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Private Property and Tax Policy in a Libertarian World: A Critical Review

David G. Duff

I. Introduction

The idea that taxes, particularly personal income and wealth transfer taxes, involve the confiscation of private property is widely held in popular thinking and scholarly writing. Commentators and politicians, for example, routinely describe taxes as “your money”,¹ while those advocating tax cuts regularly promise to “give you your money back”.² A similar perspective affects much scholarly writing on taxation, which is often characterized as the “removal”, “surrender”, “taking” or “confiscation” of the taxpayer’s property.³

While these views are often associated with conservative political ideologies, their influence is much greater. Politically, the conviction that taxes deprive people of *their* money shapes both conservative arguments for tax cuts and liberal arguments that taxes are the price that must be paid for a civilized society.⁴ At the same time, the idea that all taxes entail an imposition on private property has had a major impact on tax policy scholarship—affecting conventional understandings about the goals of taxation and the meaning of tax fairness.⁵ In each respect, as Liam

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1. See, e.g., David MacRae, “Cut Taxes to Increase Revenues” *Le Quebecois Libre* (30 September 2000), online: <http://www.quebecoislibre.org/000930-12.htm>; and Stephen Harper, Leader of the Conservative Party of Canada, “Address to the Frontier Centre for Public Policy” (17 May 2002) available at http://www.fcpp.org/publication_detail.php?PubID=759.
 2. See Progressive-Conservative Party of Ontario, “The Common Sense Revolution” *The Ontario PC Party* (May 1994), online: Ontario PC Party http://www.ontariopc.com/feature/csr/csr_text.htm. See also George W. Bush, “George W. Bush on Tax Reform” *On the Issues* (4 November 2000) online: OnTheIssues.org—Candidates on the Issues http://www.issues2000.org/Celeb/George_W_Bush_Tax_Reform.htm.
 3. See, e.g., Art Cockfield, “Income Taxes and Individual Liberty: A Lockean Perspective on Radical Consumption Tax Reform” (2001) 46 S. Dakota L. Rev. 8 at 28 (“All tax systems impose some form of restriction on personal liberty because they mandate government removal of some aspect of an individual’s property”); Richard A. Epstein, “Taxation in a Lockean World” (1986) 4:1 Soc. Phil. & Pol’y 49 at 49 (“Taxation is the power to coerce other individuals to surrender their property *without* their consent”); Geoffrey Brennan & James M. Buchanan, *The Power to Tax: Analytical Foundations of a Fiscal Constitution* (Indianapolis, IN: Liberty Fund, 2000) at 11 (“the power to ‘tax’ is simply the power to ‘take’”); and Graeme S. Cooper, “Income Tax Law and Contributive Justice: Some Thoughts on Defining and Expressing a Consistent Theory of Tax Justice and Its Limitations” (1986) 3 Aus. Tax Forum 297 at 297 (“The imposition and collection of tax by a government is a confiscation of the private property of a citizen”).
 4. *Compania General de Tabacos de Filipinas v. C.I.R.* (1927), 275 U.S. 87 at 100 (per Holmes, dissenting). For a more recent argument along these lines, see Stephen Holmes & Cass Sunstein, *The Cost of Rights: Why Liberty Depends on Taxes* (New York: W.W. Norton & Company, 1999).
 5. As a general rule, conventional tax scholarship specifies the goals of tax policy as equity, efficiency and administrative simplicity and defines tax fairness as horizontal equity (the principle that persons with the same taxable capacity should pay the same tax) and vertical equity (the principle that persons with a greater taxable capacity should pay an appropriately greater amount of tax). See, e.g., Robin W. Boadway & Harry M. Kitchen, *Canadian Tax Policy*, 3rd ed. (Toronto, ON: Canadian Tax Foundation, 1999) at 52-86. For an insightful critique of traditional concepts

Murphy and Thomas Nagel have argued, much thinking about taxation reflects a sort of unconscious libertarianism.⁶

This article challenges the libertarian foundations of this tax scholarship by critically examining libertarian theories of private property and their implications for tax policy. Part II summarizes the leading libertarian theories of private property, reviewing John Locke's argument in the *Second Treatise of Government*⁷ and Robert Nozick's account in *Anarchy, State and Utopia*.⁸ Part III examines the implications of these libertarian theories for tax policy, considering libertarian prescriptions for substantive tax measures as well as institutional arrangements that affect tax policy outcomes. Part IV criticizes the libertarian theories of private property considered in Part II of the article, casting doubt on tax thinking that relies on these libertarian foundations. Part V considers the implications of this critique for tax policy and tax scholarship.

II. Private Property in a Libertarian World

According to libertarian theories, the sole legitimate purpose of the state is to protect the personal liberty and private property to which each individual is entitled as a matter of natural right. As Richard Epstein contends, “the end of the state is to protect liberty and property, as these conceptions are understood independent of and prior to the formation of the state.”⁹ For this purpose, it follows, it is necessary to explain the liberty and property rights that individuals may possess irrespective of the state. The two most prominent libertarian accounts of natural property rights are found in Locke's *Second Treatise on Government* and Nozick's *Anarchy, State and Utopia*.

A. The State of Nature and Private Property in Locke's *Second Treatise*

Locke's theory of private property begins with the state of nature that he envisions prior to the formation of political or civil society.¹⁰ In this condition, he maintains, individuals are both free and equal—enjoying “a *state of perfect freedom* to order

of tax fairness, see Liam Murphy & Thomas Nagel, *The Myth of Ownership: Taxes and Justice* (Oxford: Oxford University Press, 2002) at 12-39.

6. *Ibid.* at 27 (suggesting that “[a]n unreflective form of libertarianism casts a shadow over much discussion of tax policy”) and 31-37 (criticizing the “everyday libertarianism” that influences much thinking about tax policy).

7. John Locke, *Second Treatise of Government* (1690), ed. by C.B. Macpherson (Cambridge: Hackett Publishing Company, Inc., 1980) at ch. V.

8. Robert Nozick, *Anarchy, State and Utopia* (New York: Basic Books, 1974).

9. Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* (Cambridge, MA: Harvard University Press, 1985) at 5. See also Eric Mack, “Liberty and Justice” in John Arthur & William H. Shaw, eds., *Justice and Economic Distribution* (Englewood Cliffs, NJ: Prentice Hall, 1978) 183 at 184.

10. Locke, *supra* note 7 at 8-14 [chap. II]. For useful discussions of Locke's theory of private property, see James Tully, *A Discourse on Property: John Locke and His Adversaries* (Cambridge: Cambridge University Press, 1980); Jeremy Waldron, *The Right to Private Property* (Oxford: Clarendon Press, 1988) at 137-252; and Gopal Sreenivasan, *The Limits of Lockean Rights in Property* (Oxford: Oxford University Press, 1995).

their actions, and dispose of their possessions and persons, as they think fit,”¹¹ and “[a] *state also of equality*, wherein all the power and jurisdiction is reciprocal, no one having more than another”¹²—but also subject to a “law of nature” that obliges each individual not to harm the “life, health, liberty or possessions” of another, to preserve oneself, and “*to preserve the rest of mankind*” as much as possible whenever one’s own preservation “comes not in competition”.¹³ In this state of nature, as well, he adds, the earth and all natural resources are initially held “in common”,¹⁴ making it difficult to imagine “how any one should come to have a *property* in any thing”,¹⁵ at least without some kind of agreement to this effect. Since Locke sought to justify private property as a pre-political natural right, it was necessary to show how individuals could acquire title to parts of this common “without any express compact of all the commoners.”¹⁶ Locke’s argument is essentially twofold.

First, he suggests, a right to private property originates in the duty of self-preservation affirmed by the law of nature.¹⁷ Since this duty and natural reason imply a right to self-preservation,¹⁸ Locke begins, “there must of necessity be *a means to appropriate*” the plants and animals that nature affords for human subsistence “before they can be of any use, or at all beneficial to any particular man.”¹⁹ If “the consent of all mankind” were required for this purpose, however, “man [would have] starved, notwithstanding the plenty God had given him.”²⁰ Consequently, he concludes: “The fruit, or the venison, which nourishes the wild *Indian*, who knows no inclosure, and is still a tenant in common, must be his, and so his, *i.e.* a part of him, that another can no longer have any right to it, before it can do him any good for the support of his life.”²¹

More importantly, Locke argues, property rights can attach to things that individuals “remove” from their natural condition through labour.²² Since each individual “has a *property* in his own person, to which “no body has any right . . . but himself,” he reasons, “[t]he *labour* of his body, and the *work* of his hands . . . are properly his.”²³ In addition, he contends, whatever a person “removes out of the state that nature hath provided, and left it in, he hath mixed his *labour* with, and

11. Locke, *supra* note 7 at 8 [chap. II, para. 4].

12. *Ibid.*

13. *Ibid.* at 9 [chap. II, para. 6].

14. *Ibid.* at 18 [chap. V, para. 25]. Locke adopts this position on the grounds of “natural reason” and “revelation”—the former suggesting that “men, being once born, have a right to their preservation, and consequently to meat and drink, and such other things as nature affords for their subsistence”; the latter proclaiming that “God, as King *David* says, *Psal. cxv. 16. has given the earth to the children of men; given it to mankind in common.*” *Ibid.*

15. *Ibid.*

16. *Ibid.* For useful discussions of this consent problem, see Waldron, *supra* note 10 at 149-53; and Sreenivasan, *supra* note 10 at 24-32.

17. See the discussions in Waldron, *supra* note 10 at 145-47 and 168-71; and Sreenivasan, *supra* note 10 at 23-24.

18. Locke, *supra* note 7 at 18 [chap. V, para. 25].

19. *Ibid.* at 19 [chap. V, para. 26].

20. *Ibid.* at 19 [chap. V, para. 28].

21. *Ibid.*

22. See the discussions in Tully, *supra* note 10 at 116-24; Waldron, *supra* note 10 at 171-94; and Sreenivasan, *supra* note 10 at 59-92.

23. Locke, *supra* note 7 at 19 [chap. V, para. 27].

joined it to something that is his own, and thereby makes it his property.”²⁴ In this way, he maintains, individuals could “exclude ... the common right of other men”²⁵ and acquire “distinct titles” in parts of the original common,²⁶ without resorting to any express agreement.

Nonetheless, Locke continues, this argument is subject to two qualifications. First, he insists, individuals may only appropriate that which they “can make use of to any advantage of life before it spoils”²⁷—emphasizing that “whatever is beyond this, is more than his share, and belongs to others.”²⁸ Second, he suggests, the property rights that a person can acquire in something by removing it from its natural condition attach only “where there is enough, and as good, left in common for others.”²⁹ Following C.B. Macpherson, these qualifications may be termed the spoilage and sufficiency limitations.³⁰

For Locke, however, neither of these qualifications is a serious barrier to private appropriation of the original commons in the state of nature. Although “the first commoners of the world” sought “things of *short duration*” that “if ... not consumed by use, will decay and perish of themselves,”³¹ the evolution of barter and exchange allowed people to trade perishable goods for money: “some lasting thing that men might keep without spoiling.”³² On this basis, Locke concludes, appropriation could expand beyond what could be consumed personally, leading to “a disproportionate and unequal possession of the earth, ... made practicable out of the bounds of society, and without compact.”³³

Nor does the second limitation prevent private appropriation, Locke argues, since “there was still enough, and as good left”³⁴ for others during the “first peopling

24. *Ibid.* See also *ibid.* at 27 [chap. V, para. 44]: “though the things of nature are given in common, yet man, by being master of himself, and proprietor of his own person, and the actions or labour of it, had ... in himself the great foundation of property.”

25. *Ibid.* at 19 [chap. V, para. 27].

26. *Ibid.* at 25 [chap. V, para. 39].

27. *Ibid.* at 20 [chap. V, para. 31]. See also *ibid.* at 21 [chap. V, para. 32]: “As much land as a man tills, plants, improves, cultivates, and can use the product of, so much is his property.”

28. *Ibid.* at 20-21 [chap. V, para. 31]. See also *ibid.* at 24 [chap. V, para. 38]: “if either the grass of his inclosure rotted on the ground, or the fruit of his planting perished without gathering, and laying up, this part of the earth, notwithstanding his inclosure, was still to be looked on as waste, and might be the possession of any other.” For a useful discussion of the theological foundation of this limitation, see Tully, *supra* note 10 at 121-24.

29. *Supra* note 7 at 19 [chap. V, para. 27]. See also *ibid.* at 21 [chap. V, para. 33]: “he that leaves as much as another can make use of, does as good as take nothing at all” and *ibid.* at 22 [chap. V, para. 34]: “He that had as good left for his improvement ... needed not complain”

30. C.B. Macpherson, *The Political Theory of Possessive Individualism* (Oxford: Oxford University Press, 1962) at 197-221. For an alternative discussion of these qualifications, see Waldron, *supra* note 10 at 207-18 (questioning the existence of a distinct sufficiency limitation apart from other aspects of Locke’s theory). For a critical response to Waldron’s argument, see Sreenivasan, *supra* note 10 at 37-41.

31. *Supra* note 7 at 28 [chap. V, para. 46].

32. *Ibid.* at 28 [chap. V, para. 47].

33. *Ibid.* at 29 [chap. V, para. 50]. For useful discussions of the role that money and exchange plays in Locke’s theory of private property, see Tully, *supra* note 10 at 145-54; Waldron, *supra* note 10 at 218-25; and Sreenivasan, *supra* note 10 at 35-36.

34. Locke, *supra* note 7 at 21 [chap. V, para. 33]: “Nor was this appropriation of any parcel of land, by improving it, any prejudice to any other man, since there was still enough, and as good left; and more than the yet unprovided could use. So that, in effect, there was never the less left for others because of his inclosure for himself.”

of the great common of the world” when “[t]he law man was under, was ... for appropriating,”³⁵ and even in his own day in the “vacant places of *America*.”³⁶ More importantly, he contends, the productivity associated with private property is so great that “he who appropriates land to himself by his labour, does not lessen, but increase the common stock of mankind.”³⁷ Indeed, he concludes: “he that incloses land, and has a greater plenty of the conveniencies of life from ten acres, than he could have from an hundred left to nature, may truly be said to give ninety acres to mankind: for his labour now supplies him with provisions out of ten acres, which were but the product of an hundred lying in common.”³⁸ As a result, he suggests, even if there were no longer “enough and as good” left for others to appropriate, private appropriation might be justified by the productivity of private property compared to the original commons.³⁹

Although Locke is not explicit on the specific rights that attach to private property,⁴⁰ he clearly assumes that these include the right to possess the property (which cannot be taken without the owner’s consent⁴¹) the right to use the property (“to any advantage of life”⁴²) and a right to bequeath the property as one pleases.⁴³ Since these rights are subject to a natural duty to preserve mankind once one’s own preservation is secure, however, they are not unlimited.⁴⁴ On the contrary, Locke maintains, the property rights that one can acquire through labour or bequest are subject to a natural right to charity among those without any other means of subsistence,⁴⁵

35. *Ibid.* at 22 [chap. V, para. 35].

36. *Ibid.* at 23 [chap. V, para. 36]: “And the same *measure* may be allowed still without prejudice to any body, as full as the world seems: for supposing a man, or family, in the sate they were at first peopling of the world ...; let him plant in some in-land, vacant places of *America*, we shall find that the *possessions* he could make himself upon the *measures* we have given, would not be very large, nor, even to this day, prejudice the rest of mankind, or give them reason to complain, or think themselves injured by this man’s inchoachment, though the race of me have now spread themselves to all the corners of the world, and do infinitely exceed the small number was at the beginning.”

37. *Ibid.* at 23 [chap. V, para. 37], adding: “for the provisions serving to the support of human life, produced by one acre of inclosed and cultivated land, are (to speak much within compass) ten times more than those which are yielded by an acre of land of an equal richness lying waste in common.”

38. *Ibid.* at 23-24 [chap. V, para. 37].

39. For a similar conclusion, see Geoffrey P. Miller, “Economic Efficiency and the Lockean Proviso” (1987) 10 *Harv. J. L. & Pub. Pol’y* 401. See also Sreenivasan, *supra* note 10 at 54-58.

40. See the discussion in Sreenivasan, *supra* note 10 at 96-100.

41. See, e.g., Locke, *supra* note 7 at 73 [chap. XI, para. 138] (insisting that “[t]he *supreme power cannot take* from any man any part of his *property* without his own consent”) and 74 [chap. XI, para. 140] (asking “what property have I in that, which another may by right take, when he pleases, to himself?”).

42. *Ibid.* at 20 [chap. V, para. 31].

43. See, e.g., *ibid.* at 39 [chap. VI, para. 72] (referring to “the power men generally have to *bestow their estates* on those who please them best”).

44. See, e.g., Waldron, *supra* note 10 at 145-47.

45. John Locke, *Two Treatises of Government* (1690), ed. by Peter Laslett (Cambridge: Cambridge University Press, 1988) at 170 [*First Treatise*, chap. 4, para. 42]: “God the Lord and Father of all, has given no one of his Children such a Property, in his peculiar portion of the things of this World, but that he has given his needy Brother a Right to the Surplusage of his Goods; so that it cannot justly be denied him, when his pressing Wants call for it... As *Justice* gives every Man a Title to the produce of his honest Industry and the fair Acquisitions of his Ancestors descended to him, so *Charity* gives every Man a Title to so much of another’s Plenty, as will keep him from extream want, where he has no means to subsist otherwise.” On the right to charity in Locke’s

and a natural right of inheritance on the part of dependent children.⁴⁶

B. Private Appropriation in Nozick's Entitlement Theory

Like Locke, Nozick begins his account of private property with a state of nature in which individuals “generally satisfy moral constraints and generally act as they ought.”⁴⁷ Unlike Locke, however, Nozick does not assume that resources are originally held in common—explaining in contrast to Locke that the first task for a theory of private property is to show “how *unheld* things may come to be held.”⁴⁸ For Nozick, a just system of private ownership depends on principles of justice in the acquisition of unheld things, in the transfer of justly acquired holdings, and in the rectification of past injustices.⁴⁹ Together, he explains, these principles constitute an entitlement theory of private property, the justice of which depends on historical events rather than “end-result” or “patterned” principles of distributive justice.⁵⁰

Although Nozick's assumption that resources are initially unowned suggests that original acquisition might be achieved more easily than Locke imagined, the moral significance of this difference should not be exaggerated.⁵¹ On the contrary, as Nozick himself acknowledges, even if an object is unowned prior to its acquisition and not held in common, its acquisition by one person “changes the situation of all others”. “Whereas previously they were at liberty (in Hohfeld's sense) to use the object, they now no longer are.”⁵² For this reason, like Locke, Nozick must provide some justification for private property—a justification that cannot depend on social convention or the state.

For Locke, this justification depends on a natural right of self-preservation and entitlement to the products of one's labour, subject to a spoilage limitation that is overcome through the development of money and a sufficiency limitation that is

theory of property, see Tully, *supra* note 10 at 131-32; Waldron, *supra* note 10 at 145-47; and Sreenivasan, *supra* note 10 at 102-04.

46. See, e.g., Locke, *supra* note 7 at 36 [chap. VI, para. 65] (explaining that “a *father* may dispose of his own possessions as he pleases, when his children are out of danger of perishing for want”). On the right to inheritance in Locke's theory of property, see Tully, *supra* note 10 at 133-35; Waldron, *supra* note 10 at 244-47; and Sreenivasan, *supra* note 10 at 44-46 and 104-06.

47. Nozick, *supra* note 8 at 5. For this purpose, Nozick assumes a state of nature “sufficiently similar” to that of Locke that many “many of the otherwise important differences may be ignored here.” *Ibid.* at 9.

48. *Ibid.* at 150 (emphasis added).

49. *Ibid.* at 150-53.

50. *Ibid.* at 153-60. For useful discussions of Nozick's theory, see Thomas Scanlon, “Nozick on Rights, Liberty, and Property” (1976) 6 *Phil. & Pub. Affairs* 3; Waldron, *supra* note 10 at 253-83; Sreenivasan, *supra* note 10 at 120-39; and Will Kymlicka, *Contemporary Political Philosophy: An Introduction*, 2nd ed. (Oxford: Oxford University Press, 2002) at 102-65.

51. See, e.g., Epstein, “Taxation in a Lockean World,” *supra* note 3 at 51 (arguing that “Locke's case would have been made more forcefully if he had taken the basic position of both the common and the Roman law—that all external things are unowned in the original position—for then first possession need not defeat any prior claims”). See also Epstein, *Takings*, *supra* note 9 at 10-12.

52. Nozick, *supra* note 8 at 175. For a useful discussion of this point, see Sreenivasan, *supra* note 10 at 122.

effectively satisfied by the productivity of private property.⁵³ For Nozick, the means of appropriation is largely irrelevant, provided that it satisfies a “Lockean proviso” that the appropriation does not worsen the situation of others.⁵⁴ More specifically, he suggests, even if private appropriation makes it impossible for others to freely use what they previously could, it does not make them worse off than they would otherwise have been if they still have the opportunity to improve their situation in other ways.⁵⁵ Finally, he reasons, since private property increases social output and creates varied opportunities for employment,⁵⁶ private appropriation is unlikely to worsen anyone’s situation in the way that his proviso specifies.⁵⁷ On this basis, he concludes, one can justify “a permanent bequeathable property right in a previously unowned thing.”⁵⁸

III. Tax Policy in a Libertarian World

Although libertarian theories begin with the state of nature, they also recognize that the liberty and property rights that exist in this state are insecure and best protected through some form of civil or political society. According to Locke, for example, the state of nature lacks “an *established, settled, known law*” to uphold the law of nature, “a *known and indifferent judge*” with authority to adjudicate issues, and the “*power to back and support the sentence when right, and to give it due execution.*”⁵⁹ For these reasons, he explains, individuals are “willing to quit” the state of nature and “join in society with others ... for the mutual *preservation* of their lives, liberties and estates,” which he calls by the general name property.⁶⁰

53. See the discussion at *supra* notes 17-39 and accompanying text.

54. Nozick, *supra* note 8 at 175: “The crucial point is whether appropriation of an unowned object worsens the situation of others.” Although Nozick is not clear on the means by which unowned things may be appropriated, he criticizes Locke’s labour theory of appropriation on the grounds that the boundaries of the property that may be acquired through labour are unclear, and that the labourer’s entitlement might reasonably be limited to the added value created rather than the whole of the object with which labour is mixed. *Ibid.* at 174-75. Elsewhere, however, Nozick emphasizes the role of labour in his entitlement theory, insisting that “[w]hoever makes something, having bought or contracted for all other held resources used in the process ... is entitled to it.” *Ibid.* at 160. For similar observations, see Sreenivasan, *supra* note 10 at 124; and Barbara Fried, “Wilt Chamberlain Revisited: Nozick’s ‘Justice in Transfer’ and the Problem of Market-Based Distribution” (1995) 24 *Phil. & Pub. Affairs* 226 at 227.

55. Nozick, *supra* note 8 at 176 (distinguishing between a stringent and a weaker requirement that no one be made worse off by private appropriation and arguing that “no one legitimately can complain if the weaker provision is satisfied”). See also *ibid.* at 178 (emphasizing that “[i]t is important to specify *this* particular mode of worsening the situation of others, for the proviso does not encompass other modes” such as “the worsening due to more limited opportunities to appropriate”).

56. *Ibid.* at 177 (emphasizing that “[t]hese considerations enter a Lockean theory to support the claim that appropriation of private property satisfies the intent behind the ‘enough and as good left over’ proviso, *not* as a utilitarian justification of property”).

57. *Ibid.* at 181 (arguing that “the baseline for comparison is so low as compared to the productiveness of a society with private appropriation that the question of the Lockean proviso being violated arises only in the case of catastrophe”).

58. *Ibid.* at 178.

59. Locke, *supra* note 7 at 66 [chap. IX, paras. 124-126].

60. *Ibid.* at 66 [chap. IX, para. 123]. See also *ibid.* at 12 [chap. II, para. 13] (suggesting that “*civil government* is the proper remedy for the inconveniences of the state of nature, which must certainly

Similarly, Nozick theorizes that individuals in the state of nature would enter into mutual protection associations, one of which would emerge as the dominant association within a geographical area and assume the form of a minimal state.⁶¹

As the sole legitimate purpose of this state is to protect the personal liberty and private property to which individuals are entitled in the state of nature, the scope of the libertarian state is necessarily circumscribed. Since people enter into society only to preserve themselves, their liberty, and their property, Locke insists, “the power of the society, or *legislative* constituted by them, can *never be supposed to extend farther, than the common good*; but is obliged to secure every one’s property, by providing against those . . . defects . . . that made the state of nature so unsafe and uneasy.”⁶² According to Nozick, only “a minimal state, limited to the narrow functions of protection against force, theft, fraud, enforcement of contracts, and so on, is justified; that any more extensive state will violate persons’ rights not to be forced to do certain things, and is unjustified.”⁶³ Consequently, he emphasizes, “redistribution is a serious matter indeed, involving, as it does, the violation of people’s rights.”⁶⁴ Likewise, he maintains, the taxation of labour income “is on a par with forced labor”⁶⁵—resulting in the “(partial) ownership by others of people and their actions and labor” and violating “the classical liberals’ notion of self-ownership.”⁶⁶

Despite its limited scope, however, even a minimal state requires resources to finance its activities—resources that cannot be obtained through voluntary contributions alone, since free-riders may enjoy the benefits of mutual protection without bearing any of the costs associated with its provision.⁶⁷ For this reason, the libertarian state must levy some kind of compulsory levy or tax in exchange for

be great, where men may be judges in their own case”) and 66-67 [chap. IX, para. 127] (emphasizing that “mankind, notwithstanding all the privileges of the state of nature, being but in an ill condition, while they remain in it, are quickly driven into society” where they “take sanctuary under the established laws of government, and therein seek *the preservation of their property*”).

61. Nozick, *supra* note 8 at 10-14.

62. Locke, *supra* note 7 at 68 [chap. IX, para. 131]. As a result, he maintains, natural laws do not cease in civil society, “but only in many cases are drawn closer, and have by human laws known penalties annexed to them, to enforce their observation.” *Ibid.* at 71 [chap. XI, para. 135]. For a useful discussion of Locke’s understanding of the relationship between the state of nature and civil society, see Waldron, *supra* note 10 at 232-41. For opposing views, suggesting that Locke adopted a conventional view of property rights in civil society, see Scanlon, *supra* note 50 at 23-24; and Tully, *supra* note 10 at 98-100, 145-54, and 163-70.

63. Nozick, *supra* note 8 at ix. See also Eric Mack, “Self-Ownership, Taxation, and Democracy: A Philosophical-Constitutional Perspective” in Donald P. Racheter & Richard E. Wagner, eds., *Politics, Taxation and the Rule of Law: The Power to Tax in Constitutional Perspective* (Boston, MA: Kluwer Academic Publishers, 2002) 9 at 22: “From the Lockean perspective, the only legitimate use of force by the state or its officials is use that suppresses the violation of rights.”

64. *Ibid.* at 168. See also Epstein, “Taxation in a Lockean World,” *supra* note 3 at 68 (“within the Lockean world, the redistribution of income through the tax system is an unacceptable function of government”); and Richard A. Epstein, “Can Anyone Beat the Flat Tax?” (2002) 19:1 Soc. Phil. & Pol’y 140 at 161 (“redistribution of wealth, when consciously done, counts as little more than theft initiated by the state”).

65. Nozick, *supra* note 8 at 169.

66. *Ibid.* at 172.

67. See, e.g., Epstein, “Taxation in a Lockean World,” *supra* note 3 at 54; and Mack, “Self-Ownership, Taxation, and Democracy,” *supra* note 63 at 23-24.

the services that it provides.⁶⁸ Nonetheless, since this state is formed in order to preserve pre-existing property rights, the taxes that it collects from each individual cannot exceed the value of the benefits that it provides in terms of security and protection.⁶⁹ To the extent that deliberate redistribution is explicitly prohibited, moreover, it also follows that the taxes levied by this libertarian state should correspond to the benefits that each individual receives, so that any net benefits resulting from the protective services that it provides are distributed in proportion to taxes paid.⁷⁰ The rest of this part discusses further implications of libertarian theory for tax policy, considering both substantive tax measures and institutional arrangements that affect tax policy outcomes.

A. *Substantive Tax Measures*

Substantively, libertarian theories of private property and the state appear to favour the benefit principle of taxation, according to which the taxes that each individual must pay should depend on the benefits that the individual receives from the state.⁷¹ Other general principles include neutrality and administrative simplicity: the former because a neutral tax system does not affect the individual choices that people would make in the state of nature, the latter because low administration and compliance costs increase the likelihood that the benefits that each individual receives from the state will exceed the taxes paid.⁷² These principles might suggest that the state should finance its activities solely by means of user fees or benefit taxes imposed on individuals in proportion to their specific use of public goods or services or the benefits that these goods and services confer.⁷³ In practice, however, it is often difficult to determine the specific beneficiaries of publicly-provided goods and

68. Epstein, "Can Anyone Beat the Flat Tax?" *supra* note 64 at 143; and Mack, "Self-Ownership, Taxation, and Democracy," *supra* note 63 at 25.

69. See, e.g., Epstein, *Takings*, *supra* note 9 at 15 ("whenever any portion of [a person's property] is taken from [the person through taxation], he must receive from the state ... some equivalent or greater benefit as a part of the same transaction"); Epstein, "Can Anyone Beat the Flat Tax?" *supra* note 64 at 147 ("government coercion is justified only to the extent that it provides net benefits to those individuals subjected to coercion"); and Mack, "Self-Ownership, Taxation, and Democracy," *supra* note 63 at 25 (suggesting that "for each individual, the loss imposed upon him by taxation must be less than the benefit to him of the protective services he receives").

70. See, e.g., Epstein, "Can Anyone Beat the Flat Tax?" *supra* note 64 at 147 (insisting that "in principle every individual must be made better off to the same degree, that is, receive the same rate of return on his proportionate investment in social infrastructure"); and Mack, "Self-Ownership, Taxation, and Democracy," *supra* note 63 at 29, n. 11 (arguing that "no individual [should] be made to contribute out of proportion to the benefits to him of the protective services").

71. For a brief discussion of the benefit principle of taxation, see Richard A. Musgrave, Peggy B. Musgrave, & Richard M. Bird, *Public Finance in Theory and Practice*, 1st Cdn. ed. (Toronto, ON: McGraw-Hill Ryerson, 1987) at 210-13. On the link between the benefit principle and libertarian conceptions of private property and the state, see Richard E. Wagner, "Tax Norms, Fiscal Reality and the Democratic State," in Richard E. Wagner, ed., *Charging for Government Services: User Charges and Earmarked Taxes in Principle and Practice* (New York: Routledge, 1991) 1 at 2-3. For my own views on the appropriate scope of benefit taxes and user fees, see David G. Duff, "Benefit Taxes and User Fees in Theory and Practice" (2004) 54 U.T.L.J. 391.

72. Epstein, "Taxation in a Lockean World," *supra* note 3 at 55-56.

73. On the distinction between user fees and benefit taxes, see Duff, "Benefit Taxes and User Fees in Theory and Practice," *supra* note 71 at 393-95.

services and frequently impossible to charge individual beneficiaries according to their use of these goods and services without incurring substantial administrative costs that would render the effort wasteful or inefficient.⁷⁴ As a result, a libertarian state must rely on a more general tax in order to implement the benefit principle on which it is based. Surprisingly, however, there appears to be little consensus on the form that this tax should take.

1. Tax Base

The concept of a tax base refers to the specific measure to which a tax is applied. For direct taxes, which are levied on persons rather than commodities or transactions, the three main types of tax base are income, consumption, and wealth.⁷⁵ Another kind of direct tax is a poll or head tax that applies to each individual irrespective of income, consumption or wealth. Among those who have considered the subject, each of these taxes has been suggested as a proxy for the benefits received from civil society.

Beginning with a poll or head tax, Thomas Hobbes argued that equal taxation of the poor and the rich could be justified on the basis that both received the same benefit from the commonwealth, namely “the enjoyment of life”.⁷⁶ To the extent that this argument depends on Hobbes’ view of the state of nature as a war of all against all, however, it is arguably incompatible with libertarian theories which take a very different view of the state of nature and civil society.⁷⁷ Epstein, for example, dismisses the idea of a poll tax as a “very bad measure” of the benefits associated with public goods and services.⁷⁸ Nonetheless, the idea that all individuals should pay the same amount of tax has also been defended on libertarian grounds.⁷⁹

Since the libertarian state is established in order to secure private property as well as personal liberty, a tax based on personal wealth might be regarded as a better proxy for the benefits that each individual receives than a poll tax which applies equally to all. Indeed, Locke himself appears to have contemplated this kind of tax, suggesting that “every one who enjoys his share of the protection” provided by the state “should pay *out of his estate* his proportion for the maintenance of it.”⁸⁰

74. See the discussion about the feasibility of user fees and benefit taxes in *ibid.* at 410-11.

75. See, e.g., Boadway & Kitchen, *supra* note 5 at 88-102.

76. Thomas Hobbes, *Leviathan* (1651), ed. by C.B. Macpherson (Harmondsworth, UK: Penguin, 1985) at 386 [chap. 30]: “To equal justice, appertaineth also the equal imposition of taxes; the equality whereof dependeth not on the equality of riches, but on the equality of the debt that every man oweth to the commonwealth for his defence.... Seeing the benefit that every one receiveth thereby, is the enjoyment of life, which is equally dear to poor and rich; the debt which a poor man oweth them that defend his life, is the same which a rich man oweth for the defence of his.”

77. For Hobbes’ view of the state of nature, see *ibid.* at 185 [chap. 13] (describing the natural condition of mankind as “that condition which is called Warre; and such a warre, as is of every man, against every man”).

78. Epstein, *Takings*, *supra* note 9 at 297.

79. Jeffrey A. Schoenblum, “Tax Fairness or Unfairness? A Consideration of the Philosophical Bases for Unequal Taxation of Individuals” (1995) 12 *Am. J. Tax Pol’y* 221.

80. Locke, *supra* note 7 at 74 [chap. XI, para. 140] (emphasis added).

Notwithstanding this apparent endorsement, however, contemporary libertarians generally reject all forms of personal wealth taxation—whether collected on an annual basis,⁸¹ or only when property is transferred at death.⁸²

As an alternative to wealth taxation, the benefit principle might also support the taxation of personal consumption. Immediately after arguing that the poor and rich should be taxed equally, for example, Hobbes also suggested that the benefits that individuals enjoy under a commonwealth are best measured by what they consume.⁸³ In more recent times, consumption taxation has also been favoured on the basis that it is neutral between saving and spending and therefore affects individual choices less than most other kinds of tax.⁸⁴ On this basis, some have argued that consumption taxation is most compatible with libertarian principles.⁸⁵

Notwithstanding these arguments for consumption, wealth or poll taxes, others regard income as the best measure of the benefits received from civil society. According to Adam Smith, for example, “[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.”⁸⁶ Graeme Cooper makes a similar argument, reasoning that “the creation, maintenance and protection of a society within whose markets individuals can pursue and accumulate income and wealth, is a benefit derived from government,” that this benefit “manifests itself in the income derived by individuals,” and therefore that “income is an appropriate measure of the benefit.”⁸⁷ Although libertarians may question the extent to which the state is responsible for the creation and maintenance of income and wealth, many appear to accept these arguments in favour of personal income taxation. Epstein, for example, endorses the idea of a broad-based or comprehensive income tax on the basis that “everything of value protected by government is subject to

81. See, e.g., Richard E. Wagner, “Sense versus Sensibility in the Taxation of Personal Wealth” (1980) 2:1 *Canadian Taxation* 23-30. For a critical assessment of the benefit rationale for wealth taxation, see Eric Rakowski, “Can Wealth Taxes Be Justified?” (2000) 53 *Tax Law Rev.* 263 at 300-09.

82. See, e.g., Richard E. Wagner, *Inheritance and the State: Tax Principles for a Free and Prosperous Commonwealth* (Washington, D.C.: American Enterprise Institute for Public Policy Research, 1977); and Epstein, *Takings*, *supra* note 9 at 303-05.

83. Hobbes, *supra* note 76 at 386-87: “Which considered, the 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, than 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.”

84. See, e.g., William D. Andrews, “A Consumption-Type of Cash Flow Personal Income Tax” (1974) 87 *Harv. L. Rev.* 1113 at 1167-20.

85. See, e.g., Arthur Cockfield, “Income Taxes and Individual Liberty: A Lockean Perspective on Radical Consumption Tax Reform” (2001) 46 *S. Dak. L. Rev.* 8. For an opposing view, see Alvin Warren, “Would a Consumption Tax Be Fairer Than an Income Tax?” (1980) 89 *Yale L.J.* 1081 at 1122, 1123 (arguing that “consumption taxation is less consistent with individual freedom than is income taxation” on the grounds that: “A person’s collective responsibilities are concluded at the time of production under the income tax; by contrast, under the consumption tax those responsibilities are not discharged until a person consumes his last resource”).

86. Adam Smith, *An Inquiry into the Nature and Causes of The Wealth of Nations* (1776), ed. by Edwin Cannan (Chicago, IL: University of Chicago Press, 1977) Vol. 2 at 350.

87. Graeme S. Cooper, “The Benefit Theory of Taxation” (1994) 11 *Aus. Tax Forum* 397 at 493.

taxation.”⁸⁸ As a result, it seems, libertarian principles can be relied upon to support all major tax bases.

2. Tax Rates

Although libertarian theories of private property and the state seem to be compatible with different types of taxes, they tend to agree that any tax on personal income should be levied at a single or flat rate.⁸⁹ Locke himself, for example, suggests that taxes should be levied in “proportion” to the property protected by the state.⁹⁰ Friedrich Hayek contends that proportionate taxation corresponds to the benefits of government services which “form a more or less constant ingredient of all we consume and enjoy.”⁹¹ Similarly, Epstein argues that a flat-rate income tax “works quite well with the limited-state libertarian model as a rough (indeed the only serviceable) proxy for a benefits theory of taxation.”⁹² Other libertarian arguments for a flat rate of tax are that it does not alter the relative distribution of income,⁹³ and discourages factional efforts to shift the costs of government expenditures to other groups.⁹⁴

From a libertarian perspective, however, at least two arguments might be made for progressive taxation. First, if the benefits from civil society increase with

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88. Epstein, *Takings*, *supra* note 9 at 60 (endorsing “the two standard definitions of income” advanced by economists Robert Murray Haig and Henry Simons, subject to the exclusion of imputed income and the taxation of gains only on realization). Haig defined personal income as “the money value of the net accretion to one’s economic power between two points of time.” Robert Murray Haig, “The Concept of Income — Economic and Legal Aspects” in R.M. Haig, ed., *The Federal Income Tax* (New York: Columbia University Press, 1920) 27 at 59. Simons defined personal income as “the algebraic sum of (1) the market value of rights exercised in consumption and (2) the change in the value of the store of property rights between the beginning and end of the period in question.” Henry C. Simons, *Personal Income Taxation: The Definition of Income as a Problem of Fiscal Policy* (Chicago, IL: University of Chicago Press, 1938) at 50. For a libertarian argument against a comprehensive income tax, see Brennan & Buchanan, *supra* note 3 at 231-33 (arguing that “loopholes” guard against “undue fiscal exploitation” by the state).
89. For a critical analysis of libertarian arguments for a flat rate of tax, see Barbara H. Fried, “The Puzzling Case for Proportionate Taxation” (1999) 2 Chap. L. Rev. 157 (concluding that libertarian principles are more compatible with regressive taxation).
90. Locke, *supra* note 7 at 74 [chap. XI, para. 140]: “everyone who enjoys his share of the protection, should pay out of his estate his proportion for the maintenance of it.” Both Epstein and Cockfield rely on this passage to support the conclusion that Locke favoured a flat rate of tax. Epstein, “Taxation in a Lockean World,” *supra* note 3 at 68; and Cockfield, *supra* note 85 at 50.
91. Friedrich A. Hayek, *The Constitution of Liberty* (Chicago, IL: University of Chicago Press, 1960) at 315-16 (adding that “therefore, a person who commands more of the resources of society will also gain proportionately more from what the government has contributed”).
92. Epstein, “Can Anyone Beat the Flat Tax?” *supra* note 64 at 144.
93. See, e.g., Epstein, “Taxation in a Lockean World,” *supra* note 3 at 68-69 (arguing that in a Lockean world, “the just tax should not alter the rank ordering by wealth of individuals within the society”); and Milton Friedman, *Capitalism and Freedom* (Chicago, IL: University of Chicago Press, 1962) at 174 (describing graduated rates as “a clear case of using coercion to take from some in order to give to others and thus ... conflict[ing] head-on with individual freedom”).
94. See, e.g., Brennan & Buchanan, *supra* note 3 at 223-24 (concluding that “a proportionality restriction might well serve to constrain discrimination among different groups of taxpayers” and “would surely ... reduce, or even substantially ... eliminate, the debate-conflict over relative tax shares ... that characterizes much modern discussion”); and Epstein, *Takings*, *supra* note 9 at 299 (suggesting that a progressive tax “increases the frequency and intensity of legislative rent seeking by increasing the expected gains of factions”).

income, then graduated rates might yield a closer correspondence than a single rate between taxes paid and benefits received. Indeed, if the benefits that individuals receive from the state are measured by their willingness to pay, the concept of diminishing marginal utility suggests that these benefits do increase with income or wealth since more affluent individuals are generally prepared to pay more for the benefits that they receive.⁹⁵ On reflection, however, this argument for tax progressivity only applies if the benefits received from the state increase more rapidly than income.⁹⁶ While arguments to this effect are occasionally advanced,⁹⁷ they are highly speculative.⁹⁸ Although the benefits from property protection presumably increase with income, for example, the rate of any such increase is uncertain.⁹⁹ Nor is it clear that these benefits outweigh those from personal security, for which the relationship with income is unclear.¹⁰⁰ Indeed, as John Stuart Mill argued, since the state arguably provides the greatest protection to those who are “weakest in mind or body,” it follows that “those who are least capable of helping or defending themselves, being those to whom the protection of government is the most indispensable, ought to pay the greatest share of its price.”¹⁰¹ This is an approach that is more likely to produce regressive tax rates rather than progressivity.¹⁰² In the absence of any precise measure of the benefits from civil society, therefore, libertarians generally gravitate toward a flat-rate tax as the least inappropriate measure.¹⁰³

An alternative argument for progressive taxation ignores the benefits that individuals receive from civil society altogether, regarding taxes as nothing more than a burden on private property—“as though the tax money once collected were thrown into the sea.”¹⁰⁴ On this basis, as Mill first argued, justice might seem to

95. See, e.g., Eric Lindahl, “Tax Principles and Tax Policy” (1960) 10 *International Economic Papers* 7 at 9 (arguing on this basis that “taxation in accordance with ability to pay could be regarded as an essential part of a (modified) taxation according to benefit principle”). See also Murphy & Nagel, *supra* note 5 at 82.

96. See, e.g., Walter J. Blum & Harry Kalven, Jr., “The Uneasy Case for Progressive Taxation” (1952) 19 *U. Chi. L. Rev.* 417 at 454.

97. See, e.g., Marjorie Kornhauser, “The Rhetoric of the Anti-Progressive Income Tax Movement: A Typical Male Reaction” (1987) 86 *Mich. L. Rev.* 465 at 491-97.

98. See, e.g., Epstein, *Takings*, *supra* note 9 at 298 (arguing that “there is no real evidence to support [the] conclusion” that the benefits from government increase more steeply than income).

99. On the other hand, as Blum and Kalven suggest, “it would be preposterous to assume that [the costs of protecting property] increase more rapidly than the value of the property being protected.” *Supra* note 96 at 454.

100. See, e.g., Epstein, *Takings*, *supra* note 9 at 298 (suggesting that “[t]he interest in bodily security ... is probably not linear with income, for people with taxable low incomes may tend to value bodily security highly, especially if they are young with extensive human capital or imputed income”).

101. John Stuart Mill, *Principles of Political Economy* (1848), ed. by Donald Winch (London: Penguin Books, 1970) at 156 [Book V, chap. II, sec. 2].

102. See, e.g., Schoenblum, *supra* note 79 at 225-33.

103. See, e.g., Friedman, *supra* note 93 at 175 (explaining that a “flat-rate-tax would involve higher absolute payments by persons with higher incomes for governmental services, which is not clearly inappropriate on grounds of benefits conferred”). See also Epstein, *Takings*, *supra* note 9 at 298 (suggesting that a flat-rate tax “minimizes the expected mismatch of taxes and benefits” and “is clearly superior to a highly progressive tax, where the redistributive motive is powerful evidence of redistributive effects”).

104. Blum & Kalven, *supra* note 96 at 517.

require that this burden be shared equally among all citizens, so that “whatever sacrifices [the government] requires of them should be made to bear as nearly as possible with the same pressure upon all.”¹⁰⁵ Assuming that the marginal utility of income decreases as its quantity increases, this approach might suggest that a personal income tax should be levied at progressive rates in order to ensure “equality of sacrifice” in terms of happiness or utility.¹⁰⁶ If equality of sacrifice requires each taxpayer to experience the same loss of utility from taxation (equal absolute sacrifice) however, graduated rates are called for only where the marginal utility of money decreases more rapidly than increases in income, but this relationship is virtually impossible to establish.¹⁰⁷ If equality of sacrifice is understood proportionately, on the other hand, so that taxpayers are required to surrender an equal share of the utility derived from their incomes (equal proportionate sacrifice) progressive rates are generally required.¹⁰⁸ Since equal proportionate sacrifice does not alter the relative distribution of satisfactions, this argument for progressive rates should appeal to anyone who regards the pre-tax distribution of welfare as appropriate or just.¹⁰⁹ On this basis, Murphy and Nagel suggest that equality of sacrifice “would seem to provide the natural solution to [the] problem of fair taxation for a libertarian.”¹¹⁰ To the extent that libertarian theories emphasize rights over welfare, however, one might question this conclusion. Libertarians, at any rate, do not seem to have been persuaded.

B. Institutional Arrangements

In addition to substantive tax measures, libertarian theories of private property and

105. Mill, *supra* note 101 at 155 [Book V, chap. II, sec. 2].

106. See, e.g., Blum & Kalven, *supra* note 96 at 456: “It seems likely that a dollar has less ‘value’ for a person with a million dollars of income than for a person with only a thousand dollars of income. To take the same number of dollars from each is not to require the same amount of sacrifice from them. Instead a fair tax would take more from the wealthier individual, and this is what a progressive tax does.” Interestingly, Mill himself rejected progressive rates for the taxation of personal income, preferring a degressive tax with a flat rate above a threshold designed to exempt “the amount of income needful for life, health, and immunity from bodily pain.” Mill did, however, favour graduated rates for legacy and inheritance duties. Mill, *supra* note 101 at 157-60 [Book V, chap. II, sec. 3].

107. See, e.g., A.C. Pigou, *A Study in Public Finance*, 3rd rev. ed. (London: Macmillan, 1951) at 85-86: “All that the law of diminishing utility asserts is that the last £1 of a £1000 income carries less satisfaction than the last £1 of a £100 income does. From this datum it cannot be inferred that, in order to secure equal sacrifice ... taxation must be progressive. In order to prove that the principle of equal sacrifice necessarily involves progression we should need to know that the last £10 of a £1000 income carry less satisfaction than the last £1 of a £100 income: and this the law of diminishing utility does not assert.” Where the percentage reduction in the utility of money is less than the percentage increase in income, equal absolute sacrifice requires rates to decrease as income increases. Equal absolute sacrifice supports a flat-rate income tax only where each percentage increase in income is accompanied by an identical percentage reduction in its marginal utility—a relationship that defines a rectangular hyperbola. See Blum & Kalven, *supra* note 96 at 458-59.

108. *Ibid.* at 459.

109. *Ibid.* at 460.

110. Murphy & Nagel, *supra* note 5 at 27 (asking “what would be fairer, if we assume that the distribution of welfare produced by the market is just, than that everyone contribute the same amount in real (as opposed to monetary) terms?”).

the state tend to support various institutional arrangements designed to affect tax policy outcomes in a manner consistent with the limited scope of the libertarian state. For Locke himself, the key institutional requirement was that taxes should not be levied except by “*the consent of the people*,”¹¹¹ which he understood as “the consent of the majority, giving it either by themselves, or their representatives chosen by them.”¹¹² In more recent times, the concern that majority coalitions could implement fiscal policies that transfer wealth from one group to another has motivated proposals for special voting rules and constitutional limits applicable to tax measures.¹¹³

With respect to voting rules, it is often argued that tax measures should be decided by super-majorities, upper houses, or popular referenda. Knut Wicksell, for example, argued that unanimity on combined tax and spending decisions was “the only certain and palpable guarantee against injustice in tax distribution,”¹¹⁴ though he was prepared to accept something less than unanimity “for practical reasons.”¹¹⁵ Hayek proposed that the basic tax structure and the distribution of tax shares among persons and groups should be decided by an upper house dedicated to the enactment of general laws designed to endure beyond ordinary legislation.¹¹⁶ Eric Mack suggests that “the basic tax structure of government be subject to approval by direct popular vote and that the necessary vote for approval be a large super-majority, e.g., 80 percent.”¹¹⁷ Consistent with these proposals, the State of California requires a two-thirds majority in the state legislature for the enactment of new taxes,¹¹⁸ and the Province of Ontario prohibits new taxes or tax increases unless they have been approved in a referendum or announced during an election campaign.¹¹⁹

In addition to special voting rules, it is also argued that substantive tax measures should be subject to direct constitutional constraints.¹²⁰ Consistent with the prevailing libertarian view that a personal income tax should be levied at a flat rate, for example, Epstein favours a constitutional provision limiting the taxation of income to “a uniform, flat rate.”¹²¹ He would also interpret the eminent domain provisions of the current U.S. Constitution to strike down various taxes that cannot

111. Locke, *supra* note 7 at 75 [chap. XI, para. 142].

112. *Ibid.* at 74 [chap. XI, para. 140].

113. See, e.g., Brennan & Buchanan, *supra* note 3.

114. Knut Wicksell, “A New Principle of Just Taxation” (1896), in R.A. Musgrave & A. Peacock, eds., *Classics in the Theory of Public Finance* (London: Macmillan, 1958) 72 at 90. This argument, it should be noted, is premised on the presumption that “the existing distribution of property and income” is just—a view that libertarians hold but that Wicksell did not. *Ibid.* at 108-09.

115. *Ibid.* at 92.

116. Friedrich Hayek, *The Political Order of a Free People in Law, Legislation and Liberty*, vol. 3, (Chicago, IL: University of Chicago Press, 1979).

117. Mack, “Self-Ownership, Taxation and Democracy,” *supra* note 63 at 28.

118. Brennan & Buchanan, *supra* note 3 at 235.

119. *Taxpayer Protection Act, 1999*, S.O. 1999, c. 7.

120. See, e.g., Epstein, “Taxation in a Lockean World,” *supra* note 3 at 71 (suggesting that “constitutional restraints on the power to tax are the only available tool known to political theory”).

121. *Ibid.* at 73. Michigan’s State Constitution, for example, prohibits an income tax that is “graduated as to rate or base”. Gary Wolfram, “Taxpayers Rights and the Fiscal Constitution” in Wagner et al., *Politics, Taxation and the Rule of Law*, *supra* note 63, 49 at 72-73 (explaining that this provision “allows for a certain amount of progression due to the existence of exemptions”).

be justified as legitimate payments for benefits received.¹²² Geoffrey Brennan and James Buchanan support constitutional provisions stipulating maximum rates of tax, particularly for taxes on wealth.¹²³ Others advocate constitutional limits on total taxation as a percentage of a jurisdiction's aggregate income or output.¹²⁴ In fact, a constitutional limit along these lines was introduced in the State of Michigan in 1978, limiting total state revenues to slightly less than 9.5 percent of personal income in the state.¹²⁵ The National Tax Limitation Committee has proposed an amendment to the U.S. Constitution along these lines, limiting increases in federal tax revenues to increases in the country's gross national product.¹²⁶

IV. Critical Responses

Whether acknowledged or not, libertarian approaches to tax policy necessarily depend upon libertarian premises regarding natural rights to private property. To the extent that the latter are called into question, therefore, the former may also be challenged. The following sections examine different aspects of the libertarian theories considered in Part II, challenging the kinds of property rights that they purport to establish.

A. *Historical Acquisition and Rectification*

As an initial matter, even if one accepts a libertarian explanation for how private property might legitimately arise in a state of nature, one might question the extent to which actually existing property conforms to the methods of appropriation imagined in Locke's *Second Treatise* or the principles of justice in the acquisition and transfer of property that Nozick presumes in *Anarchy, State and Utopia*.¹²⁷ On the contrary, as even the briefest survey of human history reveals, the current distribution of property is as much the consequence of theft and conquest as it is the product of libertarian entitlement.¹²⁸ In these circumstances, Nozick explains, historical entitlement is subject to a principle of rectification, which attempts to use

122. Epstein, *Takings*, *supra* note 9 at 295-96. See also Mack, "Self-Ownership, Taxation and Democracy," *supra* note 63 at 26 (proposing that "[e]ach individual should have the opportunity to challenge in court the fee-for-service that is imposed upon him on the grounds that this fee equals or exceeds the benefits of the service to him").

123. Brennan & Buchanan, *supra* note 3 at 229-31.

124. See, e.g., Wolfram, *supra* note 121 at 76.

125. *Ibid.* at 68-71.

126. For a brief discussion of this proposal, see Brennan & Buchanan, *supra* note 3 at 233-34.

127. See, e.g., Kymlicka, *supra* note 50 at 111-13.

128. See, e.g., Mill, *supra* note 101 at 358-59 [Book II, chap. 1, sec. 3]: "The social arrangements of modern Europe commenced from a distribution of property which was the result, not of just partition, or acquisition by industry, but of conquest and violence: and notwithstanding what industry has been doing for many centuries to modify the work of force, the system still retains many and large traces of its origin." While these origins might have less influence today than when Mill was writing 150 years ago, the legacies of slavery and colonialism suggest that their significance remains. Even Epstein acknowledges that "[m]uch of the current stores of wealth were acquired by improper means, and these imperfections necessarily infect the system as it now stands." Epstein, *Takings*, *supra* note 9 at 346.

historical information to reproduce “what would have occurred ... if the injustice had not taken place,”¹²⁹ but may employ a patterned principle of distributive justice “to approximate the general results of applying the principle of rectification of injustice.”¹³⁰ In either case, private property rights will be less rigid than otherwise presumed and redistributive taxation may have a legitimate role to play within libertarian theory.¹³¹

As an argument against libertarian theories of private property and taxation, however, one would not want to rely solely on the rectification of past injustices.¹³² First, while many injustices can be historically traced, many others are buried and forgotten, so that the principle has only limited application, unless one assumes that those who are least well-off are most likely to have been the victims of historical injustice.¹³³ Second, the attempt to rectify past injustices can affect “innocent” owners and undermine the certainty of legal title, suggesting that claims for rectification might be barred beyond a stipulated period of time.¹³⁴ In any event, the principle of rectification justifies only temporary transfers to correct for past injustices, not the more extensive system of taxation and redistribution contemplated in a liberal state. In order to justify this more extensive state, therefore, something more than the principle of rectification is required.

B. The State of Nature and Civil Society

Another argument against libertarian theories of private property and taxation challenges libertarian assumptions regarding the state of nature and its relationship to civil or political society or the state. Left-libertarians, for example, question the traditional libertarian assumption that resources are initially unowned or held in common in the state of nature, deriving more egalitarian implications by assuming instead that resources are initially held jointly or equally.¹³⁵ Under a system of joint ownership, for example, the least advantaged might be expected to use their veto on appropriation to bargain for some kind of redistributive scheme.¹³⁶ Legal positivists, on the other hand, maintain a Hobbesian view of the state of nature as a war of all against all,¹³⁷ concluding on this basis that property rights are purely conventional, that is, the product of positive laws and the state rather than a constraint on their legitimate form.¹³⁸ On this basis, they argue, taxes cannot be understood

129. Nozick, *supra* note 8 at 152-53.

130. *Ibid.* at 231.

131. *Ibid.*

132. See, e.g., Elliott M. Abramson, “Philosophization Against Taxation: Why Nozick’s Challenge Fails” (1981) 23 *Ariz. L. Rev.* 753 at 755 (characterizing this approach as “a glib way of escaping the general force of Nozick’s comprehensive argument”).

133. See, e.g., Nozick, *supra* note 8 at 231.

134. See, e.g., Epstein, *Takings*, *supra* note 9 at 346-50.

135. See, e.g., G.A. Cohen, “Self-Ownership, World-Ownership, and Equality: Part II” (1986) 3 *Soc. Phil. & Pol’y* 77.

136. *Ibid.* at 80-83. See also the brief discussion in Kymlicka, *supra* note 50 at 120-21.

137. See, e.g., Murphy & Nagel, *supra* note 5 at 16: “The no-government world is Hobbes’ state of nature, which he aptly described as a war of all against all.”

138. See, e.g., *ibid.* at 74: “Property rights are the product of a set of laws and conventions, of which the tax system forms a part.”

independently from private property, but “must be evaluated as part of the overall system of property rights that they help to create.”¹³⁹

Assumptions about the initial ownership of the world are issues of theology which cannot be resolved by rational argument. To the extent that one affirms a more egalitarian understanding about the initial ownership of resources in the state of nature, however, one may justifiably question libertarian conceptions of private property and taxation. Legal positivism, however, provides a less persuasive critique of libertarian theory, as it relies upon an empirical claim about the state of nature as a war of all against all to refute an essentially normative argument about the rights to which free and equal persons should be entitled irrespective of positive law. To challenge this normative argument, one should instead ask whether libertarian accounts of natural property rights are consistent with the idea of free and equal persons on which they are based.¹⁴⁰

C. Property Rights and the Lockean Proviso

A third argument against libertarian theories of private property and taxation takes up this normative question directly by questioning the extent to which libertarian justifications for private appropriation support the kinds of property rights that they seek to validate. For Locke, this justification depends on a natural right of self-preservation and entitlement to the products of one’s labour, subject to the important qualification that “enough, and as good” is left for others.¹⁴¹ For Nozick, the justification for private appropriation turns only on the satisfaction of a weak “Lockean proviso” that the appropriation does not worsen the situation of others.¹⁴² In each case, these theories purport to justify extensive property rights,¹⁴³ and presume that the stipulated limitations on private appropriation are effectively satisfied by the productivity of private property.¹⁴⁴ Neither argument is convincing.

Beginning with Locke, it is important to recall that private appropriation, in Nozick’s words, “changes the situation of all others” by obliging them to refrain from using the owner’s property.¹⁴⁵ For this reason, the mere act of labouring on an external object cannot be sufficient to establish property rights in the object. On the contrary, since property rights are properly understood as relations between persons and other persons, not between persons and things,¹⁴⁶ it is essential for any theory of property that takes the idea of free and equal persons seriously to demonstrate why it is that others have no reason to complain when something is appropriated.¹⁴⁷ While Locke relies on the assumption that “enough, and as good” remains

139. *Ibid.* at 8.

140. See, e.g., Kymlicka, *supra* note 50 at 113 (asking “[w]hat sort of initial acquisition of absolute rights over unowned resources is consistent with the idea of treating people as equals?”).

141. *Supra* notes 17-39 and accompanying text.

142. *Supra* notes 54-55 and accompanying text.

143. *Supra* notes 40-46 and accompanying text (Locke) and text accompanying note 58 (Nozick).

144. *Supra* notes 37-39 and 56-57 and accompanying text.

145. Nozick, *supra* note 8 at 175.

146. See, e.g., Waldron, *supra* note 10 at 267.

147. See *ibid.* at 271-78 (suggesting that this question is properly considered by asking whether others could reasonably be considered to consent to this appropriation if asked).

to satisfy this requirement,¹⁴⁸ it is doubtful whether this condition existed in Locke's own time and certain that it no longer does.¹⁴⁹ Nor is it obvious that the productivity of private property satisfies the intent behind Locke's sufficiency limitation, since those without the opportunity to appropriate have no choice but to work for others on terms whereby they are unlikely to obtain the full surplus from their efforts.¹⁵⁰ As a result, those who come late to the process of private appropriation may have good reason to complain,¹⁵¹ and one might reasonably reconsider the kinds of property rights that this account may justify.¹⁵²

If those without private property have reason to complain about their treatment under Locke's theory of appropriation, their grounds for complaint are even greater with Nozick's version, which requires only that others are not made worse off by someone's private appropriation.¹⁵³ As with Locke's theory, Nozick's account allows first-comers to appropriate much larger shares than others, leaving those without property no option but to work for others on terms according to which they need merely be no worse off than they would have been as hunters and gatherers on common land.¹⁵⁴ Moreover, Nozick's concept of a "worse" situation seems limited to material welfare, thereby oddly ignoring the key libertarian value of personal autonomy.¹⁵⁵ Most significantly, by making the meagre conditions of the original common

148. *Supra* note 29 and accompanying text.

149. See, e.g., Fried, "Wilt Chamberlain Revisited" *supra* note 54 at 230, n. 14 (arguing that Locke's reference to the availability of land in "the vacant places of America" does not satisfy the "as good" element of the sufficiency limitation "because, due to its locational disadvantages, land in America is not an economic substitute for land in England"). This is to say nothing about the colonial assumptions underlying the idea of "vacant" land in America.

150. See, e.g., Sreenivasan, *supra* note 10 at 114.

151. See, e.g., *ibid.* at 115 (concluding that "it is not true that appropriation which satisfies Locke's sufficiency condition does not injure the other commoners, and it follows that they have ample grounds for complaint").

152. See, e.g., Waldron, *supra* note 10 at 241-51 (concluding that Locke's argument supports only personal entitlements and does not justify a right to bequeath property"); and Sreenivasan, *supra* note 10 at 95-119 (arguing that Locke's argument establishes only a right to use a share of land equal to that of other commoners, which is "open to modification should it subsequently prove not to be universalisable").

153. *Supra* notes 54-55 and accompanying text.

154. See, e.g., G.A. Cohen, "Self-Ownership, World-Ownership, and Equality" in Frank S. Lucash, *Justice and Equality Here and Now* (Ithaca, NY: Cornell University Press, 1986) 108 at 127-28 (asking why the propertyless should "be required to accept what amounts to a doctrine of 'first come, first served'"); Barbara Fried, "Wilt Chamberlain Revisited" *supra* note 54 at 232 (commenting that Nozick's weak version of the Lockean proviso "in effect permits first-comers to appropriate the surplus value inherent in soon-to-be scarce resources"); and Michael Otsuka, "Self-Ownership and Equality: A Lockean Reconciliation" (1998) 27 *Phil. & Pub. Affairs* 65 at 78 (suggesting that "it is manifestly unfair that a first grabber be allowed to acquire a much greater share than others, at a cost in terms of the opportunities of others, of worldly resources over which she has no greater moral claim than anybody else").

155. See, e.g., Cohen, "Self-Ownership, World-Ownership, and Equality" *supra* note 154 at 127 (observing that "entitlement theorists tend to neglect the value people may place on the kind of power relations in which they stand to others, a neglect that is extraordinary in supposed libertarians professedly committed to human autonomy and the overriding importance of being in charge of one's own life"); Sreenivasan, *supra* note 10 at 132 (suggesting that Nozick judges someone to be better or worse off according to "the state of their material well being"); and Kymlicka, *supra* note 50 at 116 (commenting that "[o]ne would expect Nozick's account of what it is for an act of appropriation to worsen the condition of others ... to emphasize people's ability to act on their conception of themselves, and to object to any appropriation that puts someone in an unnecessary and undesirable position of subordination and dependence on the will of others").

the baseline for determining whether someone is worse off,¹⁵⁶ Nozick's proviso arbitrarily restricts the choice of property regimes to the primitive communism of the original common or the absolute property rights of the libertarian state¹⁵⁷—ignoring the possibility that other systems of property rights, such as those providing for redistributive taxation, might make everyone better off or at least attend to all persons' interests more fairly.¹⁵⁸

D. Self-Ownership and the Market

A final argument against libertarian theories of private property and taxation questions whether individuals are fully entitled to the market value that may be realized by the exercise of their efforts. That they are so entitled is an assumption that is closely connected to Locke's labour theory of appropriation,¹⁵⁹ and central to Nozick's view that the taxation of labour income is equivalent to forced labour.¹⁶⁰ At least two versions of this argument can be distinguished.

First, to the extent that individual talents are attributable to genetic fortune or social contributions, one might reasonably wonder whether they should form the basis for absolute rights to their market value. In the former circumstance, liberal-egalitarians argue that the distribution of natural abilities should be regarded as a kind of "collective asset" the advantages of which are properly shared in order to minimize their economic consequences.¹⁶¹ Alternatively, inasmuch as individual talents reflect social contributions, it is arguable that society as a whole has a claim to a share of the products that these talents yield.¹⁶² Although these arguments

156. *Supra* notes 56-57 and accompanying text.

157. See, e.g., Cohen, "Self-Ownership, World-Ownership, and Equality," *supra* note 154 at 132 (commenting that Nozick's approach "unreasonably restrict[s] the range of permissible comparison"); and Sreenivasan, *supra* note 10 at 133-34 (concluding that "Nozick is guilty of arbitrariness because the legitimacy conferred by the logic of his productive bounty criterion is not unique to regimes of full individual ownership").

158. See, e.g., *ibid.* at 128 (concluding that "Nozick's condition licenses and protects appropriations whose upshots make each person worse off than he need be, upshots that are, therefore, in one good sense, Pareto-inferior"); John Christman, "Can Ownership Be Justified by Natural Rights?" (1986) 15 *Phil. & Pub. Affairs* 156 at 174-76 (noting that Nozick does not consider "alternative systems of property rights ... that would make certain persons better off than under a system of full private ownership"); Kornhauser, *supra* note 97 at 500 ("the comparison should not be between a system of private property and a state of nature but between a system of full private ownership and another system of ownership"); and Kymlicka, *supra* note 50 at 117-19 (concluding that a "more plausible test of legitimate appropriation would consider all relevant alternatives" and ask "whether a system of appropriation makes people worse off ... compared to a world in which their interests are fairly attended to").

159. *Supra* notes 22-26 and accompanying text.

160. *Supra* notes 65-66 and accompanying text.

161. See, e.g., John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971); and Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (Cambridge, MA: Harvard University Press, 2000).

162. See, e.g., Abramson, *supra* note 132 at 759: "Since a social being is the result of an incalculable number of influences and experiences, most of them social in nature, why are products which issue through the individual not likewise social as well as individual? If part of each individual has been contributed by others, then why should everything the individual produces belong to him or her? At the least, why should such products, for which the individual might be regarded as the ontological confluence, the conduit, be considered as belonging entirely to such individual? If the individual was not entirely responsible for the creation of such products, why is she or he exclusively entitled to them?"

necessarily reject libertarian conceptions of self-ownership,¹⁶³ they are consistent with the moral intuition that those who experience undeserved disadvantages have a claim on the more fortunate,¹⁶⁴ and arguably more compatible than formal self-ownership with the more fundamental value of substantive self-determination that the idea of self-ownership is meant to promote.¹⁶⁵

Second, even if people's talents are regarded as their own property, it does not necessarily follow that individuals are entitled to the full market value of the goods or services that these talents produce. On the contrary, because this market value depends on social circumstances such as the particular tastes and material conditions that make specific assets valuable, it is arguable that society as a whole has a stronger claim to the surplus value resulting from their scarcity.¹⁶⁶ Consequently, as Alvin Warren concludes, "the importance of fortuity and the interrelationships of contemporary society deprive producers of a controlling moral claim to what would be distributed to them in the absence of a tax system."¹⁶⁷

V. Conclusion

Since libertarian approaches to tax policy depend on libertarian views about private property, a critical assessment of these underlying premises should cast doubt on the substantive measures and institutional arrangements that libertarians tend to favour for taxation. A critical response to libertarian theories also has implications for tax scholarship, to the extent that it embodies an "unreflective form of libertarianism".¹⁶⁸ By way of conclusion, it is useful to consider the implications of these criticisms for tax policy and tax scholarship.

Beginning with the tax policies considered in Part III, the most important implication of the arguments in Part IV of this article is that redistributive taxation may be justified as a legitimate activity of the state. As a result, although the benefit principle may justify the collection of various taxes to finance public goods and services,¹⁶⁹ this should not be regarded as the sole principle of justice in taxation, as it is in libertarian theories. On the contrary, it would seem, more general principles

163. See G.A. Cohen, *Self-Ownership, Freedom and Equality* (Cambridge: Cambridge University Press, 1995).

164. Kymlicka, *supra* note 50 at 127. See also Abramson, *supra* note 132 at 758 (asking whether it can be "that those who are incapable of producing anything because of physical infirmity, mental impairment or whatever are *entitled* to nothing?").

165. Kymlicka, *supra* note 50 at 125-27.

166. See, e.g., Fried, "Wilt Chamberlain Revisited" *supra* note 54 at 242; and Donna M. Byrne, "Locke, Property, and Progressive Taxes" (1999) 78 Neb. L. Rev. 700 at 718-23 (arguing that this claim on the "social increment of value" is compatible with Locke's emphasis on individual entitlement to the products of their labour). See also Warren, *supra* note 85 at 1091 at (suggesting that "a producer does not have a controlling moral claim over the product of his capital and labor, given the role of fortuity in income distribution and the dependence of producers on consumers and other producers to create value in our society—factors that create a general moral claim on all private product on behalf of the entire society"); and Michael J. Graetz, "To Praise the Estate Tax, Not to Bury It" (1983) 93 Yale L.J. 259 at 274-78 (defending progressive taxation on the basis that "[a]ll receipts are joint products, both individual and societal").

167. Warren, *supra* note 85 at 1093.

168. Murphy & Nagel, *supra* note 5 at 27.

169. See Duff, "Benefit Taxes and User Fees in Theory and Practice," *supra* note 71.

of distributive justice must be relied upon in order to determine the kinds of taxes that should be collected for redistributive purposes. Since the willingness to pay for public goods and services depends on the distribution of economic resources, moreover, the application of these principles of distributive justice is logically prior to the benefit principle.¹⁷⁰

With respect to substantive tax measures and institutional arrangements, it is impossible to make specific proposals without a more developed conception of distributive justice than that implied by the arguments in Part IV. In practice, however, the logic of these arguments tends to support progressive income and wealth transfer taxes—the former because they moderate the economic consequences of good and bad fortune and establish a social claim to a larger share of the surplus value attributable to scarce resources and talents,¹⁷¹ the latter because they lessen unequal opportunities and regulate the transmission of private property from generation to generation.¹⁷² Institutional arrangements are less certain, though a rejection of legal positivism and a willingness to regard a non-libertarian conception of property rights as a form of “natural right” might favour the constitutionalization of various tax and spending requirements, such as progressive taxes and welfare rights for those who cannot provide for themselves.

Turning to tax scholarship, the main implication of this article is consistent with Murphy and Nagel’s primary argument that taxation should be regarded as part of the process by which property rights are defined, and therefore “cannot be evaluated by looking at its impact on private property, conceived as something that has independent existence and validity.”¹⁷³ For this reason, as these authors rightly explain, it is inappropriate to rely on traditional tax policy principles such as ability to pay, benefits received, and horizontal and vertical equity as the sole or even primary criteria of tax fairness.¹⁷⁴ At the same time, it is important to recognize that taxes may be collected both to redistribute economic resources and to finance public goods and services; this is a dual role that public finance theory has long recognized by distinguishing between the “distribution function” and the “allocation function”

170. *Ibid.* at 402, n. 43.

171. See, e.g., Dworkin, *supra* note 161 at 99-109 (analogizing progressive income taxes to premiums in a hypothetical insurance market); and Byrne, “Locke, Property, and Progressive Taxes,” *supra* note 166 at 733-39 (arguing for a progressive income tax based on the greater extent to which extremely high incomes result from luck than do lower incomes). See also Warren, *supra* note 85 (arguing that an income tax is fairer than a tax on consumption); and Charles O’Kelley, Jr., “Rawls, Justice, and the Income Tax” (1981) 16 *Geo. L. Rev.* 1 at 1091 (rejecting consumption taxation on the basis that it does not correct an initially unjust distribution of income). For an opposing view of the choice between income and consumption taxation, see Edward J. McCaffery, *Fair Not Flat: How to Make the Tax System Better and Simpler* (Chicago, IL: University of Chicago Press, 2002).

172. See, e.g., David G. Duff, “Taxing Inherited Wealth: A Philosophical Argument” (1993) 6 *Can. J. L. & Juris.* 3. For an opposing view, see Edward J. McCaffery, “The Uneasy Case for Wealth Transfer Taxation” (1994) 104 *Yale L.J.* 283. See also the critical responses to this article by Anne L. Alstott, “The Uneasy Liberal Case Against Income and Wealth Transfer Taxation: A Response to Professor McCaffery” (1996) 51 *Tax L. Rev.* 363; and Eric Rakowski, “Transferring Wealth Liberally” (1996) 51 *Tax L. Rev.* 419.

173. Murphy & Nagel, *supra* note 5 at 8. Although the argument in Part IV rejects the legal positivism that these authors rely upon to support this statement, it arrives at the same conclusion by rejecting libertarian conceptions of natural property rights.

174. *Ibid.* at 12-39.

of the public sector.¹⁷⁵ Although the first of these functions necessarily involves a general conception of distributive justice in relation to which traditional tax policy principles must play a secondary role, the latter may rely on these principles as legitimate measures of tax justice.

175. See, e.g., Musgrave, Musgrave, & Bird, *supra* note 71 at 5-12.

