

THE NORMATIVE UNDERPINNINGS OF TAXATION

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INTRODUCTION

Questions about the appropriate rules and mechanisms of taxation are first and foremost questions concerning the nature of society. What can be taxed, what may not, for what purpose, when, and how are all matters that go to the heart of society and, in particular, concern society’s underlying beliefs and values vis-à-vis the meaning and attainment of justice. A modern society is required to consider these underlying beliefs and values when contemplating how best to allocate the fruits of social cooperation, including income, wealth, power, and opportunity.¹ This allocation is determined in each societal order by its major institutions.² One such key institution is the system of taxation.³

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¹ JOHN RAWLS, A THEORY OF JUSTICE 7 (rev. ed. 1999) (advocating equal access to the fruits of social cooperation).

² *Id.* at 4–7.

In reality, much of the tax scholarship generally suggests that questions of justice cannot form an integral part of the tax debate. The concept of justice, the argument goes, is a matter of personal preference and to argue about these matters “is to reduce the discussion . . . to the level of ethics or aesthetics.”⁴ Notwithstanding the merit of this perspective, a decision-making process that falls short of soliciting discussions on the meaning and attainment of justice leads to de facto acceptance of the prevailing socio-economic order and its pre-tax distribution, luring us to believe that they are just or equitable.⁵ By so doing, this approach diverts attention from possible transgressions in fiscal policy and hinders the development of society and its system of taxation.

As a practical matter, it is challenging to clearly elaborate the meaning and attainment of justice and, for that matter, to prove the validity of any one normative theory.⁶ Normative perspectives are often subjective in nature and can be presented as self-evident truths.⁷ It is nonetheless possible to meaningfully discuss competing arguments of moral judgment by elaborating on the basic beliefs and values about society and its mechanisms for achieving justice.⁸ In

³ Cf. JOHN STUART MILL, *THE PRINCIPLES OF POLITICAL ECONOMY* 227–28 (Batoche Books 2001) (1848) (discussing the methods used by society to redistribute property).

⁴ HENRY C. SIMONS, *PERSONAL INCOME TAXATION: THE DEFINITION OF INCOME AS A PROBLEM OF FISCAL POLICY* 18 (1938); see also Charles R. O’Kelley, Jr., *Rawls, Justice, and the Income Tax*, 16 GA. L. REV. 1, 5 (1981). Cf. Thomas Nagel, *Comments: Individual Versus Collective Responsibility*, 72 FORDHAM L. REV. 2015, 2019 (2004) (“The concern for social justice seems to have almost disappeared from the nation’s political discourse.”).

⁵ See, e.g., LIAM MURPHY & THOMAS NAGEL, *THE MYTH OF OWNERSHIP: TAXES AND JUSTICE* 7–8 (2002) (criticizing the frequent acceptance of the societal status quo as a basis for tax debate and policies). See generally *infra* notes 169–71 and accompanying text.

⁶ Charles Fried, *The Laws of Change: The Cunning of Reason in Moral and Legal History*, 9 J. LEGAL STUD. 335, 341–45 (1980) (justifying a theory “of moral causation as an account of legal change”); Deborah H. Schenk, *Foreword: Colloquium on Wealth Transfer Taxation*, 51 TAX L. REV. 357, 361 (1996) (addressing the pragmatic implications of diverse normative perspectives and concluding that “when it comes to tax system design . . . there is much room for disagreement . . . as to what constitutes ‘the best we can be.’”).

⁷ But see *infra* notes 24–36, 80–85, 132–35, 192–98 and accompanying text (discussing underlying rationales of the theories explored in this Article).

⁸ William D. Andrews, *Fairness and the Personal Income Tax: A Reply to Professor Warren*, 88 HARV. L. REV. 947, 950 (1975) (“Matters of fairness are not generally subject to logical demonstration from independent premises. All that reason can do is elaborate the implications of plausible hypotheses in order to facilitate an informed choice among them.”). There are several useful examples of scholarly discussions that explore normative arguments for the meaning and attainment of justice in taxation. See, e.g., Donna M. Byrne, *Progressive Taxation Revisited*, 37 ARIZ. L. REV. 739 (1995) [hereinafter Byrne, 1995]; Donna M. Byrne, *Locke, Property, and Progressive Taxes*, 78 NEB. L. REV. 700 (1999) [hereinafter Byrne, 1999]; Yoseph M. Edrey, *Al Huka Deklerativit V’ Huka Constitutivit [A Declarative and a Constructed Constitution—The Right for Property Under the Israeli Constitutional Law and Its Location on the “Constitutional Rights” Scale]*, 28 MISHPATIM L. REV. 461 (1997) [in Hebrew]; Marjorie E. Kornhauser, *The Rhetoric of the Anti-Progressive Income Tax Movement: A Typical Male Reaction*, 86 MICH. L. REV. 465 (1987); Marjorie E. Kornhauser, *The Rise of Rhetoric in Tax Reform Debate: An Example*, 70 TUL. L. REV. 2345 (1996); Marjorie E. Kornhauser, *Equality, Liberty, and a Fair Income Tax*, 23 FORDHAM URB. L.J. 607 (1996); Jeffrey A. Schoenblum, *Tax Fairness or Unfairness? A Consideration of the Philosophical Bases for Unequal Taxation of Individuals*, 12 AM. J. TAX POL’Y 221 (1995); Linda Sugin, *Theories of Distributive Justice and Limitations on Taxation: What Rawls Demands from Tax Systems*, 72 FORDHAM L. REV. 1991 (2004).

fact, even a very preliminary examination of the current tax discourse reveals it is already grounded in profound normative claims. Often, when inheritance tax is debated, for example, a person's right to transfer her assets to the next generation is invoked.⁹ Similarly, when citizens complain about high tax rates they generally argue against what is, from their perspective, an unjust appropriation.¹⁰ However, the extent to which the existing normative tax discourse is based on anecdotes and used to advance self-serving interests rather than a well-defined framework of principles and rationales is striking.

A candid and comprehensive tax discourse will allow society a more accurate and meaningful understanding of its tax system than what currently exists. Such a discourse may also further the development of taxation in a manner consistent with society's normative aspirations alongside the more commonly debated pragmatic constraints. This Article promotes developing a broader normative tax discourse by returning to fundamentals and re-examining three relevant political theories and how they shed light on taxation: the theory of natural entitlement, utilitarianism, and Rawls's theory of justice as fairness. The Article explores the perspectives of these theories on fiscal policy, particularly with respect to one question: What can taxpayers expect to receive in fair return for their expended labor and capital? The Article opines that under all three political theories taxpayers can generally expect to only receive a net return on labor and capital—gross return on their investments less the sum needed for maintenance of the existing societal order. In an unjust, or suboptimal, societal order (however this measure is conceived by the three theories), further taxation can be expected to rectify this condition. Importantly, such additional taxation becomes a plausible scenario under each of the theories explored, supporting some form of redistributive mechanism.

Section I of this Article presents the entitlement theory and addresses the concept of natural or divine law. Section II discusses utilitarianism, its aim to increase aggregate utility, and the social welfare function as a modern interpretation of utilitarianism that has come to dominate the contemporary, especially professional, tax discourse. Section III explores the Rawlsian doctrine of justice as fairness. While each section examines possible implications of the three theories on taxation, in its Summary and Conclusions the Article seeks to offer a

⁹ See, e.g., Lily L. Batchelder, *Taxing Privilege More Effectively: Replacing the Estate Tax with an Inheritance Tax*, THE HAMILTON PROJECT, June 2007, at 5 (proposing replacement of the estate tax with an inheritance tax based on efficiency as well as equity considerations). See also Lily L. Batchelder, *What Should Society Expect from Heirs? The Case for a Comprehensive Inheritance Tax*, 63 TAX L. REV. 1, 7 (2009); MICHAEL J. GRAETZ & IAN SHAPIRO, DEATH BY A THOUSAND CUTS: THE FIGHT OVER TAXING INHERITED WEALTH 7 (2005); Edward J. McCaffery, *The Uneasy Case for Wealth Transfer Taxation*, 104 YALE L.J. 283, 304 (1994). Cf. Eric Rakowski, *Can Wealth Taxes Be Justified?*, 53 TAX L. REV. 263, 372–73 (2000) (“Wealth might prove a burden for some, a warm blanket for most others. But the choice to retain rather than spend is not one for which society or less fortunate persons can impose a charge, because it is not a benefit to the saver for which the state, or the congeries of social forces, or an unfair nature can claim due.”).

¹⁰ See, e.g., JOEL SLEMIEROD & JON BAKIJA, TAXING OURSELVES: A CITIZEN'S GUIDE TO THE DEBATE OVER TAXES 72–74 (4th ed. 2008) (citing several polls to discuss Americans' perspectives regarding the fairness of progressivity in taxation. Note, however, that the authors identify numerous misconceptions where public perceptions do not match available data concerning actual progressivity in the tax burden distribution).

broader normative undertaking. Due to the scope of this Article, as well as space limitations, the Article does not address the advantages and disadvantages of utilizing the tax system to advance redistributive ends nor does it fully explore the theory of optimal taxation. These issues are left for future works.

I. ENTITLEMENT AND THE NATURAL ORDER

A. *John Locke*

The Lockean description of the origin of mankind invokes individuals as free and equal persons,¹¹ living in a “state of nature” and lacking political authority to govern them.¹² This ideal state was short-lived as some individuals inflicted harm on others, undermining the harmonic state of nature and pushing humanity into war.¹³ According to Locke, abhorrence of war led humanity to join together to form civil society.¹⁴ The idea of civil rights, especially those rights that concern private ownership of property, is central to the Lockean model and its application to tax.¹⁵ Locke posits that individuals are property holders in the state of nature, and he maintains that they continue to possess property under the regime of civil society.¹⁶

Locke’s theory and conception of rights relies on the premise that in the state of nature, earth belonged to humanity as a whole.¹⁷ According to this historical proposition, resources were initially owned in common by mankind.¹⁸ Locke does not regard people in the initial state as having exclusive rights over resources.¹⁹ In fact, anyone could have obtained shared resources for personal use by simply exerting the effort to do so.²⁰ This includes, for

¹¹ JOHN LOCKE, CONCERNING CIVIL GOVERNMENT, SECOND ESSAY § 21 (1690), *reprinted in* 33 GREAT BOOKS OF THE WESTERN WORLD 25–84 (Mortimer J. Adler ed., 6th prtg. 1996) (“The natural liberty of man is to be free from any superior power on earth . . .”).

¹² *Id.* Locke explains that the meaning of freedom is that people are not subject to the will of others and that everyone possesses equal (but not necessarily the same) powers and jurisdiction over these powers. Thus, there is no hierarchy in the state of nature. Hierarchy, Locke claimed, meant slavery. *See also id.* at 25, ch. II, § 4.

¹³ *Id.* at 28, ch. II–III, §§ 13, 16–21 (describing the state of war as a condition in which people lose their freedom to the impartial judgment of others).

¹⁴ *Id.* at 28, 44, 55, ch. II, VI, XI, §§ 13, 87–88, 134. In entering the Lockean type of civil society, people gave the right to govern themselves to the political authority. Locke presents this authority as a trustee, acting on behalf of the interests of its citizens. In this way, the political authority becomes almost a servant for the common good.

¹⁵ *See, e.g., id.* at 53, ch. IX, § 124 (“The great and *chief* end, therefore, of men uniting into commonwealths, and putting themselves under government, *is the preservation of their property.*”) (emphasis added).

¹⁶ *Id.* at 53, ch. IX, §§ 124–25.

¹⁷ *Id.* at 30, ch. V, §§ 24–25. Locke’s interpretation of the beginning of time is that God gave power to “them” (i.e., Mankind) not “him” (Adam). *Id.* at 30, ch. V, § 24.

¹⁸ *Id.* at 30, ch. V, §§ 25–26; *see also* Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 297 (1988).

¹⁹ LOCKE, *supra* note 11, at 31, ch. V, §§ 27–28.

²⁰ *Id.* at 31, ch. V, §§ 28–31 (“Though the water running in the fountain be every one’s, yet who can doubt but that in the pitcher is his only who drew it out? His labour hath taken it out of the hands of Nature where it was common, and belonged equally to all her children, and hath thereby appropriated it to himself.”) *id.* at § 28.

example, picking apples from a tree or gathering crops in a field.²¹ Locke's basic tenet, which came to be known as the "labor-mixing principle,"²² is that individuals are entitled to holdings that result from the application of their labor: "Whatsoever, then, he removes out of the state that Nature ha[s] provided and left it in, he ha[s] mixed his labour with it, and joined to it something that is his own, and thereby makes it his property."²³

Locke's labor-mixing principle and conception of rights give rise to several key justifications in support of a system of private property. These justifications become imperative in the evaluation of tax issues including, for example, the right to tax, the goals of taxation, and the tax rate structure. The first justification for a system of private property, and the one most commonly identified with the Lockean paradigm, addresses the individual and her right to autonomy; the other two, more modern justifications of the theory, concern labor and its value to society.

Locke's theory is grounded in fundamental respect for free will and the right to autonomy.²⁴ According to this view, the first justification for a system of private property rights holds that individuals have a right to self-ownership, to the labor they apply, and thus, by extension, to the product of this labor.²⁵ Exercise of free will coupled with the assignment of labor is the means by which individuals expand their right of self-ownership over external resources and make these resources their own.²⁶

Conversely, the second justification in support of a system of private property rights is that labor is virtuous in and of itself and, therefore, laborers deserve reward and encouragement.²⁷ This perspective draws from a theological belief that the exercise of labor is the manner by which individuals enjoy the goodness the world provides.²⁸ Since labor fulfills a godly design, it is virtuous on its own merit.²⁹ This idea corresponds with the conviction that labor is generally unappealing and requires remuneration to be performed.³⁰

A third, more modern justification relies on utilitarian principles to suggest that labor deserves reward because it adds value that benefits society at large.³¹ According to this line of thinking, the value one creates through labor

²¹ *Id.* at 30, ch. V, § 27.

²² *See, e.g.*, Edward Feser, *There Is No Such Thing as an Unjust Initial Acquisition*, 22 Soc. PHIL. & POL'Y 56, 61 (2005) (referencing Locke's "labor-mixing" principle).

²³ LOCKE, *supra* note 11, at 30, ch. V, § 26.

²⁴ *Id.* at 30, ch. IV, § 22 (holding that free will and the right to autonomy are virtues possessed by all individuals).

²⁵ *Id.* at 30, ch. V, § 27.

²⁶ *Id.* at 30–31, ch. V, §§ 27–28.

²⁷ Byrne, 1999, *supra* note 8, at 708–09 (citing Hughes, *supra* note 18, at 288).

²⁸ *See, e.g.*, LOCKE, *supra* note 11, at 31–32, ch. V, § 31.

²⁹ *Id.* at 31, ch. V, § 31 ("God, when He gave the world in common to all mankind, commanded man also to labour, and the penury of his condition required it of him."); *see also* Marjorie E. Kornhauser, *The Morality of Money: American Attitudes Toward Wealth and the Income Tax*, 70 IND. L.J. 119, 125 (1994) (suggesting that Americans' perspectives about wealth and money are partly drawn from the idea of serving God); Jeremy Waldron, Book Review, 102 ETHICS 401, 402 (1992) (reviewing STEPHEN MUNZER, *A THEORY OF PROPERTY* (1990)).

³⁰ LOCKE, *supra* note 11, at 35, ch. V, § 48.

³¹ *Id.* at 34, ch. V, §§ 42–43.

ultimately trickles down to others and improves society's general well-being, or, in other words, enlarges the societal pie.³² It is not enough to merely acknowledge the value of labor; rather, the right to private property must be established to motivate individuals to invest effort.³³ Over the long term, such a reward system advances the exercise of effort and, consequently, the establishment of wealthier, more resilient nations.³⁴ One well-known example Locke offers for this "trickle-down" argument concerns uncultivated, non-productive land. Locke explains that no matter how large and potentially prosperous uncultivated land might be, it is still worthless without human effort to cultivate it.³⁵ Further, labor is not only necessary to cultivate land, such as in sowing seeds or gathering crops, but it also creates more demand for the labor of others.³⁶ Accordingly, the benefits created by transforming uncultivated land to productive land eventually trickle down from the landowner to the broader society, including workers and consumers, through advantages such as additional job opportunities and greater productivity.

As the above discussion illustrates, the Lockean theory suggests that a system of private property rights acknowledges the innate bond between a person's free will, right to autonomy, and labor, or more accurately, the product of one's labor. Private property rights also manifest society's gratitude for human effort and serve as a system of incentives to elicit productive outlays and the enlargement of the societal pie. Despite these important ends, Locke narrows the application of the labor-mixing principle and, accordingly, entitlement to private appropriation, with two restrictions known as the first and second "Lockean Provisos."³⁷

According to the first Lockean Proviso, the accumulation of private property is permissible only to the extent that it can be maintained without spoil-

³² *Id.* at 34, ch. V, § 43; *see also id.* at 33, ch. V, § 40 ("[C]onsider what the difference is between an acre of land planted . . . and an acre of the same land lying in common without any husbandry upon it, and he will find that the improvement of labour makes the far greater part of the value.").

³³ *Compare id.* at 34, ch. V, § 44 (describing how the invention of property protects the products of labor: "[Man] . . . had . . . in himself the great foundation of property; and that which made up the great part of what he applied to the support or comfort of his being, when invention and arts had improved the conveniences of life, was perfectly his own, and did not belong in common to others."), with Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667, 1683 (1988) ("In this [Hobbesian] model of human nature, limitless self-interest and the consequent urgent need for self-defense require the most expansive possible notion of private property . . .").

³⁴ LOCKE, *supra* note 11, at 33–34, ch. V, §§ 40–41.

³⁵ *Id.* at 33–34, ch. V, § 41 ("[S]everal nations of the Americans are of this, who are rich in land and poor in all the comforts of life . . . with the materials of plenty . . . yet, for *want of improving it by labour*, have not one hundredth part of the conveniences we enjoy . . .") (emphasis added); *id.* at 34, ch. V, § 43 ("It is labour, then, which *puts the greatest part of value upon land*, without which it would scarcely be *worth anything*.") (emphasis added).

³⁶ *Id.* at 34, ch. V, § 43.

³⁷ *Id.* at 30, ch. V, § 26; *see also* Geoffrey P. Miller, Comment, *Economic Efficiency and the Lockean Proviso*, 10 HARV. J.L. & PUB. POL'Y 401, 401 (1987) (identifying the "Lockean Proviso" as stating that the "acquisition of unowned property is permissible 'at least where there is enough, and as good left in common for others.'").

age.³⁸ Waste is undesirable under the Lockean model.³⁹ It follows that the first Proviso primarily allows personal appropriation when necessary for subsistence.⁴⁰ Thus, for example, a person cannot retain one hundred acorns and assert entitlement over them if she can only consume fifty acorns, leaving the other fifty to spoil. This person can rightfully appropriate only the fifty acorns she will use.

According to the second Lockean Proviso, appropriation of resources is permissible only “where there is enough, and as good left in common for others.”⁴¹ Hence, if one hundred acorns constitute food supply of an entire village, one person cannot claim all one hundred acorns for herself since this will not leave sufficient acorns for others. Locke, however, does not clarify how much of any resource should be left for others, making the application of the second Proviso rather difficult. Even more problematic are attempts to apply the Lockean Provisos to the conditions of modern economy.

Locke’s model envisions the world as populated with few people and sufficient resources for everyone.⁴² Compared to this starting point, today’s world is considerably more populous, with some goods becoming increasingly scarce.⁴³ Under these conditions, Locke’s Provisos are harder to sustain and justify.⁴⁴ Specifically, in a market economy, where resources are exchanged for money, individuals are able to appropriate resources beyond immediate needs and bargain any surpluses of perishable goods for monetary compensation, which never spoils.⁴⁵ Accordingly, appropriation beyond immediate needs, a practice forbidden under Lockean principles, is made possible by a market economy. Applying the labor-mixing principle to modern market conditions

³⁸ LOCKE, *supra* note 11, at 33, ch. V, § 37; *but see id.* at 34–35, ch. V, §§ 45–50 (explaining the development of storage and trade, which greatly undermines his first Proviso).

³⁹ *Id.* at 31, ch. V, § 30 (“Nothing was made by God for man to spoil or destroy.”); *id.* at 35, ch. V, § 46 (“[I]t was a foolish thing, as well as dishonest, to hoard up more than he could make use of.”).

⁴⁰ *Id.* at 33, ch. V, § 37 (“[M]en had a right to appropriate by their labour, each one to himself, as much of the things of Nature as he could use . . .”).

⁴¹ *Id.* at 30, ch. V, § 26. According to Locke, the “enough and as good” Proviso was not very limiting as the Americas had access to what seemed at the time to be unlimited unclaimed resources. *See id.* at 33, ch. V, § 41. Some interpret the “enough and as good” proviso as applying to the market as a whole; thus, making goods available for purchase becomes analogous with leaving “enough and as good.” Byrne, 1999, *supra* note 8, at 711 (citing Arvid Pardo, *An Opportunity Lost*, in *LAW OF THE SEA: U.S. POLICY DILEMMA* 23 (Bernard H. Oxman et al. eds., 1983)).

⁴² LOCKE, *supra* note 11, at 32–33, ch. V, § 36.

⁴³ Scarcity introduces conflicts over the allocation of resources. *See id.* at 32, ch. V, § 33; Waldron, *supra* note 29, at 403 (“[T]alk of property makes little sense except against a background of scarcity . . .”).

⁴⁴ According to Locke, money enables the unlimited accumulation of wealth because it permits an enhanced capacity of durable goods production. LOCKE, *supra* note 11, at 35, ch. V, §§ 46–48. This implies that money does not decrease social productivity but rather increases it. *See also infra* note 46.

⁴⁵ LOCKE, *supra* note 11, at 35, ch. V, § 47 (“And thus came in the use of money; some lasting thing that men might keep without spoiling, and that, by mutual consent, men would take in exchange for the truly useful but perishable supports of life.”).

thereby results in “disproportionate and unequal possession of the earth,” a state of affairs predicted by Locke centuries ago.⁴⁶

Disparity in wealth and income, which causes much concern in modern civilizations, is acceptable and even encouraged under the Lockean paradigm.⁴⁷ In Locke’s view, economic differences prod individuals to labor which, in turn, advances the economy, improves human condition, and enlarges the societal pie.⁴⁸ It is not surprising, then, that in his theory of entitlement, Locke does not condemn inequality. Under the Lockean paradigm, it is industry and labor, not equality, which are virtuous.

Accumulation of money is fair, according to the Lockean model, precisely because money is a durable, non-perishable good that, Locke maintains, not only causes no harm when hoarded by individuals but benefits the entire society.⁴⁹ It is unclear, however, whether Locke would have been as forgiving of money accrual given what is known today about potential repercussions of large concentrations of accumulated wealth and income. Recent empirical work demonstrates that large concentrations of wealth and income provide wealthy individuals with disproportionate power and influence, stratifying society into classes of citizens and leading to socio-political unrest and slow economic growth.⁵⁰ In particular, there is a danger of perpetuating and magnifying these harms through the flow of poorly distributed fortune from one generation to the next.⁵¹ In line with such evidence, it remains questionable at what point entitlement to private property becomes sufficiently unwarranted that it is no longer justifiable under the tenets of Locke’s entitlement doctrine.⁵² Additionally, in a market economy, money serves as a necessary means to attain subsistence

⁴⁶ *Id.* at 35, ch. V, § 50; *see also id.* at 35, ch. V, § 48 (“[A]s different degrees of industry were apt to give men possessions in different proportions, so this invention of money gave them the opportunity to continue and enlarge them.”); *id.* at 35–36, ch. V, §§ 50–51 (“[I]t is plain that the consent of men have agreed to a disproportionate and *unequal possession of the earth* . . . they having, by consent, found out and agreed in a way how a man may, rightfully and without injury, possess more than he himself can make use of by receiving gold and silver For as a man had a right to all he could employ his labour upon”) (emphasis added).

⁴⁷ *Id.* at 33, ch. V, § 48.

⁴⁸ *Id.* (“Where there is not something both lasting and scarce, and so valuable to be hoarded up, there men will not be apt to *enlarge their possessions of land, were it never so rich, never so free for them to take.*”) (emphasis added).

⁴⁹ *Id.* at 35, ch. V, § 50 (asserting that gold and silver “may continue long in a man’s possession without decaying for the overplus”); *see also supra* notes 44–48.

⁵⁰ Reuven S. Avi-Yonah, *Why Tax the Rich? Efficiency, Equity, and Progressive Taxation*, 111 YALE L.J. 1391, 1407–13 (2002) (reviewing DOES ATLAS SHRUG?: THE ECONOMIC CONSEQUENCES OF TAXING THE RICH (Joel B. Slemrod ed., 2000)); James R. Repetti, *Democracy, Taxes, and Wealth*, 76 N.Y.U. L. REV. 825, 832–36, 840–48 (2001); Roberto Perotti, *Political Equilibrium, Income Distribution, and Growth*, 60 REV. ECON. STUD. 755, 755–57 (1993); Roberto Perotti, *Growth, Income Distribution, and Democracy: What the Data Say*, 1 J. ECON. GROWTH 149, 149–150 (1996).

⁵¹ Sagit Leviner, *From Deontology to Practical Application: The Vision of a Good Society and the Tax System*, 26 VA. TAX REV. 405, 442–45 (2006) (discussing the harms of mal-distributed inter-generationally transmitted wealth).

⁵² *Cf. LOCKE, supra* note 11, at 35, ch. V, § 46 (“[I]f he would give his nuts for a piece of metal, pleased with its colour, or exchange his sheep for shells, or wool for a sparkling pebble or a diamond, and keep those by him all his life, he invaded not the right of others; he might heap up as much of these durable things as he pleased.”).

needs. Once basic resources turn scarce, their dearth undermines the merit of unrestricted private appropriation, since “enough and as good” resources are not left for others.⁵³

In view of Locke’s basic stance that moral entitlement to holdings is the product of labor-mixing activities, society and its institutions must assume responsibility for protecting the resulting distribution of holdings and corresponding system of private property. To this end, individuals are required to share the financial burden of societal protection through payment of taxes.⁵⁴ Locke, however, does not discuss more extensive public responsibilities, such as construction of infrastructure, including highways and parks, nor does he consider utilizing the tax system to advance redistributive goals.⁵⁵ At first glance, then, the Lockean model of entitlement yields a relatively limited government and tax bill. Under a more probing examination, however, matters appear less clear-cut.

The three justifications for the Lockean paradigm defend entitlement to private property based on autonomy, desert, and productivity grounds. Convincing claims have been made, however, against the strength of any of these justifications to support entitlement to the *entire* share of market returns.⁵⁶ In real-world circumstances, it is generally impossible to draw a clear distinction between market returns resulting from one’s effort and exercise of free will and those returns that derive from factors outside of the individual’s control, such as luck, effort exerted by others, and societal infrastructures.⁵⁷ To the extent

⁵³ Cf. John T. Sanders, *Justice and the Initial Acquisition of Property*, 10 HARV. J.L. & PUB. POL’Y 367, 372–73, 377–80 (1987) (discussing the “enough and as good” proviso).

⁵⁴ See, e.g., 3 RICHARD A. MUSGRAVE, *Public Finance and Distributive Justice*, in PUBLIC FINANCE IN A DEMOCRATIC SOCIETY 135, 136 (2000) [hereinafter MUSGRAVE, *Public Finance and Distributive Justice*].

⁵⁵ For early discussions of public goods and their social role, see ADAM SMITH, WEALTH OF NATIONS 325 (4th ed. 1850); see also ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 230–31 (1974) (discussing the distributive role of society).

⁵⁶ See, e.g., MURPHY & NAGEL, *supra* note 5, at 68–69 (discussing the various faults of resource distributions achieved by an unaltered free market economy); Michael J. Graetz, *To Praise the Estate Tax, Not To Bury It*, 93 YALE L.J. 259, 275–77 (1983) (making a case for market returns to depend on factors outside of any one individual’s control, including forces of market supply and demand as well as societal conditions. “[M]ost production is based upon the *joint use* of different resources, typically provided by different people . . . some share of total market returns . . . [is also] attributable to societal conditions. . . . All receipts are *joint products*, both individual and societal. Because individual characteristics and social characteristics are both essential to their *joint outcome*, there is simply no means by which a percentage of individual and social ‘dessert’ can be calculated.”) (emphasis added); Edrey, *supra* note 8 (further developing the role which society plays in the process of income production—coined and explored as the “joint venture.”).

⁵⁷ For example, an athlete’s accomplishments are the result of genetic and environmental factors over which she has no control. Similarly, talent, age, health, and social positions are greatly influenced by luck, a morally arbitrary factor. See, e.g., HERBERT KIESLING, TAXATION AND PUBLIC GOODS: A WELFARE-ECONOMIC CRITIQUE OF TAX POLICY ANALYSIS 119–20 (1992) (discussing the issues of deservedness and reward as notions requiring an active action of the individual); Barbara H. Fried, *Fairness and the Consumption Tax*, 44 STAN. L. REV. 961, 1007–09 & n.131 (1992). However, according to entitlement theorists, as long as initial entitlements were justly acquired and all subsequent transfers are freely entered into, inequality in resources, luck, and other people’s effort may not make one less

that wealth and income accruals result from factors other than one's effort and free will, claims to such accumulations may be morally questioned.

Instead of embracing the prevailing market allocation unaltered, it may make more sense to consider possible infirmities in the existing distribution of holdings. Taking this view, taxation could be levied, not only because of its functions as a revenue-raising mechanism—necessary to secure the existing distribution of holdings—but also considering its potential to correct this distribution. That is, taxation may appropriate from individuals the share of market returns that is not rightfully theirs and redirect (i.e., redistribute) it toward a more entitled destination.

According to the productivity justification, allowing individuals to reap the rewards of their labor is meant to encourage future efforts. Taxation, however, does not necessarily depress productivity in the sense of removing, either wholly or partially, the incentive to engage in work and other productive endeavors.⁵⁸ Empirical research illustrates, for example, that monetary rewards, including increases in after-tax wages, do not always correspond with the number of hours people work.⁵⁹ Such findings suggest the relationship between economic incentives and productive outlays depends on different factors, including the desire for power, satisfaction, and security.⁶⁰ That is, at least part of the reason people work is not driven by monetary considerations and people may accordingly respond to taxation in ways that are not entirely predictable.⁶¹ In fact, recent studies suggest that the possibility of acquiring a *relatively* higher economic standing may be a more successful inducement to effort and productivity than simple economic rewards.⁶² Thus, as long as after-tax market

entitled to her holdings. *See, e.g.*, Nozick's theory of entitlement, *infra* notes 86–89 and accompanying text.

⁵⁸ SLEMROD & BAKIJA, *supra* note 10, at 121–22 (explaining that taxes have two counter-vailing effects. On the one hand, taxes reduce the marginal reward for productive activities and, by so doing, make these activities less attractive. This effect is known as the substitution or incentive effect. On the other hand, most taxes make individuals poorer so that they need to work more, rather than less, in order to maintain their living standard. This effect is known as the income effect.).

⁵⁹ *See, e.g., id.* at 124–27 (reviewing the literature and concluding that “[a]lthough, as with many economic questions, there is controversy, it is still fair to say that the consensus is that labor supply responsiveness [to taxation] is fairly low.”). *Cf.* Joseph Bankman & Thomas Griffith, *Social Welfare and the Rate Structure: A New Look at Progressive Taxation*, 75 CALIF. L. REV. 1905, 1922–26 (1987) (finding that work contributes to social standing and self-esteem and showing that elasticity of labor is generally low, but higher for married women).

⁶⁰ Carroll, for example, underscores the key role of non-monetary motivations to work, including achieving professional gratification, power-lust, and philanthropic ambitions. Christopher D. Carroll, *Why Do the Rich Save So Much?*, in *DOES ATLAS SHRUG?: THE ECONOMIC CONSEQUENCES OF TAXING THE RICH* 465, 477 (Joel B. Slemrod ed., 2000).

⁶¹ *Id.* at 480 (discussing aggregate effect of bequest taxes). For a good discussion on the complexity of factors to potentially influence individuals' inclination to work, *see* Byrne, 1999, *supra* note 8, at 725–26.

⁶² According to Frank, relative standing, in terms of income and wealth, is more significant than one's absolute standard of living. Thus, as long as greater effort results in an improvement in relative conditions, the imposition of tax does not create a disincentive for productive effort. Note, however, that taxation leads to at least some welfare loss since taxpayers' optimal economic behavior may be affected by taxes even when there is no apparent change in the choices they make. This can happen when the income and substitution effects of

returns remain relatively high to other, comparable taxpayers (however comparable taxpayers are conceived), an entitlement to the *entire* share of economic rewards may not be necessary.

Furthermore, evidence suggests that making some individuals better off does not inevitably lead to increased welfare for the entire society, as suggested by the trickle-down proposition. The presence of poverty, rising inequality, and social stratification, alongside considerable wealth and prosperity of the modern world,⁶³ undermines the argument that wealth trickles down the economic hierarchy.⁶⁴ Such conditions cast doubts over the workings of the market economy in general and unrestricted entitlement to private property in particular. They challenge the legitimacy of inequality, including disparities created under the system of entitlement and, more profoundly, the soundness of the theory itself. At the very least, these conditions highlight the need for constraints on entitlement to private property in order to ease economic inequality and allow social, economic, and political benefits to reach citizens across the societal spectrum.⁶⁵

taxation cancel each other out. Robert H. Frank, *Progressive Taxation and the Incentive Problem*, in DOES ATLAS SHRUG?: THE ECONOMIC CONSEQUENCES OF TAXING THE RICH 490, 499–505 (Joel B. Slemrod ed., 2000); *see generally* ROBERT H. FRANK, CHOOSING THE RIGHT POND: HUMAN BEHAVIOR AND THE QUEST FOR STATUS (1985); ROBERT H. FRANK & PHILIP J. COOK, THE WINNER-TAKE-ALL SOCIETY (1995).

⁶³ *See, e.g.*, Congressional Budget Office, Trends in the Distribution of Household Income Between 1979 and 2007 (2011) (finding after-tax income for the highest-income households grew more than it did for any other group. Between 1979 and 2007, income grew by 275% for the top 1% of households; 65% for the next 19%; 40% for the next 60%; 18% for the bottom 20%). *Cf.* Yoram Margalioth, *Tax Competition, Foreign Direct Investments and Growth: Using the Tax System to Promote Developing Countries*, 23 VA. TAX REV. 161, 162 & nn.1–2 (2003) (discussing deprived conditions of developing countries in particular).

⁶⁴ For example, during the mid-1970s and late 1980s, many U.S. working families struggled to rise above the poverty line when faced with stagnated wages and crushing inequality, while other Americans enjoyed much better conditions. Gilbert argues that overall, the working poor in the U.S. included about 15.6% of the population in 1996, compared to a lower rate of 13.9% in 1990. Neil Gilbert, *The Size and Influence of the Underclass: An Exaggerated View*, 37 SOC'Y 43, 45 (1999). Many of the working poor occupy part-time or temporary jobs that pay little and provide few opportunities to gain professional skills or develop careers, further decreasing their earning potential. James Midgley, *The United States: Welfare, Work and Development*, 10 INT'L J. SOC. WELFARE 284, 285–291 (2001).

⁶⁵ This could be done, for example, by implementing redistributive measures within the tax system that aim at guaranteeing basic living conditions, such as shelter and education, for all. For the role of the tax system in advancing redistributive goals see, for example, Reuven S. Avi-Yonah, *The Three Goals of Taxation*, 60 TAX L. REV. 1, 11–22 (2006) (suggesting that personal income taxation, in particular, best serves to advance the goal of redistribution via the tax system); David A. Weisbach, *Should Legal Rules Be Used to Redistribute Income?*, 70 U. CHI. L. REV. 439, 439 (2003) (“[L]egal rules should not be used to redistribute to the poor . . . [because] the tax system is a better tool for redistribution . . .”); Richard M. Bird & Eric M. Zolt, *Redistribution via Taxation: The Limited Role of the Personal Income Tax in Developing Countries*, 52 UCLA L. REV. 1627, 1682–83 (2005) (“Despite . . . many qualifications . . . the income tax, and particularly the personal income tax, is probably the only significant progressive element found in most tax systems.”). *Cf.* WALTER J. BLUM & HARRY KALVEN, JR., THE UNEASY CASE FOR PROGRESSIVE TAXATION I (1953) (“Progressive taxation is now regarded as one of the central ideas of modern democratic capitalism and is widely accepted as a secure policy commitment which does not require serious examination.”). Notwithstanding the above references, the redistributive goal

It becomes evident that the levy of taxation may not only occur without violating the Lockean entitlement paradigm, but also may contribute to its integrity. Taxes need not reduce the incentive to engage in productive efforts nor do they necessarily serve to eliminate its rewards or infringe upon one's right to free will and autonomy. On the contrary, taxes have the potential to ensure effort is rightfully, but not excessively, compensated and economic incentives remain at an efficient and effective level.

B. Robert Nozick

Similar to Locke, Robert Nozick develops his theory from an initial "state of nature,"⁶⁶ a state of affairs lacking political authority where individuals live and obtain goods and services using whatever means they have in their possession.⁶⁷ Under these conditions, Nozick argues, individuals form a protective societal model.⁶⁸ Nozick's basic assumption is that this society naturally develops into a state very limited in powers and responsibilities, an undertone that precludes most forms of taxation, particularly those tax structures that are redistributive in nature.⁶⁹

The meaning of entitlement under the Nozickean paradigm includes the Lockean right to own property justly acquired.⁷⁰ Nozick's conception of entitlement, however, expands beyond simple ownership to also emphasize the right to dispose of property.⁷¹ These aspects of entitlement, Nozick prescribes, cannot be challenged without compelling justifications. In fact, according to Nozick, individuals' rights are so strong and extensive that they raise the question of what, if anything, the state can do without violating these rights.⁷² Protecting individuals' rights is understood to require limiting state's powers to narrow functions, such as enforcement of contracts and protection against force, theft, and fraud.⁷³ In keeping with Nozick's view, "any more extensive

of taxation remains highly controversial and is often advocated to come with a hefty price on growth and efficiency. See ARTHUR M. OKUN, EQUALITY AND EFFICIENCY: THE BIG TRADE-OFF 1 (1975) ("[P]ursuit of efficiency necessarily creates inequalities. And hence society faces a tradeoff between equality and efficiency."); LOUIS KAPLOW & STEVEN SHAVELL, FAIRNESS VERSUS WELFARE xvii (2002); Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961, 966 (2001) (asserting that welfare is the only appropriate legal policy standard). For the view that fairness and equity considerations on one hand and efficiency constraints on the other may in fact enhance, rather than be in conflict with, each other see *supra* note 50 and accompanying text.

⁶⁶ NOZICK, *supra* note 55, at 10.

⁶⁷ *Id.* at 10–12.

⁶⁸ *Id.* at 12–17.

⁶⁹ *Id.* at 12–17, 26–27, 113–118.

⁷⁰ See, e.g., *id.* at 185 ("[E]ach individual deserves what he gets unaided by his own efforts; or rather, no one else can make a claim of justice against this holding.").

⁷¹ *Id.* at 160 ("From each according to what he chooses to do, to each according to what he makes for himself . . . and what others choose to do for him and choose to give him of what they've been given previously (under this maxim) and haven't yet expended or transferred . . . From each as they choose, to each as they are chosen.").

⁷² According to Nozick, individuals have rights, and there are things no one may do to anyone else without violating these rights. *Id.* at ix.

⁷³ *Id.* at 26–27.

state will violate persons' rights not to be forced to do certain things, and is unjustified."⁷⁴

Nozick's assumption of a state limited in powers and responsibilities presupposes the merit of entitlements to existing property.⁷⁵ Nozick accordingly argues that just distribution of resources results from subsequent, freely entered exchanges.⁷⁶ Government meddling with private property through the levy of taxation becomes equivalent to forced labor because it requires individuals to undertake additional labor to compensate for taxes.⁷⁷ This, Nozick posits, violates basic rights and liberties, a far more devastating outcome than an insult to efficiency.⁷⁸ Government intervention by means of redistributive taxation—taking from one person to improve the lot of another—is perceived to be a greater rights and liberties violation, as it more aggressively interferes with individuals' possessions.⁷⁹ It is therefore clear that the Nozickean description of the state does not account for public education, childcare, or parks, as these outlays necessarily involve more elaborate forms of taxation than those required by a stripped-down societal model.

At the heart of the Nozickean doctrine are two rationales. The first rationale draws on the idea of free exercise of natural rights and entitlements and its prospect, over the long run, to improve everyone's well-being.⁸⁰ As Richard Posner, for example, claims: "The individual may be completely selfish but he cannot, in a well-regulated market economy, promote his self-interest without benefiting others as well as himself."⁸¹ A second rationale explains the theory

⁷⁴ *Id.* at ix.

⁷⁵ *Id.* at 224–26.

⁷⁶ *Id.* at 186–87.

⁷⁷ *Id.* at 172 ("Whether it is done through taxation on wages over a certain amount, or through seizure of profits, or through there being a big *social pot* so that it's not clear what's coming from where and what's going where . . . [such policies necessarily involve] appropriating the actions of other persons. Seizing the results of someone's labor is equivalent to seizing hours from him and directing him to carry on various activities . . . This process whereby they take this decision from you makes them a *part-owner* of you; it gives them a property right in you. Just as having such partial control and power of decision, by right, over an animal . . .").

⁷⁸ First and foremost, taxation is viewed as a violation of the right to self-ownership. *Id.* at 171–72. As Kymlicka notes, "If I own my self, then I own my talents. And if I own my talents, then I own whatever I produce with my self-owned talents." WILL KYMLICKA, *CONTEMPORARY POLITICAL PHILOSOPHY: AN INTRODUCTION* 109 (2d ed. 2002).

⁷⁹ Nozick, *supra* note 55, at 171–72. Progressive taxation does not aim to maintain the existing distribution of resources but rather to change it. A somewhat related argument is that progressive taxation constitutes "taking" under the Fifth Amendment. See Calvin R. Massey, *Takings and Progressive Rate Taxation*, 20 HARV. J.L. & PUB. POL'Y 85, 86, 105–06, 124 (1996) (arguing that the Takings Clause requires that federal taxation satisfy the benefit theory of taxation and be levied relative to benefits the taxpayer receives from the government. Because the benefit principle does not necessarily fit with progressive tax rates, progressive rates are understood to violate the Takings Clause.).

⁸⁰ NOZICK, *supra* note 55, at 157. Some argue, however, that Nozick does not provide any substantive support for his theory of entitlement. See, e.g., Thomas Nagel, *Libertarianism Without Foundations*, 85 YALE L.J. 136, 137–38 (1975) (reviewing ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974)); cf. NOZICK, *supra* note 55, at 150 (stating the theory of entitlement as if it is self-evident).

⁸¹ Richard A. Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103, 132 (1979); cf. JEREMY BENTHAM, *THE THEORY OF LEGISLATION* 53 (C. K. Ogden, ed., R.

as inherently drawing on the concept of self-ownership, derived from either the idea of equality (treating people as equals) or the notion of liberty (allowing individuals to live as they choose).⁸² This line of thinking suggests that an entitlement to holdings is fundamental to the principle of treating individuals as equal beings who cannot be exploited as resources for others.⁸³ According to this logic, the theory of entitlement is the best paradigm by which to assess the nature and scope of any cost that can be legitimately incurred by one person for the benefit of another.⁸⁴ At the same time, treating people with respect, by respecting their individual rights, is to everyone's advantage, as this allows us "to choose our life and to realize our ends and our conception of ourselves . . . aided by the voluntary cooperation of other individuals possessing the same dignity."⁸⁵

Similar to Locke, Nozick suggests that individuals' free exercise of labor is a method by which their right of self-ownership extends to external resources. Nozick acknowledges entitlement to holdings that result from any one of an individual's resources, including the fruits of her natural abilities, such as superior physical or intellectual attributes.⁸⁶ Nozick therefore assumes that individuals are morally entitled to what others, at times, consider the product of luck, social cooperation, or both.⁸⁷ Alternatively, it can be argued that under the Nozickean doctrine it is not luck or social cooperation, but rather effort expended in productive activity or productivity itself that results in entitlement,⁸⁸ a more intuitively appealing system of rewards.⁸⁹ Notwithstanding either interpretation of entitlement, self-ownership and the corresponding notion of mutual gains represent a rather limited platform for treating people in the same manner while respecting their rights and liberties. It is not merely the actions of isolated individuals that affect society and its market economy. Civil rights and obligations, as well as background circumstances, luck, and institutional conditions also play an important role in market production and the

Hildreth, trans., Humanities Press, Inc. 1931) (1864) [hereinafter BENTHAM, *THE THEORY OF LEGISLATION*] ("Society is so constituted that, in labouring for our particular good, we labour also for the good of the whole. We cannot augment our own means of enjoyment without augmenting also the means of others.").

⁸² KYMLICKA, *supra* note 78, at 107–28.

⁸³ See, e.g., NOZICK, *supra* note 55, at 30–31. Rights affirm individuals' "separate existences" and take seriously "the existence of distinct individuals who are not resources for others." *Id.* at 33.

⁸⁴ KYMLICKA, *supra* note 78, at 103–04. The theory of utilitarianism may be understood to undermine the existence of such limits. *Cf. infra* notes 141–52 and accompanying text.

⁸⁵ NOZICK, *supra* note 55, at 334 (emphasis added).

⁸⁶ NOZICK, *supra* note 55, at 225–26. *Cf.* Richard A. Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 *HOFSTRA L. REV.* 487, 499 (1980) (suggesting the value of individuals relies on their "capacity to produce for others.").

⁸⁷ See, e.g., NOZICK, *supra* note 55, at 226 ("Whether or not people's natural assets are arbitrary from a moral point of view, they are entitled to them, and to what flows from them.").

⁸⁸ *Id.* at 225.

⁸⁹ *Cf. id.* at 224–25 (using a negative argument to support claim that people deserve that which comes from their natural assets); Marjorie E. Kornhauser, *Equality, Liberty, and a Fair Income Tax*, 23 *FORDHAM URB. L.J.* 607, 614 (1996) (defining the principle of desert as relying on personal traits such as ability, effort, and talent).

resulting distribution of entitlements.⁹⁰ Accordingly, if Nozick's principles are to truly convey notions of equality and liberty, they should lead to a more generous understanding of the state and taxation than what is generally envisioned under the Nozickean doctrine.⁹¹

When discussing the issue of background circumstances, Nozick initially appears more responsive to the need to correct the distribution of entitlements generated under an unfettered market economy. Specifically, Nozick explores the possibility of compensating for inequality in circumstances caused as a result of unlucky life events.⁹² However, such compensation, according to Nozick, conflicts with his basic understanding of rights. In Nozick's words:

The major objection to speaking of everyone's having a right *to* various things such as equality of opportunity, life, and so on, and enforcing this right, is that these "rights" require a substructure of things and materials and actions; and *other* people may have rights and entitlements over these. *No one has a right to something whose realization requires certain uses of things and activities that other people have rights and entitlements over.*⁹³

Thus, without a mechanism to effectively compensate for diversity in assets, adjust for life circumstances, and affect the resulting distribution of possessions, Nozick's theory is highly susceptible to unequal patterns of distribution.⁹⁴

The issue of inequality comes up again when Nozick lays out the three main tenets of his doctrine: (1) the principle of transfer—specifying that holdings justly acquired can be freely transferred;⁹⁵ (2) the principle of initial acquisition—offering an account of how people initially came to own their

⁹⁰ See *supra* note 57 and accompanying text.

⁹¹ KYMLICKA, *supra* note 78, at 107–10 (discussing the notion of self-ownership). For an example of a theory based on the idea of self-ownership that leads to different conclusions than Nozick's theory does, see the discussion on Rawls's Theory of Justice, *infra* notes 188–237 and accompanying text. There are interesting similarities between Nozick's paradigm and Rawls's theory of justice. Nozick not only appeals to the principle of equality (albeit one that is broadly conceived), but he also makes a case against utilitarianism, which is an important part of Rawls's thesis. Rawls, for example, claims that utilitarianism fails to treat people as ends in themselves, since it allows some people to be sacrificed for the benefit of others. Accordingly, both Rawls and Nozick agree that treating people as equals requires placing limits on the manner they can be used for the benefit of others or society in general. People should have rights that are not subject to the utilitarian calculation. Rawls and Nozick disagree, however, on the question of which rights are most important to ensure that people are treated as ends in themselves. Generally speaking, Rawls sees the right to a given share of society's resources as one of the most important rights. Yet, Nozick values most the right individuals have over themselves—the right to "self ownership." KYMLICKA, *supra* note 78, at 107–10.

⁹² NOZICK, *supra* note 55, at 235–38.

⁹³ *Id.* at 238 (some emphasis added).

⁹⁴ In Nozick's view, distributions that comply with his three principles are morally just regardless of the issue of inequality. *Id.* at 166 ("Rights do not determine a social ordering but instead set the constraints within which a social choice is to be made, by excluding certain alternatives, fixing others, and so on. . . . If entitlements to holdings are rights to dispose of them, then social choice must take place *within* the constraints of how people choose to exercise these rights.").

⁹⁵ *Id.* at 150. According to Nozick, the topic of transfer involves "complicated truth," which he does not develop. He does mention, however, that this principle includes "descriptions of voluntary exchange, and gift and (on the other hand) fraud." *Id.*

resources;⁹⁶ and (3) the principle of rectification—prescribing that entitlement to holdings unjustly acquired or transferred must be corrected.⁹⁷ According to Nozick, only those holdings that comply with these three tenets are rightfully possessed.⁹⁸ If all private possession is rightfully held, the entire distribution of resources is just and should not be disturbed.⁹⁹

The first and second tenets of the Nozickean doctrine state that to justify the existing distribution of holdings, past acquisitions must be legitimate.¹⁰⁰ An illegitimate use of force or deception, for example, undermines the justness of entitlement to assets and, hence, the right to pass these assets to others.¹⁰¹ Conversely, when past acquisitions and transfers are legitimate, there can be no justification for infringement upon privately held possessions. According to the third tenet, redistributive measures aimed at remedying injustice in past acquisitions or transfers of holdings, are morally justified.¹⁰² Overall, then, when addressing incidents of unjust past acquisitions or transfers, Nozick's theory may allow for a more extensive state and tax schemes than Nozick initially posits.¹⁰³

Unfortunately, it is difficult to conclusively and timely identify incidences of past injustice and, accordingly, the rightful owners of resources in such circumstances.¹⁰⁴ Nozick thus provides a rule of thumb for detecting victims and beneficiaries of unjust acts. He explains:

- (1) . . . victims of injustice generally do worse than they otherwise would and
- (2) . . . those from the least well-off group in the society have the highest probabilities of being the (descendants of) victims of the most serious injustice who are owed compensation by those who benefited from the injustices (assumed to be those better off, though sometimes the perpetrators will be others in the worst-off group).¹⁰⁵

Next, Nozick suggests that injustice in existing holdings could be rectified by a single, across-the-board measure of ex-post resource redistribution, tailored to appropriate from well-off members of society and bestow upon those at the bottom of the economic scale.¹⁰⁶ However, despite introducing this broad rule

⁹⁶ *Id.* Unfortunately, similar to the underdevelopment of the principle of transfer, Nozick does not expand on the principle of acquisition. Nozick notes that the principle of acquisition raises several problems including figuring out which “unheld” things came to be held and how. *Id.*

⁹⁷ *Id.* at 152–53.

⁹⁸ *Id.* at 151.

⁹⁹ *Id.* at 151–52. For example, according to the transfer principle, when a person owns a piece of land, he is free to engage in any transfer concerning that land as long as the initial acquisition of the land was freely made and not a result of unfair competition or fraud. If all land was justly acquired and transferred then the entire distribution of land in a given society is fair as well.

¹⁰⁰ *Id.* at 151.

¹⁰¹ *Id.* at 151–52.

¹⁰² *Id.* at 152–53. Nozick maintains that holdings acquired or transferred by means of, for example, stealing or fraud, are unjustified and ought to be returned to their rightful owners.

¹⁰³ *Id.* at 230–31 (“Although to introduce socialism as the punishment for our sins would be to go too far, past injustices might be so great as to make necessary in the short run a more extensive state in order to rectify them.”).

¹⁰⁴ *Id.* at 231 (suggesting the lack of historical information).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* (“[T]hen a rough rule of thumb for rectifying injustices might seem to be the following: organize society so as to maximize the position of whatever group ends up least well-off

of thumb and the method of rectification, Nozick does not further clarify the conditions under which rectification takes place, nor does he address issues such as how to assess the effect of prior injustices or execute corresponding redistributive measures.¹⁰⁷ Coming short of sufficiently elaborating on the third tenet of rectification, Nozick leaves unanswered fundamental questions concerning the viability of this principle.¹⁰⁸ Accordingly, the extent to which rectification can truly be implemented by policymakers seeking to follow the Nozickean theory of entitlement remains to be seen.

A second, more blunt, indication of the elusiveness of the rectification principle is offered by Nozick himself. Generally, it can be assumed that provision of a minimum standard of living for all members of the society would benefit the most disadvantaged households and individuals at the expense of those more affluent citizens who are better situated and possess the actual means to finance such outlays. In the spirit of the principle of rectification, it seems reasonable to presume Nozick would have endorsed such a provision. A guaranteed minimum standard of living has the potential to rectify past injustices by compensating those most likely to have suffered prior injustices at the hands of those expected to have gained from these acts. Nozick, however, is far from endorsing the provision of social minimums.¹⁰⁹ He stresses that arguments in favor of such provision do not address the question of whether the required redistribution compromises existing, rightfully held entitlements.¹¹⁰ Notably, in emphasizing incidences where redistribution may cause injustice rather than examining the broader issue of whether the present distribution of holdings is just to begin with, Nozick practically abandons his principle of rectification.

Nozick's theory is further problematic when it comes to his description of the "state of nature" and the role this description plays in generating what Nozick offers as the foundation for a just societal order. Despite Nozick's attempts at portraying a starting point of free exercise of effort, talent, and transfers, alternative accounts of the beginning of time are often riddled with images of violence and oppression.¹¹¹ Since the use of force and violence makes acquisitions and transfers illegitimate according to the Nozickean doctrine,¹¹² these descriptions call into question the justness of the present distribution of holdings. If one acknowledges that the present distribution of holdings

in the society." Note the similarity between this rule and the Rawlsian difference principle. See *infra* notes 213–15 and accompanying text.

¹⁰⁷ NOZICK, *supra* note 55, at 152–53; *but see* Byrne, 1995, *supra* note 8, at 785 (suggesting that while Nozick does not specify the circumstances that would constitute rectifiable injustice, he raises important questions about what to account for when the principle of rectification is to be developed).

¹⁰⁸ NOZICK, *supra* note 55, at 152–53.

¹⁰⁹ *Id.* at 232–35 (discussing Bernard Williams, *The Idea of Equality*, in *PHILOSOPHY, POLITICS, AND SOCIETY* 110–131 (Peter Laslett & W. G. Runciman eds., 1962), *reprinted in* *MORAL CONCEPTS* (Joel Feinberg ed., 1969)).

¹¹⁰ *Id.* at 235.

¹¹¹ *Id.* at xi ("I argue that a state would arise from anarchy . . . even though no one intended this or tried to bring it about, by a process which need not violate anyone's rights."); *cf.* THOMAS HOBBS, *LEVIATHAN* 94–98 (Oxford Univ. Press 1909) (1651) (describing the beginning of time as a violent state of war of all against all).

¹¹² NOZICK, *supra* note 55, at 152–53; *see supra* notes 95–103 and accompanying text.

is questionable, it is difficult to construe a valid argument in favor of Nozick's minimal state and against taxation and redistribution. Furthermore, the description of the initial state of the world as free of possession may also be brought into question. If, for example, an initial joint ownership paradigm is considered,¹¹³ the inegalitarian implications of Nozick's theory are yet again debatable.¹¹⁴

In conclusion, Nozick's theory highlights several fundamentals in societal beliefs and mechanisms. Emphasizing the importance of privately held property rights, Nozick outlines a framework from which issues such as equality, political legitimacy, distributive justice, and taxation can be fleshed out and explored. Similar to Locke and contrary to egalitarian theorists, Nozick does not include equality among the principles necessary for normative assessment and generally criticizes other theorists who do.¹¹⁵ Rather, Nozick is a proponent of allowing the market to function on its own terms. In Nozick's theory, the main reference to social solidarity, and, hence, the possible attainment of more than a minimal protective state, relates to the workings of the market economy. Nozick's third principle of rectification addresses infractions that occur in the course of market acquisitions and transfers. That the application of this principle is practically unattainable, however, has serious implications for the integrity of the Nozickean theory of entitlement. The only legitimate system of taxation under the Nozickean paradigm is generally understood to be that which is necessary to raise revenues for the maintenance of institutions needed to protect the system of private property and free market exchanges, such as the monetary and justice systems.¹¹⁶ For this reason, placing a high value on an unrestricted market economy and generally assuming the merit of the prevailing distribution of resources, Nozick's theory often prescribes the administration of taxation in a manner that preserves, rather than disturbs, the societal status quo. In doing so, the theory avoids a candid consideration of plausible infringements in the initial distribution of resources and the later chain of acquisitions and transfers and can accordingly be challenged on these grounds.¹¹⁷

¹¹³ *Supra* notes 17–19 and accompanying text (discussing the Lockean description of the beginning of time).

¹¹⁴ Despite Locke's joint-ownership starting point, Locke's perspective on subsequent allocations of societal resources is similar to the description that Nozick provides. In addition, an "individually held" property rights approach is not uncommon. *See, e.g.*, RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 5 (1985).

¹¹⁵ Nozick questions the starting point of equality. NOZICK, *supra* note 55, at 215–16. He moreover claims that an argument that draws on equality cannot be used to justify greater equality and criticizes Rawls's original position for using such a circular proposition. *See id.* at 215 (*citing* RAWLS, *supra* note 1, at 538–41); *id.* at 156–57 (challenging the idea of pre-determined "patterned" distributions); *id.* at 198–202 (discussing competing incentives arising in the process of determining equal distribution).

¹¹⁶ *Id.* at 26–27 (discussing the practical implications of the minimal state).

¹¹⁷ *See e.g., id.* at 153 ("The general outlines of the theory of justice in holdings are that the holdings of a person are just if he is entitled to them by the principles of justice To turn these general outlines into a specific theory we would have to specify the details of each of the three principles of justice in holdings I shall not attempt that task here.").

II. UTILITARIANISM

A. Bentham and the Pursuit of Happiness

Utilitarianism, a more contemporary doctrine than the theory of entitlement, is a normative platform essential to modern, particularly professional, tax analysis. The theory has its roots in the work of Jeremy Bentham.¹¹⁸ It relies on two key fundamentals: the first concentrates on human welfare or “utility,”¹¹⁹ while the second considers human welfare by appointing equal weight to each individual.¹²⁰ Utilitarianism is grounded in a vision of equality that prescribes no one person is worth more than another.¹²¹ In its most common formula, the theory suggests that the right act or policy is that which produces the greatest utility for the greatest number of persons, calculated by adding up all utility units individuals enjoy.¹²²

Bentham believed that individuals are governed by two main forces: pain and pleasure.¹²³ Seen in this light, human behavior is understood as the pursuit of utility, based on a reasoned calculation designed to maximize pleasure and minimize pain.¹²⁴ Human experience provides utility, for example, when it produces pleasure in the form of benefit, advantage, good, or happiness or when it prevents pain through avoiding unhappiness or mischief.¹²⁵ Happiness, Ben-

¹¹⁸ See generally BENTHAM, THE THEORY OF LEGISLATION, *supra* note 81.

¹¹⁹ *Id.* at 2 (“Utility is an abstract term. It expresses the property or tendency of a thing to prevent some evil or to procure some good. *Evil* is pain, or the cause of pain. *Good* is pleasure, or the cause of pleasure.”).

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² Note, however, that Bentham’s understanding of utilitarianism is grounded in happiness. *Id.* (“That which is conformable to the utility, or the interest of an individual, is what tends to augment the total sum of his happiness. That which is conformable to the utility, or the interest of a community, is what tends to augment the total sum of the happiness of the individuals that compose it.”); see also *infra* note 126 and accompanying text.

¹²³ BENTHAM, THE THEORY OF LEGISLATION, *supra* note 81, at 2 (“Nature has placed man under the empire of *pleasure* and of *pain*. We owe to them all our ideas; we refer to them all our judgments, and all the determinations of our life.” Bentham suggested that man’s “only object is to seek pleasure and to shun pain These eternal and irresistible sentiments ought to be the great study of the moralist and the legislator. The *principle of utility* subjects everything to these two motives.”); see also 3 JEREMY BENTHAM, *The Psychology of Economic Man*, in JEREMY BENTHAM’S ECONOMIC WRITINGS 419, 433 (W. Stark ed., 1954) [hereinafter BENTHAM’S ECONOMIC WRITINGS].

¹²⁴ BENTHAM, THE THEORY OF LEGISLATION, *supra* note 81, at 18 (“Every one makes himself the judge of his own utility; such is the fact, and such it ought to be; otherwise man would not be a rational agent. He who is not a judge of what is agreeable to him, is less than a child; he is an idiot.”); see also BENTHAM’S ECONOMIC WRITINGS, *supra* note 123, at 434 (“Men calculate, some with less exactness, indeed, some with more: but all men calculate.”).

¹²⁵ BENTHAM’S ECONOMIC WRITINGS, *supra* note 123, at 437. For Bentham, utility is a multi-faceted concept. It includes, for example, (1) intensity, (2) duration, (3) certainty or uncertainty, and (4) propinquity or remoteness. *Id.* at 435. Also important is the likelihood that the pleasure or happiness will be followed by more of the same, and that the pleasure will not be followed by pain. *Id.* at 436. Bentham lists twenty-six categories of pleasure and pain that make up utility, including (but not limited to) sense, wealth, skill, amity, good name, power, benevolence, and association. See BENTHAM, THE THEORY OF LEGISLATION, *supra* note 81, at 21–27. Bentham also discusses how to measure the amount of pleasure and pain. *Id.* at 31–32.

tham argued, is the most desirable form of pleasure and the goal of the utility calculus.¹²⁶ As each individual seeks to maximize her happiness, it is the role of society to bring about the greatest happiness to the greatest number.¹²⁷ In this view, each private act or policy decision is to be judged “according to the tendency which it appears to have to augment or diminish the happiness of the party whose interest is in question.”¹²⁸ Utilitarianism is thus not concerned with moral issues per se, such as virtues, natural rights, or the social contract.¹²⁹ The theory suggests the government should abstain from such matters, since they are inappropriate considerations for policy formation.¹³⁰ Moreover, preoccupation with morality diverts the government from the true principle of policymaking: the pursuit of happiness, or utility.¹³¹ In this view, while maximizing utility may overlap with moral aspirations, it ought to guide society even when distinct from morality.

Notwithstanding the budding divide between utilitarianism and morality, two main arguments exist in support of utilitarianism as a standard for moral worth.¹³² According to the first argument, based on equality,¹³³ each individual possesses unique desires, characteristics, and interests and these should be given equal value because all individuals matter equally. The right act, which gives equal consideration to each individual, also maximizes total utility. The second argument places the focal point on the whole (i.e., society) rather than the individual.¹³⁴ According to this second, more commonly invoked rationale, maximizing the good is a primary, not secondary, goal of utilitarianism, and individuals are given equal consideration because it is in this way only that aggregate utility is maximized. Utilitarianism, in this light, is more concerned

¹²⁶ BENTHAM’S ECONOMIC WRITINGS, *supra* note 123, at 421 (“My notion of man is, that, successfully or unsuccessfully, he aims at happiness, and so will continue to aim as long as he continues to be man, in every thing he does.”).

¹²⁷ JEREMY BENTHAM, BENTHAM’S POLITICAL THOUGHT 195 (Bhikhu Parekh ed., 1973) [hereinafter BENTHAM’S POLITICAL THOUGHT].

¹²⁸ *Id.* at 67. Utilitarianism demands not only the value of individuals’ acts or experiences be considered based on their prospect to maximize welfare but also the behavior of the government. BENTHAM, THE THEORY OF LEGISLATION, *supra* note 81, at 1–2; *see also id.* at 60 (“Morality in general is the art of directing the actions of men in such a way as to produce the greatest possible sum of good. Legislation ought to have precisely the same object.”).

¹²⁹ *See, e.g.*, BENTHAM, THE THEORY OF LEGISLATION, *supra* note 81, at 3 (finding utility a calculation only of pleasure and pain).

¹³⁰ *Id.* at 60–65.

¹³¹ *Id.* at 60; *see also id.* at 3 (“I am a partisan of the *principle of utility* when I measure my approbation or disapprobation of a public or private act by its tendency to produce pleasure or pain; when I employ the words *just, unjust, moral, immoral, good, bad*, simply as collective terms including the ideas of certain pains or pleasures He who adopts the *principle of utility*, esteems virtue to be a good only on account of the pleasures which result from it; he regards vice as an evil only because of the pains which it produces.”).

¹³² Some, however, claim the theory of utilitarianism rests on self-evident truths or draws on a set of axioms, not debatable rationales, and thus falls short of offering substantive normative merit. BENTHAM’S ECONOMIC WRITINGS, *supra* note 123, at 421 (“This position may, to some eyes, present itself in the character of an axiom: as such self-evident, and not standing in need of proof.”).

¹³³ *See, e.g.*, *infra* text accompanying notes 154–56.

¹³⁴ *See, e.g.*, *infra* text accompanying notes 153.

with the welfare of society as a whole than with the welfare of its individual members.¹³⁵

Although Bentham sought to offer a theory that is compelling and simple to implement,¹³⁶ utilitarianism faces a number of practical challenges. Most of these difficulties follow the paradigm from its inception and should be carefully considered in policy settings.¹³⁷ Importantly, the measurement and comparison of utility units of different individuals, key functions in utilitarianism, are highly difficult to apply because individuals are distinct in their preferences and welfare or utility functions.¹³⁸ Further, Bentham's initial apprehension of utilitarianism accounting for moral and social values only deepens with later developments of utilitarianism, triggering troubling normative dilemmas once the theory's method of analysis is taken into full view.

Specifically, in a vastly heterogeneous world, it is nearly impossible to accurately measure utility units obtained by different individuals and compare the utility gains and losses associated with different policy alternatives. If utility cannot be readily measured and compared, the utilitarian calculus provides little aid in policy settings.¹³⁹ Avoiding the need to fully address this challenge, Bentham argued the comparability of utility must be assumed as a matter of practicality. According to Bentham: "If we refuse to acknowledge the principle of utility, we fall into a complete circle of sophistry. . . . If you desire to reject the principle of utility . . . what is there to put in its place?"¹⁴⁰

¹³⁵ The primary duty according to the second argument is not to treat people as equals, but to maximize total welfare. Treating individuals as equals emerges as a consequential effect of the utility calculation. See *infra* text accompanying notes 153–56.

¹³⁶ BENTHAM, THE THEORY OF LEGISLATION, *supra* note 81, at 2–3 ("A *principle* is a first idea, which is made the beginning or basis of a system of reasonings. . . . Such a principle must be clearly evident Such are the axioms of mathematics.")

¹³⁷ See, e.g., *id.* at 45 ("The principle [of utility] is not denied, but its application is thought to be impossible.")

¹³⁸ *Id.* ("There are some specious objections which I do not wish to dissemble. 'How is it possible to take account of all the circumstances which influence the sensibility? How can we appreciate internal and secret dispositions, such as strength of mind, knowledge, inclinations, sympathies? How can we measure these different qualities?' . . . I allow that the greater part of these differences in sensibility cannot be appreciated; that it would be impossible to prove their existence in individual cases, or to measure their strength and degree.")

¹³⁹ Given that the pursuit of the greatest good for the greatest number often involves utility losses and gains for different individuals, without a workable standard of measurement and comparability, there is no certain way to assess whether the added value to those who gain offsets the losses to those who lose.

¹⁴⁰ BENTHAM, THE THEORY OF LEGISLATION, *supra* note 81 at 18–19. Bentham prescribed that assuming the comparability of utility, and, hence, being able to use the theory for policymaking, is better than failing to take utility into account even when it is ill applied. See *id.* at 46; see also Hank Jenkins-Smith, *Continuing Controversies in Policy Analysis*, in POLICY ANALYSIS AND ECONOMICS: DEVELOPMENTS, TENSIONS, PROSPECTS 23, 25 (David L. Weimer ed., 1991). The comparability of utility, however, has nonetheless remained a challenge for utilitarianism. See, e.g., Lionel Robbins, *Interpersonal Comparisons of Utility: A Comment*, 48 ECON. J. 635, 636 (1938) ("I find it easy to understand the belief of Bentham and his followers that they had found the open sesame to problems of social policy. But, as time went on, things occurred which began to shake my belief in the existence of so complete a continuity between politics and economic analysis."). But see *id.* at 635 ("I am far from thinking that thorough-going utilitarianism *a' la Bentham* is an ultimate solution But I have always felt that, as a first approximation . . . the approach which counts each man as

Even if one accepts Bentham's practical solution to the issue of measurement and comparability, utilitarianism remains in conflict with basic principles of moral worth.¹⁴¹ Particularly, despite the aspiration of traditional utilitarianism to treat all individuals as possessing equal value, the theory may prescribe the degradation of some for the benefit of others when this practice increases aggregate utility.¹⁴² Lying, inhumane punishment, and repressing minorities can be justified, and even encouraged, in the same vein. Put differently, traditional utilitarianism places all forms of happiness and pleasure on the same, one-dimensional metric of utility. In this way, each source of benefit is equally considered when it provides or subtracts similar units of value. Notwithstanding the benefits of such a straightforward method of calculation, it may be socially desirable to distinguish between different types of preferences based on their social desirability.¹⁴³ This distinction allows policy-makers to take less desirable preferences out of the utility calculation or give them less utility weight,¹⁴⁴ while favoring other, more desirable, goals.¹⁴⁵

The difficulty of utilitarianism to account for moral and social values is particularly troubling in the use of money as a proxy for utility.¹⁴⁶ When utilizing a tangible criterion such as money to capture utility, an individual's supply of monetary units represents access to, and enjoyment of, goods and services. These are ultimately translated to reflect gains and losses in utility. Using this method permits the comparison of a wide range of policies and greatly enhances the efficacy of utilitarianism.¹⁴⁷ However, when money substitutes

one, and, on that assumption, asks which way lies the greatest happiness, is less likely to lead one astray . . .").

¹⁴¹ Cf. RAWLS, *supra* note 1, at 13 (discussing Rawls's idea of justice and fairness in society).

¹⁴² *But see* BENTHAM, THE THEORY OF LEGISLATION, *supra* note 81, at 16 ("The only difference between politics and morals is, that one directs the operations of governments, and the other the actions of individuals; but their object is common; it is happiness. That which is politically good cannot be morally bad, unless we suppose that the rules of arithmetic, true for large numbers, are false for small ones. While we imagine that we follow the *principle of utility*, we may nevertheless do evil. . . . That which constitutes a bad man, is the habit of pleasures injurious to others; but this very habit supposes the absence of many kinds of pleasure. *One ought not to hold utility responsible for mistakes contrary to its nature, and which it alone is able to rectify. If a man calculates badly, it is not arithmetic which is in fault; it is himself.*") (second emphasis added).

¹⁴³ Nozick argued, for example, for the legitimacy of preferences in calculating utility. He theorized the existence of a neuropsychologist machine able to induce high levels of pleasure by injecting drugs into people. If pleasure is the greatest good, everyone would volunteer to use this machine. However, most people are unlikely to opt in favor of the machine, suggesting that happiness may not be all that people care about and that other qualities to life exist. *See* NOZICK, *supra* note 55, at 42–45.

¹⁴⁴ Such preferences could be those that undermine acceptable notions of moral behavior in society including, for example, preferences for slavery and other violent acts.

¹⁴⁵ Those preferences could, for example, advance arts and poetry over plain pushpins even when both produce similar levels and duration of utility.

¹⁴⁶ BENTHAM'S ECONOMIC WRITINGS, *supra* note 123, at 437–38; BENTHAM'S POLITICAL THOUGHT, *supra* note 127, at 119–24. *See also* Jenkins-Smith, *supra* note 140, at 25.

¹⁴⁷ Utility calculation is accomplished, for example, through the determination of what individuals would pay to obtain a benefit or avoid a loss. Consider the Kaldor-Hicks proposition where the policy option that maximizes aggregated dollars is elected, and those who lose are (ideally) compensated through lump-sum transfers. For a useful introduction to the Kaldor-

for utility, utilitarianism is yet again challenged by troubling normative questions. Utilitarianism, as a paradigm, struggles to embody the complexity and, arguably, the supremacy of social and moral values. The principle of maximizing utility, as computed in monetary terms, offers a limited platform for policies that involve preferences for certain goods and services, such as the guarantee of a minimum level of nutrition or shelter for all,¹⁴⁸ when these may not be adequately expressed by, or compensated with, dollars.¹⁴⁹ However, as Bentham explains: “The *logic of utility* consists in setting out, in all the operations of the judgment, from the calculation or comparison of pains and pleasures, and in not allowing the interference of any *other* idea.”¹⁵⁰ And so, introducing values other than utility or wealth maximization into utilitarianism might itself be a rejection of the theory. Accordingly, even though contemporary scholarship offers alternative explanations for safeguarding access to certain rights and liberties,¹⁵¹ utilitarianism, as a normative platform, remains challenged when it comes to values.¹⁵²

Practically, utilitarianism suggests public policy should be based on the pursuit of happiness, the maximization of utility, and fundamental equality. Applying these principles to tax system design leads to two main tax policy alternatives. The first policy option recognizes that taxation lessens the amount of money, and thereby utility, enjoyed by individuals and demands the least sacrifice, in *collective* utility loss, while maintaining social welfare at a maxi-

Hicks proposition see, for example, HARVEY S. ROSEN, PUBLIC FINANCE 241 (5th ed. 1999). Cf. BENTHAM’S ECONOMIC WRITINGS, *supra* note 123, at 438 (“In the way, and by means of compensation, there is no evil to which it may not happen to be, in the instance of the individual in question, reparable in the way of equivalent. Relation had to the individual in question, an evil is reparable, and exactly repaired, when, after having sustained the evil and received the compensation, it would be a matter of indifference whether to receive the like evil, coupled with the like compensation, or not.”).

¹⁴⁸ See, e.g., Laurence H. Tribe, *Policy Science: Analysis or Ideology?*, 2 PHIL. & PUB. AFF. 66, 87–88 (1972) (discussing the idea, for instance, that “individuals would not trade breathing rights for pollution rights (even *infinite* pollution rights) below a certain point.”).

¹⁴⁹ *Id.* at 88. According to Tribe, a rich method of analysis that reflects the complexity and supremacy of social and moral preferences should evolve in the area of public policy. See also *id.* at 92–93 (discussing the issue of distribution for society as one which should reflect more than the gains or losses of individuals from goods and services).

¹⁵⁰ BENTHAM, THE THEORY OF LEGISLATION, *supra* note 81, at 3 (second emphasis added).

¹⁵¹ See, e.g., RAWLS, *supra* note 1, at 118–23 (discussing Rawls’s theory and design of the “veil of ignorance,” which may safeguard rights and liberties).

¹⁵² *Id.* at 23; John C. Harsanyi, *Rule Utilitarianism, Equality, and Justice*, 2 SOC. PHIL. & POL’Y, 115, 115 (1985) (discussing the concepts of equity and justice from a utilitarian perspective). Consider critical tax scholars who often challenge the seemingly objective analysis of taxation as based on the underlying value judgments of those who occupy the dominant, well-off positions in society. Here, the issue of values is brought to the surface to underscore the subjectivity of contemporary—mostly utilitarianism-driven—tax analysis. See, e.g., Dorothy A. Brown, *Race and Class Matters in Tax Policy*, 107 COLUM. L. REV. 790, 790–802 (2007) (exploring the debate over earned income tax credit, welfare programs, and the concepts of deserving and undeserving poor as racially based); Anthony C. Infanti, *Tax Equity*, 55 BUFF. L. REV. 1191, 1249–50 (2008) (“The concept of tax equity is part of the ‘entire system of values, attitudes, beliefs, morality, etc. that is in one way or another supportive of the established order. Cloaked in a mantle of positive connotations, tax equity is viewed as an indisputable good.’ ” Tax equity “seems nearly ‘unchallengeable, [a] part of the natural order of things.’ ”) (quoting CARL BOGGS, GRAMSCI’S MARXISM 7 (1976)).

mum level.¹⁵³ The second policy alternative prescribes that taxation levies an equal burden on each person, based on *individual* utility losses, while underscoring the idea of equal consideration.¹⁵⁴

Early utilitarianism, by and large, advocated the second policy alternative.¹⁵⁵ Taxes were designed so that the loss in marginal utility of income—that is, the loss in utility from taking a dollar away from an individual—was the same for all persons.¹⁵⁶ It was Bentham who first suggested that the value of money decreases as the total amount of wealth possessed increases, a phenomenon later known as “the decreasing marginal utility of money.”¹⁵⁷ In Bentham’s words: “[T]he quantity of happiness [read ‘utility’] produced by a particle of wealth (each particle being of the same magnitude) will be less and less at every [additional] particle.”¹⁵⁸ And, so, taking a dollar away from a rich person inflicts less utility loss than taking a dollar away from a poor person. Therefore, if additional dollars increase utility but the incremental gain in utility decreases with increased wealth, aggregate utility rises with an equal (rather than unequal) distribution of fortune.¹⁵⁹ Based on this view, the principles of maximizing total utility and levying an equal tax burden on individuals both lead to the same approach: advancing a progressive tax structure.¹⁶⁰ Put differ-

¹⁵³ MUSGRAVE, *Public Finance and Distributive Justice*, *supra* note 54, at 142.

¹⁵⁴ Both types of policies attempt to safeguard the highest amount of aggregated utility either as a main or derivative goal. See BLUM & KALVEN, *supra* note 65, at 39–45 (discussing different formulations for equal sacrifice); RICHARD A. MUSGRAVE, *THE THEORY OF PUBLIC FINANCE: A STUDY IN PUBLIC ECONOMY* 77 (1959) (discussing allocation and distribution); SIMONS, *supra* note 4, at 6–10 (discussing satisfaction and sacrifice).

¹⁵⁵ See, e.g., MILL, *supra* note 3, at 925–30 (conceptualizing the doctrine of equal sacrifice). Note that with respect to many other issues, Mill is far from endorsing utilitarianism as a basis for moral analysis.

¹⁵⁶ Mill’s doctrine of equal sacrifice ultimately aims for the extraction of the least total sacrifice from society. For a somewhat confused illustration of this idea, see *id.* at 927 (“As a government ought to make no distinction of persons or classes in the strength of their claims on it, whatever sacrifices it requires from them should be made to bear as nearly as possible with the same pressure upon all, which, it must be observed, is the mode by which least sacrifice is occasioned on the whole.”).

¹⁵⁷ BENTHAM’S ECONOMIC WRITINGS, *supra* note 123, at 441–42; see also Jenkins-Smith, *supra* note 140, at 25. For a useful discussion on the decreasing value of money (or its “declining utility”), see BLUM & KALVEN, *supra* note 65, at 40–42 (“It seems likely that a dollar has less ‘value’ for a person with a million dollars of income than for a person with only a thousand dollars of income. To take the same number of dollars from each is not to require the same amount of sacrifice from them.” Blum and Kalven conclude “[i]nstead a fair tax would take more from the wealthier”) *Id.* at 40.

¹⁵⁸ 3 JEREMY BENTHAM, *Pannomial Fragments*, in *THE WORKS OF JEREMY BENTHAM* 211, 229 (John Bowring ed., 1962). BENTHAM’S ECONOMIC WRITINGS, *supra* note 123, at 439, 441–42. Bentham applies this general rule not only to money but to all other sources and causes of pleasures. See, e.g., *id.* at 442 (finding that “[a]s it is with *money*, so is it with all other sources or causes of pleasure.”).

¹⁵⁹ Cf. 1 JEREMY BENTHAM, *Principles of the Civil Code*, in *THE WORKS OF JEREMY BENTHAM* 297, 304–07 (John Bowring ed., 1962) [hereinafter BENTHAM, *Principles of the Civil Code*]; see also JEREMY BENTHAM, *THE PRINCIPLES OF MORALS AND LEGISLATION* 3 (Hafner Publ’g Co. 1948) (1789).

¹⁶⁰ Progressivity in taxation can be achieved through different mechanisms, including, for example, the rate and base structures. See, e.g., Lawrence Zelenak, *The Myth of Pretax Income*, 101 MICH. L. REV. 2261, 2264 (2003) (reviewing MURPHY & NAGEL, *supra* note 5, and exploring the policy implication that “[t]o some, justice requires an income tax base,

ently, traditional utilitarianism complements a redistributive type of taxation where individuals with more financial means bear a gradually higher burden of taxation.

The application of utilitarianism to tax system design is not, however, that simple. The rate at which the value of money decreases is unknown, and questions as to who is equal and how to treat unequally situated taxpayers are also unresolved.¹⁶¹ Although traditional utilitarianism generally fits with progressive tax structures, the exact details of the ideal system are far from obvious.¹⁶² Moreover, utility derived from wealth is only one piece of the puzzle. The value of well-protected property rights is of no less importance and serves as a prerequisite for the creation of wealth and utility, weakening the case for progressivity.¹⁶³ The productivity of the economy depends, among other factors, on the effort invested by individuals. When the government takes a portion of the return on individuals' efforts, it might in turn reduce the overall exercise of effort and add costly distortions to the economy.¹⁶⁴ Further, raising taxes on high earners could disincentivize economic activity among highly productive members of society.¹⁶⁵ According to this view, progressive taxation bears the risk of reducing total revenue raised or otherwise leaving society worse off in terms of aggregate utility than it was prior to taxation.¹⁶⁶

Considering the potentially adverse effects of taxation, especially progressive taxation, on economic productivity, modern utilitarianism requires that the loss in utility from taxation will be less than the gain in utility from revenue raised.¹⁶⁷ More precisely, contemporary utilitarianism suggests that for each

while others insist that consumption is the only fair tax base. To some, progressive marginal tax rates are morally required; to others progressive rates are anathema.”). Each approach to taxation can be adjusted to levy a heavier tax burden on the wealthy, including exemptions for basic goods and services in the context of consumption taxation and low (or zero) initial tax bracket in the income tax structure.

¹⁶¹ See, e.g., Edwin R. A. Seligman, *Progressive Taxation in Theory and Practice*, 9 AM. ECON. ASS'N Q. 7, 219–22 (2d ed. 1908); MUSGRAVE, *supra* note 154, at 98–105, 109; 3 RICHARD A. MUSGRAVE, *The Role of the State in Fiscal Theory*, in PUBLIC FINANCE IN A DEMOCRATIC SOCIETY 3, 8 (2000) [hereinafter MUSGRAVE, *The Role of the State*]; STANLEY W. JEVONS, *THE THEORY OF POLITICAL ECONOMY* 21 (London & New York, MacMillan & Co. 1871); Robbins, *supra* note 140, at 635–41.

¹⁶² See sources cited *supra* note 161. When addressing progressive tax rates, for example, it is unclear how progressive the rates should be and what should be the income ranges to correspond with these rates.

¹⁶³ Cf. BENTHAM, *Principles of the Civil Code*, *supra* note 159, at 311 (“When security and equality are in opposition, there should be no hesitation: equality should give way.”).

¹⁶⁴ However, see *supra* notes 58–62 and accompanying text for similar claims and some counter findings.

¹⁶⁵ See *supra* notes 58–62.

¹⁶⁶ See, e.g., 3 RICHARD A. MUSGRAVE, *Social Science, Ethics, and the Role of the Public Sector*, in PUBLIC FINANCE IN A DEMOCRATIC SOCIETY 104, 111–12 (2000) (explaining the manner in which the cost of redistribution can be taken into account. According to Musgrave, income decline and deadweight losses from progressive taxation must be weighed against the social gains from reducing inequality).

¹⁶⁷ Bentham and Edgeworth argued for equal taxation based on the assumption of a fixed-income base, but then qualified this conclusion when they allowed for the “detrimental effects” of taxation on the available base. Smith, on the other hand, called for taxes “to take out and to keep out of the pockets of the people as little as possible, over and above what it brings into the public treasury of the state.” SMITH, *supra* note 55, at 372. Beginning with

individual or commodity taxed, the relation between the loss in utility from taxation and the gain in utility from revenue raised will be the same and that, viewed as a whole, there will be minimum loss of aggregate utility and some gain in social welfare.¹⁶⁸ Consequently, once the effects of taxation and redistribution are understood and accounted for, a less progressive tax scheme than under traditional utilitarianism emerges. However, even this modern interpretation of utilitarianism, as it applies to taxation, raises critical normative dilemmas. For example, according to the theory's revised fundamentals, an individual who depends on life-saving medicine should be taxed at the maximum tax rate on her treatment. The underlying assumption is that an individual who can afford life-saving medicine and the taxes it entails is unlikely to reduce her consumption of the treatment even when taxed at the greatest extent. In other words, society's gain in utility from revenue raised in such circumstances will probably not be offset by a loss of utility from diminished medical use. From an intuitive, moral point of view, however, this option seems to constitute gross exploitation of one person's misfortune for the benefit of others.

From a broad societal perspective, the idea of diminishing aggregate utility may not necessarily be unappealing when other benefits are considered. Some scholars argue, for example, that in circumstances where a smaller societal pie allows for the provision of social minimums, it is a cost worth paying.¹⁶⁹ Additionally, like other theories explored in this Article, utilitarianism rests on unstated assumptions about the status quo and pre-tax distribution of resources. In the quest for the greatest utility for the greatest number, utilitarianism relies on the existing distribution to serve as a baseline from which to assess the

Pigou, what was referred to as "announcement effects" took central stage in tax theory. ARTHUR C. PIGOU, *A STUDY IN PUBLIC FINANCE* 55–75 (3d rev. ed. 1947) (To achieve the goal of least total sacrifice, not only must there be an optimal distribution of the tax burden but its level must be minimized. Announcement effects were measured in terms of the excess burden or the deadweight loss that results when taxes distort economic choices.) The concept of announcement effects was later developed into the theory of optimal taxation. For more on this issue, see Peter A. Diamond & James A. Mirrlees, *Optimal Taxation and Public Production I: Production Efficiency*, 61 *AM. ECON. REV.* 8 (1971); MUSGRAVE, *The Role of the State*, *supra* note 161, at 3; 3 RICHARD A. MUSGRAVE, *Public Finance and Finanzwissenschaft Traditions Compared*, in *PUBLIC FINANCE IN A DEMOCRATIC SOCIETY* 33 (2000).

¹⁶⁸ Looking at income taxation, for example, some individuals may have a very elastic labor supply, meaning that when tax rates on labor income increase, these individuals significantly reduce the quantity of taxable labor. In this case, an increase in the tax rate is expected to both yield relatively little revenue and cause a large loss of utility. Therefore, contemporary utilitarianism suggests that these individuals ought to bear a relatively light tax burden. In contrast, when people have an inelastic labor supply, taxes should be greater, since the gain in revenue will be greater than the loss of utility. Ramsey showed that, provided certain preliminary assumptions vis-à-vis commodity taxation, deadweight loss would be minimized with a rate structure that ensures proportional reduction of all product consumption. See Frank P. Ramsey, *A Contribution to the Theory of Taxation*, 37 *ECON. J.* 47, 54 (1927).

¹⁶⁹ See, e.g., Ronald M. Dworkin, *Is Wealth a Value?*, 9 *J. LEGAL STUD.* 191, 191–93 (1980). Cf. RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* ix–xi, 233, 238 (1977) [hereinafter DWORKIN, *TAKING RIGHTS SERIOUSLY*]; RAWLS, *supra* note 1, at 26–27, 186–87.

subtractions and additions of utility.¹⁷⁰ This approach naturally favors maintaining the status quo compared with alternative policy options that may, at least in the short run, reduce total welfare. More sound policymaking must first look into the existing pre-tax distribution of resources, including civil rights and liberties, and evaluate its merit. Only when the pre-tax distribution is found to be just and alternative allocations have been compared and excluded can the exercise of utility maximization be applied to the status quo and yield just results.¹⁷¹

B. *The Social Welfare Function*

Over time the traditional utilitarian hypothesis prescribing that individuals have similar and comparable utility functions was rejected as scientifically unacceptable and immeasurable through empirical authentication.¹⁷² Policy analysts who nonetheless embraced the premise of utilitarianism could have attempted to overlook the issue of distribution to focus exclusively on maximizing aggregate utility.¹⁷³ However, the paradigm was eventually expanded to explore new methods of comparing welfare or utility units in order to establish a system that more effectively addresses distributional as well as efficiency considerations.

Initially the economist Vilfredo Pareto introduced what is known today as the concept of “Pareto improvement.”¹⁷⁴ The Pareto idea suggests that when comparing two economic distributions, one distribution is preferable to the other if at least one person is made better off and no one is made worse off

¹⁷⁰ Daniel W. Bromley, *Institutional Change and Economic Efficiency*, 23 J. ECON. ISSUES 735, 736–38, 740–41, 757 (1989) (citing DANIEL W. BROMLEY, *ECONOMIC INTERESTS AND INSTITUTIONS: THE CONCEPTUAL FOUNDATIONS OF PUBLIC POLICY* (1989)).

¹⁷¹ Any other method mandates that the pre-tax distribution of resources be corrected prior to the pursuit of utility maximization. For an application of this perspective, see MILL, *supra* note 3, at 925–46 (claiming that the principle of equal sacrifice should be applied only after the pre-tax distribution is assured to be just). Cf. Knut Wicksell, *A New Principle of Just Taxation*, in *CLASSICS IN THE THEORY OF PUBLIC FINANCE* 72, 72–75 (Richard A. Musgrave & Alan T. Peacock eds., J. M. Buchanan trans., 1958) (suggesting that for the benefit taxation to be equitable as well as efficient, the underlying distribution of income from which benefit taxes are drawn must also be just). See generally MURPHY & NAGEL, *supra* note 5, at 76–128; but see Zelenak, *supra* note 160, at 2262–63 (suggesting that the unquestionable embrace of the pretax income distribution was criticized already in the late 1960s by economist Carl Shoup).

¹⁷² Robbins, *supra* note 140, at 638–39.

¹⁷³ Abram Burk, *A Reformulation of Certain Aspects of Welfare Economics*, 52 Q.J. ECON. 310, 326–27 (1938). One may question, however, the extent to which distributional issues are distinct from those of welfare or utility maximization. See, e.g., Pierre Lemieux, *Social Welfare, State Intervention, and Value Judgments*, 11 INDEP. REV. 19, 19 (2006) (“The state can promote efficiency . . . in a second stage, it can . . . redistribute the supplementary output made possible by efficiency-enhancing interventions. Efficiency and distribution are two different issues If redistribution obviously requires value judgments, wealth creation does not because having more goods is always desirable. . . . So thought many economists until the 1950s. By that time, however, the ‘new welfare economics’ had all but destroyed these conclusions and shown that value judgments are also required for creating wealth—indeed, for even defining it.”).

¹⁷⁴ VILFREDO PARETO, *MANUAL OF POLITICAL ECONOMY* 451–52 (Ann S. Schwier & Alfred N. Page eds., Ann S. Schwier trans., Augustus M. Kelley Publishers 1971) (1906).

(leading to a “Pareto-efficient” allocation).¹⁷⁵ Although a powerful tool for ensuring the efficient distribution of resources, the Pareto platform does not provide a mechanism for ranking equally efficient allocations and, therefore, offers an incomplete tool for policymaking.¹⁷⁶ The “social-welfare function,” an algebraic-utility calculation designed to reflect normative judgments concerning the appropriate distribution of resources in society, emerged to fill the void.¹⁷⁷

Unlike the entitlement premise, the social-welfare function relies on the assumption that the prevailing resource allocation in society might not be an optimal one and is likely to require policy adjustments.¹⁷⁸ The utility calculation and, more fundamentally, policymaking itself, become means in the advancement of normative judgments. The goal for policymakers, under the social-welfare paradigm, is to maximize societal well-being while focusing on the welfare of specific members of the society.¹⁷⁹ Now, the purpose of taxation includes not only revenue-raising functions but also redistributive aspects.¹⁸⁰ Analysts look at efficiency considerations while taking into account factors such as the distortions caused by taxation, the resources used to implement different tax structures, and administrative and compliance costs.¹⁸¹ Pareto-efficient tax systems, where no individual can be made better off without making someone else worse off, are then identified.¹⁸² Next, applying a particular

¹⁷⁵ *Id.*; see also Manel Baucells & Steven A. Lippman, *Justice Delayed Is Justice Denied: A Cooperative Game Theoretic Analysis of Hold-Up in Co-Ownership*, 22 CARDOZO L. REV. 1191, 1196 n.26 (2001) (“A Pareto improvement is a change that leaves some party to an economic exchange better off and no party worse off.”) (citing DAVID M. KREPS, A COURSE IN MICROECONOMIC THEORY 153–56 (1990)).

¹⁷⁶ Richard A. Musgrave, *Equity and the Case for Progressive Taxation*, in TAX JUSTICE: THE ONGOING DEBATE 9, 15 (Joseph J. Thorndike & Dennis J. Ventry Jr. eds., 2002).

¹⁷⁷ *Id.* Total welfare originally meant the utility sum of individual members of society, giving an equal weight to each individual. Today, the empirically unattainable utility functions of different individuals are replaced with an artificial design of a welfare function of the entire society. In other words, individuals are treated as if they are comparable. Accordingly, the facts that marginal utility of income is downward sloping and similar across individuals are simply assumed in the design of the function.

¹⁷⁸ *Cf. supra* text accompanying notes 69, 75, 93–94 (the Nozickian undertone regarding taxation and redistributive adjustments); Adolf Wagner, *Three Extracts on Public Finance*, in CLASSICS IN THE THEORY OF PUBLIC FINANCE 1, 12–13 (Richard A. Musgrave & Alan T. Peacock eds., Nancy Cooke trans., 1958) (claiming that proportional taxation is designed to maintain the relatively unequal positions of taxpayers).

¹⁷⁹ MUSGRAVE, *supra* note 166, at 112 (explaining that, ultimately, the social-welfare function reflects the importance which society places on wealth and income for individuals of varying socioeconomic statuses, while leaving it to policymakers to construe the specific shape of the desirable distribution).

¹⁸⁰ Wagner, *supra* note 178, at 14 (discussing the practical application of welfare economics to taxation). See also J. DE V. GRAAFF, THEORETICAL WELFARE ECONOMICS 26–27 (1957) (discussing distribution of outputs among final customers).

¹⁸¹ Peter A. Diamond & James A. Mirrlees, *Optimal Taxation and Public Production: II—Tax Rules*, 61 AM. ECON. REV. 261, 276–77 (1971).

¹⁸² PAUL ANTHONY SAMUELSON, FOUNDATIONS OF ECONOMIC ANALYSIS 212 (10th prtg. 1975).

welfare function, a tax structure is chosen among plausible Pareto-efficient tax systems.¹⁸³

Although the social-welfare function serves as an important development of utilitarianism, the theory still faces serious implementation difficulties. To begin with, there is little agreement on how to reveal the social, moral, and economic considerations needed to form the function.¹⁸⁴ The desirable distribution of resources and the manner in which society can determine this distribution are also unclear.¹⁸⁵ Further, it might be impossible to employ the function in a way that is consistent with the basics of its design because consistently applying any collective decision-making procedure is considered an unfeasible task.¹⁸⁶ The current paradigm also fails to clarify what constitutes welfare. The social-welfare approach assumes that welfare can be captured and expressed in monetary terms. This makes the theory vulnerable to criticisms similar to those of traditional utilitarianism, particularly with respect to the difficulty of accounting for social and moral values.¹⁸⁷ One plausible way to work through these challenges is to go back to basics and openly contemplate the many underlying normative questions of taxation, including what constitutes welfare and what may be the optimal resource distribution for society. In this way, theories of political legitimacy, social justice, and economics remain vital to tax policy formation. It is possible that in the process of deliberation no one path will emerge as more correct or compelling than another. Questions over which idea to implement and what method of computation to follow in taxation are yet again debatable and call for a deliberate and honest discussion.

III. THE RAWLSIAN DESIGN—JUSTICE AS FAIRNESS

With his 1971 masterpiece *A Theory of Justice*, John Rawls centers the philosophical-political debate on the concept of fairness rather than on entitle-

¹⁸³ Note, however, that both the advantages and disadvantages of the social-welfare function stem from the theory's method of analysis. On its face, the theory separates efficiency considerations from value judgments while taking both into account. However, often no single alternative tax system dominates all other options. Thus, choosing among equally efficient tax structures must draw on value preferences.

¹⁸⁴ See, e.g., Giovanni Montemartini, *The Fundamental Principles of a Pure Theory of Public Finance*, in CLASSICS IN THE THEORY OF PUBLIC FINANCE 137, 149–50 (Richard A. Musgrave & Alan T. Peacock eds., D. Bevan trans., 1958) (questioning whether an organic, neutral body exists in society to collectively decide on social issues).

¹⁸⁵ Policy outcomes may be ranked, for example, on the grounds that they reflect personal preferences or judgments (such as of analysts or politicians) regarding the community's preference for equality. See, e.g., Erik Lindahl, *Some Controversial Questions in the Theory of Taxation*, in CLASSICS IN THE THEORY OF PUBLIC FINANCE 214, 219 (Richard A. Musgrave & Alan T. Peacock eds., Elizabeth Henderson trans., 1958) (suggesting determining the principles of the function based on the preferences of government officials); cf. ANTHONY B. ATKINSON, SOCIAL JUSTICE AND PUBLIC POLICY 310 (1983) (asserting that “considerations of income inequality” must be “precisely formulated” if they are to provide tax guidance).

¹⁸⁶ KENNETH J. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES 2–3 (1951) (demonstrating that it is impossible for any fair collective-choice process to consistently and appropriately resolve interpersonal differences while also satisfying certain axioms regarding the validity of the decision-making process).

¹⁸⁷ *Supra* notes 146–52 and accompanying text.

ment to holdings or the pursuit of happiness or utility.¹⁸⁸ Addressing the public sphere, Rawls works toward revealing the principles that ought to guide the political system.¹⁸⁹ Rawls begins his analysis by exploring how society can reach an agreement about its fundamental characteristics,¹⁹⁰ and he is especially concerned with defining aspects of social justice, including the division of the societal pie and the assignment of civil rights and liberties.¹⁹¹ According to Rawls, one main reason the principles of justice that evolve from his theory are superior to other normative doctrines is that they develop from a plausible social contract.¹⁹² That is, if people were truly positioned in a pre-state condition and had to decide which principles should govern their society, they would have reasonably chosen his principles.¹⁹³

Rawls arrives at his principles of justice based on his interpretation of the “original position.”¹⁹⁴ The Rawlsian original position is a hypothetical—as opposed to a historical—event, in which individual representatives of society (the “deliberators” or “negotiators”) decide on the principles that will guide the political order of the future, emerging state.¹⁹⁵ The deliberators are free, equal, and rational individuals who represent all segments of society, but lack knowledge of their own abilities or status in it.¹⁹⁶ They are acquainted with basic

¹⁸⁸ RAWLS, *supra* note 1, at 3.

¹⁸⁹ *Id.* at 4, 7–8, 12.

¹⁹⁰ *Id.* at 10, 15.

¹⁹¹ *Id.* at 4–5. Rawls recognizes that in a pluralistic society, individuals hold different religious, philosophical, and moral beliefs. *See* JOHN RAWLS, *POLITICAL LIBERALISM* 29–32 (1993). Nevertheless, to coexist, it is necessary to find an “overlapping consensus” on what principles will be embraced and used to develop social institutions. *See, e.g.*, RAWLS, *supra* note 1, at 340.

¹⁹² *Id.* at 10–11. Different thinkers, including Hobbes, Locke, Kant, and Rousseau endorse the social-contract approach but arrive at very different results. They are all, however, subject to the same criticism—that is, relying on a state of nature or a contract that never existed, and thus, citizens and governments cannot be bound by it. As Dworkin says: “A hypothetical contract is not simply a pale form of an actual contract; it is no contract at all.” DWORIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 169, at 151. However, as Dworkin notes, it is possible to view the social contract not primarily as an agreement, actual or hypothetical, but as an intellectual exercise for arriving at certain moral fundamentals. *Id.* at 169. Accordingly, the idea of a state of nature is invoked to model the moral views of individuals rather than to describe a historical pre-condition. RAWLS, *supra* note 1, at 11 (“[T]he original position of equality corresponds to the state of nature in the traditional theory of the social contract. This original position is not, of course, thought of as an actual historical state of affairs, much less as a primitive condition of culture. It is understood as a purely hypothetical situation characterized so as to *lead* to a certain conception of justice.”) (emphasis added). The Rawlsian hypothetical contract is therefore a way of understanding a certain conception of fairness, and a way of extracting the consequences of that conception for the social order.

¹⁹³ RAWLS, *supra* note 1, at 12; *see also id.* at 123–30.

¹⁹⁴ *Id.* at 11, 15–19.

¹⁹⁵ *Id.* at 10; *see also id.* at 11 (“This original position is not, of course, thought of as an actual historical state of affairs, much less as a primitive condition of culture. It is understood as a purely hypothetical situation . . .”).

¹⁹⁶ *Id.* at 11 (“Among the essential features of this situation is that no one knows his place in society, his class position or social status, nor does any one know his fortune in the distribution of natural assets and abilities, his intelligence, strength, and the like. I shall even assume that the parties do not know their conceptions of the good or their special psychological propensities.”). Rawls asserts that in choosing principles of justice, the deliberators’

theories of human psychology, economics, and social structure, to the exclusion of their own particular views or psychological characteristics.¹⁹⁷ Thus, according to the Rawlsian original position, the deliberators are situated in a nonbiased, yet educated, sphere. They are, as Rawls puts it, behind a “veil of ignorance.”¹⁹⁸

According to Rawls, people are committed to the idea of a good life, which may be advanced through the pursuit of whatever life plans they have.¹⁹⁹ Rawls posits that the resources most needed to carry out this commitment are called “primary goods.”²⁰⁰ Only one kind of primary goods, social primary goods, can be distributed by social institutions. These goods are the result of social cooperation and include, among others, income, wealth, opportunity, power, rights, and liberties.²⁰¹ In choosing the principles of justice, the deliberators seek to maximize their access to social primary goods.²⁰² The deliberators understand that mutual cooperation increases the possibility of pursuing their individual goals, encouraging them to establish social alliances.²⁰³ Positioned behind a veil of ignorance, each deliberator remains oblivious to her place in society and is expected to be sympathetic to a wide spectrum of interests.²⁰⁴

It becomes clear, therefore, that to maximize social benefits, the deliberators must seek long-term societal stability.²⁰⁵ The deliberators are accordingly interested in eliciting the willing cooperation of all members of the society,²⁰⁶ making the coming together of mutual interests inherent to the Rawlsian design.²⁰⁷ According to Rawls, assuming a veil of ignorance and rational self-interested deliberators “achieves much the same purpose as benevolence”

natural fortune and social circumstances should not enter into the process. Thus, he characterizes the original position as “the appropriate initial status quo.” *See id.* at 10–12.

¹⁹⁷ *Id.* at 119; *see also id.* at 74.

¹⁹⁸ *Id.* at 118; *see also id.* at 11.

¹⁹⁹ *Id.* at 10–11, 54, 131–32.

²⁰⁰ *Id.* at 54. There are two kinds of primary goods: social and natural. The second kind of goods, “natural primary goods,” includes health, intelligence, vigor, imagination, and natural talents. Natural primary goods are affected by social institutions, but are not directly distributed by them. *Id.*

²⁰¹ *Id.* at 54–55.

²⁰² *Id.*

²⁰³ *Id.* at 4. In the process of optimizing the access to social primary goods, conflicts over the allocation of goods are expected to occur. *Id.*

²⁰⁴ *Id.* at 120–21.

²⁰⁵ *Id.* at 6.

²⁰⁶ *Id.* at 13–14. The desire to elicit the willing cooperation of all members of the society is central to the Rawlsian analysis even when the allocation of goods that one receives according to the resulting order will be less than he would have originally desired. *Id.* at 13.

²⁰⁷ *Id.* at 12–13. Rawls admits to modifying the original position in order to make sure that it yields principles that match common intuitions of fairness. While Rawls at times claims that the construction of the original position has no necessary bearing on his resulting principles of justice, in other places he acknowledges that the two are interdependent. *Id.* at 18 (“[W]e have a choice. We can either modify the account of the initial situation or we can revise our existing judgments, for even the judgments we take provisionally as fixed points are liable to revision. By going back and forth, sometimes altering the conditions of the contractual circumstances, at other[] [times] withdrawing our judgments and conforming them to principle, I assume that eventually we shall find a description of the initial situation that both expresses reasonable conditions and yields principles which match our considered judgments duly pruned and adjusted.”).

because the deliberators must identify with other individuals and consider their interests as their own.²⁰⁸ In this manner, agreements made in the original position put individuals on a level playing field so that the original position naturally yields an egalitarian starting point for the political order under consideration.²⁰⁹

Rawls reasons that because the deliberators are morally equal, unaware of their status in the society to emerge and their personal talents and other characteristics, each deliberator will agree to an equal access to social primary goods.²¹⁰ Rawls assumes risk-averse behavior, prescribing that each deliberator be unwilling to gamble on ending up disadvantaged.²¹¹ However, the deliberators can enlarge the societal pie if some individuals are provided better access to social primary goods than others.²¹² For this reason, a self-interested pursuit of the best possible life prospect gives rise to the deliberators accepting some discrepancies in the access to social primary goods, leading to a societal order more complex than a strictly egalitarian one.

Rawls hypothesizes that the deliberators select what he calls “the difference principle.”²¹³ According to the difference principle, “[a]ll social values—liberty and opportunity, income and wealth, and the social bases of self-respect—are to be distributed equally unless an unequal distribution of any, or all, of these values is to everyone’s advantage.”²¹⁴ Any difference—that is, any inequality in the access to social primary goods—is just only if it serves to improve the lot of the worst-off members of society. Stated another way, in the original position the deliberators agree to some disparity in the access to social primary goods on the condition that the most disadvantaged individuals are made better off under an unequal, rather than equal, distribution.²¹⁵ The differ-

²⁰⁸ *Id.* at 128; *see also id.* at 12–13, 153–56 (prescribing that the life plans of each individual are important in and of themselves so that no representative will be willing to agree to a principle which allows anyone to be used and sacrificed to achieve someone else’s goals).

²⁰⁹ *Id.* at 55, 65–66, 86–93, 130.

²¹⁰ *Id.* at 118, 130 (explaining it would be rational for each individual interested in furthering his life plans to accept a greater than equal share, but irrational to accept anything less).

²¹¹ *Id.* at 144. Some economists explored social interactions in similar terms of gambling. *See, e.g.,* John C. Harsanyi, *Cardinal Utility in Welfare Economics and in the Theory of Risk-Taking*, 61 J. POL. ECON. 434, 434–35 (1953); ABBA P. LERNER, *THE ECONOMICS OF CONTROL: PRINCIPLES OF WELFARE ECONOMICS* xiii (1944); William Vickrey, *Measuring Marginal Utility by Reactions to Risk*, 13 *ECONOMETRICA* 319, 324–28 (1945); John C. Harsanyi, *Cardinal Welfare, Individualistic Ethics, and Interpersonal Comparisons of Utility*, 63 J. POL. ECON. 309, 316 (1955). However, the introduction of risk aversion may weaken the moral merit of Rawls’s theory to the extent that the resulting distribution stems from a utility maximization calculation rather than from the premise of equal worth.

²¹² RAWLS, *supra* note 1, at 130–31. For example, when additional incentives are provided for those accomplishing a socially desirable task, more of that task might be pursued, making everyone better off.

²¹³ *Id.* at 65–70, 131.

²¹⁴ *Id.* at 54.

²¹⁵ *Id.* at 65, 68. More specifically, Rawls’s general rule is comprised of three components arranged according to a principle of “lexical order.” *Id.* at 37–38. This order prescribes that some social goods are more important than others and cannot be sacrificed to improve their distribution. For that matter, equal access to liberty takes precedence over equal access to opportunity, which is more important than equal access to resources. *Id.* at 38. Within each category, inequality is only allowed when it benefits the least well off. *See id.* at 65.

ence principle is hence set to ensure that the deliberators optimize their access to social primary goods in case they end up at the bottom of the social ladder,²¹⁶ while allowing them to optimize this access under other scenarios (the maximin strategy).²¹⁷

Notwithstanding the general supremacy of Rawls's difference principle, inequality in what Rawls calls "natural primary goods"—including health, intelligence, and other inherited traits—is not subject to the difference principle.²¹⁸ Rawls, for example, argues for the justness of equality in economic opportunity. This includes, particularly, "equal chances of education and culture for persons similarly endowed and motivated."²¹⁹ Accordingly, individuals not similarly endowed and motivated may be unable to enjoy the same opportunities as others. When the underlying distribution is just, inequality in the allocation of resources that results from voluntary exchanges under the conditions of fair competition is also allowed.²²⁰ However, in a free-market economy, inequality in natural characteristics generally leads to other forms of disparity. If a naturally gifted pianist and a layperson are each given an equal opportunity to play in an orchestra, for example, the former would outperform the latter. In a market economy, the naturally endowed individual—the person who is healthier, more intelligent, and more imaginative—is more likely to receive a higher-paying job and be in a better position to provide a good life for her

²¹⁶ See, e.g., Musgrave, *supra* note 176, at 16–17 (explaining that under the veil of ignorance, the problem of distributive justice turns to be one of choice under uncertainty, and depends on individuals' levels of risk aversion. Assuming extreme risk aversion, maximin distribution that maximizes the welfare of the least advantaged members of society will be chosen. A utilitarian view of distribution as a matter of rational choice is thus retained under Rawls's design, but only after incorporating the veil of ignorance paradigm.).

²¹⁷ RAWLS, *supra* note 1, at 72–73 (although rejecting the equalization of the difference principle with the "maximin criterion" as the latter may imply extreme attitudes toward risk); see also *id.* at 133. Imagine the following distributive scheme in a three-person world: (1) 9: 6: 0; (2) 10: 3: 2; (3) 5: 5: 5. Rawls's principles make a case for option three if the likelihood to be in the best or the worst position in society is unknown. Under the third option, ending up in the worst position still gives those at the bottom more than they would receive occupying the bottom of options one or two. It is difficult, however, to assess the rationality of gambling without knowing something about the probability of ending up with each choice, or about people's inclination to risk. Such doubts come back to the claim that Rawls only arrives at the difference principle because he designs the veil of ignorance so as to yield it. See *supra* note 207. Cf. Lawrence G. Sager, *Pareto Superiority, Consent, and Justice*, 8 HOFSTRA L. REV. 913, 921–22 (1980) (arguing that the worst off should prefer inequality if there is a chance for a better position but no chance for a worse one). On the one hand, Rawls is opposed to large accumulations of wealth, and this presumably extends to unequal distributions of wealth even when the poor are not made worse off. On the other hand, it is possible to argue that the Rawlsian paradigm is not sufficiently egalitarian in that it may allow significant wealth and income disparities as long as the position of the worse off is improved to some, even if minor, extent.

²¹⁸ RAWLS, *supra* note 1, at 54; see also *id.* at 69.

²¹⁹ *Id.* at 243.

²²⁰ *Id.* at 57–58, 131; Nagel, *supra* note 4, at 2016 ("Rawls always emphasizes that the main target of evaluation for his principles of justice is the basic structure of society, which determines the ex ante allocation of opportunities and expectations at birth. If the basic structure is fair, then inequalities arising through the free exercise of their autonomy by individuals living out their lives inside that structure are not objectionable from the standpoint of justice.").

family and other loved ones. Not oblivious to this predisposition, Rawls states that too much inequality is inherently offensive as it undermines social institutions, including individuals' right to equality of opportunity.²²¹

Equal opportunity puts individuals on a level footing so that their lives are shaped based on the choices they make rather than arbitrary circumstances.²²² In Rawls's view, natural talents and social circumstances are a matter of luck that yields no moral entitlement. In Rawls's words: "No one deserves his greater natural capacity nor merits a more favorable starting place in society."²²³ Moreover, social institutions are "put in jeopardy when inequalities of wealth exceed a certain limit; and political liberty likewise tends to lose its value, and representative government to become such in appearance only."²²⁴ Rawls relies on either transfer payments or a negative income tax structure to prevent too much inequality.²²⁵ He, nonetheless, avoids clarifying how much inequality is too much. Rather, at one point Rawls suggests that the limits of inequality are "a matter of political judgment guided by theory, good sense, and plain hunch."²²⁶

To conclude, Rawls reasons that from behind a veil of ignorance, people would agree on principles of general equality with the goal of maximizing the welfare of the worst off members of society. This egalitarian undercurrent requires political intervention in the workings of the market economy.²²⁷ Read in this light, the Rawlsian theory of justice provides a standard against which the fairness of both the pre- and post-tax distributions of resources is to be evaluated. In a society structured in accordance with the Rawlsian rules of justice, the purpose of taxation is "to preserve an approximate justice in distributive shares" and "raise the revenues that justice requires."²²⁸ In a society not structured in accordance with the Rawlsian rules of justice, the tax system takes

²²¹ RAWLS, *supra* note 1, at 245–46. Unfortunately, Rawls leaves the idea of equality of opportunity fairly undeveloped, allowing major controversies in its interpretation. KYMLICKA, *supra* note 78, at 56 (finding that although people generally accept the principle of equality of opportunity, they differ on the issue of its implementation. "Some people believe that [enforcing] non-discrimination in education and employment is sufficient [to comply with such a requirement]. Others argue that affirmative action programmes are required for economically and culturally disadvantaged groups, if their members are to have a genuinely equal opportunity to acquire the qualifications necessary for economic success.").

²²² RAWLS, *supra* note 1, at 16.

²²³ *Id.* at 87. Rawls states that the conditions that characterize the original position should not be misunderstood. The idea is to clarify the restrictions most reasonable to impose on principles of justice. "Thus it seems reasonable and generally acceptable that no one should be advantaged or disadvantaged by natural fortune or social circumstances . . ." *Id.* at 16.

²²⁴ *Id.* at 246.

²²⁵ *Id.*

²²⁶ *Id.* (in the context of limiting inherited wealth). *Cf.* Neil H. Buchanan, *What Do We Owe Future Generations?*, 77 GEO. WASH. L. REV. 1237, 1279 (2009) ("The concerns that motivated Rawls . . . were not simply a matter of looking at who had the smallest incomes and trying to help those individuals by transferring resources to them from those with more to give. He was not, in other words, advocating some mechanical and arbitrary narrowing of living standards for its own sake. He was instead concerned that the least fortunate were excluded from full participation in society.").

²²⁷ RAWLS, *supra* note 1, at 62–63 (stressing the importance of fairness considerations more than efficiency constraints).

²²⁸ *Id.* at 245–46.

on an additional role of redistribution intended to ensure that the after-tax allocation of resources complies with the fundamentals of the theory.²²⁹

Because the free-market economy and competitive prices do not take human needs into account, revenue-raising becomes a means to level the playing field and provide for certain societal basics, including freedom of political thought and equality of opportunity in education.²³⁰ Therefore, a society structured in accordance with the Rawlsian doctrine applies constant adjustments.²³¹ Such adjustments bear the risk of reducing the size of the societal pie. This, however, does not necessarily undermine Rawls's theory of justice given that the main goal of the Rawlsian society and its institutions is to aid in the establishment of justice more than to maximize total welfare.²³²

In a system that evolves from a just distribution, Rawls appears to prefer a proportional consumption tax to raise revenue.²³³ Rawls argues that such a structure treats all individuals equally and taxes what is taken out of the common pool rather than what is productively added to it.²³⁴ Rawls nonetheless admits that progressive tax rates may be necessary to prevent harmful accumulations of resources and protect equality.²³⁵ It is unclear, however, whether strong arguments for a progressive tax structure emerge from Rawls's framework.²³⁶ In fact, the theory might be too general to favor any one particular form of taxation over another.²³⁷

²²⁹ *Id.* at 245. For instance, if the pre-tax distribution of income, a Rawlsian social primary good, fails to satisfy the difference principle, the tax system can then be the mechanism utilized to ensure that the after-tax allocation of income is just. This could be achieved through collecting revenues from well-off taxpayers and transferring these funds to the least advantaged.

²³⁰ *Id.* at 244 (asserting that ensuring social minimum is necessary because “[a] competitive price system gives no consideration to needs and therefore it cannot be the sole device of distribution.”).

²³¹ *Id.*

²³² *Id.* at 64–65.

²³³ *See, e.g., id.* at 246 (“Leaving aside many complications, it is worth noting that a proportional expenditure tax may be part of the best tax scheme.”).

²³⁴ *Id.* The justness of taxing consumption goes all the way back to the work of Thomas Hobbes. HOBBS, *supra* note 111, at 179. Several authors have more recently advocated in favor of a consumption taxation. *See generally* Joseph Bankman & David A. Weisbach, *The Superiority of an Ideal Consumption Tax over an Ideal Income Tax*, 58 STAN. L. REV. 1413 (2006); Joseph Bankman & David Weisbach, *Consumption Taxation Is Still Superior to Income Taxation*, 60 STAN. L. REV. 789 (2007); Daniel Shavero, *Beyond the Pro-Consumption Tax Consensus*, 60 STAN. L. REV. 745 (2007); Edward J. McCaffery & James R. Hines Jr., *The Last Best Hope for Progressivity in Tax*, 83 S. CAL. L. REV. 1031 (2009).

²³⁵ RAWLS, *supra* note 1, at 246.

²³⁶ An insightful analysis that involves the application of the Rawlsian doctrine to the tax system is offered by Musgrave. *See* Musgrave, *supra* note 176, at 16–17 (applying the maximin analysis while taking into account the announcement effects of taxation).

²³⁷ *See, e.g.,* Byrne, 1995, *supra* note 8, at 777; *cf.* RAWLS, *supra* note 1, at 246–47; *but see* Sugin, *supra* note 8, at 1993–94 (suggesting that “[r]ather than searching in theories of justice for required precepts of taxation, we might more fruitfully ask what constraints, if any, a particular theory of justice imposes on the tax system. Application of such an approach to Rawls's theory of justice may explain his apparent preference for a flat consumption-based tax. . . . If Rawls's discussion of economic justice is treated as offering limitations rather than mandates for taxation, then a variety of tax systems may be part of a just Rawlsian society.”).

IV. SUMMARY AND CONCLUSIONS

This Article explores three theories of normative analysis and the manner in which these theories may inform tax policymaking in a modern society. Regardless of their specific differences, the normative perspectives presented here crystallize the idea that what individuals can expect to receive in fair return for their labor and capital depends on the merit of the pre- and post-tax distributions of resources in society. This merit is evaluated differently by each of the normative doctrines. All three theories, however, raise questions and employ analytic tools essential to public and, particularly, fiscal policymaking.

According to the theory of entitlement, the principles of natural or divine law entitle each person to the benefits gained from the exercise of free will and effort. Followers of this paradigm usually embrace unaltered the pre-tax distribution of resources and any proceeding rewards obtained through voluntary market exchanges. To some, the justness of private entitlement and, accordingly, the existing distribution of resources, is self-evident. Others find justification by asserting the moral deservedness of reward for effort or the importance of incentives created under a system of entitlement. Still others emphasize individuals' rights and liberties and, more generally, the prospect of mutual advantage. Regardless of one's perspective on either the Lockean or more modern Nozickean interpretation, those who adhere to the entitlement paradigm believe that safeguarding the right to private property and, thereby, the existing distribution of holdings, is a necessary step in determining the role of the government in civil society. Entitlement theorists, then, offer a framework from which to analyze government authority, particularly to intervene in the private affairs of individuals, including through the levy of taxes.

The entitlement theory does not prescribe that people's possessions should be equally distributed nor does it follow other pre-determined distributional ends. Rather, the theory prescribes that the pre-tax distribution of resources is just if it represents the product of an unfettered market economy. This includes, for example, distributions that are the result of unequal bargaining relationships, such as those involving natural monopolies and cartels. According to certain interpretations of entitlement, taxation deprives individuals of their right to autonomy. Even without extending the entitlement concept to this degree, entitlement theorists discourage most forms of taxation and especially those tax schemes aimed at redistribution, because the imposition of taxes is expected to violate (at least some) rightfully held property rights. However, the entitlement doctrine does not disqualify all forms of taxation and redistribution.

Entitlement theorists advocate for strong civil, especially property, rights, and for the value of the political order in protecting its citizens and enabling the workings of a market economy. To this end, taxation is required as a means, at the very least, of raising the revenue needed to fund society and its institutions. However, the doctrine fails to persuasively account for the justness of entitlement to the entire share of returns on labor and capital and may, therefore, allow for some portion of market returns to be taxed and redistributed. It can be argued that a portion of these returns is the product of luck, societal conditions, or infringements in the workings of the free-market economy, such as holdings tainted by force or deception. This portion, the argument goes, ought to be

redistributed to a more just destination than that which is created under the status quo. Advocates of the Lockean paradigm may endorse redistribution as long as it ensures that effort invested by individuals is rightfully, but not excessively, rewarded and economic incentives remain at an efficient and effective level. Likewise, for the Nozickean doctrine to maintain integrity, its proponents ought to accept, even if reluctantly, some redistribution when this allows the rectification of past injustices in the acquisition or transfer of holdings. For these reasons, although the entitlement doctrine precludes very progressive tax structures it may allow for other, less aggressive, schemes.

In developing a different line of thinking, Bentham and his followers depart from the entitlement premise. Instead of reaching out to a natural or divine order, utilitarianism turns to reason, simplicity, and the pursuit of happiness and utility. The underlying principle of utilitarianism is that all individuals and society as a whole are dominated by two forces: pleasure and pain. The first is good and should be pursued, while the second is bad and must be avoided. The key goal for people and governments becomes the pursuit of the greatest good for the greatest number while placing pleasure and pain on the same metric of utility. Because marginal utility declines as income rises, traditional utilitarianism suggests that aggregate utility is maximized by an equal—as opposed to unequal—distribution of resources. On a public policy scale, this objective leads to the demand for an equalization of resources among members of the society. The tax system that develops under this premise prescribes a redistributive (i.e., progressive) tax structure so that whatever the pre-tax distribution of resources may be, the after-tax allocation aims at maximum equality. However, a more profound examination of the theory and its repercussions reveals that absolute equality might be an undesirable goal for society.

Inequality, at least to some extent, provides an important incentive for economic productivity, making absolute equalization an unwise societal aspiration. Moreover, the assumption of a fixed amount of resources, which can be equally divided among members of society, was also refuted. Modern utilitarianism clarifies that taxation can negatively affect market production by reducing the gain from productive effort. This effect, and its distribution across households and individuals, is difficult to estimate. For this reason, taxation might not only distort economic activity and reduce the societal pie and total revenue raised, but could also treat similarly situated taxpayers differently. According to a more modern interpretation of utilitarianism, as it applies to the area of taxation, the after-tax loss in utility from taxation and the after-tax gain in utility from revenue raised must be comparable with a minimal loss in aggregate utility and, overall, net gain in social welfare. Unfortunately, although this interpretation of utilitarianism solves a number of issues concerning the cost associated with taxation and redistribution, serious doubts remain concerning the merit of the theory. Specifically, by focusing on aggregate utility, utilitarianism might allow the subordination of moral and social considerations to efficiency constraints, resulting in tax systems that put individuals in a position where they are used as means for others, rather than as equal beings and ends in themselves.

More recently, attempts have been made to rationalize the implementation of what is known as the social-welfare function. The social-welfare function is

reached by artificially constructing a collective function based on value judgments about the desirable distribution of resources in society. It aspires to weigh fairness considerations independently from efficiency constraints, while taking both into account. The feasibility of disjointedly analyzing these issues is, nevertheless, questionable. Even more troubling is that there is little agreement on how the social, political and economic considerations, which ought to guide the construction of the social welfare function, are to be revealed and implemented with consistency and integrity.

Finally, the Rawlsian doctrine suggests that the principles to guide the political system should be decided from behind a veil of ignorance. In contrast with entitlement theorists, Rawls offers a hypothetical—compared with historical—starting point where representative men and women gather to lay down the principles of justice to govern the society expected to emerge. The representatives are rational, mutually disinterested, risk-averse individuals, seeking to further their own life plans and unaware of their particular characteristics or status in the emerging society. Drawing on the risk-averse assumption, a maximin solution is derived. In other words, according to Rawls the general principle that will be unanimously decided from behind the veil of ignorance is the equal distribution of chances to acquire social primary goods, including income, wealth, power and opportunity, coupled with the difference principle. Rawls's difference principle prescribes that inequality in the distribution of chances to acquire primary social goods may be tolerated only to the extent that it improves the lot of the least advantaged members of society. Further, while Rawls allows for some disparity, he argues against “too much inequality” and calls for using the tax system to constantly correct the market distribution of resources in addition to its revenue-raising function.

To conclude, under all three normative theories explored in this Article, a person living in civil society can reasonably expect to only receive a net reward for his effort and capital: the gross amount of returns less taxes raised for the maintenance of the existing societal order and its institutions. If the pre-tax distribution of resources is without merit, however merit is conceived by each of the theories, individuals should expect the levy of additional taxes as a redistributive measure. Accordingly, the one conclusion consistent with all three normative theories is that a key role for taxation is to intervene in the free-market economy, at the very least, for the purpose of raising revenue.

Whether it is based on rewarding effort but not luck or societal conditions, rectifying past injustice, maximizing utility, or fairness considerations, some form of redistribution of resources can also be justified. The degree of government intervention and the level of redistribution ultimately depend on society's views on social and, especially, distributive justice and the efficiency cost of policy implementations. Accordingly, the extent to which the present tax discourse avoids incorporating a well-defined normative framework concerning the meaning and attainment of justice, alongside efficiency-based analyses, is both puzzling and disturbing. While this Article does not claim that normative perspectives can be agreed upon or proven, it suggests that a candid and comprehensive elaboration of normative beliefs and values and how they shed light on taxation would lead to a better understanding of society and an improved tax system. This, in the long run, may bring society closer to the realization of tax

policies that are normatively worthy and socially, politically, and economically within reach.

In a modern democracy that is diverse and constantly changing, policy issues are likely to raise a mix of normative perspectives. Moreover, a tax structure that fits certain societal conditions might be unworkable in others. By embracing the co-existence of normative beliefs—rather than searching for one ideal theory—various tax structures can evolve. Fairness considerations drawn from the Rawlsian doctrine could, for instance, support adjustments to the pre-tax resource distribution either through tax expenditures or the finance of spending programs directed toward the less fortunate. At the same time, entitlement theory can justify shying away from extreme levels of taxation. Utilitarianism may add depth to both perspectives by emphasizing the value of redistribution in increasing societal welfare on the one hand while underscoring the efficiency cost of going too far with equalization on the other. In the process of generating a viable tax discourse, fundamental disagreements about normative perspectives are likely to arise. These issues tend not to be the focus of tax analysis and debate. However, as this Article illustrates, if tax policy is to evolve in a clear and effective manner, these underlying attitudes and assumptions should be made the subject of serious discourse—sooner rather than later.