

FOUNDATIONS OF THE RIGHT OF CHARITABLE USES

*Adam J. MacLeod^o & Mark David Hall**

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^o Professor of Law, St. Mary’s University; Senior Research Fellow, Center for Religion, Culture and Democracy. Thanks to conference attendees at the Philosophy, Politics, and Economics Society annual meeting; the Ciceronian Society annual meeting; and a workshop of the Mississippi Law Journal Faculty Forum for helpful comments. Thanks especially to Eric Claeys, Paul DeHart, Martin Edwards, Chris Green, Matthew Hall, Adam Mossoff, and Diana Simpson for insightful observations and suggestions. We are also grateful for capable research assistance from Kimberley Ham, Livia Lavender, Caleb Ridings, Jazmyn Rivera, and Mia Gradick. The errors are our own.

* Professor of Government, Regent University; Project Director, Religious Liberty in the States; Senior Research Fellow, Center for Religion, Culture and Democracy.

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INTRODUCTION

On March 8, 2022, police officers in Bullhead City, Arizona cited Norma Thornton for serving home-cooked meals in a park near her home.¹ The city charged her with violating an ordinance that prohibits anyone from sharing food on public property for charitable purposes more than once a month.² The ordinance also requires a permit whose requirements, Ms. Thornton alleges, effectively prevent her from serving food legally.³ This ordinance frustrates the efforts of the Salvation Army, the Bullhead City Food Bank, and the Society of St. Vincent de Paul to feed hungry people gathered in public commons in the city. It also authorizes a hefty fine and even jail time for individuals such as Norma Thornton.

Bullhead City is just one of several local governments that have enacted anti-food sharing ordinances in recent years. For anyone who knows Anglo-American legal history, the ordinances call to mind the anti-almsgiving statutes of sixteenth-century England. One must reach that far back in history because, for more than 400 years since the landmark Charitable Uses Act of 1601, the common law has held charitable uses of private property to be inviolable against coercive sanction.⁴

¹ Order, *Thornton v. Bullhead City*, U.S. Dist. Ct. Ariz. No. CV-22-08195-PCT-SMB 3-6, 8 (Sept. 23, 2024). Norma Thornton is represented by the Institute for Justice. This article expands on research that we performed in consultation with the Institute for Justice. Neither of us has any stake in the outcome of Norma Thornton's case.

² Order, *Thornton v. Bullhead City*, U.S. Dist. Ct. Ariz. No. CV-22-08195-PCT-SMB 3-6, 8 (Sept. 23, 2024).

³ Complaint for Declaratory and Injunctive Relief, *Thornton v. Bullhead City*, U.S. Dist. Ct. Ariz. No. CV-22-08195-PCT-SMB 10, 14-20 (Oct. 25, 2022).

⁴ See part IV.A *infra*.

Throughout almost all of Anglo-American history, men and women who help others at their own expense have been considered moral exemplars. This is especially true of those who feed the hungry. Against that history, the anti-charity ordinance in Bullhead City, Arizona, which criminalizes sharing of prepared meals in public parks “for charitable purposes” —and only for charitable purposes—appears to be an aberration from the long history and tradition of American law.⁵ Under the Bullhead City ordinance, citizens are free to share as many prepared meals as they wish in public parks and for any reason, so long as they are not feeding those in need without compensation.⁶

Although still uncommon, such ordinances have appeared in several American towns and cities since the 1980s.⁷ Food-sharing ordinances may be constitutionally valid as applied in certain cases.⁸ Cities own public property in trust for the whole community. And they have obligations to protect health and safety. But direct prohibitions on the charitable use of one’s property, especially when employed to feed the hungry, burden the right of charitable uses.⁹ The right belongs to all owners of private property, whether they hold their property rights as individuals or in groups. Norma Thornton and the Salvation Army both have a right to give their

⁵ For additional details about the case, see *Arizona Charitable Sharing*, INST. FOR JUST., <https://ij.org/case/arizona-charitable-giving/> [<https://perma.cc/FHR8-MSRN>] (last visited Dec. 27, 2023).

⁶ Other laws may regulate or forbid for-profit food sharing on public land. But the particular ordinance at issue makes it unlawful only to serve or distribute food in a public park “for charitable purposes at no cost, or for a nominal charge, to any member of the public.” BULLHEAD CITY, ARIZ., CODE OF ORDINANCES § 5.36.020 (2024).

⁷ Marc-Tizoc González, *Criminalizing Charity: Can First Amendment Free Exercise of Religion, RFRA, and RLUIPA Protect People Who Share Food in Public?*, 7 U.C. IRVINE L. REV. 291, 295 (2017).

⁸ Because we take no position on the exact constitutional dimensions of the right, lawful limits on the right need not concern us here.

⁹ Some restrictions on this right may be constitutional. For instance, a city might enact a neutral and generally applicable ordinance to ensure that food served in public places is sanitary. Also, it should be apparent that the right cannot be used to justify what would otherwise be a criminal act, such as distributing illegal firearms or providing material assistance to a fugitive from justice. Though the recipients of such gifts may benefit from them in one sense, the gifts are not charitable in the sense meant in the Judeo-Christian religious traditions and Western jurisprudential tradition. Charity consists in willing the good of others, and lawlessness is inconsistent with a will for the common good.

resources and labor to others for their benefit without any expectation of consideration or compensation.

In this article we argue that the right of charitable uses is fundamental, and we examine its origins in fundamental law. We do not here claim that any particular constitutional provision secures the right, though our findings do have constitutional implications. Whether it is declared in the Ninth Amendment, incorporated against the states by the Fourteenth Amendment's Due Process Clause, protected by the Fourteenth Amendment's Privileges or Immunities Clause, secured by state constitutions, or merely part of the unquestioned fundamental law that pertained at the time those constitutional provisions were ratified (and before and since), the right to make charitable uses of one's property is deeply rooted in the history and tradition of American law.

We do not make this claim lightly. Courts should be circumspect in identifying and enforcing constitutional rights, especially unenumerated rights. In *Washington v. Glucksberg*, Chief Justice William Rehnquist explained:

Our established method of substantive due process analysis has two primary features: First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, "deeply rooted in this Nation's history and tradition." Second, we have required in substantive-due-process cases a "careful description" of the asserted fundamental liberty interest.¹⁰

In *Glucksberg*, a majority of justices determined that there was no Substantive Due Process right to physician-assisted suicide.¹¹ In other cases, justices have appropriately identified and enforced unenumerated rights that are deeply rooted in our legal history and tradition, for instance, the right of parents to "direct the

¹⁰ *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (citations omitted) (first quoting *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion); then citing *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934), *overruled by* *Malloy v. Hogan*, 378 U.S. 1 (1964); then citing *Palko v. Connecticut*, 302 U.S. 319, 325-26 (1937), *overruled by* *Benton v. Maryland*, 395 U.S. 784 (1969); then quoting *Reno v. Flores*, 507 U.S. 292, 302 (1993); then citing *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992); and then citing *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 277-78 (1990)).

¹¹ *Glucksberg*, 521 U.S. at 728.

education” of their children.¹² And the approach to identifying and defining rights described by Chief Justice Rehnquist has played a major role in recent Supreme Court cases concerning claims of enumerated and unenumerated rights.¹³

In this article, we argue that there is a *very* long history and tradition of enforcing and protecting the right of individuals to engage in acts of charity using their property.¹⁴ This history may be traced to ancient Greece and Rome; it is prevalent in the Hebrew Scriptures; and it is a central teaching of the Christian New Testament. The right to charitably dispose of one’s own property—especially to feed the hungry—has long been protected as a matter of Western law, English law, and American law. As well, charitable activities have been encouraged by ministers, civic leaders, and popular authors throughout American history, and governments have often passed laws to protect those engaging in such activities. Indeed, it is very common for governments to pass laws encouraging such activities, and almost unheard of for them to attempt to restrict them (although as we have seen with respect to Bullhead City, there are exceptions to this rule).

The right of charitable uses secures a valuable human activity: charitable uses of private property. Charitable uses are valuable not only instrumentally, for the benefits they confer upon recipients, but also intrinsically, for the moral effect they have upon the persons and groups who make them. To do this work, charitable uses must be both free and supererogatory. Laws that forbid

¹² See *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534 (1925).

¹³ See *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215 (2022); *N.Y. State Rifle & Pistol Ass’n, Inc. v. Bruen*, 597 U.S. 1 (2022); and *City of Grants Pass v. Johnson*, 63 U.S. ___, 144 S. Ct. 2202, 2217 (2024) (quoting *Hurtado v. California*, 110 U.S. 516, 528 (1884)) (reiterating that the Court looks to the “settled usages” of English and American law).

¹⁴ Compare Laura Brown Chisolm & Dennis R. Young, *Introduction*, 39 CASE W. RESRV. L. REV. 653, 654-55 (1989); Lars G. Gustafsson, *The Definition of “Charitable” for Federal Income Tax Purposes: Defrocking the Old and Suggesting Some New Fundamental Assumptions*, 33 HOUS. L. REV. 587, 602-13 (1996). In contrast, one commentator takes a Rousseauian view and locates the origins of both poverty and charity in the advent of private property rights. See Charles A. Borek, *Decoupling Tax Exemption for Charitable Organizations*, 31 WM. MITCHELL L. REV. 183, 189 (2004). Leaving aside its implausibility (there was no poverty before humans invented private property?), this thesis ignores most charitable activity throughout human history, including nearly all of the history recited below, and the author concedes that the concept of charity in American law is “rooted in religion.” *Id.* at 189.

charitable actions, such as almsgiving prohibitions in the 16th century and food-sharing ordinances in the 21st century, destroy opportunities for charitable uses. And laws that require sharing of surplus resources destroy the moral value of charitable uses because they displace charitable motivations with coercive motivations. This means that a political community has strong reasons neither to forbid nor to require charitable actions. To get charitable citizens, a political community must empower and liberate property owners to make charitable uses.

Our fundamental common law has reinforced these truths about charitable uses for centuries, first by developing the law of uses in ecclesiastical courts and then by the institution of the trust in Chancery. In addition, the right of charitable uses has been the official doctrine of the common law since Parliament enacted the Charitable Uses Act 1601. The history of charitable uses in the common law and equity, which led to and resulted in the Charitable Uses Act, vindicates the conviction that charitable uses are both morally valuable and fragile, requiring power and freedom to make charitable uses of private property.

There are few law articles about the right to engage in charitable acts for the simple reason that few governments even considered the possibility of restricting such acts. A handful of scholars and activists have argued that laws prohibiting food-sharing and other charitable uses violate the First Amendment (free exercise of religion, peaceful assembly, expressive conduct, and expressive association), the Fourteenth Amendment's Equal Protection Clause, or state or federal statutes (e.g., state and federal versions of the Religious Freedom Restoration Act and the Religious Land Use and Institutionalized Persons Act).¹⁵ And

¹⁵ See Sydney Rosenblum, Note, *Homeless and Hungry: Demanding the Right to Share Food*, 46 FORDHAM URB. L.J. 1004, 1015-36 (2019); Marc-Tizoc González, *Hunger, Poverty, and the Criminalization of Food Sharing in the New Gilded Age*, 23 AM. U. J. GENDER, SOC. POL'Y & L. 231, 259-78 (2015); González, *supra* note 7, at 296-97; Christine L. Bella & David L. Lopez, Note, *Quality of Life—At What Price?: Constitutional Challenges to Laws Adversely Impacting the Homeless*, 10 ST. JOHN'S J. LEGAL COMMENT. 89, 116-21 (1994); Caleb Detweiler, *Breaking Bread and the Law: Criminalizing Homelessness and First Amendment Rights in Public Parks*, 51 VAL. U.L. REV. 695, 713-30 (2017); Nate Vogel, *The Fundraisers, the Beggars, and the Hungry: The First Amendment Rights to Solicit Donations, to Beg for Money, and to Share Food*, 15 U. PA. J.L. & SOC. CHANGE 537, 550-64 (2012); Andrew J. Liese, Note, *We Can Do Better:*

several articles discuss concepts of charity in different parts of the law, for example tax law, nonprofit law, and the law of trusts.¹⁶

In this article we make a more comprehensive claim: that laws which make it more difficult to make charitable uses of property burden a right that is deeply rooted in our Nation's history and tradition. There is a long history and tradition of protecting the right to engage in charitable activities, give alms to those in need, make bequests and devises for charitable purposes, and make other charitable uses of one's property. This right may be recognized and enforced against local governments that seek to keep some citizens from helping others.¹⁷ And it is implicated in other attempts to limit

Anti-Homeless Ordinances as Violations of State Substantive Due Process Law, 59 VAND. L. REV. 1413, 1437-49 (2006).

¹⁶ See generally Chisolm & Young, *supra* note 14; see generally Gustafsson, *supra* note 14; see generally Borek, *supra* note 14; see generally Thomas Kelley, *Rediscovering Vulgar Charity: A Historical Analysis of America's Tangled Nonprofit Law*, 73 FORDHAM L. REV. 2437 (2005); Penina Kessler Lieber, *1601-2001: An Anniversary of Note*, 62 U. PITT. L. REV. 731, 732 (2001); Evelyn Brody & John Tyler, *Respecting Foundation and Charity Autonomy: How Public Is Private Philanthropy?*, 85 CHI.-KENT L. REV. 571 (2010); Stacey H. Van Zuiden, *The Good Food Fight for Good Samaritans: The History of Alleviating Liability and Equalizing Tax Incentives for Food Donors*, 17 DRAKE J. AGRIC. L. 237, 242-45 (2012).

¹⁷ We do not address the question whether the U.S. Constitution provides something like a right to receive charity. On this possibility, see generally Ann I. Park, *Human Rights and Basic Needs: Using International Human Rights Norms to Inform Constitutional Interpretation*, 34 UCLA L. REV. 1195 (1987); see generally Frank I. Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969); see generally Frank I. Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice*, 121 U. PA. L. REV. 962 (1973); see generally Frank I. Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 WASH. U. L.Q. 659 (1979); see generally HENRY SHUE, *BASIC RIGHTS: SUBSISTENCE, AFFLUENCE, AND U.S. FOREIGN POLICY* (1980); see generally CARL WELLMAN, *WELFARE RIGHTS* (1982); see generally Thomas C. Grey, *Property and Need: The Welfare State and Theories of Distributive Justice*, 28 STAN. L. REV. 877 (1976); see generally Bernard Evans Harvith, *Federal Equal Protection and Welfare Assistance*, 31 ALB. L. REV. 210 (1967); see generally Martha H. Good, *Freedom from Want: The Failure of United States Courts to Protect Subsistence Rights*, 6 HUM. RTS. Q. 335 (1984). The assertion of such a right would need to confront the long history and tradition in Anglo-American law of placing legal restrictions and duties on the able-bodied poor. See generally E.M. LEONARD, *THE EARLY HISTORY OF ENGLISH POOR RELIEF* (1900); see generally KARL DE SCHWEINITZ, *ENGLAND'S ROAD TO SOCIAL SECURITY* (1943); see generally GEORGE NICHOLLS, *A HISTORY OF THE ENGLISH POOR LAW (1854)*; see William P. Quigley, *Five Hundred Years of English Poor Laws, 1349-1834: Regulating the Working and Nonworking Poor*, 30 AKRON L. REV. 73 (1996) (providing sources showing the history of legal restrictions and duties on the able-bodied poor). The history and meaning of poor laws and similar burdens on the working poor are beyond the scope of this article, which focuses

or regulate charitable activity, such as laws that constrain the freedom of charitable organizations to solicit funds.¹⁸ The right is also at stake in requirements that private charities serve governments' purposes,¹⁹ such as a mandate to serve a discrete population,²⁰ or perform government functions, such as a mandate to verify the immigration status of those served.²¹ Burdens on charities' exercise of their right of association also burden the right to make charitable uses of property.²²

Our study of the right also bears lessons for legislators and public officials whose purpose is to employ governments in providing for those in need. As the history in Part IV.A below illustrates, governments have competed with churches and other private charitable actors for many centuries. Some evidence suggests that government poor relief and welfare programs crowd out charitable activity,²³ especially in homogenous communities.²⁴ For the reasons discussed in Part II.B.2 below, a government's success in displacing charitable uses comes with a moral cost. The most essential value of a charitable use is intrinsic to the charitable use itself, and it is a value that state action and tax payments cannot replicate. Charitable uses make charitable people who take the flourishing of other people into their own deliberations and who act for the purpose that another person's life go well. Redistribution to satisfy a legal or political mandate does not have that same intrinsic value.

exclusively on the rights of those who want to *give* charitable donations and make other charitable uses.

¹⁸ *Adams v. City of Park Ridge*, 293 F.2d 585, 589-90 (7th Cir. 1961); Recent Cases, *Charity Has Constitutionally Guaranteed Right to Engage in Door-to-Door Solicitation of Funds*, 75 HARV. L. REV. 1649, 1649-52 (1962). *But see* *Nat'l Found. v. City of Fort Worth*, 415 F.2d 41, 45 (5th Cir. 1969) ("No constitutional right exists to make a public solicitation of funds for charity. The reasonable regulation of charitable organizations is within a government's police power."). *See generally* Nate Vogel, *supra* note 15.

¹⁹ Brody & Tyler, *supra* note 16, at 579-83.

²⁰ *Id.* at 580-81.

²¹ FLA. STAT. § 395.3027 (2023).

²² Evelyn Brody, *Entrance, Voice, and Exit: The Constitutional Bounds of the Right of Association*, 35 U.C. DAVIS L. REV. 821, 830-32 n.27, n.31 (2002).

²³ Jonathan Gruber & Daniel M. Hungerman, *Faith-Based Charity and Crowd-Out During the Great Depression*, 91 J. PUB. ECON. 1043, 1064 (2007).

²⁴ Daniel M. Hungerman, *Crowd-out and Diversity*, 93 J. PUB. ECON. 729, 730 (2009).

We draw from history, jurisprudence, and legal doctrines to examine the foundations of the right of charitable uses. Though this article does not provide a complete history of the right, it assembles evidence of the right's historical grounding in human history generally (Part II.A), Judaism and Christianity (Part III), the common law (Part IV), and American law (Part V). Though we do not attempt a complete jurisprudential analysis of the right, we summarize evidence that the right has always been understood as natural, pre-political, and nearly absolute (Parts II.B and VI). Throughout the article, we discuss particular legal rules and doctrines that have emerged in Anglo-American law as the right has faced (and defeated) political and legal challenges throughout the centuries.

I. THE WESTERN TRADITION OF DOING GOOD TOWARD OTHERS

A. *Benevolence and Hospitality in Human History*

Benevolence has long been a prized virtue in western culture and thought. Though charity toward those in need has a specific origin in the Judeo-Christian religious tradition, the virtue of altruism and the good of generous sharing are both thought to be part of the natural law, the principles of reason that all human beings can recognize as true. When the Judeo-Christian tradition gave birth to the right of charitable uses that was later incorporated within Anglo-American law, it was building upon the teachings of natural law in favor of general benevolence, which had long been recognized throughout the world and articulated as a virtue in the West.

As anyone who has read Homer's *Odyssey* knows, hospitality was an important virtue in the ancient Greek world.²⁵ Yet, for the ancient Greeks and Romans, hospitality had:

nothing to do with altruism, but only with the desired effects of giving: namely honour, prestige, fame, status. Honour is the driving motive behind Greek beneficence, and for that reason the Greek word *philotimia* (literally, 'the love of honour') could

²⁵ See HOMER, *THE ODYSSEY* (Robert Fagles, trans., 1999); See also WALTER I. TRATTNER, *FROM POOR LAW TO WELFARE STATE: A HISTORY OF SOCIAL WELFARE IN AMERICA* 1 (6th ed. 1999).

develop the meaning of ‘generosity, beneficence’, not directed towards the poor but to fellow humans in general, especially those from whom one could reasonably expect a gift in return.²⁶

This ancient sense of beneficence was general and diffuse rather than oriented toward the well-being of particular persons. As one commentator has characterized the motivation, “Ancient Greeks believed in charitable giving to benefit the whole community rather than alleviating individual need.”²⁷ This general beneficence toward others can be perceived throughout the world and its major religious traditions.²⁸

B. Beneficence and Charity in Natural Law

i. Altruism and General Beneficence

Natural law commends what philosopher Thomas Nagel called “pure altruism,” which is the act of accounting for the interests of other people alongside one’s own.²⁹ To borrow Nagel’s colorful example, altruism requires a person to remove his heel from another person’s “gouty toes” because he would want the same done for him if the situation were reversed.³⁰ This obligation is part of the natural law that obligates every person to every other person and is known by reason.³¹ It is captured in such maxims as Jesus of Nazareth’s Golden Rule and Kant’s categorical imperative, which express a general principle that no one has a reason to favor his own interests to the exclusion of other people’s interests.³²

²⁶ Pieter van der Horst, *How the Poor Became Blessed*, AEON (Mar. 14, 2019), <https://aeon.co/essays/the-poor-might-have-always-been-with-us-but-charity-has-not> [<https://perma.cc/Z3JS-2YLE>] (last visited July 20, 2023); See also JAMES WILLIAM BRODMAN, CHARITY AND RELIGION IN MEDIEVAL EUROPE 12 (2009).

²⁷ Lieber, *supra* note 16, at 732.

²⁸ See Kelley, *supra* note 16, at 2440-41.

²⁹ THOMAS NAGEL, THE POSSIBILITY OF ALTRUISM 79-80 (1970).

³⁰ *Id.* at 85.

³¹ JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 106-09 (2d ed. 2011).

³² *Id.*

In jurisprudence, the principle often appears under the name “benevolence”³³ or “beneficence.”³⁴ A classic treatise that influenced early American lawyers, James Wilson’s *Lectures on Law*, taught that the principle of beneficence motivates generous actions for the common good, such as the provision of legal services pro bono and public service for the state.³⁵ The principle also can give rise to concrete duties in law and equity.³⁶ As explained in another treatise that heavily influenced generations of American lawyers, Blackstone’s *Commentaries on the Laws of England*, the principle contains within it concrete duties not to harm others by acts of nuisance.³⁷ For example,

it is a nuisance to stop or divert water that uses to run to another’s meadow or mill;[] to corrupt or poison a water-course, by erecting a dye-house or a lime-pit for the use of trade, in the upper part of the stream;[] or, in short, to do any act therein that in it’s consequences must necessarily tend to the prejudice of one’s neighbour. So closely does the law of England enforce that excellent rule of gospel morality, of “doing to others as we would they should do unto ourselves.”³⁸

Except in its particular duties not to injure others and to perform an undertaking once offered, general beneficence is universal and diffuse rather than particular and concrete. Everyone owes beneficence to everyone else, but it does not demand very much of any person. As an influential jurist put it, “the duty of benevolence is much more limited than the virtue.”³⁹

³³ HENRY HOME, LORD KAMES, PRINCIPLES OF EQUITY 74-76 (Michael Lobban ed., 3d ed. 2014) (1760).

³⁴ MATTHEW HALE, OF THE LAW OF NATURE 91-92 (David S. Sytsma ed., 2015) (1670); JAMES WILSON, *Lectures on Law: Of Man, as a Member of Society* in COLLECTED WORKS OF JAMES WILSON 633 (Mark David Hall & Kermit Hall eds., 2007) (1790); for more information on Wilson’s law lectures, see MARK DAVID HALL, THE POLITICAL AND LEGAL PHILOSOPHY OF JAMES WILSON 1742-1798 27-29 (1997).

³⁵ WILSON, *supra* note 34, at 633.

³⁶ See KAMES, *supra* note 33, at 77-109.

³⁷ 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *218.

³⁸ *Id.*

³⁹ KAMES, *supra* note 33, at 74-75.

Unlike charity, general beneficence does not direct one's attention and actions toward willing the flourishing of a particular person. Also, general beneficence is generally an obligation of abstention, a duty to refrain from causing others harm. Even in equity, where the judicial power historically reached the farthest, a "court of equity cannot force one man, whether by his labour or money, to add to the riches of another; because, abstracting from a promise, no connection makes this a duty."⁴⁰ The power of equity is, "in certain circumstances, to compel persons to save from mischief those they are connected with, or to relieve them from want or distress. . . . In all other cases, benevolence is a virtue only, not a duty[.]"⁴¹

Therefore, where a person is engaged in an action that is harming another, general beneficence may require a further act to remove or terminate the cause of the harm, but absent a prior interaction or existing relationship of trust between two persons, one can generally act benevolently toward others by leaving them alone. Where a duty arises to bestow some beneficence on another person, it grows out of a pre-existing legal relationship, such as parent-child, debtor-creditor, landlord-tenant, or bailor-bailee.⁴²

The principle of beneficence is illustrated in the case *The Huntress*,⁴³ where it performed work in the court's reasoning about the duties of a common carrier toward those who accept the carrier's public offer of carriage.⁴⁴ Bonney took carriage in *The Huntress*, a steamboat that made regular trips between Boston, Massachusetts and Portland, Maine and held open a general offer of carriage on that route.⁴⁵ Bonney brought aboard with him three crates of merchandise.⁴⁶ When the ship with Bonney and his crates aboard arrived in Portland, Bonney paid the freight for the crates, which were then placed in a warehouse on the wharf while Bonney went to a nearby tavern.⁴⁷ Bonney left instructions for the porter to

⁴⁰ *Id.* at 76.

⁴¹ *Id.*

⁴² *Id.* at 77-117; BLACKSTONE, *supra* note 37, at *434-47.

⁴³ 12 F. Cas. 984 (D. Me. 1840).

⁴⁴ *The Huntress*, 12 F. Cas. 984, 985-87 (D. Me. 1840).

⁴⁵ *Id.* at 984-85.

⁴⁶ *Id.*

⁴⁷ *Id.*

deliver the crates to the tavern.⁴⁸ In the meantime, another passenger claimed one of the crates as her own and made off with it.⁴⁹ When Bonney finally recovered the crate with the assistance of the ship's clerk and agent, much of the merchandise was missing and the rest was damaged.⁵⁰

It was not clear from the evidence that Bonney had complied with the ship's terms of carriage.⁵¹ This is significant because, though common carriers owe a general duty to carry all whom they have capacity to carry on their advertised route,⁵² they retain the power to determine the terms of carriage and may refuse service to any person on reasonable grounds of which the public has notice, or if the carriage were outside its usual course of business.⁵³ So, Bonney had no right to demand carriage of his crates if he failed to comply with the carrier's posted terms of carriage. A notice posted on board *The Huntress* required "all freight to be intelligibly marked, or it would not be received[.]"⁵⁴ At trial,

The clerk stated, that the two boxes detained had no marks upon them by which they could be known, but that Bonney pointed out to him his name written with a pencil upon them, but that the lines were so faint and indistinct as to be nearly illegible, and that if he had seen them in the store-house in Boston, he should have left them as unmarked goods. The mate, who delivered the other box to the female passenger, stated that it had no mark upon it, and stated the circumstances of the delivery of it to the woman somewhat differently from the libellant's witness.⁵⁵

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *The Huntress*, 12 F. Cas. 984, 984-85 (D. Me. 1840).

⁵¹ *Id.*

⁵² See Adam Candeub, *Common Carrier Law in the 21st Century*, 90 TENN. L. REV. 813, 838-46 (2023); compare *Alexander v. Greene*, 7 Hill 533, 545-55 (N.Y. 1844) (enforcing a general common carrier duty) and *Chi. & Alton R.R. Co. v. Suffern*, 21 N.E. 824, 826-28 (Ill. 1889), with *Memphis & Little Rock R.R. Co. v. S. Express Co.*, 117 U.S. 1, 21-25 (1886) (common carrier railroad had no duty to provide express service to everyone where express service would consume capacity set aside for general carriage).

⁵³ JOSEPH STORY, COMMENTARIES ON THE LAWS OF BAILMENTS 463 (Edmund H. Bennett ed., 8th ed. 1870); see, e.g., *Johnson v. Midland Ry. Co.*, 154 Eng. Rep. 1254, 1256-57 (Exch. 1849); *Coup v. Wabash, St. Louis & Pac. Ry. Co.*, 22 N.W. 215, 216 (Mich. 1885); *Cal. Powder Works v. Atl. & Pac. R.R. Co.*, 45 P. 691, 692-93 (Cal. 1896).

⁵⁴ *The Huntress*, 12 F. Cas. at 984.

⁵⁵ *Id.*

Furthermore, it appeared that the carrier never consented to carry Bonney's crates before or during the voyage. The ship's clerk testified that he always stood on the wharf to receive freight, that he kept records of all the freight except small packages in a book, and "he had no account of the boxes of Bonney in his book, and had no knowledge of their being in the boat until after she arrived at Portland."⁵⁶ The ship owner argued that it therefore had no contract of affreightment with Bonney and no contractual duties to him.⁵⁷

The court acknowledged that Bonney bore the duty to mark the crates adequately and must bear the loss if he failed to mark them.⁵⁸ And the court found it "certain" that the boxes were not adequately marked.⁵⁹ Nevertheless, the court held that the carrier was not excused from liability.⁶⁰ Accepting that Bonney put the crates aboard the ship without the shipowner's consent and in violation of the posted terms, the court reasoned that the carrier had a duty to complete the carriage and fulfil the duties of a bailee once it discovered the crates in its possession, unless the vessel were "overcharged" or some other circumstance prevented the master from making safe delivery.⁶¹ The court explained,

This obligation does not arise from the contract of the parties, because no contract has intervened, but results from the principles of natural law, the great law of social charity, which commands us on all occasions to promote the well-being of others, when it can be done without a sacrifice for ourselves, and not to do an act, though permitted by the positive law, which will be materially injurious to another, without any corresponding benefit to ourselves.⁶²

By "social charity" the court seems to have meant what Nagel called "pure altruism" and what the jurists refer to as "general beneficence." The owners of *The Huntress* had no particular duty to act charitably toward Bonney, absent the peculiar circumstances of the case after discovery of the crates on board. The carrier had no

⁵⁶ *Id.*

⁵⁷ *Id.* at 986.

⁵⁸ *Id.* at 987.

⁵⁹ *The Huntress*, 12 F. Cas. 984, 987 (D. Me. 1840).

⁶⁰ *Id.*

⁶¹ *Id.* at 986.

⁶² *Id.*

duty to take the crates on board in Boston because they were unmarked. Furthermore, had Bonney not paid the freight, or had the ship been overloaded, or had Bonney “furtively” snuck the crates on board and attempted to conceal them, Bonney would not have been entitled to lawful carriage.⁶³ But having carried the crates (albeit unknowingly) and accepted Bonney’s payment of freight after the voyage, the carrier became responsible.⁶⁴

ii. Charity

By comparison to pure altruism and general beneficence (and the similarly diffuse motivations of philanthropy⁶⁵), charity is more particular and less demanding. A charitable act is an act for the well-being of a person. In classical terms, it is an act of love.⁶⁶ Above the baseline of general beneficence, altruism, or mutual cooperation, an act of charity is a relinquishment of one’s rights with the intention that another person benefits as a result. And moving beyond what natural law and reason teach about the obligation to treat others as one would be treated, the concept of charity that became rooted in Anglo-American law originated in religious sources, especially Hebrew and Christian teachings and practices.⁶⁷

Christian philosopher, Thomas Aquinas explained the move from the general duty of beneficence to the particular reasons to act charitably in his influential synthesis of natural law theory and Christian thought, the *Summa Theologica*. Aquinas taught charity is a kind of friendship⁶⁸ and the greatest of all the virtues.⁶⁹ Beneficence is not a different kind of virtue than charity,⁷⁰ but it is

⁶³ *Id.* at 986-87.

⁶⁴ *Id.* at 987.

⁶⁵ Lieber, *supra* note 16, at 734 (“charity is specific while philanthropy is general”).

⁶⁶ Michael J. Perry argues that the Christian conception of love—agape or “charity”—is the foundation of human inviolability and therefore of human rights. Michael J. Perry, *The Morality of Human Rights: A Nonreligious Ground?*, 54 EMORY L.J. 97, 105-06 (2005).

⁶⁷ Kelley, *supra* note 16, at 2441-42; TRATTNER, *supra* note 25, at 2-4.

⁶⁸ Thomas Aquinas, SUMMA THEOLOGICA II-II, Q23, art. 1 (Fathers of the English Dominican Province trans., 2d ed. 1947) (available at <https://www.newadvent.org/summa/> [<https://perma.cc/7Z7F-WJKH>]).

⁶⁹ *Id.* at II-II, Q23, art. 6.

⁷⁰ *Id.* at II-II, Q31, art. 4.

less particular than charity.⁷¹ While general beneficence is an act that wills the good in general, and is in this sense a type of charitable action,⁷² beneficence extends to all persons and is contingent on a number of circumstances.⁷³ Charity brings this diffuse, general beneficence to a practical point when we give to a person who is in need and is near us, related to us, or connected to us in some other way.⁷⁴

Law and equity attribute particularity to a charitable use, even when a donor's or testator's intention to make a charitable use is less than perfectly clear. In an illustrative case, a testator made a bequest "unto the suffering poor of the town of Auburn."⁷⁵ Though the bequest did not identify particular individuals as beneficiaries, the court was confident that the testator "had in his mind a distinct class of persons," namely residents of the town of Auburn, Maine who were "compelled to submit to privations" but who were not benefitting from the pauper laws and other public welfare benefits.⁷⁶ Otherwise, "the bequest would really be to the town of Auburn, in its corporate capacity."⁷⁷ The court concluded that the bequest "was the result of a laudable desire to supply the wants of those in a humble pecuniary condition, and prevent the necessity for a call upon the municipal authorities to relieve their sufferings; and should not fail, unless for substantial reasons."⁷⁸

Charity toward those in need is a right rather than a standing duty, because the moral value of charity is its central aspect, and that value cannot be coerced. Aquinas defined almsgiving as "an act of charity through the medium of mercy."⁷⁹ This act has a "corporal effect," to be sure, insofar as it meets the bodily needs of the person who receives the alms.⁸⁰ But it also has a spiritual effect both for the almsgiver, who is moved to act from love of neighbor, and for

⁷¹ *Id.* at II-II, Q31, art. 3.

⁷² *Id.* at II-II, Q31, art. 1.

⁷³ *Id.* at II-II, Q31, art. 2.

⁷⁴ *Id.* at II-II, Q31, art. 3.

⁷⁵ *Howard v. Am. Peace Soc.*, 49 Me. 288, 302 (Me. 1860).

⁷⁶ *Id.* at 302-03.

⁷⁷ *Id.* at 303.

⁷⁸ *Id.*

⁷⁹ Aquinas, *supra* note 68, at II-II, Q32, art. 1.

⁸⁰ *Id.* at II-II, Q32, art. 4.

the one who receives the succor, who may be moved to care (and pray) for his benefactor.⁸¹

In modern times, charity came to be associated with results-oriented social engineering.⁸² One implication is that the concept of charity has expanded to encompass any use for “promoting the welfare of mankind at large, or of a community, or of some class forming a part of it, indefinite as to numbers and individuals.”⁸³ Ironically, this concept has led to a distinction between so-called “public” and “private” charity, and special legal advantages for charitable uses that are deemed “public.”⁸⁴ Indeed, in some opinions “charitable” has become synonymous with “public.”⁸⁵ But originally a charitable use referred to a particular action motivated by the purpose to improve the well-being of a particular person or group of people, an idea expressed in the maxim that “charity begins at home.”⁸⁶ It is the concern for another’s well-being, not a diffuse desire to change society, that makes a use charitable in the focal sense. Public charitable uses are charitable but in a derivative sense; we recognize the charitable motivation by reference to the central case of one person parting with his property rights to meet the needs of another person.

Whatever economic or pragmatic utility they facilitate, charitable uses have moral value for the people who make them, and derivatively for the communities of which they are part.⁸⁷ In the Christian way of thinking, charity is a movement created in the soul, a virtue that requires “some habitual form superadded to the natural power” that we all possess to act justly toward others, “inclining that power to the act of charity, and causing it to act with

⁸¹ *Id.*

⁸² Kelley, *supra* note 16, at 2439, 2444-46.

⁸³ People ex rel. Ellert v. Cogswell, 45 P. 270, 271 (Cal. 1896).

⁸⁴ See Eric M. Katz, *Dissolution of Public Charity Corporations: Preventing Improper Distribution of Assets*, 59 TEX. L. REV. 1429, 1441-43 (1981); Loren D. Prescott, Jr., *Pennsylvania Charities, Tax Exemption, and the Institutions of Purely Private Charity Act*, 73 TEMP. L. REV. 951, 952-58 (2000); Roger Colinvaux, *Charity in the 21st Century: Trending Toward Decay*, 11 FLA. TAX REV. 1, 11-12 (2011).

⁸⁵ See, e.g., *Petition of Pierce*, 136 A.2d 510, 516 (Me. 1957) (quoting 2 POMEROY’S EQUITY JURIS. § 987); *Jones v. Vermont Asbestos Corp.*, 182 A. 291, 296-97 (Vt. 1936); *Shenandoah Valley Nat’l Bank of Winchester v. Taylor*, 63 S.E.2d 786, 789 (Va. 1951).

⁸⁶ R.H. HELMHOLZ, NATURAL LAW IN COURT 78 (2015).

⁸⁷ The argument for this proposition is set out more fully in ADAM MACLEOD, PROPERTY AND PRACTICAL REASON 128-32 (2015).

ease and pleasure.”⁸⁸ An act of almsgiving, for example, frees the almsgiver from the “excessive love of riches” and exercises the virtue of liberality.⁸⁹

Charity has intrinsic benefits and pleasures. One of the pleasures of charitable giving is “man’s habitual inclination to do good, by reason of which doing good becomes connatural to him: for which reason the liberal man takes pleasure in giving to others.”⁹⁰ But the benefits of charity are more particular than the general development of benevolent virtues. The intrinsic worth of charity is love itself, the love of another person which desires and acts for that person’s flourishing. This benefit is built into the very motive of a charitable act, “for instance when a man is moved by one whom he loves, to do good to someone: for whatever we do or suffer for a friend is pleasant, because love is the principal cause of pleasure.”⁹¹

In short, the most fundamental value of charity is internal to the acting person, the effect that the charitable act has on the character of the person who chooses to perform the charitable action. Some modern philosophers call this internal effect the “intransitive” aspect of human actions, because it is the part of a person’s action that, rather than transiting out into the world to cause material changes, stays within the person and shapes the person’s habits and dispositions.⁹² Because charitable action has intransitive effects on the character of those who act charitably, charitable uses form charitable people. In turn, charitable people use property rights and institutions for charitable purposes. Property institutions that secure rights of charitable uses are thus better able to facilitate cooperative and beneficial uses of resources than those that do not.

To be sure, charitable uses also have some utility; they redistribute resources from those who have excess to those who are in need. But their relative utility as compared with other forms of distribution is questionable. It is not obvious that charitable uses

⁸⁸ Aquinas, *supra* note 68, at II-II, Q23, art. 2.

⁸⁹ *Id.* at II-II, Q32, art. 1.

⁹⁰ *Id.* at I-II, Q32, art. 6.

⁹¹ *Id.*

⁹² Finnis, *supra* note 31, at 421-22; JOHN FINNIS, INTENTION AND IDENTITY: COLLECTED ESSAYS: VOLUME II 9-10 (2011).

are the most efficient or effective way to meet basic human needs, much less to distribute property access and opportunities to those who need them most. Charity's instrumental value is thus not its most attractive feature.

Whatever their pragmatic utility, charitable uses have value because they form charitable persons. A charitable use of one's property is an exercise of one's practical reason that has an intransitive effect on the person making the use. To make charitable uses of one's property is to form oneself into a charitable person. A charitable person is the kind of person who forms and executes plans for the use and management of things around the reasons of other persons.

In central cases of charitable use, the reason for the act just is the well-being of another person. Think of buying a sandwich for a hungry war veteran or paying a child's school tuition. The person who makes these charitable uses takes into consideration the good of the war veteran—the veteran's bodily health—or the good of the destitute child—the child's knowledge—and makes that good a reason for her own actions. By taking the good of another person into her own practical deliberations and willing that good for its own sake, the person who makes the charitable use does more than accomplish some good thing out there in the world (though she certainly *also* does that). She also incorporates the good of other persons into her practical reasoning as part of her own willing and choosing, and therefore of her own character.

This moral value of charitable uses is fragile. It requires both freedom and a legal power to choose to act charitably. For this reason, a charitable use of property is charitable insofar as the person making the use has no legal obligation to do so. Unlike general beneficence, charity is inherently supererogatory, above and beyond what one's duties (obligations of natural law and social justice) require.⁹³ For the same reason, charity is beyond the

⁹³ MacLeod, *supra* note 87, at ch. 5. However, though charity is not a duty of natural law, it is a conditional religious obligation. See TRATTNER, *supra* note 25, at 2-4. Aquinas taught that, for the Christian, almsgiving is a matter of precept. Aquinas, *supra* note 68, at II-II, Q32, art. 5. He made clear that the precept is one of divine law, rather than natural law. Indeed, "right reason," the classic term for natural law, qualifies the precept in important ways. *Id.* For one thing, one must first provide for himself and "those over whom he has charge" before giving alms to others. *Id.* For another, the precept only binds

mandates and prohibitions of positive laws.⁹⁴ One who gives to satisfy a legal obligation or to avoid undesirable coercion is not giving solely, or in most cases even at all, for the purpose of improving the well-being of the other person. To give to satisfy a legal duty is to lose the opportunity to realize in one's own deliberations and actions the moral good of charity. Therefore, legal duties that either compel or interfere with charitable acts destroy the very feature of charitable uses that makes them valuable and worth protecting in law.

Because the chief value of charity is its intransitive effects on the charitable donor, the most important aspect of a charitable use is the intention with which it is made. For this reason, law and equity go to great lengths to preserve and carry into effect a donor's charitable intended purposes.⁹⁵ In one illustrative case, a testator bequeathed the residue of his estate to "the poor of Voorst, Gelderland, Netherlands."⁹⁶ In an action challenging the bequest, the plaintiff argued that the will left the identity of the beneficiaries uncertain and failed to appoint a trustee.⁹⁷ But the court observed its duty to render a charitable bequest valid, if at all possible, by choosing particular beneficiaries, such as the residents of a hospital in the vicinity, and appointing a trustee, such as a bishop of the church.⁹⁸ The common law so approves the testator's charitable purpose that it supplies particular testamentary details when necessary to bring the purpose into effect. The court explained that

the one who has surplus to give to "one whose need is extreme: otherwise almsgiving, like any other greater good, is a matter of counsel." *Id.*

⁹⁴ This may be one reason why, from the earliest days, Progressive reformers have grounded laws and policies to assist the poor in a concept of social justice instead of charity. Christine Robitscher Ladd, *A Right to Shelter for the Homeless in New York State*, 61 N.Y.U. L. REV. 272, 288 (1986); Olivier De Schutter, *From Charity to Entitlement: Implementing the Right to Food*, U.N. SPECIAL RAPPORTEUR ON THE RIGHT TO FOOD (2012), http://www.srfood.org/images/stories/pdf/otherdocuments/20120620_briefing_note_05_en.pdf; Nadia Lambek & Priscilla Claeys, *Institutionalizing a Fully Realized Right to Food: Progress, Limitations, and Lessons Learned From Emerging Alternative Policy Models*, 40 VT. L. REV. 743, 747 (2016).

⁹⁵ By contrast, a court will not read extrinsic purposes into a will that contains no expression of charitable intent. *Baxley v. Birmingham Trust Nat'l Bank*, 334 So.2d 848, 854 (Ala. 1976).

⁹⁶ *Klumpert v. Vrieland*, 121 N.W. 34, 34-35 (Iowa 1909).

⁹⁷ *Id.* at 35.

⁹⁸ *Id.*

in a “legacy to an individual, the mode is deemed to be of the substance of the legacy; but, when the legacy is to charity, the court considers the charity as the substance, and, if the mode prescribed shall fail, will provide another rather than allow the purpose to fail.”⁹⁹

On the other hand, and for the same reason, the testator or donor must have identified *some* person or class of persons as her intended donee or beneficiary before a court will find a charitable use.¹⁰⁰ The court’s obligation is to carry out the intentions of the testator, donor, or settlor,¹⁰¹ the “real purpose” of the use.¹⁰² A charitable intention is formed around the end that a person or group of people be better off as a result of the use.¹⁰³ Courts will refuse to rescue a failed devise or bequest absent an expression of intention that the property “is to be applied to a *particular* charitable purpose.”¹⁰⁴ Without the purpose to benefit some person or persons, a use is not charitable, even if a testator uses words such as “worthy” and “charitable.”¹⁰⁵ By the same token, where a testator or settlor has expressed an intention to benefit a particular person or institution, a court will not exercise its *cy-pres* power to substitute a different beneficiary.¹⁰⁶ “The clearly expressed intention of the settlor should be zealously guarded by the courts, particularly when the trust instrument reveals a careful and

⁹⁹ *Id.* at 36.

¹⁰⁰ *Dolan v. Johnson*, 509 P.2d 1306, 1310 (Idaho 1973); *Marsh v. Frost Nat’l Bank*, 129 S.W.3d 174, 178-79 (Tex. App. 2004).

¹⁰¹ *Marsh*, 129 S.W.3d at 176; *Snow, Christensen & Martineau v. Lindberg*, 299 P.3d 1058, 1067-68 (Utah 2013); *First Nat’l Bank & Trust Co. of Wyo. v. Brimmer*, 504 P.2d 1367, 1369-71 (Wyo. 1973).

¹⁰² *Shanep v. Strong*, 160 P.2d 683, 689 (Kan. 1945).

¹⁰³ So, in *Shanep*, the court reasoned: We think [the testator’s] dominant purpose and intent was to aid the two particular local churches in his old home town rather than to create a general charity for religious purposes. It was quite natural, and certainly appropriate, for an old farmer who had struggled and lived successfully in a small community for over half a century to contribute to the welfare of his home community and old friends by aiding these two local character building institutions which, if like most churches, are always in need of funds. *Id.*

¹⁰⁴ *Doll v. Post*, 132 N.E.3d 34, 39-40 (Ind. Ct. App. 2019).

¹⁰⁵ *Yribar v. Fitzpatrick*, 416 P.2d 164, 167 (Idaho 1966).

¹⁰⁶ *Nugent ex rel. St. Dunstan’s Day Sch. v. St. Dunstan’s Coll. of Sacred Music*, 324 A.2d 654, 669-70 (R.I. 1974); *First Nat. Bank & Trust Co. of Wyo. v. Brimmer*, 504 P.2d 1367, 1369-71 (Wyo. 1973).

painstaking expression of the use and purposes to which the settlor's financial accumulations shall be devoted."¹⁰⁷

II. CHARITY IN JEWISH AND CHRISTIAN THOUGHT

In comparison to the ancient virtue of hospitality and the general duty all people have not to act with a preference for themselves, Jewish and Christian thoughts have long taught that it is good and right to give to those in need, even when the act of charity brings no honor and even when it exceeds one's general duty of altruism.¹⁰⁸ The Hebrew Scriptures are replete with praise for those who care for and feed the hungry. Early in these texts, we see the Patriarch Abraham making elaborate preparations to feed three strangers,¹⁰⁹ and the Prophet Isaiah emphasizes the importance of "shar[ing] your bread with the hungry and bring[ing] the homeless poor into your house."¹¹⁰ Similarly, the Prophet Ezekiel observes that the righteous man "gives his bread to the hungry and covers the naked with a garment."¹¹¹

The Hebrew Scriptures often encourage people to feed the hungry, and Levitical law even requires farmers to leave a portion of their harvest for the poor: "And when you reap the harvest of your land, you shall not reap your field right up to its edge, nor shall you gather the gleanings after your harvest. You shall leave them for the poor and for the sojourner: I am the LORD your God."¹¹² In the book of Ruth, Boaz goes beyond this law by instructing his laborers to leave additional grain for Ruth to glean.¹¹³

Perhaps no religious leader emphasized the importance of charity—including feeding the hungry—more than Jesus Christ.

¹⁰⁷ *First Nat. Bank & Trust Co. of Wyo.*, 504 P.2d at 1371.

¹⁰⁸ Quigley, *supra* note 17, at 78 ("The Bible contributed many themes to English poor law, themes that continue to resonate even now in the American experience," such as "special attention to the needs of the poor.").

¹⁰⁹ *Genesis* 18: 1-8. All scriptural references quoted by the authors are to the English Standard Version of the Bible.

¹¹⁰ *Isaiah* 58:7.

¹¹¹ *Ezekiel* 18:7.

¹¹² *Leviticus* 23:22. This rule law became part of the common law, so that gleaning is a recognized exception to the general duty to exclude oneself from land one does not own. 3 WILLIAM BLACKSTONE, COMMENTARIES *131.

¹¹³ *Ruth* 2:15-16.

Indeed, in the parable of the sheep and the goats, he explains that those who “inherit the kingdom” do so because when the Lord:

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, saying, ‘Lord, when did we see you hungry and feed you, or thirsty and give you drink? And when did we see you a stranger and welcome you, or naked and clothe you? And when did we see you sick or in prison and visit you?’ And the King will answer them, ‘Truly, I say to you, as you did it to one of the least of these my brothers, you did it to me.’¹¹⁴

Similarly, the parable of the Good Samaritan¹¹⁵ has been so influential in western civilization that dozens of hospitals and mercy ministries are named after it, as is an entire category of laws intended to protect individuals who aid others.¹¹⁶

Early Christians were known for their acts of charity¹¹⁷ and church officers known as deacons were created to ensure that food was distributed to those in need.¹¹⁸ The early church fathers emphasized the importance of charity. For instance, Ignatius of Antioch (d. 98-117) “condem[ned] the Gnostics for showing no concern for widows, orphans, the oppressed, or those who are hungry and thirsty.”¹¹⁹ Charity was often provided by individuals or local churches, but in the fifth century it became the responsibility of bishops and monasteries.¹²⁰ The thirteenth century saw the formation of charity orders: “[b]y establishing regional networks to collect alms, the Antonines, Brothers of the Holy Spirit, and Trinitarians attempted to systematize what had been a highly localized and decentralized practice of charity.”¹²¹

¹¹⁴ *Matthew* 25:34-40.

¹¹⁵ *Luke* 10:25-37.

¹¹⁶ *See infra* Section V(c).

¹¹⁷ E.g., *Acts* 4:34.

¹¹⁸ *Acts* 6:1-4.

¹¹⁹ JAMES WILLIAM BRODMAN, CHARITY AND RELIGION IN MEDIEVAL EUROPE 11 (2009).

¹²⁰ *Id.* at 12.

¹²¹ *Id.* at 6.

Lay organizations dedicated to providing charity were formed after 1000, and by 1300 most parish charities were run by local laymen.¹²² Among these lay charitable efforts were what was called “Tables of the Poor” because of “the tables that were set outside parish churches to distribute food (bread, meat, fish, and even beer) . . . to needy selected from the community.”¹²³

Although the Protestant Reformers emphasized the importance of faith and deemphasized the importance of good works, they still held that all good works necessarily followed from a redeeming faith. And like Christians before them, they emphasized the importance of charity. Martin Luther, for instance, contended that:

If your enemy needs you and you do not help him when you can it is the same as if you had stolen what belonged to him, for you owe him your help. St. Ambrose says, ‘Feed the hungry: if you do not feed him, then as far as you are concerned, you have killed him.’¹²⁴

The settlers who came to America continued to value charity highly—especially feeding the hungry.¹²⁵ Of course, one need not be religious to be charitable, but in the medieval and early modern world, the two were often connected. Much more could be written about the importance of charity and feeding the hungry in Western civilization, but space and time constraints require us to turn our attention to Anglo-American history and tradition.

III. ORIGINS OF THE RIGHT IN THE COMMON LAW

A. Development of the Right in England

Though political sovereigns have occasionally undertaken actions that burden it, the right of charitable uses has always survived. The history of the common law from the time of the Norman Conquest until the seventeenth century is characterized by the Crown’s efforts to wrest property rights from nobles, the

¹²² *Id.* at 6-7, 68-75, 207-09.

¹²³ *Id.* at 212-13.

¹²⁴ Martin Luther, *Treatise on Good Works* in 44 LUTHER’S WORKS: THE CHRISTIAN IN SOCIETY 109 (James Atkinson ed., 1966) (1520).

¹²⁵ See *infra* Section X.

Church, and others. But property rights have generally prevailed, and particularly, the right to make charitable uses has always prevailed eventually. The history of our fundamental law is characterized by the persistent and repeated re-assertion of the property right to make charitable use as a fundamental limitation on executive, judicial, and legislative power.

Attacks on property rights by sovereigns have occasionally made it more difficult for property owners to be charitable. Many of the contests discussed below concerned the right of charitable uses because, in attacking other property rights, English sovereigns sometimes indirectly affected the freedom to act charitably. But significantly, in none of these instances did the Crown or Parliament attack or infringe the right to make charitable uses directly. In each case, the right was a casualty of a law or royal action that was aimed at some other target. And in all events, the right of charity always survived. Indeed, it emerged victorious in the seventeenth century.

The Normans brought primogeniture to English soil in the eleventh century. The Norman doctrine made it difficult to make charitable uses of land because it required succession of the entire estate to the eldest son. The crown would recognize no testamentary devise of any property right greater than a term of years.¹²⁶ And while primogeniture prohibited charitable devises (indeed, *any* devises) of freeholds in land, the jurisdiction of Church courts over the movable property of dead men imposed limitations on charitable bequests.¹²⁷

To solve those problems, lawyers invented two legal tools, which have become part of our fundamental law: the use and the trust.¹²⁸ The “use” was a particular legal right whose chief benefit

¹²⁶ 2 BLACKSTONE, *supra* note 37, at *374-75.

¹²⁷ See generally R.H. Helmholz, *The Early Enforcement of Uses*, 79 COLUM. L. REV. 1503, 1506, 1512 n.55 (1979)(explaining complications arising from ecclesiastical jurisdiction over chattels); F.W. MAITLAND, *STATE, TRUST AND CORPORATION* 82-83 (David Runciman & Magnus Ryan eds., 2003). Secular courts had exclusive jurisdiction over succession of real property, even where succession was directed by a charitable gift or devise, while ecclesiastical courts had jurisdiction over succession to goods and chattels. R.H. Helmholz, *William Lyndwood* in *Great Christian Jurists in English History* 45-67, 61 (Mark Hill QC and R.H. Helmholz eds., 2017).

¹²⁸ MAITLAND, *supra* note 127, at 84-89.

was to make property rights alienable. As Richard Helmholz explained:

[t]he holder of freehold land—the feoffor—would convey land during his lifetime to feoffees to uses. They in turn held it for the benefit of the feoffor, or sometimes of a third party—the cestui que use—under instructions to convey the land to persons to be named in the feoffor’s will.¹²⁹

Being outside the law, uses were unenforceable in the Crown’s courts, but from early in the fourteenth century, the Church enforced them in ecclesiastical courts.¹³⁰ The Church enforced the uses in the exercise of its probate jurisdiction and on the ground “that the courts of the Church should provide justice whenever secular law was inadequate.”¹³¹

Eventually, lawyers appealed to the Chancellor, the keeper of the King’s conscience, to enforce trusts in equity and, from the fourteenth or fifteenth century on, the Chancellor did so.¹³² Owners began making charitable trusts “at an early date,” and any charitable purpose would suffice to render the trust valid in equity.¹³³ The right of charitable uses thus became the source of one of the common law’s most distinct institutions, the trust, which property owners have used to commit countless acts of charity in the seven centuries since.

One implication of this victory of charitable uses is that it does not matter who the recipient is. Trusts and gifts to trusts may be made in favor of any person or group of persons. The donor or settlor

¹²⁹ Helmholz, *supra* note 127, at 1503.

¹³⁰ *Id.* at 1504-05, 1508-10. However, the church courts enforced only testamentary uses, not inter vivos gifts. *Id.* at 1506. One responsibility of the church courts’ jurisdiction was “the duty to secure a person’s final wishes.” *Id.* at 1507. Church courts also enforced charitable bequests. The civil law, which applied in church courts in the absence of contrary canon laws or local customs, authorized an executor, including the church, to enforce charitable bequests and other “pious dispositions” when an heir refused to hand over the necessary resources. Brian E. Ferme, *The Testamentary Executor in Lyndwood’s Provinciale*, 49 *JURIST* 632, 633, 635-36 (1989). The rule applied to “bequests for the poor as well as for redemption of captives.” *Id.* at 635.

¹³¹ Helmholz, *supra* note 127, at 1507.

¹³² MAITLAND, *supra* note 127, at 82-84; 2 BLACKSTONE, *supra* note 112, at *301. By 1465, Chancery had assumed jurisdiction over enforcement of uses. Helmholz, *supra* note 127, at 1511.

¹³³ MAITLAND, *supra* note 127, at 99.

may decide who will benefit from the disposition of his property. The right is not defined narrowly to encompass any particular class of beneficiaries. It is more expansive than a right to give alms, meet emergencies, or satisfy immediate needs. The right of charitable uses is therefore much broader than the right to receive compensation from a minor for the provision of necessities (which is an exception to the general legal incapacity of minors to make enforceable contracts)¹³⁴ and the conditional right to enter another's land without consent when necessary to save a human life.¹³⁵

The next property dispute to burden charitable uses indirectly was the battle between the nobles and the Church over Church ownership of rights in land. Feudal lords fought hard to prevent the Church from acquiring real property rights. The offending practice was known as "mortmain," or dead hand, because once the Church acquired the property, the feudal lords lost all of the feudal incidents that they would otherwise obtain from living, natural persons.¹³⁶ In 1258, barons sitting in Parliament asked for a law that "men of religion may not enter the fees of earls and barons and others without their will, whereby they lose for ever their wardships, marriages, reliefs and escheats."¹³⁷ For the next couple decades, Parliament made unsuccessful attempts to place legal restrictions on mortmain. Its enactments were, in the words of two of the greatest historians of the common law, "now law, now not law, as the barons or the king obtained the mastery" and to the extent that the "clergy were influential enough with the king."¹³⁸

The decisive contest was waged between 1279 and 1301. By Edward I's Statute of Mortmain in 1279, the king and Parliament attempted conclusively to prevent donations of land to the Church

¹³⁴ Ragan v. Williams, 127 So. 190, 191 (Ala. 1930); Burnand v. Irigoyen, 186 P.2d 417, 420-21 (Cal. 1947).

¹³⁵ Ploof v. Putnam, 71 A. 188, 189 (Vt. 1908); Vincent v. Lake Erie Transp. Co., 124 N.W. 221, 222 (Minn. 1910).

¹³⁶ 1 BLACKSTONE, *supra* note 112, at *466-67. Gifts of rights in land given "in charity" or in "perpetual alms" were enforceable in ecclesiastical courts in the thirteenth century. 1 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I, 151-52 (2d ed. 2010) (1898).

¹³⁷ *Id.* at 201.

¹³⁸ *Id.*

without royal consent.¹³⁹ This law indirectly affected charitable uses on behalf of the poor because the Church was the center of charitable activity in England and the enforcer of the general obligation to act charitably. Indeed, Englishmen were sometimes prosecuted in ecclesiastical courts for not making adequate contributions to relieve the suffering of the poor,¹⁴⁰ but the purpose of the law was not to prevent charitable uses of property. Instead, the goal was to prevent rights in land from falling into the hands of corporations, especially religious corporations.¹⁴¹ Corporate ownership of land detracted from the crown's feudal rights, since corporations render no fealty, never ask permission to marry, never pay estate taxes, and never die intestate for their lands to escheat to the crown.¹⁴²

Furthermore, the laws were largely political, directed at the Church, and did not prohibit direct gifts to the poor. The intention of the mortmain statutes was, as a legal historian explained, "to prevent the Church from acquiring lands in such a way that the king and other principal lords lost feudal services and dues."¹⁴³ It was not to prevent relief of the poor. Henry VIII's mortmain statute exempted various charitable uses, and applied only to conveyances to religious orders.¹⁴⁴

In the end, even this limited attack on charitable uses failed. While Edward was waging an unpopular war without the full support of his lords, the Church joined with a number of aggrieved subjects and demanded that Edward affirm the ancient liberties of the Church and other property owners declared in Magna Carta.¹⁴⁵ Defeated, King Edward complied. He reaffirmed Magna Carta in 1298, and again in 1299, 1300, and 1301, confirming repeatedly that the Church's liberty and its property rights were the fundamental, common law of the land.¹⁴⁶

Later attacks on property rights also failed to destroy the right of charitable uses. In the contest between crown and Church that

¹³⁹ *Id.*

¹⁴⁰ R.H. HELMHOLZ, ROMAN CANON LAW IN REFORMATION ENGLAND 109-10 (1990).

¹⁴¹ ARTHUR R. HOGUE, ORIGINS OF THE COMMON LAW, 74-75 (1986).

¹⁴² *Id.* at 74.

¹⁴³ *Id.*

¹⁴⁴ 23 Henry VIII c. 10; 2 BLACKSTONE, *supra* note 37, at *171.

¹⁴⁵ HOGUE, *supra* note 141, at 78-79.

¹⁴⁶ *Id.* at 79-80.

succeeded Henry VIII's break from the Pope, the crown and Parliament used writs of prohibition, a mortmain statute, and other laws to wrest land away from the Church and jurisdiction over the law of charity away from ecclesiastical courts.¹⁴⁷ When Henry dissolved the monasteries and took their land, he dispossessed the poor who had found shelter and succor in the church, along with the churchmen who had provided it.¹⁴⁸ As a consequence of Henry VIII's acts and those of his daughter Elizabeth I, secular authorities began to assert primary responsibility for relief of the poor.

During this period, the crown and Parliament placed indirect burdens on charitable uses again, and, the right of charitable uses prevailed once again. In the midst of their contests with the Church in the sixteenth century, Henry and Elizabeth supported enactments that attempted to prevent people from giving alms to able-bodied, unemployed men—gifts of property that an earlier act, the Statutes of Laborers 1349 (enacted in response to labor shortages during the Black Death)¹⁴⁹ had termed “promiscuous alms.”¹⁵⁰ Those laws did not prohibit alms to the so-called deserving poor, only to those capable of working.¹⁵¹ Furthermore, they were not effectively enforced and were soon swept away in the poor-relief reforms that immediately succeeded them: the so-called “poor laws” of the seventeenth century.¹⁵²

Indeed, Queen Elizabeth I's lasting legacy is that during her reign Parliament enacted a declaration of the right to make charitable uses, which quickly became a landmark expression of our fundamental law and has been a benchmark of legal reasoning ever since.¹⁵³ This law, the Charitable Uses Act 1601, bearing Queen Elizabeth's name, is known in trust law as the “Statute of Elizabeth.”¹⁵⁴ The Act identified uses of “Landes Tenementes

¹⁴⁷ HELMHOLZ, *supra* note 140, at 51-54.

¹⁴⁸ Quigley, *supra* note 17, at 80-81; TRATTNER, *supra* note 25, at 7; De Schweinitz, *supra* note 17, at 18-20.

¹⁴⁹ Quigley, *supra* note 17, at 83-85.

¹⁵⁰ Kelley, *supra* note 16, at 2443-44.

¹⁵¹ Quigley, *supra* note 17, at 93-98. This distinction between deserving and undeserving poor carried over into American culture and law. See *infra* Part IV.B.ii.

¹⁵² See LEONARD, *supra* note 17, at 47-64; Quigley, *supra* note 17, at 100-08.

¹⁵³ Borek, at 195 n.51.

¹⁵⁴ David Villar Patton, *The Queen, the Attorney General, And the Modern Charitable Fiduciary: A Historical Perspective On Charitable Enforcement Reform*, 11 U. FLA. J.L. & PUB. POL'Y 131, 138 n.43 (2000).

Rentes Annuities Profittes Hereditamentes, Goodes Chattels Money and Stockes of Money” that the law deems to be charitable due to their alleviation of poverty, illness, and other misfortunes, or for their promotion of education and other public goods, and thus entitled to enforcement in equity.¹⁵⁵ The very first use on the list is “for Releife of aged impotent and poore people.”¹⁵⁶ Under the Act, even a devise to a corporation is valid as long as it is for charitable uses.¹⁵⁷

The seventeenth century was, of course, a watershed in the history of the common law which marked the end of the unlimited royal prerogative and the triumph of natural rights of property, charity, religious liberty, and self-governance.¹⁵⁸ Conflicts arising under James I and Charles I, the Petition of Right 1628, the English Civil War, and finally the Glorious Revolution resulted in the English Bill of Rights 1689. That landmark legislation established the principles that the executive power is under the law, that Parliament rather than the executive is supreme, and that certain rights, including property rights, are prior and superior to the royal prerogative.¹⁵⁹

Since the seventeenth century, courts have continually taken it for granted that charitable uses of property are lawful and shall be enforced according to the intentions of the donor absent fraud or other violation of fundamental law. And no further attempts have been made at the state or national level to infringe the right to give alms to those in need until very recently.

In the 1980s, a new challenge emerged to the right of charitable uses, as local governments in America began enacting ordinances to prohibit public sharing of food with those in need.¹⁶⁰ In the last decade, several more municipal governments have enacted ordinances making it difficult to serve food and provide

¹⁵⁵ Statutes of the Realm 1225, 43 Eliz. c. 4, (Eng.).

¹⁵⁶ *Id.*

¹⁵⁷ 2 BLACKSTONE, *supra* note 37, at *375-76.

¹⁵⁸ *See generally* PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? (2014).

¹⁵⁹ 6 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 163-273 2d ed. 1966); *The English Bill of Rights 1689*, in THE AMERICAN REPUBLIC: PRIMARY SOURCES 106-09 (Bruce Frohnen, ed. 2002); HOGUE, *supra* note 141, at 243-47; THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 58-60 (2d ed. 1936); A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 3-14 (8th ed. 1915).

¹⁶⁰ González, *supra* note 7, at 295.

other alms to homeless persons in public spaces. A report written in 2014 documented ordinances that were either then recently enacted or proposed for enactment in the period from 2012 to 2014.¹⁶¹ The ordinances included permitting requirements, limitations on the numbers of people sharing food, temporary suspensions, labeling requirements, and outright prohibitions.¹⁶² These types of ordinances are often justified on grounds of health, safety and welfare, and they may be constitutionally valid as applied in certain cases.¹⁶³ But, like mortmain statutes and prohibitions against giving promiscuous alms, which also were framed in neutral terms, these laws are incongruous with the whole corpus of Anglo-American law, in which the right of charitable uses has played a central role.

¹⁶¹ See NAT'L COAL. FOR THE HOMELESS, SHARE NO MORE: THE CRIMINALIZATION OF EFFORTS TO FEED PEOPLE IN NEED (Michael Stoops ed., 2014).

¹⁶² *Id.* at 8-19.

¹⁶³ Bullhead City's ordinance contains a "Findings and Purpose" statement, which reads,

Outdoor food sharing events take place frequently in public parks. A number of the people served are homeless, but many are also people with very limited economic means who are not homeless but whom are able to avoid homelessness in part by accessing food from these events. Private persons and organizations have engaged in the distribution of prepared foods to those in need without having to obtain permits or operate under regulations that control the manner in which food is prepared, stored, transported, or served. City departments have been repeatedly called to address public nuisance and other illegal behavior, clean-up human waste, litter, trash and other debris left over from the food sharing events. These activities have resulted in a deterioration of the condition of public property and negatively affect use of parks by other patrons. The purpose of this chapter is to protect public health, safety and welfare by requiring all persons or organizations that sponsor, promote or engage in food sharing events at public parks to obtain a permit issued by the city prior to engaging in such activity, and requiring compliance with applicable Mohave County health regulations regarding food preparation and distribution; to accommodate competing interests and uses for park space and to ensure that events taking place in public parks are consistent with the intended primary uses of the parks.

BULLHEAD CITY, ARIZ., CODE OF ORDINANCES § 5.36.010 (2021).

B. Instances of the Right in the Common Law

i. The Power to Dispose One's Property for Charitable Ends

The power to give, devise, and bequeath one's property for charitable ends is one of the most fundamental rights in all of property law. Defects that would make other bequests, devises, and gifts invalid, such as an indefinite purpose, unascertained beneficiaries, or a violation of the Rule Against Perpetuities, do not defeat donations made for charitable purposes.¹⁶⁴ If the purpose or intended beneficiaries are ambiguous or indefinite, or if the testator or trustee fails to carry out the charitable purpose, then courts have the power to ascertain the benefactor's charitable intention and to construe the gift to accomplish as much of that intention as is possible, even in states that have not conferred on their courts a general *cy pres* power.¹⁶⁵ Also, charitable conveyances are

¹⁶⁴ *Russell v. Allen*, 107 U.S. 163, 167 (1883).

¹⁶⁵ RESTATEMENT (SECOND) OF TRUSTS § 399 (AM. L. INST. 1959); See Robert A. Lundrigan, *The Cy-Pres Doctrine: Bequest to a Non-Existing Charity—Whether the Rule against Perpetuities Applies—Vesting—Re Brier*, 1 ALTA L. REV. 598 (1961); *Mastin v. First Nat. Bank of Mobile, Inc.*, 177 So.2d 808, 813-14 (Ala. 1965); *Biscoe v. Thweatt*, 86 S.W. 432, 433-34 (Ark. 1905); *Bakos v. Kryder*, 543 S.W.2d 216, 218-19 (Ark. 1976); *in re McKenzie's Est.*, 227 Cal. App. 2d 167, 169-70 (Cal. Ct. App. 1964); *Smith v. U.S. Nat'l Bank of Denver*, 207 P.2d 1194, 1199-1201 (Colo. 1949); *Bridgeport-City Tr. Co. v. Bridgeport Hosp.*, 179 A. 92, 94-95 (Conn. 1935); *Union Methodist Episcopal Church v. Equitable Tr. Co.*, 83 A.2d 111, 114-15, 117 (Del. Ch. 1951); *Christian Herald Ass'n v. First Nat'l Bank of Tampa*, 40 So. 2d 563, 568 (Fla. 1949); *Trammell v. Elliot*, 199 S.E.2d 194, 198-99 (Ga. 1973); *in re Elizabeth J.K.L. Lucas Charitable Gift*, 261 P.3d 800, 806-13 (Haw. Ct. App. 2011); *in re Eggan's Est.*, 386 P.2d 563, 569-71 (Idaho 1963); *Cont'l Ill. Nat'l Bank & Tr. Co. v. Harris*, 194 N.E. 250, 255 (Ill. 1934); *Quinn v. Peoples Tr. & Sav. Co.*, 60 N.E.2d 281, 285-86 (Ind. 1945); *in re Tr. of Rothrock*, 452 N.W.2d 403, 405-06 (Iowa 1990); *Kasey v. Fid. Tr. Co.*, 115 S.W. 739, 741-42 (Ky. Ct. App. 1909); *in re Succession of Milne*, 89 So.2d 281, 286-88 (La. 1956); *Petition of Pierce*, 136 A.2d 510, 515-21 (Me. 1957); *Nat'l Soc'y of Daughters of Am. Revol'n v. Goodman*, 736 A.2d 1205, 1210 (Md. Ct. Spec. App. 1999); *Wesley United Methodist Church v. Harvard Coll.*, 316 N.E.2d 620, 623-24 (Mass. 1974); *Gifford v. First Nat'l Bank of Menominee*, 280 N.W. 108, 113 (Mich. 1938); *in re Ruth Easton Fund*, 680 N.W.2d 541, 549-50 (Minn. Ct. App. 2004); *Lenoir v. Anderson*, 12 So. 3d 589, 595 (Miss. Ct. App. 2009); *Obermeyer v. Bank of Am., N.A.*, 140 S.W.3d 18, 22-27 (Mo. 2004); *Epperly v. Mercantile Tr. & Sav. Bank of Quincy, Ill.*, 415 S.W.2d 819, 821-23 (Mo. 1967); *in re Last Will and Testament of Teeters*, 288 N.W.2d 735, 738 (Neb. 1980); *Sch. Dist. No. 70, Red Willow Cnty. v. Wood*, 13 N.W.2d 153, 157-59 (Neb. 1944); *in re Certain Scholarship Funds*, 575 A.2d 1325, 1328-30 (N.H. 1990); *Howard Sav. Inst. of Newark, N.J. v. Peep*, 170 A.2d 39, 42-48 (N.J. 1961); *in re MacDowell's Will*, 112 N.E. 177, 180 (N.Y. 1916); *Young Women's Christian Ass'n of Asheville, N.C., Inc. v. Morgan*, 189 S.E.2d 169, 171-72 (N.C. 1972); *Dalioia v. Franciscan*

interpreted to avoid the Rule Against Perpetuities, and successions of interest between two or more charities and conveyances to charitable trusts are entirely exempt from the Rule.¹⁶⁶ Other rules

Health Sys. of Cent. Ohio, Inc., 679 N.E.2d 1084, 1091-93 (Ohio 1997); *in re Shaw's Est.*, 620 P.2d 483, 485 (Okla. Civ. App. 1980); Good Samaritan Hosp. & Med. Ctr. v. U.S. Nat'l Bank, 425 P.2d 541, 543 (Or. 1967); *in re Farrow*, 602 A.2d 1346 (Pa. Super. Ct. 1992); *in re Women's Homeopathic Hosp. in Phila.*, 142 A.2d 292, 294-95 (Pa. 1958); R.I. Hosp. Tr. Co. v. Williams, 148 A. 189, 191-92 (R.I. 1929); Colin McK. Grant Home v. Medlock, 349 S.E.2d 655, 658 (S.C. Ct. App. 1986); Furman Univ. v. McLeod, 120 S.E.2d 865, 872-73 (S.C. 1961); Hardin v. Indep. Ord. of Odd Fellows of Tenn., 370 S.W.2d 844, 849 (Tenn. Ct. App. 1963); Henshaw v. Flenniken, 191 S.W.2d 541, 544-46 (Tenn. 1945); Rice v. Morris, 541 S.W.2d 627, 632 (Tex. Civ. App. 1976); *in re Gerber*, 652 P.2d 937, 939-40 (Utah 1982); *in re Leonard's Est.*, 318 A.2d 179 (Vt. 1974); *in re Booker*, 682 P.2d 320, 324-25 (Wash. Ct. App. 1984); Puget Sound Nat'l Bank of Tacoma v. Easterday, 350 P.2d 444, 449-52 (Wash. 1960); Stockert v. Council of World Serv. & Fin. of Methodist Church, 427 S.E.2d 236, 237 (W. Va. 1993); *in re Bletsch's Est.*, 130 N.W.2d 275, 277-78 (Wis. 1964).

¹⁶⁶ JOHN CHIPMAN GRAY, THE RULE AGAINST PERPETUITIES 476 (3d ed. 1915); *See Ould v. Wash. Hosp. for Foundlings*, 95 U.S. 303 (1877); *Tumlin v. Troy Bank & Tr. Co.*, 61 So.2d 817, 824 (Ala. 1950); *Mastin v. First Nat. Bank of Mobile, Inc.*, 177 So.2d 808, 815 (Ala. 1965); *Lowell v. Lowell*, 240 P. 280, 283-84 (Ariz. 1925); *Est. of Hinckley*, 58 Cal. 457, 472-76 (Cal. 1881); *in re Schleier's Est.*, 13 P.2d 273, 274-75 (Colo. 1932); *Hartford Nat'l Bank & Tr. Co. v. Redev't Agency of City of Bristol*, 321 A.2d 469, 472-73 (Conn. 1973); *Girard Tr. Co. v. Rector, Wardens & Vestrymen of St. Anne's Protestant Episcopal Church*, 52 A.2d 591, 596-98 (Del. Ch. 1947); *Miller v. Flowers*, 27 So.2d 667, 669-70 (Fla. 1946); *Atlanta Dev. Auth. v. Clark Atlanta Univ., Inc.*, 784 S.E.2d 353, 356-57 (Ga. 2016); *in re Est. of Kirk*, 907 P.2d 794, 805-06 (Idaho 1995) (providing the same exemption from statutory rule against suspension of alienability, which replaced the common-law rule against perpetuities); *Skinner v. N. Tr. Co.*, 123 N.E. 289, 290 (Ill. 1919); *Quinn v. Peoples Tr. & Sav. Co.*, 60 N.E.2d 281, 287 (Ind. 1945) (exempting charitable uses from rule against unlawful accumulations, rule against perpetuities, and rule against restraints upon alienation); *in re Small's Est.*, 58 N.W.2d 477, 484-85 (Iowa 1953) (exempting from rule against perpetuities); *Com. Nat'l Bank of Kan. City v. Martin*, 340 P.2d 899, 904 (Kan. 1959); *Kasey v. Fid. Tr. Co.*, 115 S.W. 739, 742 (Ky. Ct. App. 1909); *City of Belfast v. Goodwill Farm*, 103 A.2d 517, 521 (Me. 1954); *Gordon v. City of Balt.*, 267 A.2d 98, 109 (Md. App. Ct. 1970); *Frazier v. Merch.'s Nat'l Bank of Salem*, 5 N.E.2d 550, 551 (Mass. 1936); *Penny v. Croul*, 43 N.W. 649, 652 (Mich. 1889); *Epperly v. Mercantile Tr. & Sav. Bank of Quincy, Ill.*, 415 S.W.2d 819, 823-24 (Mo. 1967); *in re Swayze's Est.*, 191 P.2d 322, 325-26 (Mont. 1948); *State ex rel. Brennan v. Bowman*, 503 P.2d 454, 456-57 (Nev. 1972); *Smart v. Town of Durham*, 86 A. 821, 823 (N.H. 1913); *Litcher v. Tr. Co. of N.J.*, 93 A.2d 368, 377 (N.J. 1952); *in re Rolston's Will*, 253 N.Y.S.2d 614, 618 (N.Y. Surr. Ct. 1964); *in re MacDowell's Will*, 112 N.E. 177, 178 (N.Y. 1916); *Z. Smith Reynolds Found. v. Tr. of Wake Forest Coll.*, 42 S.E.2d 910, 918 (N.C. 1947); *Hagen v. Sacrison*, 123 N.W. 518, 522 (N.D. 1909); *Siltstone Servs., LLC v. Guernsey Cnty. Cmty. Dev. Corp.*, 161 N.E.3d 778, 791 (Ohio Ct. App. 2020); *Rice v. Stanley*, 327 N.E.2d 774, 780 (Ohio 1975); *Phillips v. Chambers*, 51 P.2d 303, 310 (Okla. 1935); *Good Samaritan Hosp. & Med. Ctr. v. U.S. Nat'l Bank*, 425 P.2d 541, 543 (Or. 1967); *in re Scholler's Est.*, 169 A.2d 554, 558 (Pa. 1961); *R.I. Hosp. Tr. Co. v. Benedict*, 103 A. 146,

prohibiting restraints on alienation have also been held to not apply to conveyances for charitable uses.¹⁶⁷

The right of charitable uses is strong because judges have a categorical duty to find a way to render a charitable use valid if at all possible.¹⁶⁸ As the Massachusetts high court described the rule:

[G]ifts to charitable uses are highly favored, and will be most liberally construed in order to accomplish the intent and purpose of the donor; and trusts which cannot be upheld in ordinary cases, for various reasons, will be established and carried into effect when created to support a gift to a charitable use.¹⁶⁹

In other words, because the right to use one's property charitably is both fundamental and equitable, courts have an obligation to uphold the validity of a gift or charitable donation

150 (R.I. 1918); *in re Geppert's Est.*, 59 N.W.2d 727, 730 (S.D. 1953); *Buchanan v. Willis*, 255 S.W.2d 8, 11 (Tenn. 1953); *Rice v. Morris*, 541 S.W.2d 627, 633 (Tex. Civ. App. 1976); *Boyd v. Frost Nat'l Bank*, 196 S.W.2d 497, 505 (Tex. 1946); *Staines v. Burton*, 53 P. 1015, 1015 (Utah 1898); *Jones v. Vt. Asbestos Corp.*, 182 A. 291, 296 (Vt. 1936); *Maguire v. Loyd*, 67 S.E.2d 885, 893 (Va. 1951); *in re Booker*, 682 P.2d 320, 324 (Wash. Ct. App. 1984); *in re Galland's Est.*, 173 P. 740, 741-42 (Wash. 1918); *United Bank, Inc. v. Blosser*, 624 S.E.2d 815, 823 (W. Va. 2005); *White v. Keller*, 68 F. 796, 801 (5th Cir. 1895); *Lancaster v. Merchs. Nat'l Bank of Fort Smith, Ark.*, 961 F.2d 713, 716 (8th Cir. 1992); *in re Roman Cath. Archbishop of Portland in Or.*, 345 B.R. 686, 694 (Bankr. D. Or. 2006). Several states have now codified these rules by statute, in whole or part. *See* ALA. CODE § 35-4A-5(6); ALASKA STAT. § 34.27.100; ARIZ. REV. STAT. ANN. §14-2904(5); CAL. PROB. CODE §21225(e); COLO. REV. STAT. §15-11-1105; CONN. GEN. STAT. § 45a-514; DEL. CODE ANN. tit. 25, § 503(b)(1); FLA. STAT. § 689.225(5)(e); GA. CODE ANN. § 44-6-204(5); IND. CODE § 23-10-2-11; KAN. STAT. ANN. § 59-3404; MD. CODE ANN., EST. & TRUSTS § 11-102(b)(5) (West); MINN. STAT. § 501B.31; NEB. REV. STAT. § 76-2005; NEV. REV. STAT. § 111.1037; N.J. STAT. ANN. § 46:2F-10; N.M. STAT. ANN. § 45-2-904(A)(5); N.C. GEN. STAT. § 41-18; N.D. CENT. CODE § 47-02-27.4; OKLA. STAT. tit. 60, § 175.47; OR. REV. STAT. § 105.965; 20 PA. STAT. CONS. STAT. § 6104; S.C. CODE ANN. § 27-6-50; S.D. CODIFIED LAWS § 43-5-7; S.D. Codified Laws § 55-9-2; TENN. CODE ANN. § 35-13-108; TEX. PROP. CODE ANN. § 112.036(a) (West); UTAH CODE ANN. § 75-2-1206(5); VA. CODE ANN. § 55.1-127; W. VA. CODE § 36-1A-4(5); WIS. STAT. § 701.0413.

¹⁶⁷ *Girl Scouts of S. Ill. v. Vincennes Ind. Girls, Inc.*, 988 N.E.2d 250, 256-57 (Ind. 2013) (ruling that charitable uses are exempt from the rule against restraints on alienation); *in re Coe Coll.*, 935 N.W.2d 581, 586-91 (Iowa 2019) (ruling that charitable uses are exempt from the rule against restraints on alienation).

¹⁶⁸ *McCarroll v. Grand Lodge, I.O.O.F.*, 243 S.W. 870, 873-74 (Ark. 1922).

¹⁶⁹ *Jackson v. Phillips*, 96 Mass. 539, 550 (1867).

unless the only reasonable interpretation of both the applicable law and the instrument of donation would render the gift unlawful.¹⁷⁰

Practically speaking, the power and liberty to make charitable dispositions are immunized first by the interpretive canon that a law should not be understood to prevent a charitable act. A charitable use is lawful and “there is no authority to construe it to be void, if by law it can possibly be made good.”¹⁷¹ This well-established canon is entailed in the strong presumption that all charitable uses of property are legal and valid.

The presumption entails another canon too, that the donor’s intention should be interpreted as charitable, even where the evidence conflicts, or the donor acted with mixed motivations. “A gift dictated by a general benevolent purpose is to be liberally construed and, if reasonably possible, upheld as a valid charity.”¹⁷² So, a mixed testamentary purpose that includes a charitable purpose is deemed to be charitable where, for example, a charitable use is entitled to more favorable treatment under state law than other uses.¹⁷³ The First Restatement summarized the common-law rule: “Even if the motive of the testator in disposing of his property is to spite his heirs, the trust is none the less a charitable trust if the purposes are charitable.”¹⁷⁴ Common law and equity presume the best about property owners, rather than the worst, and strongly support the right to make charitable uses of one’s property.¹⁷⁵

¹⁷⁰ This duty and power of a court to make a charitable donation effective to the extent possible is sometimes referred to as “judicial cy pres,” in contrast to the executive or prerogative power of cy pres. See *Lowery v. Jones*, 611 S.W.2d 759, 761 (Ark. 1981) (“Judicial cy pres, as opposed to prerogative cy pres, has long been recognized and applied in Arkansas.”); *Puget Sound Nat’l Bank of Tacoma v. Easterday*, 350 P.2d 444, 449-50 (Wash. 1960); *In re Bletsch’s Est.*, 130 N.W.2d 275, 278 (Wis. 1964).

¹⁷¹ *Sorresby v. Hollins* (1740), 88 Eng. Rep. 410, 411 (Ch.).

¹⁷² *Bowditch v. Att’y Gen.*, 134 N.E. 796, 800 (Mass. 1922).

¹⁷³ *Santa Fe Lodge No. 460, B.P.O.E., v. Emp. Sec. Comm’n*, 159 P.2d 312, 314-15 (N.M. 1945); *Rice v. Morris*, 541 S.W.2d 627, 631-32 (Tex. Civ. App. 1976); *United Bank, Inc. v. Blosser*, 624 S.E.2d 815, 822-23 (W. Va. 2005).

¹⁷⁴ RESTATEMENT (FIRST) OF TRUSTS § 368 cmt. d (1935).

¹⁷⁵ MACLEOD, *supra* note 87, at 122-45.

ii. Almsgiving and Poor Relief

Since the Statute of Elizabeth in 1601, both law and equity have with almost no qualifications secured the right to make charitable gifts to the poor.¹⁷⁶ Like the First (at least some of its clauses), Second, Fifth, Ninth, and Fourteenth Amendments to the Constitution of the United States, the Charitable Uses Act 1601 did not create a new right; it codified a pre-existing right.¹⁷⁷ The Act did not purport to list all charitable uses of property exhaustively. Nor do courts read it that way. Instead, lawyers and jurists universally understand the Act to be in substance declaratory and illustrative of typical uses that are charitable in law and equity, enforceable in Chancery before the Act and in courts of law and equity in the centuries since.¹⁷⁸

New charitable uses are discerned by analogy to those listed in the statute.¹⁷⁹ The Act is “the principal test and evidence of what are in law charitable uses.”¹⁸⁰ But the Act’s list of charitable uses is accepted in law not because the statute is deemed binding but rather “by common usage and constitutional recognition; and not only these, but the more extensive range of charitable uses which chancery supported before that statute and beyond it.”¹⁸¹ Thus “any purpose is charitable in the legal sense of the word, which is within the principle and reason of this statute, although not expressly named in it.”¹⁸² So a general gift to poor people, “though not falling within any of the descriptions of poor in the statute, is a good charitable gift.”¹⁸³

In the centuries since, the charitable right has universally been interpreted as securing a right to give to the poor. The High Court of Chancery re-affirmed the right to make charitable donations to the poor in the landmark case *Sorresby v. Hollins*,

¹⁷⁶ Compare Oliver A. Houck, *With Charity for All*, 93 YALE L.J. 1415, 1422-25 (1984), with Gustafsson, *supra* note 14, at 605-18.

¹⁷⁷ See *State Rifle & Pistol Ass’n, Inc. v. Bruen*, 597 U.S. 1, 20 (2022).

¹⁷⁸ *Vidal v. Girard’s Ex’rs*, 43 U.S. 127, 195 (1844) (quoting Att’y Gen. v. Mayor of Dublin, 1 Bligh R. 312, 347 (1827)).

¹⁷⁹ RESTATEMENT (FIRST) OF TRUSTS § 368 cmt. a (AM. L. INST. 1935); *Alden v. Lewis*, 182 So. 2d 600, 605 (Miss. 1966).

¹⁸⁰ *Jackson v. Phillips*, 96 Mass. 539, 551 (1867).

¹⁸¹ *Vidal*, 43 U.S. at 192 (quoting *Zimmerman v. Andres* (January term, Pa. 1844)).

¹⁸² *Jackson*, 96 Mass. at 551.

¹⁸³ *Id.*

ruling that the right determines the interpretation even of such fundamental laws as statutes against mortmain and perpetuities.¹⁸⁴ In his will, John Naylor directed his executors to make annual payments out of his estate “among the poor and indigent people of Leeke.”¹⁸⁵ He directed that the payments be made by a trust of lands in his estate or by other means.¹⁸⁶ The canon that a judge must validate a charitable devise or bequest “if by law it can possibly be made good” constrained the Chancellor to interpret the statutes against mortmain and perpetuities narrowly to prohibit only perpetual future interests in land.¹⁸⁷ As long as the charitable uses could be satisfied by personalty and would not tie up the land perpetually, the gift had to be sustained.¹⁸⁸

IV. CHARITY IN AMERICAN LAW

A. *Early Colonies to the American Founding*

From the earliest settlements in Jamestown and Plymouth through the present day, American civic and religious leaders and authors have emphasized the importance of helping those in need. Indeed, before he even stepped foot in America, John Winthrop preached a sermon aboard the *Arbella* entitled “Christian Charity: A Model Hereof” (1630), wherein he reminded his fellow Puritans that relations between the rich and the poor must be governed by the rules of “justice and mercy.” Notably, he specifically encouraged his fellow believers to “deale thy bread to the hungry and to bring the poore wander into thy house, when thou seest the naked to cover them . . .”¹⁸⁹

Similarly, in 1742 Nathaniel Appleton exhorted his Boston congregation to consider the righteous man who is “feeding the Hungry, cloathing the Naked, relieving the Distressed, instructing

¹⁸⁴ *Sorresby v. Hollins* (1740), 88 Eng. Rep. 410, 410 (Ch.).

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 410-11.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* See *Porter’s Case* (1592), 76 Eng. Rep. 36 (Exch.).

¹⁸⁹ JOHN WINTHROP, *A Modell of Christian Charitie*, in *THE SACRED RIGHTS OF CONSCIENCE: SELECTED READINGS ON RELIGIOUS LIBERTY AND CHURCH-STATE RELATIONS IN THE AMERICAN FOUNDING* 123-24, 126 (Daniel L. Dreisbach and Mark David Hall eds., 2009) (1630).

the Ignorant, setting them to rights that are out of the Way, sympathizing with all according to their Circumstances, weeping with them that weep, and rejoicing with them that rejoice, and studying the Things that make for Peace”¹⁹⁰ Almost a half century later, Thomas Reece, a Presbyterian minister from South Carolina, encouraged his parishioners in 1788 to be:

conformed to the temper, governed by the precepts, and influenced by the example of the benevolent Jesus, will, like the good Samaritan, pour balm even into the wounds of an enemy; will feed him when hungry, cloath him when naked, return him good for evil, and blessing for cursing. In a word, that unbounded benevolence which Christianity requires, necessarily leads to the performance of all the duties of charity, hospitality, gratitude, mercy and compassion, which we have shown human laws cannot enforce, and which are nevertheless necessary to the peace and happiness of civil government.¹⁹¹

In a 1790 sermon entitled “Disinterested love, the ornament of the Christian, and the duty of man” the Reverend Samuel Austin observed that the benevolent Christian’s:

hand will be open to relieve the distressed. The hungry, the naked, the widow and the orphan; the family of sickness and affliction, will be the objects of his tenderness and charity. He will sympathize with them under their affliction, and it will afford him solid satisfaction to contribute to their relief.”¹⁹²

It is important to recognize that for Rev. Austin, having disinterested love for the “least of these”¹⁹³ is not just a good idea, it is “the foundation of the Christian character, and absolutely binding on all mankind.”¹⁹⁴ In other words, loving one’s neighbor is a duty.

¹⁹⁰ NATHANIEL APPLETON, THE CLEAREST AND SUREST MARKS OF OUR BEING SO LED BY THE SPIRIT OF GOD, AS TO DEMONSTRATE THAT WE ARE THE CHILDREN OF GOD. SET FORTH IN SEVERAL DISCOURSES FROM ROMANS VIII 184 (1743).

¹⁹¹ THOMAS REECE, AN ESSAY ON THE INFLUENCE OF RELIGION, IN CIVIL SOCIETY 45 (1788).

¹⁹² SAMUEL AUSTIN, DISINTERESTED LOVE, THE ORNAMENT OF THE CHRISTIAN, AND THE DUTY OF MAN 11 (1791).

¹⁹³ *Matthew* 25:45.

¹⁹⁴ *Id.* at 14.

Charles Chauncy, the famous Congregational minister in Boston, similarly preached about “the great stress [the Lord] has laid upon the duty of charity, in the new-testament-writings. Of all the duties we owe to our neighbour, there is no one, perhaps, in the whole system of christian morality, that is more particularly, frequently, and pressingly urged upon us.”¹⁹⁵ By charity, he meant love, and he was quite clear that love of neighbor must manifest itself in concrete ways. Notably, he highlighted the importance of feeding the hungry and referenced the passage quoted above from the Gospel of Matthew multiple times—including as the epigraph for the sermon.¹⁹⁶

Admonitions to do charity and, specifically, to feed the hungry were not limited to sermons. In a 1741 charge to a grand jury, Samuel Chew, a judge in Delaware, observed that “DOING Good for Evil, Loving our Enemies, and Praying for those that persecute and calumniate us, are, no doubt, Christian Duties: So are Cloathing the Naked and Feeding the Hungry.”¹⁹⁷ In 1753, Benjamin Franklin and D. Hall printed *The American instructor: or, Young man’s best companion*, a compilation advice for young men which included the following admonition from an unnamed “Gentleman in Virginia”:

THE most acceptable Service we can render to GOD is Beneficence to *Man*. There are three Ways of benefiting our Fellow Creatures. We may be useful to their Souls by good Instruction, and good Example: We may be helpful to their Bodies, by feeding the Hungry, cloathing the Naked, and prescribing easy Remedies to the Sick: We can aid them in their Fortunes, by encouraging of Industry, by relieving the Distressed, and doing all the kind Offices we are able to our Neighbours. These are the several Ways of improving the

¹⁹⁵ CHARLES CHAUNCY, CHARITY TO THE DISTRESSED MEMBERS OF CHRIST ACCEPTED AS DONE TO HIMSELF, AND REWARDED, AT THE JUDGEMENT-DAY, WITH BLESSEDNESS IN GOD’S EVERLASTING KINGDOM 15-16 (1757).

¹⁹⁶ See *id.* at 15-16, 19; see also AUSTIN, *supra* note 192, at 14.

¹⁹⁷ SAMUEL CHEW, THE SPEECH OF SAMUEL CHEW, ESQ; CHIEF JUSTICE OF THE GOVERNMENT OF NEW-CASTLE, KENT AND SUSSEX UPON DELAWARE: DELIVERED FROM THE BENCH TO THE GRAND-JURY OF THE COUNTY OF NEW-CASTLE, NOV. 21. 1741 13 (1741).

Talents our Maker has entrusted us with; and we must every one expect hereafter to give an Account how we have employed them.¹⁹⁸

A year later, Franklin compiled documents encouraging citizens to support “the Pennsylvania Hospital.” In his collection, he reproduced several anonymously authored articles from the *Pennsylvania Gazette*, one of which included the admonition that to “visit the Sick, to feed the Hungry, to clothe the Naked, and comfort the Afflicted, are the inseparable Duties of a christian life.”¹⁹⁹

Francis Hopkinson, a signer of the Declaration of Independence, member of Pennsylvania’s convention that ratified the Constitution, and the first federal judge of the Eastern District Court of Pennsylvania, penned a poem that included the following lines:

How fair is charity, celestial maid!
And this is charity sincere indeed,
To see our foes with tend’rest care repaid,
To cloth the naked and the hungry feed.²⁰⁰

Examples of ministers, educators, and civic leaders in early America admonishing their readers and hearers to be charitable could be multiplied almost indefinitely.²⁰¹ In the seventeenth and eighteenth centuries, this duty was almost always connected to a commitment to Christianity and was rooted in the Hebrew Scriptures and the New Testament. It is important to recognize this connection if one is to understand that acts of charity weren’t

¹⁹⁸ GEORGE FISHER, *THE AMERICAN INSTRUCTOR: OR, YOUNG MAN’S BEST COMPANION* 344 (1753).

¹⁹⁹ *To the Managers of the Pennsylvania Hospital* in BENJAMIN FRANKLIN, *SOME ACCOUNT OF THE PENNSYLVANIA HOSPITAL; FROM ITS FIRST RISE, TO THE BEGINNING OF THE FIFTH MONTH, CALLED MAY, 1754* 20 (1754).

²⁰⁰ FRANCIS HOPKINSON, *THE MISCELLANEOUS ESSAYS AND OCCASIONAL WRITINGS OF FRANCIS HOPKINSON* 127 (1792).

²⁰¹ This is particularly true after advances in printing led to an explosion of newspapers, magazines, and books in the nineteenth century. Instead of recounting such admonitions, our focus after 1800 is on concrete acts of charity by individuals and organizations.

simply viewed as a nice thing to do—engaging in them was viewed as a divinely ordained duty.²⁰²

America’s founders believed that there was a reciprocal connection between duties and rights.²⁰³ For instance, Article XVI of Virginia’s Declaration of Rights (1776) reads:

That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed by reason and conviction, not by force or violence; and therefore all men are equally entitled to the free exercise of religion, according to the dictates of conscience; and that it is the mutual duty of all to practice Christian forbearance, love, and charity towards each other.²⁰⁴

For George Mason, primary drafter of Virginia’s Declaration of Rights, as for many founders, the right to freely exercise one’s faith was grounded in the duty which men and women owe to the Deity. Note too that he described “charity” as a “duty.”

The reciprocal relationship between duties and rights is evident as well in the Massachusetts Constitution of 1780, which was drafted by John Adams. Article II of the constitution proclaims that:

It is the right as well as the duty of all men in society, publicly, and at stated seasons, to worship the Supreme Being, the great Creator and Preserver of the universe. And no subject shall be hurt, molested, or restrained, in his person, liberty, or estate, for worshiping God in the manner and season most agreeable to the dictates of his own conscience, or for his religious profession of sentiments, provided he doth not disturb the public peace, or obstruct others in their religious worship.²⁰⁵

²⁰² Our argument is *not* that all citizens regularly acted upon this duty. If they did, it would not have been necessary for colonies and states to pass the laws discussed in the first paragraph of the next section.

²⁰³ See Paul Grimley Kuntz, *Thomas Jefferson on Rights and Duties*, THE IMAGINATIVE CONSERVATIVE (Oct. 1, 2017), <https://theimaginativeconservative.org/2017/10/thomas-jefferson-rights-duties-paul-kuntz-timeless.html> [<https://perma.cc/889U-PELW>].

²⁰⁴ DREISBACH & HALL, *supra* note 189, at 241.

²⁰⁵ *Id.* at 246.

The same constitution stipulates that “. . . it shall be the duty of legislatures and magistrates, in all future periods of this commonwealth . . . [to support schools that] . . . inculcate the principles of humanity and general benevolence, *public and private charity*, industry and frugality, honesty and punctuality in their dealings; sincerity, good humor, and all social affections, and generous sentiments among the people [emphasis added].”²⁰⁶

A little more than a decade after the Massachusetts constitution was ratified, Nathaniel Chipman, a United States District Court judge, observed in his book, *Sketches of the Principles of Government* that:

If man be by nature a social being, it is an obvious conclusion, that it is his duty to forbear to injure the society, of which he is a member; and that the violation of this duty is a violation of the laws of his nature. It may here, perhaps, be thought sufficient to say, that rights and duties are reciprocal; every society must have a right corresponding with the duty of the individual; if the individual violate his duty to the society, the society have clearly a right to take satisfaction.²⁰⁷

The protection of rights was of great concern to America’s founders, and so most states crafted bills of rights when they revised their constitutions after independence. The authors of the federal constitution did not include one because, according to the Federalists, it was not needed, as the document strictly enumerated the powers of the national government. Anti-Federalists were not convinced, and eventually the ten amendments now known as the Bill of Rights were proposed and ratified. These amendments expressly protect the free exercise of religion, among other rights, but do not specify the right to engage in charitable acts.²⁰⁸ Why? Simply put, Americans were well aware of instances where colonial and state governments restricted “the free exercise of religion” and other rights but, as we shall see in Section V, they had *no* experience with governments banning acts of charity, generally, or

²⁰⁶ MA. CONST. pt. 2, ch. V, § II (emphasis added).

²⁰⁷ NATHANIEL CHIPMAN, *SKETCHES OF THE PRINCIPLES OF GOVERNMENT* 191 (1793).

²⁰⁸ See *generally* THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS (Neil H. Cogan ed., 1997); MARK DAVID HALL, ROGER SHERMAN AND THE CREATION OF THE AMERICAN REPUBLIC 122-49 (2013).

of feeding the hungry, specifically.²⁰⁹ At least in the American context, such laws and ordinances are of recent origin.²¹⁰

Anti-Federalist suspicions that the national government would not remain within its enumerated powers were confirmed in 1794 after thousands of destitute French citizens, fleeing a rebellion of enslaved people in Haiti, arrived in Maryland. They were fed and otherwise cared for by local residents and the state government. Later, representatives from the state asked Congress to reimburse these expenditures. Members of Congress were sympathetic to the refugees, but James Madison objected that “. . . he could not undertake to lay a finger on that article in the Federal Constitution which granted a right to Congress of expending, on objects of benevolence, the money of their constituents.”²¹¹ According to Barry Riley, several weeks after the initial debate, “[b]enevolence won out over Madison’s view of the constitutional legalities. The majority, while agreeing that Madison was undoubtedly correct in a legal sense, nevertheless felt that the overwhelming sympathy demonstrated by the residents of Baltimore for the three thousand French refugees was honorable and deserving of reimbursement.”²¹² Congress allocated up to \$15,000 to reimburse the expenses.²¹³ In a similar act of generosity, in 1812 Congress passed a bill to send \$50,000 worth of wheat to feed hungry people in Venezuela after the country suffered a

²⁰⁹ MARK DAVID HALL, DID AMERICA HAVE A CHRISTIAN FOUNDING: SEPARATING MODERN MYTH FROM HISTORICAL TRUTH 123-31 (2019); *see generally* THOMAS J. CURRY, THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT (1986).

²¹⁰ *See* González, *supra* note 7, at 295; NAT’L COAL. FOR THE HOMELESS, *supra* note 161.

²¹¹ BARRY RILEY, THE POLITICAL HISTORY OF AMERICAN FOOD AID: AN UNEASY BENEVOLENCE 3 (2022).

²¹² *Id.*

²¹³ *An Act Providing for the Relief of such of the Inhabitants of Saint Domingo, Resident Within the United States, as may be Found in want of Support*, BROWN HAITI COLLECTION INTERNET ARCHIVE REOCR, <https://artflsrv04.uchicago.edu/philologic4.7/haitireocrallpg/navigate/741/1> [<https://perma.cc/5DH4-JQA9>] (last visited Dec. 2, 2024); James Madison, *Santo Domingan Refugees, [10 January] 1794*, NAT’L ARCHIVES: FOUNDERS ONLINE, <https://founders.archives.gov/documents/Madison/01-15-02-0117> [<https://perma.cc/9YJ7-ER9W>] (last visited Dec. 2, 2024). There is no record of who voted for or against the bill in the House of Representatives.

devastating earthquake; the bill was signed into law by President James Madison.²¹⁴

In this article, we focus on charitable acts by individuals and private organizations, not governments. Still, recounting Congress's first foray into food aid is worthwhile for two reasons. First, note that the destitute refugees were initially cared for by local residents who did not know they would be reimbursed for their expenses. They fed the hungry simply because it was the right thing to do. Second, it is telling that enough members of Congress overcame their serious constitutional objections and agreed to appropriate federal funds to assist those in need. As Barry Riley documents in *The Political History of American Food Aid*, Congress sporadically allocated funds to feed hungry people in other countries throughout its history, and after the Second World War it greatly expanded and systematized such assistance.²¹⁵

B. Early Republic to the Present Day

A book-length treatment of American charity, even with a limited focus on feeding the hungry, would not be comprehensive. In the paragraphs that follow we provide a selective account of these matters, one that shows Americans from the early republic to the present day have always been concerned with helping those in need. In the twentieth century, both state and national governments became far more involved in directly helping and even feeding the needy. Government created and funded programs were often motivated by the same concerns that motivated private individuals and institutions, but we do not discuss them here, choosing instead to focus on private individuals and institutions. In some cases, these organizations received funds from governments to help them accomplish their missions, but they nevertheless remain non-governmental organizations.

The nineteenth century saw the formation of literally thousands of organizations aimed at reforming society and alleviating suffering. They were dedicated to benevolent activities such as feeding the hungry, housing orphans, reforming prisons, aiding the mentally challenged, promoting peace, and educating the

²¹⁴ RILEY, *supra* note 211, at 4-5.

²¹⁵ *See generally id.*

uneducated (including women and African Americans). Membership in these organizations often overlapped, and there were so many of them and they were so pervasive that they came to be referred to as the “Benevolent Empire.”²¹⁶

Individuals concerned about poverty in this era often distinguished between the “deserving” and the “undeserving” poor. The former were unable to help themselves—i.e., widows, orphans, and injured adults—whereas the latter were able but unwilling to help themselves. Most Americans were committed to ensuring that no one starved to death, and food, clothing, and fuel were often simply given to the deserving poor. On the other hand, the undeserving poor were often required by local governments to live in workhouses where, as the name implies, they had to work for their sustenance. We are concerned here with aid given to what was then called the deserving poor, not private or public programs aimed at the undeserving poor.²¹⁷

The great French chronicler of American life, Alexis de Tocqueville, who visited America in 1831-32, contrasted the European and American approaches to poverty. He wrote that in Europe “[i]t is the State that has undertaken almost alone to give bread to those who are hungry, relief and a refuge to the sick, work to those without it; it has made itself the almost unique repairer of all miseries.”²¹⁸ In the United States, however, he observed that “I have often seen Americans make great sacrifices for the common good, and I have noticed a hundred cases in which, when help was needed, they hardly ever failed to give each other trusty support.”²¹⁹ Of note, he was particularly impressed by the

²¹⁶ MARK DAVID HALL, PROCLAIM LIBERTY THROUGHOUT ALL THE LAND: HOW CHRISTIANITY HAS ADVANCED FREEDOM AND EQUALITY FOR ALL AMERICANS 93-116 (2023); *see generally* RONALD G. WALTERS, AMERICAN REFORMERS: 1815-1860 (rev. ed. 1997); *see generally* JAMES BREWER STEWART, HOLY WARRIORS: THE ABOLITIONISTS AND AMERICAN SLAVERY (1997); *see generally* LORI D. GINZBERG, WOMEN AND THE WORK OF BENEVOLENCE: MORALITY, POLITICS, AND CLASS IN THE NINETEENTH-CENTURY UNITED STATES (1990).

²¹⁷ *See generally* MARVIN OLASKY, THE TRAGEDY OF AMERICAN COMPASSION (1992); *see generally* MICHAEL B. KATZ, POVERTY AND POLICY IN AMERICAN HISTORY (1983).

²¹⁸ 4 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 1223 (Eduardo Nolla ed., James T. Schleifer trans., 2010).

²¹⁹ ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 512 (George Lawrence, trans. 1966).

numerous private organizations formed by Americans to help those in need.²²⁰

Perhaps the most deserving of the poor were orphans who, through no fault of their own, were unable to support themselves. In *The Tragedy of American Compassion*, Marvin Olasky writes that in the 1830s numerous orphanages were founded to help boys and girls whose parents had died.²²¹ A partial list of cities within which orphanages were started by private groups in this decade include the following: “Albany, Utica, New York City, Brooklyn, Troy, Buffalo, Rochester, . . . Boston, Washington, New Haven, Cincinnati, Providence, Philadelphia, Mobile, Bond Hill (Ohio), and Bangor (Maine).”²²² In the 1840s, additional ones were started in Baltimore, Avondale (Ohio), Richmond, Savannah, Syracuse, Nashville, Natchez, Poughkeepsie, Newark, Watertown (New York), Baton Rouge, Worcester, Chicago, Midway (Kentucky), and Hudson (New York).²²³

A number of charities intended to help the deserving poor were founded and run by women. A few of the many examples of such organizations include the Philadelphia Female Society for the Relief of the Distressed (1795), Society for the Relief and Poor Widows with Small Children (1797), Boston Female Asylum (1800), Female Association for the Relief of Women and Children in Reduced Circumstances (1801), Society for the Relief of Poor Widows (1802), Female Hebrew Benevolent Society (1819), and the Female Orphan Asylum of Fayetteville (1813).²²⁴ Many of these organizations were founded by women from different faith traditions while some were explicitly non-religious.

That literally thousands of institutions dedicated to helping the poor, the weak, and the dispossessed—including feeding the hungry—were founded in 19th century America is contested by no historian of which we are aware. Some academics discount the extent to which their founders were motivated by a sense of duty to

²²⁰ *Id.* at 509-17.

²²¹ OLASKY, *supra* note 217, at 14-15.

²²² *Id.*

²²³ *Id.*

²²⁴ See generally KATHLEEN D. MCCARTHY, AMERICAN CREED: PHILANTHROPY AND THE RISE OF CIVIL SOCIETY, 1700-1865 30-48 (1st ed. 2003); see also GINZBERG, *supra* note 216.

help those in need, positing instead that they founded such institutions as a means of social control.²²⁵ As one of us has argued elsewhere, there are good reasons to question these accounts.²²⁶ Indeed, the primary motivation of men and women involved with these organizations was to help the needy.²²⁷

The Irish potato famine of 1845-49 was caused by a fungus that destroyed 40% of the country's potato crops in 1845 and nearly all the 1846 and 1848 crops.²²⁸ The famine was widely reported in America, and in 1847, bills were introduced in both houses of Congress to provide hundreds of thousands of dollars to assist the starving Irish.²²⁹ Advocates in Congress pointed to the aid provided to Venezuela in 1812 as a precedent, and opponents, like a younger James Madison, objected that Congress did not have the enumerated power to provide such aid.²³⁰ Senator John Crittenden responded to the constitutional argument by observing that:

with the voice of suffering ringing in our ears and this precedent [aid to Venezuela] before me, I lay down all objections at the feet of charity . . . It would be strange if our Constitution was so fashioned and framed as to interdict the exercise of Christian charity by a nation the hearts of whose people prompt them to offer such assistance as is now proposed.²³¹

No one, apparently, was against helping the hungry, but some members of Congress were convinced the national government did not have the power to provide aid. John Fairfield of Maine, for instance, said he would "gladly aid them 'from his own slender means,' but felt impelled by his oath of office to refrain from being generous with money that was not his own."²³² Opponents of federal

²²⁵ See WALTERS, *supra* note 216, at ix-xi.

²²⁶ HALL, *supra* note 216, at 93-116; see generally Mark David Hall, *Beyond Self-Interest: The Political Theory and Practice of Evangelical Women in Antebellum America*, 44 J. CHURCH & STATE 477 (2002).

²²⁷ See generally Hall, *supra* note 226, For further discussion of the literature on nineteenth century benevolent organizations, see *supra* note 216.

²²⁸ See RILEY, *supra* note 211, at 5.

²²⁹ *Id.* at 6.

²³⁰ *Id.*

²³¹ *Id.* at 7.

²³² *Id.*

spending on food aid largely won this debate although Congress agreed that two navy ships, the USS *Jamestown* and the USS *Macedonian*, could “carry privately donated food to famine-afflicted populations in Ireland and Scotland.”²³³ According to Barry Riley, “[c]onsiderable private American assistance was provided, much of it through private Catholic charities. The total amounts of food sent as a result of these efforts is unknown.”²³⁴

Congress again authorized the use of a naval ship to carry private donations of food to Ireland when the country experienced another famine in 1880, and in 1889, Congress appropriated funds to charter a private vessel to take “200,000 bushels of privately financed corn to India.”²³⁵ In 1902, Congress made a similar arrangement to ship “privately donated foodstuffs” to the French West Indies after the islands were struck by a devastating hurricane.²³⁶

Few if any Americans facilitated the feeding of more hungry people in the 20th century than Herbert Hoover, known almost everywhere except the United States as “the Great Humanitarian.”²³⁷ A young, successful engineer living in London when the First World War broke out, Hoover was asked to organize shipments of food to civilians in occupied Belgium (the Germans agreed to permit the food to be imported).²³⁸ To this end, Hoover created the private, nonprofit Commission for Relief in Belgium (CRB).²³⁹ The organization was staffed by “seasoned American businessmen with international experience and academics, all of whom he would convince to participate, full-time, as unpaid

²³³ See RILEY, *supra* note 211, at 8.

²³⁴ *Id.*

²³⁵ *Id.* at 9.

²³⁶ *Id.*

²³⁷ See, e.g., *The Emergence of the Great Humanitarian*, NAT'L PARK SERV. (Jan. 16, 2023), <https://www.nps.gov/articles/emergence-of-the-great-humanitarian.htm> [<https://perma.cc/Z4HZ-7YAG>] (last updated Jan. 16, 2023). Hoover's reputation in America has been tarnished by New Deal historians who painted him as being unconcerned with and inactive in responding to the Great Depression. More recent students of history have begun to reconsider and rehabilitate his reputation in these regards. DAVID M. KENNEDY, *FREEDOM FROM FEAR: THE AMERICAN PEOPLE IN DEPRESSION AND WAR, 1929-1945* (2001).

²³⁸ RILEY, *supra* note 211, at 14-15.

²³⁹ *Id.* at 15.

volunteers.”²⁴⁰ The CRB eventually shipped hundreds of thousands of tons of food to non-combatants.²⁴¹ Private American citizens contributed \$34,500,000 to the effort.²⁴²

After serving his nation directly as head of the U.S. Food Administration in 1917 and 1918, Hoover was named head of the American Relief Administration (ARA), a government organization tasked with feeding hungry Europeans.²⁴³ In 1919, he organized a private organization, the European Children’s Fund, which received donations from governments and private organizations, to purchase food for needy children.²⁴⁴ In 1921, President-elect Warren G. Harding named Hoover as Secretary of Commerce, but he remained head of the now private ARA.²⁴⁵

In 1921-1923, “the worst famine in the history of modern Europe” broke out in the Soviet Union.²⁴⁶ Hoover, initially acting as head of the ARA, immediately organized the establishment of stations to feed children in Russia.²⁴⁷ Over the course of the famine, he oversaw the transportation and distribution of 540,000 tons of food, which at one point sustained 10,000,000 Soviet citizens.²⁴⁸ He initially relied on private donations, but the need for funding was so great that eventually Congress appropriated \$20,000,000 to buy American grain for Soviet citizens.²⁴⁹ The profoundly anti-communist Hoover understood that feeding Soviet men, women, and children could inadvertently prop up the communist regime, but in response to critics, he declared, “Twenty million people are starving. Whatever their politics, they shall be fed.”²⁵⁰

According to Hoover biographer George Nash, between 1914 and 1923 “more than 83,000,000 men, women, and children in more than 20 countries received food allotments for which Hoover and

²⁴⁰ *Id.* at 15.

²⁴¹ *Id.* at 21.

²⁴² *Id.* at 18.

²⁴³ RILEY, *supra* note 211, 24, 46.

²⁴⁴ *Id.* at 55-56.

²⁴⁵ *Id.* at 58.

²⁴⁶ BENJAMIN M. WEISSMAN, *HERBERT HOOVER AND FAMINE RELIEF TO SOVIET RUSSIA: 1921-1923* 198-99 (1974).

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ RILEY, *supra* note 211, at 66-67.

²⁵⁰ KENNETH WHYTE, *HOOVER: AN EXTRAORDINARY LIFE IN EXTRAORDINARY TIMES* 273 (2017).

his associates were at least partially responsible.”²⁵¹ Barry Riley, in his definitive *The Political History of American Food Aid*, writes that “Hoover was, without a doubt, *the* precipitating element—the single most important force causing all the other contributing components to coalesce into American food relief programs that he himself largely created and scrupulously managed.”²⁵² When the world went to war for a second time, now former-president Hoover was first in line to volunteer to feed the hungry.

In 1939, Hoover helped found the National Committee on Food for the Small Democracies, a private organization that proposed to help feed civilians in Finland, Norway, Holland, Belgium, and Central Poland.²⁵³ This time the Allies refused to cooperate, fearing the food would aid the Axis powers.²⁵⁴ But after the war, President Truman appointed Hoover to be the honorary chairman of the Famine Emergency Committee.²⁵⁵ Unwilling to remain on the sidelines, Hoover traveled the world extensively over the next three years to examine famine-stricken countries, explore efforts to feed the hungry, and advocate for public and private efforts to feed those in need.²⁵⁶ Hoover represents, well, on a grand scale, the commitment most Americans have had to feeding the hungry.

After the Second World War, government programs intended to help citizens in need exploded.²⁵⁷ Nevertheless, private citizens and organizations remain actively involved in providing charity to the needy. It is impossible to delineate the innumerable soup kitchens, food pantries, and the like started by local churches, fraternal organizations, and benevolent societies. We can, however, briefly consider large American-based organizations whose missions include feeding the hungry. A very partial list includes CARE , World Vision, Compassion International, Food for the Hungry, Operation Blessing, Feeding America, Feed the Children,

²⁵¹ GARY DEAN BEST, *THE LIFE OF HERBERT HOOVER: KEEPER OF THE TORCH*, 1933-1964 471 (2013).

²⁵² RILEY, *supra* note 211, at 74.

²⁵³ CLOTILDE DRUELLE, *FEEDING OCCUPIED FRANCE DURING WORLD WAR I: HERBERT HOOVER AND THE BLOCKADE* 325-27 (2019).

²⁵⁴ *Id.* at 327.

²⁵⁵ BEST, *supra* note 251, at 189-278.

²⁵⁶ *Id.* at 278-316.

²⁵⁷ OLASKY, *supra* note 217, at 167-183.

City Harvest, Food for the Poor, Share Our Strength, and Midwest Food Bank.²⁵⁸

The largest of these organizations is the aptly named “Feeding America,” which consists of a “network of more than 200 food banks, 21 statewide food bank associations, and over 60,000 partner agencies, food pantries and meal programs has been on the front lines responding to increased demand for food assistance over the past year.”²⁵⁹ In 2023, the organization raised \$4,908,009 in donations.²⁶⁰ This figure include only private donations, not “[g]overnment grants, payments for services and investment returns.”²⁶¹ It includes the value of donated food from large corporations, and the cash gifts provided by more than 750,000 individuals.²⁶²

Forbes’ list of “One Hundred Top Charities” contains other American organizations dedicated, in full or in part, to feeding the hungry, including the following: the Salvation Army, Compassion International, World Vision, Food for the Poor, Feed the Children, Midwest Food Bank, Save the Children Federation, City Harvest, Food Bank of Central and Eastern North Carolina, El Pasoans Fighting Hunger, North Texas Food Bank, San Antonio Food Bank, and Feeding Tampa Bay.²⁶³

²⁵⁸ William P. Barrett, *America’s Top 100 Charities*, FORBES (Dec. 12, 2023, 6:30 AM), <https://www.forbes.com/lists/top-charities/?sh=2591bd255f50> [<https://perma.cc/WN4J-URTH>]. This list does not include organizations such as Bread for the World (1974), which exist primarily to lobby Congress and other governments for greater spending on anti-hunger programs.

²⁵⁹ *Forbes Ranks Feeding America Second Largest Charity in the U.S.*, FEEDING AMERICA (Dec. 17, 2021), <https://www.feedingamerica.org/about-us/press-room/2021-forbes-rank> [<https://perma.cc/R8ZD-XPZ3>].

²⁶⁰ Feeding America Annual Report 2023. Available at: https://www.feedingamerica.org/sites/default/files/2023-12/FA_23AR_EV_F_0.pdf [<https://perma.cc/EY3V-FVDA>] (last accessed January 15, 2025).

²⁶¹ Barrett, *supra* note 258. *America’s Top 100 Charities*, FORBES (Dec. 12, 2023, 6:30 A.M.), <https://www.forbes.com/lists/top-charities/?sh=2591bd255f50> [<https://perma.cc/2R32-52BT>].

²⁶² *Id.*

²⁶³ *Id.*; see also William P. Barrett, *Food Bank Network Ousts United Way As America’s Largest Charity*, FORBES (Dec. 13, 2022, 6:30 AM), <https://www.forbes.com/sites/williambarrett/2022/12/13/food-bank-network-ousts-united-way-as-americas-largest-charity/?sh=2327c6395b1d> [<https://perma.cc/5EB4-HZV9>] [hereinafter *FBN Ousts United Way*]. The list is based on the value of private donations. See also William P. Barrett, *Give Smart: How To Avoid Fake Charities And Compare Real Ones*, FORBES (Dec. 13, 2022, 6:28 AM),

Hungry people in Bullhead City benefit directly from a local branch of one of these large organizations: the Salvation Army.²⁶⁴ Two other foodbanks are active in the city as well—Bullhead City Food Bank (affiliated with Food for Families) and Society of St Vincent de Paul (affiliated with the Arizona Food Bank Network).²⁶⁵ But only organizations feed the hungry; individuals often give food to needy men and women. In Bullhead City, one of these individuals was Norma Thornton, who provided home-cooked food for the needy in a public park by her home.²⁶⁶ She did so regularly until the city enacted an ordinance effectively prohibiting sharing prepared food in public parks “for charitable purposes.”²⁶⁷ Such a restriction is at odds with the long history and tradition of civic authorities protecting and encouraging, rather than prohibiting, charitable acts.

C. American Legislative Protections

It is not possible to prove a negative, but a very extensive survey of early American colonial and state laws reveals no examples of colonies or states banning charitable activities generally, or feeding the hungry, specifically.²⁶⁸ Indeed, to the

<https://www.forbes.com/sites/williambarrett/2022/12/13/give-smart-how-to-avoid-fake-charities-and-compare-real-ones/?sh=6b35d04642fc> [https://perma.cc/HRF6-HVGD].

²⁶⁴ See generally SALVATION ARMY, <https://bullheadcity.salvationarmy.org/> [https://perma.cc/T638-6226] (last visited Aug. 29, 2023).

²⁶⁵ See generally *Bullhead City Food Bank/Food for Families*, ARIZ. FOOD BANK NETWORK, <https://azfoodbanks.org/maps/bullhead-city-food-bank-food-for-families/> [https://perma.cc/Z2JD-XV9Z] (last visited Aug. 29, 2023); see also *Society of St Vincent de Paul: St Margaret Mary's*, ARIZ. FOOD BANK NETWORK, <https://azfoodbanks.org/maps/society-of-st-vincent-de-paul-st-margaret-marys/> [https://perma.cc/TMY3-HUQH] (last visited Aug. 29, 2023).

²⁶⁶ INST. FOR JUST., *supra* note 5.

²⁶⁷ See *Thornton v. Bullhead City*, No. CV-22-08195-PCT-SMB, at *3-9, *14 (D. Ariz. Oct. 25, 2022) (order granting summary judgment for the Defendant).

²⁶⁸ To survey these laws, Mark David Hall skimmed through virtually every volume of John D. Cushing's series of reproductions of early colonial statutes and early state laws. Many of these volumes are cited in the following notes. He also conducted a variety of key word searches of Evans Early American Imprints. See generally *Evans Early American Imprint Collection*, UNIV. OF MICH. LIBR., <https://quod.lib.umich.edu/e/evans> [https://perma.cc/8JQN-LKBB] (last visited Dec. 2, 2024). Colonies and states routinely revised their laws, sometimes adding or deleting them. He may have missed a law prohibiting acts of charity or feeding the hungry, but given the overwhelming consensus that citizens had a duty to engage in such actions, we would be surprised to find a law of

extent to which colonies and early states legislated on these matters, these laws and policies ensured that the poor were housed and fed. For instance, a 1647, Rhode Island stipulated that “[e]ach Towne shall provide carefully for ye relief of ye Poore maintain ye Impotent & to Employ ye able & shall appoint Overseers for ye same purposes.”²⁶⁹ Colonial laws did impose some concrete duties. In May 1636, selectmen of the City of Boston required citizens to obtain the City’s permission before housing strangers from out of town for more than two weeks, the concern being that strangers would flock to Boston and “bec[o]me public charges.”²⁷⁰ This concern for the public fisc arose precisely because colonists “relieved neighbor’s needs rather generously, and without suspicion,” and people in need knew that they could obtain help if they asked.²⁷¹ The colonies contributed to this generosity by abating the taxes or parish dues of those who acted charitably or by making direct payments to families who took the poor into their homes.²⁷²

By the late 18th century, most states had similar but longer poor relief statutes. They usually required local officials, e.g., justices of the peace or selectmen, to ensure that those unable to care for themselves were housed and fed and that able-bodied paupers and vagabonds were put to work.²⁷³

One might assume that government regulation of the economy was lighter in the 18th century than regulation is today, but this was not always the case. For instance, many states had laws regulating the contents and price of bread.²⁷⁴ In Georgia, bakers were required to “mark or imprint each loaf “with the initial letters of his or her name.”²⁷⁵ Bakers who violated these rules would be

this nature in this era (or, indeed, at any time throughout American history until recently).

²⁶⁹ THE EARLIEST ACTS AND LAWS OF THE COLONY OF RHODE ISLAND AND PROVIDENCE PLANTATIONS, 1649-1719 69 (John D. Cushing ed., 1977); *see also* THE EARLIEST LAWS OF THE NEW HAVEN AND CONNECTICUT COLONIES: 1639-1673 131 (John D. Cushing ed., 1977); EARLIEST PRINTED LAWS OF PENNSYLVANIA: 1681-1713 77-80 (John D. Cushing ed., 1978).

²⁷⁰ *See* TRATTNER, *supra* note 25, at 19.

²⁷¹ *Id.*

²⁷² *See id.* at 18.

²⁷³ *See* OLASKY, *supra* note 217, at 13.

²⁷⁴ *See*, for instance, the statutes cited in notes 268 and 271.

²⁷⁵ 1 THE EARLIEST PRINTED LAWS OF THE PROVINCE OF GEORGIA, 1755-1770 38-39 (John D. Cushing ed., 1978).

fined and would have to “forfeit all such bread . . . for the use of the poor of the parish where the offence shall be committed.”²⁷⁶ New Haven Colony had a similar regulation, except that one-third of the bread went to civic officers enforcing the act and two-thirds went to the poor.²⁷⁷

Early Americans of European descent were a very religious, specifically Christian, and even more specifically Protestant, people.²⁷⁸ Many were committed to following biblical admonitions, including the Fourth Commandment: “Remember the Sabbath day, to keep it holy.”²⁷⁹ But colonial officials, from north to south, did not rely on citizens to voluntarily keep the Sabbath; they required them to do so by law.²⁸⁰ Even the tolerant Quakers of Pennsylvania legislated on this subject:

²⁷⁶ *Id.*

²⁷⁷ THE EARLIEST LAWS OF THE NEW HAVEN AND CONNECTICUT COLONIES: 1639-1673, *supra* note 269.

²⁷⁸ See HALL, *supra* note 209, at XXI.

²⁷⁹ Exodus 20:8.

²⁸⁰ Alvin W. Johnson, *Sunday Legislation*, 23 Ky. L.J. 131, 131 (1934).

TO the End that all People within this Province may with the greater Freedom devote themselves to religious and pious Exercises, BE IT ENACTED, &c. That according to the Example of the Primitive Christians, and for the Ease of the Creation, every First Day of the Week, commonly called Sunday, all People shall abstain from Toil and Labour, that whether Masters, Parents, Children, Servants, or others, they may the better dispose themselves to read and hear the Holy Scriptures of Truth at Home, and frequent such Meetings of religious Worship abroad as may best suit their respective Persuasions. And that no Tradesman, Artificer, Workman, Labourer, or other Person whatsoever, shall do or exercise any worldly Business or Work of their ordinary Callings, on the First Day, or any Part thereof (*Works of Necessity and Charity only excepted*) upon Pain that every Person so offending, shall, for every Offence, *forfeit the Sum of Twenty Shillings, to the Use of the Poor of the Place where the Offence was committed*; being thereof convicted before any Justice, either upon his View, Confession of the Party, or Proof of one or more Witnesses.²⁸¹

Note that as with the statutes regulating bread, fines for violating this law are dedicated to the “use of the poor.”²⁸² But the primary relevance of these statutes for present purposes is the colony’s exemption from the law for people engaged in acts of charity. The necessity of fulfilling one’s duty to engage in acts of charity—including feeding the hungry—was so important that it superseded what was, at that time, viewed as the government’s weighty interest in protecting the Sabbath.

Virtually all colonies and later states had laws protecting the Christian Sabbath, and almost without exception they exempted from these statutes works of “charity” or “mercy” (the two terms are interchangeable in this context). So, for instance, the colonies of Massachusetts, Rhode Island, and South Carolina exempted from Sabbath legislation works of “necessity and charity,”²⁸³ Maryland

²⁸¹ THE CHARTERS OF THE PROVINCE OF PENSILVANIA AND CITY OF PHILADELPHIA 45 (Benjamin Franklin 1742) (emphasis added).

²⁸² Several other colonies did this as well. *See, e.g.*, EARLIEST PRINTED LAWS OF NEW HAMPSHIRE 27-28 (John D. Cushing ed., 1978).

²⁸³ MASSACHUSETTS PROVINCE LAWS, 1692-1699 33 (John D. Cushing ed., 1981); *see also* LAWS, *Made and Pass'd by the General Assembly of His Majesty's Colony of Rhode-*

“Works of absolute necessity and Mercy,”²⁸⁴ New Hampshire “works of Necessity and Mercy,”²⁸⁵ and Delaware “Works of Necessity, Charity and Mercy.”²⁸⁶ Later, the states of Massachusetts, Georgia, North Carolina, Rhode Island, New York, New Jersey, Delaware, Virginia, Georgia, Florida, Alabama, Mississippi, Tennessee, Kentucky, Missouri, Ohio, and Michigan exempted acts of “necessity and charity”²⁸⁷ and Pennsylvania, Connecticut, and New Hampshire exempted acts of “necessity and mercy.”²⁸⁸ Sabbath legislation remained common throughout the 19th and 20th centuries, and virtually all of the statutes we read contained exemptions for acts of charity or mercy.²⁸⁹ In *Elliott v. State* (1926), Arizona Supreme Court Justice Alfred Lockwood observed, regarding Sunday closing laws, that “running throughout the best considered opinions we find one general principle adhered to. If the obvious purpose of the act is to grant a general day of rest to the community, *even though certain works declared to be of necessity or charity are permitted*, it is generally upheld.”²⁹⁰ In the 20th century, states began to grant numerous exceptions to these statutes or abolish them altogether.²⁹¹

Island, and Providence-Plantations, Held at Newport, the Sixth Day of May, 1679, in ACTS AND LAWS, OF HIS MAJESTY’S COLONY OF RHODE-ISLAND, AND PROVIDENCE-PLANTATIONS, IN NEW-ENGLAND, IN AMERICA 18 (1745); HARMON KINGSBURY, THE SABBATH: A BRIEF HISTORY OF LAWS, PETITIONS, REMONSTRANCES AND REPORTS, WITH FACTS, APPEALS, AND ANSWERS TO POPULAR OBJECTIONS RELATING TO THE CHRISTIAN SABBATH 15, 18 (1841).

²⁸⁴ THE LAWS OF THE PROVINCE OF MARYLAND LAWS 6 (John D. Cushing ed., 1978).

²⁸⁵ EARLIEST PRINTED LAWS OF NEW HAMPSHIRE 27-28, *supra* note 282.

²⁸⁶ THE EARLIEST PRINTED LAWS OF DELAWARE: 1704-1741 129 (John D. Cushing ed., 1981).

²⁸⁷ *See generally* 1 THE FIRST LAWS OF THE PROVINCE OF GEORGIA, *supra* note 275, AT 80; *see also* THE FIRST LAWS OF THE COMMONWEALTH OF MASSACHUSETTS 238 (John D. Cushing ed., 1981); THE FIRST LAWS OF THE STATE OF NORTH CAROLINA 77 (John D. Cushing ed., 1984); KINGSBURY *supra* note 283, at 16-22.

²⁸⁸ *See generally* EARLIEST PRINTED LAWS OF THE COMMONWEALTH OF PENNSYLVANIA 181 (John D. Cushing ed., 1984); *see also* THE FIRST LAWS OF THE STATE OF CONNECTICUT 213 (Wilmington: Michael Glazier, John D. Cushing ed., 1982); KINGSBURY, *supra* note 283, at 14-15.

²⁸⁹ Maine’s 1834 statute stated, “In this State, travelling, ordinary labor, and business are prohibited on the Lord’s day” does not have a clear exemption, although in the context of other state statutes it seems reasonable to assume acts of charity are not “ordinary labor” and thus would be permitted. *See* KINGSBURY, *supra* note 283, at 14.

²⁹⁰ *Elliott v. State*, 242 P. 340, 341 (Ariz. 1926) (emphasis added).

²⁹¹ *See* HALL, *supra* note 209, at 186.

Among the reasons Puritans immigrated to the New World was to “civilize” Native Americans and convert them to Christianity.²⁹² To that end, a 1692 Massachusetts statute prohibited colonists from selling them alcohol of any kind.²⁹³ As with Sabbath legislation, the statute stipulated that “this Act shall not be intended or extend to restrain any Act of Charity for relieving any *Indian (Bona fide)* in any sudden exigent of Faintness or Sickness, not to exceed one or two Drams”²⁹⁴

In the 20th century, states and then the federal government protected other acts of charity and mercy. Concerned that private citizens would not attempt to help their fellow citizens facing a medical emergency for fear of liability, California legislators passed the nation’s first Good Samaritan law in 1959.²⁹⁵ Every state has since followed California’s lead.²⁹⁶ So has the United States Congress.²⁹⁷ Relevant portions of California’s current law read:

(a) No person who in good faith, and not for compensation, renders emergency medical or nonmedical care at the scene of an emergency shall be liable for any civil damages resulting from any act or omission. The scene of an emergency shall not include emergency departments and other places where medical care is usually offered. This subdivision applies only to the medical, law enforcement, and emergency personnel specified in this chapter.

(b) (1) It is the intent of the Legislature to encourage other individuals to volunteer, without compensation, to assist others in need during an emergency, while ensuring that those volunteers who provide care or assistance act responsibly.²⁹⁸

Note that the legislature explicitly acknowledged that it wanted to *encourage* individuals to help others in need.

²⁹² FRANCIS J. BREMER, PURITANISM: A VERY SHORT INTRODUCTION 29 (2009).

²⁹³ MASSACHUSETTS PROVINCE LAWS 1692-1699 78 (John D. Cushing ed., 1978).

²⁹⁴ *Id.*

²⁹⁵ Eric A. Brandt, *Good Samaritan Laws - The Legal Placebo: A Current Analysis*, AKRON L. REV. 303, 303-04 (1983).

²⁹⁶ See *Good Samaritan Laws by State*, RECREATION L., (May 28, 2014), <https://recreation-law.com/2014/05/28/good-samaritan-laws-by-state/> [<https://perma.cc/2QB4-VL4Y>].

²⁹⁷ See generally Aviation Medical Assistance Act of 1998, Pub. L. No. 105-170.

²⁹⁸ CAL. HEALTH & SAFETY CODE § 1799.102(a)-(b)(1) (West 2009).

Similarly, in an effort to make sure Americans did not hesitate to volunteer for charitable activities out of fear of liability, Congress passed the Volunteer Protection Act of 1997.²⁹⁹ Like California's Good Samaritan Statute, the Volunteer Protection Act clearly affirms that:

The purpose of this Act is to promote the interests of social service program beneficiaries and taxpayers and to sustain the availability of programs, nonprofit organizations, and governmental entities that depend on volunteer contributions by reforming the laws to provide certain protections from liability abuses related to volunteers serving nonprofit organizations and governmental entities.³⁰⁰

As we have seen, Americans have long been concerned with alleviating hunger. But, in the 20th century, farmers, businesses, restaurants, and other individuals and organizations that produce/process food hesitated to donate excess food to the needy for fear of liability should someone get sick or die after consuming any donated food.³⁰¹ To address these concerns, California passed the nation's first Good Samaritan food donation law in 1977.³⁰² The law limits donors' liability except in case of "gross negligence" or willfully harmful acts.³⁰³ Within a decade, every state passed a similar law although there were significant differences between them.³⁰⁴ Congress standardized these protections with the Bill Emerson Good Samaritan Food Donation Act (1996).³⁰⁵ According to the USDA, the act

²⁹⁹ Volunteer Protection Act of 1997, Pub. L. No. 105-19, 111 Stat. 218.

³⁰⁰ *Id.*

³⁰¹ Stacey H. Van Zuiden, *The Good Food Fight for Good Samaritans: The History of Alleviating Liability and Equalizing Tax Incentives for Food Donors*, 17 DRAKE J. AGRIC. L. 237, 241-42 (2012).

³⁰² *Id.* at 242.

³⁰³ *Id.* at 242-43.

³⁰⁴ David L. Morenoff, *Lost Food and Liability: The Good Samaritan Food Donation Law Story*, 57 FOOD & DRUG L.J. 107, 108 (2002).

³⁰⁵ *See generally* Bill Emerson Good Samaritan Food Donation Act, 42 U.S.C. § 1791 (2023).

establishes Federal protection from civil and criminal liability for persons involved in the donation and distribution of food and grocery products to needy individuals when certain criteria are met. In order to receive protection under the Act, a person or gleaner must donate in good faith apparently wholesome food or apparently fit grocery products to a nonprofit organization for ultimate distribution to needy individuals. The Act also provides protection against civil and criminal liability to the nonprofit organizations that receive such donated items in good faith.³⁰⁶

States may give additional protections to donor but not detract from the federal standard.³⁰⁷ By protecting farmers, gleaners, restaurants, grocers, manufacturers, and other food producers/providers, the act has undoubtedly encouraged many donations of food.³⁰⁸

The laws discussed in this section provide exemptions to otherwise neutral laws of general applicability that might keep people from engaging in charitable activities. State and national legislators obviously believed they had important interest when they passed the relevant statutes, but they understood that there is an even greater interest in permitting citizens to fulfill what they consider to be their duty to help others. Moreover, as we shall see in the next section, governments also affirmatively encourage individuals and organizations to engage in charitable activities.

D. American Legislative Encouragement

In the 19th and early 20th centuries, governments became more involved in directly helping the poor and even feeding the hungry. Some well-meaning poverty fighters worried that individual and private charity could hurt rather than help the poor and argued for the professionalization of poverty relief.³⁰⁹ Marvin Olasky argues persuasively in *The Tragedy of American Compassion* that

³⁰⁶ *Frequently Asked Questions about the Bill Emerson Good Samaritan Food Donation Act*, UNITED STATES DEPT OF AGRIC., <https://www.usda.gov/sites/default/files/documents/usda-good-samaritan-faqs.pdf> [<https://perma.cc/B9YC-WNLX>] (last visited August 31, 2023).

³⁰⁷ *Id.*

³⁰⁸ See *supra* Part IV.D.

³⁰⁹ See generally OLASKY, *supra* note 217.

increasingly centralized government programs (at both the state and national levels) intended to help the poor were, in fact, less efficient than earlier, more local programs.³¹⁰ But the important point for our purposes is that governments still intended to help the poor, and although their efforts sometimes crowded out private ones, civic leaders rarely prohibited private charitable activity until very recently.³¹¹

Before the adoption of general incorporation statutes in the 19th century, corporate charters were granted on a case-by-case basis.³¹² This sometimes presented difficulties for churches and benevolent societies to create legal entities capable of owning property over time.³¹³ In 1787, Delaware, responding to petitions from “sundry religious societies or congregations” adopted a statute to enable all religious congregations to incorporate if they so desired.³¹⁴ Important for our purposes is the General Assembly’s explanation that it considered “it their duty to countenance and encourage virtue and religion, by every means in their power, and in the most expedient manner.”³¹⁵ Far from placing restraints on individuals and organizations who desired to help or minister to others, state governments have a long tradition of enabling them to do so.³¹⁶ In the absence of general incorporation statutes, states regularly granted corporate charters to benevolent organizations throughout the early 19th century.³¹⁷

Even as government agencies expanded into poverty relief, elected officials at the local, state, and national levels passed laws to encourage eleemosynary institutions—most importantly for our purposes, institutions focused on feeding and otherwise aiding

³¹⁰ *Id.*

³¹¹ *Id.* at 42-183; *see also* MCCARTHY, *supra* note 224, at 166-72.

³¹² Eric Hilt, *Corporation Law and the Shift toward Open Access in the Antebellum United States*, in ORGANIZATIONS, CIVIL SOCIETY, AND THE ROOTS OF DEVELOPMENT 147-48 (Noami R. Lamoreaux & John Joseph Wallis eds., 2017) (accessible at <https://www.nber.org/books-and-chapters/organizations-civil-society-and-roots-development/corporation-law-and-shift-toward-open-access-antebellum-united-states> [<https://perma.cc/9J65-JX9A>]).

³¹³ *Id.*

³¹⁴ 2 THE FIRST LAWS OF THE STATE OF DELAWARE 878-84 (John D. Cushing ed., 1981).

³¹⁵ *Id.*

³¹⁶ *See generally* MCCARTHY, *supra* note 224, at 30-48.

³¹⁷ *Id.*

needy people.³¹⁸ One important way they did this was by exempting such organizations from taxation. At the national level, the Tariff Act of 1894 stated that “nothing herein contained shall apply to . . . corporations, companies, or associations organized and conducted solely for charitable, religious, or educational purposes.”³¹⁹ The Revenue Act of 1913, which established the national income tax system, likewise exempted certain charitable organizations. According to Bruce Hopkins, when Congress drafted this law, it

saw exemption of charities in the federal tax statutes as an extension of comparable practice throughout the whole of history. No legislative history expands on the point. Presumably, Congress believed that these organizations ought not be taxed and found the proposition sufficiently obvious so that extensive explanation of its actions was not necessary.³²⁰

Four years later, Congress made donations to charitable institutions tax deductible.³²¹ These laws have been revised over the years, but it is not necessary to trace all changes here.³²² The important point is that Congress has never abandoned its use

³¹⁸ See generally *City of Grants Pass v. Johnson*, 144 S. Ct. 2202 (2024) (noting that communities still depend upon charitable individuals and groups to provide for those in need). “As they have throughout the Nation’s history, charitable organizations “serve as the backbone of the emergency shelter system in this country,” accounting for roughly 40 percent of the country’s shelter beds for single adults on a given night.” See *Faith-Based Organizations: Fundamental Partners in Ending Homelessness*, NAT’L ALL. TO END HOMELESSNESS (May 4, 2017), <https://endhomelessness.org/resource/faith-based-organizations-fundamental-partners-in-ending-homelessness/> [<https://perma.cc/CHP6-TBCU>]; see also *City of Grants Pass*, 144 S. Ct. at 2209. The Court further observed,

“Almost 200 years ago, a visitor to this country remarked upon the ‘extreme skill with which the inhabitants of the United States succeed in proposing a common object to the exertions of a great many men, and in getting them voluntarily to pursue it.’ 2 A. de Tocqueville, *Democracy in America* 129 (H. Reeve transl. 1961). If the multitude of amicus briefs before us proves one thing, it is that the American people are still at it. Through their voluntary associations and charities, their elected representatives and appointed officials, their police officers and mental health professionals, they display that same energy and skill today in their efforts to address the complexities of the homelessness challenge facing the most vulnerable among us.”

Id. at 2226.

³¹⁹ BRUCE R. HOPKINS, *THE LAW OF TAX-EXEMPT ORGANIZATIONS* 35 (11th ed. 2015).

³²⁰ *Id.* at 13.

³²¹ *Id.* at 35.

³²² *Id.* at 35-39 (explaining the evolution of Congress’s statutory regime in this area of law).

of the tax code to encourage the formation of charitable institutions and charitable giving.

The constitutionality of exempting religious eleemosynary organizations from federal taxation has been challenged, but the Supreme Court has found the practice to be constitutional.³²³ In *Walz v. Tax Commission*, Chief Justice Burger noted that the “State has an affirmative policy that considers these groups as beneficial and stabilizing influences in community life and finds this classification [tax exemption] useful, desirable, and in the public interest.”³²⁴ In a later case, Justice Blackmun similarly observed that “exemption from federal income tax is intended to encourage the provision of services that are deemed socially beneficial.”³²⁵

Congress’ use of the tax code to encourage charity has been remarkably successful. According to *Forbes*, America’s largest charity, Feeding America, discussed in IVc, has benefited tremendously from this code:

More than 60% of Feeding America’s private support in 2021 came in donated gift-in-kind foodstuffs from eight large retailers, with Walmart alone giving \$1.5 billion. These corporations took advantage of enhanced federal tax breaks created by Congress in 1976 that allow them to deduct from their taxable income roughly double their tax basis (meaning their cost of producing) that food. Since 2005 this break has been available to any business, including sole proprietors and partnerships, so the neighborhood restaurant or corner store now also has a big incentive to donate food to a local pantry, rather than let it go to waste.³²⁶

According to the National Philanthropic Trust, there were 1,800,000 charitable institutions in the United States, and Americans gave \$557.16 billion to charities in 2023.³²⁷ Americans are a giving people, and there would likely still be a large number of charitable organizations and a great deal of giving without

³²³ See generally *Trinidad v. Sagrada Orden De Predicadores*, 263 U.S. 578 (1924).

³²⁴ *Walz v. Tax Comm’n of City of New York*, 397 U.S. 664, 673 (1970).

³²⁵ *Portland Golf Club v. Comm’r*, 497 U.S. 154, 161 (1990).

³²⁶ *FBN Ousts United Way*, *supra* note 263.

³²⁷ *Charitable Giving Statistics*, NAT’L PHILANTHROPIC TRUST, <https://www.nptrust.org/philanthropic-resources/charitable-giving-statistics/> [https://perma.cc/48Z2-5N6F] (last visited Oct. 28, 2024).

federal (and state) tax incentives. Norma Thornton, for instance, received no tax deduction for the value of the meals she shared with needy citizens.³²⁸

In 2014, Congress recognized the importance of feeding the hungry by creating the National Commission on Hunger.³²⁹ In 2015, the bi-partisan commission released a report with twenty recommendations for reducing hunger in America.³³⁰ Many of these recommendations involved government programs, but the commission specifically noted the importance of encouraging private organizations to help feed the hungry.³³¹ This observation should come as no surprise; it fits with the long history and tradition of American local, state, and national governments protecting and encouraging Americans to engage in charitable activities—including but not limited to feeding the hungry.

V. THE RIGHT OF CHARITABLE USES DEFINED

Having examined the philosophical and theological foundations of the right of charitable uses, the history of the right's development in fundamental, common law and equity, and the Anglo-American tradition of securing the right, we are now in a position to state specifically what the right is. The right of charitable uses is a property right and is part of the fundamental law, deeply rooted in our Nation's history and tradition. The right of charitable uses consists of an immunized power to make charitable uses of one's resources. This right is natural and pre-positive. And it is nearly unlimited in scope.

³²⁸ INTERNAL REVENUE SERV., IRS PUBLICATION 526 6 (2023), <https://www.irs.gov/pub/irs-pdf/p526.pdf> [<https://perma.cc/94ZS-2ED2>].

³²⁹ See generally *History of the Commission*, NAT'L COMM'N OF HUNGER (Dec. 17, 2015, 12:08:49 AM), <https://cybercemetery.unt.edu/archive/hungercommission/20151217000849/https://hungercommission.rti.org/About/History-of-the-Commission> [<https://perma.cc/L95S-R7XG>].

³³⁰ NAT'L COMM'N ON HUNGER, FREEDOM FROM HUNGER: AN ACHIEVABLE GOAL FOR THE UNITED STATES OF AMERICA 40 (2015), https://drexel.edu/~media/Files/hunger-free-center/research-briefs/hungercommission/Hunger_Commission_Final_Report.ashx [<https://perma.cc/M4HM-KQWF>].

³³¹ *Id.* at 58-59.

A. The Types of the Right

The right of charity that developed in the western political tradition, Judeo-Christian teaching, Anglo-American law, and American constitutionalism, as described above, is a right to give one's valuable resources to others. The right encompasses large gifts, devises, and bequests to charitable organizations and small gifts of food and money to those in need, known in our legal tradition as almsgiving.³³² In all exercises of the right, the owner divests himself or herself of control and use of the valuable thing, in whole or in part,³³³ without any legal duty to do so, so that another person or group of people can benefit.³³⁴

Analytically, the right that one finds most deeply rooted in Anglo-American legal history and tradition is a legal power to dispose of one's own property for charitable purposes.³³⁵ Because the *use* is the property right that canon lawyers and common-law jurists developed to make charitable dispositions possible,³³⁶ the standard convention is to call this power the right of charitable uses.³³⁷ The right is a power because it secures the legal ability of a property owner to decide who will receive and benefit from her property.³³⁸ For most of the right's history, at issue was whether courts had an obligation to give effect to charitable dispositions that

³³² See *supra* Part IV.B.ii.

³³³ Thus, sharing a resource with another person can be an act of charity. For example, Bostonians who shared their homes with outsiders in 1636 were making a charitable use; see also *supra* text accompanying notes 235-238.

³³⁴ See generally MACLEOD, *supra* note 87.

³³⁵ Here and in what follows, we use the Hohfeldian taxonomy of rights, which is conventional in modern analytical jurisprudence. See generally WESLEY NEWCOMB HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING AND OTHER LEGAL ESSAYS* (Walter Wheeler Cook ed., 1923); see also 4 JOHN FINNIS, *PHILOSOPHY OF LAW: COLLECTED ESSAYS* 375-88 (1st ed. 2011) (explaining Hohfeldian analysis of rights). This taxonomy divides all rights into the following: claims, which correlate with duties; liberties/privileges, which correlate with no-rights; powers, which correlate with liabilities; and immunities, which correlate with disabilities. See generally Leif Wenar, *Rights § 2.2 The Function of Rights: The Will Theory and the Interest Theory*, in STAN. ENCYC. PHIL. (Feb. 24, 2020), <https://plato.stanford.edu/entries/rights/> [https://perma.cc/H8GQ-AH3R].

³³⁶ See MAITLAND, *supra* note 127, at 86-89.

³³⁷ See *Sorresby v. Hollins* (1740), 88 Eng. Rep. 410, 411 (Ch.); see also 2 BLACKSTONE, *supra* note 37, *273-74, *374-76.

³³⁸ See generally Christopher Essert, *Legal Powers in Private Law*, 21 LEGAL THEORY 136 (2015) (describing the legal powers of property owners).

the owner directed. This issue is seen clearly in the legal and constitutional battles of the 14th and 15th centuries, which ended with creation of the trust to make effective charitable dispositions of uses.³³⁹ The power is immunized because officials cannot take it away either by refusing to enforce or changing the law to prohibit a charitable devise, bequest, or gift.

Over time, the right of charitable uses emerged also as an immunized liberty to dispose of one's own resources for charitable purposes.³⁴⁰ This phenomenon is seen clearly in the legal and constitutional battles over almsgiving, which resulted in the Charitable Uses Act 1601.³⁴¹ The right to use one's property charitably is a liberty insofar as all other persons have no right to prevent a property right holder from using resources for charitable purposes. The liberty is immunized insofar as state actors have a legal disability—they lack legal power or competence—to deprive the property owner of the liberty. The liberty to give one's property away, especially to those in need, is coupled with the power to do so. Those rights are coupled necessarily. One cannot exercise a liberty without a legal power to do so. And the power would equally be meaningless if one had a legal duty not to give.

B. Fundamental, Natural, and Pre-Positive

Jurists have always characterized the right to use one's property charitably as a pre-positive, natural right.³⁴² This right pre-existed the Constitution of the United States, the state constitutions, and the American founding. The right's authority rests in immemorial customary law, canon law, equity, and other pre-political sources.³⁴³ English and American courts have found roots of the right in Christian Scripture and doctrine, and the immemorial usage of England and her former colony, the United

³³⁹ See *supra* Part IV.A.

³⁴⁰ See *supra* Part IV.B.

³⁴¹ See *supra* Part IV.B.ii.

³⁴² Aquinas, *supra* note 68, at II-II, Q31; see HELMHOLZ, *supra* note 86, at 58, 78, 106.

³⁴³ HELMHOLZ, *supra* note 140, at 53, 109-10; HELMHOLZ, *supra* note 86, at 186 n.33; 2 BLACKSTONE, *supra* note 37, at *373 ("It seems sufficiently clear that, before the [Norman] conquest, lands were devised by will."); *Id.* at *375 (explaining how charitable uses came to be enforced in Chancery).

States.³⁴⁴ Positive laws that secure the right to act charitably do not create the right; they merely declare the right and add particular legal securities to it.³⁴⁵

The Charitable Uses Act was not a substantive innovation; it merely made the right of charitable uses more secure. As the judicial opinions interpreting the Act have made clear, the right always was both an immunized power and an immunized liberty.³⁴⁶ Statutes that secure the right of charitable uses, such as the Charitable Uses Act, may create new remedies and jurisdiction, but they create “no new law.”³⁴⁷ In determining whether any particular charitable use comes within the right, it is “quite immaterial” whether a statute securing the right is part of a state’s law.³⁴⁸ The existence of the right and the constitutionality of burdens on it “must be determined upon the general principles of jurisprudence, and the presence or absence of the statute cannot affect the result.”³⁴⁹

Only when royal officials challenged the right did jurists and lawmakers find it necessary to say expressly that owners are at liberty to make charitable uses. Parliament stated so expressly in 1601, and the liberty has remained uncontested ever since.³⁵⁰ So, when the Supreme Court of the United States rules upon legal burdens on the right of charitable uses, the Court does not reason primarily from positive laws. Instead, it evaluates the validity and constitutionality of positive laws by comparison to the right of charitable uses itself.³⁵¹

³⁴⁴ See generally *Ould v. Washington Hosp. for Foundlings*, 95 U.S. 303 (1877), see also *Garrison v. Little*, 75 Ill. App. 402, 411-16 (1897).

³⁴⁵ As the U.S. Supreme Court explained of the Statute of Charitable Uses, “[t]he statute was silent as to the creation or inhibition of any new charity, and it neither increased nor diminished the pre-existing jurisdiction in equity touching the subject. The object of the statute was to create a cheaper and a speedier remedy for existing abuses.” *Ould*, 95 U.S. at 309-10.

³⁴⁶ See *supra* Part IV.B.

³⁴⁷ *Vidal v. Girard’s Ex’rs*, 43 U.S. 127, 195 (1844).

³⁴⁸ *Ould*, 95 U.S. at 310.

³⁴⁹ *Id.*

³⁵⁰ See *supra* Part IV.B.ii.

³⁵¹ See *Vidal*, 43 U.S. at 196-98 (the right declared in the Statute of Elizabeth is part of the common law and Pennsylvania’s constitution of 1790, whether or not declared in its positive laws); *Ould*, 95 U.S. at 309-10 (though the Statute of Elizabeth was “was never in force in Maryland,” the absence of a statutory text is “quite immaterial”

The right is also a natural right in the sense that it is fully specified in the law of reason, sometimes called natural law.³⁵² Acting charitably toward others is a reasonable thing to do, and interfering with acts of charity is presumptively unreasonable. Natural law teaches that charitable uses of one's property are not only presumptively valid but, unless made for some ulterior motive, conclusively lawful.³⁵³ Our fundamental law follows this teaching. The common law goes out of its way to privilege charity because charity is very close to the basic reasons to have property rights in the first place, especially the moral and civic value of empowering people to act charitably with things and resources in their possession.³⁵⁴

C. *Absolute and Nearly Unlimited*

The right of charitable uses is not unlimited, but it is nearly so. The triumph of charitable uses and trusts in law and equity means that a property owner may confer a charitable use on any person or group of persons, no matter whether they are related or unrelated to the donor, whether materially comfortable or in dire need, and no matter whether the benefits conferred upon them are strictly necessary for human survival.³⁵⁵ And the charitable use may be made for any good purpose. A use is charitable if made to advance knowledge and learning, religious piety, physical health, art and beauty, or a host of other ends.³⁵⁶

The one possible exception to the right in common law and equity is charitable devises and bequests for political purposes,³⁵⁷ and even that limitation is itself qualified. Courts have divided on the question of whether political and constitutional causes are

because the law declared in the statute is part of "general principles of jurisprudence" and therefore binding law in Maryland, as elsewhere).

³⁵² See *supra* Part II.B.

³⁵³ See *supra* Part II.B.ii.

³⁵⁴ See MACLEOD, *supra* note 87, at 122-145.

³⁵⁵ The right is thus much more expansive than a non-owner's right to enter private property without the owner's consent and a minor's power to enter into a valid contract. Both of those rights are limited to cases of necessity.

³⁵⁶ Statutes of the Realm 1225, 43 Eliz. c. 4, (Eng.); cases cited *supra* Part IV.B.ii.

³⁵⁷ Gustafsson, *supra* note 14, at 611-13.

charitable.³⁵⁸ The reason given for the political exception to charitable uses was that no gift could be valid if given to do some act contrary to law, and political agitation to change a fundamental law, such as a constitution, was contrary to that law.³⁵⁹ On the other hand, to advocate for a change in positive law is a charitable act if the change would free captive slaves or accomplish some other purpose expressed in the Charitable Uses Act.³⁶⁰ Furthermore, to advocate for the abolition of slavery is lawful because abolition would bring the positive law into closer alignment with fundamental, natural and common law, which both forbid slavery.³⁶¹ Such advocacy is not contrary to law; this advocacy reconciles the law to itself.

Courts remain ambivalent about the political exception.³⁶² Regardless, all other charitable purposes bring a donation within the expansive category of charitable uses. The category is capacious:

A charity, in the legal sense, may be more fully defined as a gift, to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works or otherwise lessening the burdens of government. It is immaterial whether the purpose is called charitable in the gift itself, if it is so described as to show that it is charitable in its nature.³⁶³

³⁵⁸ Compare *Garrison v. Little*, 75 Ill. App. 402, 411, 412 (1897) (holding a bequest to advocate for women's suffrage to be a charitable use), with *Jackson v. Phillips*, 96 Mass. 539, 555-65, 571 (1867) (holding a donation to advocate for abolition of slavery to be charitable, but a donation for married women's property acts and suffrage to not be charitable).

³⁵⁹ See *Jackson*, 96 Mass. at 555.

³⁶⁰ See *id.* at 558-59.

³⁶¹ See *id.* at 560-65.

³⁶² See generally A.S. Klein, Annotation, *Validity of Charitable Trust to Promote Change in Laws or Systems or Methods of Government*, 22 A.L.R.3d 886 (1968); see also John D. Perovich, *Validity and Construction of Testamentary Gift to Political Party*, 41 A.L.R.3d 833 (1972); L.A. Sheridan, *Charity Versus Politics*, 2 ANGLO-AM. L. REV. 47 (1973).

³⁶³ *Jackson*, 96 Mass. at 556.

In short, a use of property for any charitable purpose is strongly presumed to be lawful and enforceable in courts of law and equity no matter the character of the donor's charitable motivation.

To be sure, the right cannot *do more than* what any other private right can do. The right cannot justify acts of public wrongdoing. That a criminal act is also charitable does not make it any less criminal. For example, to aid an escaped convict by feeding him a meal may be a crime, whether or not it is charitable, if done for an unlawful purpose. In many cases, a criminal act may not even be charitable. Just as the essence of a charitable use is an intention to divest oneself of property for the good of another, the boundary between a lawful act of charity and an unlawful act of aiding and abetting a crime may be drawn according to the actor's intentions.

In cases of mixed motivations, where the act is performed for both unlawful and charitable purposes, that the act is performed for another's well-being adds moral value to what would otherwise be a valueless act, and the gift is valid though the act of making the gift is a ground for criminal sanction. Those who risked their lives and liberty to assist fugitive slaves acted heroically and virtuously, though contrary to the positive laws of antebellum America. In classical juristic terms, charity toward fugitive slaves is commended by the natural law though condemned by the positive law.³⁶⁴ This case is a boundary case because the positive laws which forbade assisting fugitive slaves were unreasonable, not because of any defect in the right of charitable uses.

That a private right is absolute does not entail that it includes a right to do wrong. The description of the right as absolute simply entails that officials have no power to declare a property use invalid *as a use of property*, nor to deprive any person of the right without due process of law.³⁶⁵ And in cases of charitable use, the idea entails something more. The donor is entitled to a strong presumption that her use is lawful and valid.

³⁶⁴ See generally JUSTIN BUCKLEY DYER, NATURAL LAW AND THE ANTISLAVERY CONSTITUTIONAL TRADITION (Cambridge Univ. Press, 2012).

³⁶⁵ 1 BLACKSTONE, *supra* note 37, at *121-*124.

CONCLUSION

From ancient Israel through the history of western Europe and, more specifically, Anglo-American history, many citizens have been convinced that they have an obligation to help those in need. This assistance takes many forms but among the most common and widespread charitable practices is feeding the hungry. Civic authorities have often protected and encouraged such practices, and the Anglo-American legal tradition does so in multiple ways. American governments at the local, state, and national levels have a long history and tradition of protecting and encouraging charitable activities.

The ability of private citizens and organizations to engage in acts of charity, especially the ability to feed the hungry, has long been respected and encouraged in Anglo-American law. Indeed, we believe that this right is so deeply rooted in American history and tradition that it should be protected by courts. As with any right, it is not unlimited, but these limits need not concern us here. Outright bans on the charitable, and only charitable, preparation and serving of food in public parks clearly violate the longstanding right of Anglo-Americans to use their property to help others. Ordinances, such as that enacted by Bullhead City, infringe the right of charitable uses even more directly than the anti-almshousing laws of the 14th and 16th centuries. Other laws that interfere with charitable uses less directly may be less obviously unconstitutional. But the right itself is deeply rooted in our Nation's history and tradition.