
- “Other Species” (concern for other species and the environment)
- “Play” (“[b]eing able to laugh, [] play, [and] enjoy recreational activities”)
- “Control Over One’s Environment” (participating in political choices as well as opportunities to hold property and employment).³⁰³

In contrast to the maximin approach, the capabilities approach would likely counsel a fairly broad conception of charity. As an initial matter, since this approach focuses on minimum thresholds of capabilities (instead

302. Martha C. Nussbaum, *Capabilities as Fundamental Entitlements: Sen and Social Justice*, 2003 FEMINIST ECON. 33, 40–41 (2003).

303. *Id.* at 41–42.

of equality of capabilities or redistribution for utilitarian principles), the deduction would generally not be limited to organizations benefiting only the poor and disadvantaged. Take, for example, the opera or an art museum. As long as the organization provides some access to those who otherwise would not have the ability to enjoy its benefits, it furthers the development of a threshold level of capabilities. That it may also benefit those who might be able to develop their imaginations and senses without a subsidy generally should not matter, for this approach does not seem to be relational: Person A's capacity to enjoy art does not appear to affect Person B's capacity to enjoy art.³⁰⁴ Thus, the fact that wealthy people may primarily benefit from groups like the opera does not generally detract from the fact that—so long as the opera made itself available to poorer persons via reduced prices or a similar manner—the opera also enhances the capabilities of the less advantaged.

The capabilities approach also supports subsidizing a wide range of activities. For example, the capability of “play” suggests subsidizing not only groups like the YMCA but also sports leagues, tennis clinics, and the like. And the capability of “senses, imagination, and thought” suggests subsidizing the arts, literature, music, dance, and so on—both to participate in and to enjoy vicariously. The capabilities approach may thus suggest a deduction very similar to the current one. To that end, explicitly recognizing this approach to distributive justice helps answer many of the current criticisms leveled against the charitable tax subsidies. So doing would, however, change current law in one important respect by requiring subsidized organizations somehow to assist people who would otherwise be unable to develop their capabilities. On the other hand, due to the breadth of the capabilities approach, using it to define charity, standing alone, may not help us allocate scarce resources.

D. Egalitarianism and Equality of Opportunity

The notion of equality of opportunity³⁰⁵ plays a large role in many tax policy debates, providing one of the most common justifications for the

304. The one exception *might* be education, where relative levels of education do affect other capabilities. For example, even if Person A has a threshold level of education, she may still be at a disadvantage in competing for jobs and the like (control over one's environment) if Person B has a clearly superior education. This raises the question of whether elite schools like Harvard and Yale, which primarily (but not exclusively) benefit individuals who could develop their capabilities without societal assistance, should merit a subsidy.

305. Most lay people think of “equal opportunity” as requiring that one's talents and abilities should determine one's chances for success in life. Individual outcomes may diverge over time, but

estate tax and other forms of redistribution. As explored below, various strands of egalitarianism have very different implications for the charitable tax subsidies.³⁰⁶

1. *Equality of Resources*

This version of equality (which would equalize financial resources, so that a smart but poor child could become a successful businesswoman, doctor, or lawyer) would suggest granting a deduction for charities that enable less well-off individuals to develop their innate skills as much as their wealthier counterparts. At first, this appears to have few implications: of course, we think, groups that provide training and education that enable the poor to develop their skills enough to compete in the marketplace (such as job-training programs and tutoring sessions in low-income areas) should be subsidized.

But the implications might not be so clear cut. For example, what about organizations that simply provide material benefits to the poor, such as soup kitchens, low-income health clinics, and the like, without any “training” component? Should these be subsidized on the grounds that a poor child cannot learn to read if she is too hungry to learn? After all, poor adults may have a hard time finding jobs to support themselves without adequate food, clothing, and so on. Or, might one argue that simply “giving someone a fish” does not help them develop their talents, and that only “teaching someone to fish” creates equality of resources over time?

And what about organizations that enable the poor or middle class to develop other, less-marketable skills, in the same manner as their better-off peers. For example, what about music camps for the non-wealthy? Is helping a talented pianist who otherwise could not afford a pricey music camp become a better musician—even if it has no impact on her financial well-being—what we have in mind when we speak of ensuring that everyone has an equal chance to develop their talents? In other words,

that divergence should not be due to the financial circumstances of one’s birth. Rather, divergent outcomes should be due to differing initial endowments or differing choices with respect to the use of initial endowments. As many readers already know, however, there are several different interpretations of what is required to implement that ideal: only the absence of legal impediments to success based on race or class (“careers open to talents”), or the equalization of initial resources (“equality of resources”)? If the latter, what should be equalized? Financial resources? Capabilities? Welfare?

306. For insightful analyses of the various strands of equality of opportunity, see KYMLICKA, *supra* note 150, at 53–101; ERIC RAKOWSKI, *EQUAL JUSTICE* 43–148, 149 (1991); Alstott, *supra* note 3, at 476–85; David G. Duff, *Taxing Inherited Wealth: A Philosophical Argument*, 6 *CAN. J.L. & JURIS.* 3, 45–57 (1993). In this short preview, I only address two such strands, although the second part of this Series will also address “careers open to talents” and “equality of capabilities.”

should we treat all talents equally? Lastly, what about charities that help both the advantaged and disadvantaged develop their skills? (As discussed with respect to the maximin theory, it is likely that such groups should be subsidized only if they do, in fact, aid the disadvantaged, and even then, only partially.) Regardless, we can see that focusing on equality of resources may change the contours of the charitable tax subsidies.

2. *Equality of Opportunity for Welfare*

In contrast, a deduction structured around equality of opportunity for welfare (which equalizes tastes, on the theory that someone with expensive tastes is at a relative disadvantage vis-à-vis individuals with cheaper tastes)³⁰⁷ would likely be fairly broad, much like the current subsidies. Under this conception of equality, those with expensive tastes (wine, leisure, and the like) should be compensated, which suggests subsidizing groups such as Harvard, the opera, and the ballet without regard to the financial status of the charity's clientele: under this view, someone who enjoys the opera (regardless of their income level) is worse off than someone of the same income level who is satisfied with *American Idol*, and her tastes should therefore be subsidized. Explicitly identifying this conception of equality could also help resolve the give-a-fish-teach-to-fish debate, for this theory suggests that those with a stronger taste for leisure are worse off than hard workers. Under this conception of equality, therefore, simply giving someone a fish should be considered charitable. Here again, we see that making explicit the normative underpinnings of the charitable tax subsidies might help us answer critics of the subsidies.

V. CONCLUSION

Analysis of distributive justice should play a role in theorizing the charitable tax subsidies. So doing extends the work of the efficiency and pluralism scholarship by recognizing that the charitable tax subsidies have redistributive consequences that must be addressed. Making distributive justice concerns explicit also helps us better analyze whether the content of the subsidies should be defined more precisely in order to further the implicit normative values motivating the current focus on efficiency and pluralism. As can be seen, alternative conceptions of distributive justice have very different consequences for the content of the subsidies. It is precisely this diversity of implications that should animate us to think

307. RAKOWSKI, *supra* note 306, at 44–45.

more carefully about what distributive justice—alongside the values of efficiency and pluralism—adds to our understanding of the charitable tax subsidies.