
EQUALITY OF OPPORTUNITY AND THE CHARITABLE TAX SUBSIDIES

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* Associate Professor, University of Colorado Law School. I would like to thank Ellen Aprill, Marcia Baron, Kristen Carpenter, John Colombo, Noel Cunningham, Heather Field, Victor Fleischer, Adam Hosein, Heidi Hurd, Leandra Lederman, Lloyd Mayer, Paul Ohm, Katie Pratt, Rob Reich, Jim Repetti, Ted Seto, Dan Shaviro, Larry Solum, David Walker, Larry Zelenak and Eric Zolt for helpful discussions during the development of this project, as well as participants in the 2010 Junior Tax Scholars’ Conference, the 2010 University of Colorado Law School Roundtable on Tax Policy and Distributive Justice, and in workshops at the University of Michigan, Boston College, Indiana University, Notre Dame, Loyola-Los Angeles, and the University of Colorado. Lastly, I would like to thank Sarah Rector and Garreth Winstead for wonderful research assistance.

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Americans cherish the notion of equality of opportunity, believing that it protects a commitment to liberty and neutrality. Despite the importance of equal opportunity principles in our society, most legal scholarship invoking the concept often fails to address complexities raised by the political philosophy literature, such as the “equality of what” debate. Moreover, current scholarship on the charitable tax subsidies overemphasizes the benefits of efficiency and pluralism to the detriment of distributive justice, resulting in substantial normative gaps. For example, which organizations should be subsidized? Should charities be required to assist the poor? Is a deduction or a credit preferable?

This Article carefully mines the equal opportunity philosophy literature for insights into those questions. Often, these nuances lend rigorous philosophical support for commonly held intuitions. The basic version of ex ante equality of material resources, for example, confirms the intuition that the charitable sector does not do enough to provide opportunities for the financially poor to participate fully in our society. Other insights seem counter-intuitive: a broader version of resource equality that addresses talent-pooling and expensive tastes suggests that we continue to subsidize elite cultural institutions, such as the opera, without requiring them to offer free or discounted services to the poor.

INTRODUCTION

Americans cherish the idea of equal opportunity,¹ believing that it protects a commitment to liberty and neutrality.² Given its bedrock role as an organizing principle in our society,³ it is not surprising that the political philosophy literature has produced a rich debate about the definition and implementation of equal opportunity.⁴ In surprising contrast, however, most legal scholarship invoking equality of opportunity does so only on a very general level and often fails to address complexities raised by the philosophy literature such as the “equality of what” debate.⁵ This failure is all the more striking in the tax arena, given the central role of the tax system in distributing the benefits and burdens of our society and the significance of equal opportunity theory in other distributive justice debates.⁶

¹ BRUCE ACKERMAN & ANNE ALSTOTT, *THE STAKEHOLDER SOCIETY* 1 (1999) (discussing Americans’ belief in equal opportunity); Marjorie E. Kornhauser, *Choosing a Tax Rate Structure in the Face of Disagreement*, 52 *UCLA L. REV.* 1697, 1728 (2005) (“Americans . . . agree . . . that all people should have an equal chance to achieve their goals, including the accumulation of wealth and income.”). As explored *infra* Part II, however, great disagreement exists as to precisely what offering people an equal chance to achieve their goals actually means.

² Anne Alstott, *Equal Opportunity and Inheritance Taxation*, 121 *HARV. L. REV.* 470, 476-77 (2007) (arguing that choice and neutrality are core principles of equality of opportunity). Ensuring equal chances – but not equal outcomes – is thought to allow citizens freedom to live their own conceptions of the good life, while being held responsible for their choices (liberty) without prioritizing any one such conception over another (neutrality). *Id.*

³ CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* 139-40 (1993) (stating that our Constitution embodies the principle of “rough equality of opportunity”).

⁴ See *infra* Part II for a brief summary of these debates.

⁵ Alstott, *supra* note 2, at 471 (“But the resource equality ideal has not been fully translated into the legal literature.”). Notable exceptions to this generalization include ACKERMAN & ALSTOTT, *supra* note 1, at 4-17 (proposing a two percent annual wealth tax to fund equal opportunity grants for young adults); LIAM MURPHY & THOMAS NAGEL, *THE MYTH OF OWNERSHIP* 3-11 (2002) (surveying “diverse theories of social, political and economic justice” and exploring those theories’ implications for evaluating tax policy); ERIC RAKOWSKI, *EQUAL JUSTICE* 1 (1991).

⁶ Until the recent work of Anne Alstott, for example, nobody had rigorously examined the nuances of equal opportunity for insights into the *design* (as opposed to the existence) of an inheritance tax scheme. Alstott, *supra* note 2, at 471-72. Other recent exceptions include James R. Repetti, *Democracy and Opportunity: A New Paradigm in Tax Equity*, 61 *VAND. L. REV.* 1129, 1131 (2008) (arguing that a tax should be designed to promote the principle of equal opportunity for self-realization); Daniel N. Shaviro, *Endowment and Inequality*, in *TAX JUSTICE: THE ONGOING DEBATE* 123, 125 (Joseph J. Thorndike & Dennis J. Ventry, Jr. eds., 2002) (arguing that the best measure of inequality for determining the most “coherent and defensible” tax base with respect to distributive justice “might [be] call[ed] ‘endowment,’ ‘ability,’ or ‘wage rate’”); Kirk J. Stark, *Enslaving the Beachcomber: Some Thoughts on the Liberty Objections to Endowment Taxation*, 18 *CAN. J. L. & JURISPRUDENCE*

This Article mines the nuances of the philosophy literature on equal opportunity to see what light it sheds on the design of the charitable tax subsidies.⁷ As I have previously argued, current scholarship on these subsidies over-emphasizes the benefits of efficiency and pluralism, while under-emphasizing distributive justice issues.⁸ As a result, both existing literature and current law contain substantial normative gaps and leave unanswered a number of key questions (such as which organizations should be subsidized, and whether such groups should be required to help the poor).⁹

For the most part, looking closely at the complexities of equal opportunity theory adds philosophical rigor to the common intuition that the charitable tax subsidies focus insufficiently on creating opportunities for the poor to participate fully in our society.¹⁰ The most common interpretation of resource egalitarianism, for example, suggests that groups be required to somehow assist the financially disadvantaged to merit a subsidy. Additionally, a deep exploration of what it means to “level down” as envisioned by Rawls suggests

47 (2005); Lawrence Zelenak, *Taxing Endowment*, 55 DUKE L.J. 1145 (2006). And in addition, tax scholars have long invoked equal opportunity concerns on a general level when debating progressivity, wealth, and estate taxation. See, e.g., Barbara H. Fried, *Compared to What? Taxing Brute Luck and Other Second-Best Problems*, 53 TAX L. REV. 377, 385-95 (2000); Michael J. Graetz, *To Praise the Estate Tax, Not to Bury It*, 93 YALE L.J. 259, 274-78 (1983); Edward J. McCaffery, *The Uneasy Case for Wealth Transfer Taxation*, 104 YALE L.J. 283, 291-92 (1994) [hereinafter *Uneasy Case*] (“[T]he liberal egalitarian case for some form of wealth transfer tax is intimately linked with the ‘fair equality of opportunity’ ideal.”); Eric Rakowski, *Can Wealth Taxes Be Justified?*, 53 TAX L. REV. 263, 264-65 (2000) [hereinafter *Wealth Taxes*]; Eric Rakowski, *Transferring Wealth Liberally*, 51 TAX L. REV. 419, 430 (1996) [hereinafter *Transferring Wealth*].

⁷ To be clear, my goal is to think in the affirmative about how to structure the tax subsidies to *promote* equal opportunity. In contrast, past explorations of equal opportunity and the charitable tax subsidies have considered the different question of whether the current structure violates equal opportunity ideals. See, e.g., John G. Simon, *Charity and Dynasty Under the Federal Tax System*, 5 PROB. LAW 1 (1978).

⁸ Miranda P. Fleischer, *Theorizing the Charitable Tax Subsidies: The Role of Distributive Justice*, 87 WASH. U. L. REV. 505 (2010) [hereinafter *Theorizing*].

⁹ See *id.* at 528-53.

¹⁰ My goal is not to suggest that other theories of distributive justice have nothing to add to our understanding of charitable giving policy, or to argue that equal opportunity is the “best” theory of distributive justice. For our purposes, it is enough to note that equal opportunity ideals enjoy wide support among the public. See, e.g., Kornhauser, *supra* note 1, at 1728 (“What Americans do agree on, however, is that all people should have an equal chance to achieve their goals . . .”). Additionally, equal opportunity ideals are often explored by legal academics in other fields, thus these ideals present themselves as a natural area of more detailed inquiry for tax scholars. In future work, however, I shall explore what insights consequentialist and libertarian theories of distributive justice may have for charitable giving policy; this Article is but one piece of a multi-part series. See *Theorizing*, *supra* note 8, at 510 (presenting the first Article in the Series and laying out the Series’ scope).

limiting subsidies to family-controlled private foundations. Other interpretations of equality of opportunity, however, yield results that may be counter-intuitive. For example, defining equality of opportunity as resource equality that takes into account disabilities suggests that hospitals need not offer free or discounted services to the financially poor to qualify for the charitable tax subsidies. An even more expansive interpretation of resource equality that accounts for talent-pooling and expensive tastes supports subsidizing “elite” cultural organizations such as the opera. This may surprise some, given that the opera is a favorite *bête noir* of many who criticize the charitable tax subsidies for not doing “enough” to help the disadvantaged.

In conducting this inquiry, this Article assumes that society pursues a large portion of its equal opportunity goals through direct governmental programs, and that the philanthropic world is simply an additional avenue by which to pursue such objectives. I am not suggesting that the charitable sector is the best, or should be the only, sector responsible for implementing equality of opportunity. To that end, this Article takes the existence of the charitable tax subsidies as a given¹¹ and proceeds from the assumption that the tax benefits they provide represent government spending, just as direct government transfers do.¹² The question then becomes, given the motivating role that equal opportunity ideals play in other realms of government policy, why not examine the interaction of those ideals with charitable giving policy?¹³ I view this exploration as an extension of and complement to existing literature on the charitable tax subsidies, which highlights the efficiency- and pluralism-enhancing advantages of subsidizing charities through the tax system. Although I believe that distributive justice should play *some* role in our assessment of charitable giving policy, I do not believe that we should push aside considerations of efficiency and pluralism for a single-minded focus on distributive justice. My ambition in this Article, therefore, is to identify what a detailed exploration of equal opportunity theories – in addition to

¹¹ Indeed, it is plausible that in ideal theory, equal opportunity (or other distributive) concerns might be implemented solely through direct governmental action, thus negating the need for the charitable tax subsidies to assist. This Series, however, works within non-ideal theory. For explanations of ideal and non-ideal theory, see generally JOHN RAWLS, *A THEORY OF JUSTICE* 7-8, 215-16, 308-09 (Harvard Univ. Press rev. ed. 1999) [hereinafter *THEORY OF JUSTICE*]; Lawrence B. Solum, *Constitutional Possibilities*, 83 *IND. L.J.* 307, 309-11 (2008).

¹² See *infra* Part I.B (comparing the benefits of implementing the charitable subsidies through the tax system instead of through direct government grants).

¹³ Although my goal is to shed more theoretical light on the charitable tax subsidies – and not to advocate changing them – I would be remiss not to acknowledge that any changes to these subsidies could trigger political opposition. Nonetheless, the possibility of political opposition should not discourage academics from more closely analyzing those subsidies from a theoretical perspective in order to enhance our understanding of them. See, e.g., Alstott, *supra* note 2, at 473.

considerations of pluralism and efficiency – can tell us about designing the charitable tax subsidies.¹⁴

This Article proceeds as follows: Part I briefly describes the charitable tax subsidies, their theoretical foundations, and recurring practical and normative questions. Part II provides a brief introduction to the various strands of equality of opportunity. Parts III and IV mine those strands for insights into the content and structure of the charitable tax subsidies.

I. THE CHARITABLE TAX SUBSIDIES AND THEIR THEORETICAL FOUNDATIONS

Charities have enjoyed special tax benefits since our country's earliest days. Most of the American colonies, for example, exempted charities from their taxing schemes.¹⁵ Our federal system has granted tax-exempt status to charitable organizations since 1894,¹⁶ and individuals have been allowed to deduct contributions to charities for income tax purposes since 1917.¹⁷ In

¹⁴ To that end, two possible approaches present themselves. First, we could prioritize equality of opportunity by using it to determine which projects to subsidize, and then use efficiency and pluralism to structure the subsidy (and potentially to narrow the world of subsidized projects). For example, equality of resources might counsel most heavily subsidizing projects that provide early childhood education. Efficiency and pluralism concerns would then explain why some such programs should be subsidized via a charitable deduction or a credit, as opposed to solely through direct government funding. Alternatively, we could prioritize efficiency and pluralism by using those theories to initially identify which charities merit subsidies, and then turn to equality of opportunity to help us resolve unanswered questions. For example, efficiency and pluralism might counsel subsidizing any group with a threshold number of donors that provides public goods, and then equal opportunity concerns might counsel that such groups be required to offer free or reduced-cost services to the poor. And in both instances, it may be the case that we continue to subsidize organizations having little to do with equality of opportunity (yet which still provide public goods, such as environmental research), but simply decide to subsidize more heavily groups that enhance equality of opportunity. Folding equality of opportunity into our analysis, therefore, does not necessarily mean that the considerations of pluralism and efficiency would disappear wholesale.

¹⁵ JOHN D. COLOMBO & MARK A. HALL, *THE CHARITABLE TAX EXEMPTION 4-5* (1995) (describing the exemption of educational, religious, and poverty-relieving organizations from taxation in colonial America).

¹⁶ *Id.* at 5.

¹⁷ JAMES J. FISHMAN & STEPHEN SCHWARZ, *TAXATION OF NONPROFIT ORGANIZATIONS* 652 (2d ed. 2006). The estate and gift tax systems also allow deductions for charitable contributions. See I.R.C. §§ 2055, 2522 (2006); Miranda P. Fleischer, *Charitable Contributions in an Ideal Estate Tax*, 60 *TAX L. REV.* 263, 267-69 (2007) [hereinafter *Charitable Contributions*] (exploring the contours of a charitable deduction in an ideal estate tax and arguing that the social goal used to justify the estate tax determines which charitable contributions should be deductible).

addition, charities are exempted from most (if not all) state property, sales, and corporate income taxes.¹⁸

To qualify for these provisions, the Internal Revenue Code requires organizations to (1) be formed for a specific set of purposes and (2) refrain from engaging in certain behavior. First, the statutory language of sections 170(c) (deductible contributions) and 501(c)(3) (exemption) mandates that groups must serve religious, charitable, scientific, literary, or educational purposes to be eligible for those benefits.¹⁹ Organizations qualifying for both subsidies are generally referred to as “charitable organizations,” even if they serve one of the specifically enumerated purposes (such as “educational” or “scientific” purposes) instead of the more general “charitable” purpose.²⁰

As one might expect, this language has been interpreted to cover a wide range of organizations. In particular, the “charitable purpose” prong has been broadly construed to include a multiplicity 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.²¹ Quite generally, groups eligible under the “charitable purpose” prong must provide some type of “community benefit” by fulfilling needs unmet by the private market.²² Precisely what counts as a community benefit, however, is unclear.²³

¹⁸ COLOMBO & HALL, *supra* note 15, at 20.

¹⁹ I.R.C. § 170(c)(2)(B) (“For purposes of this section, the term ‘charitable contribution’ means a contribution or gift to or for the use of . . . (2) A corporation, trust, or community chest, fund, or foundation . . . (B) organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes . . .”). Organizations qualifying for tax-deductible contributions under I.R.C. § 170 are almost always also eligible for exempt status under § 501(c)(3). I.R.C. § 501(c)(3) (exempting organizations operated for “religious, charitable, scientific, . . . literary, or educational purposes.”). Analytical interpretations of such purposes for § 170 thus generally apply to § 501(c)(3), and vice versa.

²⁰ Although § 501 also exempts a number of other types of organizations that are ineligible to receive deductible contributions under § 170, this Article focuses solely on organizations that qualify for both provisions.

²¹ JOINT COMM. ON TAXATION, JCX-29-05, HISTORICAL DEVELOPMENT AND PRESENT LAW OF THE FEDERAL TAX EXEMPTION FOR CHARITIES AND OTHER TAX-EXEMPT ORGANIZATIONS 122-47 (2005) [hereinafter HISTORICAL DEVELOPMENT] (describing the evolving standard for “charitable organizations” as it applies to charitable hospitals, elder care facilities, credit counseling organizations, low-income housing, environmental organizations, and college sports); FISHMAN & SCHWARZ, *supra* note 17, at 101-47.

²² John D. Colombo, *The Role of Access in Charitable Tax Exemption*, 82 WASH. U. L.Q. 343, 345 (2004) [hereinafter *Access*] (arguing that tax-exempt status should turn on whether “the organization provides access to services for previously-underserved populations or provides specific services to the majority population that otherwise are not provided by the private sector”).

²³ For example, in some cases, the poor must benefit – a health club for middle-class people would not count, but community recreation centers with programs for the poor do.

Second, subsidized organizations must comply with an additional set of rules that work in the negative by proscribing certain activities. Most importantly, these rules prohibit *quid pro quos*,²⁴ commerciality,²⁵ private benefit,²⁶ and private inurement,²⁷ while simultaneously requiring that an organization have an appropriately indeterminate class of beneficiaries.²⁸ These requirements thus reason backwards: if an organization does not benefit specific individuals or act too much like a for-profit commercial enterprise, then it must be doing something good for the community, thus meriting a subsidy. Not surprisingly, defining the good by prohibiting the bad often creates inconsistent results.

Although a few scholars believe that exemption and deductibility are necessary for measurement reasons,²⁹ the more accepted view³⁰ is that these

In other cases, no benefit for the poor is required, such as with the arts and many health services. Further, organizations formed for the other specifically enumerated purposes (e.g., religion, science, and education) are not required to somehow benefit the poor, creating a confusing mismatch in the requirements to qualify for these benefits.

²⁴ Treas. Reg. § 1.170A-1(h) (as amended in 1996) (prohibiting a deduction for transfers made in consideration for goods or services).

²⁵ Treas. Reg. § 1.501(c)(3)-1(e) (as amended in 2008) (“An organization which is organized and operated for the primary purpose of carrying on an unrelated trade or business is not exempt under section 501(c)(3)”); HISTORICAL DEVELOPMENT, *supra* note 21, at 51 (“If an organization conducts a trade or business that is not related to exempt purposes, the question under the operational test is whether such activity is substantial. If so, then the organization should lose exempt status under what generally is known as the commerciality doctrine.”).

²⁶ Treas. Reg. § 1.501(c)(3)-1(d)(1)(ii) (as amended in 2008); HISTORICAL DEVELOPMENT, *supra* note 21, at 55-56 (“Unlike the absolute prohibition against private inurement, *de minimis* private benefit is permitted . . . [but] must be incidental in both a qualitative and quantitative sense to the public benefit.”).

²⁷ I.R.C. § 501(c)(3) (2006) (requiring for tax exemption that “no part of the net earnings . . . 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, *supra* note 21, at 54-55.

²⁸ This requirement (explicit in neither the Code nor the regulations) reflects the fear that an organization formed to benefit specific individuals or a group of people that is “too small” may not be benefiting the community at large. See HISTORICAL DEVELOPMENT, *supra* note 21, at 63 (“The charitable class requirement provides that an organization be organized to benefit a sufficiently large or indefinite class of people.”); BRUCE R. HOPKINS, *THE LAW OF TAX-EXEMPT ORGANIZATIONS* 180-81 (9th ed. 2007) (discussing the requirement that the beneficiaries of an exempt organization “must constitute a sufficiently large or indefinite class”).

²⁹ See, e.g., William D. Andrews, *Personal Deductions in an Ideal Income Tax*, 86 HARV. L. REV. 309, 314-15 (1972) (arguing that because a charitable donor shares with others any benefit she receives, charitable contributions do not constitute “consumption” under Haig-Simons and therefore should be excluded from the ideal individual income tax base); Boris I. Bittker & George K. Rahdert, *The Exemption of Nonprofit Organizations*

provisions serve as subsidies that contribute to the size and success of the charitable sector.³¹ The theoretical justifications for subsidizing charities through the tax system are briefly described below.³²

A. *Why Subsidize Charity?*

Various arguments abound as to why charity should be subsidized.³³ The traditional explanation is that subsidizing charities is “good” because of the

from *Federal Income Taxation*, 85 YALE L.J. 299, 307-14 (1976) (arguing that the difficulty of accurately measuring the income of charities justifies exempting them from the corporate income tax). To my knowledge, however, scholars seem to agree that the ability to issue tax-exempt bonds is justifiable only as a subsidy.

³⁰ David E. Pozen, *Remapping the Charitable Deduction*, 39 CONN. L. REV. 531, 552-53 (2006) (“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 . . .”). For thoughtful and influential critiques of the measurement theories, see Mark P. Gergen, *The Case for a Charitable Contributions Deduction*, 74 VA. L. REV. 1393, 1397, 1416 (1988) (arguing that Andrews’s thesis is 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) (contending that Andrews lacks a “coherent normative principle”); Henry Hansmann, *The Rationale for Exempting Nonprofit Organizations from Corporate Income Taxation*, 91 YALE L.J. 54, 59-62 (1981) (critiquing Bittker and Rahdert’s theory); 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) (disagreeing with Andrews’s contention that charitable giving is not consumption, because of the deference, respect, and attention accorded donors); Stanley A. Koppelman, *Personal Deductions Under an Ideal Income Tax*, 43 TAX L. REV. 679, 707 (1988) (contending that spending cash or property on charitable purposes “represents a clear personal benefit to the donor” which should constitute consumption).

³¹ As of 2004, over a million organizations qualified for tax-exempt status as charities under § 501(c)(3). HISTORICAL DEVELOPMENT, *supra* note 21, at 2 (“The 2004 IRS Master File of Exempt Organizations shows 1,010,365 charitable organizations.”). This figure excludes churches (which, for First Amendment reasons, are not required to file returns) but includes private foundations (quite generally, groups that make grants to other nonprofits that operate direct charitable programs, in lieu of conducting their own programs directly). *Id.* In financial terms, the sector is also quite sizable: in 2001, for example, the sector’s assets exceeded two trillion dollars, and its revenues made up almost ten percent of gross domestic product. *Id.* at 2. Lastly, over ten million paid employees work in the nonprofit sector, which comprises over seven percent of the paid workforce. FISHMAN & SCHWARZ, *supra* note 17, at 17. The cost to the federal fisc of the subsidies is also large: it is estimated that the deduction alone cost roughly \$228 billion between 2005 and 2009. HISTORICAL DEVELOPMENT, *supra* note 21, at 45.

³² For a more detailed exploration and analysis of these theories, see generally *Theorizing*, *supra* note 8, at 514-48.

³³ The deduction acts as a subsidy as follows: imagine that *Felix*, who is in the 35% tax bracket, makes a deductible contribution of \$100. Because a \$100 deduction saves a 35%

benefits charities provide.³⁴ Some such theories focus on the fact that charities relieve the government of burdens it would otherwise have to bear, such as poverty relief.³⁵ Other theories 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, in countering governmental power, and in enhancing pluralism and experimentation.³⁶ Lastly, the altruism

taxpayer \$35 in taxes, the net after-tax cost of *Felix's* contribution is only \$65. The tax savings to *Felix* act as a subsidy. Tax exemption subsidizes charities that would otherwise pay corporate tax, because exempting their income from taxation means that they have more funds left over to operate than otherwise. For example, suppose that in *Year 1*, a given charity has net revenues of \$100,000. If the organization were subject to tax, it would only have \$65,000 left over to spend in *Year 2*. But free of this tax burden, the charity has the entire \$100,000 available for *Year 2*. In addition, allowing charities to issue tax-exempt bonds is also a subsidy because it allows charities to borrow at a lower cost than organizations whose bonds are fully taxable. To illustrate, imagine that the pre-tax rate of return is 10%. An investor in the 35% bracket should be indifferent between a taxable bond (pre-tax return of 10% but post-tax return of only 6.5%) and an exempt-bond yielding 6.5%. Although the extent of capitalization in the exempt-bond market is debatable, most scholars agree that nonprofits do have the ability to borrow more cheaply than otherwise. See Boris I. Bittker, *Equity, Efficiency, and Income Tax Theory: Do Misallocations Drive Out Inequities?*, 16 SAN DIEGO L. REV. 735, 738-42 (1979).

³⁴ For a typical example of how courts invoke these traditional arguments, see *Green v. Connally*, 330 F. Supp. 1150, 1157-59 (D.D.C. 1971) (holding that racially discriminatory private schools are not eligible for tax exemptions and deductible contributions because they are contrary to public policy).

³⁵ See, e.g., COLOMBO & HALL, *supra* note 15, at 45-58 (discussing and critiquing the government burden rationale); Boris I. Bittker, *Charitable Contributions: Tax Deductions or Matching Grants?*, 28 TAX L. REV. 37, 39 (1972); 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 (1998) (citing H.R. REP. NO. 75-1860, at 19 (1938)); Hansmann, *supra* note 30, 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. I.R.C. § 170(c)(1) (2006). For purposes of this Series, however, I take such rules as given; my focus is on the tax treatment of organizations other than governments and contributions thereto.

³⁶ See Rob Atkinson, *Altruism in Nonprofit Organizations*, 31 B.C. L. REV. 501, 605 (1990) (“[Charities] are said to deliver goods and services more efficiently, more innovatively, or otherwise better than other suppliers. In the second place, their very existence is said to promote pluralism and diversity, which are taken to be inherently desirable.”); Bittker, *supra* note 35, at 39; McDaniel, *supra* note 35, at 390-91 (arguing that the charitable deduction promotes pluralism and disperses power); Simon, *supra* note 7, 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.

theory suggests that charitable groups should be subsidized because the “altruistic provision of any good or service [is] inherently desirable.”³⁷

The newer (and probably more accepted) subsidy theories are grounded in economics: quite generally, they propose that subsidizing charities is necessary to help them provide goods or services that would otherwise be under-produced due to various market and governmental failures.³⁸ More specifically, this work posits that charitable tax subsidies are warranted because a democratic process dependent on majority preferences³⁹ only supplies public goods at a level demanded by the median voter.⁴⁰ This means that only public goods supported by the median voter (for example, national defense) – but not others (maybe a modern art museum) – are funded by the democratic process.⁴¹ Individuals who favor public goods not initially funded by that process respond by bargaining together in a “you scratch my back, I’ll scratch yours” manner, agreeing to provide partial funding (via a tax subsidy) for each other’s preferred minority projects.⁴² The charitable tax subsidies thus allow individuals with minority preferences to channel some of the funds otherwise flowing to the federal fisc toward their visions of the public good.⁴³

Brennen, *A Diversity Theory of Charitable Tax Exemption – Beyond Efficiency, Through Critical Race Theory, Toward Diversity*, 4 PITT. TAX REV. 1, 4 (2006).

³⁷ Atkinson, *supra* note 36, 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 a tax exemption. *See id.* at 636 (arguing that contributions to “pointless” purposes should be tolerated due to the larger gain from increased diversity in choosing altruistic objectives).

³⁸ *See, e.g.*, COLOMBO & HALL, *supra* note 15, at 100-08 (discussing the underlying economics of the donative theory); Gergen, *supra* note 30, 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, 21-40 (Susan Rose-Ackerman ed., 1986) (describing a model in which nonprofit organizations provide goods that are undersupplied by government actors).

³⁹ 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* Miranda P. Fleischer, *Generous to a Fault? Fair Shares and Charitable Giving*, 93 MINN. L. REV. 165, 167-68 n.10 (2008) [hereinafter *Generous to a Fault*].

⁴⁰ *Id.* at 185-86.

⁴¹ *Id.* at 168.

⁴² *Id.* at 168-69; *see also* COLOMBO & HALL, *supra* note 15, at 107-08 (“[A]lthough a majority of voters may resist paying the full cost of government directly providing certain goods and services, a majority may be willing for government to ‘contribute’ to such production . . . especially if such agreement would permit a partial cross-subsidy of their own special interest.”); Weisbrod, *supra* note 38, at 35-36 (describing how individuals form “social compacts” to provide for undersupplied goods through voluntary giving).

⁴³ The subsidies allow individual taxpayers to allocate federal funds as follows: imagine that a taxpayer in the 35% bracket donates \$100 to the opera. The \$100 deduction reduces her taxes by \$35, which means that although the opera receives \$100, she is only out of pocket \$65. Because the federal fisc is out the remaining \$35, the taxpayer has essentially directed \$35 of federal funds to a project she has deemed worthy of federal funding. Tax

B. *Why Use the Tax System to Subsidize Charity? 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 through the tax system. Several economists, for example, have argued that subsidization through a tax deduction (or credit)⁴⁴ is more efficient than subsidization via direct governmental grants.⁴⁵ Namely, subsidization through a tax deduction allocates the cost of subsidizing a given charitable project among individuals in proportion to the value each places on that project.⁴⁶ In contrast, direct grants would require an across-the-board tax increase, which would most likely be disproportional to how much any given taxpayer values the subsidized project.⁴⁷

exemption and the ability to issue tax-exempt bonds also allow individuals (instead of the government) to decide which projects receive a federal subsidy: all that one must do is form an organization that qualifies for § 501(c)(3) (tax exemption) or § 145 (exempt bonds). It is thus up to a given individual or group of individuals to decide whether to start a reading skills program, a museum, or a health clinic. *See, e.g.*, Bittker, *supra* note 35, at 39-56 (comparing the charitable deduction to a matching grant system); Saul Levmore, *Taxes as Ballots*, 65 U. CHI. L. REV. 387, 405 (1998) (describing an individual taxpayer's charitable contribution as a "ballot" that triggers a matching government contribution in the form of a reimbursement of part of the taxpayer-donor's gift); McDaniel, *supra* note 35, 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).

⁴⁴ Whether a deduction or a credit is the most efficient way of subsidizing charity through the tax system is debated. Compare Jeff Strnad, *The Charitable Contribution Deduction: A Politico-Economic Analysis*, in *THE ECONOMICS OF NONPROFIT INSTITUTIONS*, *supra* note 38, 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 38, at 224, 236 (supporting a credit).

⁴⁵ *See* Gergen, *supra* note 30, at 1399-1406 (summarizing the works of Harold Hochman, James Rogers, and Burton Weisbrod).

⁴⁶ *Id.* This is so because high-demanders pay "more" by making a voluntary donation to the project, while low-demanders pay "less" by refusing to contribute but being forced (through the tax system) to indirectly pay something. This forced payment is thought to reflect the fact that low-demanders do receive some benefit (even if small) from the subsidized project. For a discussion of whether it is morally "fair" to force low-demanders to partially subsidize such goods, see *id.* at 1401 n.27. 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.*

⁴⁷ *Id.* at 1402 ("People who desire more of a collective good, but who do not place great value on the increase, may refuse to support a subsidy because they fear that they will bear a disproportionate share of the tax cost.").

Other scholars have focused on the pluralism-enhancing benefits of having individual taxpayers determine which projects merit subsidies.⁴⁸ 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.⁴⁹ He posits that allowing taxpayers to “vote” in this manner better matches the size of the government subsidy to the enthusiasm of taxpayers for a given project.⁵⁰ In addition, Levmore suggests that taxpayers who have a direct say in deciding which projects to fund will develop a greater commitment to such projects, be more active volunteers and monitors, and be more tolerant of redistribution and of greater government funding of public goods.⁵¹ Similarly, David Schizer has

⁴⁸ Unfortunately, there is some confusion as to what is meant in the literature by terms such as “pluralism” and “diversity.” It often seems that theorists who invoke these terms believe our society should affirmatively encourage numerous views in order to promote a rich debate, a counter-weight to government power, and experimentation in the way public goods are produced. Another interpretation of pluralism, however, is that we live in a pluralistic society where individuals have differing conceptions of what is beneficial to society. To that end, the tax subsidies should not differentiate among varying conceptions of the good in the interests of neutrality. Pluralism can thus encompass either a positive duty to promote a variety of points of view, or, more simply, a duty not to discriminate among viewpoints. Both understandings of “pluralism” surface from time to time in discussions of the charitable tax subsidies. The positive duty to promote a variety of views is reflected in literature celebrating the fact that by subsidizing non-governmental groups in the first instance, the subsidies promote a counterbalance to government power and allow for experimentation in the ways that problems are attacked. For example, this position supports attacking poverty not only with programs like WIC but also with groups like Dress for Success. The understanding that pluralism means non-discrimination is reflected in that 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.

⁴⁹ Levmore, *supra* note 43, at 405. He argues that when a taxpayer makes a charitable gift and receives a deduction, she has essentially “voted” for the recipient to receive a federal subsidy in the amount of the foregone tax revenue. *See id.* (“Hence each individual taxpayer’s choice, deduction, or ‘ballot,’ not only reflects a private contribution but also triggers a matching government contribution in the form of a reimbursement of part of the taxpayer-donor’s gift.”). Levmore acknowledges two common criticisms of this structure. First, one could compare allowing taxpayers to vote in this manner to a “poll tax,” because someone must make a financial contribution out-of-pocket in order to trigger the subsidy. *Id.* at 405-06. Second, the subsidy’s structure as a deduction gives more “votes” to higher-bracket taxpayers because of the upside-down effect of deductions. *Id.* The latter problem could be solved by replacing the deduction with a credit, although the poll-tax criticism would still remain.

⁵⁰ *See id.* at 411-12; David M. Schizer, *Subsidizing Charitable Contributions: Incentives, Information, and the Private Pursuit of Public Goals*, 62 TAX L. REV. 221, 229 (2009).

⁵¹ Levmore, *supra* note 43, at 406.

concluded that giving individual taxpayers latitude in choosing which projects to subsidize enhances generosity and monitoring.⁵²

These beliefs are echoed by John Colombo's and Mark Hall's "donative theory," which identifies two main benefits of having individual taxpayers determine (via donations) which activities merit a subsidy.⁵³ First, they reason that voluntary donations to an organization signal that its services are undersupplied by the market or government – demonstrating the group's need for a subsidy.⁵⁴ Colombo and Hall further maintain that these donations show that the public considers the services beneficial to the community – thus demonstrating the group's "deservedness" of a subsidy.⁵⁵

C. *Unanswered Questions*

Despite the valuable insights offered by the foregoing works, several unanswered normative questions remain with respect to the charitable tax subsidies. Most importantly, neither existing scholarship nor current law adequately identifies which projects deserve subsidies. The listed statutory purposes are vague, and the act of defining the good by prohibiting the bad is not, at the end of the day, very definite.⁵⁶

At this point, many readers may wonder why this vagueness is troublesome.⁵⁷ Isn't allowing a broad spectrum of organizations to qualify for

⁵² Schizer, *supra* note 50, at 230-42, 257-67 (describing the role of the charitable tax subsidies in encouraging generosity and recruiting private monitors).

⁵³ COLOMBO & HALL, *supra* note 15, at 99.

⁵⁴ *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.

⁵⁵ *Id.* at 163-64.

⁵⁶ The traditional subsidy theories, for example, use terms that are too vague to be helpful in attempts to more specifically identify which groups merit subsidies. To say, for example, that charities do "good" things that "benefit society" is meaningless without some conception of what is "good." See COLOMBO & HALL, *supra* note 15, 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."). The economic subsidy theories are somewhat more determinate, in that these theories would subsidize any group which (1) provides either public or quasi-public goods, (2) is subject to the type of free-rider problems that cause market failure, and (3) has a threshold number of supporters. *Theorizing*, *supra* note 8, at 530-31. Churches, for example, would not merit a subsidy because the club-like nature of the group minimizes free-riding. Gergen, *supra* note 30, at 1434. Nor would public radio deserve a subsidy, since modern technology makes market provision possible. COLOMBO & HALL, *supra* note 15, at 99-113; Gergen, *supra* note 30, at 1444 n.176. Even so, these theories would subsidize quite a large group of organizations, and what are "public goods" to some are "public bads" to others.

⁵⁷ To illustrate, I faced many audience members skeptical that this vagueness was

the charitable tax subsidies in and of itself beneficial in our pluralistic society, where citizens have many differing conceptions of the good? Why even bother exploring the implications of equal opportunity and other theories of distributive justice?

Although I have extensively addressed this problem elsewhere,⁵⁸ I shall briefly reiterate why the pluralism and efficiency concerns described above are necessary, but not sufficient, for a fuller understanding of charitable giving policy, and why exploring equal opportunity and other theories of distributive justice is both logical and beneficial.

1. Current Law Is Vague and Inconsistent

First, there is no rhyme or reason as to whether a given organization must somehow serve the poor to be eligible for the subsidies.⁵⁹ Not surprisingly, this inconsistency makes planning difficult for organizations seeking to qualify for the subsidies. To illustrate, consider two types of purposes that qualify under the “charitable purpose” prong: healthcare and housing. 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.⁶⁰ Modern IRS rulings and court opinions, however, make free medical care for the poor a virtual requirement of exemption for other health organizations (such as HMOs and

troubling at workshops at the University of Michigan, USD, Loyola, Colorado, and elsewhere.

⁵⁸ *Theorizing*, *supra* note 8, at 508 (“While identifying these advantages is a necessary and important contribution to our understanding of charitable giving policy, avoidance of distributive justice concerns ignores the very purpose of charity: voluntary redistribution.”).

⁵⁹ 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) (including 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” (citing Charities Act, 2006, c. 50, § 3 (Eng.))).

⁶⁰ Rev. Rul. 69-545, 1969-2 C.B. 117 (ruling that 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 (ruling that 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*, 925 N.E.2d 1131, 1136 (Ill. 2010) (“[W]e now affirm the judgment of the appellate court upholding the decision by the Department of Revenue to deny the exemption.”); Debra Pressey, *Supreme Court Rules Against Provena in Tax Case*, THE NEWS-GAZETTE (Champaign, Ill.), March 18, 2010 (“The Illinois Supreme Court this morning affirmed a ruling . . . which determined the hospital wasn’t dispensing enough charity care to merit a property tax exemption.”). Thus, state law would also be aided by a more explicit consideration of distributive justice issues.

pharmacies).⁶¹ In contrast, 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.⁶² 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).⁶³ Moreover, although the Supreme Court has held that organizations serving the specifically enumerated purposes (such as education) must also be “charitable,”⁶⁴ there seems to be no question as a matter of law that the enumerated purpose organizations need not serve the poor (even though the “charitable” groups sometimes must). No coherent explanation for this distinction exists.⁶⁵

⁶¹ See, e.g., *IHC Health Plans, Inc. v. Comm’r*, 325 F.3d 1188, 1198 (10th Cir. 2003) (affirming the Tax Court’s ruling denying exempt status to an HMO that did not offer free or below-cost medical services); *Fed’n Pharmacy Serv., Inc. v. Comm’r*, 625 F.2d 804, 809 (8th Cir. 1980) (denying exemption to a pharmacy that sold drugs and other items at cost to the poor and elderly); John D. Colombo, *The Failure of Community Benefit*, 15 HEALTH MATRIX 29, 30-37 (2005) (detailing various rulings denying tax-exempt status to HMOs). In contrast, art galleries and community theaters need not reduce fees to the poor in order to qualify, see *Goldsboro Art League v. Comm’r*, 75 T.C. 337, 344 (1980), yet groups that provide other recreational facilities for adults (such as health clubs) are generally required to do so. See *Access*, *supra* note 22, at 358-60, 384. At least in one instance, however, an ice skating rink attained tax-exempt status with little more than vague plans to offer some sort of program for disadvantaged children. I.R.S. Priv. Ltr. Rul. 05-32-058 (May 18, 2005) (“A . . . Program shall be offered to provide disadvantaged youth in the local area the opportunity to learn to skate and to attend a day program at the Ice Arena.”). In that case, the IRS held that simply providing recreation on a nondiscriminatory basis promoted social welfare and thus qualified for the subsidies. *Id.*

⁶² Rev. Rul. 70-585, 1970-2 C.B. 115.

⁶³ *Id.*

⁶⁴ *Bob Jones Univ. v. United States*, 461 U.S. 574, 591 (1983) (“History buttresses logic to make clear that, to warrant exemption under § 501(c)(3), an institution must fall within a category specified in that section and must demonstrably serve and be in harmony with the public interest.”).

⁶⁵ See also John Simon et al., *The Federal Tax Treatment of Charitable Organizations*, in THE NONPROFIT SECTOR: A RESEARCH HANDBOOK 267, 277-78 (Walter W. Powell & Richard Steinberg eds., 2d ed. 2006) (discussing Congress’s inconsistency in requiring some institutions but not others to help the poor in order to qualify for the charitable tax subsidies); John D. Colombo, *The Role of Redistribution to the Poor in Federal Tax Exemption*, Nat’l Ctr. on Philanthropy & the Law, *Shades of Virtue: Measuring the Comparative Worthiness of Charities* (2009) (forthcoming 2011) (manuscript at 4-13) (on file with author) (discussing the changing standards used by courts and the IRS to determine qualification for tax exemption). See generally FISHMAN & SCHWARZ, *supra* note 17, at 101-218 (providing a general overview of the requirements for health, educational, religious, and other organizations to attain the charitable tax exemption). Scholars have lamented the inconsistency 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., *Access*, *supra* note 22, at 343-46 (observing that organizations serving the specifically-enumerated purposes need not provide

The problems created by this confusion became particularly acute in the aftermath of the September 11, 2001 terrorist attacks, when over two billion dollars flowed to disaster relief groups such as the Red Cross and the Twin Towers Fund.⁶⁶ 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.⁶⁷ After some outcry, however, the Service relented and allowed distributions to the non-needy if made “in good faith using objective standards.”⁶⁸

Further, these questions have caught the eye of both policymakers and academics. In recent years, for example, Congress has held a number of hearings addressing charitable activity in which the question of aid to the needy has arisen;⁶⁹ both lawmakers and witnesses have suggested increasing incentives to organizations that help the poor or needy.⁷⁰ Outside of Congress, several commentators – including former Labor Secretary Robert B. Reich – have echoed these concerns, calling for more of an emphasis on helping the less fortunate and promoting equality.⁷¹ These worries are also reflected in the

poor relief and offering an alternative explanation for granting tax-exemption to such organizations). Recently, Congress and the IRS have also taken an interest in the problem. *Tax-Exempt Charitable Organizations: Hearing Before the Subcomm. on Oversight of the H. Comm. on Ways and Means*, 110th Cong. 10 (2007) [hereinafter *Tax-Exempt Charitable Organizations Hearing*] (hearing testimony from a number of nonprofit experts – including officials from the IRS, the GAO, the Independent Sector, and the Council on Foundations – concerning the proper scope of nonprofit activities).

⁶⁶ Philip Rucker, *9/11 Charity Held Up as Model of How Best to Help Bereaved*, WASH. POST, May 4, 2008, at C01.

⁶⁷ Diana B. Henriques & David Barstow, *Victims’ Funds May Violate U.S. Tax Law*, N.Y. TIMES, Nov. 12, 2001, at B1 (quoting an IRS official as saying that “[a]n affected individual generally is not entitled to charitable funds without a showing of need”).

⁶⁸ I.R.S. Notice 2001-78, 2001-2 C.B. 576; FISHMAN & SCHWARZ, *supra* note 17, at 143-47 (summarizing the status of disaster relief as a charitable purpose); *see also* David Barstow & Diana B. Henriques, *I.R.S. Makes an Exception on Terror Aid*, N.Y. TIMES, Nov. 17, 2001, at B1.

⁶⁹ *Tax-Exempt Charitable Organizations Hearing*, *supra* note 65, at 4-5, 18-21 (announcing that one purpose of the hearing will be to “review charities’ efforts to assist diverse communities”); *To Examine Whether Charitable Organizations Serve the Needs of Diverse Communities: Hearing Before the Subcomm. on Oversight of the H. Comm. on Ways and Means*, 110th Cong. 4 (2007) (statement of Rep. John Lewis, Chairman, Subcomm. on Oversight of the H. Comm. on Ways and Means) (“[T]he resources of the charitable community do not exactly match our needs. Sadly those with the greatest need are not always served.”).

⁷⁰ *See id.* at 57 (statement of Rep. Xavier Becerra, Member, Subcomm. on Oversight of the H. Comm. on Ways and Means) (“So, you could probably incent noble activity by . . . treat[ing] charitable gifts more generously under the Tax Code if they are directed at the general welfare, or direct general welfare of serving those who are in need.”).

⁷¹ Pablo Eisenberg, Op-Ed., *What’s Wrong with Charitable Giving – and How to Fix It*,

ongoing debate about university endowments, and in state challenges to property-tax exemption for nonprofit hospitals.⁷² The Supreme Court of Illinois, for example, recently revoked one nonprofit hospital's state property-tax exemption because the hospital did not provide adequate charitable care.⁷³ And although not part of the final federal legislation, the question of whether to require hospitals to offer charity care was part of early versions of the 2010 health care overhaul bill.⁷⁴

2. Existing Scholarship Is Incomplete and Inconsistent

Unfortunately, existing scholarship adds little to the resolution of the foregoing debate, as it generally ignores explicit considerations of distributive justice. To be fair, this inattention is largely purposeful; in the 1970s and 1980s, for example, many scholars dissatisfied with the vagueness of the traditional subsidy theory turned to economic efficiency to create objective criteria for subsidizing charitable projects.⁷⁵ Later theorists, such as Levmore and Colombo, refined these objective tests by incorporating pluralism considerations.⁷⁶ Taken together, these theories counsel subsidizing projects that (1) are pure or impure public goods, (2) suffer from market and government failures, (3) do not directly benefit the donor, and (4) have some threshold level of support from people other than the donor.⁷⁷

a. *Incompleteness*

As I have previously detailed elsewhere, this valuable work is necessary but not sufficient for a full understanding of the charitable tax subsidies, as it is both inconsistent and incomplete.⁷⁸ Beginning with the latter, the objective

WALL ST. J., Nov. 9, 2009, at R1 (urging that foundations and wealthy donors direct more of their giving to the poor and disadvantaged); Robert B. Reich, Op-Ed., *Revamp Deductions for the Rich's 'Charities'*, PITTSBURGH TRIB. REV., Oct. 7, 2007, http://www.pittsburghlive.com/x/pittsburghtrib/news/s_531422.html (proposing that donors be allowed to deduct the full amount of contributions to agencies that help the poor but only half the amount of contributions to other nonprofits); Stephanie Strom, *Big Gifts, Tax Breaks and a Debate on Charity*, N.Y. TIMES, Sept. 6, 2007, at A1.

⁷² John Hechinger, *College Endowment Tax is Studied*, WALL ST. J., May 9, 2008, at A5 (describing efforts in Massachusetts to tax college endowments that exceed \$1 billion, as well as proposals in the U.S. Senate to require minimum annual payouts by endowments).

⁷³ *Provena Covenant Med. Ctr. v. Dep't of Revenue*, 925 N.E.2d 1131, 1146-51 (Ill. 2010) (denying exemption largely because of hospital's minimal provision of free or discounted medical services to indigent patients).

⁷⁴ Barbara Martinez, *Senators Consider Curtailing Hospitals' Tax Breaks*, WALL ST. J., July 10, 2009, at A4 ("One change being floated by Senate Finance Committee Leaders . . . is that hospitals would be required to offer a minimum amount of charity care . . .").

⁷⁵ *Theorizing*, *supra* note 8, at 530.

⁷⁶ *Id.*

⁷⁷ *Id.* at 531.

⁷⁸ *See Theorizing*, *supra* note 8.

tests offered by pluralism and efficiency considerations, standing alone, still do not answer the question of which organizations should be subsidized. On the broadest level, resources are scarce.⁷⁹ How do we prioritize if forced to choose among the many projects meeting the objective criteria outlined above?⁸⁰ More narrowly, how do we know if a given project is, in fact, a “public good?”

There are some activities (religion, for example) that are considered “public goods” by some but “social costs” by others. The pluralists might respond by saying the fact of voluntary donations demonstrates the project’s worthiness. But this presents its own set of questions. As I have asked before (borrowing from David Schizer), “why does the fact that a group of people want a ketchup museum justify subsidizing it?”⁸¹ And more importantly, what happens when the project in question isn’t silly yet harmless (like the ketchup museum), but one that almost everyone agrees is immoral and detrimental to the values of our society, such as racially-segregated schools?

b. *Inconsistency*

Existing scholarship is also internally inconsistent, for it implicitly contains the type of value judgments that its proponents disavow. The scholars who extol the efficiency- and pluralism-enhancing virtues of the subsidies are largely silent as to why they prize those values, other than hoping to avoid the type of moral judgments implied by the traditional subsidy theory. But despite this silence, the mere decision to use pluralism or efficiency as a guide implies an underlying normative value judgment.⁸²

Take efficiency: as Ed McCaffery has noted, liberalism, welfarism, and libertarianism can each motivate the use of efficiency.⁸³ Both Pareto and Kaldor-Hicks efficiency, for example, have welfarist roots in that they judge a given policy by looking to individual well-being.⁸⁴ Using such standards, therefore, reflects a set of value judgments: first, that well-being matters, and second, that there are proper ways to determine how to define and aggregate

⁷⁹ Several states, for example, have recently proposed limiting the tax benefits offered to nonprofits as a way to minimize the damage to their fiscs due to the recent economic downturn. Terry Schwadron, *To Tax or Not to Tax? Cities Ask the Billion-Dollar Question*, N.Y. TIMES, Nov. 12, 2007, at H30 (“Despite a long tradition of waiving taxes for charitable nonprofit groups, communities are feeling more pressure to eliminate property-tax exemptions . . . as communities struggle over diminishing revenue.”).

⁸⁰ See *Theorizing*, *supra* note 8, at 531 n.140 (noting that although markets measure preferences for allocating resources among private goods, markets are unable to do so for public goods).

⁸¹ *Id.* at 532.

⁸² *Id.* at 544-48.

⁸³ Edward J. McCaffery, *Slouching Towards Equality: Gender Discrimination, Market Efficiency, and Social Change*, 103 YALE L.J. 595, 639-40 (1993).

⁸⁴ DANIEL M. HAUSMAN & MICHAEL S. MCPHERSON, *ECONOMIC ANALYSIS, MORAL PHILOSOPHY, AND PUBLIC POLICY* 64-65, 144-45, 217 (2d ed. 2006); LOUIS KAPLOW & STEVEN SHAVELL, *FAIRNESS VERSUS WELFARE* 56 (2002).

well-being.⁸⁵ Likewise, *something* must be motivating scholars who emphasize pluralism, be it preference satisfaction (suggesting welfarism) or egalitarian values.⁸⁶ Regardless of why a given scholar cares about pluralism or efficiency, however, the fact remains that caring about pluralism or efficiency implies an additional set of underlying values. It is thus inconsistent to ignore such values when considering the charitable tax subsidies more deeply, especially when much uncertainty in and debate surrounding current law involves distributional concerns.⁸⁷

c. *Distributive Justice Is a Logical Extension of Current Scholarship*

In light of the indeterminacy of current law and scholarship, distributive justice is a logical place to turn for more insight into the charitable tax subsidies. This is especially so given that the subsidies are themselves inherently redistributive⁸⁸ and are part of the tax system, which necessarily invokes distributive justice concerns in apportioning the burdens and benefits of our society.⁸⁹ Indeed, the importance of considering distributive justice goes unchallenged in many other tax policy debates, such as those concerning wealth transfer taxation, consumption taxes, endowment taxation, and the progressive rate structure.⁹⁰

Moreover, considering distributive justice does not undercut the values of pluralism and economic efficiency, as some may worry. In fact, an important

⁸⁵ See HAUSMAN & MCPHERSON, *supra* note 84, at 97-155 (discussing alternative definitions of well-being and various methods of comparing alternate policies in terms of their impact on well-being); KAPLOW & SHAVELL, *supra* note 84, at 16, 25-27.

⁸⁶ See *Theorizing*, *supra* note 8, at 547-48 (suggesting alternative factors that implicitly or explicitly drive various pluralism scholars).

⁸⁷ Griffith, *supra* note 30, at 345.

⁸⁸ John K. McNulty, *Public Policy and Private Charity: A Tax Policy Perspective*, 3 VA. TAX REV. 229, 247 (1984) (“Any analysis of philanthropy and its related tax allowances must consider that both its purpose and consequence is the redistribution of resources. Indeed, at an elemental level redistribution seems to be what philanthropy is.”).

⁸⁹ See, e.g., Griffith, *supra* note 30, at 345 (arguing that “a satisfactory tax policy must make its underlying ethical assumptions and distributional goals explicit”).

⁹⁰ See, e.g., Alstott, *supra* note 2, at 470-71; William D. Andrews, *Fairness and the Personal Income Tax: A Reply to Professor Warren*, 88 HARV. L. REV. 947, 947-53 (1975); Joseph Bankman & Thomas Griffith, *Social Welfare and the Rate Structure: A New Look at Progressive Taxation*, 75 CAL. L. REV. 1905, 1907 (1987); Lily L. Batchelder, *What Should Society Expect From Heirs? The Case for a Comprehensive Inheritance Tax*, 63 TAX L. REV. 1, 2 (2009); Walter J. Blum & Harry Kalven, Jr., *The Uneasy Case for Progressive Taxation*, 19 U. CHI. L. REV. 417, 468-79, 486-506 (1952); Barbara H. Fried, *Fairness and the Consumption Tax*, 44 STAN. L. REV. 961, 1007-16 (1992); Graetz, *supra* note 6, at 269-74; Edward J. McCaffery, *A New Understanding of Tax*, 103 MICH. L. REV. 807, 812 (2005); *Uneasy Case*, *supra* note 6, at 322-24; *Transferring Wealth*, *supra* note 6, at 419; Shaviro, *supra* note 6, at 123; Alvin Warren, *Would a Consumption Tax Be Fairer Than an Income Tax?*, 89 YALE L.J. 1081, 1082 (1980); Zelenak, *supra* note 6, at 1145.

body of economic empirical work explicitly acknowledges that policy discussions of the subsidies should consider distributive justice.⁹¹ Economist Charles T. Clotfelter, for example, has noted that “[a]lthough 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.”⁹² And, as argued above, there is nothing inconsistent about making explicit the value judgments already implicit in current scholarship.

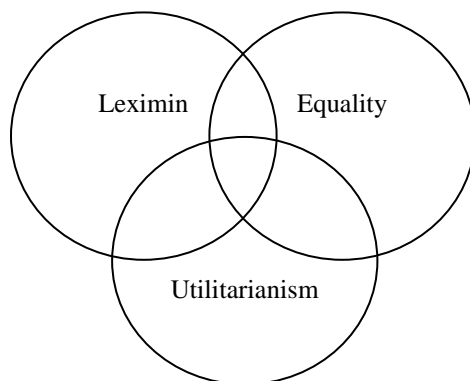
Nor is considering distributive justice necessarily inconsistent with pluralism. First, to say that the charitable tax subsidies should be broadly crafted in order to make room for differing conceptions of what is “good” for society, just because we live in a pluralistic society, misses a step. Namely, it conflates the fact of living in a pluralistic society where citizens hold competing views of the good with the normative claim that the charitable tax subsidies should also be pluralistic. Non-discrimination among competing views of the good does not necessarily translate into funding all such competing views; it could just as easily translate into funding only those aspects of the good that are shared among the competing conceptions.⁹³

Second, even if pluralism concerns do justify a broad definition of charity as a normative matter, the implications of the various strands of distributive justice should still be carefully considered. So doing would ensure that any such broad definition does, in fact, accurately reflect competing views of what is beneficial for society. Consider three common theories of distributive justice: egalitarianism, utilitarianism, and the leximin or maximin approach. Next, assume that we want the definition of charity to include everything considered beneficial under any of these theories.

⁹¹ WHO BENEFITS FROM THE NONPROFIT SECTOR 3 (Charles T. Clotfelter ed., 1992) (“Despite the importance of these issues, however, we simply do not have a good idea about the sector’s distributional consequences.”).

⁹² *Id.*

⁹³ *Theorizing*, *supra* note 8, at 532-33.



Looking closely at these theories might demonstrate that the definition of charity should be broadened, if a given activity not currently subsidized falls within any of these three circles. On the other hand, there may also be projects currently subsidized that do not fall within any reasonable conceptions of the good (perhaps, for example, organizations that discriminate against African-Americans or other racial minorities). If so, then the current definition should be narrowed. Either way, explicitly considering the implications of various moral theories (instead of simply asserting that “anything goes”) is a more rigorous method of implementing a pluralistic definition of charity.⁹⁴

3. Concluding Thoughts on the Role of Distributive Justice

Current law and scholarship thus leave a number of key questions concerning the charitable tax subsidies unresolved – questions with practical and theoretical implications that have caught the eye of policymakers, the public, and academics. Given the logic of turning to distributive justice to address these questions, it is not surprising that a few policymakers and commentators have indeed done so. Quite generally, these scholars tend to argue that “too much” charitable giving helps the well-off and that “too little” helps the poor, or that the current structures violate equal opportunity.⁹⁵ Unfortunately, this scholarship is insufficiently deep: it inadequately identifies what we mean by “poor” or “disadvantaged,” and insufficiently identifies what we are trying to equalize.⁹⁶ Given the superficiality of existing discussions of equal opportunity in the charitable giving literature, the wide appeal of equal opportunity, and the logic of addressing distributive justice in addition to pluralism and efficiency, this Article thus seeks to explore the extent to which

⁹⁴ See *id.* at 534-35.

⁹⁵ *Id.* at 549-53 (summarizing existing scholarship that criticizes the charitable tax subsidies on distributive justice grounds).

⁹⁶ See *id.* (pointing out the vagueness of many of the terms used in existing discussions of the charitable deduction and distributive justice).

a close examination of equal opportunity can shed light on the charitable tax subsidies.⁹⁷

II. WHAT IS EQUALITY OF OPPORTUNITY?

Most Americans believe in something called “equal opportunity,”⁹⁸ generally meaning that we should minimize the extent to which arbitrary characteristics unrelated to talent (such as one’s race) determine one’s success in life, in order to allow one’s abilities to do so.⁹⁹ If that condition is met, most seem to tolerate divergent outcomes so long as they are the product of individual choices and not the circumstances of one’s birth. This focus on equal chances (instead of equal outcomes) is attractive to many because it allows citizens to pursue whatever vision of the good life they may have but requires them to bear responsibility for their choices.¹⁰⁰

Underneath these generalities, however, lie a number of stark disagreements about what implementing this goal requires. One common interpretation, known as “careers open to talents,” essentially mandates nothing more than non-discrimination in the awarding of opportunities such as jobs.¹⁰¹ In contrast, a set of theories loosely referred to as “liberal egalitarian” theories of equal opportunity – including Rawls’s “democratic equality,” resource egalitarianism, and the capabilities approach – requires some redistribution in addition to formal non-discrimination.¹⁰²

⁹⁷ In addition to determining which projects merit a subsidy, a number of additional issues can also benefit from a consideration of equal opportunity ideals. For example, should the subsidy be structured as a credit or a deduction? Should there be participation limits? Should charities be permitted to lobby and engage in political activity? What limits should there be on compensation and unrelated business activities? Should special rules apply to private foundations? Exploring the ideals of equal opportunity may shed light on these issues, as well.

⁹⁸ WILL KYMLICKA, *CONTEMPORARY POLITICAL PHILOSOPHY* 58 (2d ed. 2002) (stating that equal opportunity “seems fair to many people in our society”); Kornhauser, *supra* note 1, at 1728 (“Today, most Americans not only believe in equal opportunity, but also believe that society collectively ought to take steps to achieve it.”).

⁹⁹ KYMLICKA, *supra* note 98, at 58.

¹⁰⁰ This is in contrast to outcome-based theories of equality, which would equalize welfare or some other currency, without regard to the role individual choice plays in determining one’s level of welfare. I shall address such theories and their implications for the charitable tax subsidies in future portions of this Series. This Article, however, focuses on deontological notions of equality.

¹⁰¹ Alstott, *supra* note 2, at 486 (“[C]areers open to talents’ . . . requires only that people be permitted equal access to jobs for which they are qualified.”).

¹⁰² *Wealth Taxes*, *supra* note 6, at 265 (“[M]any liberal egalitarian theories of distributive justice . . . call for some redistribution from those with greater means and opportunities to those with less.”). Of course, much more could be said about the intricacies and relative pros and cons of each conception of liberal egalitarianism (as well as the outcome-based interpretations of equality). My goal here, however, is simply to provide enough context to

A. *Careers Open to Talents*

Careers open to talents (also called the “merit principle”) requires ensuring that as a formal matter, each individual has an equal chance to compete for jobs, school admissions, and the like.¹⁰³ Access to such positions, for example, cannot be limited only to people of a certain race, gender, or social class. Instead, requiring open competition is thought to ensure that positions are awarded based on merit to the most talented applicant, instead of going to those with less talent because of some unrelated quality, such as race. Unequal outcomes are thus tolerated as the product of an individual’s own choices about whether or not to compete and how hard to do so, instead of as the product of arbitrary characteristics.

B. *The “Liberal Egalitarian” Theories*

Although the merit principle plays a large role in much of our legal system (such as anti-discrimination law) and enjoys wide popular support, many theorists feel that it offers equal chances in name only. These critics argue that careers open to talents ignores the fact that the resources available at birth influence one’s ability to fully develop her talents.¹⁰⁴ Some segments of society therefore have a greater ability than others to cultivate their talents to compete for various positions, rendering the merit principle an insufficient guarantee of substantive equality of opportunity.

explore in satisfactory detail what these deontological accounts might imply for the charitable tax subsidies. Moreover, I have chosen to distill this context from those philosophical books and articles most commonly referred to by other tax and legal scholars who more routinely import the insights of political philosophy. By so doing, I underscore that I am not attempting to take a stand on which such works are the most influential, or suggest the best implementation of equal opportunity ideals. Rather, I am simply trying to import the insights of those works already recognized as useful by other scholars into the field of charitable giving policy. *See supra* notes 5-6. Lastly, the interpretations of liberal egalitarianism discussed herein necessarily relate to the distribution of resources; this is not to say that other conceptions of egalitarianism have nothing to add in other spheres of society.

¹⁰³ HARRY BRIGHOUSE, *JUSTICE* 48 (2004) (“[C]areers open to talents’ states that no-one should be discriminated against at the point of hiring . . . except on grounds strictly relevant to their likely performance in the position.”); *THEORY OF JUSTICE*, *supra* note 11, at 62; Alstott, *supra* note 2, at 486 (“[E]very job should go to the most qualified person, regardless of morally irrelevant attributes like race, gender, and so on.”).

¹⁰⁴ *See, e.g.*, BRIGHOUSE, *supra* note 103, at 48-49 (“So, for example, someone who is talented and well born will be rewarded, which will enable him to buy for his less talented child an expensive education which will enable him to do better than an equally talented but less well-born child.”); *THEORY OF JUSTICE*, *supra* note 11, at 62-63; Alstott, *supra* note 2, at 486 (“But the merit principle standing alone would leave uncorrected the brute luck that affects early development and the resources to which one has access. For example . . . a child born to a poor family may lack the money to obtain higher education.”).

To that end, a body of work loosely defined as “liberal egalitarian” theory has focused on conceptualizing deontological¹⁰⁵ alternatives to careers open to talents. To generalize broadly,¹⁰⁶ these theorists seek to minimize the impact that the arbitrary circumstances of one’s birth have on an individual’s opportunity, while simultaneously holding each individual responsible for her own decisions concerning what kind of life to pursue.¹⁰⁷ Most liberal egalitarians thus tolerate unequal outcomes due to choices, but not unequal outcomes due to chance.¹⁰⁸

1. Rawlsian Equality

The first major liberal egalitarian alternative to the merit principle is John Rawls’s conception of “democratic equality,”¹⁰⁹ which (*very generally*)

¹⁰⁵ To be clear, consequentialist traditions also offer numerous alternatives to the merit principle, most notably utilitarianism and equality of welfare. As mentioned previously, this Article concerns itself only with deontological notions of equality of opportunity. It should be noted, however, that Rawls, Dworkin and the other egalitarian theorists discussed herein were writing in reaction to, and primarily critiquing, utilitarianism and equality of welfare. See KYMLICKA, *supra* note 98, at 53 (contextualizing the liberal egalitarian enterprise).

¹⁰⁶ As Eric Rakowski has noted, liberal egalitarianism is a “woolly doctrine, a canopy sheltering a colorful array of theories.” *Transferring Wealth*, *supra* note 6, at 419.

¹⁰⁷ See, e.g., *Uneasy Case*, *supra* note 6, at 289-90 (1994) (distilling shared principles of liberal egalitarianism from a set of scholars that includes John Rawls, Ronald Dworkin, Bruce Ackerman, and Eric Rakowski); *Transferring Wealth*, *supra* note 6, at 429-30 nn.26 & 28 (explaining liberal egalitarianism and characterizing John Rawls, Ronald Dworkin, Richard Arneson, G. A. Cohen, Thomas Nagel, Philippe Van Parijs, Martha Nussbaum, Amartya Sen, and himself as ascribing to such); Daniel N. Shaviro, *Inequality, Wealth, and Endowment*, 53 TAX L. REV. 397, 400-01 nn.13 & 19, 417 (2000) (adding Anne Alstott to the list); Stark, *supra* note 6, at 55-56 (defining and likewise listing prominent liberal egalitarians (here including Liam B. Murphy)); Zelenak, *supra* note 6, at 1154, 1172 (describing liberal egalitarianism and referring to a number of theorists characterized as such “by self-identification and common understanding”).

¹⁰⁸ *Wealth Taxes*, *supra* note 6, at 285; Seana Valentine Shiffrin, *Egalitarianism, Choice-Sensitivity and Accommodation*, in REASON AND VALUE 270, 270 (R. Jay Wallace et al. eds., 2004) (“Many contemporary liberal egalitarians construe egalitarianism to require resource distributions that are designed to be insensitive to features of people that are due to luck but sensitive to their choices.”). But see Liam B. Murphy, *Liberty, Equality, Well-Being: Rakowski on Wealth Transfer Taxation*, 51 TAX L. REV. 473, 475, 481 (1996) (questioning the extent to which *all* liberal egalitarian theories rest on the choice/chance distinction and arguing that a belief that “the mere fact that a person is badly off presents a prima facie reason for the state to transfer resources in his direction” is not inconsistent with liberal egalitarianism); Samuel Scheffler, *What is Egalitarianism?*, 31 PHIL. & PUB. AFFAIRS 5, 11 (2003) (arguing that Rawls does not place great importance on the choice/chance distinction).

¹⁰⁹ As readers familiar with Rawls already know, his exposition of democratic equality (which he at times refers to as “justice as fairness”) as a measure of distributive justice is the second of Rawls’s two principles of justice. Very generally, the first (which has priority

involves two components.¹¹⁰ The first, “fair equality of opportunity,” calls for minimizing the varying ability to develop skills that equally talented people from different social classes have.¹¹¹ Rawls argues, however, that reducing the role of the material circumstances of one’s birth isn’t enough; the distribution of natural endowments at birth also influences life prospects, and is just as arbitrary as the distribution of initial material resources.¹¹² Rawls thus proposes that fair equality of opportunity be coupled with what he terms the “difference principle.”¹¹³

Quite generally, the difference principle acknowledges that unequal natural talents are not, in and of themselves, either “just or unjust.”¹¹⁴ What Rawls condemns is when societal structures are such that the less talented are necessarily in a position of disadvantage as compared to the more talented.¹¹⁵ He argues that a just society allows better endowed individuals to gain financially from drawing out their talents, but only if the less advantaged also benefit.¹¹⁶ Inequalities resulting from unequal endowments – as well as unequal efforts – are thus allowable,¹¹⁷ so long as they make the *financially*

over the second) mandates that each person has an “equal right to . . . basic liberties” such as political liberty, free speech, freedom of thought, freedom from physical assault, the right to hold property, and the like. THEORY OF JUSTICE, *supra* note 11, at 53.

¹¹⁰ To be sure, a large debate surrounds how to best interpret Rawls’s works. In this Article, I take as my starting point the interpretations of his work that are most frequently referred to by legal scholars. Further, while Rawls was concerned with very broad questions of justice, the principles discussed herein focus only on the narrower parts of his theory that are concerned with the distribution of resources. BRIGHOUSE, *supra* note 103, at 56.

¹¹¹ JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT 44 (Erin Kelly ed., 2001) [hereinafter JUSTICE AS FAIRNESS]; THEORY OF JUSTICE, *supra* note 11, at 63 (“The expectations of those with the same abilities and aspirations should not be affected by their social class.”). Examples of policies that could implement Rawls’s conception of fair equality of opportunity include using the tax system and inheritance laws to prevent the accumulation of wealth concentrations and creating an educational system that would enable all individuals to cultivate their talents, regardless of their family’s income. THEORY OF JUSTICE, *supra* note 11, at 63; *see also* BRIGHOUSE, *supra* note 103, at 56-57 (offering examples of Rawls’s fair equality of opportunity in practice).

¹¹² THEORY OF JUSTICE, *supra* note 11, at 64.

¹¹³ *Id.* at 65.

¹¹⁴ *Id.* at 87. In fact, Rawls suggests that the fact that talents differ from one person to another can benefit society. *Id.* at 68, 87.

¹¹⁵ *Id.* at 67-68, 87 (“The naturally advantaged are not to gain merely because they are more gifted.”).

¹¹⁶ *Id.* at 68, 87 (“[Those who have been favored by nature . . . may gain from their good fortune only on terms that improve the situation of those who have lost out.”).

¹¹⁷ Because Rawls implicitly endorses inequalities that are the result of individual choices, he is often credited with starting the modern emphasis on the choice/chance distinction. SAMUEL FREEMAN, JUSTICE AND THE SOCIAL CONTRACT: ESSAYS ON RAWLSIAN POLITICAL PHILOSOPHY 113 (2007) (crediting Rawls with originating the liberal egalitarian concern with responsibility). *But see* Scheffler, *supra* note 108, at 11 (arguing that Rawls

least advantaged better off than they would be otherwise.¹¹⁸ (Although Rawls defines the least advantaged in terms of social primary goods,¹¹⁹ he almost exclusively emphasizes income and wealth in explaining and illustrating the difference principle.¹²⁰)

2. Equality of Resources

A second alternative to careers open to talents is that offered by a group of theorists loosely known as “resource egalitarians,”¹²¹ who wrote in reaction to Rawls.¹²² In its most basic form, resource egalitarianism calls for ex ante equality of material resources, so that later outcomes will not turn on the arbitrary material circumstances of one’s birth.¹²³ Most resource egalitarians, however, go beyond this basic view in favor of a more expansive interpretation.¹²⁴ Like Rawls, they recognize that people are born with unequal abilities; even if individuals start with equal material resources ex ante, the resulting distribution will still reflect some luck.¹²⁵ Unlike Rawls, however,

places less importance on the choice/chance distinction than most scholars interpret him as doing).

¹¹⁸ THEORY OF JUSTICE, *supra* note 11, at 65.

¹¹⁹ Briefly, Rawls conceives of his list of primary goods in the following manner: even though individuals will differ in their conception of the good life, each person has some such conception. To that end, “certain things are needed in order to pursue these commitments, whatever their more particular content.” KYMLICKA, *supra* note 98, at 64. Rawls calls these things primary goods, of which there are two sorts. The first includes “social primary goods,” which are “goods that are directly distributed by social institutions, like income and wealth, opportunities and powers, rights and liberties.” *Id.* at 65; THEORY OF JUSTICE, *supra* note 11, at 54. The second sort are “natural primary goods,” which consist of “goods like health, intelligence, vigor, imagination, and natural talents, which are affected by social institutions, but are not directly distributed by them.” KYMLICKA, *supra* note 98, at 65; THEORY OF JUSTICE, *supra* note 11, at 54; *see also* BRIGHOUSE, *supra* note 103, at 44-45 (adding a third category of primary goods, that of self-respect that “depends in part on the distribution of social primary goods, but is not distributed itself”).

¹²⁰ THEORY OF JUSTICE, *supra* note 11, at 97-98; *see also* Mark S. Stein, *Rawls on Redistribution to the Disabled*, 6 GEO. MASON L. REV. 997, 999 (1998) (“[I]n interpreting the difference principle [Rawls] focuses almost exclusively on the primary goods of income and wealth.”).

¹²¹ BRUCE A. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* 31-34 (1980); RONALD DWORIN, *SOVEREIGN VIRTUE* 65 (2000); Alstott, *supra* note 2, at 476.

¹²² KYMLICKA, *supra* note 98, at 55 (stating that many “later theorists have defined themselves in opposition to Rawls”).

¹²³ Alstott, *supra* note 2, at 476 (“[E]ach person should initially receive an equal, per capita share, because such a division accords equal respect to each individual, *and* that any inequalities thereafter should be accepted as fair, because they result from individuals’ choices about how to use their resources.”).

¹²⁴ *E.g.*, *id.* at 478-84 (discussing interpretations of resource equality that account for expensive tastes, differential talents, and disabilities).

¹²⁵ This is so because the unequal distribution of abilities is arbitrary – one person, for

most resource egalitarians consider these differences in natural abilities *per se* unjust.¹²⁶

Resource egalitarians thus suggest that persons with meager natural endowments should be compensated so that they have the same opportunities to live their conceptions of the good life as those with greater endowments.¹²⁷ For example, a person who is born with paralyzed legs needs to spend funds on items like crutches or a wheelchair, while an able-bodied person does not. After purchasing a wheelchair, the disabled individual has fewer resources leftover with which to pursue his view of a good life.¹²⁸ This simple example, however, betrays a deep debate concerning exactly which aspects of a person should be considered part of his natural endowment, and therefore due to chance:¹²⁹ only basic skills such as walking and seeing, or more specific talents like an ability to play the piano? And what about expensive tastes?

example, does not “deserve” to be born smarter or with a better voice than another. Thus, even with equal resources, a person who is smarter, can sing better, or farm better than others will have a greater chance at success, and that chance is due to luck. In contrast, a person who can barely read, or who is blind, or wheelchair bound needs more resources than others to have the same shot at success.

¹²⁶ FREEMAN, *supra* note 117, at 116 (“The point then is simply that no one deserves to be born with greater or less innate intelligence or ability, greater or less strength and health, or greater or less beauty or physical attractiveness, charm, and so on, than anyone else.”). Recall that Rawls suggests that unequal endowments are not in and of themselves unjust, but that what is unjust is when societal structures are such that those with lesser endowments are necessarily disadvantaged in terms of primary goods. Theorists thus read Rawls as neither requiring compensation for unequal endowments as such nor calling for equalization or elimination of the effects of unequal endowments. *See, e.g., id.* at 116, 118-19; KYMLICKA, *supra* note 98, at 98-99 n.7 (summarizing various theorists’ views about Rawls’s rejection of compensation for natural disadvantages as a matter of justice). Rather, theorists interpret Rawls as requiring redistribution to persons with meager natural endowments only if such persons are the least advantaged in terms of income and wealth. KYMLICKA, *supra* note 98, at 70.

¹²⁷ This contrasts with the common interpretation of Rawls as focusing solely on unequal outcomes as defined in terms of the social goods of income and wealth. As Kymlicka explains:

The difference principle may ensure that I have the same bundle of social goods as a handicapped person. But the handicapped person faces extra medical and transportation costs. She faces an undeserved burden in her ability to lead a satisfactory life, a burden caused by her circumstances, not her choices. The difference principle does not remove that burden.

KYMLICKA, *supra* note 98, at 71; *see also* BRIGHOUSE, *supra* note 103, at 45 (stating that Rawls skirts the question of disabilities and handicaps).

¹²⁸ Amartya Sen, *Equality of What?*, in THE TANNER LECTURES ON HUMAN VALUES 196, 218 (Sterling M. McMurrin ed., 1980) (arguing that “resources should be devoted to remove or substantially reduce the handicap” of the disabled to promote equality of “basic capabilities”).

¹²⁹ Another point of departure between Rawls and these theorists is that the latter seem to place more emphasis on *why* the least advantaged lack wealth and income. The resource

a. *Disabilities and Talents*

Consider the question of mental and physical endowments. Most resource egalitarians agree that physical and mental disabilities should trigger compensation, but this then raises the question of defining which abilities the lack of which should trigger compensation. Should a person of average intelligence be compensated for having fewer prospects than someone with an IQ of 150? Or should compensation be limited to those with below-average IQs, who will have a hard time earning an “average” living?

Unfortunately, the resource egalitarian literature¹³⁰ recognizes this dilemma, but largely avoids attempts to identify specific “lacks” that should trigger compensation. Dworkin addresses this problem with his hypothetical insurance scheme: quite generally, he posits that “handicaps” that prudent individuals would insure against (such as “blindness or the loss of a limb”) be considered disabilities triggering compensation.¹³¹ Other theorists, such as Ackerman and Rakowski, resolve the issue by noting that although creating a precise list of which disabilities should merit compensation is impossible, some easy cases could likely be identified.¹³² In their view, disabilities that would impact the ability to attain a wide variety of conceptions of the good life would qualify.

A more controversial permutation of the disabilities issue involves “talent-pooling.” Advocates of talent-pooling believe that people with fewer talents (here meaning specific skills that individuals cultivate where the success of that cultivation depends in part upon one’s initial endowment) should be compensated.¹³³ This is so, they reason, because the distribution of skills

egalitarians, for example, would (for the most part) not redistribute to a poor person if his material disadvantage stemmed from his prior choices. In contrast, these theorists interpret Rawls’s difference principle to counsel redistribution to the voluntarily poor who have chosen a life of leisure. *See, e.g.,* KYMLICKA, *supra* note 98, at 74. To be fair to Rawls, however, it seems that he later adapted his definition of primary goods to include leisure, so that someone poor in wealth but rich in leisure would not count as disadvantaged.

¹³⁰ In contrast to later resource egalitarians, Rawls assumes a world in which nobody is severely physically or mentally disabled, although he does address temporary illnesses.

¹³¹ DWORKIN, *supra* note 121, at 78-79.

¹³² *See* ACKERMAN, *supra* note 121, at 115-20, 129-33 (discussing the types of defects that could lead to one’s domination by others and why they merit redress such as special equipment or education); RAKOWSKI, *supra* note 6, at 121-22 (suggesting that “severe handicaps and debilitating childhood diseases and injuries that have serious long-term effects” merit compensation).

¹³³ Alstott, *supra* note 2, at 479-80 (“Their argument . . . is that talents are not chosen by the individual but are distributed according to brute luck, so that the ‘natural’ distribution of talents is morally arbitrary. Although society cannot literally redistribute talent, it can respond to inequality of talent in other ways, for example by adjusting the distribution of resources *ex ante* or of income *ex post*.”). In some respects, the difference principle represents a form of talent-pooling, as it allows the better endowed to benefit from their natural good luck to be born talented so long as the least advantaged also benefit.

capable of cultivation (such as a good voice or the ability to run fast) is arbitrary. To that end, if *Adam* is untalented at something (say, singing or carpentry) but would gladly work as a singer or carpenter if he had the skill, then *Adam* would merit compensation. Some, like Dworkin, further argue that the fact that some are born with talents that can command great returns in the marketplace (like a pop singer) while others are born with similar but less remunerative talents (such as a folk singer) also represents an arbitrary luck of the draw.¹³⁴

Opponents of talent-pooling¹³⁵ offer two main critiques. First, they suggest that distinguishing chosen tastes (for which one should not be compensated) and innate talents is in practice impossible. Although someone born with perfect pitch is more likely to spend the time and energy necessary to become a talented singer than someone born tone deaf, that is not always the case. Thus, how do we know whether *Adam* is a poor singer because he never worked at cultivating a good voice (a choice meriting no compensation), or because he would have a terrible voice no matter how hard he worked (thus meriting compensation)? Second, such theorists (very generally) believe that individuals should be judged not by their parts, but as a whole, and that each individual is good at some things and bad at others.¹³⁶ For example, *Adam* may be a bad singer, but he may be a great cook. If he spends his time getting booed off the stage at auditions for Broadway musicals instead of working as a cook, that's just an expensive choice on his part.¹³⁷

b. *Expensive Tastes*

Even ignoring the talent-pooling issue, one final dilemma remains for resource egalitarians: that of expensive tastes. Under this view, those with unchosen expensive tastes are at a relative disadvantage vis-à-vis individuals with cheaper tastes.¹³⁸ I prefer champagne, while my husband prefers beer. Because champagne costs more, it is thus harder for me to live my vision of the good life than for him, even if we have equal talents and equal resources. Is my preference for champagne arbitrary, like my brown hair? If so, my

¹³⁴ DWORKIN, *supra* note 121, at 93 (“People might then be supposed to insure against turning out to lack some particular skill.”).

¹³⁵ Such opponents include Anthony Kronman, Phillip van Parijs, Bruce Ackerman, and Anne Alstott. Alstott, *supra* note 2, at 481-82.

¹³⁶ *Id.* 484 (“Instead of looking at deficits in a piecemeal fashion . . . the state ought to evaluate individuals’ prospects as a whole.”).

¹³⁷ Alstott further argues that Dworkin’s characterization of market values as arbitrary violates the liberal value of neutrality, which would suggest we honor them. In her view, saying that pop singers are over-rewarded while folk singers are under-rewarded in effect deems one “better” than the other. *Id.* 482.

¹³⁸ See, e.g., Richard J. Arneson, *Equality and Equal Opportunity for Welfare*, 56 PHIL. STUD. 77, 79 (1989) (arguing that at least some of our preferences are outside our control and therefore must be taken into account for purposes of resource equality); G.A. Cohen, *On the Currency of Egalitarian Justice*, 99 ETHICS 906, 906 (1989).

ability to live the life I seek is influenced by arbitrary factors unrelated to choice.

Most theorists, however, reject compensation for expensive tastes. Some argue that tastes are chosen and not innate, and that individuals choose to develop certain tastes (such as an appreciation for expensive wine) once they know their initial endowments. Others argue that even if tastes are not chosen, one has a choice as to whether to fulfill those tastes. I may innately prefer champagne to beer, but it is my choice to spend a portion of my salary on champagne instead of other goods I also value.

3. The Capabilities Approach

A third liberal egalitarian theory prevalent in the legal philosophy is the “capability approach,” championed by Amartya Sen and Martha Nussbaum.¹³⁹ Although Sen and Nussbaum couch their model as an alternative to both Rawls and the resource egalitarians,¹⁴⁰ it too tolerates unequal outcomes due to choices while recognizing potential harms from unequal material and natural endowments.¹⁴¹ Under their approach, society’s duty is to ensure that each individual enjoys a minimal level of certain basic capabilities so that each person can decide for herself what level of “functioning” to achieve with that capability.¹⁴²

Very generally, a “functioning” is a type of activity or experience, while a “capability” is the ability to do that activity or achieve that experience. For example, having the means and opportunity to get enough calories to be well-nourished is a capability, while actually being well-nourished is a functioning. A wealthy person who lives among a cornucopia of grocery stores and restaurants, for example, may be under-nourished because she chooses to go on a hunger strike for political reasons even though she has the capability to attain enough food.

¹³⁹ Martha C. Nussbaum, *Capabilities as Fundamental Entitlements: Sen and Social Justice*, 9 FEMINIST ECON. 33, 33-34 (2003) [hereinafter *Capabilities*]. Although Nussbaum and Sen often write specifically about either gender justice or justice in developing nations, their central points also apply to any disadvantaged group and to developed nations such as our own.

¹⁴⁰ Sen, *supra* note 128, at 197.

¹⁴¹ To be clear, neither Sen nor Nussbaum is concerned with inequality per se (like Rawls, but in contrast to the resource egalitarians). Instead, their focus is on society’s obligation to ensure a minimum of certain capabilities. I have included their theories here, however, because legal scholars often invoke the capabilities approach as one answer to the equality-of-what question and group the capabilities approach with the liberal egalitarian theories discussed herein (instead of, say, with utilitarianism or libertarianism). See, e.g., *Transferring Wealth*, *supra* note 6, at 429-30 nn.26 & 28 (grouping Sen and Nussbaum alongside the liberal egalitarians).

¹⁴² *Id.* at 217-18 (according to this approach a person warrants compensation if they lack certain “basic capabilities”).

Although Sen did not specify a list of capabilities when he first proposed the capability approach, Martha Nussbaum later argued that each society should provide the following basic capabilities:

- life (“[b]eing 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 . . . to 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”); and
- control over environment (participating in political choices as well as opportunities to hold property and employment).¹⁴³

The capability approach thus goes further than Rawls and the small subset of resource egalitarians that focuses solely on material resources, in that it uses metrics other than material resources to define the less well-off. On the other hand, it goes less far than the group of resource egalitarians concerned with talent-pooling and expensive tastes, for it seems to imply that achievement of certain specific “functionings” (such as the enjoyment of champagne) is a product of choice.

C. *Equal Opportunity in Practice*

As outlined above, two common threads among the various conceptions of equal opportunity are tolerance of unequal outcomes due to choices, and intolerance of unequal outcomes stemming from the chance circumstances of one’s birth. That said, the analyses discussed above reflect very stark differences concerning which outcomes to attribute to choice versus chance, what currency should be equalized, and how to achieve that equalization.

Real world implementation of any of these conceptions of equality would therefore require some policies distinct to each interpretation, as well as a few overlapping elements. Each conception discussed above, for example, would require strict nondiscrimination policies – laws such as those prohibiting racial or gender discrimination in hiring, school admissions, and the like. While implementing careers open to talents would likely require nothing more than that, executing the liberal egalitarian conceptions of equality is more complicated.

¹⁴³ *Capabilities*, *supra* note 139, at 41-42.

This is so because the alternate interpretations all essentially counsel that an ideal world would provide either ex ante equality of or an ex ante minimum of some currency.¹⁴⁴ For example, the capabilities approach implies that if everyone enjoys an initial baseline level of capabilities, then later differences in “functionings” are tolerable. Similarly, resource egalitarianism suggests that if resources are equal ex ante, then unequal ex post outcomes are acceptable. And although not couched as an ex ante theory, Rawls’s theory also contains such elements: if the principle of fair equality of opportunity is met (and if the difference principle is satisfied), then later inequalities are bearable.¹⁴⁵

Once one of the foregoing currencies was chosen, we would provide ex ante equality (or the ex ante minimum) with respect to that currency and then let the chips fall where they may without further redistribution. In practice, of course, implementation of an ex ante distribution of resources is impossible. The real world is an ongoing state, meaning that there is no single point in time which we can identify as the appropriate time to provide, for example, equality of resources going forward. Because the real world is composed of people of all ages – those just starting out, those in the midst of successful or not-so-successful careers, and those near the end of their lives, the distribution of resources at any given time thus reflects a mix of choices and luck.¹⁴⁶

To illustrate, suppose that in *Year 10*, we impose a confiscatory tax on all income over a set amount coupled with redistribution to those with incomes under that amount. Although this would provide ex ante equality from *Year 10* forward, it ignores the choices made before that date. It is quite likely that the financial positions of individuals both subject to the tax and benefiting from redistribution are due, at least in part, to their choices. If *Bonnie* is financially successful because she forewent leisure in *Years 1* through *9* in order to work long hours, while *Colette* is broke because she spent all her time snowboarding, then taxing *Bonnie* to redistribute to *Colette* erases the inequality that reflects their choices. Imposing equalization at any given point, therefore, erases the choice/chance distinction and the emphasis on personal responsibility valued by equality of opportunity theorists. And of course, in addition to these technical obstacles, there would be overwhelming political opposition to such an effort.

The practical implementation of liberal egalitarian ideals thus generally involves policies that do not seek complete equalization but instead combine partial (but not confiscatory) taxation of the more successful along with some

¹⁴⁴ *Transferring Wealth*, *supra* note 6, at 430 (stating that “an overwhelming number of liberal egalitarians agree that justice demands greater equalization . . . of people’s chances to acquire and achieve” when discussing wealth redistribution).

¹⁴⁵ FREEMAN, *supra* note 117, at 114 (explaining that Rawls does not call for equality of primary goods).

¹⁴⁶ See, e.g., *Uneasy Case*, *supra* note 6, at 294-95 (“Neither of the background conditions of the liberal egalitarian, equal-opportunity model – equal initial entitlements and just social institutions – materialize in the real world.”).

(but not substantial) redistribution to the less wealthy. The latter part of this redistribution is generally referred to as “leveling up.”¹⁴⁷ Existing examples include programs such as Head Start, public schools, and scholarship programs, each of which tries to provide all children – regardless of the financial circumstances of their birth – with the education necessary to develop their talents as they wish. Likewise, social insurance programs such as the Children’s Health Insurance Program (CHIP) and Women, Infants, and Children Nutrition Program (WIC) also reflect these ideals by helping providing food and healthcare to poor children, so that they are not arbitrarily disadvantaged in their physical and mental development. Not surprisingly, theoretical proposals of leveling up go even further: Anne Alstott and Bruce Ackerman, for example, propose that upon reaching early adulthood, each individual be given a “stake” of \$80,000 with which to pursue their conception of the good life, be it schooling, buying a home, or some entrepreneurial enterprise.¹⁴⁸

All three liberal egalitarian theories discussed above countenance leveling up in this manner, whether these programs are conceptualized as implementing Rawls’s fair equality of opportunity, providing Sen and Nussbaum’s capabilities, or compensating individuals for unequal initial endowments. Here, a reader may wonder why these examples have focused on children. In the real world, whether redistribution to less advantaged adults furthers or hinders liberal egalitarian ideals is debatable. On one hand, it is quite likely that some of their plight is due to the past arbitrary circumstances of their birth, and they thus deserve compensation. At the same time, however, it is also plausible that their own past choices (for example, dropping out of school) have contributed to their situation. Some theorists thus argue that redistribution to adults is necessary to compensate for past injustices, while others believe that it negates individual responsibility for past choices.

These theories also counsel for redistribution away from the more fortunate, often referred to as “leveling down.” At the most basic level, each theory must tax the better off to fund the leveling up of the worse off that it counsels. Some theories, however, additionally imply that leveling down is intrinsically good: Rawls, for example, calls for policies such as inheritance taxation that minimize wealth concentrations, which he fears can lead to political domination by the wealthy.¹⁴⁹ Additionally, both Rawls and the resource egalitarians suggest that taxing the better off is necessary to diminish their ability to provide their offspring with advantages which – from the *heirs’*

¹⁴⁷ See, e.g., Alstott, *supra* note 2, at 472 (discussing “leveling up” as a necessary component of implementing equality of opportunity).

¹⁴⁸ See ACKERMAN & ALSTOTT, *supra* note 5, at 4-5; see also PHILIPPE VAN PARIJS, REAL FREEDOM FOR ALL 30-57 (1995) (proposing a basic income to be paid in monthly installments).

¹⁴⁹ JUSTICE AS FAIRNESS, *supra* note 111, at 44. Progressive taxation and inheritance taxation exemplify this policy.

perspectives – are arbitrary, as nobody deserves to be born into a wealthier family than someone else.¹⁵⁰ And conceptually, taxing the better off is also consistent with the liberal egalitarian view that some of their advantage is due to the arbitrary fact they were born better endowed than others, and therefore do not deserve to keep all of the benefits of that good luck.

In practice, then, policies designed to promote “equal opportunity” generally share one or more of the components just discussed. Implementation of the merit principle, as well as the various resource-based schemes, would all require nondiscrimination. The liberal egalitarian theories discussed above include some practices designed to level up, as well as policies to level down – although the extent of and reasoning for the leveling down varies somewhat.

III. EQUAL OPPORTUNITY AS CAREERS OPEN TO TALENTS AND THE CHARITABLE TAX SUBSIDIES

Moving from theory and general practices to our specific inquiry, how would a set of charitable tax subsidies be designed to complement and further these varying ideals of equal opportunity? I will first address separately the implications of careers open to talents before discussing the liberal egalitarian theories as a group. This approach will allow me to contrast the merit principle with the various egalitarian theories, while highlighting the variations among the latter.

As outlined above, careers open to talents emphasizes ensuring an absence of formal legal impediments to the right to compete, rather than the affirmative presence of some amount of *ex ante* resources. What light does this conception of equal opportunity shed on the charitable tax subsidies? In large part, the answer turns on whether we prioritize the merit principle, or subordinate it to the additional goals of efficiency and pluralism.

Prioritizing careers open to talents would mean using it as an initial means of delineating which organizations deserve subsidies by identifying groups that proactively further the merit principle. In that case, we would likely subsidize only a small number of organizations: civil rights groups fighting for opportunities to be open to all as a matter of law, libertarian-style public interest groups combating other types of arbitrary laws (such as certain licensing schemes), and the like. Efficiency and pluralism concerns would still, however, explain why such organizations should be subsidized via the deduction and exemption.¹⁵¹ To illustrate, consider affirmative action:

¹⁵⁰ THEORY OF JUSTICE, *supra* note 11, at 245-47 (discussing the need for inheritance taxation to correct wealth inequalities that preclude “similar chances of education and culture for persons similarly motivated”); Alstott, *supra* note 2, at 473 (proposing an inheritance tax system that would “distinguish between inheritance reflecting arbitrary luck (the wealth of the family into which one is born or by which one is adopted) and one’s own choices”).

¹⁵¹ This approach, of course, gives careers open to talents a very large priority, for it suggests an all or nothing approach to subsidization. Giving a smaller priority to careers

reasonable people disagree about whether it furthers or frustrates the merit principle. Pluralism thus suggests allowing individual taxpayers to decide which groups weighing in on the subject to support (if any), so that a variety of opinions – not just the voice of the majority at any given moment – are heard.

In contrast, subordinating the merit principle to efficiency and pluralism would yield a much larger set of subsidized organizations. In that case, we would first subsidize groups deemed worthy of help by the efficiency and pluralism theories (groups that provide public goods, suffer free rider problems, and have a threshold number of donors). We would then ensure that such groups did not act in a manner contradictory to the merit principle. This would require (as current law does) that such groups not engage in racial discrimination (in hiring or in decisions about to whom to offer services) and the like. It would not, however, require such groups to offer free or reduced-cost services to the poor or disadvantaged (however defined), as careers open to talents has nothing to say about the inequality of resources.

Thus, thinking about structuring the subsidies themselves to reflect the merit principle would either counsel an extremely small set of subsidies, or a set of subsidies much like current law (but with the helping the poor question resolved in the negative). Perhaps another way to view careers open to talents, however, is that it represents an ideal to which our society should aspire¹⁵² but that is impossible to implement currently due to past and existing inequalities. Many Americans, for example, simultaneously support equal opportunity and oppose redistributive taxation. To that end, those opposed to mandatory redistribution by the government might tolerate a charitable sector that incorporated more resource redistribution,¹⁵³ in order to move the more mandatory part of our societal structure closer to the merit principle. Therefore, the goal of implementing careers open to talents *outside* the charitable sector might counsel implementing another version of equal opportunity *within* it.

IV. THE “LIBERAL EGALITARIAN” EQUAL OPPORTUNITY THEORIES AND THE CHARITABLE TAX SUBSIDIES

As outlined in Part II.C, implementing the various liberal egalitarian theories entails a mix of some or all of the following policies: leveling up, leveling down to prevent the arbitrary head start of the children of the better off, and leveling down to minimize wealth concentrations. A set of charitable

open to talents might suggest continuing to subsidize other organizations, but less heavily than those organizations that directly enhance careers open to talents.

¹⁵² Indeed, the brevity of the discussion of the merit principle and charitable giving should not be read to give short shrift to the merit principle. The discussion’s brevity stems from the fact that because careers open to talents does not counsel redistribution, its nuances for charitable giving policy are relatively straightforward.

¹⁵³ Levmore, *supra* note 43, at 406.

tax subsidies inspired by liberal egalitarianism¹⁵⁴ would likely contain similar components, and would therefore differ in several respects from current law – regardless of whether one prioritizes or subordinates liberal egalitarianism to the values of pluralism and efficiency. This Part shall first address what the philosophy literature implies for leveling up before turning to the implications of that work for leveling down. Then, this Part will explore the interaction between leveling up and leveling down, particularly whether a donation should be required to do both in order to receive a subsidy.¹⁵⁵

A. *Leveling Up*

Each liberal egalitarian theory discussed above in Part II.B implies some type of leveling up in the form of redistribution to the less-fortunate: Rawls to ensure fair equality of opportunity, Sen and Nussbaum to provide basic capabilities, and the resource egalitarians to compensate for arbitrary disadvantages. Let's assume, for the moment, that a set of charitable tax subsidies inspired by these theories would *require* a given transfer to level up in order to qualify for a subsidy.¹⁵⁶ Although one might think such a rule would counsel a very narrow set of subsidies, the equality literature implies that the question of leveling up is much more complex than it initially appears.¹⁵⁷ This Part unpacks these nuances by exploring which charitable transfers¹⁵⁸ level up the disadvantaged, defined first in terms of a lack of

¹⁵⁴ To be clear, I am not asserting that the various theories discussed herein *require* any type of charitable tax subsidies in the first instance, let alone the specific subsidies envisioned here. Rawls's difference principle, for example, is highly abstract, and what it requires in terms of a tax system is hotly debated. *See, e.g., Wealth Taxes, supra* note 6, at 284 (declining to venture whether the difference principle compels wealth taxation); Stark, *supra* note 6, at 49 n.8. Rather, my goal is to extract the principles of these theories to explore how such principles might inspire our thinking about the subsidies, or might help us answer questions that are currently unresolved.

¹⁵⁵ Again, this all-or-nothing approach reflects giving equality concerns a very large priority over efficiency and pluralism. One could still prioritize equality (but to a lesser degree) by continuing to subsidize groups that had little to do with equality while subsidizing groups that promoted equality of opportunity more heavily.

¹⁵⁶ As discussed *infra* Part IV.C, it is plausible that donations that *only* level down without also leveling up might warrant a subsidy. But for the moment let's assume leveling up is required, so that we can focus on what that means.

¹⁵⁷ Because of this complexity, my exploration will by necessity pale in comparison to the voluminous philosophy literature addressing how to implement leveling up in an ideal world. A rich debate exists, for example, as to whether each citizen should be awarded some baseline level of resources to facilitate some semblance of equal starting points, and if so, how that award should be structured (for example, a one-time "stake" or grant, or as ongoing basic income?). *See generally*, BRUCE ACKERMAN, ANNE ALSTOTT & PHILIPPE VAN PARIJS, *REDESIGNING DISTRIBUTION* (2006); ACKERMAN & ALSTOTT, *supra* note 1; VAN PARIJS, *supra* note 148.

¹⁵⁸ To be clear, this Article is not arguing that the question of leveling up should be left

material resources, then expanding this definition to include those with disabilities, before finally incorporating the questions of talent-pooling and expensive tastes.

1. Material Resources

First consider what the liberal egalitarian theories suggest in terms of leveling up those disadvantaged by a lack of material resources. I shall start by discussing these theories as a group: it seems to me that, regardless of what else a given theory might call for, each urges some type of redistribution to the financially disadvantaged.¹⁵⁹ Rawls, for example, calls for educational systems that provide poor children true educational opportunities; providing Sen and Nussbaum's basic capabilities to all also requires some redistribution to the less wealthy. For ease of exposition, I shall refer to this concept simply in terms of leveling up financial resources, be it for the purpose of compensating bad luck, providing capabilities, or ensuring Rawls's fair equality of opportunity.

Recall that in an ideal world, such policies would provide either ex ante equality of resources or an ex ante minimum of resources. As outlined briefly in Part II.C, however, picking one point in time to provide a given ex ante distribution of resources across all of society is impossible. What is possible, however, is implementing the ex ante/ex post distinction on an individual level via policies that give people who are just starting out the resources necessary for them to truly have choice about the shape of their lives going forward.

The various liberal egalitarian theories in practice thus involve trying to ensure that everyone makes it to the "starting point" with enough resources to compete on an equal basis.¹⁶⁰ This in turn suggests that minimizing the disadvantages of being born to a family with fewer financial resources would be a necessary component of a set of charitable tax subsidies inspired by such theories. To that end, the subsidies would prioritize organizations that enabled materially disadvantaged youth to develop their talents by providing resources either directly, or indirectly via training. Examples that spring to mind include pre- and post-natal care for poor mothers, orphanages, adoption groups, tutoring programs and libraries, scholarship programs, private schools in poor

solely to the charitable sector. Rather, this Part explores the question from the following perspective: assuming that the charitable tax subsidies are but one of a number of government programs that level up, how might liberal egalitarian theories influence the design of those subsidies?

¹⁵⁹ See *Transferring Wealth*, *supra* note 6, at 430 (commenting on liberal egalitarian agreement on the need for wealth redistribution in order to equalize "people's chances to acquire and achieve").

¹⁶⁰ Bruce Ackerman and Anne Alstott, for example, have argued that society should provide each individual with an \$80,000 "stake" upon reaching adulthood so that all people have a chance to pursue their own visions of the good life. ACKERMAN & ALSTOTT, *supra* note 1, at 21-44.

areas, projects like the Harlem Children's Enterprise Zone, and the like.¹⁶¹ More complicated issues are discussed below.

a. *Training*

An interesting question arises with respect to groups that provide training of various types. For many, what initially springs to mind when considering equality of opportunity are programs that teach skills that are obviously practical and relevant to entering the work place: organizations such as reading skills programs, as well as groups that help children develop marketable practical skills (such as preparing inner-city children for careers in the culinary arts). In contrast, programs such as chess teams, golf classes, or music camps for non-wealthy children may at first feel frivolous.

How should we treat the latter, that is, organizations that enable the poor or middle class to develop less marketable skills? Is helping a talented pianist who otherwise couldn't afford a pricey music camp become a better musician – even if it has no impact on her later financial well-being – what we have in mind when we speak of ensuring that everyone has an equal chance to develop their talents? In other words, would a liberal egalitarian scheme of charitable subsidies treat the development (in children) of all skills and talents equally?

My instinct is that such a scheme would. First, it is important to remember that at this point, we are talking about helping all children (regardless of their financial background) develop their talents, so that each can strive for her vision of the good life, whatever that may be. To that end, differentiating among talents at this stage would violate the principle of neutrality. We should not yet be concerned with the possible later financial rewards accompanying various talents, as so doing verges into debates about talent-pooling and expensive tastes. Who is not to say that although most children do not make a career in music, the child given a scholarship to music camp might be the next Bruce Springsteen? Moreover, participating in these types of activities is beneficial even when they remain a mere "hobby" for the individual in question – for three reasons. First, the liberal egalitarian goal is to ensure that all individuals have the means to pursue whatever conception of the good life they may have. In some instances, this means helping an individual develop a non-marketable talent (in addition to simply providing her with material resources), if she views pursuing that talent as part of her conception of the good life. Second, the very act of developing talents in these types of activities helps develop more practical life skills, such as patience and discipline. And lastly, the capabilities approach would counsel making these activities available separate and apart from any practical skills learned, for the

¹⁶¹ Although I emphasize that my project is academic in nature (instead of prescriptive), a great deal of research exists analyzing the effectiveness of various programs in assisting the less financially advantaged. To that end, delineating a list of programs that level up in this manner should not present an insurmountable hurdle to policymakers who choose to follow this path.

capabilities approach suggests that capabilities to imagine, create, and play are inherently valuable, regardless of one's particular conception of the good life.

b. *Cultural Appreciation*

These questions lead to an even tougher problem: What about organizations that simply allow the poor and middle class to enjoy cultural benefits such as the arts? Organizations such as museums and community theaters likely allow the poor and middle class to enjoy a resource that would otherwise be out of reach for them; but is access to art a necessary resource in fully developing as a person, or is it simply an "expensive taste"?

A first response is that opportunities to appreciate art should be considered a resource that may introduce children to interests and talents they might otherwise never know they have. It would seem to violate liberal egalitarianism, for example, for wealthy children with access to these cultural resources to envision a broader array of conceptions of the good life than less wealthy children. For example, children growing up in disadvantaged and isolated areas of rural Texas should know that there are many conceptions of the good life that do not involve playing professional football.

A similar answer is also suggested by the capabilities approach. In particular, Nussbaum's listing of specific capabilities that a just society should provide includes that of using one's senses to think, imagine, reason, and create.¹⁶² This suggests that when liberal egalitarians speak of the types of opportunities that should be open to all regardless of financial background, they mean more than just financial opportunities such as jobs. In addition, this implies that cultural appreciation (or at least access to such) isn't just one of many consumption choices, but rather a fundamental part of being human, just as eating is.

These insights thus answer one question not satisfactorily answered by current law or scholarship. A set of charitable tax subsidies focused on leveling up those without financial resources would still subsidize groups such as the opera and the ballet, but only as long as those groups offered free or discounted admission to the less advantaged (or other programs that help the less privileged develop their abilities).

c. *Adults*

The foregoing discussion has, of course, focused on assistance to children, in order to help all citizens reach the starting point of adulthood with a legitimate chance to fully capitalize upon their talents.¹⁶³ The problem, of course, is that children do not live in a vacuum – they live with families, that is, with adults whose successes or failures in life reflect a mix of choice and chance. From the child's perspective, however, the parent's circumstances are

¹⁶² *Capabilities*, *supra* note 139, at 41.

¹⁶³ See ACKERMAN & ALSTOTT, *supra* note 5, at 34-43 (conceptualizing the onset of adulthood as the appropriate starting point for determining resource equality).

pure chance. Take a poor family without health insurance in which the father is ill because he has smoked his entire life. Here, not helping the father (on the grounds that the father's misfortune stems from his voluntary prior choices, as many resource egalitarians would argue) harms the child. On the other hand, helping the father is in some sense compensating him for poor choices. In such a case, the benefit to the child by keeping her parents healthy very likely outweighs any possible negative incentive effects from the ex post equalization to her father. This suggests that we should subsidize groups providing basic necessities such as health care, food, clothing, and shelter for poor adults who are parents or guardians.

But what about assisting groups that provide similar services to needy adults who are not parents? Here, the various strands of liberal egalitarianism likely diverge, and even within certain strands, no clear answer emerges. Let's start with the general interpretation of resource egalitarianism, which heavily emphasizes the choice/chance distinction. (Indeed, this emphasis is so profound that such theorists are often referred to as "luck" egalitarians.) A very strict application of these theories, such as that proffered by Eric Rakowski, would probably counsel not assisting such adults on the grounds that their past choices led them to their current straits. These theorists might assert, for example, that disadvantaged adults should be held accountable for decisions such as dropping out of school or pursuing low-paying jobs. Redistributing to such people, one could argue, effectuates ex post equalization of welfare instead of ex ante provision of opportunities.

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

For other liberal egalitarians, however, the issue of assistance to childless adults can be addressed more simply. Some theorists with luck egalitarian stripes, for example, suggest providing resource equality through an ongoing basic income scheme or via coupon capitalism,¹⁶⁴ both of which preclude

¹⁶⁴ See, e.g., VAN PARIJS, *supra* note 148 (arguing for unconditional, ongoing payments of basic income to all adults); John Roemer, *Egalitarian Strategies*, DISSENT, Summer 1999,

young adults from blowing opportunities that would come if resources were distributed only at one point in time, at the onset of adulthood. These proposals thus imply that at least to some extent, a thirty-five-year-old *Dudley* should not be held responsible for the choices that a twenty-two-year-old *Dudley* made. Put another way, these theories recognize that people change over time (along the lines of Derek Parfit's insights¹⁶⁵), and sometimes this change is so dramatic that one should be given a fresh start rather than be held hostage by decisions made by one's former self.

An additional alternative stems from the insights of theorists such as Elizabeth Anderson and Liam Murphy, who suggest that many luck egalitarians overstate the importance of the choice/chance distinction while minimizing the value of beneficence.¹⁶⁶ In their views, one can value equality of opportunity and the idea of holding people responsible for their choices without entirely doing away with the notion of beneficence: after all, they reason, the whole point of thinking about equality of resources is giving each individual equal respect, and this means assisting people who need help even if they bear some responsibility for their unfortunate circumstances. It is also likely that Rawls's difference principle and Sen's and Nussbaum's focus on capabilities would also counsel assisting such persons. Although these theories tolerate unequal outcomes due in part to choices, they do not seem as if they seek to implement the choice/chance distinction to the same extent as, say, the more strict luck egalitarians.

d. *Who Merits Leveling Up*

Most of my discussion thus far has used "easy" examples of leveling up people who are quite far down on the income scale. Moving away from these straightforward examples, however, complicates the question of who merits leveling up. Is it only the poor who struggle for basic material resources and training for their children? Or what about the middle class who can provide basic necessities and training, but not the types of opportunities the wealthier can afford (for example, travel abroad, exotic volunteer opportunities, sports camps, music lessons, and the like)? To illustrate, would an expensive music camp be required to assist only the inner-city violinist, or also the middle-class pianist whose family – while not lacking for food or shelter – is also unable to

at 64, 67-68 (proposing that each young adult receive a stock portfolio representing a share of the nation's assets, and that recipients be allowed to trade one stock for another but not cash out the portfolio).

¹⁶⁵ Derek Parfit, *Personal Identity*, 80 PHIL. REV. 3, 24-25 (1971) (discussing the idea of successive selves).

¹⁶⁶ Elizabeth S. Anderson, *What Is the Point of Equality?*, 109 ETHICS 287, 288-89 (1999) (arguing that the disadvantaged merit redistribution not out of pity for their bad luck, but out of concern for their ability to participate in society on equal terms with others); Murphy, *supra* note 108, at 480.

pay the tuition? Alternatively, would we subsidize a free music camp whose pupils were middle class but not poor?

As with the question of aid to adults, it is quite probable that the responses among liberal egalitarians would diverge. Egalitarians with a prioritarian bent (such as Thomas Nagel), as well as Rawlsians who interpret his theory to imply a maximin principle,¹⁶⁷ might well argue that the subsidies should be focused only on the very poor. Likewise, while it seems that in the abstract Sen and Nussbaum might desire to provide a broad set of capabilities to all (regardless of income), they might prioritize the provision of more essential capabilities to the poorest members of society.

On the other hand, a good argument can be made that some interpretations of liberal egalitarianism would inspire the charitable tax subsidies to assist not only the very poor, but also the middle class. While this is more ambitious, it is also more neutral: it suggests that all people should have a true shot at *whatever* they aspire to, given their natural talents (be it admission to Harvard, attending medical school, or attaining public office), and not just a real chance at attaining middle-class status. Providing this broader conception of equal opportunity likely requires assisting the middle class (in addition to the very poor) because of the “arms race” that has essentially developed with respect to many opportunities or stepping-stones to later positions.

The wealthy, for example, can send their children on exotic trips abroad or to talent-specific camps (such as music camps) during the summer, which in turn beefs up college applications. During college, higher-income families can also support their children during prestigious yet unpaid internships, which more and more are becoming a prerequisite for a permanent job after graduation. In contrast, middle-class children (in addition, of course, to poor children) must often work at more “typical” summer jobs, such as lifeguarding or waitressing. This contrast even impacts high school sports teams: in some areas, kids who must work during the summers are disadvantaged when competing for spots on their school’s teams against wealthier youth who spend the summer at pricey sports camps, giving the latter a leg up.

A broad interpretation of equality of opportunity, therefore, would likely countenance helping the middle class compete on the same terms as the wealthy. To suggest otherwise seems to me to violate the principle of neutrality, by suggesting that the higher goals and aspirations of those who already have their basic needs met aren’t important to such individuals’ conception of the good life. This interpretation, therefore, would counsel subsidizing groups that assisted either the poor *or* the middle class.

e. *Measurement and Implementation Issues*

Once we have identified those whom we desire to level up and which broad types of activities level up, we must determine which organizations engage in

¹⁶⁷ See, e.g., ACKERMAN, *supra* note 121, at 267 (equating Rawls’s thoughts with the maximin principle).

that task. This raises a number of complex measurement and implementation questions; although my current task is normative and theoretical, a few broad points can be made. As an initial matter, schemes in other countries (and some states) demonstrate that at least to some extent, we could impose some type of leveling up requirement as a prerequisite for subsidization. Here, two approaches predominate; choosing among them in some respects requires deciding whether to prioritize furthering equality of opportunity over efficiency and pluralism, or vice versa.

One approach is simply to require that a given organization offer free or reduced-cost services to those otherwise unable to afford its services, as the 2006 UK Charities Act requires.¹⁶⁸ This seems relatively simple, and could be one means of providing otherwise unaffordable opportunities not only to the poor, but also to the middle class. Such a requirement, for example, would subsidize a violin camp for musically talented youth, but only if the camp discounted its tuition to those who otherwise couldn't pay (regardless of whether those students were poor or simply middle class).¹⁶⁹ By requiring assistance to such students but not mandating that such students be the focus of the organization, this approach seems to subordinate equality of opportunity to efficiency and pluralism.

A second strategy would be to subsidize only those organizations that primarily promoted equality of resources. This would require differentiating among organizations more precisely than we do now, but is possible. Australia, for example, provides deductions only to organizations "set up for the direct relief of poverty, misfortune, destitution, or helplessness."¹⁷⁰ Germany likewise differentiates among nonprofits, providing more favorable treatment to contributions to scientific, cultural, or benevolent organizations.¹⁷¹ In addition, Arizona grants greater state tax subsidies to organizations that primarily serve the poor;¹⁷² a number of federal legislators have proposed similar bills. Very generally, these bills give extra subsidies to groups that spend a certain percentage (say, 50% or 70%) of their expenditures on low-

¹⁶⁸ CHARITY COMM'N OF ENGLAND AND WALES, CHARITIES AND PUBLIC BENEFIT 7 (2008), available at <http://www.charity-commission.gov.uk/Library/guidance/publicbenefittext.pdf> (identifying the "principles of public benefit" under U.K. law).

¹⁶⁹ Of course, this raises some more specific questions. How much discounting in price must an organization provide? What percentage of its clients must receive a discount? And so on.

¹⁷⁰ Leon E. Irish & Karla W. Simon, *Tax Preferences for Non-Governmental Organizations*, in THE TAX TREATMENT OF NGOS 303, 315 n.41 (Paul Bater et al. eds., 2004).

¹⁷¹ See Klaus Neuhoff, *Legal and Fiscal Provisions for Charitable and Non-profit Foundations and Related Institutions in Germany*, in THE TAX TREATMENT OF NGOS, *supra* note 170, at 89, 126 (indicating that donations to such organizations make taxpayers eligible for a deduction of up to ten percent of total income).

¹⁷² ARIZ. REV. STAT. ANN. § 43-1088(G)(2)-(3) (2010).

income individuals (defined as people whose income is below some percentage of the poverty line).¹⁷³

Yet a third alternative would be to adjust the amount of the subsidy based on the extent to which the organization provided services to those meriting leveling up. Because this also implicates questions of leveling down, I shall set aside this issue for now and return to it *infra* Part IV.C, after we have explored more fully the implications of leveling down.

2. Disabilities

Our exploration of liberal egalitarianism and charitable giving has thus far focused only on material resources. As Part II illustrates, however, a number of philosophers believe that when providing equality of opportunity, the definition of disadvantage should be broadened to encompass more than just a lack of material resources. This is true, for example, of many of the resource egalitarians, and likely Sen and Nussbaum. On the other hand, it seems that Rawls does not countenance redistribution to those other than the financially disadvantaged for the sole purpose of compensating for unequal natural endowments.

For expository ease, let's continue to refer to equality of opportunity in terms of resource equality, but let's broaden our conception of resources. What would so doing suggest for our exploration of the charitable tax subsidies? As explained above, a conception of resource equality that considered one's basic natural endowments – that is, powers such as sight, hearing, the ability to think and reason, and to control one's body reasonably well – as a resource would compensate individuals with disabilities. What might this conception add to an exploration of charitable giving policy?

a. *Charity Care*¹⁷⁴ Requirements

To begin, what insight might the nuances of equality of opportunity theory shed on the question whether health organizations and groups that assist the disabled in other ways must offer free or reduced-cost services? Let's begin by reorienting ourselves to the initial conversation about disabilities while assuming a world with equal financial resources. Among individuals with

¹⁷³ Tax Credit for Charitable Contributions Act of 2003, H.R. 1672, 108th Cong. § 25C(d)(2)-(3)(A) (2003) (proposing to offer a tax credit of up to \$100 for donations to charities spending at least 70% of their resources on “individuals whose annual incomes generally do not exceed 150 percent of the official poverty line”); Charity Empowerment Act of 1999, S. 997, 106th Cong. § 102(b)(3)(A), (b)(4)(A) (1999) (proposing that donations to charities providing at least 75% of their services “to individuals and families whose annual incomes generally do not exceed 185 percent of the official poverty line” be eligible for a state tax credit funded by the federal government); Charity Empowerment Act of 1999, H.R. 1607, 106th Cong. § 102(b)(3)(A), (b)(4)(A) (1999) (same).

¹⁷⁴ Here, I am using the term “charity care” to mean offering free or reduced-cost medical services to the financially less advantaged.

equal amounts of material resources, a disabled individual is at a disadvantage due to her lesser physical endowment. Providing that individual with medical care (even if she can and does pay for it) should thus be viewed as transferring to her a non-financial resource (in the form of better health, relief from pain, or a no-longer-broken leg). Put another way, the mere provision of health care should be viewed as a transfer of a nonfinancial resource, and something separate and apart from financial resources.

Still assuming a world of equal material resources, the question then becomes whether providing medical care for a cost should be considered “charitable” in the sense contemplated by the charitable tax subsidies. Given that the disabled individual is paying for the service, how is providing medical services for a price any different than providing, say, plasma televisions at a price? Here, it is useful to remind ourselves of the contributions of the efficiency scholarship: activities that suffer from contract failure (such as medical care) form as nonprofits to overcome information asymmetries, but at the same time, organizing as a nonprofit necessitates a governmental subsidy due to the resulting limitations on raising capital.¹⁷⁵

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

Fully remedying the disadvantage would therefore require two steps: first, physically fixing the disability, and second, addressing the resulting disparities in financial resources.¹⁷⁶ Put another way, a full remedy requires both a transfer of financial resources to the disabled individual *and* structures that grant the individual access to the appropriate remedies. Why not, then, require subsidized medical providers to offer their services for free in order to tackle both steps at once? The simple answer is that such a requirement is not economically feasible: medical providers likely could not afford to provide their services for free (even with a subsidy), and requiring them to do so would

¹⁷⁵ See Hansmann, *supra* note 30, at 69-71, 72-75 (discussing the advantages that nonprofits have in responding to contract failure and the disadvantages they face in raising capital).

¹⁷⁶ To be sure, some physical impairments may never be fully remedied. Even with implants and hearing aids, for example, some deaf individuals may never hear as sharply as hearing individuals. To that end, I use the words “remedy” and “fix” and “address” in a general sense to mean “limit disadvantages as much as possible.”

likely result in an undersupply of medical providers who can address the initial physical disability. Instead of letting the perfect be the enemy of the good by requiring medical providers to offer their services for free, it seems better to minimize at least some inequality by ensuring that medical providers exist. Financial transfers to a disabled individual are ineffective without service providers who can mitigate the physical aspect of the disability.

To that end, subsidizing medical providers furthers equal opportunity, in that ensuring such service providers exist is a necessary part of remedying the disadvantage from physical disabilities. It therefore seems that in a world with equal resources, hospitals and other health organizations would not be required to provide charity care (defined as free or reduced-cost services to the poor). Of course, any service provider that decided to offer free or reduced-cost services would be furthering equal opportunity to an even greater degree, and should likely merit an additional subsidy.

Thinking about individuals with equal resources thus suggests, I think, that financial resources should be treated separately from nonfinancial resources. And this conclusion, I think, is implied by the philosophy literature. That literature (to my knowledge) does not suggest that individuals with greater-than-average physical endowments deserve less compensation if they begin with fewer financial resources. Looking solely at material resources, a strong and fast poor child would merit just as much compensation as a poor child of regular strength and speed. Later differences that emerge due to the former's extra endowments would be taken care of by taxes. The discussion of equality of material resources begins as a question separate from the discussion of other types of endowments.

It seems plausible that this implicit separation should also hold in a world with unequal material resources. To that end, providing medical care should in and of itself constitute redistribution to the less physically endowed, and charity care should not be required as a condition for subsidization. This is so because remedying the disadvantage faced by financially-poor, disabled individuals takes *three* steps (instead of the two outlined above): (1) fixing the physical disadvantage itself, (2) transferring enough resources to the poor individual to pay for Step 1, and (3) transferring resources to the poor individual to make sure that she has the same amount of financial resources as others with which to pursue her life plans (that is, implementing basic material resource equality once the fact of the disability has been addressed). Again, taking Step 1 is a necessary (but not sufficient) precursor to implementing equality of resources for these individuals, and therefore warrants subsidizing groups that do nothing more than provide opportunities to achieve that first step.

That said, however, an individual who is disabled or unhealthy *and* cannot pay for care is doubly disadvantaged. To that end, it seems plausible that a conception of resource equality that took into account disabilities (in addition to financial resources) would somehow offer a *greater* subsidy for organizations that did offer charity care – one subsidy for the contribution to

financial resource egalitarianism, and one for the contribution to nonfinancial resource egalitarianism. This conclusion, however, is subject to the conditions described below.

b. *Disabilities, Option Luck and Brute Luck*

As illustrated in Part II, one of the central tenets of resource egalitarianism is choice sensitivity – compensating for arbitrary bad luck (brute luck), but not for bad luck resulting from risks undertaken voluntarily (option luck). The philosophy literature argues, however, that the existence of insurance can turn what would otherwise be brute luck into option luck. For example, without an insurance market, having one’s leg broken by a runaway car while crossing the street is bad brute luck.¹⁷⁷ But with an insurance market where one can insure against the costs of having a broken leg, that luck is transformed into option luck. Those who insure against and suffer a broken leg are compensated by the policy. Those who do not insure are therefore worse off than those who do insure, but this disparity is because of the choice not to insure.¹⁷⁸

This, I think, adds a twist to the charity care requirement: it seems clear that charity care for people who could have bought insurance – but chose not to – would *not* be a requirement for subsidization (or, depending on how one resolves the initial charity care issue, for additional subsidization). Of course, determining who truly has a choice to buy or not buy insurance raises another difficult question. What if one chooses not to buy insurance because one needs to spend that money on food for one’s children? This seems different than someone who foregoes insurance in order to lounge on the beach.

c. *Definitional Issues*

Resolving the question of charity care leaves the further question of whether all types of medical care¹⁷⁹ should be treated equally. Put another way, for purposes of the charitable tax subsidies, what should count as a disability if we wanted to stop there in implementing resource egalitarianism?¹⁸⁰ Here, it seems that Dworkin’s hypothetical insurance scheme is – possibly contrary to one’s initial instinct – not helpful. This is so because Dworkin suggests

¹⁷⁷ To be sure, the distinction between brute luck and option luck is not always clear-cut. For example, what if one was hit by a car while crossing a seemingly clear street against a red light? What if one waited for the light to turn green, but didn’t check for cars before crossing?

¹⁷⁸ DWORKIN, *supra* note 121, at 76-77 (explaining how insurance transforms brute luck into option luck).

¹⁷⁹ Although this section focuses on the direct provision of medical services, this analysis would likely apply to similar endeavors, such as medical research. Contributing to medical research (for example, to a group seeking a cure for cancer) might not currently level anyone up, but would help minimize the effect of brute luck on citizens in the future.

¹⁸⁰ As explained *supra* Part II.B.2, expanding the conception of resource equality to include talent-pooling and expensive tastes in many ways resolves this question.

looking at actual insurance markets to inform what coverage would be bought by his average prudent person in his hypothetical insurance market.¹⁸¹ It seems, however, that so doing is inapt in a sector (the nonprofit sector) which by definition is a response to market failures.¹⁸² Nor is the Ackerman/Rakowski resolution of the definitional issue applicable. By trying to find a baseline of abilities that most people would agree substantially impact a variety of life paths, they are appealing to majority tastes – which, again, is inapt in a sector which by definition plays a role in protecting minority tastes.¹⁸³ The same holds true of looking to the Americans with Disabilities Act, given that Congressional action generally also depends on the will of the majority.¹⁸⁴

One solution, therefore, might be to define as a disability anything for which insurance coverage is currently offered – even if such coverage might not be what the prudent average person chooses. For example, a violinist might insure against damage to her hands that regular people might not. Another solution might be to view the nonprofit sector itself as a form of secondary insurance, and to regard individual contributions to a given medical organization as a signal of willingness to have purchased insurance if available. Lastly, it might be possible to look at Sen's and Nussbaum's work on setting priorities to see if it sheds light on the question of defining disabilities; for example, any condition that interfered with the ability to attain one of their capabilities might be considered a disability.

3. Talent-Pooling and Expensive Tastes

Moving beyond physical and mental disabilities to the issues of talent-pooling and expensive tastes yields an additional set of insights into the possible design of the charitable tax subsidies.¹⁸⁵ As an initial cut, following this line of inquiry would produce a different answer to the dilemma of whether to subsidize certain groups that assist adults. More specifically, this conception of equal opportunity would counsel subsidizing groups like community theater, the ballet, and the opera – and not just on the grounds that

¹⁸¹ DWORKIN, *supra* note 121, at 78-79 (“[R]isks of most catastrophes are now regarded by the actual insurance market as randomly distributed, and so we might follow actual insurance practice.”).

¹⁸² See *supra* Part I.A (describing how nonprofits arise in response to market failure).

¹⁸³ See *supra* Part I.A. (describing how nonprofits arise as part of a bargain between individuals with minority tastes not shared by the median voter).

¹⁸⁴ But see *Generous to a Fault*, *supra* note 39, at 223-39 (discussing non-majoritarian models of the legislative process).

¹⁸⁵ I am addressing these issues together for two reasons. First, many theorists feel that the two in practice are indistinguishable. See, e.g., Alstott, *supra* note 2, at 483 (illustrating “why the talent-pooling view skates very close to the proposition that the state should indemnify expensive tastes”). Whether or not that is true, it is the case – as this section demonstrates – that there is substantial overlap with respect to the two concepts when it comes to the charitable tax subsidies.

they provide a resource to children, but on the additional grounds that they further resource equality (more broadly defined to include talent-pooling and expensive tastes) in adults.

As the discussion of health care and disabilities posited, this conception of resource equality seems to view individuals as holding several distinct endowments – one of financial resources, another of health and basic physical and mental abilities, and a third of talents and tastes. All else being equal, someone who wishes she could act like Meryl Streep (but cannot) is worse off than Meryl Streep, and someone who enjoys the opera is worse off than someone of the same income level who is satisfied with *American Idol*.

This suggests, therefore, that we subsidize organizations such as Harvard, the opera, and the theater, without regard to whether they serve children, and without regard to the financial status of the charity's clientele. This is so because many of these groups (like community theater) allow individuals not talented enough to earn a living at a given skill (such as acting) in an unsubsidized marketplace a chance to engage in such activities. Such groups also make consuming certain pleasures (such as theater and the opera) less expensive. By providing these opportunities, such organizations should thus properly be considered as "transferring" nonfinancial assets to those with lesser nonfinancial endowments. As with health care, however, such organizations may warrant an additional subsidy for providing opportunities at a free or reduced cost to those otherwise unable to pay (on the grounds that they are now engaging in two types of redistribution).

At this point, some liberal egalitarians (such as Alstott) might argue that subsidizing groups like the opera on these grounds interferes with neutrality by second-guessing market choices.¹⁸⁶ One response, however, is to assert that it is bad luck to have a taste for goods subject to market and government failure: in that case, you are unlucky because you never even get the chance to decide whether to purchase a good (like an opera ticket, if opera were not subsidized), and how much to purchase. In some respects, then, the nonprofit sector can be viewed as a Dworkinian insurance market against not having tastes shared by the legislative majority.

a. *Participation Limits*

Continuing with this analogy, we can now answer the question inspired by David Schizer's ketchup museum.¹⁸⁷ If someone is unlucky enough to value something that suffers from both government and market failure (be it the ketchup museum or the ballet), she suffers from bad brute luck. The idea of participation limits suggests subsidizing such projects only if a certain number of other individuals also demonstrate their desire for a project, via a

¹⁸⁶ Alstott, *supra* note 2, at 482 ("[T]alent-pooling theorists . . . treat market values as arbitrary rather than as legitimate expressions of individual taste rendered into a price system via aggregation.").

¹⁸⁷ Schizer, *supra* note 50, at 230.

donation.¹⁸⁸ Does this make sense against an equal opportunity backdrop? Perhaps not, given that one could wonder why a ketchup trivia lover's claim for compensation for his bad luck to have odd tastes turns on how many others share it. On the other hand, we can view participation limits as another iteration of Dworkin's insurance scheme: it is much more likely, for example, that I would insure against being in a minority group of one hundred with a given taste than against being in a minority group of one with an even odder given taste. Thus, the act of requiring other participants may help identify those types of projects that people would have insured against not being available by the market or government.

b. *Offensive Tastes*

A further question arises when one's tastes are not just expensive or quirky, but when they impede the provision of equality of opportunity to others. Intuitively, it seems that such a taste (for example, a taste for racial segregation), should not be considered the type of expensive taste that warrants compensation even under the most expansive conception of resource equality. On one level, current law reflects this intuition; in *Bob Jones University v. United States*, the Supreme Court held that racially segregated schools do not qualify for the charitable tax subsidies on the grounds that they violate public policy.¹⁸⁹

But why stop there? What about other tastes that some may find offensive, such as Robert Mapplethorpe's art? Here, equality of opportunity principles can play a useful dividing line. While some may find Mapplethorpe's art offensive, it would be a stretch to say that displaying his art impedes the ability of others to achieve equal opportunity or impinges upon their basic liberties. In contrast, maintaining racially segregated schools not only precludes some citizens from having equal chances to attain an education,¹⁹⁰ but also undermines the primary social good of self-respect. Put another way, subsidizing expensive tastes does not mean subsidizing tastes that interfere with other citizens' basic liberties, an approach buttressed by Rawls's ordering of his principles of justice.¹⁹¹

¹⁸⁸ See COLOMBO & HALL, *supra* note 15, at 10 (“[A] proper concept of charity should at least roughly match the level of support to the level of deservedness.”).

¹⁸⁹ *Bob Jones Univ. v. United States*, 461 U.S. 574, 592 (1983) (“[T]here can no longer be any doubt that racial discrimination in education violates deeply and widely accepted views of elementary justice.”).

¹⁹⁰ I am here considering whether such schools should be subsidized under the charitable tax subsidies. I do not address the question of whether such schools should be allowed to exist in the first instance.

¹⁹¹ THEORY OF JUSTICE, *supra* note 11, at 53 (establishing as a first principle of justice the notion that “each person is to have an equal right to the most extensive scheme of equal basic liberties compatible with a similar scheme of liberty for others”). As the Mapplethorpe example demonstrates, moreover, using equality of opportunity to differentiate among groups shouldn't trigger concerns that the government would begin to

B. *Leveling Down*

In addition to leveling up, each of the liberal egalitarian theories broadly outlined in Part II requires some sort of leveling down, albeit for slightly different reasons. It seems that Sen's and Nussbaum's capability approach, for example, would not counsel leveling down for its own sake, but rather only in order to fund (via taxation) the leveling up required to guarantee minimum capabilities to all. In contrast, Rawls and the resource egalitarians argue that in addition to funding leveling up, leveling down (meaning limiting the financial resources one can transfer to one's heirs) is inherently desirable. This is so because limiting the intergenerational transfer of wealth diminishes the arbitrary advantages that those born to wealthy families enjoy due to chance.¹⁹² Going one step further, Rawls also suggests that leveling down is valuable in order to minimize wealth concentrations that could negatively affect the functioning of our democracy, thereby impinging upon the primary liberties of those born with fewer material resources.¹⁹³

For practical reasons, the following discussion conceives of leveling down in terms of leveling down wealth or income. To illustrate, let's consider leveling down for the purpose of minimizing arbitrary head starts at birth. A child born into a family whose parents read more books at bedtime, talk to their children more, are physically active, fix healthy meals, and eat dinner together as a family generally has a leg up over a child whose family does none of the above. Yet, those advantages cannot really be leveled down; attempting to do so would not only be highly impractical, but would also trigger important liberty concerns. You cannot "take" good looks or healthy genes from fit and attractive parents, for example, or force active and involved parents to seek out and spend time with the children of negligent parents who park them in front of the television. The primary means of leveling down in our society is thus taxation, and to that end, this discussion will consider what the movement of material resources (via a charitable donation) away from one's family means for leveling down.

At first glance, one might suppose that all charitable transfers necessarily level down in the sense envisioned by liberal egalitarians because they remove assets from outright family use: funds donated to charity, for example, cannot be spent directly on a tutor for one's daughter, or used to make contributions to local political campaigns. Further inquiry, however, shows that some

discriminate among groups based on their viewpoints. For example, whether a group helps the poor or not, or directly interferes with someone's liberty, don't seem to be the types of questions that might allow the government to stop funding organizations that promote controversial or minority views. To the extent one values pluralism because it affirmatively brings more viewpoints into the marketplace of ideas, adding equal opportunity to our analysis of the charitable tax subsidies does not seem to undercut this value.

¹⁹² THEORY OF JUSTICE, *supra* note 11, at 245-47.

¹⁹³ *Id.* (concluding that "the precedence of liberty entails equality in the social bases of respect").

donations do not level down in this manner and instead exacerbate inequality of opportunity.¹⁹⁴ Take contributions to a private school that one's child attends. Little or no leveling down occurs when one increases the resources available for one's child's education (albeit indirectly). Or, consider funds donated to a private foundation or other charity controlled by one's family. Even if the funds ultimately are used to help those worse off, the family still retains a good deal of power over the assets. This power can translate into economic and political clout over others, of the kind that Rawls feared inhibited fair equality of opportunity.

In contrast, charitable transfers that benefit neither the donor's own family nor individuals of the same social class do level down in the sense that they reduce the head start of the already-advantaged. Similarly, contributions to charities not controlled by the donor's family level down in the sense that they minimize the economic and political power that Rawls identified as an ill from wealth concentrations. The remainder of this Part explores the implications of these distinctions for designing charitable tax subsidies inspired by liberal egalitarianism.

1. Minimizing Head Starts

Let's start with leveling down in the sense of minimizing the head start of the already-advantaged, which entails ensuring that a contribution does not benefit members of the same social class. As an initial matter, contributions to organizations that financially benefit a member of the donor's family should not be considered leveling down in this sense, since such a donation does not minimize the arbitrary financial advantages of those born to the better off. Transferring funds to one's child directly would not be considered leveling down, so neither should indirect transfers.

Although donors would still be free to donate all they wanted to such organizations, those donations would not be subsidized (or at least not subsidized at the highest level, depending on whether they met other criteria for providing equal opportunity). This would mean, for example, that if *Ed* works for a salary at a nonprofit art gallery, or is a paid board member, his parents would not receive a deduction for donating to the gallery. Likewise, if *Fiona* is enrolled (or is vying for admission) at St. Paul's, her parents would not receive a deduction for donations to the school.¹⁹⁵

¹⁹⁴ See Rob Reich, *Philanthropy and Its Uneasy Relation to Equality*, in *TAKING PHILANTHROPY SERIOUSLY: BEYOND NOBLE INTENTIONS TO RESPONSIBLE GIVING* 27, 40-45 (William Damon & Susan Verducci eds., 2006) (arguing that private funding for public schools exacerbates existing inequalities between wealthy and poor towns).

¹⁹⁵ A few problems present themselves upon further reflection. What if *Fiona's* parents donate, and five years later she enrolls? As a practical matter, we might not be able to do anything about that. As a normative matter, we might want to know if the donation was made with the expectation or hope of attendance. Alternatively, what should we do if *Fiona's* parents, setting aside old rivalries, decide that if they can't contribute to St. Paul's,

Of course, tangible resources are not the only ways in which the financially advantaged give their children a head start. For example, as Teresa Odendahl has explored, charitable giving among the wealthy often augments or solidifies one's social stature, through involvement on boards, attendance at charity events, and the like.¹⁹⁶ On one hand, these benefits could be thought of simply as additional fruits of one's talents and ambitions that should be respected as a product of choice, not chance – much like material rewards.

The problem, however, is that social culture and contacts are resources passed down from one generation to another that contribute to unequal starting points, just like financial resources. Unlike financial resources, such intangibles cannot be taxed to achieve some measure of leveling down. One possibility, therefore, would be to subsidize such donations only when the donor does not have children to whom she could potentially pass down these intangible cultural resources. In contrast, this type of charitable giving by parents (who could thereby advantage their children) would not be subsidized.

A more complicated issue involves donations that do not benefit one's family, but that benefit individuals of roughly the same social class. Imagine that, long after her children have graduated, *Gail* makes a donation to an elite private boarding school. While this donation does not benefit *Gail's* children (as they have graduated), it primarily benefits other individuals who already have a head start in life, in that they come from advantaged families who can afford the tuition (let's set aside the issue of scholarships for now). On one level, this donation might promote equality of opportunity in the narrow sense of minimizing the financial resources that *Gail* passes along to her children directly. In the larger sense, however, it does not promote equality of opportunity because it does not help minimize the head start of those who are already advantaged, compared to those born to poorer families.

Resolving this issue seems to require deciding whether we care about leveling down on a macro or micro level: looking at the issue on a macro level would address the question by focusing on the advantage to those of *Gail's* social class, while so doing on a micro level would focus only on *Gail* and her children. Let's start with the micro level. On one hand, it is true that *Gail's* donation to the school precludes her from transferring the gifted assets directly to, or spending them directly on, her children. On the other hand, however, it might well be the case that *Gail's* decision to make the donation in no way impacts how much money she gives to or spends on her children. The higher *Gail's* income, and the smaller the donation, the more likely this is true: if *Gail* is quite wealthy, a \$100 donation to the school likely has no effect on the financial advantages she passes along to her children.

maybe they'll contribute to Groton (hoping that a set of Groton parents mirror their actions)?

¹⁹⁶ TERESA ODENDAHL, CHARITY BEGINS AT HOME 39-42 (1990) (discussing the interaction of philanthropy and social status).

This suggests that charitable contributions that do not directly benefit one's own children truly level down only when the donation actually reduces what would otherwise benefit one's family. Unfortunately, making such a determination would likely be difficult in practice. Would we choose an absolute floor, and thereby subsidize donations over a certain amount (say, \$10,000 or \$100,000) regardless of the donor's income? Or would we choose a relative floor, and subsidize donations that exceeded a certain percentage (say, 10% or 15%) of a donor's income? Or, as discussed in Part IV.C, can we skirt this question by requiring that a donation also level up?

2. Minimizing the Accumulation of Dynastic Wealth

In addition to leveling down to minimize the financial head start of better-off individuals, Rawls urged leveling down for an additional reason: "gradually and continually to correct the distribution of wealth and to prevent concentrations of power detrimental to the fair value of political liberty and fair equality of opportunity."¹⁹⁷ Although much scholarship conflates minimizing wealth concentrations with the more traditional leveling down discussed above, the two are actually distinct concepts.¹⁹⁸ The latter focuses on the head start of the advantaged with respect to what I call "equality of private opportunity," meaning the ability of each individual to develop her own talents to the extent she desires and compete on equal footing for education, employment, housing, and so on, regardless of how much money she has.¹⁹⁹ It is this aspect of equality of opportunity that the leveling-up²⁰⁰ and leveling-down policies²⁰¹ discussed thus far tackle.

In contrast, leveling down to minimize wealth accumulations addresses equality of public opportunity. This component of equal opportunity recognizes that it is not just inequalities in material resources or endowments that interfere with one's ability to pursue one's conception of the good, but also the unequal dispersion of power that some have over others.²⁰² Handing power down to one's children is just as arbitrary (from the child's perspective) as handing down material wealth. Along those lines, allowing wealth to accumulate is feared for two reasons: it enables the wealthy to hand down economic power over others to their children, and it allows them to hand down political power over others to their children.

¹⁹⁷ THEORY OF JUSTICE, *supra* note 11, at 245.

¹⁹⁸ See, e.g., Alstott, *supra* note 2, at 471 ("The classics of the legal literature use the term 'equal opportunity' quite generally and often blend equal opportunity with principles that are distinct."); *Charitable Contributions*, *supra* note 17, at 277 n.69.

¹⁹⁹ *Charitable Contributions*, *supra* note 17, at 277 n.69.

²⁰⁰ See *supra* Part IV.A (exploring leveling up via the charitable tax subsidies).

²⁰¹ See *supra* Part IV.B.1 (considering the extent to which charitable donations by the wealthy, for the wealthy, level down).

²⁰² See, e.g., Anderson, *supra* note 166, at 312-15.

What, one might think, does this have to do with charitable giving? Although it may not be as obvious as when a family controls the largest employer in a small town, having control of a charity can amount to both economic and political power over others, and this is true regardless of whether the charity in question is a public charity or private foundation.

Let's start with economic power. Even when a charity's activities fall squarely within its enumerated purpose, that organization still affects the fates of others. Take a private school: having control over that school impacts the educational opportunities of its students in addition to the economic opportunities of the teachers and staff. Or, consider the impact of policy changes within the types of institutions on which many low-income people rely for basic necessities. Whether a day care raises or lowers its prices, or whether a housing group increases or decreases the number of homes it builds, such decisions can dramatically impact the lives of the charity's clients and the community. Choosing which grants to make gives private foundations similar power: such decisions impact the ability of grant applicants to conduct their charitable activities, which in turn affects the lives of community members.²⁰³ For example, grants to fund research on one disease instead of another can impact the health of those suffering from diseases that receive less funding.²⁰⁴

In addition, private foundations (which must pay out only a small percentage of their assets each year)²⁰⁵ wield additional power, via their investment decisions, over the resources they retain. To illustrate, the Gates Foundation, the Ford Foundation, and the Lilly Endowment all have assets numbering into the billions of dollars, rivaling the gross national incomes of many countries.²⁰⁶ It is hard not to see that decisions about so much wealth translate into economic power. Further, while a private foundation may not own more than 20% of a given corporation,²⁰⁷ smaller ownership interests can effectively control a corporation when other stockholders are dispersed.²⁰⁸

²⁰³ See, e.g., Stephanie Strom, *A Charity's Envious Problem: Race to Spend Buffett Billions*, N.Y. TIMES, Aug. 13, 2006, at A1 (discussing the size and influence of the Bill and Melinda Gates Foundation, which at the time, according to philanthropy expert Rick Cohen, was responsible for "[o]ne out of every 10 foundation dollars spent . . . giv[ing] it influence that is impossible to calculate").

²⁰⁴ See, e.g., Keith Bradsher, *Laos, Apparently Without Bird Flu, Is Still Pressed by the West to Join Global Fight*, N.Y. TIMES, Jan. 15, 2006, at A12 (lamenting donors' focus on bird flu instead of diseases many feel require more urgent attention).

²⁰⁵ I.R.C. § 4942 (2006) (requiring private foundations to spend 5% of their net assets annually on charitable purposes, including not only grants to public charities but also administrative costs such as salaries).

²⁰⁶ *Charitable Contributions*, *supra* note 17, at 287 (providing data from 2006).

²⁰⁷ I.R.C. § 4943(a)(1), (c)(2)(A) (2006) (capping permissible ownership of a corporation by a private foundation at 20% of the voting stock).

²⁰⁸ See, e.g., PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 1.10 (1994) (providing a definition for a "controlling shareholder" that includes possibilities in addition to simply owning more than 50% of the voting shares);

Lastly, the ability to hire advisors such as lawyers and bankers to deal with all these assets also gives the foundation control over others.²⁰⁹

Political power can also accompany control of a charity, whether a private foundation or public charity. First, public charities may conduct a small amount of direct lobbying, such as meeting directly with public officials and testifying before Congress.²¹⁰ They may also engage in a variety of indirect lobbying activities, such as urging the public to vote one way or another on public initiatives or encouraging community members to contact elected officials. Moreover, both public charities and private foundations can influence public discourse in a number of ways: voter education activities (such as guides relating the past votes or stated positions of electoral candidates)²¹¹ and policy papers on controversial issues are two common examples.²¹² Lastly, control of a charity often translates into social prominence in one's community, which can in turn bring political power.²¹³ High-level charity positions are often a stepping stone either to or from prominent political positions,²¹⁴ and it is quite likely that low-level policy positions are often awarded to individuals involved with a given issue in the nonprofit world.

ADOLF A. BERLE, JR. & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* 80-84 (1933) (explaining the concept of "minority control" of a corporation through a stock interest large enough to dominate company governance).

²⁰⁹ *But see* Simon, *supra* note 7, at 13-14 (finding the control issue to be overstated in terms of overall economic power).

²¹⁰ By prohibiting "substantial" lobbying, the Tax Code and Regulations implicitly allow some non-substantial amount of lobbying. I.R.C. § 501(c)(3) (2006) (dictating that "no substantial part of the activities" performed by a charity may include influencing legislation or public campaigns); Treas. Reg. § 1.501(c)(3)-1(c)(1), (3) (as amended in 2008) (denying tax-exempt status to any organization "if a substantial part of its activities is attempting to influence legislation").

²¹¹ Although such communications must be phrased carefully to comply with neutrality requirements, *see* Treas. Reg. § 53.4945-3(b) (1972) (requiring organizations receiving tax-exempt status to remain nonpartisan), a well-designed voter guide can quite likely indirectly influence public opinions while still meeting such requirements. *See* JODY BLAZEK, *TAX PLANNING AND COMPLIANCE FOR TAX-EXEMPT ORGANIZATIONS: FORMS, CHECKLISTS, PROCEDURES* 572-78 (3d ed. 1999) (elucidating the difference between voter education and candidate promotion).

²¹² For example, nonprofits across the political spectrum have weighed in on the merits of retaining or repealing the estate tax. *See Charitable Contributions, supra* note 17, at 289 n.112 (listing sources that broach the subject of the estate tax).

²¹³ In the past, for example, charitable work was one of the few ways women could attain status and power. ODENDAHL, *supra* note 196, at 100-02.

²¹⁴ Elizabeth Dole, for example, ran the Red Cross between positions in the Cabinet and the Senate. *Elizabeth Hansford Dole*, *BIOGRAPHICAL DIRECTORY OF THE U.S. CONGRESS*, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=d000601> (last visited Mar. 2, 2011).

Control of a charity can thus bring with it economic and political power. To that end, charitable tax subsidies inspired by liberal egalitarianism would likely not subsidize contributions to charities controlled by one's family, for such transfers merely perpetuate the power of a given family. Put another way, such donations do not diminish the arbitrary handing down of power over others that many liberal egalitarians fear interferes with fair equality of opportunity – just as gifts to a private school that one's daughter attends do not diminish the arbitrary head start that she enjoys in developing her talents.²¹⁵

C. *The Interaction Between Leveling Down and Leveling Up*

Identifying which charitable transfers level up or level down, however, does not fully answer the question of how to design the charitable tax subsidies to enhance equality of opportunity. Namely, a number of questions remain concerning the interaction between leveling up and leveling down, and what implications that relationship has for the subsidies.

1. *Should Both Be Required?*

An initial question is whether both leveling up and leveling down should be required in order for a given transfer to be subsidized.²¹⁶ Consider a contribution to a group neither controlled by nor directly benefiting the donor's family or other members of the family's social class – maybe a contribution to something like the Humane Society. Such a contribution perpetuates neither the head start of the donor's family nor the family's economic and political power over others; but nor does it level up. Would such a transfer be subsidized by a set of charitable tax subsidies inspired by liberal egalitarianism?

Although others may disagree, I think not. As discussed in Part IV.B.1, such a contribution levels the playing field only when it actually does reduce what the donor would otherwise spend on her children, which is quite difficult (if not impossible) to determine. Moreover, material resources are the only advantages which in practice can be leveled down, leaving in place a number of other arbitrary advantages (such as better-educated and more involved parents). Thus, even though leveling down of material resources is a necessary

²¹⁵ Although my task is normative in nature, it should be noted that determining whether or not a given family controls a charity is likely possible in practice. In a variety of other contexts, for example, the Code defines both "family" and "control." *See, e.g.*, I.R.C. §§ 267, 318(a)(1)(A), 368(c), 2702, 4941 (2006) (providing such definitions in the context of transaction losses and expenses, constructive ownership of stock, corporate reorganizations, interests in trusts, and taxes on self-dealing (respectively)). These definitions and tests for control could most likely be revised to reflect the various ways a family can control a charitable organization, such as the institutional offices held by family members or the proportion of votes held by family members on a board of directors.

²¹⁶ Or, as considered *supra* notes 151 and 155, subsidized more heavily.

component of creating equality of opportunity, it is not a sufficient element. Real equality of opportunity cannot be achieved without also leveling up.

To that end, I believe that liberal-egalitarian-inspired charitable subsidies would require that a donation do both. One benefit of such a rule is administrative. Given the difficulty of determining whether a transfer to a group such as the Humane Society does in fact level down, focusing solely on the recipient organization might be easier to implement. On the other hand, this leaves a number of practical questions unresolved.

2. Mixed-Clientele Charities

Charities that help both the advantaged and disadvantaged to develop their skills present another problem. Think of donations to Harvard and other elite colleges. On the one hand, by providing fairly sizable scholarship assistance, these schools help provide students from poorer families the same educational and networking opportunities formerly reserved to the rich.²¹⁷ And given the recent dramatic rise in tuition,²¹⁸ this assistance is becoming increasingly necessary for upward mobility. Such institutions also level up through a variety of secondary services that help the poor, such as law school legal aid clinics and college tutoring programs for underprivileged children in the surrounding community. On the other hand, however, the majority of students benefited at these institutions are already well-off.²¹⁹ Thus, the ability of such students to receive a top-notch education and network with other already-advantaged individuals perpetuates, at least to some extent, their head start.

As a result, determining the extent to which gifts to such organizations further a level playing field is complicated. As I have argued in a slightly different context,²²⁰ however, it seems that the marginal benefit to the non-wealthy is so much larger than the benefit to the better-off that at least some subsidy is justified. Someone born to the Kennedy family, for example, is advantaged whether she goes to Harvard or her state school. In contrast, attending Harvard can radically alter the life prospects of, say, a first-generation college student from rural Colorado or inner-city Baltimore. Moreover, that student's Harvard education may have spillover effects to her larger community: she may have more financial resources later to donate back

²¹⁷ Duke and Stanford, for example, provide some type of need-based assistance to roughly 40% and 50% of their undergraduates, respectively. See *Duke's Financial Aid Initiative*, DUKE, <http://dukefinancialaid.duke.edu/undergraduate/basics/Financial%20Aid%20Initiative.html> (last visited Nov. 15, 2010); *Stanford Facts: Undergraduate Program and Admission*, STANFORD, <http://www.stanford.edu/home/stanford/facts/undergraduate.html> (last visited Nov. 15, 2010).

²¹⁸ See, e.g., Jonathan D. Glater, *Tuition Again Rises Faster than Inflation, Board Finds*, N.Y. TIMES, Oct. 25, 2006, at A12.

²¹⁹ See *Charitable Contributions*, *supra* note 17, at 303 n.165 (noting the economic strength of most families whose children attend private institutions).

²²⁰ See *id.* at 303-07.

to the community, the education necessary to serve as a mentor to its other youth, or the ability to inspire just by being a role model.

To that end, it seems that charities that help a mixed clientele to develop their skills would merit at least a partial subsidy. (Let's hold off on the question of how much of a subsidy until Part IV.C.4.) 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.²²¹ What would differ from current law, however, is the insistence that such groups should engage in a substantial amount of assistance to the needy.

3. Other Mixed Transfers

A similar question arises with respect to another type of transfer with mixed effects: what about donations to charities that clearly engage in leveling up, but that are somehow controlled by the donor's family? Here, no answer jumps out at me, and it seems that liberal egalitarians may well reach different conclusions based on why they care about equality. Take, for example, the resource egalitarians concerned primarily with equalizing the burdens and benefits of luck. If, along those lines, one focuses mainly on the material benefit to the poor individual, a subsidy might be warranted under the same reasoning applicable to mixed-clientele charities: the large marginal benefit to the underprivileged far outweighs the small marginal benefit to the family whose power is perpetuated.

In contrast, those liberal egalitarians who frown upon resource inequality not for its sake (such as Anderson) but because of its implications for the broader power structure may reach a different conclusion. In the hypothetical posed above, even if there is no question that a poor person benefits from the charity, she is to some extent still at the mercy of the wealthy family running the charity. Because such a transfer perpetuates that family's control (even if that control is used for good), some liberal egalitarians could find a subsidy repugnant.

4. Measurement Questions

Let us now return to a question left unanswered in Part IV.C.2. Now that we've determined that mixed-clientele charities would merit some subsidy, the question remains how much. As an initial matter, it seems logical to conclude that because the advantaged do benefit from such charities, an unlimited subsidy isn't warranted. One approach to this dilemma would be to allow a full subsidy only for transfers earmarked for activities directly benefiting the less advantaged (for example, for scholarships). But since money is fungible,

²²¹ *See id.* at 305-06 (“[O]ne can overlook the fact that elite schools benefit the already well-off, because the marginal impact on the nonwealthy who are helped by educational institutions is so strong.”).

donations for scholarships just free up money for other projects which may or may not benefit the worse off.

It seems that a better approach would therefore be to impose a cap on the percentage of each contribution to a mixed-clientele charity that was deductible, to reflect the fact that only a percentage of the charity's activities engaged in leveling up. Ideally, this limit would mirror whatever percentage of the charity's programs that benefited the non-wealthy, but this is hard to measure. Consider a private school. Would you look at the percentage of students receiving financial aid, the portion of the school's budget spent on scholarships, or some other measure? And how would you account for benefits (such as tutoring programs and employment opportunities) to the surrounding community?

In practice, therefore, imposing one cap for all types of charities that serve a mixed-clientele might be most workable.²²² Exactly what this cap should be is best left to the political system, but my guess is that such a cap would be close to 50%. A substantially lower cap (say, 10% or 20%) seems to understate the benefits such charities provide to the non-wealthy, while a much higher cap (perhaps 80% to 90%) similarly understates the advantage provided to the already well-off. A cap in the middle thus seems logical.

5. Structural Design Issues

A further issue concerns the optimal structure for the subsidy from an economic perspective. For example, should the subsidy for individual donations be structured as a tax deduction or a tax credit? Here, two competing considerations are in tension. On the one hand, the goal of leveling down counsels that we focus our incentivizing efforts on the wealthier, to encourage them to limit the extent to which they use their resources to provide their families with a head start. At first glance, this may suggest a deduction.²²³ One could argue, moreover, that the upside-down subsidy resulting from a deduction²²⁴ merely reflects the fact of unequal incomes arising from different life choices, and is thus tolerable under a resource equality ideal. The problem with this, however, is that the tax benefits reflect not just a financial reward to the taxpayer donor (in the form of reduced taxes),

²²² This has the added benefit of avoiding messy questions that might arise when the amount of a given transfer that levels down is different than the amount that levels up. To illustrate, consider a \$100 donation to Harvard, which removes assets from the donor's family and does not benefit the donor's grown children. All \$100, however, is unlikely to level up.

²²³ This is supported by empirical research that suggests those with higher incomes are more tax-sensitive in their giving. Schizer, *supra* note 50, at 234 ("It should cost less to induce a high-income donor to give a dollar in charity than a low-income donor, since the opportunity cost in welfare terms is higher for a low-income donor, given the diminishing marginal utility of consumption. . . . Subsidy dollars concentrated at the upper end, then, will induce more contributions.").

²²⁴ For an illustration of this effect, see *Theorizing*, *supra* note 8, at 550-51.

but also the ability to influence government spending.²²⁵ And these types of inequalities in basic rights (such as allowing those with higher incomes to vote twice at the ballot box or have more First Amendment rights) are not tolerated under resource equality.²²⁶

The best solution, therefore, would be to determine a refundable credit large enough to provide the desired amount of incentives to the better-off. While upper-bracket taxpayers may be more sensitive than lower-bracket taxpayers to tax incentives, this sensitivity does not necessarily mean such incentives must be structured as deductions, or that the responses of the wealthy turn on the comparative advantage to them as opposed to lower-bracket taxpayers. Although this may result in “oversubsidization” of the donations of the less well-off (who would donate anyway), this cost seems tolerable in order to ensure that one’s ability to vote via charitable giving doesn’t depend on income.

That said, it is possible that fiscal considerations would require capping such a credit, and that such a cap might cause giving to drop.²²⁷ If so, a deduction might be preferable in spite of the equal-voice concerns mentioned above. Put another way, maybe society would get more bang for its charitable buck from a deduction, thus justifying any costs in terms of pluralism. More research on this question is called for in order to adequately study the trade-offs of a deduction versus a credit.

Likewise, more research is needed on the elasticity of giving to the various types of charities already discussed in order to determine the most efficient subsidy structure. What if, for example, donations to mixed-clientele charities drop due to the cap on deductibility suggested above? Here, more work is needed to estimate the magnitude of such a drop and the extent to which such a drop impacts programs for the less advantaged at these charities. Say, for example, donations to Harvard drop. Liberal egalitarians would likely react differently if the drop impacted scholarships, than if the drop merely delayed the building of a new lacrosse stadium. On the other hand, some donors may need more of a tax incentive to donate to groups to which they feel less connected (meaning, for example, they require more prodding to donate to a soup kitchen than to their alma mater). If so, this further suggests that varying the subsidy based on the type of organization receiving the donation would optimize the benefits of our charitable spending.

CONCLUSION

This Article has rigorously explored the political philosophy literature on equality of opportunity for insights into some of the most vexing questions of charitable giving policy. Which organizations merit a subsidy? Should such

²²⁵ See *supra* note 49 (explaining how the charitable deduction acts as a tax expenditure).

²²⁶ Rawls’s conception of priorities also reflects this view.

²²⁷ This was suggested to me by Jim Repetti and others at the 2010 University of Colorado Law School Roundtable on Tax Policy and Distributive Justice.

groups be required to assist the poor? Should the subsidy be structured as a deduction or a credit? Not surprisingly, the various conceptions of equality of opportunity yield sometimes-conflicting answers. The merit principle, for example, seems to require nothing more than nondiscrimination from these groups, and appears to have nothing to say about the interaction of such organizations and the disadvantaged.

In contrast, interpreting equal opportunity as *ex ante* equality of material resources provides rigorous philosophical support for the intuition of many that the charitable tax subsidies insufficiently address the needs of the poor, and especially of poor children. If one prioritizes distributive justice over efficiency and pluralism, this suggests subsidizing most heavily the charitable organizations that engage mainly in leveling up the poor, while subsidizing less heavily the organizations that serve a mixed clientele. On the other hand, prioritizing efficiency and pluralism over distributive justice may suggest nothing more than requiring all subsidized organizations to provide some level of free or discounted services to the poor.

Moreover, certain interpretations of equal opportunity prevalent in the philosophy literature, but less common in the legal literature, yield results that may seem counter-intuitive: conceptualizing resource equality to take into account disabilities implies that, in order to qualify for the charitable subsidies, hospitals shouldn't be required to offer free or discounted services to the financially poor. And an even broader interpretation of resource equality that accounts for talent-pooling and expensive tastes suggests supporting "elite" cultural organizations such as the opera. This may surprise some, given that the opera is a favorite scapegoat of many critics of the charitable tax subsidies as currently structured.

The philosophy equal opportunity literature therefore shows that critiques of the charitable tax subsidies based on superficial conceptions of equal opportunity are overly simplistic. As understood in the philosophy literature, equal opportunity is a complex concept with varying interpretations. Some of those interpretations offer support to critics of the current charitable tax subsidies, while other interpretations suggest that the subsidies' current structure is defensible. Most notably, the conception of equal opportunity that would likely appear most foreign to laypeople (that which accounts for talent-pooling and expensive tastes) seems to be the one reflected by the subsidies' current structure.