CONSUMPTION TAXATION IN RAWLS'S THEORY OF JUSTICE

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The question of whether income or consumption is a more appropriate tax base has a long and venerable history. One participant in the debate over the appropriate tax base, and one whose voice has attracted relatively little attention in this regard, is the philosopher John Rawls. In his monumental work, A Theory of Justice, Rawls argued that in certain circumstances a proportional consumption tax would be preferable to a progressive income tax. This Article examines whether it is possible to justify consumption taxation within the framework of Rawls's overall theory of justice.

Rawls gives two reasons for advocating consumption as a tax base rather than income. The first is that a consumption tax "imposes a levy according to how much a person takes out of the common store of goods and not according to how much he contributes." The second is that a consumption tax "treats everyone in a uniform way." The Article considers both Rawls's common pool argument and his uniformity argument and concludes that neither is capable of justifying proportional consumption taxation within a Rawlsian conception of justice. It goes on to consider a third argument, one that Rawls himself did not make: that consumption taxation respects autonomy and is more deferential to choice than is income taxation. However, this Kantian argument also fails. Although respect for autonomy and choice are fundamental with regard to other elements of Rawls's theory of justice (that is, the veil of ignorance and the first principle of justice that he posits would emerge from behind the veil), they play little or no role in his conception of distributive justice.

Rawls's theory of justice is extraordinarily complex and does not easily fit into traditional political categories. For instance, although the bedrock of his theory of distributive justice is that individuals do not deserve their social position or their natural talents and thus have no desert-based claim to their income or wealth, he is equally adamant that, at least when background institutions are just, individuals have an entitlement-based claim to the income and the wealth that their talents and good fortune are able to secure. In fact, one of the primary themes of

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Rawls's entire scheme of justice is his attempt to break free of the utilitarian-libertarian dichotomy and to reconcile the concepts of deontological rights and redistribution. Writers in the field of tax theory tend to gloss over these subtleties and to apply Rawlsian concepts in a fairly superficial manner. My hope is that this Article will act as catalyst to a more comprehensive understanding of Rawls's theory of justice in the tax theory discourse.

INTRODUCTION

The question of whether income or consumption is a more appropriate tax base, an issue that has in recent years entered the mainstream political debate,[1] has a long and venerable history. Thomas Hobbes pos-

1 Simplified USA Tax Act of 2003, H.R. 269, 108th Cong. (2003); ROBERT E. HALL & ALVIN RABUSHKA, THE FLAT TAX (2007); Taxpayer Choice Act of 2007, H.R. 3818, S. 2416, 110th Cong. (2007); Fair Tax Act of 2017, H.R.25, S.18, 115th Cong. (2017); *Member Pro-*

ited that taxes should accord with benefit and then argued that the appropriate measure of how much one benefits from the existence of government is how much one consumes.[2] Adam Smith countered that "[t]he subjects of every state ought to contribute towards the support of the government . . . in proportion to the revenue which they respectively enjoy under the protection of the state."[3] Alexander Hamilton favored consumption over income as a tax base because of the practical difficulty of raising consumption tax rates to confiscatory levels.[4] John Stuart Mill and Irving Fisher asserted that the income tax, by not permitting savings to be deducted, effectively imposes a double tax on the return from investment.[5] During the late-nineteenth and early twentieth centuries, progressives advanced that notion that those with greater incomes should bear a greater share of the tax burden, an idea that led to the adoption of Sixteenth Amendment and to the establishment of the income tax as the primary source of revenue for the federal government.[6] Nicholas Kaldor argued that income is an inaccurate measure of ability to pay because it does not reach the ability of the upper classes to consume out of inherited wealth.[7] In arguably the most influential tax article published in a law review, William Andrews, building on his predecessors' work and adding some insights of his own, suggested that consumption is a fairer tax base than is income.[8] Others voiced their disagreement, and the question of the appropriate tax base became perhaps the foundational issue in the

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posals for Tax Reform: Hearing Before the Subcomm. On Select Revenue Measures of the H. Comm. On Ways and Means, 109th Cong. 71–76 (2005) (statement of Leo E. Linbeck, Americans for Fair Taxation); THE PRESIDENT'S ADVISORY PANEL ON FEDERAL TAX REFORM, SIMPLE, FAIR, AND PRO-GROWTH: PROPOSALS TO FIX AMERICA'S TAX SYSTEM, 20–23, 191–205, 208–22 (2005); NEAL BOORZ & JOHN LINDER, THE FAIRTAX BOOK: SAYING GOODBYE TO THE INCOME TAX AND THE IRS (2005); NEAL BOORZ & JOHN LINDER, FAIRTAX: THE TRUTH: ANSWERING THE CRITICS (2008); Carly Fiorina (@CarlyFiorina), FACEBOOK (Nov. 10, 2015), https://www.facebook.com/CarlyFiorina/posts/10156748964830206; Teddy Davis, *Thompson Flip Flops on Taxes?*, ABC NEWS (July 31, 2007), https://abcnews.go.com/Politics/story?id=3428541&page=1 ("[F]ive Republican presidential candidates have pledged to sign the 'Fair Tax' bill into law.").

2 THOMAS HOBBES, LEVIATHAN OR THE MATTER, FORME, & POWER OF A COMMON-WEALTH ECCLESIASTICALL AND CIVILL 181 (1st ed., Clarendon Press 2012) (1651). See *infra* note 109 and accompanying text.

3 ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 412, 423 (1776).

4 THE FEDERALIST NO. 21 (Alexander Hamilton).

5 JOHN STUART MILL, PRINCIPLES OF POLITICAL ECONOMY 218 (Stephen Nathanson ed., 2004) (1848); Irving Fischer, *The Double Taxation of Savings*, 29 AM. ECON. REV. 16 (1939).

6 REYNA EISENSTARK & LORA FRIEDENTHAL, PROGRESSIVISM 68–70 (2010); MICHAEL MCGERR, A FIERCE DISCONTENT: THE RISE AND FALL OF THE PROGRESSIVE MOVEMENT IN AMERICA, 1870–1920, 93–98 (2003).

7 NICHOLAS KALDOR, AN EXPENDITURE TAX (1955).

8 William D. Andrews, *A Consumption-Type or Cash Flow Personal Income Tax*, 87 HARV. L. REV. 1113 (1974).

academic tax discourse.[9] As noted, the academic debate has in recent years spread into the political arena.

One participant in the debate over the appropriate tax base, and one whose voice has attracted relatively little attention in this regard, is the philosopher John Rawls. In his monumental work, *A Theory of Justice*,[10] Rawls argued that in certain circumstances a proportional consumption tax would be preferable to a progressive income tax.[11] Given his commitment to redistribution of wealth as part of a broad scheme of social justice, his advocacy of proportional consumption taxation might strike one as surprising, not only because it is proportional instead of progressive but also because consumption is usually considered a more regressive tax base than income.[12]

However, Rawls's theory of justice is extraordinarily complex and does not easily fit into traditional political categories. For instance, although the bedrock of his theory of distributive justice is that individuals do not deserve their social position or their natural talents and thus have no desert-based claim to their income or wealth,[13] he is equally adamant that, at least when background institutions are just, individuals have an entitlement-based claim to the income and the wealth that their talents

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9 *See, e.g.*, Alvin C. Warren, Jr., *Fairness and a Consumption-Type or Cash Flow Personal Income Tax*, 88 HARV. L. REV. 931 (1975); William D. Andrews, *Fairness and the Personal Income Tax: A Reply to Professor Warren*, 88 HARV. L. REV. 947 (1975); Alvin Warren, *Would a Consumption Tax Be Fairer than an Income Tax?*, 89 YALE L.J. 1081, 1092 (1980). *See generally* David F. Bradford, *The Case for a Personal Consumption Tax*, *in* WHAT SHOULD BE TAXED: INCOME OR EXPENDITURE? 75 (Joseph A. Pechman ed., 1980); Barbara H. Fried, *Fairness and the Consumption Tax*, 44 STAN. L. REV. 961 (1992); Richard Goode, *The Superiority of the Income Tax*, *in* WHAT SHOULD BE TAXED: INCOME OR EXPENDITURE? 49 (Joseph A. Pechman ed., 1980); Mark G. Kelman, *Time Preference and Tax Equity*, 35 STAN. L. REV. 649 (1983); William A. Klein, *Timing in Personal Taxation*, 6 J. LEGAL STUD. 461 (1977); John K. McNulty, *Symposium on Law in the Twentieth Century: Flat Tax, Consumption Tax, Consumption-Type Income Tax Proposals in the United States: A Tax Policy Discussion of Fundamental Tax Reform*, 88 CAL. L. REV. 2095 (2000); David Gamage, *The Case for Taxing (All of) Labor Income, Consumption, Capital Income, and Wealth*, 68 TAX L. REV. 355 (2015); Lawrence Zelenak, *Debt-Financed Consumption and Hybrid Income-Consumption Tax*, 64 TAX L. REV. 1 (2010); Joseph Bankman & David A. Weisbach, *The Superiority of an Ideal Consumption Tax Over an Ideal Income Tax*, 58 STAN. L. REV. 1413 (2006); Daniel Shaviro, *Beyond the Pro-Consumption Tax Consensus*, 60 STAN. L. REV. 745 (2007); Mitchell L. Engler, *A Progressive Consumption Tax for Individuals: An Alternative Hybrid Approach*, 54 ALA. L. REV. 1205 (2003).

10 JOHN RAWLS, A THEORY OF JUSTICE (rev. ed. 1999) [hereinafter THEORY].

11 *Id.* at 246.

12 *See, e.g.*, Barbara Fried, *The Puzzling Case for Proportional Taxation*, 2 CHAP. L. REV. 157, 184 (1999) [hereinafter Fried, *Puzzling Case*]; Barbara H. Fried, *Compared to What? Taxing Brute Luck and Other Second-Best Problems*, 53 TAX L. REV. 377, 392 (2000) [hereinafter Fried, *Compared to What?*]. *But see* Sagit Leviner, *The Normative Underpinnings of Taxation*, 13 NEV. L.J. 95, 129 (2012) ("It is unclear . . . whether strong arguments for a progressive tax structure emerge from Rawls's framework.").

13 THEORY, *supra* note 10, at 87 ("No one deserves his greater natural capacity nor merits a more favorable starting place in society.")

and good fortune are able to secure.[14] In fact, one of the primary themes of Rawls's entire scheme of justice is his attempt to break free of the utilitarian-libertarian dichotomy and to reconcile the concepts of deontological rights and redistribution.[15] In this light, the question of whether, within the framework of just background institutions, a proportional consumption tax better accords with Rawlsian principles than does a progressive income tax does not admit of a simple answer.

The question that this Article will consider is whether Rawls's advocacy of a proportional consumption tax, even in his ideal world, is consistent with his overall theory of justice. The remainder of this introduction will (a) very briefly summarize the derivation and content of Rawls's two principles of justice,[16] (b) describe his views on tax policy and in particular the reasons he gives for supporting or rejecting various categories of taxes,[17] and (c) provide an overview of the process by which the Article will examine his advocacy of consumption taxation.[18]

A. *Rawls's Theory of Justice*

There is little doubt that John Rawls was the most prominent social philosopher of recent generations. His work is credited with having revived normative political philosophy after a century in which political thought was dominated by utilitarianism and moral relativism.[19] Moreover, the impact of his work on the field of political philosophy extends far beyond the circle of those who agree with his methodology or his conclusions. It is probably not an exaggeration to say that such varied schools of thought as communitarianism, cosmopolitanism, and contemporary libertarianism evolved as reactions to Rawlsian liberalism.[20] Even

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[14] *Id.* at 88–89 ("[G]iven a just system of cooperation as a framework of public rules, and the expectations set up by it, those who, with the prospect of improving their condition, have done what the system announces it will reward are entitled to have their expectations met. In this sense the more fortunate have title to their better situation; their claims are legitimate expectations established by social institutions and the community is obliged to fulfill them."

[15] *Id.* at 24–30.

[16] *See infra* Section A.

[17] *See infra* Section B.

[18] *See infra* Section C.

[19] WILL KYMLICKA, CONTEMPORARY POLITICAL PHILOSOPHY: AN INTRODUCTION 9 (1990); ADAM SWIFT, POLITICAL: A BEGINNERS' GUIDE FOR STUDENTS AND POLITICIANS 10 (2006); SAMUEL FLEISCHACKER, A SHORT HISTORY OF DISTRIBUTIVE JUSTICE 110 (2004); Mark Benstein, *Should Governments Play Robin Hood? The Effects of Repeal of the Estate Tax on Wealth Apportionment*, 12 CARDOZO J. INT'L & COMP. L. 187, 195–96 n. 52 (2004); James M. Puckett, *Rethinking Tax Priorities: Marriage Neutrality, Children, and Contemporary Families*, 78 U. CIN. L. REV. 1409, 1418 (2010) ("Redistributive arguments are dominated by Rawlsian concerns."); Liam B. Murphy, *Liberty, Equality, Well-Being: Rakowski on Wealth Transfer Taxation*, 51 TAX L. REV. 473, 475 (1996) ("Rawls' self-conscious combination of liberal and egalitarian concerns was . . . a breakthrough in political theory.")

[20] Norman Daniels, *Preface*, *in* READING RAWLS xii, xiii (Norman Daniels ed., 1989) ("[P]olitical philosophy has been one of the most exciting areas of philosophical activity in the

Rawls's ideological archrival Robert Nozick had to admit that Rawls's *A Theory of Justice* is so powerful a work that "[p]olitical philosophers now must either work within Rawls's theory or explain why not."[21]

Rawls posited that as regards social cooperation, individuals have both an identity of interests and a conflict of interests. The identity of interests stems from the fact that social cooperation permits all to live better lives than they could in the absence of such cooperation. The conflict stems from disagreement over how to distribute the benefits of social cooperation. The role of justice is to set forth the rules by which the benefits of social cooperation are distributed.[22] However, the difficulty with selecting rules of justice is that people have a natural tendency to advocate principles of justice that favor themselves at the expense of others.[23]

Rawls's most innovative proposal was a thought experiment in which the task of selecting principles of justice would be assigned to individuals who were unaware of their own personal attributes, and thus of how they would fare under possible alternative arrangements.[24] Behind the "veil of ignorance" and deprived of knowledge regarding their natural talents, their social position, and even their conception of the good, individuals would be forced to reason objectively and could not attempt to skew the rules to their own benefit.[25] Rawls then argued that individuals in such a position would adopt two principles of justice.[26] The first concerns basic liberties, including liberty of conscience and freedom of thought, freedom of speech and assembly, freedom of the person, and the right to vote and hold public office.[27] It provides that

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years since *A Theory of Justice*. Even when aimed at establishing alternative theories, much of that activity has been a response to Rawls' work . . . ." [italics in original].

21 ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 183 (1974).

22 THEORY, *supra* note 10, at 4.

23 John Rawls, *Distributive Justice*, *in* PHILOSOPHY, POLITICS, AND SOCIETY 58, 58 (Peter Laslett & W.G. Runciman eds., 1967) [hereafter Rawls, *Distributive Justice*].

24 THEORY, *supra* note 10, at 11.

25 *Id.* at 116–17.

26 *Id.* at 53.

27 With regard to the first principle, Rawls originally wrote that "each person . . . has an equal right to the most extensive *liberty* compatible with a like *liberty* for all." (emphases added). John Rawls, *Justice as Fairness*, 67 PHIL. REV. 164, 165 (1958); John Rawls, *Constitutional Liberty and the Concept of Justice*, NOMOS VI: JUSTICE 98 (1963)*; see also* John Rawls, *The Sense of Justice*, 72 PHIL. REV. 281 (1963); JOHN RAWLS, LEGAL OBLIGATION AND THE DUTY OF FAIR PLAY IN LAW AND PHILOSOPHY: A SYMPOSIUM 3 (Sidney Hooks ed., 1964); Rawls, *Distributive Justice*, *supra* note 23, at 58; John Rawls, *Distributive Justice: Some Addenda*, 13 NAT. L. F. 51 (1968) [hereinafter Rawls, *Distributive Justice: Some Addenda*]; JOHN RAWLS, THE JUSTIFICATION OF CIVIL DISOBEDIENCE IN CIVIL DISOBEDIENCE: THEORY AND PRACTICE 240, 241 (Hugo Bodau ed., 1969); THEORY, *supra* note 10, at 60.

He later changed the word "liberty" to "liberties" and clarified that he was referring not to liberty in the abstract but to specific basic liberties "for example, freedom of thought and liberty of conscience, freedom of the person, and political liberty." John Rawls, *Some Reasons* everyone is entitled to the most extensive scheme of such liberties compatible with a similar scheme of liberties for others.[28] The second principle is that social and economic inequalities are to be arranged in such a manner that they are attached to positions and offices open to all under conditions of fair equality of opportunity and that they operate to the advantage of the least well-off.[29] Rawls referred to the idea that inequalities are permissible only if they benefit the least well-off (i.e., the second element of the second principle) as the difference principle.[30]

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for the Maximin Criterion, 64 AM. ECON. REV. 141 (1974) [hereinafter Rawls, *Maximin Criterion*]; *see also* John Rawls, *Reply to Alexander and Musgrave*, 88 Q. J. ECON. 633, 639–40 (1974) [hereinafter Rawls, *Reply to Alexander and Musgrave*]; John Rawls, *A Kantian Conception of Equality*, 96 CAMBRIDGE REV. 94 (1975); JOHN RAWLS, SOCIAL UTILITY AND PRIMARY GOODS IN UTILITARIANISM AND BEYOND 159 (Amartya Sen & Bernard Williams eds., 1982); John Rawls, *Justice as Fairness: Political not Metaphysical*, 14 PHIL. & PUB. AFF. 223 (1985); JOHN RAWLS, POLITICAL LIBERALISM 5 (1993) [hereinafter RAWLS, POLITICAL LIBERALISM] ("in this scheme the equal political liberties, and only those liberties, are to be guaranteed their fair value"); THEORY, *supra* note 10, at 53; JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT 42 (2003) [hereinafter RESTATEMENT].

> For the purpose of distributive justice in general and tax theory in particular tax, the difference between the original and the amended form of the principle is that the second cannot support a libertarian claim that liberty includes freedom from taxation. Thus, in the second edition of THEORY, published in 1999, at 54, Rawls added the following language:
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> These liberties have a central range of application within which they can be limited and compromised only when they conflict with other basic liberties. Since they may be limited when they clash with one another, none of these liberties is absolute; but however they are adjusted to form one system, this system is to be the same for all. It is difficult, and perhaps impossible, to give a complete specification of these liberties independently from the particular circumstances—social, economic, and technological—of a given society. The hypothesis is that the general form of such a list could be devised with sufficient exactness to sustain this conception of justice. Of course, liberties not on the list, for example, the right to own certain kinds of property (e.g., means of production) and freedom of contract as understood by the doctrine of laissez-faire are not basic; and so they are not protected by the priority of the first principle.

Compare the corresponding section of the first edition (1971), *id.* at 61, in which these four sentences are absent. *See also* Bret N. Bogenschneider, *A Philosophy Toolkit for Tax Lawyers*, 50 AKRON L. REV. 451, 462–63 (2016).

28 THEORY, *supra* note 10, at 53.

29 Furthermore, Rawls posited that between and within the principles there is a lexical ordering: the first principle is lexically prior to the second, and the principle of equal opportunity is lexically prior to the difference principle. The idea of lexical ordering is that considerations embodied in a lower ranked principle can never justify a violation of a higher ranked principle. Thus, it is impermissible to violate basic liberties even if doing so would promote equal opportunity or improve the well-being of the least well-off, and it is impermissible to deny equal opportunity in order to satisfy the demands of the difference principle. *Id.* at 52–53.

30 It appears that the term "difference principle" derives from Rawls's contention that it is only the well-being of the least well-off that can justify economic inequality. *See, e.g.*, *id.* at 56 ("One is not allowed to justify differences in income or in positions of authority and responsibility on the ground that the disadvantages of those in one position are outweighed by the greater advantages of those in another."). As its goal of the difference principle is to maximize the minimum level of well-being, it has also been described as the "maximin" principle. *See, e.g.*, Patrick B. Crawford, *Analyzing Fairness Principles in Tax Policy: A Pragmatic*

B. *Tax Theory in Rawls's Writings*

As taxation is one of the institutions via which societies regulate the distribution of resources, it is perhaps surprising that Rawls devotes relatively little space to tax policy and the role that taxes are meant to play in the realization of justice.[31] However, he does discuss tax policy on a

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Approach, 76 DENV. U. L. REV. 155, 182–83 (1998); Daniel Shaviro, *The Minimum Wage, the Earned Income Tax Credit, and Optimal Subsidy Policy*, 64 U. CHI. L. REV. 405, 431 (1997); Lawrence A. Zelenak, *Will the Federal Income Tax Have a Bicentennial?*, 41 FLA. ST. U. L. REV. 275, 286 n.54 (2013); David Kamin, *What is a Progressive Tax Change?: Unmasking Hdden Values in Distributional Debates*, 83 N.Y.U. L. REV. 241, 270 n.70 (2008); David Kamin, *Reducing Poverty, Not Inequality: What the Tax System Can Achieve*, 66 TAX L. REV. 593, 602 n.33 (2013); Kyle Logue & Ronen Avraham, *Redistributing Optimally: Of Tax Rules, Legal Rules, and Insurance*, 56 TAX L. REV. 157, 158 (2003); Eric Rakowski, *Can Wealth Taxes Be Justified?*, 53 TAX L. REV. 263, 284 (2000); Jeffrey A. Schoenblum, Myth of Ownership/*Myth of Government*, 22 VA. TAX REV. 555, 571 (2003) (reviewing LIAM MURPHY & THOMAS NAGEL, THE MYTH OF OWNERSHIP: TAXES AND JUSTICE (2002)); LOUIS KAPLOW, THE THEORY OF TAXATION AND PUBLIC ECONOMICS 42 (2008); Donna M. Byrne, *Progressive Taxation Revisited*, 37 ARIZ. L. REV. 739, 777 (1995).

Rawls originally objecting to the use of the term maximin to describe the difference principle, but in his later writing he himself adopted the term. THEORY, *supra* note 10, at 72–73; Rawls, *Maximin Criterion*, *supra* note 27, at 141; RESTATEMENT, *supra* note 27, at 97–99.

Others refer to the difference principle as "leximin," because among those distributions in which the welfare of the least well off is maximized, the difference principle would prefer those in which the welfare of the second worst off is maximized and so forth. *See, e.g.*, AMARTYA SEN, CHOICE, WELFARE AND MEASUREMENT 234 (1982); Thomas D. Griffith, *Theories of Personal Deductions in the Income Tax*, 40 HASTINGS L.J. 343 385–86 (1989); Joseph Bankman & Thomas Griffith, *Social Welfare and the Rate Structure: A New Look at Progressive Taxation*, 75 CALIF. L. REV. 1905, 1916 n.50 (1987); Lawrence Zelenak & Kempter Moreland, *Can the Graduated Income Tax Survive Optimal Tax Analysis?*, 53 TAX L. REV. 51, 53 (1999); Deborah M. Weiss, *Liberal Estate Tax Policy*, 51 TAX L. REV. 403, 413–14 (1996); Eric M. Zolt, *The Uneasy Case for Uniform Taxation*, 16 VA. TAX REV. 39, 98 (1996); Patrick B. Crawford, *The Utility of the Efficiency/Equity Dichotomy in Tax Policy Analysis*, 16 VA. TAX REV. 501, 529 (1997); Thomas D. Griffith, *Should "Tax Norms" Be Abandoned? Rethinking Tax Policy Analysis and the Taxation of Personal Injury Recoveries*, 1993 WIS. L. REV. 1115, 1122, 1154 (1993).

[31] *See, e.g.*, Charles A. Borek, *Social Science Explanations for Disparate Outcomes in Tax Court Abuse of Discretion Cases: A Tax Justice Perspective*, 33 CAP. U. L. REV. 623, 623 (2005); Linda Sugin, *Theories of Distributive Justice and Limitations on Taxation: What Rawls Demands from Tax Systems*, 72 FORDHAM L. REV. 1991, 1994 (2004) [hereinafter Sugin, *Theories*] ("Rawls wrote a great deal about economic justice generally, but very little about taxation in particular."); Blaine G. Saito, *Building a Better America: Tax Expenditure Reform and the Case of State and Local Government Bonds and Build America Bonds*, 11 GEO. J.L. & PUB. POL'Y 577, 592 (2013); Linda Sugin, *Payroll Taxes, Mythology, and Fairness*, 51 HARV. J. LEGIS. 113 (2014) ("Rawls was not particular about taxation because he considered various taxes to be consistent with justice."); Conor Colasurdo, *Welfare on Fire: The Earned Income Tax Credit is Not Enough to Extinguish Poverty*, 54 J. CATH. LEG. STUD. 1, 14 (2015); Anne L. Alstott, *The Uneasy Liberal Case Against Income and Wealth Taxation: A Response to Professor McCaffery*, 51 TAX L. REV. 363, 367 ("Rawls' initial institutional recommendations regarding taxation are sketched in a few brief pages."). *But cf.* Alice G. Abreu, *Tax Counts: Bringing Money-Law to LatCrit*, 78 DENV. U. L. REV. 575, 577 (2001) ("John Rawls devotes a considerable portion of his *A Theory of Justice* to an analysis of the optimal tax system."). Edward J. McCaffery, *The Uneasy Case for Wealth Transfer Taxation*,

number of occasions and considers a number of different types of taxes, the most prominent among them being a progressive inheritance tax, a progressive income tax, efficiency-inducing taxes, an endowment tax, and a proportional consumption tax.[32] He expresses at least qualified support for all except for the endowment tax.

1. Progressive Inheritance Taxation

According to Rawls, the primary role of a progressive inheritance tax would not be to raise revenue, but rather to preserve the equal value of political liberties and to protect the fair equality of opportunity.[33] Rawls viewed dynastic wealth as a threat to those values.[34] In fact, Rawls proposed that the right to inherit be recognized only to the extent that doing so would be compatible with liberty and fair equality of opportunity and work to the advantage of the least well-off.[35]

2. Progressive Income Taxation

With regard to the progressive income tax, Rawls posited that it might be justified as a countermeasure to the injustice of existing institutions.[36] In other words, because existing institutions do not conform to the difference principle but instead permit those with the most lucrative natural talents and the most favorable social positions to acquire wealth

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104 YALE L.J. 283, 290 (1994) (stating that "[t]his liberal egalitarian perspective led Rawls to suggest a rather precise tax system in *A Theory of Justice.*"). However, McCaffery later writes that "Rawls devotes little space" to tax philosophy." *Id.* at 293.

32 For a discussion of whether Rawlsian principles would justify a wealth tax, see Rakowski, *supra* note 30, at 284–85 (2000).

33 THEORY, *supra* note 10, at 245–46. For discussions of Rawls's inheritance tax, see Benstein, *supra* note 19, at 195–96; Patricia A. Cain, *Death Taxes: A Critique on the Margin*, 48 CLEV. ST. L. REV. 677, 683 (2000); David G. Duff, *Alternatives to the Gift and Estate Tax*, 57 B.C. L. REV. 893, 903–06 (2016); McCaffery, *supra* note 31, at 291; Edward J. McCaffery, *The Political Liberal Case Against the Estate Tax*, 23 PHIL. & PUB. AFF. 281 (1994); Alstott, *supra* note 31, at 367–69; Rakowski, *supra* note 30, at 284; Stephanie A. Weber, *Re-Thinking the Estate Tax: Should Farmers Bear the Burden of a Wealth Tax?*, 9 ELDER L.J. 109, 123 (2001) ("Imposing a nonrevenue bearing tax with high administrative costs, merely on the basis of principle, is nonsensical.").

34 *Cf.* J.D. Trout & Shahid A. Buttar, *Resurrecting "Death Taxes": Inheritance, Redistribution, and the Science of Happiness*, 16 J.L. & POL. 765, 843 n.237 (2000) (discussing the estate tax in terms of the difference principle).

35 THEORY, *supra* note 10, at 245. It is not entirely clear whether he considered the inheritance tax to be the means by which the right of inheritance would be restricted or whether he conceived of a two-step process, in which the rules delineating the right to bequeath would be set forth in accordance with the principles of justice and only then would a progressive inheritance tax be imposed on what each person received under those rules. RESTATEMENT, *supra* note 27, at 160–61 suggests the former, while THEORY, *supra* note 10, at 245 suggests the latter.

36 THEORY, *supra* note 10, at 246–47 ("It does not follow that, given the injustice of existing institutions, even steeply progressive income taxes are not justified when all things are considered.").

and income beyond what is necessary to encourage them to use their abilities for the benefit of the least well-off, taking an increasingly larger share of the income of the most well-off is a rough justice means of setting things right. Nevertheless, Rawls is very clear that the progressive income tax would not be a part of any scheme of ideal justice.[37] Discussing the progressive income tax, he writes:[38]

> In practice we must usually choose between several unjust, or second best, arrangements; and then we look to nonideal theory to find the least unjust scheme. Sometimes this scheme will include measures and policies that a perfectly just system would reject. Two wrongs can make a right in the sense that the best available arrangement may contain a balance of imperfections, an adjustment of compensating injustices.

While the progressive income tax is, in Rawls's words, "unjust," "wrong," and "imperfect," he nevertheless allows that for practical purposes it might constitute a necessary part of the "least unjust scheme."

3. Endowment Taxation (or "Head Tax")

Rawls argued that individuals do not deserve their natural talents or their social position.[39] Consequently, as natural talents and social position are the prime determiners of market outcomes, individuals have no claim of moral desert to their share of the market distribution: the income that individuals are able to earn in a competitive market follows from what Rawls refers to as the morally arbitrary natural lottery.[40] On the other hand, Rawls recognized the power of the market as an efficient creator of wealth.[41] Given these two views, it would not be unreasonable to expect that Rawls would support what the economic and legal literature calls an endowment tax. Under an endowment tax, individuals pay tax not on their income but on their potential income, on what they could earn rather than on what they did earn. In other words, those more favored by nature or by society would bear greater tax burdens that those less favored.[42]

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[37] *See* McCaffery, *supra* note 31, at 331 n.179 ("Rawls' use of the word 'even' underscores the extent to which he considered progressive income tax to be far removed from *ideal* theory.").

[38] THEORY, *supra* note 10, at 247.

[39] *See id.* at 63.

[40] *Id.* at 64–65.

[41] *See id.* at 68, 142, 246.

[42] For a comprehensive discussion of endowment taxation, see Lawrence Zelenak, *Taxing Endowment*, 55 DUKE L.J. 1145 (2006) [hereinafter Zelenak, *Taxing Endowment*]. *See also* Daniel N. Shaviro, *Endowment and Inequality*, *in* TAX JUSTICE: THE ONGOING DEBATE 123, 125 (Joseph J. Thorndike & Dennis J. Ventry, Jr. eds., 2002); Lawrence Zelenak, *The Reifica-*

What economists like about an endowment tax is its neutrality: in an endowment tax regime, the marginal rate of tax on additional earned income is zero.[43] For example, if the market is willing to offer $x for the exertion of a certain effort, the choice facing the recipient of such an offer would be whether the proffered $x is sufficient compensation for exerting the effort. Individuals will work if and only if the market values their labor more than they value their leisure. Under such an economic regime, individuals' time will be used in the most efficient manner. By contrast, under an income tax, an individual might be willing to exert the requested effort for $x, but not for the after-tax income of $x (1 – t), where t is the individual's marginal tax rate. In such a case, the individual will decline the offer even though the market values her labor more than she values her leisure, and her time will be used inefficiently. In this sense, the endowment tax operates much like a traditional head tax, in which each individual pays the same absolute amount of tax regardless of circumstances: under each of these tax regimes the marginal rate of tax is zero. However, a head tax is widely viewed as violating fundamental concepts of fairness (the very wealthy and the very poor would each be called upon to pay the same absolute amount of tax), and Rawls would certainly agree.[44] The endowment tax seems to satisfy the demands both of efficiency and of fairness: the marginal rate of tax on additional income is zero, and yet those who are better off will pay more than those who are worse off.

Nevertheless, Rawls rejected the endowment tax (which he describes as a "head tax") for two reasons. The first is impracticality: it is simply too difficult to determine at an early age a person's income-earning capacity, particularly when individuals would have a strong incentive to conceal their income-earning capacity until after the assessment.[45] In

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tion of Metaphor: Income Taxes, Consumption Taxes, and Human Capital, 51 TAX L. REV. 1, 17–19 (1995); Rawls, *Reply to Alexander and Musgrave*, *supra* note 27, at 653.

43 *See, e.g.*, DAVID F. BRADFORD & U.S. TREASURY TAX POLICY STAFF, BLUEPRINTS FOR BASIC TAX REFORM 36–37 (2d ed. 1984); DAVID F. BRADFORD, UNTANGLING THE INCOME TAX 154–56 (1986); RICHARD A. MUSGRAVE & PEGGY B. MUSGRAVE, PUBLIC FINANCE IN THEORY AND PRACTICE 291–93 (5th ed. 1989); Louis Kaplow, *Human Capital Under an Ideal Income Tax*, 80 VA. L. REV. 1477, 1498–99 (1994); Sugin, *Theories*, *supra* note 31, at 2006; Zelenak, *Taxing Endowment*, *supra* note 42, at 1150.

44 *See, e.g.*, Sugin, *Theories*, *supra* note 31, at 2006.

45 RESTATEMENT, *supra* note 27, at 157–58. *See also* Rawls, *Reply to Alexander and Musgrave*, *supra* note 27, at 654–55:

> It is doubtful, in fact, whether natural abilities even exist in a form that could be measured, even theoretically, for purposes of lump sum taxation. If an ability were, for example, a computer in the head with a measurable and fixed capacity, and with definite and unchanging social uses, this would not be so. But intelligence, for example, is hardly any one such fixed native ability. It must have indefinitely many dimensions that are shaped and nurtured by different social conditions; even as a potential, as opposed to a realized, capacity it is bound to vary significantly in little understood and complex ways. And among the elements affecting these capacities

fact, even those who support an endowment tax in theory concede that it is inapplicable in practice.[46] Rawls's second reason is more thematic and, for that reason, much more significant. He states that even if it were possible accurately to assess each individual's income earning capacity, the endowment tax should be rejected because it violates liberty. Imposing a tax based on a person's ability to earn income effectively forces highly talented individuals to work in the field in which they can maximize their talents, just in order to pay their endowment tax.[47] For example, assume that an individual could earn $600,000 a year on Wall Street but despises that sort of lifestyle and would prefer teaching high school at a salary of $60,000 a year. Under an endowment tax regime, the second option would not be available. In practice, the taxpayer would be forced to take the job on Wall Street just in order to pay the endowment tax.[48] Perhaps even more significant from Rawls's perspective, an endowment tax would violate liberty by interfering with the practice of religion.[49] Maximizing one's income might require working on religious holidays or preclude the adoption of a monastic lifestyle.

For Rawls, liberty is lexically prior to distributive justice, meaning that no improvement in the distribution of primary goods[50]—even the full implementation of the difference principle—can justify a violation of liberty.[51] Liberty, in Rawls's view, can be restricted only by liberty:[52] we may restrict one person's liberty only if doing so is necessary to protect

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> are the social attitudes and institutions directly concerned with their training and recognition. Thus potential earnings capacity is not something independent from the social forms and the particular contingencies over the course of life, and the idea of a lump sum tax does not apply.

46 Sugin, *Theories*, *supra* note 31, at 2008 n.77; Zelenak, *Taxing Endowment*, *supra* note 42, at 1145 (citing Francis A. Walker, *The Bases of Taxation*, 3 POL. SCI. Q. 1 (1888)).

47 RESTATEMENT, *supra* note 27, at 158.

48 For a more elaborate expression of this idea, see Roland Dworkin, *What is Equality? Part 2: Equality of Resources*, 10 PHIL. & PUB. AFF. 283, 312, 323 (1981) [hereinafter Dworkin, *Equality of Resources*] (describing a "slavery of the talented"). *See also* Richard Dworkin, *Is Wealth a Value?*, 9 J. LEGAL STUD. 191, 209–10 (1980); Terrence Chorvat, *Taxing Utility*, 35 J. SOCIO-ECON. 1, 6 (2006); Zelenak, *Taxing Endowment*, *supra* note 42, at 1156; Victor Fleischer, *Two and Twenty: Taxing Partnership Profits in Private Equity Funds*, 83 N.Y.U. L. REV. 1, 29 (2008).

49 For Rawls's sensitivity to matters of religious freedom, see, in particular, THEORY, *supra* note 10, at 180–94.

50 For Rawls, the focus of distributive justice is not welfare but "primary goods," things that are likely to contribute to advancing a person's conception of the good, whatever that conception might be. *See infra* text accompanying notes 161–64. To facilitate a flow of the discussion, the Article will often use the term "well-being" as a convenient substitute for "access to primary goods."

51 THEORY, *supra* note 10, at 53–54 ("These principles are to be arranged in a serial order with the first principle prior to the second. This ordering means that infringements of the basic equal liberties protected by the first principle cannot be justified, or compensated for, by greater social and economic advantages.").

52 *Id.* at 266.

the liberty of others.[53] Therefore, whatever the advantages of an endowment tax from the perspective of efficiency and distributive fairness, Rawls rejected it because of its inevitable violation of liberty.

4. Pigouvian Taxation and Subsidies

According to Rawls, one of the functions of government—assigned under his constitutional scheme to the "allocative branch"—is to regulate the market with the view of allowing it to realize its potential as an efficient allocator of resources.[54] As part of its task, the allocative branch is charged with "identifying and correcting, say by suitable taxes and subsidies . . . departures from efficiency caused by the failure of prices to measure accurately social benefits and costs."[55] In other words, the market operates efficiently when the price that consumers pay for goods and services reflects the marginal cost of producing those goods and services. However, as market prices do not reflect externalities, consumers will tend to over-purchase goods and services with negative externalities and under-purchase goods and services with positive externalities. Consequently, resources will not be used in their most efficient manner. In order to overcome this type of market failure, Rawls writes that the state needs to force the internalization of externalities by taxing activities that involve negative externalities (taxes referred to in the economics literature as "Pigouvian taxes" after the English economist Arthur Cecil Pigou who first proposed them in 1920) and subsidizing activities that involve positive externalities.[56] Assuming that the taxes and the subsidies properly quantify the various externalities, consumers will purchase goods and services if and only if the expected benefit equals or exceeds the total social cost of providing those goods and services, thus satisfying one the principal requirements of allocative efficiency.[57]

5. Proportional Consumption Taxation

When discussing how to raise revenue for providing public goods and making the transfer payments that justice requires, Rawls notes that "a proportional expenditure tax may be part of the best tax scheme."[58] His advocacy of proportional expenditure taxation is surprising.[59] Maxi-

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[53] *Id.* at 53 ("Each person is to have an equal claim to the most extensive scheme of equal basic liberties compatible with a similar scheme of liberties for others.")

[54] *Id.* at 244 ("The allocation branch . . . is to keep the price system workably competitive and to prevent the formation of unreasonable market power.").

[55] *Id.* at 244.

[56] ALFRED CECIL PIGOU, THE ECONOMICS OF WELFARE 192 (4th ed. 1932).

[57] For a discussion of allocative efficiency, see MUSGRAVE & MUSGRAVE, *supra* note 43, at 61.

[58] THEORY, *supra* note 10, at 246.

[59] Professor Fried has dismissed Rawls's proposed proportionate consumption tax as a suggestion "in passing," or as a "throwaway statement" and has gone so far as to suggest that it

mizing the wealth and income of the least well-off ostensibly requires a radical redistribution of resources, and a proportional consumption tax does not seem up to the task. First, while it is true that when the proceeds of a proportional tax are used to finance public goods and transfer payments to the poor, the result is a redistribution of wealth from those who are more well-off to those who are less well-off, the degree of redistribution is less than it would be were the same goods and payments financed by a progressive tax. Second, consumption is a more regressive tax base than income, as the marginal propensity to consume tends to decrease as income rises: the wealthy tend to devote a smaller percentage of their income to consumption than do the poor.[60] In other words, from the perspective of wealth redistribution, a proportional consumption tax is equivalent to a regressive income tax.[61]

Thus, two important questions arise with regard to Rawls's advocacy of a proportional consumption tax. The first is why he preferred consumption to income as a tax base. The second is why he preferred a proportional consumption tax to a progressive consumption tax. This Article will address the first question.

In examining Rawls's stated preference for a consumption tax over an income tax, this Article will proceed from Rawls's own underlying principles of justice. In other words, it is not my intention to challenge Rawls's methodology or the conclusions at which he arrives via that methodology. There exists a vast body of literature discussing whether the veil of ignorance is an appropriate means of determining issues of justice and which principles of justice would be adopted by those behind

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is "part of a hodgepodge of proposed fiscal arrangements to effect a just state, and it seems doubtful that he has thought through the implications of any of these institutional arrangements very clearly." Fried, *Puzzling Case*, *supra* note 12, at 184; Fried, *Compared to What?*, *supra* note 12, at 392 n.61. Others have taken Rawls's endorsement of a consumption tax at face value. *See, e.g.*, David A. Weisbach, *The (Non) Taxation of Risk*, 58 TAX L. REV. 1, 24 (2004); McCaffery, *supra* note 31, at 338–40.

60 It is arguable that the progressivity or regressivity of the tax base is immaterial because the tax burden is a function not only of the tax base but also of the tax rate: by adjusting the tax rates, it is possible to structure a consumption tax that is as progressive as any given income tax regime. On the other hand, because the consumption tax base is more regressive than the income tax base, the consumption tax rates would need to be considerably more progressive than the income tax rates to achieve an equivalent degree of progressivity (simulating the degree of progressivity inherent in even a proportional income tax—and much more so a progressive income tax—would require a prohibitively high consumption tax rate). *See generally* Michael Graetz, *Implementing a Progressive Consumption Tax*, 92 HARV. L. REV. 1575, 1581–84 (1979). However, the question of whether the required tax rates would be practically or politically feasible is irrelevant for our discussion of Rawls's tax scheme, because of his stipulation that the consumption tax is to be proportional.

61 *Cf.* William B. Barker, *Three Faces of Equality: Constitutional Requirements in Taxation*, 57 CASE W. RES. L. REV. 1, 51 n.243 (2006) ("It is interesting to note that John Rawls accepted these anti-distributive notions of justice as appropriate in taxation without much analysis.").

the veil of ignorance. My goal in the current Article is much more modest. Assuming that the procedure proposed by Rawls to examine questions of justice is fair and assuming further that his procedure does produce the principles of justice that he posits, is it possible to justify the preference of consumption over income as a tax base?

C. Justifying Consumption as a Tax Base

Rawls himself gives two reasons for advocating consumption as a tax base rather than income. The first is that a consumption tax "imposes a levy according to how much a person takes out of the common store of goods and not according to how much he contributes."[62] The second is that a consumption tax "treats everyone in a uniform way."[63] However, he does not explain in what sense consuming one's own resources detracts from the "common store" of goods nor does he explain in what sense a consumption tax—as opposed to an income tax—treats everyone in a uniform manner. More significantly, he does not explain how either of these reasons correlates to his principles of justice, which emphasize equal political liberties and the equal value of those liberties, fair equality of opportunity, and concern for the least well-off members of society.[64]

The question that this Article will ask is whether a consumption tax is indeed compatible with Rawlsian principles of justice.

Part I will consider Rawls's common pool argument. It will begin by raising a number of conceptual and normative problems with the argument and will proceed to suggest and critique some responses to those problems.

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62 THEORY, *supra* note 10, at 246. Rawls adds the parenthetical proviso, "assuming here that income is fairly earned," indicating that he is discussing taxation as part of ideal theory. As also described, he then goes on to opine that unjust background institutions might require a steeply progressive income tax.

63 *Id.* at 246. Here too he adds the parenthetical proviso, "still assuming that income is fairly earned."

64 When introducing the common store argument, Rawls describes it as conforming to "common sense precepts of justice." *Id.* at 246. His reliance here upon such precepts to justify a consumption tax is curious. First, it is highly questionable whether the use of consumption as a tax base does indeed conform to "common sense" precepts of justice. Not only did the literature overwhelmingly support the income tax from about the time of Adam Smith in the late eighteenth century until the revival of interest in consumption taxation in the late twentieth century, but so strong was the "common sense" notion that income rather than consumption is the appropriate tax base that in 1913 the U.S. Constitution was amended specifically to grant Congress the authority to impose an income tax. *See supra* notes 1–9 and accompanying text.

Second, and more importantly, in rejecting conventional criteria of taxation such as benefit and ability to pay—criteria, it should be noted, that have traditionally been used to justify income taxation—Rawls wrote that "reference to common sense precepts in connection with expenditure taxes is subordinate consideration. The scope of these precepts is regulated by the principles of justice." *Id.* at 247.

Part I will consider Rawls's uniformity argument. Rawls does not explain what he means by uniformity, so this Part speculates that uniformity is similar to what tax theoreticians refer to as horizontal equity—the doctrine that similarly situated taxpayers should bear equivalent tax burdens—and delineates the circumstances in which horizontal equity could be consistent with Rawlsian theory of justice. It proceeds to examine whether under the principles espoused by Rawls a consumption tax would be more horizontally equitable than an income tax.

Part III will consider an alternative argument that Rawls seemingly could have raised in support of consumption taxation but did not: that a consumption tax is preferable to an income tax because it respects autonomy and sanctions distributions that are traceable to choices made by individuals. This part shows that, within the context in which Rawls discusses the issue, consumption taxation does appear to be more deferential to choice than does income taxation. Nevertheless, and despite the deep deontological roots of Rawls theory of justice and the deference he gives to choice in both the structure of the veil of ignorance thought experiment and in the principles of justice that he posits would emerge from deliberations behind the veil of ignorance, responsibility for choice does not appear to play a role within the framework of difference principle.

The conclusion will summarize the findings and offer some concluding thoughts.

I. COMMON STORE

Introducing his idea that in a world organized in accordance with the principles of justice, consumption would serve as a better tax base than would income, Rawls writes as follows:[65]

> [I]t is preferable to an income tax (of any kind) at the level of common sense precepts of justice, since it imposes a levy according to how much a person takes out of the common store of goods and not according to how much he contributes (assuming here that income is fairly earned).

Rawls's common store argument raises two distinct and yet interrelated issues. The first is conceptual. Rawls describes consumption as a taking out from the common store of goods. However, if an individual may legitimately use certain goods for personal consumption, then it seems inaccurate to describe those goods as part of the common store. Goods that an individual is entitled to consume are private goods, not

65 *Id.* at 246.

common goods. If the goods concerned really are part of the common store, then appropriating them for personal conception would constitute theft, and reacting to such an appropriation by imposing a tax at any rate that is less than 100% hardly seems an adequate response. In other words, the description of consumption as a legitimate taking out from the common store of goods seems to involve a conceptual self-contraction.[66]

The second issue is normative. Rawls presents his proposed consumption tax as part of ideal theory. In a world, such as ours, in which institutions are largely unjust by Rawlsian standards, he suggests that an income tax may be necessary as a rough means of mitigating some of the underlying injustice.[67] His advocacy of a consumption tax is restricted to a world in which background institutions operate in accordance with his two principles of justice. Furthermore, in the text quoted above he conditioned his common store argument for a consumption tax on the explicit assumption that the income being consumed was "fairly earned." Presumably this means that not only do the background institutions within which the income was earned conform to Rawls's principles of justice, but also that the individual concerned acted in accordance with the stipulated rules of those institutions.

Where income is "fairly earned" in this sense of the term, Rawlsian contract theory provides that the individual concerned has a moral entitlement to whatever reward the relevant institutions proffer.[68] For example, if within the framework of just background institutions a person contracts to provide services as an employee, then that person is morally entitled to claim the appropriate wage. From the perspective of Rawls's conception of justice, income that is "fairly earned" properly belongs to the individual who earned it. Goods that were legitimately acquired in this manner would not be part of the common store, and consumption would not constitute a taking out of the common store of goods.[69]

The next two subparts will examine possible responses to these issues. The first response will address the conceptual issue. The second

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66 *Cf.* 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, 255 (1995) ("The suggestion that persons should pay for reducing the common store of goods emphasizes his attachment to communalism, and reveals a discomfort with individual property ownership.").

67 THEORY, *supra* note 10, at 246–47. More specifically, Rawls suggests that in a non-ideal world, a progressive income tax might be more appropriate than a proportional consumption tax. As noted in the introduction, this Article will focus on the tax base and not on the tax rates. Therefore, for the purpose of our discussion we will focus on the fact that, according to Rawls, ideal theory favors the use of consumption as a tax base, while under non-ideal theory, it might be better to adopt an income base.

68 See infra Part II for a discussion of the notion of Rawlsian entitlement.

69 *See, e.g.*, McCaffery, *supra* note 31, at 291 ("Rawls sees [the flat-rate consumption tax] primarily as a way to raise revenue, and he presumes that fairness in market outcomes has already been achieved.").

will address both the conceptual and the normative issues. However, I would note already at the outset that, to my mind, neither of these responses is completely satisfactory.

A. *Analogy with Common Assets*

As described above, Rawls's common store argument presents us with a conceptual dilemma: if the goods are part of the common store then no individual has the right to use them for personal consumption; if the goods are available for (legitimate) personal consumption then they are not part of the common store. This subpart will explore whether it might be possible to confront this dilemma by drawing an analogy from Rawls's view of natural talents as a "common asset" to his description of consumption as a taking from a "common store."

According to Rawls, individuals do not deserve the natural talents that they happen to possess.[70] Their talents derive from the blind luck of what he refers to as the "natural lottery." He goes on the claim that, in itself, the unequal distribution of talents is neither just nor unjust. It is simply a natural fact. What is just or unjust is how institutions deal with the unequal distribution of talents.[71]

Rawls argues that behind the veil of ignorance individuals would effectively choose to consider talents, by whomever possessed, to be common assets and to share in the social and economic advantages that those talents make possible. In other words, instead of suppressing superior talents in the name of equality,[72] they would opt to exploit them for the common good.[73] However, as even individuals behind the veil of ignorance would be aware, the implementation of this idea in practice is problematic. Although they may agree to treat talents as common assets, talents are, in fact, possessed by individuals. The principle of liberty, which, according to Rawls, those behind the veil of ignorance would position as lexically prior to any consideration of distributive justice, precludes forcing individuals to use the talents that they possess. Even if the welfare of society (or, to rephrase in a manner more compatible with the difference principle, even if the quantity of primary goods available to the least well-off stratum of society) could be drastically improved by forcing a particular individual to exploit her natural talents against her

[70] Anne L. Alstott, *Equal Opportunity and Inheritance Taxation*, 121 HARV. L. REV. 469 (2007).

[71] THEORY, *supra* note 10, at 87.

[72] Rawls, *Distributive Justice: Some Addenda*, *supra* note 27, at 62 ("[The difference principle] does not require society to move in the direction of an equality of natural assets."). *Cf.* Kurt Vonnegut, *Harrison Bergeron*, *in* WELCOME TO THE MONKEY HOUSE: A COLLECTION OF SHORT WORKS BY KURT VONNEGUT 7, 7 (2010) (describing a future in which individual are handicapped so that no one is smarter, better looking, stronger, or quicker than anyone else).

[73] THEORY, *supra* note 10, at 87.

will, doing so would violate her liberty; and no enhancement, however great, of societal welfare could justify that violation of liberty.[74] As the right is prior to the good,[75] so, too, the demands of liberty are prior to the demands of distributive justice.[76]

The situation society faces, under Rawls's analysis, is that although talents are considered common assets, the inviolable right to liberty provides individuals with an effective veto over the exploitation of the talents that they happen to possess. Such being the case, it is in practice necessary to provide incentives to encourage the socially beneficial use of talents. Of course, doing so will likely permit those individuals who happen—as a consequence of the natural lottery—to possess relatively rare and relatively useful talents to end up with a greater share of society's resources than those whose talents are less rare or less useful.[77] Despite the apparent unfairness of an arrangement in which distributive shares are a function of morally arbitrary circumstances, Rawls was fully prepared to accept as just an unequal distribution of income when necessary to provide incentives that ultimately work to the benefit the least well-off. Note that for Rawls such an arrangement is not a compromise between absolute justice and economic exigency, nor is it simply "the least unjust" practical formulation. If the unequal distribution of talents is neither fair nor unfair, neither just nor unjust, but simply a brute fact; if justice is measured strictly by how institutions deal with the fact that talents are unequally distributed; if the goal of distributive justice is to maximize the primary goods available to the least well-off; and, finally, if a scheme of economic incentives for those who happen to possess useful talents is the best practical means—within the restrictions of inviolable liberty—of maximizing the primary goods available to the least well-off, then such a scheme is just.

The question that we now need to address is whether it is possible to solve the conceptual dilemma described above—how legitimate consumption can be described as a taking from the common store of goods—by analogizing from Rawls's theory of common assets (talents) to his theory of the common store (goods). Such an attempt might proceed as follows. Possession and ownership are two distinct concepts: one can possess something that one does not own, and one can own something that one does not possess. There exist talents that, under terms that would have been agreed upon behind the veil of ignorance, are jointly

74 *See supra* Introduction.C.

75 John Rawls, *The Priority of Right and the Ideas of the Good*, 17 PHIL. & PUB. AFF. 251, 251 (1988), republished in JOHN RAWLS, COLLECTED PAPERS 449 (Samuel Freeman ed., 1999).

76 THEORY, *supra* note 10, at 3 ("Each person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override.").

77 *Id.* at 68.

owned by society ("common assets"), even though they are physically possessed by individuals. Similarly, there exist goods that are jointly owned by society ("common store"), even though they are physically possessed by individuals. In order to encourage the possessors of talents to use them for the benefit of society (i.e., to waive leisure), we provide the possessors of such talents with economic incentives, primarily in the form of wages.[78] Similarly, in order to encourage the possessors of material goods to use them for the benefit of society (i.e., to refrain from consumption) we provide the possessors of such goods with an economic incentive in the form of a tax deferral: as long as they refrain from consuming the goods in their possession, they are exempt from paying tax.

Were this analogy to hold, it would explain how goods could simultaneously be part of the common store and, paradoxically, available for personal consumption. Although society owns the goods, they are possessed by individuals. The tax deferral inherent in the consumption tax is a means of encouraging those possessing goods to continue using them for the benefit of the public.

However, a closer analysis will show that the attempted analogy is illusory. Possessors of "community-owned goods" are not in an analogous position to possessors of "community-owned talents." With regard to the latter, the primary impediment from a Rawlsian perspective to the forcible expropriation of talents is the liberty of the individual in possession of those talents, a liberty that is lexically prior to any consideration of distributive justice. That liberty provides the possessor of talents with an effective veto over their exploitation and forces society to pay for using what is, in theory, its own property. As noted, while the economic inequality resulting from such a payment is perhaps unfortunate, from a Rawlsian perspective it is nevertheless just. Privately held goods are different. In contrast to its position vis-à-vis privately held talents, society has the means, should it wish, to take possession of goods that it owns (i.e., that are part of the "common store") against the will of the current possessor. Such a dispossession would not constitute a violation of fundamental liberties.[79]

Freedom from enslavement (being forced to use one's talents against one's will) is a basic liberty protected under Rawls's first principle of justice. The freedom from interference in the possession of property is not.[80] In general, any claim to primary goods (except those the

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[78] The concept of wages is not restricted only to income of salaried employees. For those who self-employed, wages are the value of the labor that they contribute to the generation of profits.

[79] *See, e.g.*, Schoenblum, *supra* note 66, at 251 ("Unlike these other random, inherent benefits . . . wealth is a more readily controllable advantage.").

[80] For different versions of the first principle, see *supra* note 27.

possession of which is necessary to secure one's political liberties) is subject to the dictates of distributive justice. Particularly if we understand the term "common store of goods" to mean goods that are publicly owned although—perhaps for reasons of efficiency—privately possessed, society would be under no justice-derived constraint to respect the desire of the possessor to consume those goods if such consumption would be detrimental to the interests of society as a whole and specifically to the interests of the least well-off.

Thus, the attempted analogy between "common assets" and "common store" does not succeed, and the dilemma of how to reconcile the right to consume goods with the view that those self-same goods are part of the common store remains intact.

B. Private Property as a Charge Against Public Assets

The root of both the conceptual and the normative issues that arise with regard to Rawls's common store argument is the reading of the term "common store of goods" as indicating that the goods are under common ownership and that individuals, consequently, can have no right to consume those goods. The conceptual issue is that a right to reduce public goods to personal consumption seems involve a logical contradiction. The normative issue is that individuals have a moral entitlement to income that is fairly earned. Describing the goods that are the physical manifestation of that income as part of a common store seems to undermine the structure of Rawls's contract theory of justice.

What if we were to consider all goods as being under the common ownership of society, and yet stipulate that individuals may have charges against certain goods, charges that, inter alia, permit taking and maintaining physical possession of the goods and consuming them? There are a number of reasons why a society operating under Rawls's principles of justice would permit such charges against publicly owned goods. A charge could be granted as an economic incentive to encourage the socially beneficial use of privately possessed (although, in theory, commonly owned) talents. Alternatively, a charge could be granted as a transfer payment in furthering the principles of distributive justice. In any case, the goods, although privately possessed, belong to society until such time as the owner of the charge decides to realize the right therein and consume the goods.

Ostensibly, this construction allows us to avoid both the conceptual and the normative problems inherent in the common store argument. Regarding the conceptual issue, the right to reduce public goods to personal consumption is one of the rights that comprise the charge: the concept of a right to consume public goods is no longer a contradiction in term. Regarding the normative issue, what is fairly earned and must therefore be respected under Rawlsian contract theory is not the ownership of the goods but rather the right to possess and consume them.

Continuing the analysis, under such a construction, individuals have at their disposal two means by which to exploit their charges against public goods. One is to hold or invest and the other is to consume. Rawls strongly implies that from a societal perspective investment is preferable to consumption: as long as the goods are not consumed, they form part of the common store and can (and presumably will) be used to benefit society as a whole. In this light we can understand his proposal to defer the tax on income (i.e., on the receipt of charges against public goods) until such time as the income is reduced to consumption. The choice of consumption as a tax base would be motivated not by considerations of justice, but strictly by a desire to promote economic efficiency: encouraging investment and discouraging consumption.

For the purpose of this Article, I will not consider the extent to which it is true that investment is a social good and consumption is a social bad. The reason for that is that the goal of this Article is not to examine whether it would be appropriate to adopt Rawls's proposed consumption tax or, more accurately, whether it would be appropriate to do so were we to reach a point where background institutions conform to Rawlsian standards of justice. My goal is to determine whether (and how) it is possible to defend Rawls's proposed consumption tax under the terms of his own theory of justice. If it is possible to do so, relying if necessary on Rawls's assumptions about economic theory, we would then be able to consider whether the tax is justified under other economic models. Moreover, I think that Rawls himself would agree with this approach. When describing the first function of the distributive branch—imposing an inheritance tax as a means of limiting inequality and thereby protecting political liberties and the fair equality of opportunity—Rawls notes as follows:[81]

> The taxes and enactments of the distributive branch are to prevent this limit [of inequality] from being exceeded. Naturally, where this limit lies is a matter of political judgment, guided by theory, good sense, and plain hunch, at least within a wide range. On this sort of question the theory of justice has nothing specific to say. Its aim is to formulate the principles that are to regulate the background institutions.

In other words, Rawls theory of justice is not supposed to answer all the questions but rather to provide the framework within which the analysis can occur. For example, advances in economic science could demon-

[81] THEORY, *supra* note 10, at 246.

strate that policies thought to promote Rawlsian justice would actually be counterproductive. Such a development would in no way undermine Rawls's theory. It would merely undermine the means that had been chosen to implement that theory.[82] Thus, if could be shown that Rawls was, to whatever extent, mistaken in his assumption that investment is a social good and that consumption is a social bad, his argument that in a just world a consumption tax would be appropriate might no longer be valid. However, before we can take that step, we first need to understand why he proposed consumption as a tax base in the first place. The suggestion that we are currently examining is that the consumption tax is a means of promoting behavior that is socially beneficial and of deterring behavior that is socially detrimental. If this suggestion is convincing, the next step, for those interested in its potentially practical application, would be to examine whether his economic assumptions are valid. However, that would be premature at this stage. We still have not determined that he in fact proposed the consumption tax as a vehicle for promoting efficiency. Let us return to that question now.

The suggestion that underlying Rawls's consumption tax proposal is a desire to promote economic efficiency by discouraging consumption faces a number challenges: one institutional, one substantive, and one structural. Let us consider each of these challenges in turn.

1. The Institutional Challenge

The first challenge is institutional. In describing the functions of government, Rawls divides the government into four branches (he later adds a fifth),[83] each of which is responsible for a particular area of public policy:[84]

> (a) The allocation branch is tasked with keeping the price system working efficiently. As already noted, one of the means by which it does so is by imposing Pigouvian taxation and thereby internalizing externalities. It is further charged

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[82] *Cf.* Schoenblum, *supra* note 66, at 254 ("Rawls' assumption that the increased revenue can be channeled into benefit for the least advantaged also is at odds with reality. Few persons still believe the state is an effective benefactor or intermediary. Whole societies have collapsed after attempting, disastrously, to follow this premise. Other societies have abandoned it in favor of an approach that diminishes the scope of the welfare state.").

[83] The fifth is the exchange branch, which is responsibility for the provision of government services beyond that prescribed by the dictates of justice. THEORY, *supra* note 10, at 249–51.

[84] Koppelman has noted that Rawls's approach is based upon Richard Musgrave's model of governmental budgetary functions: allocation, distribution, and stabilization. Stanley A. Koppelman, *Personal Deductions Under an Ideal Income Tax*, 43 TAX L. REV. 679, 700 (1988).

with keeping markets competitive by preventing the formation of unreasonable market power.[85]

(b) The stabilization branch is concerned with macroeconomic issues and it is charged with maintaining reasonably full employment. Rawls notes that it is the job of the allocation and the stabilization branches together "to maintain the efficiency of the market economy generally."[86]

(c) The transfer branch is in charge of providing the social minimum.[87]

(d) The distribution branch is responsible for preserving approximate justice in distributive shares. It does so in two different ways. First, it restricts the power of bequest and imposes a progressive inheritance tax. Second, it raises revenue with which to provide the social services and the transfer payments that are necessary to satisfy the difference principle. It is within the framework of the second function of the distributive branch that Rawls proposes his proportional consumption tax.[88]

We are currently considering the suggestion that Rawls's proposal for a consumption tax is based on the idea that consuming is a social bad and that deferring consumption is a social good. In other words, although individuals have the right to consume certain goods, exercising that right imposes a cost on society, a cost that individuals will not normally consider when deciding how much to consume. Imposing a tax on exercising the right to consume internalizes the negative externality. Assuming that the tax properly quantifies the externality (i.e., assuming that the tax rate is such that society is indifferent to whether the individual consumes and pays the tax or, alternatively, defers the consumption), the result will be an economically efficient choice: individuals will consume if and only if current consumption makes a positive contribution to social welfare.

The institutional problem with this suggestion is that the distribution branch is not charged with making markets run efficiently. Market efficiency is the job of the first two branches. More specifically, "[t]he allocation branch is . . . charged with identifying and correcting, say by

85 THEORY, *supra* note 10, at 244.
86 *Id.* at 244.
87 *Id.* at 244–45.
88 *Id.* at 245–47.

suitable taxes and subsidies . . . departures from efficiency caused by the failure of prices to measure accurately social benefits and cost."[89] If the purpose of the consumption tax were to internalize the negative externality of current consumption, then it would properly belong to the allocation branch, not the distributive branch. In other words, by assigning the consumption tax to the distribution branch and not the allocation branch, Rawls indicated that the goal of the tax is justice, not efficiency.

2. The Substantive Challenge

The second challenge is substantive. Under the proposed construction, the purpose of the consumption tax is to encourage the retention of the wealth and to discourage saving. However, Rawls himself was very concerned with the fact that wealth confers political power and undermines the equal worth of political liberties.[90] For example, the stated purpose of his proposed inheritance tax is to prevent the concentration of wealth. Therefore, even if we accept Rawls's implicit assumption that retention of wealth is economically beneficial, the choice of consumption over income for a tax base would entail an impermissible sacrifice of equal political liberties or of the equal worth of political liberties for economic efficiency.[91]

A counterargument might be that in Rawls's view, the inheritance tax is sufficient to prevent wealth from threatening political liberties and that no accumulation of wealth during a single lifetime could confer the kind of power that would threaten the equal worth of political liberties. However, this counterargument fails, not least because of a number of examples (even if we limit our terms of reference to the time before the publication of the first edition of Rawls's treatise in 1971) of individuals who began with very little and amassed, within their lifetimes, considerable wealth and with it the potential for considerable political influence.[92] Consider, for example, John D. Rockefeller, the son of a vagabond lumberman and a homemaker,[93] who during his lifetime amassed a fortune

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[89] THEORY, *supra* note 10, at 244.

[90] For a discussion of the equal worth of political liberties, see Norman Daniels, *Equal Liberty and Equal Worth of Liberty*, *in* READING RAWLS, *supra* note 20, at 253. *See also* Sugin, *Theories*, *supra* note 31, at 2008.

[91] "These principles are to be arranged in a serial order with the first principle prior to the second. This ordering means that infringements of the basic equal liberties protected by the first principle cannot be justified, or compensated for, by greater social and economic advantages." THEORY, *supra* note 10, at 53–54.

[92] *See, e.g.*, Marjorie E. Kornhauser, *Equality, Liberty, and a Fair Income Tax*, 23 FORDHAM URB. L.J. 607, 625 (1996) ("Rawls' support of an expenditure tax is flawed because he ignores how a person controls and gets advantages from funds that he owns but does not consume.").

[93] ROD CHERNOW, TITAN: THE LIFE OF JOHN D. ROCKEFELLER, SR. 6–11 (1998).

estimated at over $336 billion (in current dollars);[94] Cornelius Vanderbilt, who at the age of 11 quit school to work on a ferry, at the at the age of 16 borrowed $100 to purchase a flat-bottomed boat,[95] and went on to amass a fortune estimated at $185 billion (in current dollars);[96] and Andrew Carnegie, who was born in a one-room cottage,[97] at the age of 13 worked for $1.20 a week,[98] and went on to amass a fortune estimated at $372 billion (in current dollars).[99] Inhibiting the accumulation of such tremendous wealth requires some form of income tax. In contrast, a consumption tax, by deferring the payment of tax as long as income is reinvested, actually subsidizes the accumulation of wealth.

3. The Structural Challenge

The third challenge is structural. The difference between an income tax and a consumption tax is one of timing (although as we will see the timing difference has significant ramifications).[100] For those who consume their income immediately, an income tax and a consumption tax are identical: as there is no time lag between the earning of income and its consumption, the tax is payable at the same time under either structure. For those who invest their income, there is a timing difference between the two models. Under an income tax model, tax is paid when the income is earned. Under a consumption tax model, tax is deferred as long as the income is invested. The tax is payable only when income is reduced to consumption.

To apply this description of the difference between an income tax and a consumption tax to our current discussion, let us rephrase it in Rawlsian terms, and specifically in terms of the interpretation of Rawls's common store argument that we are now considering. The reward for using one's talents is the receipt of a charge against public goods permitting one to take possession of those goods and, at will, to consume them. When the market provides an individual with charges that are more valuable than those received by others, distributive justice demands that some of those charges (whatever is beyond the amount necessary to encourage an optimal use of talents) be taken by the public fisc in order to provide

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94 ELIZABETH HANSON, ACHIEVEMENTS: A CENTURY OF SCIENCE FOR THE BENEFIT OF HUMANKIND 1901–2001 39 (2000).

95 ARTHUR T. VANDERBILT II, FORTUNE'S CHILDREN: THE FALL OF THE HOUSE OF VANDERBILT 7 (1989).

96 Gus Lubin, *The 20 Richest People of All Time*, BUS. INSIDER (Sept. 2, 2010, 12:54 PM), https://www.businessinsider.com/richest-people-in-history-2010-8?IR=T.

97 JAMES A. MACKAY, LITTLE BOSS: LIFE OF ANDREW CARNEGIE 23–24 (1997).

98 ANDREW CARNEGIE, AUTOBIOGRAPHY 34 (1920), https://archive.org/details/autobiography00carnuoft/page/12 (last visited Nov. 26, 2019).

99 Jacob Davidson, *The 10 Richest People of All Time*, MONEY (July 30, 2015), http://time.com/money/3977798/the-10-richest-people-of-all-time-2/.

100 *See infra* text accompanying note 104.

for the least well-off. In other words, the receipt of charges against public goods is properly subject to an income tax. However, society—so Rawls assumed—has in interest in individuals deferring for as long as possible the exercise of their right to consume, to take out from the common store of goods. To encourage them to do so, it agrees to refrain from collecting the tax until such time as the income is consumed.

If this is an accurate interpretation of Rawls's common store argument, then his consumption tax proposal—particularly when we note that he presents it as an element of ideal theory—runs counter to his description of the subject matter of a theory of justice and his delineation of what lies outside its purview. According to Rawls, the role of a theory of justice is to formulate the principles that are to regulate the background institutions. How to apply those principles in practice is not part of the theory of justice, but rather "is a matter of political judgment guided by theory, good sense, and plain hunch."[101] Thus, for example, with regard to those who possess valuable talents, Rawls's position is that just institutions would permit the retention of only as much income as is necessary to provide an incentive to exploit those talents for the good of society as a whole. How much is necessary is not part of a theory of justice but rather a matter of empirical testing and economic modeling. That is to say, even if there were universal agreement regarding the ordinal ordering of all possible distributions, the question of which policy would lead to the optimal distribution might still be open to academic and political debate. In the specific realm of tax policy, determining the ultimate effect of any given rate of tax is far from simple. Raising the tax rate would mean that more talents would be under-exploited and that less wealth would be created. Lowering the tax rate would mean that whatever wealth is created would be less evenly distributed. At what point along the spectrum stretching from a very small but equally divided pie to a large but very unequally divided pie the size of the smallest slice would be maximized is extraordinarily difficult to determine. Moreover, not only is it difficult to determine at any given time which policy would strike the ideal balance (i.e., would maximize the income and wealth of the least well-off), but even if such a balance could be achieved, it is reasonable to assume that the policy would need to be constantly revisited and readjusted in the light of economic, technological, political, and other developments.[102] Therefore, while Rawls discusses the goals of the various tax bases, the extent to which each tax base conforms to his theory of justice, and the principles by which the tax rate should be chosen, he consistently refrains from expressing an opinion regarding the appro-

[101] THEORY, *supra* note 10, at 246.

[102] For instance, optimal tax policy in a world in which each country is largely a closed economy might not be optimal in an era of globalized markets.

priate rate of tax. However, if we accept the interpretation that his preference for a consumption tax over an income tax results from an attempt to encourage investment over consumption, then under the guise of discussing pure theory, he effectively did choose a tax rate for one particular type of income.

I mentioned earlier that although the difference between an income tax and a consumption tax is merely one of timing, the timing difference can have significant ramifications. Perhaps the most important of those ramifications is known in the tax literature as the Cary Brown theorem.[103] According to Cary Brown, a consumption tax is the equivalent of a wage tax: it effectively taxes labor income and exempts investment income. To demonstrate how this theorem operates, assume that Beatrice earns $1,000 in year 1 and invests the proceeds at a 10% rate of return for one year. Now consider how much she will have available for consumption in year 2 in each of the following alternative tax regimes: (1) an income tax regime, in which wages and investment income are both subject to tax; (2) a wage tax regime, in which labor income is taxable and investment income tax is untaxed; and (3) a consumption tax regime. In all three scenarios we will assume a tax rate of 40%.

> In a regime in which all income is subject to tax, Beatrice will, in year 1, earn $1,000, pay a $400 tax, and be left with $600 to invest. A 10% return will produce before-tax income of $60 or after-tax income of $36. Consequently, in year 2, she will have $636 available for consumption.
>
> In a regime in which wages are subject to tax while the return to capital is excluded from gross income, Beatrice will invest $600 and receive a $60 tax-free return. In year 2, she will have available $660 for consumption.
>
> In a consumption tax regime, Beatrice will pay no tax in year 1 ("the timing difference"), will be able to invest the entire wage of $1,000, and will receive a return of $100. In order to consume her available funds of $1,100, she will now pay tax of $440 and be left with $660:

[103] E. Cary Brown, *Business Income Taxation and Investment Incentives*, *in* INCOME, EMPLOYMENT AND PUBLIC POLICY: ESSAYS IN HONOR OF ALVIN H. HANSEN 300, 309–10 (1948), *reprinted in* THE AMERICAN ECONOMIC ASSOCIATION, READINGS IN THE ECONOMICS OF TAXATION 525 (Richard A. Musgrave & Carl S. Shoup eds., 1959).

Tax regime	Income in year 1	Tax payable in year 1	After-tax income available for investment	Return on investment
Income tax	$1,000	$400	$600	$60
Income tax with exemption for return to capital	$1,000	$400	$600	$60
Consumption tax	$1,000	-	$1,000	$100

Tax regime	Tax on return on investment	Available for consumption (before consumption tax)	Consumption tax	Available for consumption (after tax)
Income tax	$24	$636	-	$636
Income tax with exemption for return to capital	-	$660	=	$660
Consumption tax	-	$1,100	$440	$660

> In other words, the after-tax income available for consumption under a consumption tax and the after-tax income available for consumption under a wage tax are equal.[104]

Thus, by expressing a preference for consumption over income as a tax base—under the interpretation of the common store argument that we are currently considering—Rawls is effectively espousing a 0% tax rate

[104] Conceptually, the idea behind the Cary Brown theorem is that under a consumption tax regime the government is a co-investor along with the taxpayer. The "tax" that it collects from consumption of investment income is in actuality its portion of the return. The taxpayer's portion of the return is effectively untaxed. Returning to our example, Beatrice had the option of (a) paying $400 and consuming $600 or (b) investing $1,000. By choosing to invest, she is functionally investing only the $600 that would have able to consume (i.e., she is deferring only $600 of consumption). The other $400 economically belongs to the government. When the investment yields a return of $100, the government as co-investor is entitled to $40. Thus, the $440 that it collects in year 2 is composed of a $400 tax on Beatrice's wages along with a $40 return on its passive investment of that $400 (In other words, the $40 is compensation for its willingness to defer collection of tax from year 1 to year 2). From Beatrice's perspective, she is able to consume $660 in year 2. This is composed of her after-tax income from year 1 ($600) plus the return on her investment of the after-tax income ($600 * 10% = $60). Her portion of the $60 return on the investment is not subject to tax. The analysis in this footnote implicitly assumes that the 10% return is the risk-free rate of return. It does not consider the more complicated question—irrelevant for our discussion—of whether income taxes, consumption taxes, or wage taxes effectively reach risk premium or supernormal returns. *See, e.g.*, Joseph Bankman & Thomas Griffith, *Is the Debate Between an Income Tax and a Consumption Tax a Debate About Risk? Does It Matter?*, 47 TAX L. REV. 377 (1992); David Elkins & Christopher H. Hanna, *Taxation of Supernormal Returns*, 62 TAX LAW. 93 (2009).

on income from capital. He is arguing that any tax rate higher than that would discourage investment to the extent that it would negatively affect the welfare of the least well-off. However, there is no indication that Rawls believed that theoretical analysis could determine the proper rate of tax on return to capital—meaning the tax rate that would maximize the welfare of the least well-off—any more than it can determine the proper rate of tax on wages. Stated differently, a consumption tax of x% is equal to a tax on wage income of x% along with a tax on investment income of 0%. By endorsing a consumption tax but expressing no opinion as to the proper rate of tax, Rawls is effectively saying that he cannot determine the proper rate of tax on wages but that pure theory can provide the tools for determining the proper rate of tax on investment income. It is difficult to imagine that there is—or that Rawls believed there to be—any principled reason for that distinction.

Moreover, if the common store argument were indeed an efficiency-based claim, one would expect that Rawls would refer to some empirical data or at the very least offer some speculation regarding the macroeconomic effects of taxing the after-tax return from capital investment as justification for his call for a 0% tax rate on investment income. He does not do so. Quite the contrary, in presenting his common store argument he explicitly relies upon "common sense precepts of justice."[105] This would seem to imply that the common store argument is not an efficiency-based claim, but rather a claim that relies upon some intuitive sense of justice.

C. Common Store Argument as a Moral Claim

Rawls's reliance upon "common sense precepts of justice" in defense of his common store argument could indicate that he considered consumption—or at least excessive consumption—to be, on some level, morally censurable. On this view, the purpose of taxing consumption is not to make the market operate more efficiently, but rather to redress a deontological wrong.

Support for the view that the common store argument is a moral claim can be found in Rawls's reliance upon Thomas Hobbes, perhaps the most prominent proponent of consumption taxation.[106] In arguing for a consumption tax 320 years before Rawls, Hobbes wrote as follows:[107]

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[105] THEORY, *supra* note 10, at 246.

[106] Although Theory did not mention Hobbes in the context of consumption taxation, the affinity between Rawls's common store argument and Hobbes' Commonwealth argument is clear. In a later work, Rawls explicitly cited Hobbes. RESTATEMENT, *supra* note 27, at 161 ("People would be taxed according to how much they use of the goods and services produced and not according to how much they contribute (an idea that goes back to Hobbes).").

[107] HOBBES, *supra* note 2, at 251.

> [T]he Equality of Imposition consisteth rather in the Equality of that which is consumed, than of the riches of the persons that consume the same. For what reason is there, that he which laboureth much, and sparing the fruits of his labour, consumeth little, should be more charged that he that, living idly, getteth little and spendeth all he gets; seeing the one hath no more protection from the Commonwealth than the other? But when the impositions are laid upon those things which men consume, every man payeth equally for what he useth; nor is the Commonwealth defrauded by the luxurious waste of private men.

Although Hobbes' two-step argument for consumption tax is, first, that one should pay tax in accordance with how much one benefits from protection provided by the sovereign and, second, that such benefit is proportional to the amount one consumes, the moralizing tone in this passage is palpable. Granted, Rawls refrains from employing such seventeenth-century Puritan phraseology as "living idly" and "luxurious waste," but even in Rawls's rendition of the argument it is difficult to ignore the implication that "taking out of the common store" is somehow iniquitous while "contributing to the common store" is meritorious. Furthermore, it is not unreasonable to suspect that Rawls chose the term "common store," a term that appears nowhere else in A Theory of Justice, as a deliberate parallel to Hobbes' term "Common-wealth" in order to emphasize the affinity between the Rawlsian and the Hobbesian views of consumption.[108]

Additional support for the view that underlying the common store argument is a deontological claim and not an attempt to force the internalization of externalities á la Pigou can be found in Rawls's later suggestion that the consumption tax "contain the usual exemptions for dependents."[109] An exemption for dependents effectively means that each person can consume a certain fixed amount per year without paying the consumption tax. However, if we accept Rawls's implicit assumption that investment is a social good and that consumption is a social bad, a Pigouvian consumption tax would apply to all consumption: a dollar's worth of consumption presumably has the same economic ill-effects however much the individual (or the individual's dependents) already consumed that year.[110] From Rawls's suggestion that basic consumption

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[108] See also Rawls's original formulation of the proviso in Rawls, *Distributive Justice: Some Addenda*, *supra* note 27, at 72 ("assuming that income is fairly earned in return for productive efforts").

[109] THEORY, *supra* note 10, at 246.

[110] Any consideration of need would be addressed by the transfer branch. *Id.* at 244–45.

be exempt from the tax, it is therefore reasonable to infer that his concern was not with consumption per se as an economic issue, but with excessive consumption as a moral issue.

However, as much as it may be implicit in his common store argument, a view that consumption—or consumption above a predetermined level—is in some sense morally censurable does not conform to Rawls's overall theory of justice. The moral legitimacy of (excessive) consumption is a subject matter for what Rawls refer to as "comprehensive doctrines" and as such is inadmissible in the realm of public reason. For Rawls, a "comprehensive doctrine" is a particular conception of what has value in life and of the ideals of personal character.[111] Examples of comprehensive doctrines include Aristotelian perfectionism, classic utilitarianism, and many religious creeds.[112] Under Rawlsian political liberalism, the state must remain neutral with regard to the various conceptions of the good. Moreover, while individuals may legitimately espouse comprehensive doctrines and act in accordance with those doctrines in their private lives, the exercise of public reason must be free of such doctrines: when considering constitutional issues, matters of basic justice, or issues of public policy, reliance upon a comprehensive doctrine is impermissible.[113]

Thus, political liberalism would forbid the state to adopt policies that rely, for example, upon the notion that Stoicism or religious asceticism is preferable to hedonism. Each represents a comprehensive doctrine that individuals, as free and equal citizens, are at liberty to accept or reject as guiding principles for their own behavior. It is legitimate to refrain from excess consumption in the conduct of one's affairs. It is legitimate, if one is so inclined, to attempt to convince others of the folly of excess consumption. However, under the terms of Rawlsian political liberalism, an argument for consumption taxation that proceeds from a negative view of hedonism is inadmissible in the sphere of public reason.[114]

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111 RAWLS, POLITICAL LIBERALISM, *supra* note 27, at 13, 175.

112 THEORY, *supra* note 10, at 22; RAWLS, POLITICAL LIBERALISM, *supra* note 27, at 134–35.

113 RAWLS, POLITICAL LIBERALISM, *supra* note 27, at 224–25, 243–44; RESTATEMENT, *supra* note 27, at 117.

114 A similar point was made by Daniel E. Herz-Roiphe, *Virtue's Reward: A (Qualified) Defense of Infra-Marginal Tax Subsidies*, 36 VA. TAX REV. 1, 19 (2017) ("There is a powerful case for why the tax code shouldn't be in the business of rewarding the virtuous. Rewarding the virtuous requires the state to determine which types of private conduct display virtue and which do not . . . . Liberalism maintains that since a pluralistic society will not arrive at a consensus on how to live, the state should avoid using coercive force to impose one vision of the good life on all unless it can be justified on the basis of principles all can accept.").

II. UNIFORMITY

Rawls's second argument for a proportional consumption tax is that "it treats everyone in a uniform way (still assuming that income is fairly earned)."[115]

There is some ambiguity regarding the subject matter of the uniformity argument. As noted earlier, an argument for proportional consumption taxation contains two distinct propositions: first, that consumption is preferable to income as a tax base; second, that a proportional consumption tax is preferable to a progressive consumption tax.[116] While Rawls's common store argument clearly addresses the first issue, it is unclear which issue his uniformity argument is addressing. Is Rawls claiming that a consumption base treats people more uniformly than does an income base? Or is he claiming that a proportional consumption tax would treat people more uniformly than would a progressive consumption tax?

The context in which the uniformity argument is raised does not provide conclusive evidence. Immediately preceding the uniformity argument (in fact, in the same sentence in which the uniformity argument appears) Rawls suggests that an exemption for dependents might be appropriate.[117] There are commentators who read this exemption as disguised progressivity: a two-bracket structure with an effective 0% tax rate up to the amount of the exemption and a single positive rate above that amount.[118] Under this reading, the uniformity argument might be considered an argument about the tax rate and not the tax base. However, it seems to me more reasonable to view the dependency exemption as part of the definition of the tax base: the base of the proposed consumption tax is not consumption per se but rather excessive consumption, or consumption above some social minimum.[119]

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[115] THEORY, *supra* note 10, at 246.

[116] *See supra* Introduction.B.5.

[117] THEORY, *supra* note 10, at 246 ("[A] proportional tax on total consumption (for each year say) can contain the usual exemptions for dependents, and so on; and it treats everyone in a uniform manner (still assuming that income is fairly earned).").

[118] *See, e.g.*, Sugin, *Theories*, *supra* note 31, at 1998 ("A few sentences later, he allows exemptions for dependents, which creates progressivity, even if rates are nominally flat."); Fried, *Puzzling Case*, *supra* note 12, at 161.

[119] In general, deductions are better described as part of the definition of the tax base not as part of the rate structure. For example, the Internal Revenue Code defines taxable income as gross income minus deductions. I.R.C. §63 (2010). One could read this provision as imposing a tax on gross income with a 0% tax bracket on an amount equal to the deductions, but it is more reasonable to say that the base is gross income minus deductions ("taxable income"), and that deductions are thus part of the definition of the base and not part of the rate structure. Consider a corporation with gross income of $1,000,000 and deductible expenses of $800,000. It seems to make more sense to say that it is subject to tax at the rate of 21% on $200,000 of income than to say that it is subject to a progressive tax structure of 0% on its first $800,000 of gross income and 21% on its next $200,000 of gross income.

Immediately following the uniformity argument Rawls notes that "[i]t may be better, therefore, to use progressive rates only when necessary to preserve the justice of the basic structure with respect to the first principle of justice and fair equality of opportunity, and so to forestall accumulation of property and power likely to undermine the corresponding institutions."[120] From Rawls's reference to progressive rates, one could infer that the focus of the uniformity argument is the tax rate (proportionality versus progressivity) rather than the tax base (consumption versus income). However, consumption taxation, no matter how progressive, would not forestall accumulation of property and power. To the contrary, a consumption tax would discourage consumption and consequently encourage the accumulation of wealth.[121] Furthermore, Rawls goes on to say that "in any case we are considering such a proportional tax as part of an ideal scheme. . . . It does not follow that, given the injustice of existing institutions, even steeply progressive income taxes are not justified when all things are considered."[122] Here he contrasts "a proportional tax" to "progressive income taxes." This quote, together with the fact that nowhere does he explicitly mention the intermediate alternatives of a progressive consumption tax or a proportional income tax, lends credence to the hypothesis that the only two tax systems that he considered (for supplying the funds needed to fund public goods) were a proportional consumption tax and a progressive income tax.[123] His contention was that the former is more appropriate in an ideal setting while the latter may be necessary when background institutions are unjust or in order to preserve the justice of existing institutions. If so, then when he says, just after the uniformity argument, that "[i]t may be better to use progressive rates," he may mean that, despite the fact that uniformity demands a proportional consumption tax, in certain circumstances a progressive income tax might be necessary. Thus, it could be that Rawls himself did not distinguish between the issue of the tax base and the issue of the tax rate and was simply arguing for a proportional consumption tax as opposed to a progressive income tax.

Be that as it may, this Part will consider whether it is possible to construct a Rawlsian case for consumption taxation—whether proportional or progressive—based upon the concept of uniformity.

A difficulty that one encounters when attempting to apply the concept of uniformity to Rawlsian tax theory is that Rawls does not explain

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120 THEORY, *supra* note 10, at 246.

121 *See supra* Section I.B.

122 THEORY, *supra* note 10, at 246–47.

123 The purpose of his proposed inheritance tax is not to raise revenue but to preserve equality of opportunity and the equal worth of political liberties. THEORY, *supra* note 10, at 245.

what he means by "uniform."[124] Within the broad scheme of his theory of justice, uniformity could have a number of different denotations, depending upon the context in which the term is used. In the context of political liberties, uniformity means that each person has an equal right to the most extensive scheme of liberties compatible with a similar scheme of liberties for others.[125] In the context of opportunity, uniformity means that positions and offices are open to all under conditions of fair equality.[126] What does uniformity mean in the context of distributive justice and specifically in the context of tax policy?[127] It certainly cannot mean, as it would for proponents of equality of outcome, an entitlement to the same after-tax index of primary goods, or to an equal level of after-tax well-being.[128] Rawls did not advocate equity of outcome. The difference principle, as its name implies, recognizes the fact of inequality—for example, in the distribution of talents—and is concerned not with eliminating inequality but with exploiting natural inequality for the benefit of the least well-off.[129]

I would suggest that for Rawls, uniformity in the realm of tax policy is akin to what tax theoreticians describe as "horizontal equity," the doctrine that similarly situated taxpayers should bear equivalent tax burdens.[130] Admittedly, this suggestion might appear strange, as the doctrine of horizontal equity seems foreign to Rawls's theory of justice.[131] Horizontal equity effectively requires that those who were similarly situated in the market distribution remain similarly situated in the post-tax distribution. It recognizes an individual's right to no lower a level of after-tax economic well-being than that enjoyed by others who were equally suc-

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124 His discussion of tax policy in Theory is the only place in that work in which Rawls uses the word "uniform" or any variant thereof.

125 THEORY, *supra* note 10, at 53.

126 *Id.* at 73.

127 Fried seems to understand uniformity as synonymous with proportionality. Fried, *Puzzling Case*, *supra* note 12, at 185 ("In defense of a proportional rate structure . . . Rawls notes only that it 'treats everyone in a uniform way . . . At the outset, Rawls's argument runs smack into the same difficulty faced by most libertarian defenders of a flat-rate tax: the tax rate structure Rawls supports is, in fact, not a proportionate one . . . . Whatever other merits such a scheme might have, it surely lacks the virtue of 'uniformity.' ").

128 *See, e.g.*, Gareth Griffith, *George Bernard Shaw's Argument for Equality of Income*, 6 HIST. POL. THOUGHT 551 (1985).

129 THEORY, *supra* note 10, at 61.

130 David Elkins, *Horizontal Equity as a Principle of Tax Theory*, 24 YALE L. & POL. REV. 43, 43 (2006); HENRY C. SIMONS, PERSONAL INCOME TAXATION 30 (1938); RICHARD A. MUSGRAVE, THE THEORY OF PUBLIC FINANCE 160 (1959); Joseph T. Sneed, *The Criteria of Federal Income Tax Policy*, 17 STAN. L. REV. 567, 577 (1965); Richard A. Musgrave, *In Defense of an Income Concept*, 81 HARV. L. REV. 44, 45 (1967); James Repetti & Diane Ring, *Horizontal Equity Revisited*, 13 FLA. TAX REV. 135, 135–36 (2012).

131 Elkins, *supra* note 130, at 54–56; Ira K. Lindsay, *Tax Fairness by Convention: A Defense of Horizontal Equity*, 19 FLA. TAX REV. 79, 83 (2016) ("[I]t is of no real significance whether taxes turn out to be horizontally or vertically equitable because how tax obligations compare to pre-tax income has no intrinsic significance.").

cessful in the market. With regard to those who achieved a lesser share of the market distribution, horizontal equity does not recognize their right to the same level of after-tax income (e.g., if A and B each have market income of 100 and C has market income of 70, then the doctrine of horizontal equity demands that A and B end up with equal shares of the post-tax distribution but does not require that C end up with a similar share).[132] In other words, from an Aristotelian perspective in which distributive justice means distribution in accordance with merit,[133] horizontal equity identifies "merit" as success in the market and requires that after-tax shares be distributed accordingly.[134] However, for Rawls market success cannot ground a moral claim to distributive shares, because individuals do not deserve their share of the market distribution. The market distribution is based upon factors, such as natural talents and social position, to which individuals have no claim of desert. Consequently, imposing unequal tax burdens on those who were similarly situated in the market distribution would be entirely justified if doing so would benefit the least well-off. For example, if imposing a high tax on doctors would reduce the supply of medical services to the detriment of the poorest stratum of society, while imposing a high tax on accountants—on whose services the poor are less dependent—would allow the state to raise the standard of living of the least well-off, then imposing a lower tax burden on doctors than on accountants with the same pre-tax income would be unobjectionable notwithstanding its violation of the principle of horizontal equity.[135]

Nevertheless, despite the apparent incompatibility between horizontal equity and the Rawlsian theory of distribution justice, horizontal equity might be able to play a constructive role within the narrow context of ideal tax policy. Recall that Rawls's advocacy of a consumption tax is premised upon income being fairly earned within the framework of just background institutions.[136] This proviso is significant for our discussion of uniformity because, according to Rawls, individuals who abide by the rules of such institutions acquire entitlements that must be respected. It is unjust to ignore these entitlements even if it turns out, retrospectively, that violating entitlements would contribute to allocative justice:[137]

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132 Elkins, *supra* note 130, at 72.

133 ARISTOTLE, NICOMACHEAN ETHICS 112 (David Ross trans., Oxford Univ. Press 1972).

134 Elkins, *supra* note 130, at 73–74.

135 *Id.* at 55.

136 McCaffery, *supra* note 31, at 295 ("[Rawls's] tax scheme presumes that individuals are entitled to their 'earnings'.").

137 RESTATEMENT, *supra* note 27, at 50–51. Rawls used the term "allocative justice" to describe what Nozick referred as end-state theories, those for which justice is a function of the resultant distribution without regard to the means by which the distribution come about. NOZICK, *supra* note 21, at 153–55.

> [P]articular distributions cannot be judged at all apart from the claims (entitlements) of individuals earned by their efforts within the fair system of cooperation from which those distributions result. In contrast to utilitarianism, the concept of allocative justice has no application. There is no criterion for a just distribution apart from background institutions and the entitlements that arise from actually working through the procedure.

Despite a common misconception,[138] the difference principle is not an end-state theory of justice. Rawls is quite explicit that his is a contract (or contractarian) theory of justice.[139] He argues that social institutions—assuming they are just—give rise to legitimate expectation and that these legitimate expectations produce entitlements.[140] Thus, although individuals may not, in a deep moral sense, *deserve* their market income, they may be *entitled* to their market income.[141] This entitlement, in the ideal circumstances in which Rawls considers consumption taxation, could form the basis for a claim to horizontal equity. In other words, if an individual played the game fairly within the framework of just background institutions, it would be unjust to subject that person to a more onerous tax burden than that borne by others with similar entitlements. If this is an appropriate reading of "treats everyone is a uniform way," then his uniformity argument is a statement about which tax base best respects horizontal equity.

The question that this Part will consider is whether it is possible to construct a Rawlsian argument to support the claim that—at least within the confines of just background institutions—a consumption tax is more respectful of horizontal equity than is an income tax.

A. *Present Value of Future Consumption*

One of the arguments raised in the tax literature by proponents of consumption taxation is that only by computing the present value of future consumption can we compare, in any meaningful way, present consumption and future consumption. In other words, in order to determine whether taxpayers are similarly situated before paying tax, we need to

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138 *See, e.g.*, NOZICK, *supra* note 21, at 198–204; Bankman & Griffith, *supra* note 30, at 1915–16; Byrne, *supra* note 30, at 785.

139 THEORY, *supra* note 10, at 14–15, 28, 49, 95, 99, 115, 160–62, 222, 385.

140 *Id.* at 88 ("[G]iven a just system of cooperation as a framework of public rules, and the expectations set up by it, those who, with the prospect of improving their condition, have what the system announces it will reward are entitled to have their expectations met.").

141 Rawls description of entitlement seems tantalizingly close to that of his ideological arch-rival Robert Nozick. NOZICK, *supra* note 21, 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.").

consider the present value of what they would have been able to consume in a no-tax world; and in order to determine whether taxpayers bear equivalent tax burdens, we need to compare the present value of their consumption in a no-tax world to the present value of their consumption after the imposition of tax. Furthermore, they argue, present value computation demonstrates that a consumption tax is horizontally equitable while an income tax violates the norm of horizontal equity.[142]

To demonstrate, assume that (a) Andrew and Barbara each receive wages of $1,000 in year 1, that (b) Andrew consumes his wages in year 1, and that (c) Barbara invests her wages at a risk-free return of 10% and in year 2 consumes whatever funds she has available. In a no-tax world, Andrew would consume $1,000 in year 1, while Barbara would consume $1,100 in year 2. The argument that we are presently considering tells us to compare the situations of our two protagonists by computing the present value of their consumption. As Andrew consumes $1,000 in year 1, the present value (in year 1) of his consumption is clearly $1,000.[143] Barbara consumes $1,100 but she does so in year 2, and since the present value of future consumption is less than that of current consumption, we need to reduce her future consumption by the discount rate. At a 10% discount rate (we are given that the risk-free rate of return is 10%), the present value of Barbara's future consumption is also $1,000.[144] Thus, in a no-tax world, Andrew's and Barbara's economic situations are similar.

How will a 40% consumption tax affect their relative well-being? Andrew will pay tax of $400 and will consume $600. Barbara will pay no tax in year 1 and will invest the full $1,000. In year 2, before paying tax, she will have $1,100 available for consumption. After paying tax of $440, she will be able to consume $660. As the present value of consum-

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142 *See, e.g.*, Mitchell L. Engler & Michael S. Knoll, *Simplifying the Transition to a (Progressive) Consumption Tax*, 56 SMU L. REV. 53, 66–68 (2003); John K. McNulty, *Flat Tax, Consumption Tax, Consumption-Type Income Tax Proposals in the United States: A Tax Policy Discussion of Fundamental Tax Reform*, 88 CALIF. L. REV. 2095, 2145 (2000); Lawrence Zelenak, *The Selling of the Flat Tax: The Dubious Link Between Rate and Base*, 2 CHAP. L. REV. 197, 218–19 (1999); Joseph Bankman, *Tax Policy and Retirement Income: Are Pension Plan Anti-Discrimination Provisions Desirable?*, 55 U. CHI. L. REV. 790, 831 (1988); Kelman, *supra* note 9, at 653–54; Richard L. Doernberg, *A Workable Flat Rate Consumption Tax*, 70 IOWA L. REV. 425, 440–41 (1985); George R. Zodrow & Charles E. McClure, Jr., *Direct Consumption Taxes*, 46 TAX L. REV. 407, 434–38 (1991); Fried, *supra* note 9, 961–65. The present value argument is a modern version of the claim that an income tax is unfair because it double taxed saving. *See* JOHN STUART MILL, PRINCIPLES OF POLITICAL ECONOMY, bk. V, ch. I, § 4, at 814 (W.J. Ashley ed., 1909) (1848); KALDOR, *supra* note 7, at 79–91; MUSGRAVE, *supra* note 130, at 161–63 (1959); Fischer, *supra* note 5, at 16.

143 The formula for computing present value is $x / (1 + R)^{n}$, where x is the nominal future payment, r is the rate of the return and n is the number of units of time until the date of payment. Is this case $\$1{,}000 / (1.1)^{0} = \$1{,}000$. In this and the following examples, present value means present value in year 1.

144 $\$1{,}100 / (1.1)^{1} = \$1{,}000$.

ing $660 one year in the future is $600,[145] Andrew and Barbara continue to be similarly situated after the payment of tax.

Now consider the effect of a 40% income tax. In year 1, Andrew will pay tax of $400 and will consume $600. Barbara will also pay $400 in year 1 and will be left with $600 to invest. Investing her after-tax income of $600 at a pre-tax return of 10%, she will receive $60 interest, incur a $24 tax liability,[146] and be left with $636 to consume in year 2. At a 10% discount rate, the present value of $636 one year in the future is about $578.[147] In other words, after paying tax, Barbara ($578) is worse off economically than is Andrew ($600). This proves, goes the argument, that income tax violates horizontal equity by imposing unequal tax burdens on similarly situated taxpayers.[148] If analysis along these lines were compatible with the principles of justice that Rawls espouses, we could have a Rawlsian uniformity argument for consumption taxation.

However, present value computation of future consumption appears to contradict a central tenet of Rawls's view of how individuals behind the veil of ignorance would reason and how they would assign value to asynchronous consumption. When discussing the issue of time preference, Rawls states quite emphatically that it would be irrational to assign a greater value to earlier consumption than to later consumption:[149]

> [R]ationality implies an impartial concern for all parts of our life. The mere difference of location in time, of something being earlier or later, is not itself a rational ground for having more or less regard for it.

Later, when discussing deliberative rationality, he writes:[150]

> Mere temporal position, or distance from the present, is not a reason for favoring one moment over another. Future aims may not be discounted solely in virtue of being future. . . . The intrinsic importance that we assign to different parts of our life should be the same at every moment of time.

In other words, although when living our lives moment to moment we tend to give greater attention and to attach greater weight to what we

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145 *$660 / $(1.1)^{-1}$ = $600.*

146 *$60 x 40% = $24.*

147 *$636 / $(1.1)^{-1}$ = $578.18.*

148 This analysis is not uncontroversial. For example, some proponents of income taxation question the validity of using present value to compare asynchronous consumption. *See, e.g.*, Alan Gunn, *The Case for an Income Tax*, 46 U. CHI. L. REV. 370, 375–76 (1979); Warren, *supra* note 9, at 1100.

149 THEORY, *supra* note 10, at 259.

150 *Id.* at 369.

are experiencing now and to events that we anticipate occurring in the immediate future than we do to events that we anticipate occurring in the more distant future, there is no objective basis for such a perspective. Behind the veil of ignorance, given a choice between, on the one hand, access to more primary goods over the course of a lifetime or, on the other hand, access to fewer primary goods overall but more so earlier in our lives and less later on, we would prefer the former over the latter. Returning to our example, Rawls would not consider Andrew and Barbara as being similarly situated. In a no-tax world, Andrew would have access to $1,000 worth of economic resources and Barbara would access to $1,100. Therefore, the principle of uniformity, if we understand it in terms of horizontal equity, would not require imposing the same tax burden on each of them. An income tax of 40% would reduce Andrew's consumption to $600 and Barbara's to $636. Barbara is still better off from a lifetime perspective, but the gap between them—both absolutely and relatively—has been somewhat narrowed. Such a tax regime would not seem to violate any Rawlsian principle of justice.

I should emphasize that the present value argument that we examined in this subpart does not consider the role of choice in consumption patterns (i.e., Andrew chose current consumption even though he had the option of consuming more in the future). It takes the various consumption patterns as given and attempts to reduce each to a single value so that it can be compared to other patterns. In other words, it did not consider why Barbara can consume more in year 2 than Andrew can in year 1, only the simple fact that she is able to do so. Part IV will explore the implications of choice for Rawlsian tax policy.

B. Return to Capital as Compensation for Deferring Consumption

Another possible ground for Rawls's uniformity argument is the claim that, whether or not there is an objective basis for such a preference, people who are not behind the veil of ignorance tend to prefer current over deferred consumption. Furthermore, as investment is productive (witness the positive risk-free rate of return ordinarily offered by the market), accelerating consumption is costly in term of economic resources. Thus, the argument could go, because accelerating consumption both satisfies a psychological desire and requires the expenditure of economic resources, we should include the value of the acceleration as an additional component of the consumption.[151]

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[151] Stated in a different way, (risk-free) return is compensation for the psychological pain of deferring consumption. *See, e.g.*, NASSAU W. SENIOR, AN OUTLINE OF THE SCIENCE OF POLITICAL ECONOMY 60 (1836), https://austrian-library.s3.amazonaws.com/books/Nassau%20W%20Senior/An%20Outline%20of%20the%20Science%20of%20Political%20Econ-

Returning to our example, in the no-tax world Andrew not only would have consumed $1,000 but he would have done so immediately, and the immediacy of his consumption has economic value. At a risk-free return of 10%, the consumption value of consuming $1,000 today instead of waiting for a year is $100. Thus, Andrew actually consumed $1,100 and is similarly situated to Barbara who also consumed $1,100. A consumption tax will leave them similarly situated: Andrew's consumption is $600 plus another $60 for the additional pleasure of immediately consuming the $600 for a total of $660, which is the same amount that Barbara would consume. With an income tax, Andrew is still able to consume a total of ($600 + $60 =) $660, while Barbara can consume only $636 (after-tax wages of $600 plus after-tax return on investment of $36). Hence, only a consumption tax is horizontally equitable.

Rephrasing the argument in Rawlsian terms, we could say that because expediting consumption is a primary good, only a consumption tax would treat people in a uniform manner. Now, it is clearly the case that the truth of the conclusion (only a consumption tax treats people in a uniform manner) is dependent upon the truth of the premise (expediting consumption is a primary good). Therefore, the key question that we need to address in evaluating this argument is whether the acceleration of consumption can be classified as a primary good.

In *A Theory of Justice*, Rawls lists the primary goods as rights, liberties, and opportunities, income and wealth, and the social basis of self-respect.[152] Note that he does not include the psychological pleasure of expediting consumption as a primary good.[153] However, in an article published sixteen years after *A Theory of Justice*, he writes that "[p]rovided due precautions are taken, we can in principle expand the list [of primary goods] to include other goods . . . ."[154] One of the examples that he gives of other goods that might be counted as a primary good is leisure, for which he offers the following example:[155]

> I shall only comment here that twenty-four hours less a standard working day might be included in the index as leisure. Those who are unwilling to work would have a standard working day of extra leisure, and this extra leisure itself would be stipulated equivalent to the index of primary goods of the least advantaged. So those who

omy.pdf ("To abstain from the enjoyment which is in our power, or to seek distant rather than immediate results, are among the painful exertions of the human will.").

152 *See* THEORY, *supra* note 10, at 54.

153 *Cf.* Amartya K. Sen, *Equality of What?*, *in* MCMURRIN S. TANNER LECTURES ON HUMAN VALUES 197, 213–20 (1980) (proposing capabilities instead of Rawls's list of primary goods as the basis of distributive justice).

154 Rawls, *supra* note 75, at 455.

155 *Id.* at 455 n.7.

> surf all day off Malibu must find a way to support themselves and would not be entitled to public funds.

The leisure example is significant for our purposes because of the parallel—prevalent in the economic literature—between the leisure/work tradeoff on the one hand and the current consumption/future consumption tradeoff on the other. Wages are the incentive that the market offers for waiving leisure, while interest is the incentive that the market offers for deferring consumption.[156] If we classify leisure as a primary good (and view one who enjoys leisure as similarly situated to one who waives leisure for monetary income), perhaps we should also classify expediting consumption as a primary good (and view one who enjoys expedited consumption as similarly situated to one who defers consumption in exchange for monetary income). If this analogy were to hold, we would have a uniformity (i.e., horizontal equity) argument for consumption taxation as opposed to income taxation.

Nevertheless, the analogy between the leisure/work tradeoff and current consumption/deferred consumption tradeoff is tenuous. First, we have already noted that under the Cary Brown theorem, a consumption tax is equivalent to a wage tax.[157] In other words, Rawls's consumption tax proposal is effectively a proposal to tax wage income and not to tax investment income. This proposal appears to undermine the purported correlation between leisure and accelerated consumption: if the analogy were to hold, then wages and investment income would either both be taxed (which would require an income tax) or both be excluded from the tax base.[158]

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[156] The economic literature specifies that two of the necessary conditions for an efficient market are:

> [1]The marginal rate of substitution of leisure for goods (as expressing worker's preferences) should be equal to the marginal rate of transformation of leisure into goods (via work effort) with both rates in a competitive system equal to the wage rate. Thus,
>
> MRS of L for Y = MRT of L for Y = w

where L is leisure, Y is income (or goods in general), and w is the price of leisure or the wage rate.

> [2]The marginal rate of substitution of future for present consumption (as valued by customers or savers) should be equal to the marginal rate of transformation of present into future goods in production with both equal to
>
> 1 / (1 + i), where i is the rate of interest. Thus,
>
> MRS of C_f for C_p = MRT of C_f for C_p = 1 / (1 + i)
>
> where C_f for C_p are future and present consumption and i is the return paid for postponing consumption or the rate of interest.

MUSGRAVE & MUSGRAVE, *supra* note 43, at 308–09.

[157] *See supra* text accompanying notes 105–06.

[158] One could attempt to salvage the analogy by limiting the application of Rawls's dictum that leisure is a primary good to the specific case that he mentions: a person who is willingly unemployed and seeks public assistance. In other words, while we might consider voluntary leisure to be a primary good for the purpose of adjudicating claims to receive public

A second problem with the analogy between leisure and expedited consumption derives from the definition of primary goods. As already noted, a linchpin of Rawlsian political liberalism is that the state must remain neutral among different conceptions of the good. For this reason, those behind the veil of ignorance are unaware, not only of their talents and of their social position, but also of their conception of the good.[159] Rawls insists upon this condition so that individuals may not attempt to adopt rules that accord with their conception of the good at the expense of other, perhaps competing conceptions.[160] This means that they must determine the rules of justice, including the rules of distributive justice, without being aware what they will consider worthwhile pursuing. The idea of primary goods is that there are certain goods—such as income and wealth—that are likely to be useful in realizing one's conception of the good whatever it might turn out to be.[161] From this perspective it is reasonable to assume that leisure is an asset that most people would consider useful in realizing their conception of the good. Thus, there is an argument for leisure to be considered a primary good. On the other hand, it is far from clear that individuals behind the veil of ignorance would consider that consuming earlier in their lives rather than later is most likely to be useful in realizing their conception of the good. True, expedited consumption may be useful for realizing some conceptions of the good (e.g., "carpe diem" or "eat, drink, and be merry for tomorrow we die"), but certainly not for all or even for most, particularly when we are told that those behind the veil of ignorance would rationally give equal weight to every moment of their lives.[162] Stating the same idea in terms

assistance, we would not consider it a primary good for the purpose of imposing taxation. In fact, Rawls's principles of justice effectively demand this limitation of the leisure/work equivalence. Recall that Rawls rejected the endowment tax, despite its attractiveness in the field of distributive justice, because of the lexical priority of liberty: even the common good cannot justify forcing individuals to use their talents against their will. If leisure was a primary good subject to tax, then in order to pay the tax, individuals would be forced to work. The analogy between leisure/work and current/deferred consumption would then require that when adjudicating claims for public assistance we would need to consider not only applicants' previous consumption patterns but the fact that they enjoyed immediate over deferred consumption. Whether such a proposal would constitute desirable social policy raises a number of difficult issues, which are beyond the scope of this current paper. What is important for our purposes is that, even if the analogy were to hold in these circumstances, a consequence of saying that leisure and expedited consumption are primary goods only in the context of qualifying for public assistance is that the analogy can no longer ground an argument for consumption taxation. The benefit of current over future consumption would not be counted as a primary good for the purpose of determining which taxpayers are similarly situated.

159 *See* THEORY, *supra* note 10, at 11.

160 *See id.* at 13.

161 *See id.* at 54 (primary goods are "goods [that] normally have a use whatever a person's rational plan of life.").

162 *See, e.g.*, Koppelman, *supra* note 84, at 721 ("For many people, present consumption is not more valuable than later consumption; positive interest rates are a consequence of the productivity of capital, rather than the need to induce people to defer consumption.").

of the here and now instead in the hypothetical world of the veil of ignorance, we can say that it is in keeping with the tenets of political liberalism for the state to adopt a neutral attitude toward people's choices of consumption patterns. Adopting a policy that implicitly states that accelerating consumption is a good would violate that neutrality.

C. Equal Treatment for Those with Different Income Patterns

Until now we have examined Rawls's uniformity argument by comparing individuals with similar income patterns but different consumption patterns. We have seen that, in this context, it is difficult to ground a horizontal equity argument that both conforms to Rawlsian principles of justice and justifies taxing wage income while exempting return to capital. However, the comparison between individuals with similar income patterns but different consumption patterns is not the only comparison that is relevant for the purpose of horizontal equity. We can also compare individuals with similar consumption patterns but different income patterns.

In our previous example, Barbara earned wages of $1,000 in year 1, invested her income for one year at a 10% rate of return, and then consumed all of her earnings in year 2. Let us now introduce Charles, who earned nothing in year 1 and, in year 2, received wages of $1,100, which he immediately consumed. In a no-tax world, Barbara and Charles would be similarly situated: each would consume $1,100 in year 2. The principle of horizontal equity would seem to require that Barbara and Charles continue to be similarly situated after the imposition of tax. As Charles consumes his earnings immediately, there is no difference from his perspective between a 40% consumption tax and a 40% income tax: under either regime, he would be able to consume $660 in year 2. For Barbara, on the other hand, there is a significant difference. As we saw, under a consumption tax regime she too would be able to consume $660 in year 2, while under an income tax regime, she would be able to consume only $636.[163] If Barbara and Charles are similarly situated in the pre-tax distribution, they would be treated "in uniform way" under a consumption tax, but not under an income tax.

Thus, the key question that arises here is whether Barbara and Charles are indeed similarly situated in the pre-tax distribution. If they are not, then the horizontal equity argument breaks down.

Consider the fact that Barbara received wages of $1,000, while Charles received wages of $1,100. This differential might indicate that Charles put more time or more effort into working in year 2 than Barbara did in year 1. If this is the case, then we might postulate that this might

163 *See supra* Part II.A.

be one of those circumstances in which it would be reasonable to include leisure (and by extension comfort) in the list of primary goods. Barbara would then be better-off than Charles: each consumes $1,100 worth of consumer goods, but Barbara enjoys additional leisure.[164] The fact that an income tax does not treat them uniformly but instead imposes a heavier burden on Barbara then on Charles would not violate the criterion of uniformity.

However, the premise that wage differentials are necessarily a product of additional time or effort is not particularly convincing. Much if not most of the time, wage differentials result from what Rawls would consider morally arbitrary circumstances: natural talents, social position, vagaries of the market, or pure fortuitousness (simply being in the right place at the right time). The fact that Charles received a higher wage than did Barbara might indicate that he worked harder or longer than did Barbara; on the other hand, it might indicate that he was simply lucky enough to have a more valuable set of skills or that, despite their equivalent skill sets, he received a higher wage because of institutional discrimination.

Recall, though, that Rawls's consumption tax proposal is premised upon the explicit stipulation that the income was fairly earned and that background institutions are just.[165] Therefore, it is critical to consider what Rawls would view as a fair wage policy, that is, what would justify wage differentials. If wage differentials were permitted only to compensate for the time and cost of training and for the relative unpleasantness of performing certain tasks, then we would have little difficulty in saying that those who earn more are similarly situated to those who earn less.[166] If a doctor is paid more than a housepainter simply to compensate the former for the fact the during early adulthood the apprentice housepainter experienced a positive cash flow while the medical student experienced a negative cash flow, then it is clear that, over their lifetimes, the doctor and the housepainter are similarly situated. If a coal miner earns more than a gardener to compensate the former for the hazardous workplace conditions or for the unpleasantness of being underground for most of the day, then here too it is clear the coal miner and the gardener are similarly situated. Returning to our example, if Barbara is a gardener and Charles is a coal miner and if Charles' additional $100 salary were compensation for the additional hazards and unpleasantness of the job, then

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164 Assuming that leisure is a primary good in these circumstances, the fact that Barbara and Charles enjoyed leisure in different years would be irrelevant. *See supra* Parts II.A and II.B.

165 THEORY, *supra* note 10, at 246.

166 Phrased differently, in those circumstances we would have no difficulty in saying that those who earn more not only are entitled to their additional wage but that they deserve their additional wage.

(taking into account Barbara's $100 investment income) it would not be the case that they were similarly situated: in a no-tax world each would be able to consume $1,100 while Barbara would also have enjoyed the safety and relative comfort of her work environment. Taxing her investment income via an income tax would not be a violation of horizontal equity.

However, under Rawls's theory of justice the time and cost of training and the relative unpleasantness of performing certain tasks are not the only justification for wage differentials. According to Rawls, it is permissible to pay those who happen to possess relatively rare and socially useful talents a higher wage as an incentive to exploit those talents for the benefit of the less fortunate.[167] Thus, the wage differential between the doctor and the housepainter might result not only from the additional time and cost of acquiring the necessary skills but also from the brute economic fact that there are fewer people with the potential to be good doctors than with the potential to be good housepainters or that doctors can contribute more to the well-being of the least fortunate than can housepainters.[168] Consequently, we need to separate entitlement from desert. While doctors might be entitled to their additional earnings—having offered the inducement, social institutions have an obligation to honor their commitments—they might not deserve their additional earnings in a deep moral sense and this lack of moral desert may be relevant when comparing situations for the purpose of implementing the concept of horizontal equity.[169] Returning to our example, if Barbara is a housepainter and Charles is a doctor and if Charles' extra $100 salary is simply due to the fact the Charles was lucky enough to possess talents that are rarer or more socially valuable than those possessed by Barbara, then (taking into account Barbara's $100 investment income) they would be similarly situated: in a no-tax world each could consume $1,100 worth of consumer goods. A consumption tax (leaving them each with $660) would treat them in a uniform manner. An income tax (which would leave Barbara with $636 and Charles with $660) would violate the principle of horizontal equity.

Therefore, with regard to uniformity among taxpayers with different income patterns but similar consumption patterns, the choice between an income base and a consumption base would seem to depend upon the dominant reason for wage differentials. To the extent that wage differentials are compensation for the time and cost of training or for the relative unpleasantness of the job, a consumption tax would respect horizontal

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167 THEORY, *supra* note 10, at 86–88.

168 *See, e.g.*, Alstott, *supra* note 70, at 479–80.

169 For the distinction between desert and entitlement, see *supra* text accompanying notes 138–43.

equity more than would an income tax. To the extent that wage differentials are a windfall for those who happen to possess relatively rare and relatively valuable talents, an income tax would respect horizontal equity more than would a consumption tax.

Rawls's advocacy of a consumption tax was predicated on the condition that background institutions conform to his principles of justice. It is reasonable to assume that in such a world the effect of morally arbitrary factors on wage rates would be less than they do in the world in which we currently live. However even Rawls conceded that the disparities, although "likely . . . much less than the differences that men have tolerated in the past," would be "significant."[170] As long as such disparities are significant, the case for consumption taxation based upon the supposed uniform treatment of individuals with different income patterns but similar consumption patterns would seem to be fairly weak.[171]

III. CHOICE

The previous two Parts discussed the arguments offered by Rawls in support of a proportional consumption tax: the common store argument and the uniformity argument. This Part will consider an argument that one might have expected Rawls to make but that he did not. The argument that I would like to explore in this Part is that Rawls's advocacy of a consumption base derives from his respect for individual autonomy, for the capacity of humans as moral beings to choose their conception of the good and the means by which to realize that conception, and for their responsibility for the choices that they make.

A. *The Role of Choice in Rawlsian Philosophy*

One of the fundamental principles underlying Rawls's political philosophy, and perhaps the issue with regard to which his contract theory most sharply differs from opposing views such as utilitarianism, is its respect for choice. In what Rawls describes as comprehensive or teleological views, the good is a given.[172] For example, under utilitarianism

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170 *Compare* THEORY, *supra* note 10, at 136–37 *with* Jennifer Bird-Pollan, *Why Tax Wealth Transfers?: A Philosophical Analysis*, 57 B.C. L. REV. 859, 873 n.59 (2016) ("Rawls did not actually believe that a society following his two principles of justice would have great social and economic inequality.").

171 *Cf.* Sugin, *Theories*, *supra* note 31, at 2003 (arguing that the greater pre-tax income inequality a society has, the more likely that a regressive rate structure will satisfy the difference principle).

172 *See, e.g.*, THEORY, *supra* note 10, at 22 ("Teleological doctrines differ, pretty clearly, according to how the conception of good is specified. If is taken as the realization of excellence in the various forms of culture, we have what may be called perfectionism. This notion is found in Aristotle and Nietzsche, among others. If the good is defined as pleasure, we have hedonism; if as happiness, eudaimonism, and so on.").

the good is pleasure and the absence of pain.[173] Pleasure and pain are quantified as to intensity, duration, certainty, propinquity, fecundity, purity, and extent.[174] Individuals are assumed to act so as to maximize their pleasure and minimize their pain, and the justice of any policy is determined by its affect upon the quantum of pleasure and pain in society.[175]

In contrast, the starting point for Rawls's theory of political liberalism is that individuals, as autonomous moral agents, are free to choose their own conceptions of the good.[176] There is no presumption that they all share the same conception. On the contrary, Rawls presents political liberalism as a solution to the challenge—violently brought to the fore in the religious wars of the sixteenth and seventeenth centuries—of devising a social framework within which individuals with different, even contradictory, conceptions of the good can cooperate for their mutual benefit.[177]

To devise the rules by which such a society should be governed, Rawls proposed the veil of ignorance, behind which individuals would be denied knowledge, not only of their social position and their natural abilities, but also of their conception of the good.[178] They would then be charged with devising rules of justice which would bind them after the lifting of the veil. Because they know that they have a conception of the good and that they desire to pursue their conception of the good—although they are temporarily unaware of what that conception is—Rawls posited that they would adopt two rules of justice.[179] First, they would adopt a principle protecting basic political liberties, including freedom of conscience and freedom of religion. This would guarantee that they are permitted to form their own conception of the good. Second, they would adopt a rule concerning the fair distribution of "primary goods" (rights, liberties and opportunities, income and wealth, and the social basis of self-respect), which are likely to prove useful in advancing whatever it turns out is their conception of the good.[180] This leads him to the differ-

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173 JOHN STUART MILL, UTILITARIANISM 9–10 (1879).

174 *See, e.g.*, THE BLOOMSBURY ENCYCLOPEDIA OF UTILITARIANISM 424 (James Crimmins ed., 2017); ERNEST ALBEE, A HISTORY OF ENGLISH UTILITARIANISM 184 (1901); THOMAS RAWSON BIRKS, MODERN UTILITARIANISM OR THE SYSTEMS OF PALEY, BENTHAM, AND MILL EXAMINED AND COMPARED 30–31 (1874).

175 THEORY, *supra* note 10, at 20–24. *See also* MILL, *supra* note 173, at 80 ("To have a right, then, is, I conceive, to have something which society ought to defend me in the possession of. If the objector goes on to ask why it ought, I can give him no other answer than general utility.").

176 THEORY, *supra* note 10, at 11–12, 16–17; RAWLS, POLITICAL LIBERALISM, *supra* note 27, at 19, 104.

177 THEORY, *supra* note 10, at 80–81; RAWLS, POLITICAL LIBERALISM, *supra* note 27, at xxiii–xxv.

178 *Id.* at 118–19.

179 *Id.* at 53, 266.

180 *Id.* at 123.

ence principle, the idea that social and economic inequalities are to be attached to positions and offices open to all under conditions of fair equality of opportunity and that inequalities are justified only to the extent that they work to the advantage of the least well-off members of society.[181]

Of course, it might turn out that, after the veil is lifted, an individual will discover that she would have preferred the adoption of a different set of rules, which would more effectively promote her conception of the good. For example, she might discover that she has a deeply held belief that whatever a certain religion decrees as heresy should be forcibly suppressed. Alternatively, she might discover that she is among the more talented members of society or that her family is relatively well-off, so that she would be better off without any redistribution of wealth. Nevertheless, according to Rawls she is bound by the principles of justice that she would have chosen behind the veil of ignorance (in the examples given, the principles of religious freedom and of distributive justice, respectively). Even though she did not in fact choose those principles—Rawls emphasizes that the veil of ignorance does not describe an actual historical agreement, but is rather a device of representation[182]—the fact that under the specified conditions she would have chosen them is enough to commit her to abide by them.[183]

Thus, for Rawls the capacity to choose is the *sine qua non* of political liberalism. It plays out in his following the Kantian idea of relying upon a purely procedural method to determine the rules of justice.[184] Instead of simply presenting his view of an ideal society, he assigned the task of developing the rules by which society should operate to those who would actually be obliged to abide by those rules. Those behind the veil of ignorance are to choose among various alternatives with the knowledge that the rules of justice that they choose will bind them after the lifting of the veil. It also plays out in the principles of justice that Rawls surmises would be chosen. The first of these is respect for the political liberties, including freedom of conscience and freedom of thought. The rules chosen would themselves protect the right to choose.

The rest of this Part will examine a possible Rawlsian argument for consumption taxation based on the idea of respect for choice. First, I will first explore whether it is possible to develop an argument that a consumption tax is more deferential to freedom of choice than is an income

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181 *Id.* at 65–68.

182 JOHN RAWLS, THE JUSTIFICATION OF CIVIL DISOBEDIENCE IN CIVIL DISOBEDIENCE: THEORY AND PRACTICE 240, 241 (Hugo Bodau ed., 1969).

183 *Cf.* Ronald Dworkin, *The Original Position*, 40 U. CHI. L. REV. 500 (1973). *See also* Leo P. Martinez, *Taxes, Morals, and Legitimacy*, 1994 B.Y.U. L. REV. 521, 533.

184 THEORY, *supra* note 10, at 74–75.

tax, particularly within the framework of just background institutions. Second, I will consider the more structural question of whether Rawls would agree with extending the idea of the human capacity for choice and of society's obligation to respect individual choice into the realm of the fair distribution of income and wealth as delineated in the second principle of justice.

B. Consumption Taxation and Respect for Choice

As already noted, under the Cary Brown theorem the functional difference between an income tax and a consumption tax is that the former taxes both wages and return to capital investment while the latter taxes only wages.[185] Thus, the question of which tax base is preferable is really a question of whether it is appropriate to tax investment income.

If we view the return to capital investment as resulting from a choice to defer consumption—or, equivalently, if we view immediate consumption as a choice to forego the potential return on capital investment—then we might conclude that respect for choice and the autonomy of the individual precludes denying the saver the full benefit of her choice. Recall our example of Andrew and Barbara, each of whom received a wage—we will presume for equivalent work—of $1,000 in year 1. Andrew immediately consumed his wages, while Barbara deferred her consumption until year 2, earning a 10% risk-free market return. Under the Cary Brown theorem, their wages are effectively subject to tax under either an income tax or a consumption tax. Assuming a 40% tax rate, each of them will effectively be left with $600 to consume or invest. The only question is whether further to subject Barbara to a tax on her investment income. If we do not, she will be able to consume $660, preserving the 10% incentive that the market offers for deferring consumption. If we do not, she will be able to consume only $636, reducing the compensation for deferral from 10% to 6%.[186]

The argument for consumption taxation would be that each of our protagonists faced the same choice set: consume now or consume 10% more a year from now. Respect for human beings as rational agents with the capacity to choose both their own conception of the good and the means whereby to pursue that conception, so would go the argument, requires us to allow individuals to live with the consequences of their choices. Those who could have deferred consumption but chose instead to consume immediately do not have a moral right to demand that those who chose to defer consumption contribute an additional amount to the public fisc.

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185 *See supra* text accompanying notes 105–06.
186 *See supra* Part II.A.

This argument is particularly powerful when we limit our realm of discourse—as did Rawls when advocating for a consumption tax—to a society in which background institutions are just in his sense of the term.[187] In the world in which we live, a world plagued by vast and unjust disparities of wealth, exempting the return to capital investment would likely exacerbate existing inequality and would be difficult to justify under Rawlsian principles. Indeed, Rawls himself noted that given the injustice of existing institutions, a steeply progressive income tax may be necessary as a counterweight.[188] However, in a world in which concentration of wealth is proscribed via strict regulation of the right to inherit and in which wage differentials are permitted only to the extent that they conform to the difference principle, the concern that exempting investment income will have undesirable distributional effects is limited.

Superficially, a similar argument can be made with regard to the taxation of wages. Whether to work longer or harder or in more unpleasant conditions in exchange for higher compensation is a choice that people make. If people are responsible for the choices they make and justly live with the consequences of their choices, then those who chose the more difficult but more highly compensated option would be under no moral obligation to bear a greater tax burden than those who chose more comfort with less pay. If the taxation of investment income is unfair because it intrudes upon freedom of choice, then a consumption tax—which is effectively a tax on wages—would be unfair because it too intrudes upon freedom of choice.

Nevertheless—and again limiting the parameters of our discussion to a world governed by Rawlsian principles—the argument that taxing wages does not respect freedom of choice is considerably weaker than the argument that taxing investment income does not respect freedom of choice. If it were true that wage differentials derived solely from how much, how hard, or in what conditions people chose to work, then the claim that taxing the additional compensation was unfair would have considerable persuasive force. However, we have seen that even in a world in which background institutions conform to Rawls's theory of justice, wage differentials will to some extent reflect the fortuitous circumstances of possessing relatively rare and relatively useful talents, and Rawls concedes that, even in his ideal world, these differentials could be substantial.[189] Thus, while taxing wages is to some degree a tax on the

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187 THEORY, *supra* note 10, at 246 ("[W]e are here considering such proportional tax as part of an ideal scheme for a well-ordered society . . .").

188 THEORY, *supra* note 10, at 246–47.

189 *See supra* note 170.

choice that individuals make, it is also to some degree a tax on simple good fortune.[190]

Differences in investment income likely derive from (a) inheritance (those with larger inheritances will have more available for investment), (b) wage differentials (those with higher wages will more likely have a greater capacity to invest than do those with lower wages), or (c) the decision to defer consumption. The first two are dealt with elsewhere in Rawls's tax scheme. His proposed inheritance tax would tax the capacity to invest due to inheritance. As income taxes and consumption taxes both effectively reach wage income, the difference in capacity to invest due to higher wages will be subject to tax under either regime. In other words, any additional capacity to earn investment income deriving from fortuitous circumstances will be subject to tax at whatever rate is deemed appropriate. The only question that remains is whether also to tax investment income that derives from the choice to defer consumption.[191]

It is important to note that the idea of investment income as deriving from a choice to defer consumption applies also to those whose investment capacity derives from inheritance or from high wages. Heirs and high earners must choose how much of their additional funds to consume immediately and how much to invest for later consumption. In other words, their additional capacity to invest, relative to those with smaller inheritances or lower wages, was taxed by the inheritance tax or by the wage tax component of either the income tax or the consumption tax. Relative to those with similar investment capacity, the amount of investment income that they earn is a function of choice.

Summing up, where background institutions—including the right to inherit and the wage structure—conform to Rawls's two principles of justice and are subject to appropriate Rawlsian taxation, an additional tax on investment income can be viewed as a tax on the choice to defer consumption. Consequently, if respect for choice and a willingness to allow people to live with the consequences of their choices are guiding principles of Rawls's philosophical outlook, a strong case could be made for supporting consumption rather than income as a tax base.

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190 In this sense, a tax on wages effectively acts as a tax on utilized endowment. Recall that Rawls objected to endowment taxation because of its impracticality and its infringement on liberty. *See supra* Section I. Taxing only utilized endowment is not susceptible to either of these objections.

191 *Cf.* Edward J. McCaffery, *A New Understanding of Tax*, 103 MICH. L. REV. 807, 915 (2005) ("But so long as each generation is taxed once—the estate tax serving as a proxy for an accessions tax, making sure that a tax is paid before the receipt of beneficent transfers—the problem of iteration is held in check. If the gift and estate tax worked as planned, it would put labor market and beneficent market returns on the same footing—taxed once each generation of beneficial users—with only capital market earnings free of taxation.").

C. The Role of Choice in Rawlsian Distributive Justice

The next question that we need to consider is whether respect for choice and a willingness to allow people to live with the consequences of their choices are indeed guiding principles of Rawls's philosophical outlook. A number of commentators have claimed this to be the case. Their primary argument is that Rawls was concerned not with equality of outcome but with equality of opportunity and that equality of opportunity is satisfied when individuals have equivalent starting positions.[192] Justice is not offended if, due to the different choice they make—to work more or to work less, to spend or to save—some end up with a greater control over resources than do others.[193]

The attractiveness of such a position is understandable. For example, Ronald Dworkin built his theory of equality of resources upon the idea of respect for choice.[194] One who chooses to work less or save less, Dworkin argues, has no claim under distributive justice against one who worked more or saved more and is now economically better off.[195] Furthermore, as individuals have the right to choose whether or not to live risky lives, what Dworkin refers to as "option luck" is not a basis for redistribution.[196] Those who gambled and lost have no claim against those who gambled and won or who chose not to gamble, and those who chose not to gamble have no claim against those who gambled and won. The only circumstance that could substantiate a claim under distributive justice is a difference in outcome that is attributable to brute luck, good or bad luck that does not result from a decision to gamble. However, Dworkin severely limits the scope of brute luck by classifying any risk that could have been insured against not as brute luck but as option luck.[197] Thus, although having one's home struck by an asteroid and being left destitute would seem a prototypical example of brute luck, if asteroid insurance had been available, then the non-purchase of such insurance would be classified as a gamble and the asteroid strike would simply constitute the loss of that gamble. The fact that the homeowner has fewer resources than do those who refused to gamble (i.e., who purchased asteroid insurance) or who gambled and won (i.e., who did not

[192] Bird-Pollan, *supra* note 170, at 871 ("Most completely articulated by John Rawls, liberalism generally endorses political systems that guarantee equality of opportunity, while not necessarily seeking equality of outcome."); Miranda Perry Fleischer, *Equality of Opportunity and the Charitable Tax Subsidies*, 91 B.U. L. REV. 601, 626 n.117 (2011) ("Rawls implicitly endorses inequalities that are the result of individual choices . . . .").

[193] *See, e.g.*, Alstott, *supra* note 70, at 476–77; Patrick E. Tolan, Jr., *Compromising the Safety Net: How Limiting Tax Deductions for High-Income Donors Could Undermine Charitable Organizations*, 46 SUFFOLK U. L. REV. 329, 353 (2013).

[194] Dworkin, *Equality of Resources*, *supra* note 48, at 283.

[195] *See also* Rakowski, *supra* note 30, at 263.

[196] Dworkin, *Equality of Resources*, *supra* note 48, at 293–96.

[197] *Id.* at 297–98.

purchase insurance and were not struck by an asteroid) is a consequence of option luck and would not ground a redistributive claim under Dworkin's conception of equality of resources.[198] For Dworkin, brute luck is limited to factors such as the possession of marketable talents. One who would be willing to live the life of a movie star in exchange for a movie star's salary but does not have the required talent is the victim of brute luck. To mitigate the effect of such brute luck, Dworkin suggests a tax-and-transfer scheme that would imitate a hypothetical insurance market in which individuals could insure against being born without the talents necessary to earn high income.[199]

As Dworkin and Rawls are often classified together as liberal egalitarians, it is perhaps understandable that there are those who read Rawls's theory in light of Dworkins' theory of equality of resources.[200] More direct support for the claim that Rawls would consent to inequality that derived from choice can be found in Rawls's explicit rejection of utilitarianism's emphasis on outcome as opposed to process and in his argument that whatever distribution results from the application of fair principles is fair.[201]

Nevertheless, it does not appear that Rawls would countenance inequality in wealth or in income, just because the inequality derived from choices that individuals made.[202] In all of his descriptions of the difference principle—and he described and defended the principle in innumerable ways as his thinking evolved over the course of his life—Rawls never referred to opportunity or to choice. His concern was always with maximizing the well-being of the least well-off individual or of the least well-off stratum of society. When he discusses the difference principle,

198 For further speculation regarding the difference between brute luck and option luck, see Alstott, *supra* note 70, at 480–81 (posing the interesting question of whether being born in an era in which what one's preferred vocation is economically profitable is a matter of brute luck or option luck).

199 Dworkin, *Equality of Resources*, *supra* note 48, at 314–23.

200 *See, e.g.*, Eric Rakowski, *Transferring Wealth Liberally*, 51 TAX L. REV. 419, 431 (1996) ("What unites [liberal egalitarians] is that they regard the use or possession of wealth acquired through effort or voluntary choices differently from the use of possession of wealth obtained purely by chance."); Weiss, *supra* note 30, at 416 (relying upon Rawls's measuring equality not in terms of utility by in terms of primary social goods to conclude that the difference principle applies to opportunity rather than results). It is not clear how Professor Weiss's conclusion follows from the premise. Assume that A could have had access to the same quantity of primary goods as B but has access to less. The fact that we compare them in terms of the primary goods available to them does not mean that we will necessarily judge their situations as equal or deny A any claim to redistribution.

201 THEORY, *supra* note 10, at 75.

202 *See, e.g.*, Murphy, *supra* note 19, at 475 ("[T]hough some . . . philosophers . . . wholeheartedly subscribe to the choices thesis, others . . . including Rawls, quite possibly do not."); Steven M. Sheffrin, *What Role Can Desert Play in Designing Tax Policies?*, 15 PITT. TAX REV. 137, 145 (2017) (Rawls does not assign an important role to recognition and rewarding of individual effort).

he always refers to the distribution of wealth and income, not the distribution of the opportunity to acquire wealth or income.[203]

What might be confusing in this regard is Rawls's description of the difference principle as a theory of justice, in which a just distribution is whatever results from the workings of just institutions.[204] Unlike teleological or end-state theories, a procedural theory of justice has no means of adjudicating the fairness of a distribution other than by examining whether it came about following fair procedures.[205] Thus, for instance, a utilitarian could in principle determine which of two distributions is preferable simply by adding up the total satisfaction in each distribution.[206] By contrast, without knowing how the distribution came to be, an adherent of a procedural theory of justice would not be able to ascertain which distribution was more just.[207] For example, the fact that the least-well off individual in one distribution is better off than the least well-off individual in another distribution is not conclusive evidence that the former is more just from the perspective of the difference principle.[208] If the latter distribution in fact arose from the actual operation of a fairer procedure, then it would be adjudicated more just.[209]

Rawls's reliance on procedure instead of on outcome might lead one to conclude that, as with Dworkin's equality of resources, as long as the

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[203] *See, e.g.*, Rawls, *Distributive Justice: Some Addenda*, *supra* note 27, at 138 ("The basic structure is just throughout when the advantages of the more fortunate promote the well-being of the least fortunate."); THEORY, *supra* note 10, at 54. Rawls does advocate equality of opportunity with regard to competition for offices and positions. *Id.* at 53, 72, 73–78. However, he states explicitly that the concept of equal opportunity is not a part of, and will often contradict, the difference principle (as the former is lexically superior to the latter, it will apply even when the difference principle would dictate otherwise). *Id.* at 73 ("I have not maintained that offices must be open if in fact everyone is to benefit from an arrangement. For it may be possible to improve everyone's situation by assigning certain powers and benefits to positions despite the fact that certain groups are excluded from them. Although access is restricted, perhaps these offices can still attract superior talent and encourage better performance. But the principle of open positions forbids this.")

[204] THEORY, *supra* note 10, at 73–74.

[205] Thomas Nagel, *Rawls on Justice*, *in* READING RAWLS, *supra* note 20, at 1, 5.

[206] NOZICK, *supra* note 21, at 153–55.

[207] *See, e.g.*, Eric Chason, *The Economic Ambiguity (and Possible Irrelevance) of Tax Transition Rules*, 22 VA. TAX REV. 615, 625 n.40 (2003) (describing Rawls's methodology as "the ultimate ex ante analysis.").

[208] *See, e.g.*, Thomas Nagel, *Individual Versus Collective Responsibility*, 72 FORDHAM L. REV. 2015, 2015 (2004) ("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.").

[209] *Cf. Puzzling Case*, *supra* note 12, at 185 (Rawls's notion of income fairly earned is "an island of deontological rights swamped by a sea of redistribution."). I beg to differ. One of the primary themes in Rawls's entire scheme of justice is an attempt to break free of the utilitarian-libertarian dichotomy and to reconcile the concepts of deontological rights and redistribution. Schoenblum, *supra* note 66, at 250 ("Rawls built on Kantian philosophy to develop a liberal theory of democratic society."). *See also* Maureen B. Cavanaugh, *Democracy, Equality, and Taxes*, 54 ALA. L. REV. 415, 428 (2003).

inequalities were directly traceable to the choices made by all those concerned, the distribution would be considered fair.[210] For example, one commentator noted that if some inequalities in market returns are acceptable in a just society—and Rawls believed that they are—then in judging institutions of government, we need to separate out socially created advantages from those arising out of individual effort.[211] The socially created advantages must count in determining overall benefits and burdens from government, and the calculus under the difference principle must account for them, but the benefits from individual effort appropriately produce inequalities in income and wealth and should not require adjustment under the difference principle.

I do not believe that this description of Rawls's theory is accurate. Rawls did indeed hold that some inequalities are acceptable. However, for Rawls inequalities are acceptable not when they derive from individual effort, but when they result from a social and economic structure that—due to the monetary incentives that it offers—is likely to prove beneficial to the least well-off. The distinction between justifying inequality as resulting from individual effort on the one hand and justifying inequality as an incentive for individual effort on the other may be subtle, but it is crucial for our discussion.[212]

According to Rawls, institutions are fair if they are expected to produce distributions that accord with the difference principle.[213] Presumably the designers of such institutions consider the choices that people are likely to make in practice and then factor into their calculations the likely outcomes of those choices. The institutions adjudicated the most just are ones in which—given our knowledge of human behavior—the well-being of the least well-off is expected to be maximized. These will not necessarily be the ones in which distributive shares are commensurate with choices. As an example, consider the question of whether to permit a government-sponsored lottery. The only objection that Dworkin would

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210 *See, e.g.*, Fleischer, *supra* note 192, at 633; Miranda Perry Fleischer, *Libertarianism and the Charitable Tax Subsidies*, 56 B.C. L. REV. 1345, 1405 (2015) ("As with the liberal egalitarianism of Rawls, Ronald Dworkin, and the luck egalitarians, left libertarians are unconcerned if holdings depart from a just initial distribution because of voluntary choices."). *But see* Schoenblum, *supra* note 66, at 253 ("The extent to which the levels of income of particular individuals are attributable to the individuals themselves is completely ignored. The entitlement to higher incomes of those who have expended enormous effort throughout their lives for that higher income is not taken into account."). I believe that Schoenblum goes too far in the other direction. Rawls specifically allows for inequality in income as compensation for the time and effort of acquiring professional skills. THEORY, *supra* note 10, at 136.

211 Sugin, *Theories*, *supra* note 31, at 2004.

212 *Cf.* Thomas Nagel, *Liberal Democracy and Hereditary Inequality*, 63 N.Y.U. TAX L. REV. 113, 115 (2009).

213 For the purpose of our current discussion, I will assume that the institutions also respect the principles that are lexically prior to the difference principle: equal political liberties and fair equality in competition for offices and positions.

have to such a lottery is that participation in the lottery may be traceable to genetic and environmental factors beyond a person's control. If so, those who recklessly purchased tickets might have a claim under distributive justice against those who were lucky enough not to be burdened by such an irresponsible behavior pattern. Furthermore, if personality traits beyond one's control can ground a claim that lottery losses are a matter of brute luck (possessing a certain personality trait) rather than option luck (losing a calculated gamble), perhaps the winners would be subject to a claim that their winnings are also a matter of brute luck rather than option luck. However, if we could assume that the choice to participate really is free, then Dworkin would have no reason to object or to require any redistribution of winnings and losses. Individuals have the right to live risky lives.[214]

Rawls's process of reasoning would be different. The question that Rawls would ask would be how the lottery is expected to affect the welfare of the least well-off. Whatever the presumed motives of those who choose to participate, if the lottery is expected to improve the well-being of the least well-off then it would be a desirable institution. If not, it would not. In practice, the question might come down to whether the use of profits from the lottery to finance public services or transfer payments would counterbalance the losses expected to be sustained by poor individuals who participated in the lottery. If and only if it were determined that overall, the lottery would make a positive contribution to the welfare of the least well-off would the institution of such a lottery be justified.[215]

Once the lottery is instituted and the rules of participation established, Rawls's contractarian theory of justice would then prohibit taking money from the losers and paying the winners, whoever they turned out to be. If the richest person in the society happens to have bought the winning ticket, an argument that the prize money should be confiscated and used for the poor or that the drawing should be cancelled retroactively would be inadmissible. According to Rawls, although the purchaser of the winning ticket did not *deserve* to win, she is *entitled* to the winnings. If the background institutions are fair, then whatever results from the operation of those institutions is a just distribution.[216]

Thus, Rawls's emphasis on the procedural aspect of the difference principle and his rejection of end-state theories of justice has little or nothing to do with respect for choice (in our lottery example, the fact that individuals are not compelled to participate is immaterial in adjudicating

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214 Dworkin, *Equality of Resources*, *supra* note 48, at 294.

215 *Cf.* Miranda Perry Fleischer, *Charitable Contributions in an Ideal Estate Tax*, 60 TAX L. REV. 263, 305 (2007).

216 *Cf.* Anthony T. Kronman, *Contract Law and Distributive Justice*, 89 YALE L.J. 472, 500 (1979–80).

the advisability of conducting the lottery). His emphasis on procedural justice derives from his recognition of entitlements that arise during the operation of social institutions.

Returning to the question of consumption taxation, exempting from tax the return on investment (i.e., imposing a consumption tax instead of an income tax) would be justified if it is expected to contribute to the well-being of the least well-off and would be unjustified if it is expected to work to their detriment. Even if we were to accept the proposition that individuals are free to choose whether to consume immediately or to invest and that return on investment is the direct result of that choice, such a proposition would have no bearing on whether it would be appropriate to tax the return.

The inappropriateness of choice in Rawlsian tax policy is evident also in Rawls's analysis of the hypothetical surfer. Recall that the case involves a person who could work but chooses not to do so, preferring to surf all day off the coast of Malibu. The question that Rawls considered is whether such a person, who in fact has no income, is entitled to public assistance.[217]

Perhaps the most intuitive answer is that people are responsible for the choices they make. A person who chooses not to work cannot then present himself as destitute and entitled to be on the receiving end of a scheme of distributive justice. One major advantage of this answer is that it enables us to distinguish between those who are voluntarily unemployed and those who are involuntarily unemployed.[218] As opposed to the former, the latter did not choose to have no income. Therefore, it would be illegitimate—or less legitimate—to deny their claims for assistance.[219]

This answer is not the one offered by Rawls. Instead, he suggests than perhaps we should broaden the concept of primary goods to include not only income and wealth (along with rights, liberties, opportunities and the social basis of self-respect), but also leisure.[220] By this measure, the economic position of the surfer is equivalent to the economic position of a worker: one has the primary good of leisure, while the other has the primary good of money or what money can buy. However, his suggestion seems to open a Pandora's Box of complications. To take one exam-

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217 *See supra* note 155.

218 *Cf.* EDMUND S. PHELPS, ECONOMIC JUSTICE TO THE WORKING POOR THROUGH A WAGE SUBSIDY, IN ASPECTS OF DISTRIBUTION OF WEALTH AND INCOME 151, 151–52 (Dimitris B. Papadimitriou ed., 1994); Shaviro, *supra* note 30, at 431. Of course, this does not mean that is easy in practice to determine who is voluntarily and who is involuntarily unemployed.

219 *Cf.* Fleischer, *supra* note 192, at 628 n.129 (Resource egalitarians "interpret Rawls's difference principle to counsel redistribution to the voluntarily poor who have chosen a life of leisure.").

220 *See supra* note 156 and accompanying text.

ple, if leisure is a primary good, then apparently the involuntarily unemployed would also be ineligible for public assistance. Granted, they did not choose their status, but the fact is that they have more leisure than do persons who are employed. If we follow Rawls's argument that leisure (like monetary income) is a primary good, then the involuntarily unemployed may not be worse off than the employed. We would need a further explanation of why those who are involuntarily unemployed are entitled to public assistance while those who are voluntarily unemployed are not.[221]

I would submit that the reason Rawls rejected the more obvious and less problematic solution to the surfer hypothetical (i.e., that one who is voluntarily unemployed chose to be so and cannot therefore rely on lack of income to ground a claim for public assistance) is his fundamental unwillingness to tie distributive rights to choice. In adjudicating the justice of institutions, what is important is the effect of such institutions on the quantity and quality of primary goods to which people—specifically the least well-off—are expected to have access over the course of their lives. Whether the quantity of such goods derives from choice or from fortuitousness—in Dworkin's terms, from option luck or from brute luck—is irrelevant from his point of view.

In conclusion, it is true that respect for the human capacity to choose is an essential element in Rawls's political liberalism. People have the right to choose their own conception of the good. The principles of justice are chosen in the original position by individuals who are aware that have a conception of the good even if they are unaware of what that conception is. The first principle of justice that they would choose would include, among other things, respect for freedom of thought and freedom of conscience. However, with regard to the second principle of justice, respect for choice is not significant. What is important in adjudicating the conformity of institutions to the dictates of distributive justice is the expected well-being of the least well-off strata of society. Thus, even if we accept the claim that (at least in an idealized world in which income is fairly earned and background institutions conform to Rawls's principles of justice) a consumption base is more respectful of choice than is an income base, such a claim cannot ground a Rawlsian argument for consumption taxation.

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221 Rawls does not offer such an explanation. He simply states categorically: "Those who are unwilling to work would have a standard working day of extra leisure, and this extra leisure itself would be stipulated as equivalent to the index of primary goods of least advantaged." *See supra* note 157. His limiting the scope of the sentence to those who are unwilling to work instead of, more broadly, to those who do not work, implies that we should not stipulate the leisure of those who are willing but unable to work as being a primary good. He makes no attempt to justify that distinction.

CONCLUSION

In contrast to the usual depth and meticulousness of his thinking and, in particular, his cogent arguments in favor or against other types of taxation, Rawls's endorsement of proportional consumption taxation, even within the limited context of ideal background institutions, does not appear well founded. One problem in this context is the ambiguity of his arguments in favor of consumption taxation. He argues that a consumption tax is better than an income tax because the former imposes a levy on what is taken out of the common store instead of what is contributed to it, but does explain in what sense private property is part of the common. He argues that proportional consumption taxation treats everyone in a uniform way without explaining what he means by uniformity or whether the uniformity to which he refers attaches to the tax rate (proportionality) or the tax base (consumption). Therefore, we considered a number of possible interpretations of his common store and uniformity arguments, but under none of these do his arguments seems to conform to his overall theory. As his political liberalism forbids the adoption of social policies that rely upon a preference of one comprehensive doctrine over another, an argument for consumption taxation based on the idea that excessive consumption carries a moral taint or that accelerated consumption is a primary good is impermissible in the public discourse. The fact that those behind the veil of ignorance are assumed to have no temporal preference means that any argument for uniformity based upon the present value of future consumption is bound to fail. Furthermore, the fact that consumption taxation may respect choice more than does an income tax is irrelevant because respect for choice is not an essential element of Rawls's difference principle.

The fact that a consumption tax is functionally equivalent to a wage tax—a proposition known in the literature as the Cary Brown theorem—has significant implications for Rawlsian analysis of the appropriate tax base. Rawls implicitly assumes that deferring consumption produces positive externalities and then essentially argues that deferral of consumption should be encouraged by exempting from tax the return to capital investment offered by the market. However, even if his assumption is accurate, his conclusion does not necessary follow. A consumption tax of x% is equivalent to a wage tax of x% coupled with a tax on passive income of 0%. Rawls provides no evidence that the appropriate rate of tax for passive income—that is, the tax rate on passive income that would maximize the well-being of the society's least well off—is exactly zero. Moreover, he claims quite reasonably that theory cannot determine the proper rate of rate. It is unclear why, if theory cannot determine the proper rate of tax on wages, it can determine the proper rate of tax on passive income.

The analogy between talents and consumer goods ostensibly provides a possible justification for the common store argument. The analogy between the leisure/work tradeoff and the present consumption/ future consumption tradeoff ostensibly provides a possible justification for including accelerated consumption as a primary good in support of the uniformity argument. However, deeper analysis should that neither is convincing. Even if we consider talents and accumulated wealth to be similar in the sense that they are both publicly owned assets, there is a significant practical difference between them. The lexically prior principle of liberty effectively provides the possessor of talents with a veto power over their use, a veto power that the possessor can exploit to demand a relatively high wage. In contrast a Lockean right to the wealth produced by one's own efforts is not one of the liberties protected by the first principle. Although individuals may have an entitlement to the wealth that they procure when operating within the framework of just background instit0utions, they have no pre-institutional claim of desert to the wealth they produce. Thus, society could, if it wished, establish ex ante rules that provide for the appropriation of privately possessed wealth in certain circumstances and might even be required to do so if such rules would be expected to promote the well-being of the least well off. The lack of effective veto power over direct appropriation of what they hold distinguishes between what the possessors of (publicly owned) talents and the possessors of (publicly owned) property.

Reliance on the analogy between the leisure/work tradeoff and the present consumption/future consumption tradeoff to argue that accelerated consumption, like leisure, might be considered a primary good is similarly unsuccessful. First, a consumption tax effectively taxes wages but not return to capital and thus undermines the purported analogy. Second, it is reasonable to view leisure as a primary good because it is likely to be useful to promoting one's conception of the good whatever that conception may turn out to be. In contrast, whether accelerated consumption has positive value is a function of one's conception of the good. Adopting a tax structure that implicitly views the acceleration of consumption as a good and the deferral of consumption as a bad would impermissibly favor one comprehensively doctrine over another. In accordance with Rawlsian liberalism, any argument based upon this view is illegitimate in the public discourse.

This analysis does not, of course, prove that it is impossible to formulate a Rawlsian justification for consumption taxation. First, it does not preclude an empirical argument that consumption taxation would, in fact, conform to the difference principle by maximizing the expected well-being of the least well off. Such an argument, it might be noted, could be raised whether or not background institutions are just. For example, even when background institutions are, by Rawlsian standards, extraordinarily unjust, it might be demonstrable that the greater incentive to invest in a consumption tax regime relative to an income tax regime would produce such economic prosperity that that level of well-being of the least well off would be higher under the former than under the latter. However, Rawls was quite clear that his argument for a consumption tax—like his advocacy of a progressive inheritance tax and his rejection of an endowment tax—was derived from theory and was not rooted in any empirical proof. Furthermore, when discussing tax policy in the unjust world in which we live, Rawls allowed that a progressive income tax, despite the injustice inherent therein, might be a necessary counter measure. In other words, according to Rawls a proportional consumption tax is inherently just, while a progressive income tax is inherently unjust, whatever the exigencies imposed upon the tax structure by the other background institutions.

Second, the analysis in this Article does not preclude the possibility of some other interpretation, either of Rawls's common store argument or his uniformity argument, under which Rawls's arguments would withstand scrutiny in terms of his own theory of justice. Nor does it preclude the possibility of some other argument that would justify Rawls's advocacy of a consumption tax within the context of his theory. The only claims that this article makes is that under the interpretations that I considered most reasonable, his arguments do not conform to the tenets of his overall theory and that an argument based on respect for choice—an argument that one might have expected Rawls to make but that in fact he did not—does not conform to Rawlsian principles of distributive justice. It would be most gratifying if this Article were to stimulate a discussion of whether other interpretations of his arguments or alternative arguments that he did not make could justify consumption taxation within the framework of Rawls's overall theory of justice.