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The Future of Philanthropy: Questioning Today's Orthodoxies, Re-Affirming Yesterday's Foundations

Rob Atkinson*

It is our duty to be more careful in the performance of the commandment of alms-giving than in that of any other positive commandment, for alms-giving is the mark of the righteous man who is of the seed of our father Abraham...

*Maimonides, Mishneh Torah*²

Well, then, Socrates, I should say that righteousness and piety are that part of justice which has to do with the careful attention which ought to be paid to the gods; and that what has to do with the careful attention which ought to be paid to men is the remaining part of justice.

*Plato, Euthyphro*³

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² *THE CODE OF MAIMONIDES: BOOK SEVEN, THE BOOK OF AGRICULTURE* [MISHNEH TORAH], trans. Isaac Klein (Binghamton: Vail-Ballou Press, 1979, 89 [hereafter MISHNEH TORAH]).

³ PLATO, *EUTHYPRO*, trans. F.J. Church (Indianapolis: Bobbs-Merrill Educational Publishing, 1956), 15–16 (speech attributed to Euthyphro).

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I. INTRODUCTION

Philanthropy⁴ today has reached an impasse in both theory and practice. This article maps a way beyond that impasse by taking us back to philanthropy's core function and traditional values. The standard academic model sees philanthropy as subordinate and supplemental to our society's other public sectors, the market and the state, and uses their metrics to measure its performance. Current law, best reflected in the federal income tax code, closely parallels that perspective. This article proposes to reverse the dominant theoretical perspective and reveal a radically different relationship among society's three public sectors, the market, the state, and the philanthropic. Following both classical Western philosophy and the three Abrahamist faiths, this perspective places philanthropy first and measures everything, including our current economic and political systems, by a neo-classical philanthropic standard: the highest good of all humankind.

Part II unpacks the paradox⁵ at the heart of the standard model of philanthropy: That model makes the most distinctive function of philanthropy the provision of global norms for the proper function of society as a whole and all its constituents; that model cannot, in its own terms, provide any criteria for assessing social orders and personal preferences other than majority will and individual willingness and ability to pay. The standard model's only answer to how society should be ordered is what the majority votes for; its only answer to what individuals should have is what they are willing and able to pay for. If pressed to answer how people should vote, or how a person should use his or her individual resources, the standard model can only refer to the standards offered in the philanthropic sector. But it is the job of that sector, in our pluralist society, to give people the answers they want.

⁴ "Philanthropy" and "charity" are, in common parlance, essentially synonyms; in modern American law, "charity" is the more commonly used term and, for that reason, I use it in that context. But "philanthropy" generally suits this project much better. "Philanthropy" has the advantage of its etymology, translating literally as "love of humankind." "Charity," on the other hand, has lost much of that connotation, despite its eloquent expression in St. Paul's Second Epistle to the Church at Corinth. What is worse, in the narrower sense of "alms-giving," "charity" tends to suggest that its recipients are somehow insufficiently self-reliant, and thus that they should bear a measure of shame or other social stigma. See MISHNEH TORAH, 92–93 ("One should always restrain himself and submit to privation rather than be dependent upon other people or cast himself upon public charity....").

⁵ My anonymous reviewer pointed out an important insight from Heraclitus about just such an impasse: "Whoever cannot expect the unexpected sees nothing, for the known way is an impasse." (fr. 7) In this case the known way, the politics and economics grounded in unevaluated individual preferences, is bound to lead to an impasse if used to theorize and implement the classical and scriptural values of philanthropy.

Part III offers a way out of this paradox by taking as given the norms of the philanthropic sector, rather than those of our market and governmental sectors. Admitting that our philanthropic sector gives no single standard of the good, individual or social, this part seeks the standard that is not only the best grounded in our shared Western culture, but also the very foundation of that culture. To acknowledge its dual inheritance from Athens and Jerusalem, its twin sources in Greco-Roman philosophy, and the faiths of Judaism, Christianity, and Islam, I call that alternative perspective Abrahamist Republicanism. Part II then sketches out the Abrahamist Republican understanding of philanthropy, noting its sources in Classical philosophy and the Abrahamist faiths, its compatibility with the traditional legal meaning of philanthropy, and its implicit metric for philanthropy's twin goals, relieving distress and promoting excellence. That metric is, in a word, justice; the justice of the Classics and the Scriptures.

Part IV extends that metric beyond guiding philanthropy to assessing the whole of our society. It first outlines an ideal Abrahamist Republican society, including private philanthropy's role in that society – a paradoxically small role, as we shall see. It then brings us back “home,” as it were, to the world as it is, to address perhaps the most tricky metric of all, aiming for the second best: How to move from the world we have now toward a more nearly ideal one, a commonwealth of philanthropy. Here we encounter a problem of proverbial difficulty: the best is the enemy of the good. The basic answer can come as no surprise: If we are to achieve the justice of the Classics and the Scriptures, we have no substitutes for the love of wisdom and humanity, philosophy and philanthropy.

II. THE CENTRAL PARADOX OF THE STANDARD MODEL OF PHILANTHROPY⁶

The standard model of philanthropy seeks to answer a deceptively straightforward question: What is the function of philanthropy in our society? To answer that question, the standard model makes two critical methodological moves. It first takes two essential parts of the answer as given, and then derives the rest of the answer from those unquestioned premises. Given that the function of our capitalist market economy is to provide consumers what they are willing and able to pay for, and given that the function of our liberal democratic government is to provide political majorities what they vote for, the function of philanthropy must be to deliver what the other two sectors fail to provide.⁷ The market undersupplies what consumers demand

⁶ This section is a very tight compression of Rob Atkinson, *The Function of Philanthropy: A Neo-Classical Reconsideration*, which itself is the revision and expansion of part of Rob Atkinson, *Philanthropy and the Law: Remembering and Measuring the Common Good*, NYU National Center on Philanthropy and the Law's 21st annual conference, “Shades of Virtue: Measuring the Comparative Worthiness of Charities,” October 29 and 30, 2009.

⁷ Or, to be more precise, what they can neither provide themselves by “household production” nor acquire from either the for-profit or governmental sectors. See JON VAN TIL, *MAPPING THE THIRD SECTOR: VOLUNTARISM IN A CHANGING SOCIAL ECONOMY* (1988) 87 (describing the standard three-sector model and noting the possibility of identifying an additional “household” or “informal” sector); James Douglas, “Political Theories of Nonprofit Organizations,” in *THE NONPROFIT SECTOR: A RESOURCE HANDBOOK*, ED. Walter W. Powell (Westford, MA: Murray Printing Co., 1987), 43, 46 (“Private nonprofits are subject to competition for survival from three other forms of social organization – the family, commercial for-profit enterprises, and government-run services.”); Matthew Turnour and Myles McGregor-Lowndes, “From Charity to Civil Society: Sketching Steps to an Alternative Architecture for the Common Law,” ARNOVA Conference, Session D10 (Atlanta, Georgia, 15 November 2007) 12, Figure 5, 2007 (modeling society as a tetrahedron, with apexes assigned to “business,” “government,” “family,” and “charity”). See also Steven Rathgeb Smith & Kirsten A. Gronberg, “Scope and Theory of Government-Nonprofit Relations,” in *THE NONPROFIT SECTOR*, ed Powell and Steinberg (2006) 221 (setting out three broad and overlapping theories of the nonprofit sector's role vis-à-vis the state and the market).

under two basic kinds of market failure, information asymmetries and external benefits.⁸ The state corrects these failures in wealth maximization and performs other functions of its own, including wealth redistribution, but only at the level demanded by the political majority. Citizens who want levels of provision beyond what a majority of their fellows support can, and often do, turn to suppliers in the philanthropic sector.⁹

The function of philanthropy in the standard model is thus residual, redressing the combined effects of market and government failure.¹⁰ Put more positively, philanthropy's function is to provide those goods and services that consumers are willing and able to pay for, but which are not forthcoming from the market in optimal amounts on account of standard market failures¹¹ or from the state on account of majoritarian political constraints.¹² The other two sectors, in turn, provide the standard of philanthropic performance: What consumers are willing and able to pay for, at levels above what the state provides and as close as possible to what a perfectly functioning market would provide. Typical products of the philanthropic sector include those with significant cost asymmetries, like higher education and other complex services, and those with high external benefits, like primary and secondary education and environmental amenities.

One such product, on this analysis, is uniquely available in our society from the philanthropic sector: global theories of the good, both social and individual.¹³ For-profit firms do not supply these basic normative theories, because they are essentially public goods. And the liberal state is severely limited in supplying such theories, because the liberal state is more or less committed to neutrality toward precisely what these theories offer, ultimate visions of the good.

As an account of philanthropy's function in our present society, the standard model is amazingly economical, in two significant senses of that term. In the first place, the standard model is elegantly simple, explaining both the functions and the assessment of all three social

⁸ See, e.g., Richard Steinberg, "Economic Theories of Nonprofit Organizations," in *THE NONPROFIT SECTOR: A RESEARCH HANDBOOK*, ed. Walter W. Powell and Richard Steinberg (New Haven, CT: Yale University Press, 2006), 119 ("Markets can be inefficient because they waste resources by using the wrong production processes (productive inefficiency), but they can also be inefficient because they waste resources by producing the wrong mixture of goods and services (allocative inefficiency).").

⁹ See Douglas, "Political Theories," 43, 46 (outlining a supra-majority rationale for the philanthropic sector); BURTON A. WEISBROD, *THE NONPROFIT ECONOMY* (1988) (same).

¹⁰ See Lester M. Salamon, "Partners in Public Service: The Scope and Theory of Government-Nonprofit Relations," in *THE NONPROFIT SECTOR: A RESOURCE HANDBOOK* ed. Walter W. Powell (Westford, MA: Murray Printing Co., 1987), 99, 111 (faulting prior theories for "explain[ing] the existence of the voluntary sector in terms of failures of the market system and of government," with the result that "voluntary sector is thus seen as derivative and secondary, filling in where other systems fall short."). Cf. Steinberg, "Economic Theories of Nonprofit Organizations," 127 (noting that "[t]hree-failures theory does not presume that any sector is 'first' and the other sectors react to its failures," but rather, "the approach arranges the three sectors around a circle, with each reacting to the failures of its two neighbors," although admitting that the standard presentation, beginning with the for-profit sector "...perhaps falls short in developing our intuition about the whole circle.").

¹¹ Henry B. Hansmann, "The Role of Nonprofit Enterprise," *YALE L.J.* 89 (1979): 835 (1979); Henry B. Hansmann, "Economic Theories of Nonprofit Organizations," in *THE NONPROFIT SECTOR*, ed. Walter W. Powell (Westford, MA: Murray Printing Co., 1987), 27, 30 Michael Krashinsky, "Transaction Costs and a Theory of the Nonprofit Organization," in *THE ECONOMICS OF NONPROFIT ORGANIZATION*, ed. K. Clarkson and D. Martin, (1980), 114.

¹² See Douglas, "Political Theories," 43; WEISBROD, *THE NONPROFIT ECONOMY*.

¹³ See Susan Rose-Ackerman, "Altruism, Nonprofits, and Economic Theory," *J. ECO. LIT.* 34 (1996), 701; Rob Atkinson, "Problems with Presbyterians: Prolegomena to a Theory of Voluntary Associations and the Liberal State," in *FOUNDATIONS OF CHARITY*, ED. CHARLES MITCHELL AND SUSAN R. MOODY, (Portland, OR: Publicshing, 2000).

sectors in terms of a single factor: giving people what they want, measured by what they are willing and able to pay for as individual consumers or vote for as political majorities. And that single factor, individual self-interest, is, of course, the touchstone of both neo-classical economics and liberal democratic politics.¹⁴

One of the things a majority of the American people apparently wants, or is at least willing to tolerate, a public subsidy for what the philanthropic sector provides.¹⁵ The Internal Revenue Code's charitable income exemption and charitable gift deduction offer more or less exactly that. In almost perfect congruence with the standard model, the federal income tax offers subsidies to virtually any vision of the public good that is both voluntary and non-profit. Both the exemption and the deduction are nicely suited to our present polity and economy as given; they encourage a truly Tocquevillean philanthropy for a fundamentally democratic and consumerist America. As to both politics and economics, the Code's tax subsidies to philanthropy imply a kind of Panglossian Progressivism: whatever is, is right – or can be improved by making our political and economic systems conform more closely to their own standards, economic efficiency and political majoritarianism. American law takes an astonishingly embracing view of philanthropic purpose and effectiveness: Whatever legally permitted purpose anyone wants to pursue through a truly nonprofit organization, no matter how productively inefficient or morally offensive, is not only permitted under the general law of nonprofit organizations, but also eligible for tax subsidies based on its own income and its donor's contributions.¹⁶

Our philanthropic sector is thus like a publicly subsidized garden of “grow your own” plots, with a peculiar restriction: you may grow pretty much whatever you like – flowers or fruits or vegetables – as long as you do not take the produce home with you (and as long as you don't grow something really dubious, like marijuana or opium). Our philanthropists' garden, like London's Hyde Park, also has a hallowed “speakers' corner.” If you prefer, you can tell other people what to grow, and how to grow it, or why growing stuff is a bad idea compared to other things they might be doing. Indeed, the most distinctive function of philanthropy is to provide visions of the good, the ideal for both individual and social life, what the Classics called ethics and politics,¹⁷ what the Scriptures call the Way,¹⁸ or the Law.¹⁹

¹⁴ RICHARD A. MUSGRAVE AND PEGGY B. MUSGRAVE, *PUBLIC FINANCE IN THEORY AND PRACTICE* (New York, NY: McGraw-Hill Book Company 1980), 320 (“In this case [that of taxing ‘demerit’ goods and subsidizing ‘merit’ goods], the usual efficiency argument based on free consumer choice is inapplicable and social preference is substituted for private choice.”).

¹⁵ This paragraph is a compression of Rob Atkinson, *Philanthropy and the Federal Income Tax: Should Our Republic Underwrite de Tocqueville's Democracy?*, which itself is the revision and expansion of part of Rob Atkinson, *Philanthropy and the Law: Remembering and Measuring the Common Good*, NYU National Center on Philanthropy and the Law's 21st annual conference, “Shades of Virtue: Measuring the Comparative Worthiness of Charities,” October 29 and 30, 2009.

¹⁶ *Bob Jones University v. United States*, 644 F.2d 879; 639 F.2d 147 (holding that racial discrimination cannot be recognized as charitable because it violates a fundamental public policy.).

¹⁷ See ARISTOTLE, *POLITICS*, trans. Benjamin Jowett (available online at <<http://classics.mit.edu/Aristotle/politics.4.four.html>>): “For if what was said in the *Ethics* is true, that the happy life is the life according to virtue without impediment... then the life which is in a mean... must be best. And the same principles of virtue and vice are characteristic of cities and constitutions; for the constitution is... the life of the city.” (Part XI). See also PLATO, *THE REPUBLIC* trans. A.D. Lindsay (New York, NY: Alfred A. Knopf, 1976), 44 (“So if you are willing, we shall begin our inquiry as to its nature in cities, and after that let us continue our inquiry in the individual also, looking for the likeness of the greater in the form of the less.”).

This brings us to a significant limitation, not to say flaw, of the standard model, the paradox at its core: It can account, as we have seen, for why our society needs the philanthropic sector to provide normative systems of ethics and politics, but it does not, and cannot, offer any assistance to us in choosing among the systems offered. The model is only meant to account for philanthropy in our present society; neither our society's liberal democratic polity nor its capitalist market economy can take any vision of the ultimate good as given. Accepting our capitalist market economy and liberal democratic polity as themselves given, the standard theory tries to derive the function of the third, or philanthropic, sector from the failures of the other two to properly perform functions of their own. Recognizing that the functions of the state and the market in our system are more chosen than given, more the product of human than natural selection, it treats their implicit norms as hypothetical imperatives²⁰: If you want a purely capitalist economy, then you should give consumers the most of what they want at the lowest price; if you want a purely democratic polity, you should treat government itself as a market where the currency is the ballot, and the common good is the majority will.

The standard model does not recommend any grand political or ethical system, including those it analyzes. But it does, consistent with those it analyzes, reveal the prospect that they themselves propose: Choose, from among the offerings of the philanthropic sector, whatever ethics or politics you will, or, if you prefer, create your own from the material you find preserved there for your perusal. We take up that task in the next part. In taking it up, we will not have rejected the standard model's insights; we will, rather, have accepted its invitation. This analysis of philanthropy will undermine neither liberal democracy or market capitalism; it will simply show one way, consistent with our economy and polity's own deepest values, for us to restore both of them to their philanthropic foundations.

III. AN OUTLINE OF ABRAHAMIST REPUBLICANISM

The standard model's radical acceptance of the economic and political status quo is only provisional, and it is hardly the only perspective that our philanthropic sector offers. Deeply embedded in both classical philosophy and the Abrahamist religions is a radically different perspective, which insists that we never take any economic or political system as sacrosanct, but always hold both up to critical evaluation under standards outside themselves, standards given by philosophy, on the one hand, and faith, on the other. This part outlines one such system, which I have called Abrahamist Republicanism.

Abrahamist Republicanism rests on these twin tenets: the ideal function of human society is to produce fully flourishing human beings; the highest aspiration of fully flourishing human beings is to order their society so as to make full human flourishing a viable opportunity for everyone, everywhere. That implies two coordinate roles for philanthropy in particular and society in general²¹: Enable every person to flourish fully, and encourage all forms of human flourishing. To borrow two contemporary slogans, though admittedly not without a bit of irony:

¹⁸ *Isaiah* 30:21 ("This is the way, walk in it"); *John* 14:6 ("I [Jesus] am the way and the truth, and the life."); *Acts* 9:2 (referring to Christianity as "the Way"); *Acts* 22:4 (same); *Acts* 24:22 (same); *Qu'ran*, 1:6–7 ("Show us the straight way, The way of those on whom Thou hast bestowed Thy Grace...").

¹⁹ See *Deuteronomy* 5:1 ("And Moses summoned all Israel and said to them, 'Hear, O Israel, the statutes and the rules that I speak in your hearing today, and you shall learn them and be careful to do them.'").

²⁰ IMMANUEL KANT, *FOUNDATIONS OF THE METAPHYSICS OF MORALS*, trans. Lewis White Beck (New York, NY: Macmillan 2d ed., 1990) (distinguishing between hypothetical and categorical imperatives).

²¹ See *infra* Part IV.

leave no child behind, be all that you can be. In an older idiom, philanthropy's literal meaning, love of humanity, thus has two aspects: humanitarian relief and humanistic achievement.

The first section of this Part shows how each of these goals is deeply rooted in both classical Western philosophy and Abrahamist religion, although their relative emphases admittedly may differ. Against that background, the second section shows how nicely the dual functions of Abrahamist Republican philanthropy map onto the two basic headings of traditional philanthropy, providing the needy with necessities and promoting excellence for everyone. The final section offers a metric for the dual functions of Abrahamist Republican philanthropy, a means of coordinating them for the optimal common good.

A. ATHENS AND JERUSALEM: CLASSICAL PHILOSOPHY AND ABRAHAMIST FAITH

Classical normative philosophy and Abrahamist faith both embrace the two halves of human flourishing we have identified, helping the least well off and aiming for the highest human achievement. To be sure, Abrahamist faith emphasizes the plight of the least well off and classical philosophy focuses more on human excellence. In their different emphases, however, the two sources of Abrahamist philanthropy are complementary rather than contradictory. To see how this is so, let us look first at philosophy, then at faith.

1. CLASSICAL PHILOSOPHY: PLATO AND ARISTOTLE'S ETHICS AND POLITICS

For both Plato and Aristotle, the highest human good is the highest human faculty performing at its best, and that highest faculty is reason. Both are ambivalent about what the object of the highest human reasoning should be; both, it is fair to say, are a bit torn between politics, the ordering of human affairs, and philosophy, the seeking of the highest knowledge, between achieving justice and acquiring wisdom.²² But it is also fair to say that both Plato²³ and Aristotle²⁴ see the coordination of these goals in the role of the philosopher-king, who works justice through wisdom. The most fully flourishing person, then, is the one who governs wisely to advance justice. Nor was this position only the ideal of would-be philosopher-kings; in classical Rome it was the ethos of practicing lawyers,²⁵ even reigning emperors.²⁶

²² See ARISTOTLE, *POLITICS*: "But even those who agree in thinking that the life of virtue is the most eligible raise a question, whether the life of business and politics is or is not more eligible than one which is wholly independent of external goods, I mean than a contemplative life, which by some is maintained to be the only one worthy of a philosopher." Also see PLATO, *REPUBLIC*, 202 (examining the justice of the law's forcing philosophers to put aside the highest pursuit, the study of the good, in order to govern the city that enabled them to become philosophers).

²³ PLATO, *REPUBLIC*, 225("Well, then...do you agree that our words concerning the city and constitution are not mere pious prayers... but are somehow practicable...when those who are truly philosophers ... become rulers in a state and despise the present objects of men's ambitions, thinking them worthless and mean; when holding precious the right and the prizes which it gives, and giving the chiefest and most essential place to justice, they serve and foster it, and so set their own city to rights?").

²⁴ ARISTOTLE, *POLITICS*: "If we are right in our view, and happiness is assumed to be virtuous activity, the active life will be the best, both for the city collectively, and for individuals."

²⁵ See PLINY THE YOUNGER, *A SELF-PORTRAIT IN LETTERS*, trans. Betty Radice (1978), 29 Comparing his lawyerly life with that of his philosopher friend Euphrates, who he says "has something of the sublimity and richness of Plato," Pliny writes:

My time is taken up with official duties, important but none-the-less tiresome. I sit on the bench, sign petitions, make up accounts, and write innumerable – quite unlitary – letters. Whenever I have the chance I complain about these duties to Euphrates, who consoles me by saying that anyone who holds public office, presides at trials and passes judgment, expounds and administers justice, and thereby puts into practice what the philosopher only teaches, has a part in philosophic life and indeed the noblest part of all. But of one thing he can never convince me – that all this is better than spending whole days listening to his teaching and learning from him.

The classical tradition is a good deal less emphatic, however, that justice is to include what we would call “equality of opportunity.” With rare exception, classical philosophers were pretty well-off white men with astoundingly elitist, even anti-democratic, perspectives. It is important to recall, however, that their elitism, though radical, was also radically meritocratic. What is more, for Plato at least, this meritocracy was radically egalitarian. The “noble lie,” for which *The Republic* is regularly reviled, addressed precisely this point: The fundamental myth of the just regime had to be that, in every class of humans, there might be children capable of becoming philosopher-kings.²⁷ Souls of gold and silver are to be found even among the children of iron and bronze; the city of justice must cultivate all its children, then, with the utmost care, lest any excellence be lost. “Therefore the first and weightiest command of God to the rulers is this – that more than aught else they be good guardians of and watch zealously over the offspring, seeing which of those metals is mixed in their souls.”²⁸ The education of philosopher-kings, therefore, operated under this familiar mandate: no child left behind.

What is more, these children emphatically included girls as well as boys. On the testimony of Socrates, the hardest “sell” in establishing the “city of justice” were two that he himself insisted upon: girls have to be educated along with boys, because the rulers of the Republic have to include women as well as men.²⁹ The classical tradition, then, quite comfortably accommodates the dual mandate of Abrahamist Republicanism-- equality of opportunity and encouragement of excellence – although admittedly with more emphasis on excellence than equality.³⁰

2. ABRAHAMIST FAITH: THE COMMON FOUNDATIONS OF JUDAISM, CHRISTIANITY, AND ISLAM

A parallel case can be made for this dual mandate in the Abrahamist religious tradition, with two important qualifications. First, both mandates are admittedly less firmly grounded in the original texts of the Abrahamist faiths than in those of classical philosophy. Second, as between the two mandates, the emphasis of the Abrahamist faiths, as compared with classical philosophy, is reversed: more on relieving the plight of the poor, less on achieving human excellence. On this point at least, Abrahamist morality is more a “morality of duty”; classical Greco-Roman morality, more a “morality of aspiration.”³¹

The Scriptures of Jews, Christians, and Muslims fairly resound with calls to care for the poor.³² Although they hardly approach the emphasis on upward social mobility, much less full sexual equality, found in Plato’s *Republic*, in practice the Abrahamist cultures that followed the

²⁶ See MARCUS AURELIUS, *MEDITATIONS*, trans. R.B. Rutherford (Oxford: Oxford University Press, 1989) I Book VI 26 [hereafter MARCUS AURELIUS].

²⁷ PLATO, *REPUBLIC* 94–95.

²⁸ *Id.* at 95.

²⁹ *Id.* at 131–38.

³⁰ See also JOHN RAWLS, *A THEORY OF JUSTICE*, Oxford University Press (1999), 364: adopting the “Aristotelian principle” “that, other things equal, human beings enjoy the exercise of their realized capabilities (their innate or trained abilities), and that this enjoyment increases the more the capacity is realized, or the greater its complexity.”

³¹ LON FULLER, *THE MORALITY OF LAW* (New Haven, CT: Yale University Press 1964), 5–6

³² See *Leviticus* 25:35–38 (mandating fair treatment of the poor and foreigners, forbidding selling them food a profit or lending them money at interest, and discouraging their eviction, with reference to Israel’s delivery from Egypt into Canaan); *Qur’an* 76:8–9 (“And they feed, for the love of Allah, the indigent, the orphan, and the captive, [saying] ‘We feed you for the sake of Allah alone: no reward do we desire from you, nor thanks’”); *Matthew* 25:45 (“Inasmuch as ye have done it unto one of the least of these my brethren, ye have done it unto me [Jesus]”).

Roman Empire were most distinct from late classical culture in their concern for the poor.³³ On the other hand, they also call for the cultivation of excellence, and they give high priority to wisdom (although, compared with the Classics, their wisdom tends to be a good deal more practical and pious than abstract or political).³⁴ Their model humans, Moses and David, are rulers and lawgivers,³⁵ literal and figurative shepherds.³⁶ The latter is, in addition, a poet and a musician,³⁷ the father of Solomon,³⁸ himself not only a ruler and builder, but also a scholar and philosopher, the wisest of men and the most just of judges.³⁹

Beyond their original Scriptures, all three Abrahamist faiths come much closer to the Classics on both mandates, the humanistic as well as the humanitarian, no doubt because, in all three communities, the Classics came to enjoy a very high standing in their own right. In all three Abrahamist faiths, medieval scholars made monumental efforts to assimilate classical learning, especially that of Plato and Aristotle.⁴⁰ It was, after all, Abrahamist scholars who preserved the classical texts and tradition after the collapse of the Roman Empire in the West.⁴¹ It was no small boast of the medieval church that the best and brightest of believers, be they but shepherd boys, had, under its tutelage, become its princes,⁴² the popes before whom kings, even emperors, had to bow.⁴³ The emperor Constantine had, to be sure, conquered under the sign of the Cross,⁴⁴ and the Knights of Christendom formed a self-consciously pan-Christian order,⁴⁵ but

³³ CHRIS WICKHAM, *THE INHERITANCE OF ROME: 400-1000*, 58 (Viking Penguin 2009) (noting that concern for the poor was the chief cultural difference between both Christianity and Islam from late classical Rome).

³⁴ See JOEL L. KRAEMER, *MAIMONIDES* (NEW YORK, NY: DOUBLEDAY, 2008), 68 (noting that “Maimonides justified his borrowing from the ancient Greeks by claiming that this wisdom was indigenous to Judaism” and that “[w]e find the same idea perpetuated in Islamic thought,” which “made it possible to naturalize these disciplines [Greek science and philosophy] within Islamic and Jewish culture”).

³⁵ 2 *Samuel* 15 (“So David reigned over all Israel; and David administered justice and equity to all his people.”).

³⁶ *Exodus* 3:1 (Moses); 1 *Samuel* 17:11 (David tending sheep); 2 *Samuel* 5:2 (Israelites recount God’s calling David “shepherd of my people Israel”).

³⁷ 1 *Samuel* 16:18–22 (David as lyre player for King Saul).

³⁸ 2 *Samuel* 12:24 (Bathsheba bears Solomon to David).

³⁹ 1 *Kings* 4:29–34 (wisdom of Solomon); 1 *Kings* 3:16–28 (Solomon as wise judge).

⁴⁰ THOMAS AQUINAS, *SUMMA THEOLOGICA*; AUGUSTINE, *CITY OF GOD*, trans. Henry Bettenson (1972) 304 (“There are none who come nearer to us [Christians] than the Platonists.”); *id.* at 63 (“For my part, I have no hesitation about placing Plato... above the gods themselves, to say nothing of the heroes.”).

⁴¹ See Majid Fakhry, “Philosophy and Theology,” in *THE OXFORD HISTORY OF ISLAM*, ed. John L. Esposito (Oxford: Oxford University Press, 1999), 269 (preservation of classical texts, primarily Greek, by Medieval Muslim and Christian scholars in the Near East); WICKHAM, 415 (“The Carolingian world also copied enormous quantities of texts, usually patristic writings but also including pre-Christian Latin works (these were only a small proportion of Carolingian copying, but it is because of that proportion that most classical Latin literature survives.”); KRAEMER, *MAIMONIDES*, 68 (“Indeed, without Greco-Arabic translation activity in the Islamic world and the further transmission of these texts into Hebrew and Latin, medieval Jewish thought and Christian scholasticism could not have emerged.”).

⁴² See WICKHAM, *THE INHERITANCE OF ROME*, 184 (“There were cases in which they [early medieval Christian bishops] were of lesser birth, and rose up the church hierarchy because they were good administrators or personally virtuous, but this was probably by now relatively rare everywhere.”); HERBERT APPLEBAUM, *THE CONCEPT OF WORK: ANCIENT, MEDIEVAL, AND MODERN* (Albany, NY: State University of New York Press 1992), 193 (“Lowborn Christians attained high positions in the early Church....”).

⁴³ See CRANE BRINTON, JOHN B. CHRISTOPHER, AND ROBERT LEE WOLF, *CIVILIZATION IN THE WEST* (2d ed. 1969) (submission, albeit temporary, of Emperor Henry IV to Pope Gregory VII). See also HAROLD BERMANN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* (1983) (describing the Gregorian reform).

⁴⁴ WICKHAM, *supra* note 30, at 52 (2009).

they also welcomed into their Nine Worthies both the Jewish heroes David, Joshua, and Judas Maccabeus and the pagan princes Caesar, Alexander, and Hector.⁴⁶ It is no great surprise that, by the time of the Crusades, the Church's scholars had enthusiastically embraced Aristotle, if only to keep pace with their Islamic competitors.⁴⁷ In the efforts of all three faiths to reconcile the pagan Classics with their own Scriptures, it is hardly unfair to say that, at least for important strands in all three traditions, the accommodation was more by way of moving Jerusalem toward Athens than the reverse.⁴⁸

3. *THE DOUBLE UNORTHODOXY OF ABRAHAMIST REPUBLICANISM*

Abrahamist Republicanism, then, can plausibly be placed on its twin foundations, the Classics and the Scriptures of the West. Even so, as I conceded at the outset, it is an unorthodox reading of both classical philosophy and Abrahamist faith. It is important to see the most salient aspects of this unorthodoxy with respect to each. In the case of both classical philosophy and Abrahamist faith, the basic difference lies in the same place: the foundations of those foundations. What distinguishes Abrahamist republicanism from both of the traditions on which it is founded is its attitude toward the foundation of its twin goals, equality of opportunity and encouragement of excellence.

a. *Classical Philosophy: The Problem of Meta-Ethical Realism*

In the standard reading of classical republicanism, those goals are rationally derivable as good from either the nature of human beings or the nature of the cosmos as a whole. Classical republicanism, that is, is generally thought to rest on a natural law foundation, an assumption that reason can derive the imperative "ought" from the descriptive "is." Abrahamist Republicanism accepts this possibility, but deeply doubts it; Abrahamist Republicanism takes seriously Hume's skepticism on precisely this point.⁴⁹ It is deeply suspicious that classical republicanism, as traditionally understood, commits what modern ethicists call "the naturalistic fallacy."⁵⁰ Following the method of Socrates in the Platonic dialogues, Abrahamist Republicanism is satisfied when it finds, not necessarily external foundations or free-standing proofs, but agreement among knowledgeable and conscientious participants in dialogue.⁵¹ Abrahamist

⁴⁵ See BARBARA W. TUCHMAN, *A DISTANT MIRROR: THE CALAMITOUS 14TH CENTURY* (New York, NY: Alfred A. Knopf, 2002), 64 ("Chivalry was regarded as a universal order of all Christian knights, a trans-national class moved by a single ideal....").

⁴⁶ BONNIE YOUNG, *A WALK THROUGH THE CLOISTERS* (New York, NY: Metropolitan Museum of Art, 1979) 58–59. See also MAURICE KEEN, *CHIVALRY* (Yale University Press, 1984).

⁴⁷ See Jane I. Smith, "Islam and Christendom," in *THE OXFORD HISTORY OF ISLAM*, ED. John L. Esposito (Oxford: Oxford University Press, 1999), 305, 334 ("Some scholars have argued that it was chiefly for the sake of their commentaries that the Arabic works were considered so important, especially those of Ibn Sina and Ibn Rushd."); *id.* ("Robert of Ketton...worked tirelessly in the effort to translate from Arabic into Latin out of the conviction that the knowledge of the Latin west was greatly inadequate in the scientific fields."); FAKHRY, "Philosophy and Theology," 289 ("European philosophers and theologians during the thirteenth century, including Thomas Aquinas (1225–74) were actually battling under the strange banner of pro-Averroists and anti-Averroists.").

⁴⁸ See FAKHRY, "Philosophy and Theology," 288 (brief discrediting of Ibn Rushd (Averroes) for his reliance on classical philosophy); *id.* at 289 (Church condemnation of Aristotelian-Averroist theses, including "superiority of philosophical over religious truth"); KRAEMER, *MAIMONIDES*, 324 ("Maimonides' undertaking was so audacious – introducing philosophy and omitting rabbinic sources and names of sages – that even in his lifetime the *Mishneh Torah* came under a barrage of criticism.").

⁴⁹ DAVID HUME, *A TREATISE ON HUMAN NATURE* ed. Digireads, 210), 256–7 (describing conceptual difficulty of moving from "is" to "ought").

⁵⁰ See GEORGE EDWARD MOORE, *PRINCIPIA ETHICA* 10 (paperback ed., 1922 reprint) (first ed. 1903).

⁵¹ See PLATO, *GORGAS*, trans. Walter Hamilton (Penguin Books, 1971) 58 ("I [Socrates] believe that nothing worth speaking of will have been accomplished in our discussion unless I can obtain your adhesion, and yours alone, to the

republicanism takes its twin goals as both capable of being desired and possible of realization, but as neither inherently desirable nor assured of accomplishment.⁵² To use an admittedly fraught word, it takes them as matters of faith. Abrahamist republicanism thus does to classical natural law norms what Kant did to “natural theology”: accepts the limits of reason, and thus makes way for faith.⁵³

b. Abrahamist Faith: The Problem of God

The nature of that faith, on the other hand, is what distinguishes Abrahamist Republicanism from traditional Western monotheism. Even as Abrahamist Republicanism is agnostic about the possibility of grounding the goals of classical republicanism in rationally proved norms, so it is agnostic about the traditional foundation of those norms in Western monotheism: in a word, God. But agnosticism is not atheism;⁵⁴ to doubt is not to deny. More precisely, to deny knowledge of God is not to claim knowledge that there is no God. Just as Abrahamist Republicanism holds itself open to the possibility of rationally proved norms, even as it declines to rely upon them, so it is open to the existence of God, though without requiring belief in God as an article of faith. Abrahamist Republicanism is thus a humanism, not a theism, though it is a humanism that is not inconsistent with Western monotheism, a humanism completely open to theists (including, if he exists and is inclined enlist, God).

This is, of course, a paradox, but it is not without precedent in the Abrahamist Scriptures; indeed, those Scriptures themselves show an avenue of reconciliation. In the Torah, the Gospels, and the Qur'an, there are two great commandments: Love God; love thy neighbor as thyself.⁵⁵ The priority of the first in the Abrahamist tradition is essential, not merely sequential; love of neighbor flows from love of God. Abrahamist Republicanism, by contrast, omits love of God altogether in favor of the love of humanity, philanthropy. This is, obviously, a major difference.

But, even in the Abrahamist scriptures, we are told the second command is “like unto the first.”⁵⁶ Indeed, it is so like the first that the Apostle Paul could recite the second as the sum of the whole law without reference to the first: “For the whole law is fulfilled in one word: you

truth of what I say; and the same holds good for you, in my opinion, unless you can get my individual suffrage, without regard to what the rest of the world may say.”); See also PLATO, *THE REPUBLIC*. Cf. LAURA KALMAN, *THE STRANGE CAREER OF LEGAL LIBERALISM* (Yale University Press, 1996), 163 (noting that “detractors [of the revival of interest in civic republicanism] delighted in demonstrating that for all their postmodern posing and emphasis on dialogue, Michelman and Sunstein [principal figures in the revival] still searched for objective foundations of justice and common good”); see also *id.* at 76 (citing and summarizing these critiques).

⁵² See MUSGRAVE & MUSGRAVE, *PUBLIC FINANCE*, 97 (“The basic question of whether the design of the good society can be derived by ‘reason’ alone or whether ‘value judgment’ is needed remains unresolved, a matter to be rethought as civilization proceeds.”).

⁵³ See IMMANUEL KANT, *CRITIQUE OF PURE REASON*, trans. Norman Kemp Smith (New York, NY: Macmillan, 1929) 29 (“I have therefore found it necessary to deny *knowledge*, in order to make room for *faith*.”).

⁵⁴ See Thomas H. Huxley, “Agnosticism and Christianity,” in *ESSAYS UPON SOME CONTROVERTED QUESTIONS* (London, MacMillan 1892), 449, 450 (using the term “agnostic” to indicate a verdict of “not proved,” rather than one of “disproved” or “not provable”).

⁵⁵ *Deuteronomy* 6:4–5 (“Hear, O Israel: The Lord our God is one Lord, and you shall love the Lord your God with all your heart, and with all your soul, and with all your might.”) (RSV); *Leviticus* 19:18 (“You shall love your neighbor as yourself: I am the Lord”); *Matthew* 22:34–40 (Jesus’s recitation of these commandments and declaration that “on these two commandments depend all the law and the prophets”); *Mark* 12:29–34 (same). *Qur’an* 76:8–9 (“They give food, out of love for Him, to the poor, the orphan, and the slave, saying: We feed you only for Allah’s pleasure – we desire from you neither reward nor thanks”).

⁵⁶ *Matthew* 22:39.

shall love your neighbor as yourself.”⁵⁷ As the Abrahamist Scriptures present him, God Himself is very much a humanist, in the sense that human well-being is his primary concern. He is said to love Israel⁵⁸ and the Church⁵⁹ as a husband loves a bride; he is (in a metaphor best unmixed with the foregoing) the father of his first people, Israel,⁶⁰ and the husband of his new people, the Church.⁶¹ In the Gospels he loves his needier adopted children more than his proper and perfect son, whom he sacrifices for their benefit;⁶² in Islam it is the outcaste Ishmael, the son of Abraham’s handmaid Hagar, not his proper wife Sarah, who becomes the forebear of the Prophet.) And in the Gospels the God of Abraham is the Good Shepherd, ready to lay down even his own life for his sheep.

The clear implication is that God, like a lover and a father, loves others more than he loves himself; if we are to be like him, we are to love others, especially the neediest of others, not only more than ourselves but also, like God, more than God. Thus, in the Abrahamist Scriptures, God sometimes, if not always, shows himself as more concerned that his followers care for their fellows, especially the least well-off among them, than attend to worshipping him, even acknowledging him. The Hebrew prophets are emphatic about God’s preference for human justice over divine worship:

What to me is the multitude of your sacrifices?...Bring no more vain offerings; incense is an abomination to me...[C]ease to do evil; learn to do good; seek justice, correct oppression; defend the fatherless; plead for the widow.⁶³

The Gospels are at least equally emphatic:

Inasmuch as ye have not done these things unto the least of these my brethren, you have not done them unto me.⁶⁴

And so, too, is the Qur’an:

Hast thou observed him who believeth religion?
That it is he who repelleth the orphan,
And urgeth not the feeding of the needy.
Ah, woe unto worshippers
Who are heedless of their prayer;
Who would be seen (at worship)
Yet refuse small kindnesses!⁶⁵

⁵⁷ *Galatians* 5:14. See also *Romans* 13:9 (RSV) (“The commandments, ‘You shall not commit adultery, You shall not kill, You shall not steal, You shall not covet,’ and any other commandment, are summed up in this sentence, ‘You shall love your neighbor as yourself.’”).

⁵⁸ *Hosea* 1:2; 2:16-20; 3:1.

⁵⁹ See *Ephesians* 5:25 (“Husbands, love your wives, as Christ loved the church and gave himself up for her.”).

⁶⁰ *Hosea* 1:10; 11:1.

⁶¹ *Romans* 9:25 (quoting Hosea’s marital metaphor as applicable to Christians).

⁶² *John* 3:16.

⁶³ *Isaiah* 29:13, quoted in *Matthew* 15:8-9 (“these people draw near with their mouth and honor me with their lips, while their hearts are far from me, and their fear of me is a commandment of men learned by rote....”); *Amos* 5:21-24:

I hate, I despise your feasts, and I take no delight in your solemn assemblies...Take away from me the noise of your songs; to the melody of your harps I will not listen. But let justice roll down like waters, and righteousness like an ever-flowing stream.

⁶⁴ *Matthew* 25:31-46, esp. 45; see also *Mark* 12:28-34 (keeping the two great commandments “is much more than all whole burnt offerings and sacrifices.”).

⁶⁵ See *Infra* note 107, “Small Kindnesses” (Pickthall, trans.).

The God of all three Abrahamist religions demands that his followers do justice, not that they do justice in his name, much less worship him with outward show or ceremony. His true followers are precisely those who do justice, though they have never known him⁶⁶; he acknowledges no others, no matter what claims others make upon him.⁶⁷

In leaving the things of God aside to concern itself with the needs of our fellow humans, then, Abrahamist Republicanism is not only consistent with Abrahamist faith; it may be that faith's ideal form. At the risk of offending the more orthodox of all three faiths, we could thus call Abrahamist Republicanism the Republican Torah, or Gospel, or Way; it embraces the insistences of the scriptures of all three Abrahamist faiths that God would have his followers put helping their fellows above everything, even above worshipping him. This is no more radical than John F. Kennedy's conclusion, meant to be thoroughly orthodox nearly half a century ago: "[H]ere on earth, God's work must truly be our own."⁶⁸ It is a paradox Hasidic rabbis unpacked: God Himself, who creates nothing without purpose, must have a purpose even for atheists, to help the needy when the conventionally faithful would have them look only to Him.⁶⁹

Abrahamist Republicanism's religion and its reason, its faith and its philosophy, are both a double embarrassment and a dual opportunity. For the conventionally religious, the problem is its elevation of human reason over divine revelation. Having read the Scriptures, the Abrahamist Republican believes that the God of Abraham would have to be toward the faithful, as a father is toward his children. So we cannot see how, even as he commands us to love our neighbors as ourselves, he would ask anyone, least of all Abraham, to kill his son without giving him a reason.

For modern secularists, the problem is rationally grounding our knowledge of the good. With Socrates, we hold a paradoxical belief that all we know is that we know nothing about the things that really matter. But we also believe, on his example, that the unexamined life is not worth living, and that the examined life leads us to his republic, the City of Justice in which piety and justice are one, and that one is philanthropy, the most careful concern for our fellows and ourselves.

But the Scriptures tell us God stayed Abraham's hand; may not the lesson be, not the virtue of blind obedience, but the need to act on no mandate, even God's, not grounded in clear

⁶⁶ The Gospel of Matthew is especially explicit here:

Then the King [Jesus] will say to those at his right hand, "Come, O blessed of my Father, inherit the kingdom prepared for you from the foundation of the world; for I was hungry and you gave me food, I was thirsty and you gave me drink, I was a stranger and you welcomed me, I was naked and you clothed me, I was sick and you visited me, I was in prison and you came to me. Then the righteous will answer him, "Lord, when did we see thee hungry and feed thee, or thirsty and give thee drink. And when did we see thee a stranger and welcome thee, or naked and clothe thee? And when did we see thee sick or in prison and visit thee? And the King will answer them, "Truly, I say to you, as you did it unto one of the least of these my brethren, you did it to me."

Matthew 25:34-40 (RSV).

⁶⁷ Again, Matthew's Gospel leaves no doubt on this score:

Then he [Jesus] will say to those at his left hand, "Depart from me, you cursed, into the eternal fire prepared for the devil and his angels; for I was hungry and you gave me no food, I was thirsty and you gave me no drink, I was a stranger and you did not welcome me, naked and you did not clothe me, sick and in prison and you did not visit me." Then they will answer, "Lord, when did we see thee hungry or thirsty or a stranger or naked or sick or in prison, and not minister to thee?" Then he will answer them, "Truly, I say to you, as you did it not to one of the least of these, you did it not to me." And they will go away into eternal punishment, but the righteous into eternal life.

Matthew 25:41-46 (RSV).

⁶⁸ John F. Kennedy, Inaugural Address (January 20, 1961).

⁶⁹ Martin Buber, *2 Tales of the Hasidim* 89 (1948-49).

human good? And Socrates, for all his ironic ignorance, still built his City of Justice, stopping at every step to ask the assent of his interlocutors, to gain their reasoned assent before moving on. And that basis, he has them say at its completion, is foundation enough.⁷⁰

Nowhere is this point better captured than in a story from the Talmud. One day the rabbis were arguing over the ritual purity of an oven. Having exhausted all rational argument without persuading his opponents, Rabbi Eliezer, in evident frustration, resorted to a series of miraculous proofs: if I am right, let this marvel occur. And so miracles did occur: A carob tree uprooted itself, a stream ran backward, a wall of the school itself nearly fell. But, unimpressed with each marvel, the other sages all posed the same question: What has that to do with interpreting the Torah? Finally, in complete exasperation, Rabbi Eliezer invoked heavenly intervention: If I am right, let Heaven declare it. And Heaven did, indeed, declare Rabbi Eliezer right. But Rabbi Yehoshua had the last word. Quoting a verse of Torah,⁷¹ he exclaimed, “The Torah is not in heaven!”⁷²

Subsequent commentators wondered how Rabbi Yehoshua had managed to get the better of God. Opinions varied, but one of them, attributed to a vision of the prophet Elijah, was this:

The Gemara relates that generations later Rabbi Natan met the Prophet Elijah...Rabbi Natan asked Elijah about the debate between Rabbi Eliezer and Rabbi Yehoshua. He said to him: “What did the Holy One, blessed be He, do at that time when Rabbi Yehoshua refused to heed the heavenly voice?” In reply, Elijah said to Rabbi Natan: “God smiled and said: ‘My sons have defeated Me, My sons have defeated Me!’” God's sons “defeated Him” with their arguments. Rabbi Yehoshua was correct in his contention that a view confirmed by majority vote must be accepted, even where God Himself holds the opposite view.⁷³

Here is the creed, the core belief, of Abrahamist Republicanism.

At the risk of detracting from its perfection, I must venture a few observations to put that creed more precisely into the context of our present study. Most basically, this Talmudic case, like our inquiry, is about virtue: for the rabbis, the proper condition of an oven; for us, the comparative worthiness of philanthropy. In both these matters, as in all others, the Talmud tells us to look to the Torah, the Law, for our metric. But, even in the Law, we ourselves must do the measuring.

We, ourselves, yes, but not just anyone; only those learned in the Law. The rabbis, like Socrates,⁷⁴ listened only to the few, this studious few, never to the many. Nor to the One, either, unless the One was willing to give reasons grounded, not in His will, but in the Law, as authoritatively interpreted by scholars of the Law. On that, the Talmud teaches, we have the One's own approving word – even His smile – at the lesson Rabbi Yehoshua and the others taught Him. The God of the Talmud apparently takes delight in the insight of Socrates: it is more beneficial to be corrected than to correct, to lose an argument than to win, for thus we

⁷⁰ PLATO, *THE REPUBLIC* *supra* note 15, at 280–81

⁷¹ *Deuteronomy* 30:12.

⁷² *Tractate Bava Metzia* 59B, in 3 *THE TALMUD* 235–37 (Steinsaltz ed. 1990) [hereafter *THE TALMUD*].

⁷³ *THE TALMUD*, *supra* note 68, at 237.

⁷⁴ PLATO, *CRITO* 53 (F. J. Church trans., rev. ed. 1956) (asking “why should we care so much about public opinion?” and answering “Reasonable men, of whose opinion it is worth our while to think, will believe we acted as we really did”).

become more wise;⁷⁵ And wisdom is our proper human virtue, the necessary condition for the perfect performance of our highest human function.⁷⁶

In summary, then, Abrahamist Republicanism rests comfortably on the West's twin foundations, Jerusalem and Athens, if not quite precisely in the center of either. We take Socrates' skepticism seriously; we are Abrahamists of the school of Ibn Rushd and Rabbi Yehoshua. With respect to both of its antecedent traditions, Abrahamist Republicanism emphasizes what might be called the "horizontal" over the "vertical." It focuses on the anthropocentric rather than theocentric aspects of the Abrahamist religions, and on the moral and political rather than metaphysical and metaethical aspects of classical philosophy. On the other hand, its roof is wider than their foundations; Abrahamist Republicanism comfortably accommodates all those of narrower foundational beliefs who support its twin pillars, humanitarian relief and humanistic excellence, even if those with narrower beliefs as to foundations cannot return the welcome.

With Marcus Aurelius, we see the fault in that case as more likely ours, and in any case not our neighbor's: "If he goes wrong, instruct him kindly and point out what is being overlooked; if you fail, blame yourself or, better, not even yourself."⁷⁷ With both the pagan philosopher-czar⁷⁸ and the Church father who forsooth his sacked city,⁷⁹ we believe that our own belief is a matter of grace; something our parents and our teachers and their philanthropy have given us, not something we ourselves have earned.

B. DEFINING VIRTUE: ABRAHAMIST REPUBLICANISM AND TRADITIONAL PHILANTHROPY

It should thus come as no surprise that Abrahamist Republicanism maps quite nicely onto the basic contours of the legal definition of charity;⁸⁰ charity is itself grounded in precisely the same two normative traditions: If we look closely at the traditional purposes of charity, we can, without undue tugging and hauling, reduce them to these two: providing basic goods like food, shelter, and clothing to the truly needy; and providing especially "good" goods like education, religion, art to anyone.⁸¹ We do not live by bread alone,⁸² but we do not live very long without bread, either. When we juxtapose those two categories of traditional charitable purposes with the twin goals of Abrahamist Republicanism – provide the needy with the means to flourish and promote the highest forms of human flourishing – two points become immediately apparent.

First, the goals of Abrahamist Republicanism are actually specifications of the two basic purposes of charity; Abrahamist Republicanism describes what basic needs are, even as it defines

⁷⁵ PLATO, *GORGAS* *supra* note 48, at 36 ("[I]t is better to be relieved of very bad trouble oneself than to relieve another, and in my opinion no worse trouble can befall a man than to have false belief about the subjects we are now discussing.").

⁷⁶ *Id.* at 39 ("In fact, a man who has learnt any subject possesses the character which knowledge of that subject confers."); *id.* at 49 ("Well, do you think it a benefit when a man devoid of wisdom does what seems best to him?").

⁷⁷ 7 MARCUS AURELIUS, *supra* note 23, at 64.

⁷⁸ 1 MARCUS AURELIUS, *supra* note 23 (offering thanks to ancestors, friends, teachers, and gods).

⁷⁹ See AUGUSTINE, *supra* note 37 (defending Christianity against the charge that its practices caused the sack of Rome); AUGUSTINE, *THE FREEDOM OF THE WILL* (arguing that fallen humanity cannot save itself but must rely on divine grace).

⁸⁰ As indicated above, "charity" is term most widely used in contemporary America law for "philanthropy"; in this section I follow that usage.

⁸¹ Rob Atkinson, *Altruism in Nonprofit Organizations*, 31 B.C. L. REV. 501, 605 (1990). See also John G. Simon, Harvey Dale, & Laura Chisholm, *Federal Tax Treatment of Nonprofit Organizations*, in *THE NONPROFIT SECTOR* (Powell & Steinberg, ed., 2006) (citing Atkinson for this distinction).

⁸² *Deut.* 8:23; see also *Matthew* 4:4 and *Luke* 4:4 (quoting *Deut.* 8:23).

which goods are especially good. Second, Abrahamist Republicanism coordinates the two basic purposes of charity under a common end: the goal of helping the needy is to enable them to flourish at the highest possible human level. That specification and coordination of the traditional purposes of charity is no mean task; it is a major step beyond traditional legal doctrine, and it is a step that, for reasons we have seen, the standard model is not able to take.⁸³

But that is only the qualitative aspect of our task; like other theories of charity, Abrahamist Republicanism must answer critical quantitative questions as well. We need to know who is neediest and what they need most; we need to be able to compare human excellences; most challengingly of all, we need to be able to make trade-offs between meeting the most basic needs and advancing the highest excellence.

C. MEASURING SHADES OF VIRTUE: A MIDRASH ON MAIMONIDES

Abrahamist Republicanism not only tells us what purposes are charitable, and how those purposes are functionally related, it also implies important standards of performance and comparison. Here, as in the for-profit and governmental sectors, the standard of “productive efficiency”⁸⁴ is obviously applicable; all things being equal, more bang for the philanthropic buck is better than less, whether it be in humanitarian aid or humanistic achievement. Beyond that basic point, matters become predictably more complicated.

The really challenging issues are these: ranking goods under each of the two principal goals of philanthropy, making trade-offs between the basic goals themselves, and choosing providers of particular goods for both goals from the three sectors – for-profit, governmental, and philanthropic. We consider the first two sets of issues here and the third in Part IV. In all cases, the metric derives directly from the mandate: Enable everyone (capable of being made capable) to engage in the highest forms of human flourishing; encourage all those forms of flourishing. Coordinating these twin goals will require hard, even horrible, choices; two basic principles help strike the balance.

1. TWO PRINCIPLES FOR COORDINATING PHILANTHROPY’S TWIN GOALS

The first coordinating principle is the compatibility of the twin goals. Those two goals are admittedly incommensurable; they cannot be reduced, without remainder, to each other. But they can readily be related to one another, as a foundation is related to a structure above it. The higher we want to go, the more deeply and the more broadly we must build. Without continuous cultivation, the higher forms of culture will soon wither; if we do not meet their most basic needs, the neediest will simply die. We are, in the words of the Prophet, the People of the Book;⁸⁵ our highest calling, in the Classics⁸⁶ and in the Scriptures,⁸⁷ is the study of the Law. Unless our children can read, our books of law are closed;⁸⁸ unless our children eat, they themselves are lost. Either way, our law is lost to everyone.

⁸³ See Atkinson, *Philanthropy and the Federal Income Tax*, *supra* note 14.

⁸⁴ See Atkinson, *Philanthropy’s Function*, *supra*, Part II.B.1.a., The Market’s Basic Function and Metric (“[T]his metric compares the output of goods and services with the inputs required to produce them.”).

⁸⁵ *Qu’ran* 3:64.

⁸⁶ PLATO, *THE REPUBLIC*, *supra* note 15, at 103 (“Then ... must not our children be set to more law-inspired amusements?”).

⁸⁷ *Qu’ran* 5:48 (“To you We have sent down the Book, in truth, confirming the scripture that came before, and watching over it with care.... To each among you We have revealed a Law and a Clear Path.”).

⁸⁸ See *Deut.* 6:6-7 (“And these words which I command thee this day, shall be in thine heart: And thou shalt teach them diligently unto thy children....”).

“Everyone” means everyone in the whole world; that is the second coordinating principle. Abrahamist Republican philanthropy, like classical philosophy⁸⁹ and Abrahamist faith,⁹⁰ is universalistic, not nationalistic. Its community of concern embraces the whole of humankind, with no distinction between any one person and another. All have the same basic needs; all are capable of the same forms of excellence.

2. THE TWIN GOALS OF ABRAHAMIST REPUBLICAN PHILANTHROPY

With these two basic principles in mind – the universalism of philanthropy and the mutual dependence of its two essential goals – we can now examine those two goals in greater detail. Here we can find no better guide than Moses Maimonides, the medieval Jewish Aristotelian who flourished in two different centers of Islamic culture, Alandalusia and Egypt, working to reconcile Jerusalem and Athens.

a. Relieving Distress: Maimonides's Eight Degrees of Alms-Giving

Maimonides ranked alms-giving in eight categories, according to several implicit metrics, each quite instructive for Abrahamist Republican philanthropy.⁹¹ The highest form of alms-giving for him, as it must be to Abrahamist Republicanism, is to rehabilitate the downtrodden back on their feet, back to their proper functioning in society.⁹² This, for Maimonides, is not only explicitly first; it is also far ahead of everything else. Indeed, so important is the rehabilitative goal for Maimonides that it may even supplant what is, for us, the *sine qua non* of personal charity, the absence of a *quid pro quo*.⁹³ For Maimonides, rehabilitative philanthropy may be a loan as well as a gift (although the loan is presumably without interest); it may also involve finding work for the unfortunate or becoming their partner. The point is not the degree of sacrifice the giver makes, or the form that the help takes. The point is the goal of the donor's help, its rehabilitative purpose: To put one's fellows back on their feet. Better to teach fishing, then, than to hand out fish. The converse should also follow: If rehabilitation is the goal of philanthropy, anything that increases dependency is, precisely to that extent, counter-productive.

The following three of Maimonides's categories make clear that the second most important consideration is maintaining the best possible relationship between the alms-giver and the alms recipient. The ideal relationship, as we have seen, is the aim of the highest charity: restoration of full, though not necessarily equal, membership in the shared community. Anything else is decidedly subordinate. As long as dependence remains, mutual anonymity is second-best; short of that, and therefore third, it is best for the donor not to know the donee.⁹⁴

Maimonides makes the reason for this preference for double anonymity, and for donee-anonymity over donor-anonymity, explicit: lest the poor be “put to shame,” abased in the eyes of

⁸⁹ See PLATO, GORGIAS, *supra* note 48, at 75 (“[I]f the feelings of every human being were peculiar to himself and different from those of every other human being, instead of our possessing, for all the diversity of our experience, something in common, it would not be easy for one man to make his own situation clear to another.”).

⁹⁰ Isaiah 2:1 (“It shall come to pass in the latter days that the mountain of the house of the Lord shall be established as the highest of the mountains, and shall be raised above the hills; and all the nations shall flow to it.”). Qu’ran 5:48 (“To you We have sent down the Book, in truth, confirming the scripture that came before, and watching over it with care....To each among you We have revealed a Law and a Clear Path.”).

⁹¹ MISHNEH TORAH, *supra* note 2, at 91–92.

⁹² *Id.* at 91.

⁹³ See I.R.C. § 170 (limiting charitable deduction to amounts of gifts to charity above any benefit received by donor).

⁹⁴ *Id.* Fourth-best, by his reckoning, is thus the absence of all anonymity, the case where giver and receiver know each other.

even a single one of their compatriots (and, implicitly, lest the generous be exalted).⁹⁵ Maimonides was clear on this, as is the Gospel: known givers fall on Maimonides's scale, even as the Gospel declares that their publicity is their reward.⁹⁶ And Marcus Aurelius, the pagan philosopher-emperor, concurs: "When you have done good and another has been its object, why do you require a third thing besides, like the foolish – to be thought to have done good or to get a return?"⁹⁷

This emphasis on priority of result, and assessment of result from the perspective of the needy, is underscored by the last four categories: the unasked donor, the ready donor, the stinting donor, and the grudging donor.⁹⁸ "The donor who gives without being asked" lowers, we would now say, transactions costs; this, in turn, means more relief for the poor.⁹⁹ And giving without being asked has other advantages, less obvious but perhaps more important: donors who anticipate others' needs have to have made their own assessment of that need, relative as well as absolute. Presumably, they make this assessment in light of several obvious factors: Most bang for the buck; benefits to as many as possible; rehabilitation over mere relief, but the more basic needs before the less. A mind is surely a terrible thing to waste, but before we can begin anyone's education, we must secure water, food, shelter, and security, basic physical and psychological health and safety.¹⁰⁰

Donors who have to be asked, Maimonides's sixth level, lose the opportunity to make these assessments. But at least they can give what is needed in the particular case; that puts their philanthropy above the last two levels. And finally, even if they must stint, they can at least not begrudge. Only at the very bottom does Maimonides factor in the donor's motive or mental state: It is least worthy to give grudgingly. The Lord proverbially loveth a cheerful giver¹⁰¹ the converse, Maimonides teaches, is also true: The begrudging giver is least lovely of all.

Maimonides is much more concerned about the donee's mental state. He is quite clear, as we have seen, that the donee is not to be humbled, nor the donor exalted. Poverty is, to him, implicitly a no-fault condition; nothing the poor need to apologize for or be ashamed of. But neither is it a state to be desired by individuals or valued by society; contrary to some branches of Christianity, Maimonides sees poverty, not as bringing one in any way closer to God, but simply as separating one from one's proper human function. Poverty is not a sin and should not be made a shame, but neither is it a virtue; it is a vicious condition to be remedied as quickly and completely as possible. And the remedy is getting the impoverished person back to a self-sufficient place in the community, the proper state of everyone.

Maimonides, we should note, addresses cases of individual relief given directly to distressed individuals. As his ranking of this mode of relief makes clear, this is not charity in its

⁹⁵ The other possible combination, donor and donee both knowing each other, is implicit in Maimonides's fifth level: "he who hands the alms to the poor man before being asked." *Id.* at 92.

⁹⁶ *Matthew* 6:4.

⁹⁷ 7 MARCUS AURELIUS, *supra* note 23, at 73.

⁹⁸ MISHNEH TORAH, *supra* note 2, at 92.

⁹⁹ This assumes asking is by third parties; if by the poor themselves, it would lack anonymity. But maybe that's why this one is just below both single anonymities; that would give the forth possibility: known, not to neither party or to either, but to both. If so, it is bad for that reason alone. But it is also bad, even if third parties ask, because donor is then known to them, in addition to transaction cost problem, addressed in the text.

¹⁰¹ 2 *Corinthians* 9:7 ("Each one must do as he has made up his mind, not reluctantly or under compulsion, for God loves a cheerful giver.").

ideal mode. Much better, he makes clear at several points, is a system in which the distribution of charity is made by an appropriate social body. Doubly anonymous charity, the second highest, is like contributing “directly to the alms fund,” which Maimonides found in every Jewish community of his day. And the third best, anonymous gifts directly to the needy, are especially appropriate “if those in charge of alms are not conducting themselves as they should.”¹⁰²

If they were, several advantages would be achieved: Most obviously, as Maimonides implies in this last example, there is donor-anonymity. But there is also the possibility of collective wisdom, maybe even occupational expertise, officers in a better position than an individual donor to assess relative need and opportunity. Even if a donor knows most about a particular case, that donor cannot know most about all cases, and he or she can share individual knowledge with the group.

But Maimonides makes an even more basic point. Publicly administered charity, his list makes clear, is itself only second best, a default from the ideal. In addition to the present system of officials in charge of the poor, in default of which individual alms-giving becomes necessary, Maimonides also mentions an implicitly preferable system that is no longer extant. In that system, the poor helped themselves from the temple’s relief fund: There, donors would give in secret to the public fund, from which the poor would withdraw in secret. Presumably, the metric was “from each according to ability, to each according to need.” But the Temple, in Maimonides time, was no more; Israel was in exile, dispersed across three continents and living under the political power of others. His model of individual humanitarian relief, then, is but the third-best. Before we look more closely at the first-best, we need to look at private philanthropy’s other principle object, promoting excellence.

b. *Promoting Excellence: Maimonides’s Premium on Wisdom*

What Maimonides saw as the highest form of humanitarian philanthropy, putting others back on their feet, back in their proper social and economic place, points to private philanthropy’s second function, promoting excellence. If there is a choice among places to put our rehabilitated neighbor, the most appropriate is the one where that neighbor can function best (taking costs, including opportunity costs, and risks into account). As compared with identifying and ranking basic needs, the focus of philanthropy’s humanitarian function, stating and measuring the optimum of human flourishing, philanthropy’s humanistic function, will obviously be harder. Here, as we have seen, even Plato and Aristotle were at best a bit ambivalent themselves and not entirely in agreement with each other;¹⁰³ here, then, there will necessarily be more room for conscientious disagreement even among properly schooled philanthropists.¹⁰⁴

In the conclusion of his section on alms-giving, just three paragraphs after this famous eight-tiered ranking, Maimonides makes a startling pronouncement:

One should always restrain himself and submit to privation rather than be dependent upon other people or cast himself upon public charity, for thus the Sages have commanded us, saying, “Make the Sabbath a weekday rather than be dependent upon other people.” Even if one is a Sage held in honor, once he becomes impoverished, he should engage in a trade, be it even a loathsome trade, rather than be dependent upon

¹⁰² MISHNEH TORAH, *supra* note 2, at 91.

¹⁰³ See *supra*, Part II.A.1.

¹⁰⁴ This is admittedly an important qualification; more important, perhaps, than first appears. Because our philanthropy is other-regarding, like that of Maimonides, the conversation will not comfortably include the disciples of Ayn Rand; because it is universalistic, it will not comfortably include anti-Semites or racists.

other people. It is better to strip hides off animal carcasses than to say to other people, “I am a great Sage, I am a priest, provide me therefore with maintenance.” So did the Sages command us. Among the great Sages were hewers of wood, carriers of beams, drawers of water to irrigate gardens, and workers of iron and charcoal. They did not ask for public assistance, nor did they accept it when offered to them.¹⁰⁵

This would seem, on its face, to place our second main tenet of charity, promoting excellence, below our first, humanitarian relief; those who manifest the highest form of human excellence, the Sages, are to forego public assistance in favor of the poor, even at great personal loss.

But that is only half the story; Maimonides has already let the other shoe fall. We are to be more careful in performing the commandment of alms-giving, he tells us at the beginning of this chapter, because alms-giving is the very mark of the righteous man, the child of Abraham.¹⁰⁶ In alms-giving, he has told us two chapters before, there is one thing even more fundamental than poor relief:

The ransoming of captives has precedence over the feeding and clothing of the poor. Indeed, there is no religious duty more meritorious than the ransoming of captives, for not only is the captive included in the generality of the hungry, the thirsty, and the naked, but his very life is in jeopardy.¹⁰⁷

What is more, “he who turns his eyes away from ransoming him, transgresses” several specific commandments of the Torah and “many other admonitions like these.” And so, “to sum up, there is no religious duty greater than the ransoming of captives.”¹⁰⁸ Thus, if the citizens of a city have collected money to build a synagogue, even if they are mid-way into its construction – here Maimonides is lyrically detailed – “[e]ven if they have already brought in the stones and set them up, and the beams and planed them, and thus made everything ready for construction, they must nevertheless sell everything, but only for the ransoming of captives.”¹⁰⁹

Following that example, Maimonides moves on to a series of highly technical matters: the proper ransom price, the problem of assisting captives’ escape, the status of bondsmen as captives, the propriety of ransoming women before men.¹¹⁰ Then he raises the prospect of a truly terrible dilemma, as tragic as *Sophie’s Choice*: “there are before us many poor people or many captives, and there is not enough in the alms treasury to feed or clothe or ransom all of them.” In that extremity:

The procedure is as follows: a priest takes precedence over a Levite, a Levite over an Israelite, an Israelite over a profaned priest, a profaned priest over a person of uncertain parentage, a person of uncertain parentage over a foundling, a foundling over a bastard, bastard over a Nathin, a Nathin over a proselyte... and a proselyte over an emancipated bondsman....¹¹¹

This is essentially the social hierarchy set out in the Torah. Maimonides has already seen one supervening principle: Women before men, in ransoming as in all other forms of relief.

¹⁰⁵ MISHNEH TORAH, *supra* note 2, at 92–93.

¹⁰⁶ *Id.* at 89.

¹⁰⁷ *Id.* at 82.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 83.

¹¹⁰ *Id.* at 83–84.

¹¹¹ *Id.* at 84. The reason for these last two priorities, Maimonides immediately explains, is this: “the Nathin has grown up with us in a state of holiness”; the bondsman “was once included among the accursed.” *Id.*

Only in the next paragraph, the final paragraph of the chapter, does Maimonides introduce a second criterion, which takes precedence over all the others. Having just set out the whole social hierarchy of Toranic society as the priority for ransoming captives, he then raises what seems, at first, a superfluous question: "When does this apply?" Here is how Maimonides answered the question he posed to himself:

...when both are equal in wisdom. If, however, a High Priest is unlearned and a bastard is a disciple of the wise, the latter takes precedence. In the case of two scholars, the greater in wisdom precedes the other. If one of the poor or captives is a person's teacher or father, and there is another poor man or captive greater in wisdom than one's teacher or father, so long as the latter is a disciple of the wise, he takes precedence over the one who exceeds him in wisdom.¹¹²

Here, of course, he was but following the Scriptures of his faith, particularly the Proverbs of Solomon, son of David:

Get wisdom; get insight. Do not forsake her, and she will keep you; love her, and she will guard you. The beginning of wisdom is this: Get wisdom, and whatever you get, get insight. Praise her highly, and she will exalt you; she will honor you if you embrace her. She will place on your head a fair garland; she will bestow on you a beautiful crown.¹¹³

According to the Writings, when God told Solomon to ask what he would, Solomon asked only for wisdom;¹¹⁴ God, pleased with this request, gave him what he asked, "a wise and discerning mind, so that none like you has been before and like you shall arise after you," and also what he did not ask, "both riches and honor, so that no other king shall compare with you, all your days."¹¹⁵

Of Maimonides, Moses ben Maimon, it was traditionally said, "from Moses to Moses, there is none but Moses."¹¹⁶ In Islam, the Prophet himself, Reciter of Allah's own law, made the same point, even more pointedly: The ink of the scholar is more precious than the blood of the martyr.¹¹⁷ (A point apparently lost, of late, on many of his martyrs.) One could multiply at will the same point in both Plato and Aristotle; the priority of wisdom is the very reason they called themselves and their followers philosophers.

The Hebrew Scriptures, the Qur'an, and the Classics clearly concur: wisdom, especially the wisdom gained in the study of those texts themselves, knows no higher good. The Stoic emperor Marcus Aurelius mused to himself that "no other calling in life is so fitted for the practice of philosophy as this in which you now find yourself;"¹¹⁸ still, he knew which was the higher calling: "Alexander, Julius Caesar, Pompeius, what are they compared with Diogenes, Heraclitus and Socrates?"¹¹⁹ In the realms of the Prophet, no small ruler in his own right, his scholars studied the philosophers, especially Aristotle and Plato, along with the Scriptures, in the company of the other People of the Book. Maimonides, our guide to philanthropy, studied

¹¹² *Id.* at 84.

¹¹³ *Proverbs* 4:5b-9.

¹¹⁴ *1 Kings* 3:9.

¹¹⁵ *1 Kings* 3:10-13.

¹¹⁶ *Stanford Encyclopedia of Philosophy*, Maimonides.

¹¹⁷ See Mohammed, *Tribute to Reason* *supra*, note 63.

¹¹⁸ 7 MARCUS AURELIUS, *supra* note 23, at 74.

¹¹⁹ *Id.* at 49.

Aristotle in Arabic in Islamic Spain;¹²⁰ the Christian universities of Europe would find Aristotle from the same source.¹²¹

The reason for the priority of scholarship among the excellences of Abrahamist Republican philanthropy should be clear: The Scriptures and the Classics are the foundations of Abrahamist Republican philanthropy, and both of its foundational traditions place the seeking of wisdom at the very apex of their personal virtues. But virtue, in the Classics and the Scriptures, is not, at bottom, a purely, or even primarily, personal matter. Solomon asked for wisdom, and God granted his request, that he might rule more justly,¹²² even as Socrates insisted that justice requires the rule of the wise. So we must turn, now, to the relationship of wisdom, philanthropy's highest virtue, and the law. We have already seen that law must be the foundation of the philanthropic sector in a liberal democracy;¹²³ we now need to see that, in an Abrahamist Republic, that relationship is reciprocal: Even as law is philanthropy's necessary foundation, so philanthropy is law's ideal end.

IV. PHILANTHROPY AND THE LAW: ABRAHAMIST REPUBLICANISM'S IDEAL STATE

The Christian and common law foundations of Anglo-American charity make the relationship of philanthropy and the law especially fraught, in contrast both to the other two Abrahamist religions and to the civil law systems of Continental Europe. From the perspective of Abrahamist Republicanism, the current role of philanthropy in the common law world is hardly the best of all possibilities. From that state of affairs, this imperative thus emerges: The job of our philanthropy must be to make our society more philanthropic.

A. PHILANTHROPY AND THE STATE IN THE WEST: A VERY BRIEF HISTORY

In his account of private alms-giving to the poor, as we have seen, Maimonides repeatedly points to two better alternatives. The second-best was rather like our private foundation or community chest, alms-distributions by a committee of experts. But the ideal was a tax system with generous provision for both the poor and for the system's own scholarly administrators, a system set out in the Torah itself.

In the ideal regime, we must note, poor relief was primarily mandatory, not voluntary. This helps explain what at first seems strikingly odd about Maimonides's account of alms-giving: its placement in his treatise on agriculture, and very near the end of that treatise. To account for that peculiar placement, we must recall that Israel at the time of the Torah's writing was essentially agrarian. Its primary capital was land; its principal products, crops and livestock. Maimonides's account of agriculture, accordingly, laid out the foundation of the Israelite economic system, and then derived its fiscal system. From the fruits of the land, the Torah - and in its interpretation, Maimonides - set out an elaborate system of aristocratic wealth redistribution.

Indeed, in that system we can mark unmistakable elements of four basic modern governmental functions: establishing the minimum legal conditions for a viable economy, regulating that economy to ensure efficient operation, redistributing wealth, and promoting

¹²⁰ KRAEMER, *supra* note 31, at 42-68.

¹²¹ Smith, *supra* note 44, at 305, 334 (1999); FAKHRY, *supra* note 38, at 289.

¹²² 2 *Chronicles* 7-12.

¹²³ See Atkinson, *Philanthropy's Function*, *supra*, Part III.A.

excellence.¹²⁴ As a mnemonic, we can think of these functions of government as the Four Rs: the Ricardian,¹²⁵ the Regulatory, the Redistributive,¹²⁶ and the Aretist.¹²⁷

The Torah placed the maintenance and regulation of the economy, along with the performance of religious ritual, in the hands of a hereditary priesthood, the house of Aaron.¹²⁸ The brother of Moses, the receiver of the law, with assistance from the entire tribe of Levi. All other families received as their heritage agricultural lands; the Levites' patrimony was in forty-eight walled cities,¹²⁹ the centers of cultic observance and civil administration. To them, as pillars of the Law, ritual¹³⁰ and administrative,¹³¹ went the basic revenues, the annual tithe of ten percent of crops and of first-born animals.¹³² And the revenues of their own capital asset, urban land, were tax-exempt.¹³³

¹²⁴ There is nothing sacrosanct about numbering governmental functions at four. Thus, for example, MUSGRAVE & MUSGRAVE, *supra* note 13, at 6–17, identify three basic functions, allocation, distribution, and stabilization. The first two correspond to my regulatory and redistributive functions, respectively. Musgrave and Musgrave also acknowledge my Ricardian and aretist functions, though their analysis assigns them lesser roles. *See id.*, at 6 (“the contractual arrangements and exchanges needed for market operation cannot exist without the protection and enforcement of a governmentally provided legal structure”); *id.*, at 9 (noting that “in some instances, government decides to interfere with consumer preferences” by subsidizing goods considered meritorious and taxing goods considered harmful, and that this practice requires explanation outside their three-function framework). My analysis, in turn, does not deny the existence of their stabilization purpose; it simply leaves that function aside as not warranting treatment in the context of an analysis of philanthropy or assimilates it to the regulatory function. *See also* WEISBROD, *NONPROFIT ECONOMY*, *supra* note 8, at 21–42. He notes that “the shortcomings of the private market can occur in any of three areas – the choice of goods and services produced, production processes, and the distribution of outputs”; these three forms of market failure nicely elicit my four governmental functions, if we see my Ricardian and regulatory functions as addressing two distinct problems with his “production processes.”

¹²⁵ From David Ricardo, the classical economist and prototypical proponent of *laissez-faire*. *See* DAVID RICARDO, *THE PRINCIPLES OF POLITICAL ECONOMY AND TAXATION* (1817, Everyman ed. 1911).

¹²⁶ “Robin Hoodian” was a real temptation here.

¹²⁷ This one is the trickiest. Aretist is exactly the right term, but not, alas, a term in wide use outside philosophical circles. It derives from the classical Greek word for virtue, “arête,” and that is precisely what this function is designed to promote. “Aristotelian,” though much more familiar, is not nearly as precise; Aristotle was certainly an aretist, but many aretists are not Aristotelians.

¹²⁸ *Exodus* 29 (instructions for ordination of Aaron and his sons as priests); *Leviticus* 8 (ordination and investiture of Aaron and his sons).

¹²⁹ *Numbers* 35:1–8.

¹³⁰ *Numbers* 3 and 4 (duties of the Levitical priesthood); *Numbers* 18: 1–7 (recitation of Levite’s priestly function).

¹³¹ *Deuteronomy* 17:8–12 (appellate courts of “one judge and several priests” established in Levitical cities); *Deuteronomy* 19:16–17 (special interlocutory appeals); *Deuteronomy* 17:18–19 (Levitical priests to retain custody of the official book of the law, to be copied out by each king, at the beginning of his reign, under Levitical supervision, and read by him daily); *Deuteronomy* 21:1–9 (establishing special procedures in cases of unsolved murders and recited Levitical priests appointment as judges in all cases involving property and injuries). *See also* *Deuteronomy* 20:2 (Levitical priests’ charge to troops before battle); *Deuteronomy* 10:8–9 (Levites given custody of the ark of the covenant, containing the tables of the law); *Numbers* 27:21 (Joshua instructed to consult Eleazar, Aaron’s son and successor as high priest, for instructions from God before battle); *Leviticus* 13–14:32 (priests’ role in treatment of “leprosy”), *Deuteronomy* 24:8 (recitation of priests’ role in treatment of “leprosy”); *Lev.* 14:33–53 (priest’s role in treatment of household “mildew”); *Leviticus* 27:1–25 (priest’s valuation of ritual gifts of slaves, animals, houses, and agricultural land).

¹³² *Numbers* 18:14–32 (Levites’ entitlement to annual tithe, ten percent of crops and of first-born animals and five silver piece head tax on first-born sons, as compensation, subject to a ten percent surtax for religious sacrifice). *See also* *Numbers* 18:8–20 (Levites’ share of sacred gifts and animal sacrifices); *Deut.* 18:1–8 (reciting Levites’ entitlement to first fruits and select parts of all animal sacrifices); *Lev.* 27:30–33 (reciting annual tithe of ten percent of harvest); (*Deut.* 26:12–13 (same)).

¹³³ *See* *Ezra* 7:24 (Artaxerxes banning of imperial taxes on “the priests, the Levites, the singers, the doorkeepers, the temple servants, or other servants” in the restored temple at Jerusalem).

The other principal levies went to the poor: every third year's tithe, to be shared with and administered by the Levites,¹³⁴ and a specific portion of each year's crops in the field.¹³⁵ These mandates were not merely statutory, subject to revision in routine electoral and legislative politics, nor were they, in their pre-democratic era, merely the decrees of an earthly monarch, even David or his descendants. These levies were, in effect, constitutional, even meta-constitutional. They were part of the Torah itself, reputedly delivered by God Himself through Moses and hence, presumably, not subject to amendment.¹³⁶ Like the Torah, however, they were subject to binding scholarly interpretation. Upon these passages, Maimonides built an elaborate and detailed system of poor relief, specifying even the percentages of field edges and corners to be left for the poor to harvest.¹³⁷

Islamic law makes strikingly analogous provisions for both poor relief and legal administration generally. Developed more than a millennium after the Torah, in a desert region much more reliant on commerce than agriculture, Islamic law's mandatory payments have a much wider base. But they have this in common with Maimonides's law: the basic obligations are legally, not just morally, binding. The payment of zakat, one of the five pillars of Islam, is not, as is often said, the giving of charity; it is, rather, the payment of taxes.¹³⁸ Like Maimonides's Torah-based Code, analogous Islamic legal compilations based on the Qur'an provide for voluntary, philanthropic gifts.¹³⁹ In both Jewish and Islamic law, however, these are supplemental poor relief grounded in the ultimate law itself; they are not the primary source of poor relief. And even the "voluntary" gifts are morally obligatory, not supererogatory.

The contrast with Christianity here is quite striking: Christianity has no analogous body of Scriptural civil law. Jesus himself clearly acknowledged his own obligations to the whole of Jewish law, civil and fiscal as well as strictly ceremonial.¹⁴⁰ But the first generation of his followers believed themselves exempt from all such Jewish laws, at least to the extent that they

¹³⁴ *Deut.* 14:28–29; *Deut.* 26:12–13.

¹³⁵ *Leviticus* 19:9–10 (mandating edges of fields be left unharvested and fallen grain and grapes be left for the poor and foreigners); *Lev.* 23:22 (same); *Deuteronomy* 24:19 (forgotten sheaves to be left for the poor, including widows, orphans, and resident aliens); *Deuteronomy* 24:20–21 (second and subsequent harvests of olives and grapes to be left for the poor). See also *Deut.* 24:22 (reminding Israelites of their own delivery from poverty in Egypt); *Deut.* 14:18 (same); *Deut.* 15:1–11 (commanding interest-free loans and other forms of generosity to the poor, with reference to the poor as relatives); *Lev.* 19:33–34 (forbidding mistreatment of foreigners, with reference to Israel's captivity in Egypt); *Leviticus* 25:35–38 (mandating fair treatment of the poor and foreigners, forbidding selling them food a profit or lending them money at interest, and discouraging their eviction, with reference to Israel's delivery from Egypt into Canaan); *Deut.* 24:14–15 (mandating daily payment of wages to poor, resident aliens as well as Israelites, in view of their exigent needs); *Lev.* 19:13 (mandating daily payment of wages); *Deut.* 14:17 (mandating fair treatment of orphans and foreigners and forbidding taking security interest in widows' clothes, with reference to Israel's slavery in Egypt).

¹³⁶ In principle, perhaps, they were subject to amendment by their author, God. But see THE TALMUD, *supra* note 67 ("What has God to do with the interpretation of Torah?").

¹³⁷ MISHNEH TORAH, *supra* note 2, at 52–61.

¹³⁸ See Matthew S. Gordon, *Islam* 64–65 (Oxford U. P. 2002) ("The third of the central Islamic duties is *zakat* or 'required almsgiving,' which 'is distinct from voluntary alms and traditionally has been calculated as a percentage of income, although levels of wealth, and so the ability to pay, are duly recognized.'").

¹³⁹ See AHMAD IBN NAQIB AL-MISRI, *THE RELIANCE OF THE TRAVELLER: A CLASSIC MANUAL OF ISLAMIC SACRED LAW* 275 (Nuh Ha Mim Keller, ed. and trans., rev. ed. 1994) ("Giving voluntary charity is recommended at all times; especially during Ramadan and at all noble times and places ... (... such as Mecca or Medina)").

¹⁴⁰ *Matthew* 5:17–20 ("Think not that I have come to abolish the law and the prophets; I have come not to abolish them but to fulfill them.... Whoever then relaxes one of the least of these commandments and teaches men so, shall be called least in the Kingdom of Heaven."); *Matthew* 17:24–27 (Jesus's payment of temple tax).

were not themselves within the territorial jurisdiction of Jewish legal authority.¹⁴¹ Their civil law was the law of the Roman Empire. Jesus, like his fellow Jews in Roman-occupied Palestine, accepted Roman law, generally quite begrudgingly. Hence his entirely orthodox answer to the scribes and Pharisees, pointing to the emperor's profile on the coin of the realm: "Render unto Caesar the things that are Caesar's, and to God the things that are God's."¹⁴² So, too, and in more detail, preached the Apostle Paul.¹⁴³

Paul, a Roman citizen as well as a Jew, accepted Roman authority much more comfortably, more than once deploying it to his advantage: He invoked the aid of Roman centurions to deliver him from a politically-plotted ambush;¹⁴⁴ he appealed his imprisonment for violating Jewish religious law from the Roman provincial governor of Palestine to the Emperor in Rome¹⁴⁵; he extracted an apology from local officials at Phillipi for detaining and beating him in violation of his right, as a Roman citizen, not to be punished without a trial.¹⁴⁶ And he clearly saw civil authority as divinely ordained, to restrain humanity's descent into a kind of Hobbesian chaos.¹⁴⁷ But, for him, civil law lacked the more positive role in both functions we have identified as philanthropic: relieving distress and promoting excellence.

The Emperor of Rome, of course, eventually embraced the religion of Paul. But Christianity, at least in the West, never quite got past its alienation from the secular law, an alienation that is itself alien to both Islam and Judaism.¹⁴⁸ What is more, by the time the monarchs of what became the nations of Western Europe had consolidated their kingdoms and become Christian, a very different social and economic order prevailed from that of Paul's time, in both church and state. The church of the apostles was the model for Marx: all goods were held in common; each gave according to ability, and each received according to need.¹⁴⁹ And the law of Rome, though it always recognized the distinct orders of patricians and plebians, also recognized, from its very origins, the more fundamental status of citizen.¹⁵⁰

The medieval church, of course, dropped apostolic communism, not always entirely for the better of the least well off. Jesus's paradoxical "blessed are the poor"¹⁵¹ could and did

¹⁴¹ See *Acts* 10:9–11:18 (Peter's vision removing prohibitions of ritually unclean foods and permitting preaching of the Gospel to gentiles); *Acts* 15:1–35 (apostolic counsel removing from gentile Christian all Jewish religious rituals and requiring only "that you abstain from what has been sacrificed to idols and from blood and from what is strangled and from unchastity").

¹⁴² *Matthew* 22: 17–22 (Jesus's declaration, in response to entrapping questions from the Pharisees: "Render therefore to Caesar the things that are Caesar's, and to God the things that are God's.").

¹⁴³ *Romans* 13:1–7.

¹⁴⁴ *Acts* 23:11–35.

¹⁴⁵ *Acts* 25:11.

¹⁴⁶ *Acts* 16:35–40.

¹⁴⁷ *Romans* 13:3 ("For rulers are not a terror to good conduct, but to bad"); *id.* at 13: 4b ("But if you do wrong, be afraid, for he does not bear the sword in vain; he is the servant of God to execute his wrath on wrongdoers.").

¹⁴⁸ See BERMAN, *supra* note 40, at 161 ("Surprisingly... there seem to have been virtually no direct contemporary Jewish or Islamic influences on the development of Western legal systems in their formative era, that is, in the late eleventh and twelfth centuries.") See also *id.* 161 n. 85 ("One basic reason for this [absence of Jewish influence on the formation of Western law] may have been the absence in Judaism of a separation between spiritual and secular law.... Perhaps for similar reasons, the influence of Islam on Western law was negligible in the eleventh and twelfth centuries.").

¹⁴⁹ *Acts* 4:32–37

¹⁵⁰ PETER STEIN, *ROMAN LAW IN EUROPEAN HISTORY* 3 (1999).

¹⁵¹ *Luke* 6:20 ("Blessed are you poor, for yours is the kingdom of God."); see also *Luke* 6: 21 ("Blessed are you that hunger now, for you shall be satisfied."); *Luke* 6:24 ("But woe to that are rich, for you have received your

produce a perennially popular cult of poverty, even personal degradation.¹⁵² So, too, his dictum “the poor you have always with you,”¹⁵³ though likely meant to excuse a rare and well-meaning extravagance,¹⁵⁴ could be, and sometimes was, generalized into an attitude of social complacency.¹⁵⁵ The western kingdoms, after the collapse of the Empire, reconstituted themselves with the imprimatur of the church, into the familiar three orders of feudalism: those who pray, those who fight, and those who work.¹⁵⁶ In that arrangement, it was possible, perhaps even inevitable, to look upon the poor as social, even ethnic, inferiors, not just as fellow citizens suffering temporary and remediable economic embarrassment. In the three orders of medieval Europe, the poor clearly did not belong to the first two, the nobility or the clergy, and hence they must be part of the residual and amorphous third order, the workers. Work itself, in anything other than those occupations reserved to the higher two orders, was inherently stigmatizing;¹⁵⁷ the poor could thus be seen as doubly denigrated, unsuccessful members of the naturally lowest and least respectable order,¹⁵⁸ or simply not seen at all.¹⁵⁹

In England after the Norman Conquest, the new nobility could regard the poor as racially, as well as socially, inferior folk of conquered Saxon or Celtic stock.¹⁶⁰ They might have been Christian brothers and sisters, and relieving the extremities of their distress might have been a moral or religious obligation. All their hardships, indeed, would be relieved – with interest, as it were – in the final reckoning, when the last would be made first, and the first, last, when the poor

consolation.”). Cf. *Matthew* 5:3 (“Blessed are the poor *in spirit*, for theirs is the kingdom of heaven”); *Matthew* 5:6 (“Blessed are those who hunger and thirst *for righteousness*, for they shall be satisfied.”) (emphasis added).

¹⁵² See WICKHAM, *supra* note 30, at 67 (“Christian ascetic holy men and women” were not “everywhere” after the collapse of classical Rome, “[b]ut they created an idiom of self-mortification which potential saints could systematically seek to copy in the future, with hair shirts, flesh-eating belts, chains and the like,” and “[t]heir less extreme acts could be copied by everybody, such as the pious Roman aristocratic women Paula and Melania, whose choice to walk around fourth-century Rome in rags, unwashed and smelly, was eulogized by Saint Jerome in disturbingly lip-smacking terms.”).

¹⁵³ *Matthew* 26:11.

¹⁵⁴ See OXFORD ANNOTATED BIBLE, note to *Matthew* 26:10 (“The *beautiful thing* [as Jesus refers to a woman’s anointing him with precious oil, over the objections of his disciples in favor of using the value of the oil to benefit the poor] is what is good and fitting under the circumstances of impending death,” i.e., Jesus’s imminent crucifixion.”).

¹⁵⁵ See DAVID OWEN, *ENGLISH PHILANTHROPY: 1660-1960* 4 (“Most middle- and upper-class [Victorian] Englishmen accepted ‘the poor’ as a given and permanent element in the social structure, a large stratum from which only a few would rise in each generation.”).

¹⁵⁶ See GEORGES DUBY, *THE THREE ORDERS: FEUDAL SOCIETY IMAGINED* 1 (1980); see also JACQUES LE GOFF, *MEDIEVAL CIVILIZATION* 255 (1988) (“society was composed of a ‘threefold people’ – priests, warriors, and peasants.”).

¹⁵⁷ DUBY, *supra* note 154, at 59.

¹⁵⁸ See APPLEBAUM, *supra* note 39, at 218 (“The peasant of the early Middle Ages, whether free or not, was held in deep contempt.”); *id.* at 219 (“When he [the peasant] appears later, and attains some social status as the lowest order, he still retains the pejorative traits with originated in the early Middle Ages.”); *id.* at 247 (“Those who worked were at the bottom of the social ladder.”).

¹⁵⁹ See LE GOFF, *MEDIEVAL CIVILIZATION*, *supra* note 154, at 260 (“In fact, in the society of what has been called the first feudal age, up to about the middle of the twelfth century, the mass of manual workers quite simply did not exist.”); *id.* (“It is a fact that this age was unaware of work or workers.”). See also JACQUES LE GOFF, *MEDIEVAL CALLINGS* 16 (1987) (noting marginal status of paupers).

¹⁶⁰ See SIMON SCHAMA, *A HISTORY OF BRITAIN* 109 (2000) (“After the Conquest, however, proximity and familiarity were replaced by alienation and impotence and, in all likelihood, a sense of fearfulness, of having the protection of custom ripped away, of being helpless in the face of the exercise of force.”); NORMAN DAVIES, *THE ISLES: A HISTORY* 279 (1999) (“Pre-Conquest England, with its Anglo-Saxon and Danish connections, was completely submerged.”).

inherit the kingdom of God.¹⁶¹ Meanwhile, in the worldly kingdoms of European Christendom, matters could stand more or less as they were. Rehabilitating the poor to full and equal civil status, the goal of Maimonides's Torah-based philanthropy, need hardly be the Church's goal, and never was.¹⁶² Rather, the reverse was true: "the pauper made it possible for the rich man or saint who gave alms to him to save his own soul."¹⁶³ The Roman Church, to be sure, made a measure of poor relief mandatory,¹⁶⁴ but its program was at best one of minimum sustenance, not Maimonidean rehabilitation, much less Platonic meritocracy.

And the Church itself was always separate from, and often in considerable tension with, the state.¹⁶⁵ The feudal civil law, unlike the explicitly egalitarian law of Jews and Muslims, had more to do with keeping the lower orders in their place than with lifting them up.¹⁶⁶ Every Israelite had the Torah's own promise of an inheritance in the land of Israel, to be returned every fifty-year Jubilee, along with an elaborate system of social support in the meantime.¹⁶⁷ Thus the Torah could unequivocally declare: There will be no poor among you.¹⁶⁸ So, too, the poor in Islamic lands could rely, as a matter of both fundamental faith and civil law, on the mandatory giving of alms. The serfs, even the burghers, of Christendom had no such hope, at least not in the here and now. In countries whose rulers embraced the Reformation, the break with Rome thoroughly disrupted even this modestly-aimed relief; in England, in particular, the Church lands were confiscated by the crown and redistributed to its favorites.¹⁶⁹ The state, for its part, left the poor to rely primarily on the largesse of the wealthy.¹⁷⁰

¹⁶¹ *Luke* 6:20.

¹⁶² See BERMAN, *supra* note 40, at 27 ("Similarly, when Christianity first came to the Germanic peoples of western Europe, it was presented as an otherworldly faith, concerned with the sacred and the saintly and having relatively little to say to the existing military, political, and economic power structure, except to devalue it.").

¹⁶³ APPLEBAUM, *supra* note 39, at 219 (1992).

¹⁶⁴ Matthew Turnour, *Beyond Charity: Outlines of a Jurisprudence for Civil Society* 122 (Dissertation submitted for doctorate of philosophy, Queensland University of Technology, 23 September 2009) [hereafter *Beyond Charity*].

¹⁶⁵ See WICKHAM, *supra* note 30, at 59 ("The problems of the relationship between the church as an institution and secular power has existed ever since [the early middle ages] in Christian politics, and has caused considerable conflicts, as it did already in the fifth century, and would again in the eleventh, in the Reformation, and in the post-Enlightenment states of the nineteenth and twentieth centuries."); STEIN, *supra* note 148, at 41–43 (tracing conflicts between popes and secular monarchs down to 1122 and concluding "[t]here was thus a sense of Europe as a Christian entity, ruled by Pope and emperor, and of the need to maintain its unity, but henceforth it was to be a Europe with two regimes, each with its own set of laws."). See also BERMAN, *supra* note 40, at 536 ("Every kingdom in Europe, including even Norman Sicily, experienced the tension between papal and royal authority.").

¹⁶⁶ See LE GOFF, *MEDIEVAL CIVILIZATION*, *supra* note 154, at 260 ("It is still true that the real inclination of the originators and users of the tripartite schema in the middle ages (to make three classes of which it was composed into 'orders') was to consecrate this social structure, to make it into an objective, eternal reality created and willed by God, and thus to make a social revolution impossible."); APPLEBAUM, *supra* note 39, at 581 (In the "three orders" of the middle ages "...both the Church and the nobility put into place a system of the management of work which made the peasants and the serfs subordinate to the interests of the Church, the manor and the developing state.").

¹⁶⁷ *Deut.* 15:1–18.

¹⁶⁸ *Deut.* 15:4.

¹⁶⁹ *Beyond Charity*, *supra* note 162, at 122.

¹⁷⁰ See DAVID OWEN, *ENGLISH PHILANTHROPY: 1660-1960* (1964) ("Tudor legislation on poverty, notably the Poor Law of 1597/1601, was designed as an ultimate resource, to be invoked only if the situation should exceed the capacities of private philanthropy."); *Beyond Charity*, *supra* note 162, at 122 ("With the sacking of the monasteries and the disenfranchising of the Roman Catholic religion, property relief particularly, but the supply of charitable goods in general, came to be organized voluntarily and principally at a local level, without the institutional support of the law or the Roman Catholic Church.").

In the bourgeois economic and political revolutions of the late eighteenth and nineteenth centuries (after a less-thorough start in England in the seventeenth century), the Third Estate famously proclaimed itself the Nation,¹⁷¹ leveling all three medieval estates down to the status of legally equal citizens with the same rights before the law.¹⁷² But this was the age of negative liberty, limits on what the state could do to citizens, not positive liberty, citizen entitlement to positive state assistance.¹⁷³ And, because the new liberal state was secular, there could be no unembarrassed borrowing of affirmative state obligations from the Abrahamist Scriptures.¹⁷⁴

Even if such borrowing had been permitted, that would only have re-introduced the problem with which our historical survey began. The nations of the West were Christian, and Christianity, alone among the three Abrahamist faiths, lacks a secular legal program, a program of just redistribution, for the state. Thus, in the new liberal states of the West, as Anatole France pointedly put it, “the law, in its majestic equality, forbid the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread.”¹⁷⁵ Indeed, making no alternative arrangements for the needy could be a matter of pride rather than embarrassment. The minimalist Ricardian state, the night watchman state of today’s libertarians, though totally alien to the Torah and the Qur’an, was quite comfortable in the new secular states of Christendom.

This was even more likely to be the case in the English realm, the heartland, of course, of Anglo-American charity. There, the ancient law of the Romans, foundation of all secular law on the Continent, never really took deep root outside the church. The common law thus lacked all but the faintest trace of Roman notions of free and universal citizenship, the citizenship that Apostle Paul enjoyed, first as a Jew, then as a Christian. The common law was built on feudal, not classical, roots¹⁷⁶; its students, quite significantly, trained in their own occupational schools in the precincts of the royal courts, under no obligation, or even expectation, to be schooled in the Greek or Latin Classics, much less the Greek and Hebrew (not to mention Arabic) Scriptures.¹⁷⁷ For a Continental lawyer, trained in the liberal arts in the original universities, not

¹⁷¹ See ABBE SIEYES, *QU’EST-CE QUE C’EST LE TROISIEME ETAT?* (What is the Third Estate?) (1789).

¹⁷² DECLARATION OF THE RIGHTS OF MAN AND THE CITIZEN (1789).

¹⁷³ See Isaiah Berlin, *Two Concepts of Liberty*, in *FOUR ESSAYS ON LIBERTY* (Oxford Univ. Press 1958); see also PHILLIP PETTIT, *REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT* 8–9 (1997) (“...liberalism has been associated over the two hundred years of its development, and in most of its influential varieties, with the negative concept of freedom as the absence of interference...”). See also *Baksey v. Board of Regents*, 347 U.S. 442, 472–73 (1954) (“The Bill of Rights does not say ... what government must give, but rather what it may not take away.”); *Jackson v. City of Joliet*, 715 F.2d 1200, 1203 (7th Cir. 1983) (“[t]he Constitution is a charter of negative rather than positive liberties.”).

¹⁷⁴ See BERMAN, *supra* note 40, at 31 (“[T]he significant factor...-- in the nineteenth century and even more in the twentieth – was the very gradual reduction of traditional religion to the level of a personal, private matter, without public influence on legal development, while other belief systems – new secular religions (ideologies, ‘isms’) – were raised to the level of passionate faiths for which people were collectively willing not only to die but also to live new lives.”); *id.* at 32 (“Liberal democracy was the first great secular religion in Western history – the first ideology which became divorced from traditional Christianity and at the same time took over from traditional Christianity both its sense of the sacred and some of its major values.”).

¹⁷⁵ Anatole France, *The Red Lily* (1894).

¹⁷⁶ STEIN, *supra* note 148, at 63 (noting that, when Henry II consolidated England under a single central government and national law in the second half of the twelfth century, “it was too early to adopt the Romano-canonical procedure, which was still in its infancy.”).

¹⁷⁷ See *id.* at 87 (“After its flirtation with the civil law in the time of Bracton, the English common law had become a highly sophisticated discipline with a well-trained core of lawyers, who had studied at the Inns of Court in London, a legal university in all but name,” although “it had ... become inward-looking and resistant to change.”); *id.* at 124 (By the nineteenth century “the Inns of Court in London had ceased to be active as teaching institutions.”); *id.* (“It

to know the Latin of the law (which was also the Latin of the Church and the Classics) was unthinkable.¹⁷⁸ What could not be an exception on the Continent was the rule in England.

Look where that leaves us. As we turn to sketching the ideal role of philanthropy and the state, we find ourselves in our own American society, on the most alien soil in the entire modern West. And this is, in part, quite true. The absence of a positive role for the state in the distinctly Christian Scriptures, the feudal origins of the common law, and the state-minimalism and value-neutralism of classical liberalism all combine to suggest a much narrower role of the state's redistributionist and artist functions than the Abrahamist Republican ideal.

That is, alas, only half the story; the grass is no greener on the only available alternative site for Abrahamist Republicanism, the social democratic societies of Continental Europe. To be sure, they offer a much more activist state in general, and a much more relief-oriented welfare system in particular. But they do not match the gains they thus offer in *fraternite* with parallel gains in the promotion of excellence. To hazard an even more truncated social history, the problem there is this: the "socialism" of European social democracy is an unenviable and unstable compromise with both feudalism and capitalism.

As every serious commentator since de Tocqueville has seen, Europe, despite its late eighteenth and nineteenth century liberal revolutions, even its twentieth century "communist" revolutions, still labors under a burden of feudal detritus unimaginable in America.¹⁷⁹ Some of its most advanced social democracies have nominal monarchies;¹⁸⁰ notions of hereditary nobility survive even in republican France.¹⁸¹ Indeed, the French Republic celebrates its Bastille Day with ambivalence about the revolution it launched.¹⁸² High culture in France, as in much of the rest of social democratic Europe, tends to be a matter for the remnants of a feudal aristocracy and their *arriviste* bourgeois imitators, a realm quite apart from both traditional "folk art," rooted in peasant life and orthodox religion, and post-industrial "working-class culture," centered on sport, drink, and second-hand American pop-culture.¹⁸³

was not, however, until the nineteenth century that legal education in anything resembling the continental understanding of the term really began in England."); DAVID LEMMINGS, *PROFESSORS OF THE LAW* 113–18 (2000) (noting that English legal education "tended to concentrate on practice, to the exclusion of jurisprudence, and if common lawyers became legal scholars, they did so in spite of their training" and that "the notion of an 'illiberal study' was an enduring and complex stigma which remained to be dispelled" in the eighteenth century).

¹⁷⁸ BERMAN, *supra* note 40, at 127 ("Study of the liberal arts was a prerequisite, from the twelfth century on, to the study of the new 'sciences' of law, theology, and medicine" in the universities.). See also STEIN, *supra* note 148, at 57 (noting that "in every European country a university-trained lawyer was necessarily a Roman lawyer" and that "[s]uch lawyers came to share a common legal culture, based on the same texts, expounded in the same language, Latin.").

¹⁷⁹ See HAROLD PERKIN, *THE RISE OF PROFESSIONAL SOCIETY: ENGLAND SINCE 1880* 3 (1989) ("In late twentieth-century Britain, despite the survival of class rhetoric and class-based political parties, the warp of professionalism is beginning to show through and overlay the weft of class."). *Id.* at 101 ("Liberal England foundered on the rocks of class prejudice.").

¹⁸⁰ Social democracies with extant monarchies include Sweden, Norway, Denmark, and the Netherlands.

¹⁸¹ See ALISTAIR HORNE, *SEVEN AGES OF PARIS* 416 (2002) ("[T]he scions of the pre-revolutionary nobility still tend to be interred (like Charles de Gaulle) in their own parish churchyards....").

¹⁸² See SIMON SCHAMA, *CITIZENS: A CHRONICLE OF THE FRENCH REVOLUTION* (1989).

¹⁸³ See PERKIN, *supra* note 177, at 101 (1989) ("This new or newly intensified working-class culture focused, to quote Charles Booth, not on 'trade unions and friendly societies, co-operative effort, temperance propaganda and politics (including socialism),' but on 'pleasure, amusement, hospitality and sport.'") (citation omitted); APPLEBAUM, *supra* note 39, at 414 ("[B]y the start of the twentieth century, we begin to see the first beginnings of a shift in values, from work to leisure, play, and consumerism."); ALISTAIR HORNE, *LA BELLE FRANCE: A SHORT HISTORY* 433 (2005) (noting that Hollywood has steadily displaced French films and that "Nearly all the most popular, as well as the most innovative, music has been Anglo-American....").

In that sense, state subsidization of *haute* culture is regressive, supporting with the taxes of all citizens the tastes of a begrudgingly acknowledged, mostly self-replicating elite.¹⁸⁴ As the recent riots in the *banlieues* of Paris reminded us, the *grandes écoles* and the *carrières ouverte au talent* that they represent are primarily the province of the children of their technocratic alumni, all but closed, as a practical matter, to the working classes, especially immigrants,¹⁸⁵ and overwhelming male.¹⁸⁶ Xenophobia, if not outright racism, boosted lower-class support for President Sarkozy, himself the son of European immigrants, who had, as Interior Minister, denounced the rioters, mostly of North African and Islamic extraction, as “scum.”¹⁸⁷

European Social democracy’s accommodation with capitalism is not much better. Although all social democracies boast generously public-funded education and health care systems, in all but the most advanced of these countries, differences between the rich and the poor are both noticeable and entrenched.¹⁸⁸ Partly owing to a heritage more trade-unionist than revolutionary, social democracy tends to stress income equality more than social mobility.¹⁸⁹ In Denmark, whose citizens are reportedly the happiest on earth,¹⁹⁰ and where income inequality is lowest in the world,¹⁹¹ the salaries and social status of medical doctors and sanitation workers are not markedly different.¹⁹² This is obviously deeply “un-American;” it is, more to the point, deeply un-meritocratic as well. Even if talent could be drawn to more intellectually demanding occupations without incomes as large as America offers, it would hardly be appropriate, on Abrahamist Republican principles, not to acknowledge, and encourage, higher levels of human achievement.

B. PHILANTHROPY AND THE ABRAHAMIST REPUBLIC

If we are to sketch the Abrahamist Republic’s ideal state, we must imagine it somewhere between European social democracy and American consumerist capitalism. We must not call

¹⁸⁴ HORNE, LA BELLE FRANCE, *supra* note 181, at 434–37 (2005) (recounting efforts of Socialist President Mitterand’s Minister of Culture to “arrest the decline in French culture” with programs of limited popular appeal and little apparent success).

¹⁸⁵ ELISE S. LANGAN, ASSIMILATION AND AFFIRMATIVE ACTION IN FRENCH EDUCATION SYSTEMS 40 *European Education* 49–64 (Volume 40, Number 3 / Fall 2008).

¹⁸⁶ HORNE, LA BELLE FRANCE, *supra* note 181, at 431 (“Only 10 per cent of those admitted to the scientific *grandes écoles* were women....”).

¹⁸⁷ See Craig S. Smith, *In French Bid, Immigrant’s Son Battles Anti-Immigrant Image*, N. Y. TIMES, May 5, 2007.

¹⁸⁸ See APPLEBAUM, *supra* note 39, at 541 (widening gap between “top” and “bottom” in virtually all contemporary industrialized societies).

¹⁸⁹ See PERKIN, *supra* note 177, at 463 (noting “an almost inevitable compromise with the short-term realities of working-class life, in which the need to get the best possible pay and conditions *now* had to take precedence over the ultimate goal of a socialist society and the abolition of capitalism.”); *id.* at 467 (noting “some truth in the critics’ allegation that many trade union leaders and Labor politicians had become incorporated into the corporate system,” since “[t]hat had indeed become their function.”). See also APPLEBAUM, *supra* note 39, at 420 (“The [nineteenth century] American working class was not as developed politically as were the English, the French, and German working classes, nor did the American working class organize and sustain their own independent political parties.”); *id.* at 418 (“The American working class was looked upon as different from that of Europe, and there were some who considered America to be a special case.”).

¹⁹⁰ Matt Mabe, *There’s Something About Denmark*, BUSINESSWEEK, August 20, 2008 (reporting results of two surveys, using different methodologies).

¹⁹¹ C.I.A. World Factbook, *Distribution of Family Income*, <https://www.cia.gov/library/publications/the-world-factbook/fields/2172.html>.

¹⁹² See Jandhyala B. G. Tilak, *Rates of Return to Education and Income Distribution*, 137 DE ECONOMIST 454 (1989).

down a plague on both their houses; we must combine the best of both worlds. On the one hand, we need to accept a strong European-style state, ready to regulate the excesses of capitalism and redistribute an appropriate amount of the wealth it produces for the common good. And we need to encourage an elite culture oriented to the standards of the classical past, though ready, even as ready as Nietzsche, to transcend that past, on its own terms, by its own metric.¹⁹³ On the other hand, we need to foster America's vibrant, innovative entrepreneurial spirit, and America's deeply egalitarian culture, with its commitment to social mobility (admittedly honored, of late, more in the breach than in the observance) and its distaste for state-sponsored religion. We need – with yet another bow to Aristotle – a mean between Atlantic culture's East and West.

The Abrahamist Republic, like all modern western states, would happily acknowledge its mutual dependence on a capitalist market economy. It would aggressively undertake the state's Ricardian function, maintaining the legal infrastructure of the market; in particular, it would police, with far more vigor than contemporary governments in either Europe or America, the kind of financial brinksmanship that produced the current recession by systemically unsustainable shifting of private risks onto the public. It would regulate with an eye toward optimal efficiency, seeking to spend on regulation up to exactly the point of diminishing returns. The Abrahamist Republic, then, would be guided in its Ricardian and regulatory functions by the metrics those functions imply: productive and economic efficiency.

For that ambitious regulatory role, the Abrahamist Republic would depend on a highly educated, highly paid, and highly respected civil service. At all levels of government, the higher levels of the civil service would have to pass the most rigorous of civil service examinations. These examinations would test for two basic kinds of knowledge: mastery of modern social science and appreciation of the West's history and traditional values, moral, political, and aesthetic. They would have to know, most fundamentally, the Scriptures of the three Abrahamist faiths and the Classics of Greece and Rome; the test of their mastery would be the Definitive Academic Legitimacy Exam, or DALE.¹⁹⁴

This could be modeled, quite comfortably, on the traditional Foreign Service Exam in the United States or the standard civil service exams of Europe, though both could probably be improved, for our purposes, by a shift of emphasis toward the social sciences and away from the *belle lettres*.

Mamas in the Abrahamist Republic would not let their babies listen to country music, much less grow up to be cowboys. With generous state assistance, they would see that the more gifted among them become civil servants and judges, leaving the less talented to the private practice of law and medicine. But the best, on the model of Solomon, the wisest of kings, and Marcus Aurelius, the emperor who read Aristotle and Plato in his campaign tent, would become Guardians of the Republic. And the best of the best, on the model of our model, Maimonides, would become scholars and teachers of the law.

Unlike Solomon and Marcus Aurelius, the Guardians of the Abrahamist Republic would, of course, be elected. The Republic could not likely roll back the universal adult franchise; most importantly, it would not need to. By making education in the Scriptures and the Classics universally available, it would produce wiser citizens. These wiser citizens would elect wiser

¹⁹³ See FRIEDRICH NIETZSCHE, *THE USE AND ABUSE OF HISTORY* 41 (Adrian Collins trans., Liberal Arts Press, 2d ed. 1957) (1894) ("Feast your souls on Plutarch, and dare to believe in yourselves when you believe in his heroes.").

¹⁹⁵ See Letter from Thomas Jefferson to Joseph Cabell, Sept. 9, 1817, in 17 Writings of Thomas Jefferson 417, 423-424 (Mem. ed. 1904) (proposing that state citizenship be conditioned on the ability to "read readily in some tongue, native or acquired.") (quoted in *Wisconsin v. Yoder*, 406 U.S. at 226 n.14).

leaders; it is not impossible to imagine that the President of the Abrahamist Republic might, someday, be a professor from an elite law school. Thus our Republic would not really need to impose the pre-requisite for voting that Jefferson recommended for his literacy in the common tongue.¹⁹⁵ Free public education through the university level, on the Jeffersonian model that had his beloved University of Virginia at the apex,¹⁹⁶ should be enough.

And the leaders elected by these classically educated citizens would likely make the passing of the DALE a requirement for posts beyond the higher civil service. It could easily be extended to the office corps of all branches of the military through the service academies. And, as part of long-promised, late-delivery reform of the financial system, every officer of every publicly-traded company could be required to pass the DALE, along with a majority of all members of their boards of directors.

Although the Republic, as we have seen, would take aggressive steps to ensure the economy's efficient operation, it would impose only an absolute minimum of artist restrictions on production, and these few could be expected to disappear over time. Consumers, then as now, would buy essentially whatever they wanted. But, having been educated in the Scriptures and the Classics, they would want, and buy, better things. As better-educated voters give their metaphorical ballot-dollars to better leaders, so, as better-educated consumers, they will give their literal dollars to the producers of better products. "Willingness to pay" will remain a pillar of the economic order in the Republic; what will change is what consumers are willing to pay for.

The market's other pillar, the "ability to pay" requirement, would also remain fully in place. The Republic would ensure that the basic needs of the least well off were adequately met, mostly in kind rather than in cash. As this latter condition suggests, the Republic would be more Dutch Uncle than Sugar Daddy; those who cannot find employment in the private sector will indeed work for food, not beer and cigarette money. Mindful of the Torah's warnings,¹⁹⁷ the Republic will not begrudge the poor, but neither will it be so generous as to create the underclass of idlers endemic to the more "advanced" European social democracies.¹⁹⁸ Instead of the dole, the Republic will have lots of shovel-ready, CCC-style projects¹⁹⁹. For all the able-bodied, it will follow the basic mandate of both Jamestown's Cavaliers and Plymouth's Pilgrims (not to mention Lenin's Bolsheviks): he that will not work, neither shall he eat (although perhaps stated in a bit more neighborly terms). For care-givers with small children, it will offer kindergartens of the finest imaginable caliber, the envy of the most kibitzing Kibbutznik.

The fiscal effect of all these programs, particularly universal education and public works employment, will be a very big budget. As the Republic spends, so also shall it tax. In all likelihood, the Republic's initial tax levies will be near the redistributive ceiling,²⁰⁰ the point at which any further increase leads to an offsetting loss of production. But two factors will work in favor of the Republic's finances in the long run, probably even in the short. On the one hand, as more children are raised on the Torah and the Qur'an in the Republic's schools, more citizens

¹⁹⁶ DUMAS MALONE, *JEFFERSON AND HIS TIME: THE SAGE OF MONTICELLO* 243 (1981) ("[T]he goal he hoped ultimately to reach was the establishment of a state-wide system of public education that would provide instruction at all levels.").

¹⁹⁷ *Deut.* 15:7 ("you shall not harden your heart or shut your hand against your poor brother.").

¹⁹⁸ See DAVID S. LANDES, *THE WEALTH AND POVERTY OF NATIONS: WHY SOME ARE SO RICH AND SOME SO POOR* (1998).

¹⁹⁹ Neil M. Maher, *A New Deal Body Politic: Landscape, Labor, and the Civilian Conservation Corps*, *Environmental History* (2002).

²⁰⁰ See Atkinson, *Philanthropy's Function*, *supra*, at Part II.B.2.

will appreciate that taxes are not just necessary, but good. As they realize this, they will feel less resentful over paying taxes, and that diminished resentment will reduce the “demoralization costs” of taxation, thus raising the redistributive ceiling itself. On the other hand, as the Republic’s rehabilitative relief program modeled on Maimonides, gets more and more needy citizens “back on their feet,” back into productive work succeeds, and as its educational program makes them more productive workers, tax revenues should rise, even as rehabilitative expenses fall. In this virtuous cycle – actually, a virtuous double spiral – the Republic will experience increasing budget surpluses.

These surpluses, in their turn, will most likely be allocated for foreign aid. Once a nation that is receiving foreign aid reaches an appropriate level of development, measured by the proportion of its citizens who have passed the DALE, it will be invited to join the Republic. Up until that point, any of its citizens who pass the DALE will be offered citizenship in the Republic, entitled, as a consequence, to hold any office (including, with a bow to the former Governor of California, the Presidency). The model, of course, would be the extension of classical Roman citizenship, in the Empire as well as in the Republic; even so weak an emperor as Claudius pointed to that system, which opened even the Senate to the foreign-born, as the pillar of the Roman regime.²⁰¹

In the fullness of proverbial time, the entire world will become one literally cosmopolitan Abrahamist Republic, “indivisible, with liberty and justice for all.” North Korea will likely be the last to come aboard; in the meantime, the Republic will continue to feed its starving people, even as it negotiates peace with the third and fourth generation of its “Great Leaders.” Instead of full integration, nations with predominantly Muslim populations may elect affiliate status as “Islamic Republics”; the modifier will, by then, neither distinguish nor offend. Israel may remain a Jewish state, if the Jewish people so choose, with Jerusalem as its capital, with the absolute guarantee of the Abrahamist Republic and all its allied Islamic Republics. But the places in Israel that are holy to any of the three Abrahamist faiths will most likely have to be put under Republican administration; that will be the status of the sacred precincts of Mecca and Medina, the Parthenon at Athens, the Pantheon at Rome, and all other sites voted to be of World-Historical Significance by a super-majority of DALE Registrants (DRs), Those Who Have Passed (through) the DALE. Vatican City may well remain outside the Republic as a Non-Allied but Autonomous Neighborhood of Rome. And Rome itself will become at last, as it was in the beginning, the Republic’s capital, the place to which all roads will lead once again.

The Abrahamist Republic will be radically different from the society that the last decades have brought us Americans sadly to accept; radically different, too, from our European allies’ uninspired social democracy; and radically different from the warring world-visions of the fundamentalists of all three Abrahamist faiths. It will incorporate all the values that our best sages, religious and secular, have always taught us to desire most deeply. In building that society, our philanthropy need abandon neither our liberal democracy nor our capitalist market;

²⁰¹ Tacitus, *The Annals*, in *THE COMPLETE WORKS OF TACITUS* 1, 241 (Alfred John Church and William Jackson Brodribb, trans., Moses Hadas, ed., 1942) (“My ancestors, the most ancient of whom was made at once a citizen and a noble of Rome, encourage me to govern by the same policy of transferring to this city all conspicuous talent, wherever found.”). See also STEIN, *supra* note 148, at 15 (Noting that “[i]ndeed in the early empire, it was the members of the provincial aristocracies, particularly in the West, such as Spain, who were the most prominent upholders of traditional values” and that “[t]he functioning of the imperial government came to depend on such men”).

instead, well within their framework, our philanthropy's virtues can furnish the Abrahamist Republic of our forebears and our children.

You may have noticed that this vision of the Abrahamist Republic seems to have omitted two critical things: Art and private philanthropy. Let's consider first; it is the easier of the two apparent omissions to explain. Anyone who knows that part of the Hebrew Scriptures traditionally called "the Writings" will know that poetry will have its place in the "core curriculum" of all schools, at all levels, in the Republic. And, unlike Maimonides,²⁰² the schools of the Republic will not feel the need to teach that the Song of Songs, Which is Solomon's, is to be read metaphorically, as a figure of the love of God for Israel (or, even less plausibly, of Christ for the Church).²⁰³ The Song of Songs will be read for what it seems clearly to be: a highly erotic, even graphic, depiction of human love.²⁰⁴ So, too, the poems of Sappho, sadly fragmented though they are.²⁰⁵

Book X of Plato's *Republic*, with its supposed banishing of the poets, will not stand in our way here. Our scholars will have noticed that the ban was, at worst, only conditional. Plato has Socrates ask only that the case for poetry be made philosophically;²⁰⁶ his own student Aristotle made the case in *The Poetics*.²⁰⁷ And Plato, of course, knew the poets himself; the influence that gave him most anxiety was none other than Homer; the *Republic* itself is, perhaps, the Poem to End All Poems – or the First True Poem. Ignoring Plato's strictures about the dangers of drama, Marcus Aurelius reflected on the relative merits of drama, old and new, comic as well as tragic, as he encamped along the farthest marches of the Roman realm.²⁰⁸ So, too, we can safely assume, will both the Republic's President and its Joint Chiefs of Staff.

David, of course, was not merely a writer of psalms; he also sang to his own accompaniment on the lyre²⁰⁹ and, as king, led the entire nation in celebratory music.²¹⁰ In his last days, Socrates himself took to "practicing music," as his muse had always directed. He

²⁰² See KRAEMER, *supra* note 31, at 330 ("The Biblical Song of Songs, an originally earthy love poem, was understood by Maimonides in a traditional mode as an erotic dialogue between God and the human soul.").

²⁰³ See BERNHARD W. ANDERSON, UNDERSTANDING THE OLD TESTAMENT 535 (3d ed. 1975) (discounting "this rather strained interpretation"); OXFORD ANNOTATED BIBLE, *Introductory note*, THE SONG OF SOLOMON 815, 815 (1973) ("In Christian tradition it has been interpreted as an allegory of the love of Christ for his bride, the church... or as symbolizing the intimate experience of divine love in the individual soul.").

²⁰⁴ See MARIA ROSA MENOCAL, CULTURE IN THE TIME OF TOLERANCE: AL-ANDALUS AS A MODEL FOR OUR OWN TIME (2000) ("It was because devout Jews had learned to love the same heterodox love poetry in Arabic that pious Muslims loved to recite that it became possible to read a Biblical text like the *Song of Songs* with its full compliment of erotic charges, and even to decide that what had once made Hebrew great was precisely that ability to write poetry that not only lay outside the synagogue, but that might well contradict the teachings of the synagogue."). See also KRAEMER, *supra* note 31, at 52 (noting how the Song of Solomon both inspired and legitimated erotic love poetry of Jewish scholars in twelfth century Islamic Spain).

²⁰⁵ See HORNE, *supra* note 180, at 293 ("In the 1890s, the discovery of the poems of Sappho...demonstrated ... that lesbianism had been respectable in classical times.").

²⁰⁶ PLATO, *REPUBLIC*, *supra* note 15, at 296 (After arguing for the expulsion of the poets as a corrupting influence, Socrates adds, "Nevertheless, let us say that if the pleasure-producing poetry and imitation has any arguments to show that she is in her right place in a well-governed city, we shall be glad to receive her back.").

²⁰⁷ Aristotle, *Poetics*, in THE RHETORIC AND POETICS OF ARISTOTLE 218, 230 (Ingram Bywater trans., Modern Library ed., 1954) (arguing that tragedy properly produces a cathartic release of emotions); *id.* at 235 (arguing that narrative fiction is more philosophical than history because it deals in universals, not particulars).

²⁰⁸ 7 MARCUS AURELIUS, *supra* note 23, at 73–74.

²⁰⁹ 1 Samuel 16:18–23.

²¹⁰ See 2 Samuel 6:5 ("And David and all the house of Israel were making merry before the Lord with all their might, with songs and lyres and harps and tambourines and castanets cymbals.").

admitted to having long thought of music as only a metaphor for philosophy; at the end, he says he came to take it literally.²¹¹ And so, for the schools of their republics, Plato and Aristotle emphatically included music in the “core curriculum.”²¹² So, too, did they prescribe “gymnastic”²¹³; the ideal of the sound mind in the sound body was no innovation to them.

Nor will the Republic forget the visual and plastic arts. Solomon himself commissioned the greatest builder of his day, Hiram, King of Tyre, to make the First Temple of the most perfect proportions, to frame it and panel it with the cedars of his native Lebanon, to cover its walls with gold and finest gem.²¹⁴ So, too, shall the cultural ministers of the Republic, and their prefects in all its provinces, see to the construction of our public works. Our architects will know, not just Vitruvius and Palladius, but also I.M. Pei and Le Corbusier (and, yes, even Gropius and Gaudi). By the time they study Albert Speer, they will know, too, to tremble, and to weep.

In the Abrahamist Republic the only philistinism will be that of Hiram, King of Philistine Tyre, architect for Solomon himself. No art ever known to the sages of the West, and no art ever knowable by those trained in their wisdom, will be under-funded, much less forgotten, in the Abrahamist Republic. But, if you have read that commitment carefully, you will have noticed the condition: Plato will have his due; art will have to prove itself to scholars. It may well be that art is for its own sake alone; it may even be that its sake is higher than philosophy itself. But philosophers will be the judges (and well-paid judges, make no mistake).

That brings us to what may be the most astonishing aspect of Maimonides’s account of philanthropy. Even as he said scholars should eschew public funding to support themselves, if need be, by the meanest of labors, he made a most subtle but significant point, a point implied rather than asserted: the source of this rule of scholarly self-restraint, he said with absolutely no fanfare, was the sages themselves.²¹⁵ At the very outset of his great work, he had announced a signal departure from traditional scholarly commentary: although he would take scholarly authority as definitive on the Torah, he would not identify individual scholars by name.²¹⁶ Of this there is no mistake: He meant for the Mishneh Torah to be read along with the Torah itself, without recourse to other commentary. Of course, he himself studied and taught all the other authorities.²¹⁷ But that was the work of scholars. For everyone else, Maimonides and the Torah were enough.²¹⁸

²¹¹ PLATO, PHAEDO 113 (Benjamin Jowett, trans., Modern Library ed., 1928).

²¹² PLATO, REPUBLIC, *supra* note 15, at 105 (“And therefore, I said, Glaucon, musical training is a more potent instrument than any other, because rhythm and harmony find their way into the inward places of the soul, on which they mightily fasten, imparting grace, and making the soul of him who is rightly educated graceful... and also because he has received this true education of the inner being will most shrewdly perceive omissions or faults in art and nature....”); ARISTOTLE, POLITICS, *supra* note 15, at 324 (“Thus much we are now in a position to say, that the ancients witness to us; for their opinion can be gathered from the fact that music is one of the received and traditional branches of education.”) (Benjamin Jowett, trans., Modern Library ed., 1943); *id.* at 334–5 (“But we maintain further that music should be studied, not for the sake of one, but of many benefits...”).

²¹³ PLATO, REPUBLIC, *supra* note 15, at 109 (“The really excellent gymnastic is twin sister of that simple music which we were just now describing.”); ARISTOTLE, POLITICS, *supra* note 15, at 326 (“It is an admitted principle, that gymnastic exercises should be employed in education....”).

²¹⁴ 1 Kings 5 and 6; 2 Chronicles 2, 3, and 4.

²¹⁵ MISHNEH TORAH, *supra* note 2, at 92–93.

²¹⁶ KRAEMER, *supra* note 31, at 319.

²¹⁷ *Id.* at 325 (“Maimonides told Phineas that he continued to teach the Talmud and the *Precepts* of Alfasi and did not restrict his own teaching to his own *Mishneh Torah*.”).

²¹⁸ Isaac Klein, *Introduction* to MISHNEH TORAH i-ii; KRAEMER, *supra* note 27, at 323–24.

This is breathtakingly audacious.²¹⁹ By comparison, John Marshall's invention of judicial review in *Marbury v. Madison* pales into modesty. Marshall's great case may well have been moot, but it least it was a case, a controversy brought into a court of proper jurisdiction by a real plaintiff against a real defendant alleging violation of a specific law. No one asked Maimonides to write the *Mishneh Torah*, and no one told him, in commenting on the Torah, that he would be, in effect, regulating virtually every aspect of Jewish life for all time.²²⁰ But that is what he did; that is not the least reason we must become students of Maimonides, make his the place of most pride in the Abrahamist Republic's Pantheon.

Scholars of Maimonides have long debated why he, alone among the other codifiers of Jewish law, gave detailed attention to Toranic laws that could have had no application in his own day.²²¹ The land law, in particular, which was the foundation of his elaborate system of poor relief and administrative finance, had long fallen into desuetude, if it indeed it had ever been fully operative at all. And Maimonides, writing in Cairo to a Jewish readership themselves mostly in the Diaspora, was quite clear that all these provisions applied only in the Land of Israel proper.²²² Perhaps, some have said, he simply did this for the sake of scholarly comprehensiveness; perhaps, others have said, he hoped for a restoration of Israel in Israel itself.²²³

But this much is clear: his rules of alms-giving were to be operative law for all Jewish communities everywhere. He was careful to note that every Jewish community had an alms-fund;²²⁴ he went to great pains to mandate the appointment of alms-collectors and to provide precise rules for the assessing, collecting, and distributing of alms.²²⁵ We might well imagine that, in his day, as in ours, alms-collecting was no easy task. Quite likely, donors tended to see the giving of alms as optional or supererogatory. Maimonides made sure they knew they were wrong about that; he carefully distinguished alms from "free-will offerings," and made separate provision for their collection. But, before any of that, there was this:

He who refuses to give alms, or gives less than is proper for him, must be compelled by the court to comply, and must be flogged for disobedience until he gives as much as the court estimates he should give. The court may even seize his property in his presence and take from him what is proper for him to give.²²⁶

We cannot really know whether that was the law before Maimonides wrote; we only know that it the law thereafter.

Man, the old Sophist Protagoras said, *is the measure of all things*.²²⁷ For Socrates, that measure is clearly not just anyone, but only the wise; and so justice can only come when

²¹⁹ KRAEMER, *supra* note 31, at 324 ("The *Mishneh Torah* effectively replaced the Talmud, Maimonides boldly substituting his own authority for that of the talmudic sages."); *id.* (noting that Maimonides was "so audacious" in "introducing philosophy and omitting rabbinical sources and names of sages" as to arouse extensive criticism).

²²⁰ *Id.* at 317 ("The *Mishneh Torah* established Maimonides' reputation worldwide and for all time as the authority par excellence on Jewish law, the backbone of Judaism.").

²²¹ Klien, *supra* note 209, at xxiii; KRAEMER, *supra* note 31, at 323.

²²² MISHNEH TORAH, *supra* note 2, at 74, 99–100.

²²³ Klien, *supra* note 218, at xxiii; KRAEMER, *supra* note 31, at 323.

²²⁴ 7 MARCUS AURELIUS, *supra* note 23, at 85.

²²⁵ MISHNEH TORAH, *supra* note 2, at 84–89.

²²⁶ *Id.* at 79.

²²⁷ See PLATO, THEAETETUS 494 (Benjamin Jowett trans., Modern Library ed., 1928) ("Man, he says, is the measure of all things, of the existence of things that are, and of the non-existence of things that are not...."). The actual work in which this statement appears is lost. P. H. Epps, *Protagoras's Famous Statement*, 59 THE CLASSICAL JOURNAL 223 (Feb. 1964).

philosophers, lovers of wisdom, are kings. Maimonides doubtlessly knew the *Republic*, but he did not wait for the fulfillment of its pre-condition. He simply became the ultimate arbiter of law on the authority of his own interpretation of the ultimate authorities, the scholars of the law, the only court to whom his rulings can be appealed. That is the principle of Rabbi Yehoshua in the Talmud;²²⁸ that is the foundation of the Abrahamist Republic. To lay and build upon that foundation is to practice a very high art indeed.

But art is only one of the two important things our account of the Abrahamist Republic seemed to omit and, as I have said, it is the easier omission to account for. The other is private philanthropy, which brings us to what may be the most difficult, even painful, prospect for us to consider: In the Abrahamist Republic, functioning at its very best, at its most virtuous, private philanthropy as we know it today may very well have virtually no role at all. The state, as we have seen, will be massively engaged in redistribution that is literally philanthropic: grounded in the deepest love of humanity, directed toward lifting the whole of humanity as high as humanly possible. Philanthropy, then, will not have disappeared; it will, at long last, be seen for what it was: in Maimonides's word, a seed. We will have seen that seed take root, flourish, and bear its proper fruit: the Abrahamist Republic. Its scholars will study what Maimonides wrote: not philanthropy *and* the law, but philanthropy *as* the law.

C. FROM THE IDEAL TO THE REAL: WHAT IS TO BE DONE?

Part III identified the twin goals of Abrahamist Republican philanthropy, enabling and encouraging human excellence, then grounded those goals in the general cultural tradition and our particular understanding of philanthropy. Finally, following Maimonides, it gave a metric for Abrahamist Republican philanthropy, a means of balancing its twin goals. This part has sketched an Abrahamist Republic, an ideal ordering of our political, economic, and cultural sectors. But, of course, we are not in that world.

We must now, accordingly, address an obvious question: How do we get there from here? That is the task of the remainder of this part. It first poses the central paradox, the problem of the second best: The kind of actions that would be best in an ideal world may well move us, under present conditions, away from that world.²²⁹ It then indicates, in very general terms, a way out of the paradox. Finally, it suggests, if we are to get all this right, we must go back to the sources of our philanthropy, the Classics and the Scriptures.

1. THE PROBLEM OF THE SECOND BEST

Our current practice of private philanthropy, for all its problems, is vital to the continuation of its two main functions: caring for the very neediest in our society and encouraging our very best. In the Abrahamist Republic, as we have seen, these functions would not disappear; they would be assumed, by and large, by the Republic itself. In particular, an equitable system of taxation would replace our current system of financing philanthropy, a system in which the people who donate privately are, perversely, double-taxed, forced, in effect, to pay, not only their fair share of philanthropy's cost, but also that of social slackers.²³⁰ In this light, private philanthropy's providing for the poor and promoting excellence displaces the state

²²⁸ THE TALMUD, *supra* note 67.

²²⁹ See Richard G. Lipsey & Kelvin Lancaster, *The General Theory of the Second Best*, 24 REV. OF ECO. STUD. 11 (October 1956) (showing that, if one condition of Pareto optimality, the "first best," is absent, then achieving the second best requires departing from other first-best conditions).

²³⁰ See Atkinson, *Philanthropy and the Federal Income Tax*, *supra*, Part II.B.2, Implicit Bias Toward Financing with Private Contributions Instead of Taxes.

in those very functions, functions that, on Abrahamist Republican principles, are the state's primary responsibility.²³¹

That poses a paradox, a dilemma of the second best: If the philanthropic give more, they move us away from, rather than toward, the ideal of a larger philanthropic role for the state. But if the philanthropic give less, the short-term short-fall will come at the cost of those least able to bear it, those who are poorest, who need our help most, and those who are doing what we value highest, whose work our whole society needs most. For philanthropists to cut back on their giving in the hope of forcing the state to pick up its proper share of these functions would be to play a kind of "chicken" with social slackers, where the least philanthropic hold our society's neediest and most deserving as hostages. It is an unseemly and unacceptably dangerous game. Philanthropists can hardly expect social slackers to be much moved by the prospect that those whom they are refusing help will be harmed. Like the rulers of rogue states faced with international economic sanctions, social slackers are not likely to give in before the burden of the sanction on their poorest fellows becomes unacceptable to the sanctioners themselves. In philanthropists' game of "chicken" with social slackers, the latter are not likely to be the first to flinch.

2. *THE BEST AS ALLY, NOT ENEMY, OF THE GOOD*

To get out of this dilemma, we must go back to first principles; we must, in particular, take a second look Maimonides's lowest order of philanthropy. His very lowest giver, remember, is the grudging giver.²³² To move closer to a more just placement of the burdens of philanthropy, toward more taxing of all those who are able to pay and less "dunning" of the most generous among them, we may all need to become more grudging givers.

This is not to say that we give less; as we have just seen, we cannot afford to give less, lest we harm philanthropy and its objects. It is, rather, to say that, as we give, we explain why our giving is not the best way, but the second-best. This, in effect, lets us have it both ways: We continue, as donors, to do our share, the double-share that is both ours and that of social slackers. But, even as we continue thus to give, we open a dialogue, every time we give, about a better world, a world that is more nearly an Abrahamist Republic. This is no abstraction: Next time children trick or treat at your house, give them some money for UNICEF, give them some (wholesome?) candy for themselves, thank them for their work – and put in a few good words for the Abrahamist Republic: Wouldn't it be nice if people had to pay without your having to ask them?²³³

In opening that dialogue, we will produce a paradox that Maimonides would approve of, if not delight in. The grudging giver, his worst, will have become the educating giver, which is surely the best of his best, the giver who rehabilitates. If the dialogue we open about the proper mode of philanthropy moves us toward the Abrahamist Republic, where philanthropy is the law, and rehabilitation is one of the law's two main aims, then we will have helped rehabilitate, not merely the immediate objects of our giving, but our whole society as well. Surely the old scholar would be intrigued, if not delighted.

²³¹ See WEISBROD, *NONPROFIT ECONOMY*, *supra* note 8, at 31 (noting that "the effect of a donation...on the level of tax-financed governmental expenditure is not yet known" and that "increased private donations may decrease what government would otherwise have done").

²³² MISHNEH TORAH, *supra* note 2, at 92.

²³³ This second-best problem has political as well as ethical implications. See Atkinson, *Philanthropy and the Federal Income Tax*, *supra* note 14 (recommending that withdrawal of tax subsidizes of private philanthropy be coordinated with state's taking over both financing and provision of appropriate public benefits).

3. *THE WISDOM OF CONSULTING THE WISE*

What would surely delight Maimonides would be this: the very fact that we have wondered what he would think of our philanthropy, our effort to make it both more Abrahamist and more Republican. If we are going to succeed in our meta-philanthropic project – measuring the virtues of philanthropy itself and then applying that measure to the whole of our world – we must consult our sages, even as Maimonides did in writing his great codification of the Law and living his philanthropic life. If our philanthropy is to measure up to his standards, we must test those standards themselves, as he did, by the Scriptures and by the Classics, in constant conversation with their sages.

If I am to keep faith with Maimonides, then, I cannot simply ask you to adopt what I think is his view of philanthropy, the way I myself believe most consistent with Abrahamist faith and Republican philosophy. I must, instead, ask you to talk with me about it. I have, I hope you will believe, done my very best to get it right. But we both know I may have failed. Either way, I must affirm the teaching of Socrates, who was even Maimonides's master: Being corrected about the things that really matter is not the worst thing, but the best.²³⁴

V. CONCLUSION: PHILANTHROPY AS DOING JUSTICE, JUSTICE AS ENABLING EXCELLENCE

We end where we began; we have found a way forward for philanthropy by looking back through the lenses of contemporary scholarship, to the West's two deepest cultural traditions, the faith of Abraham and the philosophy of Socrates. We have been reminded, I hope, that we must do what philanthropy, resting on its dual foundation of philosophy and faith, has always taught us to do: help the least well off, encourage the highest forms of human excellence.²³⁵

But we have not gone in a circle, nor have we wasted our time. We have, I hope, come to see more clearly where we really are, and what we really value, how to count our time as well as our money wisely spent. We can better appreciate, I hope, a point T.S. Eliot nicely captured:

We shall not cease from exploration
And the end of all our exploring
Will be to arrive at where we started
And know the place for the first time.²³⁶

But, in the same place, he also said this:

These men, and those who opposed them,
And those whom they opposed
Accept the constitution of silence
And are folded in a single party.²³⁷

²³⁴ PLATO, GORGIAS, *supra* note 48.

²³⁵ Cf. APPLEBAUM, *supra* note 39, at 589 (arguing that the history of work in the West has brought us "full circle from Aristotle's concept of the good life as the leisured life," narrowly limited to an elite, to modern theories that make that life "available to the mass of the citizenry," which can be a realistic goal only if we develop "a new set of values in modern, industrial societies").

²³⁶ T. S. Eliot, *Little Gidding*, in THE COMPLETE POEMS AND PLAYS 1909-1950, at 138, 145 (1971) [hereafter *Little Gidding*].

²³⁷ *Id.* at 143.

Here, we can see, Eliot was woefully wrong. Here he conflates, quite explicitly, Charles I Stuart²³⁸ and John Milton,²³⁹ the one in the pay and party of France's Louis XIV,²⁴⁰ the other the Latin Secretary of the English Parliamentary Republic and defender of Europe's first revolutionary regicide,²⁴¹ with copious reference to both the classics²⁴² and the scriptures.²⁴³ To be sure, they and their parties, Royalist and Parliamentary, were "united in the strife that divided them"; they were, to varying degrees, "all touched by a common genius,"²⁴⁴ all citizens, in some sense, of both Jerusalem and Athens. And even their best, as Eliot insists, were "not wholly commendable."²⁴⁵

But some, by the very standards they shared, were better than others. And all ways are not the same, then or now. All the roads do not lead to the same Rome, in their day or in ours. Milton never ceased to call for an English "Rome in the West," with Brutus the regicide as its patron saint;²⁴⁶ on the very eve of the monarchy's restoration, he published the blueprint for an English Republic.²⁴⁷ He and Eliot both were brilliant classicists;²⁴⁸ both belonged, in their turn, to the Church of England. But Milton became a regicide and a Dissenter, hoping to make his homeland and all its colonies a republic; Eliot preferred a kingdom with an established Church and a hereditary ruling class²⁴⁹ to the Tocquevillean democracy of his birth.

The hope that philanthropy holds out is to make that democracy, and with it the whole world, an Abrahamist Republic "with liberty and justice for all" (and "under God" a matter for individual consciences). And more; this is Milton's vision, and mine:

I imagine myself to have set out upon my travels, and that I behold from on high, tracts beyond the seas, and wide-extended regions; that I behold countenances strange and numberless...from the columns of Hercules to the farthest borders of India, that throughout this vast expanse, I am bringing back, bringing home to every nation, liberty, so long driven out, so long an exile.²⁵⁰

To see that for ourselves, we have had to take a very circuitous route, through the school of Chicago as well as those of Athens and Jerusalem. And we must do a great deal of highway maintenance and bridge repair if, as we all believe, everyone who comes after us is to be able to follow us. If we maintain and expand the way we have followed, if we give all the pilgrims who

²³⁸ *Id.* ("a king at nightfall...on the scaffold.").

²³⁹ *Id.* ("one who died blind and quiet.").

²⁴⁰ ANNA BEER, MILTON: POET, PAMPHLETEER, AND PATRIOT 391 (2008).

²⁴¹ *Id.*

²⁴² JOHN MILTON, DEFENSE OF THE ENGLISH PEOPLE (1651).

²⁴³ *Id.* ("When Israel sought a king like other nations, God Himself pleaded with them to remain his special people.").

²⁴⁴ *Little Gidding*, *supra* note 227, at 143.

²⁴⁵ *Id.*

²⁴⁶ BEER, *supra* note 237.

²⁴⁷ JOHN MILTON, THE READIE AND EASIE WAY TO ESTABLISH A FREE COMMONWEALTH (1660).

²⁴⁸ See 2 NORTON ANTHOLOGY OF ENGLISH LITERATURE 2162–63 (1974) (comparing the classicism of Milton and Eliot).

²⁴⁹ See *Id.* at 2163 ("He [Eliot] considered himself 'classicist in literature, royalist in politics, and Anglo-Catholic in religion (*For Lancelot Andrewes*, 1928....").

²⁵⁰ John Milton, *Second Defense*, quoted in BEER, *supra* note 237. Liberty then, of course, was mostly what we now know as negative liberty, personal freedom from state interference. But Milton always saw around his own corner: "No, if other things as great in the church, and in the rule of life both economical and political, be not looked into and reformed, we have looked so long upon the blaze that Zwinglius and Calvin hath beaoned up to us, that we are stark blind." John Milton, *Areopagitica*, in 1 NORTON ANTHOLOGY OF ENGLISH LITERATURE 1349, 1356 (3d ed. 1974).

come after us the help they need on their way, even as we preserve and promote the best of what lies in the city toward which our way climbs, then we will have done our philanthropic due.

And we may have done more as well. If the prophets are to be believed, we will have done justice and loved mercy and walked humbly with God himself.²⁵¹ According to them, that is all he expects of us. Inasmuch as we have served the least of our fellow folk in these ways, we have also served him; even if we never know him as our God, he will nonetheless recognize us as his people, and welcome us into his kingdom (even as he banishes the ceremonial religious but socially indifferent).²⁵² If the Heavenly Kingdom of the Scriptures, the New Zion, comes to this, we will also recognize it as the secular Republic of the classical philosophers. The invitation we already know, from the Prophet Isaiah: *Come, let us reason together.*²⁵³ What Plato implied, our response can prove: Piety and justice are one, and that one is the most careful concern for our fellow folk.²⁵⁴ We will have found what Maimonides sought: A measure of philanthropy that rests squarely on the philosophy of Aristotle and the faith of Abraham.

With his measure, and theirs, let us build our philanthropic city; let us, like him, make their law its law, and ours.

“I understand,” he said. “You speak of a city whose foundation we have been describing, which has its being in words; for there is no spot on earth, I imagine, where it exists.

“No,” I said; “but perhaps it is laid up in heaven as a pattern for him who wills to see, and seeing, to found a city in himself. Whether it exists anywhere or ever will exist, is no matter. His conduct will be an expression of the laws of that city alone, and of no other.”

“That is likely enough, he said.”²⁵⁵

Amen. *Et vive la République Philanthropique!*

²⁵¹ Micah 6:8.

²⁵² Matthew 23:41–46.

²⁵³ Isaiah 1:18.

²⁵⁴ PLATO, EUTHYPHRO, *supra* note 3.

²⁵⁵ PLATO, THE REPUBLIC, *supra* note 15, at 280–81.