BOOK REVIEW

TAX AND THE PHILOSOPHER'S STONE

Kevin A. Kordana[*] *and David H. Tabachnick*[**]

INTRODUCTION

LIAM Murphy and Thomas Nagel have produced a stimulating new book, *The Myth of Ownership: Taxes and Justice*.[1] The project, which grew out of a seminar taught jointly by Murphy and Nagel on "Justice and Tax Policy" at New York University School of Law,[2] provides a lively account of the relationship between tax policy and contemporary moral and political philosophy. Murphy and Nagel defend a provocative thesis, and their argument will raise interest in scholarly work at the intersection of political philosophy and tax policy.

Murphy and Nagel essentially argue for the priority of political philosophy over tax policy; for them, there is little room for tax policy per se. They argue that tax policy ought to serve the ends of a philosophical conception of justice. Questions of fairness are, in and of themselves, irrelevant to tax policy, which should be understood as a slave to philosophical conceptions of justice. If Murphy and Nagel are correct, there are no significant moral or political principles of taxation per se. There are only general principles of political morality, some of which have implications for tax policy. For Murphy and Nagel, we (and not just the consequentialists

[*] Visiting Professor, George Washington University Law School and Nicholas E. Chimicles Research Professor in Business Law & Regulation, University of Virginia School of Law. We are grateful to John G. Bennett, Terrance O'Reilly, George Rutherglen, Steven Walt, and participants in a George Washington University faculty workshop for helpful comments on an earlier draft.

[**] Peel Fellow in Philosophy, Law & Ethical Thought, Institute for Practical Ethics, University of Virginia. I would like to thank the Institute for Practical Ethics and Peel, Inc. for the generous fellowship that supports my work.

[1] Liam Murphy & Thomas Nagel, The Myth of Ownership: Taxes and Justice (2002).

[2] Id. at v.

among us[3]) should view tax policy in an instrumental fashion. Their argument is bold and raises an important insight: namely, that it seems sensible to conduct tax policy *only* in a manner consistent with one's conception of justice. Thus, the reasonableness of various tools or metrics of tax policy analysis is a function of one's conception of justice.

We will argue, however, that as interesting as the book is, Murphy and Nagel's argument is overdrawn. Specifically, we will argue that traditional approaches to tax policy, particularly those that appeal to notions of uniformity or equity, need not be understood as completely irrelevant to tax policy simply because taxation must serve one's overarching conception of justice. We will argue that, when conceptions of justice are indeterminate with regard to tax policy, traditional approaches to tax policy can be relevant. In addition, we will argue that some of Murphy and Nagel's specific views about the practical applications of tax policy are either in tension with their own views regarding the role arguments from fairness should play, or else raise questions about the contours of their view.

We analyze Murphy and Nagel's claims from within the framework of political liberalism. Our discussion focuses on what we find to be the more provocative and (perhaps) problematic aspects of their arguments. Thus, we have little to say about Chapters 3 and 4 of the book. Chapter 3 reviews the basic positions in moral and political philosophy. This chapter provides a solid overview and appraisal of the subject. Chapter 4 accomplishes a similar task in terms of reviewing the major functions of taxation: providing public goods and, perhaps, funding redistribution. Similarly, we have little to say about Chapter 6 of the book, which discusses the issue of progressivity in an interesting manner, but which draws few strong conclusions of its own.[4]

---

[3] See Louis Kaplow, A Fundamental Objection to Tax Equity Norms: A Call for Utilitarianism, 48 Nat'l Tax J. 497 (1995); Louis Kaplow, Horizontal Equity: Measures in Search of a Principle, 42 Nat'l Tax J. 139 (1989).

[4] Some significant issues in taxation are not discussed in the book, particularly those concerning tax compliance. Thus, although the United States economy appears to feature a considerable amount of tax avoidance, see, e.g., Louis Kaplow & Steven Shavell, Fairness Versus Welfare, 114 Harv. L. Rev. 961, 1302 (2001), we will not comment on issues such as criminal versus civil penalties for tax evasion or ex ante monitoring (such as reporting requirements for employers and banks) versus ex post auditing (in-

In Part I, we will discuss Murphy and Nagel's view of the conventional nature of private property, which they begin to advance in their brief introductory chapter and continue to develop throughout the book. In Part II, we will discuss and analyze Chapter 2 of their book, "Traditional Criteria of Tax Equity." Part III of our Review will respond to Chapters 5 and 8, in which Murphy and Nagel provide arguments regarding what liberal political philosophy implies for the government's selection of the tax base. Finally, in Part IV, we will analyze Chapter 7 of the book, in which Murphy and Nagel apply their views to issues concerning the taxation of gifts, particularly bequests.

I. PROPERTY RIGHTS AND THE "PRETAX WORLD"

The book's central theme is the denial of the claim that the free market (or, market outcomes in a pretax world) is the appropriate moral baseline against which one should assess arguments about justice or fairness in taxation. Murphy and Nagel appear to have two arguments that lead them to this conclusion.

First, for Murphy and Nagel, property rights, as weighty and well entrenched as they seem, are mere post-institutional conventions. All entitlements are properly understood as (only) the outcome of post-institutional arrangements.[5] Murphy and Nagel deny the existence of pre-institutional entitlement claims, such as Lockean natural rights to private property.[6] For them, this denial is crucial; without the existence of pre-institutional (i.e., natural) rights in

---

cluding how to audit—randomly, the rich, the poor, etc.). Within a broad range of choices, many approaches to these issues would be compatible with liberalism. Choices need to be made, however, and issues of justice seem relevant.

[5] Murphy & Nagel, supra note 1, at 74 ("The conviction that determines our approach to all more specific questions is that there are no property rights antecedent to the tax structure. Property rights are the product of a set of laws and conventions, of which the tax system forms a part.").

[6] There are, of course, alternative views of property rights. For a comprehensive philosophical treatment of these views, see Jeremy Waldron, The Right to Private Property (1988). For defenses of a pre-institutional conception of property, see Robert Nozick, Anarchy, State, and Utopia (1974); A. John Simmons, The Lockean Theory of Rights 222 (1992); A. John Simmons, Original-Acquisition Justifications of Private Property, Soc. Phil. & Pol'y, Summer 1994, at 63. Murphy and Nagel acknowledge such views, Murphy & Nagel, supra note 1, at 58 ("One view is that taxation is an appropriation by the state of what antecedently belongs to individuals . . . ."), but the book proceeds by applying a post-institutional view of property.

property, the free market holds no particular position of moral privilege among possible distributive schemes.[7] It is simply one of many possible schemes, each of which must be evaluated not in terms of its proximity to free market outcomes but rather in terms of its effectiveness in meeting the demands of a conception of social justice.[8] Murphy and Nagel conclude that the free market is not the moral baseline against which claims of fairness in taxation may be raised.[9] Since the free market is morally neutral, the fact that a particular distributional scheme departs radically from free market outcomes provides no moral reason to accept or reject it.

Murphy and Nagel repeatedly advance a second and closely related argument. They argue that, not only is the free market incapable of serving as a moral baseline, but also that conceptions of pretax market baselines are incoherent. The point is perhaps akin to lessons learned from Hobbesian political philosophy—in the state of nature there is no market; we may likely find ourselves dead or destitute. According to Murphy and Nagel, the incoherence of pretax market baselines arises from the fact that first, governments are required for the establishment of markets, and second, governments require taxation. Thus, the very notion of a market requires a theory of taxation. They conclude that any conception of a pretax market world is confused and that appeals to notions of distributive shares in a pretax world are incoherent.[10] Just as it would be incoherent for an entrepreneur to expect to retain all of the revenue from her business (because costs must be met—thus the convention of referring to the owner as the "residual claimant"), so too would it be incoherent for the entrepreneur to complain, "Look at how much higher my profits would be if only I did not have to pay taxes."

---

[7] Murphy & Nagel, supra note 1, at 58 ("Since there are no property rights independent of the tax system, taxes cannot violate those rights.").

[8] Id. at 58–59 ("The tax structure, which forms part of the definition of property rights . . . must be evaluated by reference to its effectiveness in promoting legitimate societal goals, including those of distributive justice.").

[9] See id. at 63 ("The money you earn under any system is yours because you have worked for it, but it is a mistake to think that what you have really earned is your pretax income, some of which the government then comes and takes away from you.").

[10] Id. at 36 ("Since that system [of property rights] includes taxes as an absolutely essential part, the idea of a prima facie property right in one's pretax income . . . is meaningless.").

While we will accept for the sake of argument that a pretax market baseline is incoherent,[11] we have some questions about the former argument that property is entirely a matter of post-institutional convention. Murphy and Nagel use this point to argue that institutional distributional schemes need not pattern market outcomes but, instead, need answer only to the demands of one's conception of distributive justice (e.g., for Rawls, the demands of the difference principle[12]). This argument may be convincing as far as it goes, but we are concerned that it may simply push the debate back a stage. It seems to us that a proponent of the view that market outcomes have prima facie moral weight (e.g., a Lockean liberal) might agree with Murphy and Nagel that one's ultimate entitlements are a post-institutional matter.[13] The Lockean liberal would, however, have quite a different view of the appropriate content of the distributive scheme. Presumably, the Lockean liberal holds that the institutional distributive scheme should, in some measure, mirror the outcomes of consensual economic transactions by respecting the prima facie weight of natural rights in property. If this is correct, it might be the case that Murphy and Nagel's argument about the post-institutional nature of ultimate distributive shares simply presses the debate back a stage. The same debate over the moral weight of market outcomes would still be unsettled, only now the debate would occur at the level of one's conception of distributive justice.[14] Thus, the claim that post-institutional dis-

[11] But, note that while government may typically be the best solution to noncooperative games faced by potential market participants, other solutions are (conceptually) available as well. Most notable would be consensual private ordering. Thus, proponents of a pretax market baseline may be wrong, but they do not seem to be confused.

[12] See John Rawls, A Theory of Justice 266 (rev. ed. 1999).

[13] While a Lockean liberal maintains that the foundations of property rights are a pre-institutional matter, the Lockean liberal might also agree that one's ultimate distributive share is a post-institutional matter. This is a possibility because a plausible Lockean liberal would presumably accept Murphy and Nagel's second point that at least some taxation, however minimal, is, all things considered, justified (even if illegitimate) in order to maintain a minimal state. Thus, a Lockean liberal might consistently hold both that property rights are natural (or, pre-institutional) and that one's ultimate distributive shares are post-institutional. A. John Simmons, Justification and Legitimacy, 109 Ethics 739 (1999).

[14] Of course, Murphy and Nagel have quite a bit to say about competing conceptions of distributive justice. In Chapter 3, they describe the landscape of the various positions in contemporary political philosophy. It is clear that they reject libertarianism. It is less clear, however, why they reject Lockean liberalism, for example, a view that

tributive shares are wholly arbitrary is vindicated only after settling the second order debate over competing conceptions of political philosophy and economic justice.

II. MEASURES OF TAX EQUITY

In Chapter 2, Murphy and Nagel examine a number of the traditional criteria of tax equity used in the tax policy literature. They are skeptical of the role that notions such as vertical and horizontal equity should play in tax justice for political liberals.[15] We think that Murphy and Nagel's critique is more powerful in the context of certain forms of liberalism than in the context of others. We will argue that equitable concerns can be rendered compatible with liberalism.

Murphy and Nagel's central claim is that one cannot separate the justice of taxation, the traditional focus of tax equity metrics, from the distribution of government benefits.[16] For them, "the totality of government's treatment of its subjects, its expenditures along with its taxes," must be examined.[17] They term doing otherwise the "problem of myopia."[18] This assertion has a degree of intuitive appeal. It would, for example, seem odd to conclude that a tax system was "fair" based on how it distributed tax burdens across the population if the government were using the revenue for unjust purposes. Such a system of taxation might be fair along one dimension, but it would fail to satisfy the full demands of justice.

---

property rights are natural and pre-institutional (if only of prima facie weight) and that, at the same time, takes seriously other natural duties (say, the duty of beneficence, the duty of justice, and the duty to rescue). See Murphy & Nagel, supra note 1, at 59.

Our concern comes to this: without a conclusive argument that rejects all sensible conceptions of pre-institutional rights in property, their argument is not entirely convincing. While Murphy and Nagel argue that some form of government is necessary for there to be a market at all, it is not so clear that they have shown that all conceptions of property that view the foundations of such rights as pre-institutional are flawed. Without an argument to that conclusion, the debate in which Murphy and Nagel are engaged can be regenerated at the level of political theory.

[15] Id. at 14–15, 38.

[16] Id. at 15 ("[T]here is no separate issue of the fair distribution of tax burdens, distinct from the entirely general issue of whether government secures distributive justice."); id. at 30 ("[I]t is meaningless to insist that tax policy be fair in itself while ignoring the fairness of expenditures.").

[17] Id. at 25.

[18] Id. at 14, 25.

A. Benefit Principle

The first metric of tax equity that we will focus on is the benefit principle. Briefly stated, the benefit principle "requires that taxpayers contribute, via taxation, in proportion to the benefit they derive from government."[19] Murphy and Nagel urge tax policy analysts to reject the benefit principle, arguing that "[i]t is inconsistent with every significant theory of social and economic justice,"[20] by which they mean to include any form of liberalism that takes seriously the demand for the provision of benefits to the worst-off, as well as libertarianism. Their arguments are general. That is, they do not adopt a particular conception of liberalism; for Murphy and Nagel, the benefit principle is inconsistent with liberalism in all of its forms. While we do not comment on the merits of the benefit principle per se, we argue that it is not *inconsistent* with liberalism. In doing so, we distinguish between different conceptions of liberalism[21] and discuss their relative compatibility with the benefit principle. We argue that the benefit principle is consistent over a wider range of contingencies for some conceptions of liberalism than for others. In practice, teleological (or "maximizing") forms of liberalism may frequently conflict with the benefit principle. We will argue, however, that this does not show that such forms of liberalism and the benefit principle are *entirely* inconsistent. We will further maintain that the conflict does not seem as serious for other forms of liberalism. In any case, our point is that the benefit principle (in theory) can be shown to be consistent with liberalism.

For Murphy and Nagel, the benefit principle is subject to the charge of "myopia"—it ignores government spending, that is, the provision of public goods and redistribution, and gives guidance only about how to raise tax revenue. Their basic idea, we think, is that if one is committed to a theory of distributive justice, the achievement of the aims of that theory may be hampered by any attempt to comply with the benefit principle. If the overarching conception of distributive justice takes fairness into account but al-

---

[19] Id. at 16.

[20] Id. at 18–19.

[21] We consider these issues in greater detail in Kevin A. Kordana & David H. Tabachnick, Taxation and Liberal Political Philosophy (Feb. 2003) (unpublished manuscript, draft on file with authors).

lows for justifiable inequalities, criticisms of resulting inequalities on the basis of fairness are ill-motivated (because the inequalities are justified by the overarching conception of distributive justice). The conception of distributive justice determines fairness in taxation; therefore, a tax policy that at first glance appears inequitable might, all things considered, be justified.

For example, a tax structure that is consistent with Rawls's difference principle may allow for what would appear (under, for example, the benefit principle) to be inequities in tax policy. However, these inequities are, all things considered, justified if the inequities are necessary to maximize the position of the least well-off. Thus, the question of justice in taxation is not separable from the question of overall distributive justice. To the extent the benefit principle treats these two questions as separable and addresses only the issue of justice in taxation, it is, for Murphy and Nagel, objectionable.

Murphy and Nagel's argument is most powerful if one's conception of distributive justice is maximizing or teleological—for example, the difference principle (maximizing the position of the least well-off) or the utility principle (maximizing general welfare). With such a theory, the attempt to maximize requires flexibility in the tax scheme. In other words, the tax system needs to serve, in an instrumental fashion, the achievement of the overall distributional aim. Any constraints placed on the tax system could possibly limit the ability to maximize the desired outcome. In short, the pursuit of the maximand and the implementation of the benefit principle possibly conflict. For example, a Rawlsian attempting to implement the difference principle would explore various tax schemes and adopt the scheme that maximizes the position of the least well-off.[22] This, however, is not necessarily a tax scheme that complies with the demands of the benefit principle.

This argument has shown only that the benefit principle frequently conflicts with the demands of a maximizing distributive scheme and in such cases must yield to such demands. Liberals who adopt both a maximizing conception of distributive justice and the benefit principle need not be inconsistent, however. If two or more

[22] See, e.g., Thomas W. Pogge, Realizing Rawls 66–67, 67 tbl.1 (1989) (using the difference principle to choose among economic schemes with different tax rates).

economic schemes equally maximize the demands of the conception of distributive justice, and if one scheme contains a tax system that satisfies the benefit principle while the other(s) do not, one who held the benefit principle could invoke it to adjudicate between schemes.[23] Doing so is not inconsistent with the maximizing conception of distributive justice.

Admittedly, a maximizing conception of distributive justice might only rarely admit of two or more schemes that equally maximize its demands.[24] The benefit principle, however, seems compatible in a wider range of contingencies if the conception of distributive justice is non-maximizing, for example, a (deontological) "moderate liberal" theory in which fixed decent social minimums are provided at public expense.[25] Under such a theory, the social minimum portion of the distributive aim is a fixed baseline, the demands of which likely can be met by a number of economic schemes. In contrast, with a maximizing theory, any particular scheme has more difficulty meeting the demands of the conception of justice since the goal is not fixed. In the case of moderate liberalism, then, the theory of distributive justice and the benefit principle

---

[23] To the extent that the conception of justice either defines (e.g., Rawlsianism) or rules out (e.g., utilitarianism) claims of fairness, a nonfairness reason for holding the benefit principle would seem to be required in order to avoid an ordering problem or an outright conflict. We discuss this issue further infra Section III.A.

[24] This might well depend on how rigorously maximization is pursued. Rawls, for example, seems less than fanatical.

> 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) . . . . By taxing only total expenditures above a certain income, the tax can be adjusted to allow for an appropriate social minimum.
>
> The difference principle might, then, roughly be satisfied by raising and lowering this minimum and adjusting the constant marginal rate of taxation. The principle cannot be satisfied exactly, but society may publicly aim at its approximate, or its good-faith, satisfaction. No fine-tuning is possible anyway. The above policies involve only various kinds of taxation and so do not require direct interference by government with individual and associational decisions or particular transactions.

John Rawls, Justice as Fairness: A Restatement 161 (Erin Kelly ed., 2001).

[25] Thomas Nagel, Equality and Partiality 57–58, 123–25 (1991); Jeremy Waldron, John Rawls and the Social Minimum, 3 J. Applied Phil. 21, 22 (1986). Waldron argues that his conception "differs from Rawls's own favored principles of justice as fairness." Id. In formulating a conception of distributive justice, Waldron substitutes for the difference principle what he calls "the social minimum principle, i.e. the principle of average utility subject to a constraint that a certain social minimum of well-being be maintained for every individual." Id.

would seem to be consistent over a wider range of real-world contingencies. To be consistent, the provision of a decent social minimum would need to take lexical priority over any principle of tax equity, such as the benefit principle. That is, in some circumstances the benefit principle would need to go unsatisfied if sufficient tax revenue to finance the provision of social minimums could not be raised under an economic scheme that complied with it. But, over a wide range of contingencies, non-maximizing conceptions of distributive justice and the benefit principle can be shown to be consistent.

Murphy and Nagel, however, have two further arguments against the compatibility of liberalism and the benefit principle. First, they argue that the benefit principle is incoherent because property is wholly post-institutional and pretax incomes wholly arbitrary. "[S]ince the pre-tax distribution of welfare is both entirely imaginary and morally irrelevant it cannot matter whether a tax scheme imposes equal, proportional, or any other pattern of sacrifice as measured against that baseline."[26] In response to this first argument, we are uncertain why post-institutional, interschemic comparisons cannot be made just because the pretax world is incoherent.[27] Insofar as different schemes meet the demands of the conception of distributive justice equally well, the benefit principle may coherently be applied in conjunction with liberal theories of distributive justice. In doing so, the benefit principle could use as its benchmark (in defining the term "benefit") something other than the pretax market.

For example, a "decent social minimum liberal" who holds a post-institutional view of property might characterize as "benefits"

---

[26] Murphy & Nagel, supra note 1, at 99.

[27] This appears to be implicit in Thomas Pogge's argument concerning "interschemic" and "intraschemic" comparisons in Rawlsian political theory. Pogge, supra note 22, at 71. Note that, for Murphy and Nagel, economic scheme S_0 in Pogge's table would have gross incomes of close to zero (since it would reflect the Hobbesian state of nature), but this would not seem to undermine Pogge's comparison of S_4–S_6, since such interschemic comparisons need not reference a "pretax world." See id. at 67 tbl.1.

Murphy and Nagel appear to recognize the feasibility of comparing post-institutional schemes at one point later in the book, although in the context of autonomy, not fairness. Murphy & Nagel, supra note 1, at 123 ("[T]he value of autonomy should lead us to prefer a set of institutions that limits the range of choices as little as possible, by comparison with other feasible sets of *actual* institutions.").

all welfare above the decent social minimum. Such benefits could be taxed according to the benefit principle.[28] This does not require taking the pretax distribution of welfare as a morally non-arbitrary benchmark, because market outcomes below the minimum are *raised* and those above are *reduced.* That is, the decent social minimum liberal needs, as a matter of lexical priority, to make sure everyone attains the minimum, but the benefit principle could be subordinate to this principle in a manner that assists in making comparisons among different economic schemes, all of which attain the floor.

Murphy and Nagel's final objection to a liberal's adoption of the benefit principle is that it cannot coexist with the provision of benefits to the least well-off. Here, the purported inconsistency arises because the least well-off in a (reasonably just) state receive relatively few benefits from political life as compared to their better-off peers. Nonetheless, the least well-off receive many benefits from political life in comparison with life in the Hobbesian state of nature.[29] If one adopts the state of nature as the baseline for the assessment of benefits and then taxes citizens in proportion to the benefits they receive, the least well-off will find themselves (paradoxically) with a not inconsiderable tax liability, given their ability to pay. For Murphy and Nagel, this renders the benefit principle inconsistent with any political theory that takes seriously the provision of benefits to the least well-off.[30]

In discussing this argument, Murphy and Nagel raise a proposal that taxing the worst-off in forced labor instead of in money might render the benefit principle and liberal theories of justice compatible. Apparently, in this view, the least well-off are compelled to work some number of hours in exchange for their share of benefits.

---

[28] Our point is not to defend this benchmark or the benefit principle, but only to make the narrower claim that the benefit principle is not necessarily irrelevant simply because the notion of a pretax market is incoherent.

[29] Murphy & Nagel, supra note 1, at 18 ("For though the very poor benefit less from government than the rich, they still benefit greatly as against the baseline of the war of all against all . . . .").

[30] In advancing this argument, Murphy and Nagel seem to be assuming that the pre-institutional Hobbesian state of nature is the baseline against which one should apply the benefit principle. See id. Note that if some other baseline, for example "perfect equality," is invoked, the problem Murphy and Nagel point to does not arise; the least well-off have not received any upward departure from perfect equality, so they would not be taxed under the benefit principle.

Interestingly, Murphy and Nagel neither pursue this proposal nor openly reject it as a counterexample to their claim that the benefit principle is incompatible with liberalism.[31] Although the proposal might be rejected on the ground that it conflicts with important liberal values, such as autonomy and a healthy skepticism toward authoritarian political institutions, we do think that at a theoretical level the proposal indicates that liberalism and the benefit principle *may* be compatible.

Consider the following proposal, which is both compatible with the benefit principle and does not conflict with other liberal political values. Governments might include in benefit packages to the worst-off enough cash subsidy for those citizens to pay their tax liability according to the benefit principle as well as to meet their other needs. In other words, the assistance they would receive in a scheme in which their payment would be untaxed would be "grossed up"[32] to allow them to pay their taxes as well.

Grossing up the benefit packages given to the worst-off to cover their taxes might seem inconsistent with the project of assessing everyone in society based on the benefits they receive.[33] Murphy and Nagel, however, would seem to be prohibited from arguing that it is incoherent to pay the worst-off more in order to allow them to pay for the very benefits for which they are taxed.[34] This is because, for them, all (post-tax) income is attributable to the institutional scheme, so there is no distinction between earnings and government subsidy. For Murphy and Nagel, monetary subsidies provided to the worst-off should be properly viewed as the salary (or distributive share) attached to one of the many positions in society—here, that of the least well-off. The least well-off, then, do *not*, under our proposal, receive a benefit above and beyond the

---

[31] See id. at 18–19.

[32] That is, if one's benefit package, including cash transfers, receipt of in-kind goods and services, and security, amounted to $3000 per month and if the benefit principle called for a thirty-three percent tax on government benefits, one would receive an additional $1500 per month to cover the tax bill, which would be $1500 of the $4500 total benefits.

[33] This objection would best hold under a pre-institutional conception of property rights. It still need not be conclusive, however, as such a theory may also hold that there are significant pre-institutional positive duties owed to the worst-off.

[34] They appear to make such a claim. Murphy & Nagel, supra note 1, at 18 ("[I]t would be entirely pointless to provide minimal income support and then demand payment for the service.").

benefits received by any other salaried citizen—so the objection is blocked. If we are correct, the benefit principle can be made consistent with transfer payments to the worst-off and is therefore consistent with liberalism, in a fashion true to liberal values (for example, no coerced labor).

While, again, it is not our intention to defend the benefit principle, its proponent might observe that the benefit principle does not lose its potential motivational appeal simply because payments to the worst-off are "grossed up." That is, the benefit principle still has important implications for the relative taxation of, for example, the moderately well-off and the wealthy. There does not seem to be any inherent difficulty with engaging in such a "grossing up," as the cost of paying taxes is merely one of the costs of living that distributive shares will need to account for, just as taxes and local cost-of-living are currently accounted for in setting the salaries of federal employees who are, in our present tax scheme, paid with pretax dollars and then taxed along with everyone else based on their salaries and other income.[35]

If our arguments are correct, we have shown that the benefit principle and liberalism are not incompatible, as Murphy and Nagel maintain. One might wonder with which forms of liberalism the benefit principle is (ultimately) compatible. The most obvious candidate is a decent social minimum liberalism that shares Murphy and Nagel's post-institutional conception of property. Since this conception of moderate liberalism only attempts to provide a decent social minimum to the worst-off, it seems likely to be compatible with a number of economic schemes over a wide range of contingencies. The benefit principle might then assist in choosing between them. Further, because the view of property is post-institutional, one need not refer to a pretax world in making inter-schemic comparisons or in defining "benefit." Instead, such a conception of liberalism might reference another (non-arbitrary) baseline, such as upward deviation from the floor. Finally, because the worst-off do not benefit in relation to the baseline (the floor), they need not be "grossed up."

[35] Or, to take another example, we recall that when New York City subway elevator operators were rendered redundant with the switch-over from mechanical to electrical lifts, most were retained in what was essentially a dole. Their "salaries," however, continued to be taxed.

While the benefit principle may be less compatible with other forms of liberalism, two categories of liberalism are still *arguably* compatible with the benefit principle. The first category includes what we have been calling maximizing conceptions of distributive justice, such as Rawlsianism and utilitarianism. As we have argued, a post-institutional view of property is consistent with "grossing up" benefit packages, which allows the benefit principle to remain compatible with the provision of benefits to the least well-off. The benefit principle, if adopted, needs to remain subordinate to the maximizing conception of justice, but may become relevant if two or more economic schemes equally satisfy the maximand.[36] Finally, in the latter case, the comparison is between two schemes, both of which include taxation, so no reference need be made to an imaginary, wholly arbitrary pretax world in choosing between them. Admittedly, the practical relevance of such a confluence of events that preserves compatibility might be small, but the two appear not to be inconsistent.

The second category includes decent social minimum liberals who hold that there are prima facie natural rights to property (e.g., moderate Lockean liberals). Since this conception of liberalism only provides a decent social minimum, it is likely compatible with a number of economic schemes. The benefit principle might assist in choosing among them. Further, since the view of property is not entirely post-institutional, the market can provide a benchmark for interschemic comparisons and the definition of "benefit." Finally, benefit packages could be "grossed up" to provide for the worst-off, although we admit here that providing "benefits" to those at the floor which include money to pay taxes, when taxes are allegedly assessed in proportion to the benefits received, does seem rather strained, given a moralized conception of the market.

---

[36] This is a view that we (cautiously) suggest Rawls may endorse:

> No mention has been made at any point of the traditional criteria of taxation such as that taxes are to be levied according to benefits received or the ability to pay. The reference to common sense precepts in connection with expenditure taxes is a subordinate consideration. The scope of these criteria is regulated by the principles of justice. Once the problem of distributive shares is recognized as that of designing background institutions, the conventional maxims are seen to have no independent force, however appropriate they may be in certain delimited cases.

Rawls, supra note 12, at 247 (citation omitted).

B. Equal Sacrifice

Another traditional metric of tax fairness is the equal sacrifice principle. Briefly stated, this principle states that the system of taxation should reduce each taxpayer's welfare by an equal amount.[37] Murphy and Nagel argue that the equal sacrifice principle makes sense if and only if one's theory of justice is libertarian.[38] They hold this view because, without moralizing pretax market outcomes, the question of how to raise tax revenue, to which the equal sacrifice principle purports to give an answer, cannot be separated from broader questions of distributive justice. Thus, Murphy and Nagel argue that non-libertarians should reject the equal sacrifice principle because "it treats the justice of tax burdens as if it could be separated from the justice of the pattern of government expenditure."[39]

Again, we think that different forms of liberalism need to be distinguished. If one holds a maximizing conception of distributive justice, the equal sacrifice principle may potentially conflict with the demands of the conception of distributive justice. Thus, equal sacrifice, like the benefit principle, should be subordinate to, and often will need to yield to, the maximizing conception.[40] Once again, however, one might hold a non-maximizing liberal view with a post-institutional conception of property in which a fixed decent social minimum is provided to the least well-off. The demands of such a conception of distributive justice could likely be met by a number of economic schemes, one or more of which could be consistent with the equal sacrifice principle. Implementing the equal sacrifice principle by imposing an equal welfare loss on each taxpayer could therefore be one coherent choice among many economic schemes that provide the floor.[41] Any comparisons among

---

[37] Murphy & Nagel, supra note 1, at 24.

[38] Id. at 26.

[39] Id. at 25.

[40] Admittedly, this conflict will not occur in every case. See supra text accompanying note 36.

[41] Of course, arguments advocating some unequal sacrifice metric could be advanced as well. The equal sacrifice principle may not be the best or most defensible metric for raising tax revenue for political liberals, but it does seem consistent with a liberal conception of distributive justice.

such schemes need not reference the pretax, morally arbitrary world.

Of course, the notion of "sacrifice" requires a non-arbitrary benchmark against which one might measure reductions in welfare assessed by the tax scheme. As Murphy and Nagel write, "A sacrifice is a burden; as with benefits, our understanding of the nature of a burden depends upon the baseline we use for comparison."[42] Since libertarianism provides such a benchmark—the pretax market—for Murphy and Nagel, it is compatible with the equal sacrifice principle.[43] We are unclear, however, why it is necessary to have a pre-institutional moral benchmark for the equal sacrifice principle to make sense. For example, a moderate liberal with a post-institutional conception of property could sensibly implement the equal sacrifice principle as long as she provides a morally non-arbitrary benchmark against which welfare reductions might be measured. Upward departures from the social minimum or "floor" provide such a benchmark. The application of the equal sacrifice principle in these circumstances would not be inconsistent with redistribution. With upward departures from the floor as the benchmark of the equal sacrifice principle, those at the floor would not be taxed.

To summarize, then, it seems to us that equal sacrifice can be shown to be consistent with liberalism across some range of contingencies.

C. Horizontal Equity

Murphy and Nagel conclude Chapter 2 with a discussion of the more general notion of horizontal equity. Their comments begin by arguing that tax justice must be part of an overall theory of distributive justice. Since this is so, they maintain that "there can be no blanket rule that persons with the same pretax income or level of welfare must pay the same tax."[44] They go on to give an example

---

[42] Murphy & Nagel, supra note 1, at 25.

[43] Id. at 26. For a decent social minimum liberal with the view that pre-institutional property rights have prima facie moral value, the benchmark would seem to be some approximation of the market. Therefore, "equal sacrifice" would seem to require that all individuals sacrifice some fraction of welfare from market outcomes. This would be inconsistent with "grossing up" distributive shares provided to those at the floor.

[44] Id. at 38.

of differential tax treatment and conclude that, if the treatment furthers "a legitimate social goal" and is consistent with the demands of distributive justice, "then the unequal treatment . . . raises no further issue of justice."[45] We think this claim is too strong. While it is true that there can be no blanket rule requiring horizontal equity, it does not follow that issues of uniformity do not count at all. From what we have argued above with respect to the benefit principle and the equal sacrifice principle, it should be clear that issues of uniformity can be relevant, if subordinate, to distributive aims.

III. THE TAX BASE

A. Choice of the Tax Base

Murphy and Nagel go on to discuss the important issue of the tax base—that is, the question of what should properly be taxed. Candidates might include wealth, income, consumption, the ability to earn income, leisure, charisma, and/or beauty. Murphy and Nagel argue that choosing the tax base has "a *purely* instrumental significance as far as justice is concerned."[46] "Since justice in taxation is not a matter of a fair distribution of tax burdens measured against a pretax baseline, it cannot be important in itself what pretax characteristics of taxpayers determine tax shares."[47]

At first, Murphy and Nagel's position might seem puzzling, as they themselves acknowledge.[48] For Murphy and Nagel, if the tax scheme consistent with one's theory of distributive justice taxes schoolteachers heavily but exempts the income of Hollywood actors, the schoolteachers have no legitimate grievance. Simply stated, the government has done no wrong. To use another example, if a single fantastically wealthy citizen bears the society's entire tax burden while everyone else is exempt from taxation, the wealthy citizen has no legitimate fairness complaint against the selection of tax base.[49]

---

[45] Id at 38–39.

[46] Id. at 99 (emphasis added).

[47] Id. at 98.

[48] Id. at 108 ("[Y]ou may still feel the force of the initial intuition: Isn't it *obviously* unfair to tax food more heavily than clothes . . . ?").

[49] Id. at 98–99 ("[A]n argument in favor of [one tax base over another] can be rejected for addressing the wrong question.").

Murphy and Nagel characterize their argument about the tax base as "rejecting arguments for and against the intrinsic fairness of one or another tax base."[50] Their argument that "the choice of tax base has only instrumental significance for economic justice"[51] seems to suggest that moral considerations are irrelevant to the choice of tax base. We think that this is a somewhat misleading way of characterizing what we take to be their own (best) position. The reference to "intrinsic fairness" and talk of "instrumentality" diverts attention from the fact that, for Murphy and Nagel, the choice of tax base should be understood as *suffused* with fairness. It is this very fact that, in their view, makes arguments grounded in *new* fairness claims incoherent. In other words, we think that the best way to understand Murphy and Nagel's view is to imagine that the response to the fairness claims advanced by the schoolteachers or the wealthy citizen is not the rather puzzling "choices of the tax base are purely instrumental," but rather, "fairness has been taken care of already."

For Murphy and Nagel, it seems that insofar as fairness is important, it is to be addressed at the level of one's conception of distributive justice. Inequities that emerge in a tax scheme consistent with the demands of the conception of distributive justice are justified. Therefore, one cannot coherently criticize the tax scheme as being unfair. Any complaints one might have need to be "taken upstairs" and addressed at the level of one's conception of distributive justice.[52] This is, first, because fairness complaints based upon pretax market outcomes are unavailable for the reasons discussed above in Part I,[53] and second, because correct principles of distributive justice define distributive shares that are not arbitrary.

In other words, if the conception of distributive justice is utilitarian, and if one objects to the resultant welfare-maximizing tax

---

[50] Id. at 98.

[51] Id.

[52] "[A] just tax scheme is one that finds its place in a set of economic institutions that together produce just and efficient social results." Id.

[53] That is, since governments require a tax base, it makes no sense to make fairness arguments that turn on some notion of a pretax, yet post-institutional, market. As Murphy and Nagel write, "Once we reject the idea that justice in taxation is a matter of ensuring a fair distribution of tax burdens relative to the pretax baseline, the issue of the tax base . . . takes on a purely instrumental significance as far as justice is concerned . . . ." Id. at 99.

scheme because it taxes toys but not art, the only coherent objection is to utilitarianism itself, not to the tax scheme per se. Similarly, for a Rawlsian, raising questions of equity with regard to the tax base could hamper the maximization of the position of the least well-off.[54] The only argument from fairness one is entitled to is the conception of fairness embodied in the difference principle.[55] One's choice of tax base is constrained only by the conception of justice. In other words, the tax base must[56] be chosen wholly instrumentally so long as it is in compliance with the conception of justice. Thus, as long as a seemingly arbitrary choice of tax base complies with the Rawlsian conception of justice, one cannot coherently object to the inequity. The only coherent response is to attack the soundness of the conception of justice itself, because any inequity consistent with that conception is justified.

This is the best account we can provide for Murphy and Nagel's "instrumentalist" position regarding the choice of tax base.[57] As we

---

[54] See id. ("Different tax bases may be better or worse suited to the tax system's task of helping to secure just social outcomes.").

[55] While Murphy and Nagel's views on taxation are neither confined to, nor directly addressed to, a Rawlsian theory of justice, it appears that because taxation, including the choice of tax base, involves the distribution of benefits and burdens across society, questions concerning the tax structure are, for a Rawlsian, properly adjudicated by the difference principle. That is, the tax base should be structured with the aim of maximizing the position of the least well-off. Interestingly, although we are not entirely certain that we are clear about Rawls's view of the issue, he seems, to us, to suggest that uniform treatment in taxation is a relevant consideration. We are uncertain whether this is a matter of equality, fairness, and/or autonomy. Rawls writes:

> [T]he burden of taxation is to be justly shared and it aims at establishing just arrangements. Leaving aside many complications, it is worth noting that a proportional expenditure tax may be part of the best tax scheme. For one thing, it 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 .... [A] proportional tax ... treats everyone in a uniform way .... [I]f proportional taxes should also prove more efficient, say because they interfere less with incentives, this might make the case for them decisive if a feasible scheme could be worked out .... [T]hese are questions of political judgment and not part of a theory of justice.

Rawls, supra note 12, at 246 (citation omitted).

[56] "[T]he choice of tax base has *only* instrumental significance for economic justice." Murphy & Nagel, supra note 1, at 98 (emphasis added).

[57] Although Murphy and Nagel never raise the issue, an additional motivation for rejecting fairness complaints about the tax base is that they could be extremely difficult to adjudicate. If taxing vanilla but not chocolate ice cream is viewed as unfair, one

previously noted in Part II, for Murphy and Nagel, there are not separate questions of fairness in taxation, only overall questions of justice. Thus, questions of tax equity must be addressed to one's conception of justice. The argument is provocative; as fascinating as it is, we think it may be overdrawn.

We have two principal objections, which we address in turn. First, we are unclear why non-instrumental arguments about the choice of tax base cannot be made with respect not to the pretax world, but rather with respect to various competing post-institutional schemes, so long as those schemes comply with the overall conception of justice. Second, the response that "fairness has been taken care of already" seems inapplicable if the conception of distributive justice is itself justified by something other than fairness per se, in other words, if the conception of justice does not itself define fairness, as may be the case in some non-Rawlsian conceptions of liberalism.

First, it is possible that even if a society's political institutions conform to a particular conception of distributive justice, so too do other conceivable post-institutional, post-tax schemes. Making comparisons among these schemes need not make reference to an incomprehensible pretax market world. For Murphy and Nagel, *new* fairness arguments cannot be invoked, both because they would hamper the achievement of the overarching conception of justice and, perhaps more importantly, because the conception of justice *defines* fairness. It does not obviously follow, however, that (non-fairness) non-instrumental reasons cannot be invoked to choose *between* schemes that satisfy the overarching conception of justice. Indeed, we are not certain how Murphy and Nagel *would* choose between such schemes. Even if one points out that fairness

might then opt for taxing the broader category of ice cream. This scheme, however, could be objectionable if other dessert items were untaxed. This fairness claim may in turn lead one to tax all desserts. Similar arguments might then be raised about desserts versus appetizers, which might lead one to tax all food. At this point, restauranteurs might object, "Why not tax expensive clothes?" This point, while interesting, might be answered as follows. We might, in the case of sales taxes, tax extremely broad categories at the same rate, and, while allowing fairness issues to be raised, be wary of allowing them to be determinative. Note that under Murphy and Nagel's framework, arguments as to the *instrumental* value of the tax base could be raised, and they might also be difficult to adjudicate. One could say, "Sure, Product X has a more inelastic demand than Product Y, but you are ignoring general equilibrium effects."

is embodied in the overarching conception so one is not entitled to choose between schemes on the basis of fairness, it does not seem incoherent to respond that the tax base that embodies more uniform treatment is preferable. This argument might be made out of deference to a democratically made decision, or as a matter of equality or autonomy.[58]

For example, assume that a government's tax base conforms to the demands of a particular conception of distributive justice, or, to use Murphy and Nagel's language, the tax base is maximally instrumental in securing just social outcomes.[59] Now, imagine that due to technological change the society can make one of several Pareto-improving changes to the tax base while still meeting the demands of its conception of distributive justice to the same extent as before the change. For example, if one held a Rawlsian conception of justice, none of the Pareto moves that have become available will affect the position of the least well-off. If all the savings from the particular change to the tax base that *is* implemented accrue to one individual, the "utility hog," the other taxpayers appear to have a comprehensible non-instrumental claim (e.g., to uniformity), one that would not need to make reference to a pre-institutional, pretax world.[60] Interschemic comparisons can refer instead to the alternative Pareto-improving move(s) that might have been made—ones that would have shifted the tax base in a manner having more uniform results. Note that invoking a non-instrumental claim here does not hamper the achievement of the overarching conception of distributive justice.

Our second objection is that it is not *necessary* that a liberal conception of distributive justice define a conception of fairness. Imagine a decent social minimum liberal with a post-institutional conception of property rights. The commitment to providing a minimum floor to the badly-off might flow from something other

---

[58] Cf. Rawls, supra note 12, at 246 ("[A] proportional tax . . . treats everyone in a uniform way . . . ."). Interestingly, Murphy and Nagel, in making reference to the role fairness plays in tax policy, state, "That does not mean that only outcomes are relevant to tax policy, because the path to a just outcome can also raise questions of justice." Murphy & Nagel, supra note 1, at 128. We are unclear, however, about the relationship between this observation and their larger claim.

[59] Murphy & Nagel, supra note 1, at 99.

[60] Murphy and Nagel briefly discuss Paretianism earlier in their book, but suggest it is of "little use in evaluating government policies." Id. at 50.

than a conception of fairness, such as beneficence or, perhaps, meeting needs.[61] In such cases, fairness has not been "taken care of" in implementing the conception of distributive justice, so arguments rooted in fairness seem to be available once a tax base has been implemented. True, fairness complaints would be subordinated to the achievement of the conception of distributive justice (here, the provision of decent social minimums), but, again, interschemic comparisons could be made, and fairness claims would seem relevant. In other words, in the special case where the conception of distributive justice neither defines fairness (e.g., Rawlsianism) nor rules it out (e.g., utilitarianism), fairness is one of the non-instrumental claims that might be relevant to choosing a tax base interschemically.

B. Applications

As Murphy and Nagel discuss more concrete issues about the tax base, their analysis seems at times to be in tension with their view that the choice of the tax base is of purely instrumental value in serving a conception of economic justice. Their account seems to admit of exceptions, but it does not fully elaborate what justifies them. One such issue is what they call "transitions"[62] in the tax base—for example, shifting from an income to a consumption tax. Here, they suggest that there exists "an important backward-looking concern, that of the protection of reasonable expectations."[63] Apparently, then, a taxpayer would be able to raise a legitimate objection to a sudden shift in the tax base, driven by instrumental calculations, if that shift undermined the taxpayer's reasonable expectations. Yet, given Murphy and Nagel's claim that the tax base should be used only to maximize a conception of economic justice, this "transition" issue should not raise troubling

---

[61] See Waldron, supra note 25, at 22.

> The main difference between the two conceptions, then, lies in the way the minimum is fixed. In one it is fixed as the upshot of a notionally equal distribution of social wealth, pursuant to what we might call the 'ordinal' idea that nobody's share should be much greater than anybody else's. In the other, it is fixed 'cardinally,' on the basis of an assessment of the resources that basic human needs require.

Id.

[62] Murphy & Nagel, supra note 1, at 128.

[63] Id.

moral issues. Murphy and Nagel suggest that transitions might be objected to on the basis of "fair play" or "autonomy."[64] For reasons discussed previously, fairness claims seem unavailable here for Murphy and Nagel, as does an appeal to autonomy in a way that might hamper the achievement of the conception of distributive justice. True, autonomy might play a role in such a conception, but Murphy and Nagel do not make that claim;[65] in short, their objection seems to be addressed to the wrong level.

For example, imagine, as is plausible, that unsettling taxpayers' expectations through "retroactive" taxation is advantageous in an instrumental sense because it leads to fewer tax-driven distortions in taxpayers' choices.[66] For Murphy and Nagel, that should be enough to trump any concerns about fairness or autonomy because letting those concerns constrain our unsettling of expectations will prevent us from meeting the demands of our maximizing conception of distributive justice. Another way of stating this would be that if the tax base *is* of merely instrumental value, taxpayer expectations of stability in the tax base would seem *un*reasonable.

---

[64] Id. at 129 ("The norm of protecting reasonable expectations may be explained by appeal to some notion of fair play, but it seems more importantly to be connected to the value of autonomy . . . .").

[65] Perhaps the argument is that the tax base must be instrumental in serving an overall conception of justice, rather than simply distributive (that is, economic) justice. From the text, we are not clear what Murphy and Nagel's view is on this point. See, e.g., id. at 98–99 (referring variously to "economic justice," "justice," and "social justice"); id. at 18–19 (referring variously to "social justice," "theory of justice," and "social and economic justice"). Because Murphy and Nagel never explicitly embrace a specific theory of distributive justice, let alone a full-blown theory of justice, we take the transitions objection to be one of first-order moral judgment, rather than an appeal to an overarching conception of justice. In particular, note that Murphy and Nagel combine their autonomy objection with a "fair play" objection. Id. at 129. If the autonomy concern fits within an overarching theory of justice, a "fair play" objection surely—for Murphy and Nagel—does not, even given a full-blown conception of justice. Therefore, the combination of autonomy and "fair play" objections suggests that Murphy and Nagel are not obviously appealing to an overarching theory of justice.

If the tax base is serving an overall conception of justice, then, for example, a Rawlsian theorist might select the tax base instrumentally but subject to the lexically prior liberty principle that would include autonomy concerns. See Rawls, supra note 12, at 266–67. A utilitarian, however, would not allow autonomy to constrain a choice of tax base that is instrumental in maximizing utility. Autonomy, to the extent it is relevant, would be of purely instrumental value.

[66] Saul Levmore, The Case for Retroactive Taxation, 22 J. Legal Stud. 265, 273 (1993).

Murphy and Nagel raise autonomy concerns again when arguing against including endowments[67] in the tax base. They suggest that taxing a law school graduate who pursues sculpture as a career as if he were a corporate attorney would impermissibly constrain autonomy in occupational choice.[68] Again, it appears that Murphy and Nagel are raising non-instrumental moral criteria in evaluating the choice of tax base. These reasons seem not to flow from an overarching conception of justice because Murphy and Nagel seem willing to make trade-offs between autonomy and welfare. Indeed, they write, "[G]iven the dubiousness of the welfare gains an endowment tax would bring, it would not be a serious option, even if the information required for its implementation were available."[69] This implies that had the welfare gains been great enough, autonomy would be traded for welfare. The difficulty with this point is that questions of autonomy, in most liberal theories, are thought to take lexical priority over gains in welfare.[70]

Another example of the tension between Murphy and Nagel's argument about how the tax base should be chosen and the specific applications of their general thesis arises in their treatment of the charitable deduction.[71] Here, they make the not-unfamiliar argu-

---

[67] Endowment taxation taxes the ability to earn income rather than actual income (that is, human capital is included in the tax base). See Murphy & Nagel, supra note 1, at 20.

[68] Id. at 123. Interestingly, if one holds a pre-institutional conception of property rights and understands these rights as a matter of autonomy, the choice to preserve autonomy less obviously favors income over endowment taxation. This is because income taxation also infringes autonomy to some degree.

Murphy and Nagel also raise practical concerns about the difficulty of implementing endowment taxation. See id. at 20, 122. As they note, economists, who focus more on utility than autonomy, often prefer an endowment theory but settle for income taxation as a "second best" option due to pragmatic concerns about the difficulty of implementing endowment taxation. Id. This instrumental argument raises the question of whether zero endowment taxation is the optimal level. Perhaps we could attempt to implement some relatively low rate of endowment taxation, using proxies for ability to earn income such as education, in an attempt to reduce the free-riding that otherwise ensues when a "surfer" enjoys security but avoids paying the income tax by consuming leisure and not working.

[69] Id. at 125.

[70] Of course, trading off the instrumental value of autonomy against other welfare gains would be permissible for a utilitarian. See id. at 122 (discussing the "value of freedom of action as a component of welfare").

[71] I.R.C. § 170 (West 2002).

ment[72] that a tax credit at a flat rate is preferable to a deduction because the tax deduction is more favorable to taxpayers in higher tax brackets.[73] That is, the government subsidizes more of the donation if the donor's tax rate is fifty percent—he or she only forgoes fifty dollars of consumption for making a charitable contribution of one hundred dollars—than if it is twenty-five percent in which case a one hundred dollar donation requires the taxpayer to forgo seventy-five dollars of consumption. A flat rate tax credit set at thirty-three percent would, in contrast, require each taxpayer to forgo sixty-seven dollars in consumption to fund a one hundred dollar contribution.

Yet this seeming fairness argument is inconsistent with their view that "information about the actual incidence of tax burdens is of instrumental importance only"[74] and that we "cannot decide whether a tax preference is unfair by examining it in isolation."[75] Their criticism of the deduction offers a non-instrumental argument (the deduction gives high-bracket taxpayers too much "say") that is based on comparing the effect of a deduction to the effect of a flat rate credit *in isolation.* An analysis consistent with their position that the tax base, in and of itself, is morally neutral would need to examine first, whether the higher brackets are themselves set *in contemplation of* utilizing a deduction rather than a credit—that is, today's high-bracket rates may be higher than they *otherwise would be* if the benefit of having more "say" were not being allocated to higher-income taxpayers[76]—and second, whether there are instrumental reasons to favor the deduction over a credit.[77]

---

[72] E.g., Charles T. Clotfelter, Tax-Induced Distortions in the Voluntary Sector, 39 Case W. Res. L. Rev. 663, 683–84 (1989) (collecting sources and noting imprecations of charitable deduction including "plutocratic bias" and "'upside-down' subsidy").

[73] Murphy & Nagel, supra note 1, at 127 ("[T]he current system is defective for allowing those in higher tax brackets a greater say.").

[74] Id. at 131.

[75] Id. at 171. Indeed, they further assert that "[r]emoving but one kind of unfairness in a multiply unfair world might make things less fair, overall." Id. at 108.

[76] See, e.g., Jeff Strnad, The Charitable Contribution Deduction: A Politico-Economic Analysis, *in* The Economics of Nonprofit Institutions 265, 268–76 (Susan Rose-Ackerman ed., 1986) (viewing charitable deduction as arising from a political bargain between interest groups).

[77] See, e.g., Mark P. Gergen, The Case for a Charitable Contributions Deduction, 74 Va. L. Rev. 1393, 1406 (1988) (discussing the price-elasticity of giving).

Finally, viewing the choice of tax base as purely instrumental to a conception of economic justice would seem to exclude claims of discrimination in the choice of tax base on the grounds of race, sex, age, etc., so long as such discrimination was instrumental in satisfying the demands of the distributive scheme. Murphy and Nagel devote a short chapter toward the end of the book, Chapter 8, to "Tax Discrimination."[78] The arguments presented in this chapter seem to be in tension with their central argument about the choice of tax base. In some places they use language that appears to qualify their earlier claims. For example, they state that "in *many* cases the relevance of a difference for tax purposes is *mainly* instrumental."[79] They go on to characterize as "questionable" the redistributive outcome of cigarette taxes[80] (an analysis performed in isolation) and state that "racial, religious, or sexual ground[s] for differential [tax] treatment would not be allowable under our system."[81] Despite their qualified language in this chapter, they do continue to argue that differential burdens on consumption choices are morally permissible.[82]

Murphy and Nagel argue that there is a difference between "carefully targeted tax breaks" that "invite assessment on grounds of justice" because they "add[] a subsidiary redistribution" and other violations of the principle of horizontal equity.[83] It is not clear what theoretical resources Murphy and Nagel have to draw on in making this distinction given their general arguments about the tax base. Although they do not explicitly make the argument, Murphy and Nagel must have in mind here that some forms of discrimination are ruled out by (non-economic) aspects of a theory of justice. Although we are not entirely clear as to the distinction between "tax breaks" and other violations of horizontal equity, we would

---

[78] Murphy & Nagel, supra note 1, at 162–72.

[79] Id. at 163 (emphasis added).

[80] Id. at 165.

[81] Id. at 166.

[82] See id. at 170–71.

[83] Id. at 164. In Chapter 5, Murphy and Nagel briefly note that "an entirely arbitrary decision to tax some consumption choices more heavily than others would be suspect." Id. at 109. "But if . . . justified by respectable social goals . . . it would be perfectly legitimate from the point of view of justice." Id. at 109. We do not take this latter point to be a qualification of their major theme, since it seems to allow for a purely instrumental approach to achieving legitimate social goals.

note that, for example, under a Rawlsian view, racial or sexual discrimination is ruled out by the opportunity principle on the ground that it does not leave "offices and positions open to all."[84] To the extent that Murphy and Nagel's arguments against racial and sexual discrimination in the tax base are grounded in the non-economic elements of an overall theory of justice, we are not clear why such elements might not similarly prohibit other forms of disparate treatment in the tax base.

IV. TAXATION OF GIFTS

Murphy and Nagel turn in Chapter 7 to the issue of the taxation of inheritances, intra-familial gifts, and estates. They take a strong stance in favor of taxing intra-familial gifts at both the donor and the donee levels. That is, the donor does not receive a deduction for the gift amount and therefore makes the gift out of after-tax income.[85] For the donee, in turn, the gift is subject to income tax. Of course, even if the donor has already paid income taxes on donated wealth, the estate tax may take an additional slice from the donor in the case of bequests. The authors make the sensible point that it seems odd to object to this "double taxation" on principle, given the fact that money that has already been taxed once is frequently taxed again, as when after-tax income spent on consumption is subject to a sales tax.[86] As they note, the real issue is the total effect of such multiple layers of taxation, not their mere existence.[87]

Murphy and Nagel's proposed system differs from that imposed by the current tax code, according to which donors make gifts out of after-tax income, but donees take gifts tax-free.[88] Murphy and Nagel make several arguments in favor of taxing both the donor and the donee. Donees, they argue, should be taxed because re-

---

[84] Rawls, supra note 12, at 266.

[85] Murphy & Nagel, supra note 1, at 148–50.

[86] Id. at 143. In addition, the bequest of an asset that has appreciated in value but whose appreciation has not yet been taxed due to the realization requirement will not trigger income (here, capital gain) taxation on the appreciation due to the step-up of basis at death. I.R.C. § 1014(a) (West 2002). Gifts made while the donor is alive, however, result in the transfer of the donor's basis to the donee. I.R.C. § 1015 (West 2002).

[87] Murphy & Nagel, supra note 1, at 143.

[88] I.R.C. § 102 (West 2002).

ceiving gifts increases their consumption and/or wealth.[89] This seems uncontroversial and, as they suggest, perhaps the reason the current system taxes donors rather than donees is that donors are presumed, on average, to have higher incomes—and hence higher marginal tax rates—than donees.[90] More controversially, Murphy and Nagel argue that even if we *do* begin to tax donees, we should continue to tax donors. They make this assertion because they believe that wealth, even if given away, "contributes to [donors'] welfare"[91] and therefore is properly included in the tax base of donors.[92]

This suggestion, however, puzzles us. The argument seems to turn on a suppressed premise that makes us wonder whether the argument should be properly understood as an argument about taxing the "income" of donors, as much as it is an argument in favor of widening the tax base beyond income. The suppressed premise appears to be that governments should tax "influence," "sway," or "power." Murphy and Nagel argue that donors should be taxed because the mere possession of wealth, even if given away, increases welfare. They provide as examples "security, political power, and social standing," the encouragement of others to provide "special treatment,"[93] presumably in the hope of reaping some reward, and the "knowledge that . . . wealth can be passed on."[94] The difficulty of making this an argument solely about taxing donors is that there are many sources of such influence and peace of mind. Wealth is doubtless among them, but so too are charisma, beauty, and a family history of longevity. So the fact that the wealthy have more influence and security does not itself justify (given a tax base that does not tax other influence-producing attributes) taxing both donors and donees. Murphy and Nagel, how-

---

[89] Murphy & Nagel, supra note 1, at 145.

[90] See id. at 147.

[91] Id. at 149–50 ("Whether the wealth is kept or given away, the wealthy person enjoys its benefits.").

[92] Assuming, on average, donors face higher tax rates than donees, the current tax code penalizes gift-giving if the "proper" treatment is a deduction for donors and inclusion in the income of donees. One might, in some rough way, view the taxing of donors as combining an income tax levied on donees with a "sales tax" levied on donors based on the (slight) increase in welfare that the ability to dispose of the gift confers due to sycophant attraction.

[93] Murphy & Nagel, supra note 1, at 114–15.

[94] Id. at 149–50.

ever, do not argue for widening the tax base so dramatically. If they wish to single out donating, it seems that, based on their view of the tax base, they need to argue that taxing both donors and donees would be maximally instrumental in achieving their distributive social aims.

There are, as Murphy and Nagel clearly recognize, other arguments in support of taxing both donors and donees. For example, there are forms of political liberalism, such as those concerned with equality of opportunity,[95] that would seek to place disabilities on gift-giving. But other forms of liberalism, such as a "moderate" liberalism concerned principally with ensuring a decent social minimum for the least well-off, would not, in and of themselves, need to feature a commitment to taxing both donors and donees unless other forms of influence were taxed as well.

In addition, one could raise questions as to how reliably the donor's welfare is increased even though he or she has given away income. The donor's gift, though gratuitous from a legal standpoint, may be made in order to satisfy some form of other-regarding *duty*. It seems anomalous, or at least quite strained, to assert that in such a case both the donor and the donee enjoy increases in welfare and should be taxed. Indeed, discharging one's duties is more naturally thought of as *reducing*, not enhancing, one's welfare.

Murphy and Nagel implicitly seem to acknowledge this tension by asserting that there should be certain exceptions to their general framework under which both donors and donees are taxed. They suggest that, if the donor is supporting dependent children, an "exception" excluding the transfer from the income of the donee is warranted.[96] They also advocate an exception for "personal gifts up to some [annual] modest total value" for "transfers between spouses" and, "probably," for "support for other legal dependents."[97] Although these exceptions seem intuitively plausible, it is unclear exactly how they are justified.

Murphy and Nagel provide two arguments that purport to justify their exemptions. They are, first, an argument that supporting dependents should not be burdened, and second, the pragmatic claim

---

[95] Murphy and Nagel discuss these forms of liberalism under the rubric of "equal libertarianism." Id. at 154–59.

[96] Id. at 145, 150.

[97] Id. at 146, 150–51.

that taxing small gifts does "more harm than good."[98] The latter may or may not be true as an empirical matter. However, it is not obviously true; after all, we tax small amounts of income, which may indicate that there is some net gain from pursuing the taxation of small transactions. With regard to the former, providing exemptions only for dependents seems under-inclusive. It seems to us that what justifies an exemption in the case of dependents is the fact that there exists an operative, other-regarding duty, such as the duty parents owe to their children. If the existence of a duty is what motivates and justifies an exemption in the case of dependents, an exemption would seem justified when different other-regarding duties are (also) in place (for example, duties of justice, beneficence, and rescue). Indeed, the case for an exemption seems even stronger when the duty is owed to a stranger than to a dependent. Under Murphy and Nagel's account of gift-giving, which taxes the donor based on the influence that comes from the ability to give, it seems plausible that the donor's welfare is increased *more* by gifts to a child, which could be used to control the child in some sense, than by gifts to relatively anonymous and hence difficult-to-control disaster victims.

If we are right that a plausible justification for excluding gifts from the donor's (or, for pragmatic reasons, the donee's) tax base is that the donor is fulfilling other-regarding duties, that argues for a *broader* set of exemptions than proposed by Murphy and Nagel. Consider the charitable contribution deduction. If charitable gifts meet other-regarding duties, and the gift does not increase the donor's welfare, charitable donations should be deductible to donors.[99] Murphy and Nagel, as we noted previously, reject this view and argue for a tax credit. To be sure, our view would, on its own, seem to advocate tax deductions for direct cash gifts to the poor,[100] rather than only for gifts channeled through charities, but this limitation may be justifiable on other, pragmatic grounds.

---

[98] Id. at 151.

[99] There are also well-developed arguments for leaving such donations untaxed at the level of the charitable recipient. Boris I. Bittker & George K. Rahdert, The Exemption of Nonprofit Organizations from Federal Income Taxation, 85 Yale L.J. 299, 307 (1976) ("[C]omputing [public service organizations'] 'net income' would be a conceptually difficult, if not self-contradictory task.").

[100] Such deductions are not permitted under our present system of tax law. Id. at 312.

If donations are taxed to the donor as well as to the donee, this has the effect of making certain forms of consumption more costly than others.[101] Improving the welfare of others would be more costly than purchasing goods and services for one's own use. For example, imagine that *A* views as consumption, and desires, an increase in his adult son's welfare. He secures this increase by giving his son a gift out of his after-tax income. Assuming a forty percent tax rate, under Murphy and Nagel's tax framework, *A*'s pretax income of one hundred dollars is reduced to sixty dollars by taxation; *A* then makes a gift of sixty dollars to the son, who pays twenty-four dollars in tax, leaving the son with a gift, net of taxes, of thirty-six dollars. *B*, in contrast, prefers to consume expensive clothing. His pretax income of one hundred dollars leads to his ability to consume clothing worth sixty dollars. *A*, then, is disadvantaged as compared to *B* in using his after-tax income to fulfill his consumption desires.[102] Murphy and Nagel, however, dismiss any fairness arguments about burdening some forms of consumption more than others, for reasons that we analyzed previously in Part III.

CONCLUSION

In this Review, we have attempted to explain, analyze, and at times, critique Murphy and Nagel's view of the role that claims of justice and fairness play in tax policy and liberal political philosophy. We hope that the careful attention we have given their view is in keeping with Murphy and Nagel's hope that questions of political philosophy will become more central to the tax literature.[103]

We embrace Murphy and Nagel's central claim that it makes little sense to engage arguments over tax policy without an antecedently held conception of distributive justice and that questions of tax policy must be consistent with one's conceptions of distributive

---

[101] Murphy & Nagel, supra note 1, at 153–54.

[102] Of course, there *is* the additional argument that *A*'s son should pay taxes on the gift-income, just as he would pay on any other income. Our point, however, is not to deny this fairness argument, but rather to point out that there are two types of fairness involved: (1) whether to tax the lucky son as compared to others with similar amounts of (earned) income, and (2) whether to tax *A* and *B*'s consumption choices differently.

[103] Murphy & Nagel, supra note 1, at 4 ("[T]here seems to us to be a gap or at least an underpopulated area in philosophical discussion of the ethical dimensions of public policy, and this book is intended to make a start at occupying it.").

justice. We believe, however, that some aspects of their argument are, ultimately, too strong. We have attempted to show that traditional metrics of tax policy analysis such as the benefit principle and the equal sacrifice principle are neither completely irrelevant to tax policy nor inconsistent with all versions of political liberalism. Further, we have tried to show that questions of uniformity are not necessarily irrelevant to the selection of the tax base. Instead, we adopt the view that such concerns of uniformity may be useful to political liberals when conceptions of distributive justice are indeterminate with regard to tax base and tax policy. Finally, we have tried to show that the central claims of Murphy and Nagel's argument are, to some extent, in tension with what they take to be their view's practical applications.

Despite our concerns about some aspects of Murphy and Nagel's argument, *The Myth of Ownership: Taxes and Justice* is an exciting book. Its central claim is bold, and the arguments to it powerful. The book has sparked and will continue to spark lively debate among political philosophers, legal academics, and tax policy analysts alike. The work should also bring philosophical sophistication to contemporary tax policy debates and will certainly serve as a springboard for interdisciplinary work and reflection at the intersection of tax policy and political philosophy.