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Tax Policy and the Virtuous Sovereign: Dworkinian Equality and Redistributive Taxation

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I. Introduction

Among the purposes of a tax system, it is generally accepted that one role is to implement a society's conception of distributive justice.[1] Indeed, if justice is, as John Rawls famously declared, "the first virtue of social institutions,"[2] it follows that the specification of tax policies to implement this conception of distributive justice is both ethically and logically prior to the determination of tax policies that are designed to fulfill other objectives of a tax system such as financing public goods and services and the regulation of market failures.[3] For this reason, distributive justice may properly be regarded as the first or sovereign virtue of a society's tax system – to which a virtuous sovereign should properly attend.

In practice, however, there are various conceptions of distributive justice, with different implications for the design of a society's tax system. Classical utilitarianism, for example, which underlies much of the economic analysis that dominates tax policy analysis, conceptualizes justice as the maximization of aggregate welfare, and supports tax and spending policies that weigh the utility gains from redistributive transfers against the utility losses attributable to the imposition of different taxes.[4] Based on these precepts, contemporary welfarist approaches to tax policy have generally favoured proportionate or declining-rate

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[1] See, e.g. Liam Murphy and Thomas Nagel, *The Myth of Ownership; Taxes and Justice*, (Oxford: Oxford University Press, 2002) at 3. Although Murphy and Nagel's book may be the most prominent articulation of this position in recent years, it can be found in Adolph Wagner's 1883 "Three Extracts on Public Finance" and is reflected in traditional public finance scholarship which distinguishes between a government's allocative and distributive functions. See Adolf Wagner, "Three Extracts on Public Finance" in Richard A. Musgrave and Alan T. Peacock, *Classics in the Theory of Public Finance*, (London: Macmillan & Co. Ltd., 1964) 1-15 at 12-15; and Richard A. Musgrave, Peggy B. Musgrave, and Richard M. Bird, *Public Finance in Theory and Practice*, 1st Cdn. Ed. (Toronto: ON: McGraw-Hill Ryerson, 1987) at 5-12. See also Reuven Avi-Yonah, "The Three Goals of Taxation" (2006), 60 *Tax Law Rev.* 1-28.

[2] John Rawls, *A Theory of Justice*, (Cambridge, MA: Harvard University Press, 1971) at 3.

[3] If justice is the first virtue of social institutions, the ethical priority of distributive justice in the design of a society's tax system is tautological. Logical priority turns on the fact that social choices regarding public goods and services and appropriate regulation are likely to differ according to the distribution of economic resources.

[4] See, e.g., James A. Mirrlees, "An Exploration in the Theory of Optimum Income Taxation" (1971), 38 *Rev. of Econ. Studies* 175-208.

income taxes combined with redistributive transfer payments,[5] or the taxation of personal consumption at progressive rates.[6]

In contrast to classical utilitarianism, which he explicitly rejects,[7] Rawls presents a liberal-egalitarian conception of justice, according to which each person is accorded "an equal right to the most extensive basic liberty compatible with a similar liberty for others" (the first principle of justice),[8] and social and economic inequalities are permitted only to the extent that they work to everyone's advantage (the difference principle)[9] and are attached to positions and offices that are reasonably accessible to all (the principle of fair equality of opportunity).[10] On this basis, he recommends progressive gift and inheritance taxes "to gradually and continually … correct the distribution of wealth and to prevent concentrations of power detrimental to the fair value of political liberty and fair equality of opportunity,"[11] and a proportional expenditure tax (a flat-rate tax on personal consumption) to raise revenues so that "the government … can provide for … public goods and make the transfer payments necessary to satisfy the difference principle."[12]

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[5] See, e.g., Joseph Bankman and Thomas Griffith, "Social Welfare and the Rate Structure: A New Look at Progressive Taxation" (1987), 75 *Calif. L. Rev.* 1905-67.

[6] See, e.g., Daniel Shaviro, "Replacing the Income Tax with a Progressive Consumption Tax" (2004), 103 *Tax Notes* 91-113; and Joseph Bankman and David A. Weisbach, "The Superiority of an Ideal Consumption Tax Over an Ideal Income Tax" (2006), 58 *Stan. L. Rev.* 1413-1456.

[7] Rawls, *supra* note 2 at 26-27.

[8] *Ibid*. at 60. Rawls defines these basic liberties (at p. 61) as "roughly speaking, political liberty, (the right to vote and to be eligible for public office) together with freedom of speech and assembly; liberty of conscience and freedom of thought; freedom of the person along with the right to hold (personal) property; and freedom from arbitrary arrest or seizure as defined by the concept of the rule of law."

[9] *Ibid.* at 61. Although the difference principle is more generally understood as requiring (as Rawls subsequently emphasizes at p. 75) that inequalities "improve the expectations of the least advantaged members of society," this more limited formulation is implied by the more general requirement that inequalities must be (as an economist would say) Pareto efficient.

[10] *Ibid*. at 73: "The thought here is that positions are to be not only open in a formal sense, but that all should have a fair chance to attain them." Rawls further explains (at p. 73) that this principle does not disregard abilities and efforts, but rather implies that "those who are at the same level of talent and ability, and have the same willingness to use them, should have the same prospects of success regardless of their initial place in the social system, that is, irrespective of the income class into which they are born."

[11] *Ibid*. at 277, adding (at p. 277) that "the progressive principle might be applied at the beneficiary's end" in order to "encourage the wide dispersal of property which is a necessary condition, it seems, if the fair value of the equal liberties is to be maintained."

[12] *Ibid*. at 278. For Rawls, a proportional annual consumption tax along these lines is "preferable to an income tax … at the level of common sense precepts of justice, since it imposes a levy according to how much a person takes out of the common store of goods and not according to how much he contributes (assuming here that income is fairly earned)." In addition, he suggests (at p. 279), "[i]t may be better … to use progressive rates only when they are necessary to preserve the justice of the basic structure with respect to the first principle of justice and fair equality of opportunity, and so to forestall accumulations of property likely to undermine the corresponding institutions" – adding that this approach "might help signal an important distinction in questions of policy."

Classical libertarian theories of justice, on the other hand, criticize utilitarian and Rawlsian conceptions of distributive justice on the grounds that these "patterned" or "end-result" approaches violate people's rights to the ownership of property that is justly acquired and justly transferred.[13] From this perspective, Robert Nozick maintains, all redistributive taxes and transfers are objectionable,[14] except to the extent that they correct for past injustices in the acquisition or transfer of property.[15] As a result, most libertarians would limit taxation to the collection of revenues necessary to support a minimal state dedicated to the protection of persons and property,[16] and allocate tax burdens according to the benefits that taxpayers receive.[17] In practice, these libertarian theories appear to be compatible with all major tax bases, including income, consumption and wealth,[18] though most libertarian approaches to tax policy conclude that whatever tax is adopted should be levied at a flat or proportional rate.[19]

Like Nozick, Ronald Dworkin also rejects patterned or end state conceptions of distributive justice – which he criticizes as "ethically insensitive" in that they "deploy standards of just distribution that … do not reflect the distinctions and assignments of responsibility we make in leading our lives."[20] In opposition to classical libertarianism, however, Dworkin regards a conception of equality as central to a theory of distributive justice, insisting that "[n]o government is legitimate that does not show equal concern for the fate of all those citizens over whom it claims dominion and from whom it claims allegiance."[21] Drawing on each of these principles, Dworkin proposes a theory of distributive justice as "equality of resources" that aims to provide "a unified account of equality and individual responsibility that respects both."[22]

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13 Robert Nozick, *Anarchy, State, and Utopia*, (New York: Basic Books, 1974) at 149-231.

14 *Ibid*. at 168, arguing that "redistribution is a serious matter indeed, involving, as it does, the violation of people's rights." See also Richard A. Epstein, "Taxation in a Lockean World" (1986), 4 *Soc. Phil. & Pol'y* 49 at 68, emphasizing that "within the Lockean world, the redistribution of income through the tax system is an unacceptable function of government."

15 Nozick at 230-31 (discussing the possibility of redistributive transfers in order to rectify past injustices).

16 Nozick at ix, arguing that 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."

17 See, e.g., Eric Mack, "Self-Ownership, Taxation, and Democracy: A Philosophical-Constitutional Perspective," in Donald P. Racheter and Richard E. Wagner, *Politics, Taxation and the Rule of Law: The Power to Tax in Constitutional Perspective*, (Boston: Kluwer Academic Publishers, 2002) 9 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."

18 See the discussion in David G. Duff, "Private Property and Tax Policy in a Libertarian World: A Critical Review" (2005), 18:1 *Can. J. Law & Juris.* 23-45 at 32-34.

19 See *ibid*. at 34-36.

20 Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality*, (Cambridge, MA: Harvard University Press, 2000) at 323-24.

21 *Ibid*. at 1.

22 *Ibid*. at 7. In this respect, Dworkin notes, his approach contradicts the "value pluralism" of Isaiah Berlin, who "insisted that important political values are in dramatic conflict" and "particularly emphasized the conflict between liberty and equality." *Ibid*. at 5. More a detailed explanation, see

This article explains Dworkin's theory of equality of resources and its implications for redistributive taxation, arguing that it provides a persuasive argument for progressive income and wealth transfer taxes as essential elements of a just tax system. Part II examines the theory itself in contrast to other prominent theories of distributive justice, concluding that Dworkin's approach provides a more compelling conception of distributive justice than welfare-based theories that do not take rights and responsibilities seriously, Rawlsian theory which is insufficiently attentive to individual rights and responsibilities, and classical libertarianism which fails to take equality seriously. Part III considers the implications of Dworkin's theory for redistributive taxation, addressing both the kinds of taxes that a virtuous sovereign should collect for this purpose and key features in the design of these taxes. Part IV concludes.

II. Theory

In order to understand Dworkin's idea of equality of resources, it is perhaps best to contrast this theory of distributive justice with other prominent theories that he explicitly rejects. The theory's emphasis on "resources" as a standard for measuring equality, for example, represents a marked departure from theories based on utility or welfare, which Dworkin subjects to detailed criticism.[23] At the same time, the theory's reliance on a concept of "ethical individualism" that evaluates the justice of distributive outcomes based on the distinction between people's choices and their circumstances differs significantly from the political liberalism of John Rawls.[24] Finally, the analytical devices and institutional arrangements on which Dworkin's theory relies in order to achieve "equality" in the distribution of resources are fundamentally opposed to those that underlie libertarian conceptions of private property.[25]

The following sections outline Dworkin's concept of equality of resources in contrast to other theories of distributive justice: (1) reviewing Dworkin's critique of welfare as a measure of distributive equality, (2) explaining Dworkin's concept of resources and the idea of ethical individualism that distinguishes Dworkin's theory from that of John Rawls; and (3) contrasting the procedural and institutional devices on which Dworkin's theory relies in order to ensure equality in the distribution of resources from the procedural and institutional arrangements contemplated in classical libertarianism. In each case, I conclude, Dworkin's theory offers a more

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Arthur Ripstein, "Liberty and Equality" in Arthur Ripstein, ed., *Ronald Dworkin*, (Cambridge: Cambridge University Press, 2007) 82-108.

[23] Dworkin, *Sovereign Virtue*, *supra* note 20, chapter 1 ("Equality of Welfare).

[24] *Ibid*. at 5, explaining that "Rawls' social-contract device is designed to insulate political morality from ethical assumptions and controversies about the character of a good life" whereas equality of resources appeals to "more general ethical values" such as "the structure of a good life" and "principles of personal responsibility."

[25] *Ibid*., chapter 2 ("Equality of Resources").

compelling account of distributive justice than the alternative theories that he rejects.

A. What's Wrong with Welfare?

Beginning with welfare, it is useful to begin by recalling Rawls' objections to classical utilitarianism – that it does not automatically exclude offensive or illegitimate preferences,[26] does not necessarily guarantee the protection of rights and liberties which are contingent on their utility at a particular time and place,[27] does not concern itself, except indirectly, with how welfare is distributed,[28] and "does not take seriously the distinction between persons."[29] Extending this critique of aggregate welfare as a criterion of distributive justice, Dworkin rejects welfare as a standard for measuring distributional equality, arguing that the concept of "resources" constitutes a better measure for this purpose.

In order to make this argument, Dworkin begins by acknowledging the initial appeal of welfare as a criterion for distributive justice – noting that the concept of welfare was devised "precisely to describe what is fundamental in life rather than what is merely instrumental" whereas "resources are valuable so far as they produce welfare."[30] As a result, he observes:

> The basic, immediate appeal of equality of welfare … lies in the idea that welfare is what really matters to people, as distinct from money and goods, which matter to them only instrumentally, so far as these are useful in producing welfare. Equality of welfare proposes, that is, to make people equal in what is fundamentally important to them.[31]

Notwithstanding this initial appeal, however, Dworkin makes three arguments against welfare as a suitable metric for equality.

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[26] Rawls, *A Theory of Justice*, *supra* note 2 at 30-31, noting that discriminatory preferences are not automatically excluded from utilitarian calculation, even if they are generally denied or suppressed "because they tend to be socially destructive and a greater welfare can be achieved in other ways."

[27] *Ibid*. at 26, explaining that "there is no reason in principle why the greater gains of some should not compensate for the lesser losses of others; or more importantly, why the violation of the liberty of a few might not be made right by the greater good shares by the many. It simply happens that under most conditions, at least in a reasonably advanced stage of civilization, the greatest sum of advantages is not attained in this way."

[28] *Ibid*. To the extent that marginal utility diminishes, classical utilitarianism may favour equality in the distribution of resources, though the welfare gain from any redistribution must be weighed against the welfare losses resulting from disincentives to production and the cost of redistribution itself. Importantly, however, equality is not an end in itself, but a (potential) product of utilitarian calculation.

[29] *Ibid*. at 27, explaining that the utilitarian conception of an "impartial spectator" who aggregates utilities across different persons effectively conflates all persons into one.

[30] Dworkin, *Sovereign Virtue*, *supra* note 20 at 14.

[31] *Ibid*. at 31.

First, he explains, to the extent that the concept of welfare does not exclude political and impersonal preferences, a concept of distributive justice premised on equality of welfare implies that individuals should be compensated for all such preferences that are not realized – even if these preferences are offensive or unreasonable, such as those attributable to racial prejudice or unrealistic aspirations about some desired state of the world.[32] In contrast, Dworkin argues, in a society that is committed to distributional equality, the conception of equality that is adopted would presumably exclude the satisfaction of offensive and unreasonable political and impersonal preferences – thereby precluding any compensation for unrealized preferences of this sort.[33] More importantly, he adds, since an unrestricted conception of welfare cannot account for this result, it is necessary to rely on some independent theory of distributive justice for this purpose.[34]

Second, he continues, even if the concept of welfare is limited to purely personal preferences, equality of welfare would require a society to allocate relatively more resources to individuals with expensive tastes that are costly to satisfy and expansive goals that are difficult to realize, than to other individuals with more modest tastes and limited ambitions – even if these expensive tastes and expansive goals are deliberately cultivated.[35] These "troubling counterexamples", Dworkin argues, "are embarrassing for the theory that equality means equality of welfare precisely because we believe that equality … condemns rather than recommends compensating for deliberately cultivated expensive tastes."[36]

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[32] *Ibid*. at 21-28.

[33] See, e.g., *ibid*. at 23, referring to offensive political preferences: "a good society is one that treats the conception of equality that society endorses, not simply as a preference some people might have, and therefor as a source of fulfilment others might be denied who should then be compensated in other ways, but as a matter of justice that should be accepted by everyone because it is right. Such a society will not compensate people for having preferences that its fundamental political institutions declare it is wrong for them to have."

[34] *Ibid*. at 25 (characterizing success-based conceptions of equality of welfare that admit "sound" political preferences as "an empty ideal, useful only when it rubber-stamps a distribution already and independently shown to be just through some more restricted conception of equality of success or through some other political ideal altogether"); and 27 (observing that "we … need an independent theory about when an impersonal preference is reasonable or when it is reasonable to compensate for one").

[35] *Ibid*. at 14-15 (concluding that "most people would resist the conclusion that those who have expensive tastes are, fore that reason, entitled to a larger share than others") and 31 (explaining that an interpretation of equality of welfare based on each individual's relative success in achieving life goals implied distributing much less to those with limited ambitions and much more to those with "almost impossible goals"). This objection appears to be based on a similar objection to welfare-based conceptions of distributive justice in John Rawls, "Social Unity and Primary Goods," in Amartya Sen and Bernard Williams, *Utilitarianism and Beyond*, (Cambridge: Cambridge University Press, 1982) at 168-69.

[36] *Ibid*. at 48 and 55. Although Dworkin's objection in this passage is limited to compensation for "deliberately cultivated expensive tastes", Dworkin maintains that equality of resources would deny compensation for all expensive tastes and ambitions (except "cravings so severe and disabling as to fall under the category of mental disease") on the grounds that the pursuit of one's tastes and ambitions is ultimately a matter of choice for which individuals should be held responsible, rather than a consequence of their circumstances for which compensation is due. *Ibid*. at 82-83. For a

Finally, and more generally, Dworkin argues that the concept of "welfare" is itself is so abstract and ambiguous that it is impossible to assess its merits for a theory of distributive justice until "a particular understanding or conception of welfare is specified" – at which point the ideal invariably loses "whatever appeal it might have had."[37]

If "welfare" is understood in classical utilitarian fashion as an excess of pleasure over pain or more broadly as "enjoyment" over "dissatisfaction",[38] for example, an obvious objection to the concept is that people differ in the extent to which they regard pleasure or enjoyment as essential to a good or successful life.[39] On the contrary, Dworkin maintains:

> most of us … are dedicated to something whose value to us is not exhausted or captured in the enjoyment its realization will bring, and some are dedicated to more things in that way, or more strongly dedicated, than others. Even when we do enjoy what we have or have done, we often enjoy it because we think it valuable, not vice versa. And we sometimes choose … a life that we believe will bring less enjoyment because it is in other ways a better life to lead.[40]

For this reason, what Dworkin calls "conscious-state" theories of welfare do not correspond to the standards by which most people govern their own lives, making it a questionable metric for a conception of equality and a theory of distributive justice.[41]

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critical response to this conclusion, see G.A. Cohen, "On the Currency of Egalitarian Justice" (1989), 99 *Ethics* 906-944 at 916-934, arguing that the problem of expensive tastes is less a matter of individual choice than a consequence of market supply and demand that render one's tastes expensive, so that the problem of involuntary expensive tastes also a matter of "brute back luck" for which an egalitarian conception of distributive justice should provide compensation. See also G.A. Cohen, "Expensive Taste Rides Again" in Justine Burley, ed., *Dworkin and His Critics*, (Oxford: Blackwell Publishing Ltd., 2004) 3-39, and Dworkin's response to Cohen, see Ronald Dworkin, "Ronald Dworkin Replies" in *ibid*., 339-95 at 339-50. For the purpose of this article, it is not necessary to address this debate, since the argument against welfare as a metric of distributional equality is effectively made on the basis of deliberately cultivated expensive tastes, on which Cohen and Dworkin agree.

[37] Dworkin, *Sovereign Virtue*, *supra* note 20 at 285; and Dworkin, "Ronald Dworkin Replies" *supra* note 36 at 340.

[38] Dworkin, *Sovereign Virtue*, *supra* note 20 at 18, explaining that these terms encompass "the full range of desirable and undesirable conscious states or emotions that any version of a conscious-state conception of equality of welfare might suppose to matter."

[39] *Ibid*. at 42-43, noting that "people differ in the importance each attaches to enjoyment" and that "almost no one pursues only enjoyment or will make any large sacrifice of anything else he values to avoid a small amount of pain." See also Dworkin, "Ronald Dworkin Replies" *supra* note 36 at 340: "Very few people think that pleasure is all that matters in an overall worthwhile or successful life, and even those who think pleasure matters to some important degree disagree about that degree."

[40] Dworkin, *Sovereign Virtue*, *supra* note 20 at 43.

[41] *Ibid*. at 44, concluding that a conception of equality based on pleasure or enjoyment is "an unattractive theory in a society in which many if not most people reject that conception, and some reject it as alien to their most profound beliefs about the goodness of their own lives."

Alternatively, if "welfare" is understood more plausibly as a matter of a person's "success in fulfilling his [or her] preferences, goals, and ambitions,"[42] it is vulnerable to another objection – regardless of whether the concept of "success" is understood by reference to the preferences, goals and ambitions that people set for themselves ("relative success") or by reference to more general judgments that people make regarding the value of their lives ("overall success").[43] Since reasonable people necessarily define their preferences, goals and ambitions and assess the value of their lives "against a background of assumptions about the rough type and quantity of resources they will have available with which to lead different sorts of lives,"[44] a theory of distributive justice must first determine the resources to which people are entitled before it can properly assess either their relative success in achieving their preferences, goals or ambitions or their overall success in leading a valuable life.[45] For this reason, Dworkin concludes, success theories of welfare are no better than conscious-state theories of welfare as a standard for measuring distributional equality and "cannot be used to justify or constitute a theory of fair distribution."[46]

Although critics of Dworkin have sought to reassert welfare as a metric for distributive justice,[47] these objections fail to articulate a specific meaning of welfare,[48] and remain vulnerable to Dworkin's objections that they do not correspond to the pluralistic standards by which people lead their lives, do not provide an adequate account of equality as a limitation on the recognition of individual preferences, and do not adequately recognize the role of individual responsibility as a criterion for assessing the justice of distributive outcomes. As the following section explains, principles of equality and individual responsibility are at the core of Dworkin's conception of distributive justice, distinguishing his theory not only from welfare-based approaches but also from Rawls.

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42 *Ibid*. at 17. See also *ibid*. at 28, describing this conception of welfare as a "plausible theory of philosophical psychology," which "supposes that people are active agents who distinguish between success or failure in making the choices and decisions open to them personally, on the one hand, and their overall approval or disapproval of the world in general, on the other, and seek to make their own lives as valuable as possible according to their own conception of what makes a life better or worse, while recognizing, perhaps, moral constraints on the pursuit of that goal and competing goals taken from their impersonal preferences."

43 *Ibid*. at 28-42.

44 *Ibid*. at 28.

45 *Ibid*. at 29 (identifying a "fatal circle" in any attempt to justify a fair distribution of resources based on a theory of welfare premised on relative success); and 39 (stating that "a concept of overall success … must include, in its description of equality of overall success, assumptions about what a fair distribution would be").

46 *Ibid*. at 39. Although this statement refers specifically to theories of welfare premised on overall success, the same criticism also applies to theories of welfare premised on relative success.

47 See, especially, Richard Arneson, "Welfare Should Be the Currency of Justice" (2000), 30 *Can. J. Phil.* 497-524, arguing that Dworkin's critique does not apply "if we adopt an objective account of welfare and properly accommodate concerns about individual responsibility." *Ibid*. at 497.

48 See, e.g., *ibid*. at 501, admitting that "a particular welfare-based theory of justice … is beyond the scope of this essay."

B. Resources, Ethical Individualism, and Distributive Justice

Having criticized welfare as a standard for measuring distributional equality, Dworkin introduces the concept of resources as an alternative criterion for this purpose. Unlike welfare, he explains, which reduces all values and preferences to a single conception of well-being that may not be universally shared, resources constitute the means through which people are able to pursue their own ends – making it a more suitable metric for distributional equality in a liberal society which generally assumes not only that "people differ, sometimes radically, in their opinions about what makes their lives go overall better or worse," but also that "people should govern their lives according to their own convictions on that matter."[49]

By resources, Dworkin generally means impersonal marketable resources that individuals may privately own and exchange[50] – though this is not always clear in Dworkin's work, since he also refers to various "personal qualities" such as "strength, talent, character, and ambition" as other "categories of resource."[51] Although these personal qualities enter into his theory of distributive justice, however, they do so, as he emphasizes, "in different ways"[52] – not as resources that are themselves the objects of distribution in accordance with equality of resources, but as factors that may (or may not) affect the meaning of an equal distribution.[53] As a result, Dworkin explains, the problem for his theory of distributive justice is "one of determining how far the ownership of independent material resources should be affected" by differences in personal qualities.[54]

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[49] Dworkin, "Ronald Dworkin Replies" *supra* note 36 at 340-41.

[50] Dworkin, *Sovereign Virtue*, *supra* note 20 at 65, stating that equality of resources is "a matter of equality in whatever resources are owned privately by individuals." Although emphasizing (at 65) that "[p]rivate ownership is not a single, unique relationship between a person and a material resource, but an open-textured relationship many aspects of which must be fixed politically," Dworkin sets these questions aside for the purpose of his argument, assuming (at 65-66) that "the general dimensions of ownership are sufficiently well-understood that the question of what pattern of private ownership constitutes an equal division of private resources can be discussed independently of these complications."

[51] *Ibid*. at 286, emphasizing a "crucial distinction within the broad category of personal qualities … between a person's personality, understood in the broad sense to include his [or her] character, convictions, preferences, motives, tastes and ambitions, on the one hand, and his [or her] personal resources of health, strength, and talent on the other."

[52] *Ibid*.

[53] *Ibid*. at 80: "Though powers are resources, they should not be considered resources whose ownership is to be determined … in accordance with some interpretation of equality of resources. They are not, that is, resources for the theory of equality in exactly the sense in which ordinary material resources are." In this respect, Dworkin's theory differs from that of John Rawls, who regards natural talents as "a common asset" the benefits of which are shared with the least well off by virtue of his difference principle. Rawls, *A Theory of Justice*, *supra* note 2 at 101, and 179, describing "the distribution of natural abilities as a collective asset" from which the more fortunate" may benefit "only in ways that hep those who have lost out."

[54] Dworkin, *Sovereign Virtue*, *supra* note 20 at 80.

For this purpose, Dworkin relies on two principles of what he calls "ethical individualism": (1) a principle of "equal importance" that requires any political community that exercises dominion over and demands allegiance from its citizens to treat them with equal concern; and (2) a principle of "special responsibility" that regards individuals as having a particular responsibility for the choices that shape their lives.[55] While the first principle "requires government to adopt laws and policies that insure that its citizen's fates are, so far as government can achieve this, insensitive to who they otherwise are – their economic backgrounds, gender, race, or particular sets of skills and handicaps," the second principle "demands that government work, again so far as it can achieve this, to make their fates sensitive to the choices that they have made."[56] Together, these principles define a conception of distributive justice that distinguishes between a person's circumstances and their choices, making the justice of distributive outcomes as insensitive as possible to people's circumstances and as sensitive as possible to their choices.[57]

While the distinction between a person's circumstances and their choices is not always easy, Dworkin's approach relies on ordinary ethical judgments that normally distinguish between chance and choice in making assignments of consequential responsibility,[58] and typically regard individuals as responsible for their own personalities in the sense that they identify with the various convictions, preferences, tastes and ambitions that comprise their personalities and regard the decisions that they make as their own choices rather than matters of good or bad luck.[59] On this basis, Dworkin generally understands a person's circumstances to include factors that are completely beyond a person's control (such as genetic endowments as well as other fortuitous circumstances that Dworkin labels "brute luck"[60]), and a person's choices to include attributes and actions to which it is reasonable to assign individual responsibility (which generally include the various elements that comprise a person's personality,[61] as well as deliberate decisions to

[55] *Ibid.* at 5-6.
[56] *Ibid.* at 6.
[57] *Ibid.* at 287, explaining that - "individuals should be relieved of consequential responsibility for those unfortunate features of their situation that are brute bad luck, but not from those that should be seen as flowing from their own choices."
[58] *Ibid.*, observing that: "We distinguish, for a thousand reasons, between what part of our fate is open to assignments of responsibility, because it is the upshot of someone's choice, and what part is ineligible for any such assignment because it is the work not of people but of nature or brute luck."
[59] *Ibid.* at 290. To the extent that this is not the case, Dworkin maintains, these attributes of one's personality are best regarded as addictions or obsessions "that we wish we did not have, and struggle to conquer or dispel." *Ibid.* at 293.
[60] *Ibid.* at 73, defining "brute luck" as "a matter of how risks fall out that are not … deliberate gambles").
[61] *Ibid.* at 82, explaining that: "The distinction required by equality of resources is the distinction between those beliefs and attitudes that define what a successful life would be like, which the ideal assigns to the person, and those features of body or mind or personality which provide means or impediments to that success, which the ideal assigns to the person's circumstances."

assume known risks, which Dworkin calls "option luck"[62]). As a result, although acknowledging that people's choices are not "causally independent of their culture, history and circumstance,"[63] nor of unchosen "convictions, ambitions, and tastes that influence their choices,"[64] Dworkin concludes that concepts of individual choice and responsibility are crucial to "a political morality that makes sense in terms of – and of – each citizen's internal practices of moral and ethical criticism, including self-criticism."[65]

In this respect, equality of resources differs not only from welfarist conceptions of distributive justice, but also from the political liberalism of John Rawls – whose principles of justice are derived from a hypothetical social contract entered into in an "original position of equality" behind a "veil of ignorance" that shields the contracting parties not only from knowledge of their "place in society," but also of their "natural assets and abilities" and their "conceptions of the good" and their "special psychological propensities."[66] From this perspective, Rawls argues, the attributes and actions that define a person's choices are regarded as morally arbitrary,[67] so that agreed upon principles of justice define only "the basic structure of society"[68] rather than individual entitlements to distributive shares – which Rawls conceptualizes not as rights in any foundational sense but instead as "legitimate expectations" for "those who, with the prospect of improving their condition, have done what the system announces that it will reward."[69]

In contrast to this approach, Dworkin emphasizes that his theory of distributive justice does not attempt "to insulate political morality from ethical assumptions and controversies about the character of a good life," but seeks its support in "the more general ethical values to which it appeals"[70] including the distinction between a person's circumstances and their choices. On this basis, he explains, equality of resources "defines a relation among citizens that is

[62] *Ibid*. at 73, defining "option luck" as "a matter of how deliberate and calculated gambles turn out – whether someone gains or loses through accepting an isolated risk he or she should have anticipated and might have declined."
[63] Ronald Dworkin, "*Sovereign Virtue* Revisited" (2002), 113 *Ethics* 106 at 107.
[64] *Ibid*. See also *ibid*. at 118, at 118, explaining that, although one may not choose one's "basic convictions, tastes, and preferences" one may "choose to act in one way or another given the[se] convictions, tastes and preferences."
[65] *Ibid*. at 107, adding that: "Equality of resources rejects strict metaphysical determinism. But we all reject determinism, all the time, and it is impossible to imagine how we would live if we did not."
[66] Rawls, *A Theory of Justice*, supra note 2 at 12.
[67] *Ibid*. at 312, arguing not only that "the initial endowment of natural assets and the contingencies of their growth and nurture in early life are arbitrary from a moral point of view," but also that "the effort that a person is willing to make" is also morally arbitrary since "the effort that a person is willing to make is influenced by his natural abilities and skills and the alternatives open to him."
[68] *Ibid*. at 7.
[69] *Ibid*. at 103. See also *ibid*. at 310-315, distinguishing between "legitimate expectations" to "claims" that are "defined by publicly recognized rules" and entitlements based on "moral desert".
[70] Dworkin, *Sovereign Virtue*, *supra* note 20 at 5.

individualized for each" – determining "what they are, as individuals, entitled to have" as "a matter of individual right rather than one of group position."[71]

While one might question the extent to which it is reasonable to attribute any particular distributive outcome to good or bad fortune rather than individual responsibility, the Rawlsian view that individual choices and actions have no normative significance for distributive justice is deeply problematic given the ethical distinction between chance and choice that is ordinarily made in assignments of consequential responsibility. For this reason, Dworkin's theory of distributive justice constitutes a valuable improvement on Rawls' difference principle, which is insufficiently attentive to individual rights and responsibilities. Although classical libertarians have criticized the difference principle on similar grounds,[72] the following section explains how Dworkin's emphasis on equality as a criterion for distributive differentiates his approach from classical libertarianism.

C. Equality of Resources: Original Acquisition and Subsequent Redistribution

While Dworkin's theory of distributive justice includes a principle of individual responsibility for the consequences of one's choices, it also affirms a conception of equality in the distribution of resources. In order to reconcile these two values, which are often seen as mutually inconsistent, Dworkin relies on the idea of "an economic market of some form" as both "an analytical device" and "an actual political institution."[73] Although Dworkin notes that the market is often regarded as "the enemy of equality" and "a necessary condition of individual liberty,"[74] equality of resources is designed to make the market serve both objectives by requiring that people enter the market "on equal terms."[75] In this respect, Dworkin's approach differs sharply from classical libertarianism.

For classical libertarianism, the justice of any distribution in the ownership of property depends not on a "patterned" or "end result" principle such as utility or the difference principle, but instead on the justice of its initial acquisition and the justice of its subsequent transfer.[76] According to John Locke, for example,[77] even if all resources were originally held "in common,"[78] individuals could legitimately appropriate these resources without any express agreement based on a right to self-preservation and entitlement to the fruits of one's labour[79] – subject to a prohibition

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[71] *Ibid.* at 114-15.
[72] Nozick, *supra* note 13.
[73] *Sovereign Virtue*, *supra* note 20 at 66.
[74] *Ibid.*
[75] *Ibid.* at 70.
[76] Nozick, *supra* note 13 at 149-231.
[77] John Locke, *Second Treatise of Government* (1690), ed. by C.B. Macpherson (Cambridge: Hackett Publishing Company, Inc., 1980) at 18-24 [chap. V]. For a more detailed account, see, "Private Property and Tax Policy in a Libertarian World" *supra* note 18 at 24-28.
[78] *Ibid.* at 18 [chap. V, para. 25].
[79] *Ibid.* at 19 [chap. V, paras. 26-28].

against the appropriation of resources that spoil before they are used which is overcome through the development of money,[80] and a requirement that "enough, and as good" is "left in common for others" which is effectively satisfied by the productivity of private property.[81] Similarly, Robert Nozick concludes that individuals may acquire ownership of originally "unheld things" so long as private appropriation satisfies a "Lockean proviso" that others are not made worse off – which is fulfilled by the increased social output and varied employment opportunities that private property creates.[82] In each case, these theories presume that the property rights so acquired include the right to transfer property through exchange or bequest.[83]

In contrast to classical libertarianism, Dworkin's concept of original acquisition imagines a division of a society's resources through an auction or other market procedure among members of the society who are assumed to enter into this procedure on equal terms.[84] Through this arrangement, each individual would acquire a bundle of resources based on his or her willingness to pay for these resources compared to the willingness to pay of other individuals – making this opportunity cost the measure of the resources that each individual could justly acquire.[85] Although individuals wanting to acquire relatively expensive resources might regret that these are not less costly, they could not reasonably complain that they have been treated unfairly because the cost of the resources that they choose to acquire would reflect their opportunity cost to society as a whole.[86] In the end,

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[80] *Ibid.* at 20-21 and 28 [chap. V, paras. 31-32 and 46-47].

[81] *Ibid.* at 19, 21-22, and 23-24 [chap. V, paras. 27, 33-34, and 37].

[82] Nozick, *supra* note 13 at 175-181.

[83] See, e.g., Locke, *supra* note 77 at 39 [chap. VI, para. 72}, referring to "the power men generally have to *bestow their estates* on those who please them best"; and Nozick, *supra* note 13 at 178, referring to "a permanent bequeathable property right in a previously unowned thing."

[84] Dworkin, *Sovereign Virtue*, *supra* note 20 at 66-71, employing the analogy of shipwrecked survivors who are washed up on an island with no indigenous population and abundant natural resources, which they seek to divide equally by allocating an equal number of clamshells to all survivors who can exchange these clamshells for the available resources. Although Dworkin's example assumes that all of the society's resources are subject to private appropriation (see *ibid*. at 67, noting that the survivors "do not yet realize … that it might be wise to keep some resources as owned in common by any state they might create"), his theory does not exclude the possibility that some resources might also be held in common. As a result, the theory addresses the only the distribution of privately-owned resources, not the division of resources between public and private ownership.

[85] *Ibid*. at 70, concluding that equality of resources requires people to "decide what sorts of lives to pursue against a background of information about the actual cost their choices impose on other people and hence on the total stock of resources that may fairly be used by them," and emphasizing that "the true measure of the social resources devoted to the life of one person is fixed by asking how important, in fact, that resource is for others."

[86] *Ibid*. at 69, arguing that "luck plays a certain role in determining how satisfied anyone is with the outcome – against other possibilities he [or she] might envision," but that no one "could … complain that the division of the actual resources … was unequal." In this respect, Dworkin explains: "the contingent facts of raw material and the distribution of tastes are not grounds on which someone might challenge a distribution as unequal. They are rather background facts that determine what equality of resources in these circumstances is."

Dworkin concludes, no one would prefer anyone else's bundle of resources to their own,[87] and an equal division of the society's resources – "equality of resources" – would prevail.[88]

Once a society's resources have been divided in this manner, of course, people would continue to transfer and exchange resources and would also produce more resources – making different decisions about work and leisure, consumption and savings, gifts and bequests, the development of skills and talents, and the riskiness of investments; obtaining different rates of return from different market activities; and accumulating different resources over time from those originally acquired.[89] Although a "starting-gate theory" of equality would permit subsequent inequalities without any adjustment on the basis that it would be unjust to interfere with the property rights acquired through original acquisition, Dworkin rejects this conclusion on the grounds that equality is no less relevant to the justification of subsequent holdings than it is for the justification of initial holdings,[90] so that any system of property rights established through an equal division of a society's resources should be subject to subsequent adjustment in the name of equality.[91] Having outlined a basic conception of equality of resources for the purpose of original acquisition, therefore, Dworkin must extend the idea to contemplate a "dynamic economy" with production, savings and investment.[92]

In order to do so, Dworkin begins by returning to the concept of ethical individualism on which his theory of distributive justice ultimately rests – arguing that a dynamic conception of equality of resources must allow distributive outcomes to vary with people's deliberate choices, while simultaneously protecting them as much as possible against adverse distributional consequences attributable to brute luck.[93] As a result, he explains, equality of resources is not violated if a person obtains more or less resources than others by choosing to work more or less or in

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[87] *Ibid*. at 67, explaining that "once the division is complete" no individual "would prefer someone else's bundle of resources to his [or her] own."

[88] *Ibid*., equating the idea of an equal division of resources with the an "envy test" requiring that no one would prefer someone else's bundle of resources to their own.

[89] *Ibid*. at 73, noting that the equality of resources achieved through an original division of a society's resources holds "only for the moment, because if they are left alone, once the auction is completed, to produce and trade as they wish, then the envy test will shortly fail."

[90] *Ibid*. at 87-88, arguing that: "Equality can have no greater force in justifying initial equal holdings … – against the competing view that all property should be available for Lockean acquisition at that time – than later in justifying redistributions when wealth becomes unequal because people's productive talents are different."

[91] *Ibid*. at 88, emphasizing that if a system of property rights making "any acquisition subject to schemes of redistribution later … is chosen at the outset, then no one can later complain that redistribution is rules out by … property rights alone."

[92] *Ibid*. at 71.

[93] *Ibid*. at 89, arguing that "we must, on pain of violating equality, allow the distribution of resources at any particular moment to be … ambition-sensitive" (reflecting "the cost or benefit to others of the choices people make"), but not "endowment-sensitive" (reflecting "differences in ability of the sort that produce income differences in a laissez-faire economy among people with the same ambitions").

occupations that pay more or less,[94] by deliberately taking or not taking risks,[95] by winning or losing intentional gambles,[96] or by saving rather than spending.[97] Where people's chances to obtain resources are not equally distributed, however, because natural talents differ,[98] inheritances vary,[99] and opportunities to take risks diverge,[100] equality of resources demands that any resulting inequalities be offset.[101] Since it is impossible to eliminate all inequalities attributable to brute luck, however, Dworkin must devise another method to ensure that equality of resources continues to apply over time.

For this purpose, Dworkin draws on the basic conception of equality of resources for an equal division of a society's resources – imagining a market mechanism that all members of society would have been willing to enter into on equal terms in order to offset the effects of brute luck on distributive outcomes. In this respect, Dworkin explains, equality of resources aims to achieve a condition of equality *ex ante* rather than *ex post*[102] – making people "equal, so far as this is possible, in the resources with which they face uncertainty"[103] as opposed to the resources they possess "after the uncertainties of risk" have transpired.[104]

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[94] *Ibid*. at 85, concluding that: "The choice should be indifferent under equality of resources, so long as no one envies the total package of work plus consumption" that each person chooses.

[95] *Ibid*. at 74, explaining that: "Some people enjoy, while others hate, risks; but this particular difference in personality is comprehended in a more general difference between the kinds of lives that different people wish to lead…. We have already decided that people should pay the price of the life that they have decided to lead, measured in what others give up in order that they can do so. That was the point of the auction as a device to establish initial equality of resources. But the price of a safe life, measured in this way, is precisely foregoing any chance of the gains whose prospect induces others to gamble. So we have no reason to object, against the background of our earlier decisions, to a result in which those who decline to gamble have less than some of those who do not.

[96] *Ibid*. at 74-75, emphasizing that "the effect of redistribution from winners to losers in gambles would be to deprive both of the lives they prefer."

[97] *Ibid*. at 479, note 8, arguing that: "Someone's decision to spend rather than save what he has earned is precisely the kind of decision whose impact should be determined by the market uncorrected for tax under this analysis."

[98] *Ibid*. at 91, distinguishing between "the effects of differential talents" and "the consequences of … choosing an occupation" in response to one's sense of what one wants to do with one's life.

[99] *Ibid*. at 347, observing that "the situation and properties of one's parents or relatives are as much a matter of luck … as one's own physical powers."

[100] *Ibid*. at 76, noting that "the argument in favor of allowing differences in option luck to affect income and wealth assumes that everyone has in principle the same gambles available to him [or her]."

[101] See, e.g., *ibid*. at 91, referring to "a scheme of redistribution, so far as we are able, that will neutralize the effects of differential talents".

[102] Dworkin, "*Sovereign Virtue* Revisited" *supra* note 63 at 120-22.

[103] *Ibid*. at 107.

[104] *Ibid*. at 121. See also Dworkin, *Sovereign Virtue*, *supra* note 20 at 81, explaining in the context of mental and physical disabilities that his approach "does not right the balance – nothing can – it seeks to remedy one aspect of the resulting unfairness"; and at 104, noting in the context of individuals with skills and talents that command low economic returns that his approach "aims to put such people in the position they would have been in had the risk of their fate been subjectively equally shared. But it does not make them as well-off in the end as those whose talents are in more demand, or as those with similar talents lucky enough to find more profitable employment." Although

According to Dworkin, this market mechanism is best represented by a hypothetical insurance arrangement in which individuals who are presumed not to know the economic returns that their skills and talents will command (and are therefore equally-situated in this respect) would purchase insurance against the risk of low returns,[105] and individuals who are presumed not to know what if any inheritance they might receive would purchase insurance against the risk of "bad inheritance luck".[106] Although recognizing that the type and level of insurance that individuals would acquire in this hypothetical arrangement is somewhat "speculative",[107] Dworkin identifies four features that are broadly consistent with those of actual insurance markets.

First, since the administration of any insurance arrangement is not costless and the costs of insurance benefits and insurance administration must be funded from premiums that reduce the resources available to those paying these premiums, it is reasonable to assume that coverage would extend only to relatively substantial and low probability risks for which the expected welfare losses exceed the welfare losses attributable to the payment of relatively small but certain premiums.[108] For this reason, Dworkin explains, "the lower the income level chosen as the covered risk, the better the argument becomes that most people given the chance to buy insurance on equal terms would in fact buy at that level."[109] Although Dworkin does not specify precisely what this income level might be, he suggests that "[t]he argument becomes compelling … well above the level of income presently used to

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Dworkin's approach is designed to provide *ex post* compensation based on a presumed state of *ex ante* equality, equality of resources might also enhance actual equality *ex ante*, for example through educational programs designed to minimize the effects of natural talents and class backgrounds on economic opportunities. Dworkin appears to contemplate this kind of *ex ante* approach to equality of resources, suggesting that "an egalitarian society ought, just in the name of equality, to devote special resources to training those whose talents, as things fall out, place them lower on the income scale," but does not address this issue in any detail on the basis that this "is part of the larger question of an egalitarian theory of education, which I have not even attempted to take up here." *Ibid*. at 108.

[105] *Ibid*. at 73-109, explaining (at 94) that the hypothetical insurance arrangement need not assume that "people are wholly ignorant of what talents they have, but rather, that for some other reason they do not have any sound basis for predicting … what income the talents they do have can produce, or even whether the economic situation will be such that these talents will find any employment." See also *ibid*. at 77, suggesting that "the idea of a market in insurance provides a counterfactual guide" through which equality of resources might address income disparities attributable to mental and physical disabilities.

[106] *Ibid*. at 347.

[107] *Ibid*. at 79.

[108] *Ibid*. at 97-98, emphasizing that in "the normal case of insurance, … people incur a small certain loss to prevent an unlikely grate loss whose marginal utility costs are serious enough to justify a financially disadvantageous transaction." Although Dworkin's analysis on this point draws on the notion of welfare and the principle of diminishing marginal utility, it does so in a very different way than welfare-based conceptions of distributive justice – as an account of the kinds of insurance that equally-situated individuals would acquire rather than an independent measure of the justice of distributive outcomes. For a more detailed discussion of the relationship between insurance and utility in Dworkin's theory, see Dworkin, "*Sovereign Virtue* Revisited" *supra* note 63 at 129-36.

[109] *Ibid*. at 97.

trigger transfer payments for unemployment or minimum wage levels in either Britain or the United States."[110]

Second, since individuals are much less likely to insure against losses for which they are personally responsible than losses for which they are not responsible (and insurers are reluctant to insure losses for which individuals are personally responsible given the problem of "moral hazard" whereby the availability of insurance encourages more and larger claims), the kinds of risks that this hypothetical insurance arrangement would be expected to cover are those that are attributable primarily to the brute luck that determines a person's circumstances rather than the attributes and actions that define their choices (including the deliberate assumption of known risks). For this reason, Dworkin suggests, a dynamic conception of equality of resources would provide health and income insurance for individuals who experience an illness or disability for which they are not responsible and against which they could not insure, but not for illnesses and disabilities that are primarily attributable to their own actions or against which they could have insured if insurance were available on equal terms.[111] For the same reason, equality of resources would generally provide insurance for individuals with skills and talents that command low economic returns,[112] though presumably not where these low returns are clearly attributable to an individual's deliberate decision to pursue less remunerative activities.[113] In addition, Dworkin maintains, equality of resources would not provide insurance against losses resulting from

[110] *Ibid*. For a more detailed examination, see Daniel Markovits, "How Much Redistribution Should There Be?" (2003), 112 *Yale L.J.* 2291 at 2305-2313, concluding that "people would insure only up to talent levels that fall significantly – more than 25% – below the mean."

[111] *Ibid*. at 73-74, distinguishing between someone who "develops cancer in the course of a normal life" where "there is no particular decision to which we can point as a gamble risking the disease" and someone who "smoked cigarettes heavily"; and at 77, arguing that "the bare idea of equality of resources, apart from any paternalistic additions, would not argue for redistribution from the person who had insured to the person who had not if, horribly, they were both blinded in the same accident." Although Dworkin is not clear on the relationship between paternalistic concerns and equality of resources, the reference to "paternalistic additions" in this passage suggests that these considerations can be integrated with his idea of equality of resources – for example, by imagining what additional insurance an individual might have acquired in a hypothetical position of equality if cognizant of the distribution of persons who do and do not purchase accident insurance.

[112] *Ibid*. at 92-99.

[113] Although Dworkin is not explicit on this point, this conclusion is consistent with his analysis of personal tastes more generally – which he attributes to a person's choices rather than their circumstances, notwithstanding that the cost to satisfy these tastes is attributable to "the contingent facts of raw material and the distribution of tastes." *Ibid*. at 69 and 83, concluding that it is "unlikely" that individuals would purchase insurance against the risk of costly preferences "except in the case of cravings so severe and disabling as to fall under the category of mental disease." See also Dworkin, "*Sovereign Virtue* Revisited" *supra* note 63 at 119, explaining that equality of resources "draws an important distinction between people's physical, material, and economic circumstances, on the one hand, and their ambitions and tastes on the other. People are in principle entitled to compensation, measured by a hypothetical insurance calculation, when their resources and opportunities are low in virtue of some disadvantage or handicap in the former circumstances, but not when they are low because the choices they have made out of the latter properties are expensive measured by the opportunity costs to other people of those choices."

risks and gambles that people voluntarily assume,[114] though he also suggests that "paternalistic reasons" might justify "limiting how much any individual may risk."[115] In contrast, he argues, equality of resources would provide insurance against the risk of receiving little or no inheritance, the prospect of which depends more on the luck of one's birth than one's own actions.[116]

Third, because it is often difficult to distinguish between economic outcomes for which an individual is primarily responsible and economic outcomes that are primarily attributable to brute luck, the coverage that a hypothetical insurance arrangement would provide might be expected to include common features of standard insurance contracts that are designed to reduce moral hazard – such as co-insurance that limits the amount of benefits paid to a percentage of a claimant's losses,[117] and a requirement that claimants prove their losses.[118] Coverage levels might also differ based on the extent to which it is possible to differentiate categories of claims for which the risk of moral hazard varies – with higher coverage for losses for which individuals are less likely to bear any responsibility and lower coverage for losses for which individuals are more likely to bear some responsibility.

Finally, and most significantly for the purpose of this article, Dworkin argues that the premiums under the hypothetical insurance arrangements that he contemplates would likely be measured as "an increasing percentage of the income the policy owner turns out to earn" in the case of insurance against the risk of a low income,[119] and "a steeply progressive rate" in the case of inheritances.[120] Since insurers would be able to offer a higher level of coverage by charging higher premiums, and individuals would have reason to purchase this insurance if it increased their expected welfare, the principle of diminishing marginal utility suggests that equally-situated individuals who are presumed not to know what they would earn or inherit would prefer to buy insurance with premiums that are an

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[114] *Ibid*. at 74-75, arguing that "the possibility of loss was … the fair price of the possibility of gain" and concluding that "the effect of redistribution from winners to losers in gambles would be to deprive both of lives they prefer."

[115] *Ibid*. Although Dworkin does not appear to contemplate the possibility, one way to limit the amount that any individual may risk is to provide some kind of compensation in the event of losses – presumably on the basis of the same paternalistic considerations that might justify limits on how much any individual might risk. As explained earlier, these paternalistic considerations might reasonably be integrated with what Dworkin calls "the bare idea of equality of resources" by imagining what additional insurance individuals might have acquired in a hypothetical insurance market if cognizant of the risks of various losses. *Supra* note 111.

[116] *Ibid*. at 346-49.

[117] *Ibid*. at 101. Other common features might include deductibles that limit benefits to losses exceeding a minimum threshold (as is often the case with employment and disability insurance), and caps that limit the maximum amount of any benefit.

[118] *Ibid*. at 101-02, adding that proof of a loss would be "easily provided" at lower levels "by failed attempts to find employment or by evidence of less than average general physical and mental abilities, and so forth."

[119] *Ibid*. at 100.

[120] *Ibid*. at 348.

increasing function of their income or inheritances.[121] In each case, therefore, the concept of a hypothetical insurance market constitutes the basis for redistributive taxes, conceptualized as "premiums" that equally-situated individuals would agree to pay.

Although one might question the emphasis that equality of resources places on *ex ante* equality over *ex post* outcomes, the extent to which brute luck can be distinguished from option luck, and the types of insurance that equally-situated individuals might reasonably be expected to purchase in a hypothetical insurance market,[122] Dworkin's ideas of original acquisition and subsequent redistribution represent compelling alternatives to classical libertarianism, affirming a conception of equality as essential to a theory of justice not only for the original acquisition of resources but also for their subsequent distribution. The remainder of this article considers the implications of Dworkin's theory for redistributive taxation.

III. Practice

As a legal and political philosopher, not a tax scholar, it is not surprising that Dworkin's comments on redistributive taxation are limited and basic – emphasizing primarily the conceptual rule of these taxes in a society committed to equality of resources as "premiums" that equally-situated individuals would have been willing to pay to insure against the risks of illness, disability or low market returns, and the risk that they might receive little or no inheritance.

The following sections build on Dworkin's account of redistributive taxation, considering the implications of his theory for the kinds of taxes that a society should levy in order to promote equality of resources, as well as the design of these taxes. The first section considers the form of a personal tax to insure against illness, disability and low market returns, and the second examines the design of a tax to insure against little or no inheritance.

A. Personal Taxation

With respect to personal taxation, tax policy analysts generally contemplate three different kinds of taxes, which apply to different tax bases: (1) income taxation, which applies to revenue less expenses over a period of time, typically a year, and in

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[121] *Ibid*. at 100-101, referring specifically to insurance against a low income.

[122] See, e.g., Michael Otsuka, "Luck, Insurance and Equality" (2002), 113 *Ethics* 40-54 at 50, arguing that Dworkin's *ex ante* approach fails to reconcile equality of resources with inequalities that arise *ex post*; and Elizabeth Anderson, "How Should Egalitarians Cope with Market Risks?" (2008), 9 *Theoretical Inquiries in Law* 239-270, arguing that an egalitarian conception of distributive justice requires constraints on distributive shares that markets may generate. To the extent that Dworkin's concept of a hypothetical insurance market can incorporate paternalistic considerations and provide insurance against the risk of inhabiting a society characterized by extreme inequalities, it may be possible to incorporate these concerns within an expanded conception of equality of resources.

principle includes all income from labour and capital[123]; (2) consumption or expenditure taxation, which also applies to revenue less expenses over a period of time, but excludes all income that is saved during this period rather than spent[124]; and (3) wealth taxation, which generally applies to the aggregate value of a person's assets less liabilities at a particular time such as the end of a taxation year.[125] To this traditional trio of personal tax bases, tax theorists have also added ability or endowment taxation, which would in principle apply to a person's income-earning ability, irrespective of the amount of income that the person actually earns.[126]

Beginning with income taxation, proponents generally extol the fairness of this tax base, which in principle applies comprehensively to all categories of income, and is often said to provide the most equitable measure of each person's "ability to pay" tax.[127] Although many arguments for the taxation of personal income are explicitly welfarist, viewing the concepts of income and ability to pay as substitutes or surrogates for individual welfare or utility,[128] some rely on non-welfarist

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123 This description emphasizes the source of the income, which generally corresponds to the concept of income in source-based income tax regimes like those in Canada and the United Kingdom. In contrast to this source concept of income, much U.S. tax policy analysis refers to the comprehensive concept of income proposed by Henry Simons, which defines income in terms of its uses for consumption or saving. Henry C. Simons, *Personal Income Taxation: The Definition of Income as a Problem of Fiscal Policy*, (Chicago: University of Chicago Press, 1938) at 50.

124 This description applies to a cash-flow personal consumption tax in which tax is paid when income is spent on consumption rather than saved. See, e.g., William D. Andrews, "A Consumption Type or Cash Flow Personal Income Tax" (1974), 87 *Harv. L.* Rev. 1113; and Nicholas Kaldor, *An Expenditure Tax*, (London: Routledge, 1955). Alternatively, a yield-exemption consumption tax would exempt all capital income from tax, making this form of consumption tax equivalent to a so-called wage tax that would apply exclusively to labour income. See, e.g. David Bradford, *Untangling the Income Tax*, (Cambridge, MA: Harvard University Press, 1986) at 89-94. Although these authors generally assume that the yield-exemption approach is equivalent to the cash-flow approach, this equivalence holds only if several assumptions apply, including that investment returns are certain, taxpayers can borrow and lend unlimited amounts at a risk-free rate, and that tax rates are not progressive and remain constant over time – assumptions that are unlikely to be satisfied in practice. See, e.g., Michael J. Graetz, "Implementing a Progressive Consumption Tax" (1979), 82 *Harv. L. Rev.* 1575 at 1602.

125 See, e.g., C.T. Sandford, J.R.M. Willis and D.J. Ironside, *An Annual Wealth Tax*, (London: Heinemann Educational Books, 1975); and David Shakow and Reed Shuldiner, "A Comprehensive Wealth Tax" (2000), 53 *Tax L. Rev.* 499.

126 See, e.g., Lawrence Zelenak, "Taxing Endowment" (2006), 55 *Duke L.J.* 1145 at 1145, explaining that the idea was proposed by the first president of the American Economic Association in 1888, who argued that "a faculty tax constitutes the only theoretically just form of taxation, men being required to serve the state in the degree in which they have ability to serve themselves." Francis A. Walker, "The Bases of Taxation" (1888), 3 *Pol. Sci. Q.* 1 at 15. Although it is widely recognized that a tax on earning ability would be impossible to administer, ability or endowment might nonetheless be regarded as an ideal to which an actual tax system should aspire in various ways.

127 See, e.g., Alan Gunn, "The Case for an Income Tax" (1979), 46 *U. Chi. L. Rev.* 370.

128 See, e.g., Richard Goode, "The Economic Definition of Income" in Joseph A. Pechman, *Comprehensive Income Taxation*, (Washington, D.C.: The Brookings Institution, 1977) 1 at 9, arguing that "the income tax is superior in principle to the expenditure tax … because income is generally a better index of ability to pay than is consumption"; and Robert Murray Haig, "The Concept of Income – Economic and Legal Aspects," in R.M. Haig, *The Federal Income Tax*, (New York: Columbia

conceptions of distributive justice which regard personal income taxation as the legitimate assertion of a social claim to a share of all output based on "the role of fortuity in income distribution and the dependence of producers on consumers and other producers to create value in our society."[129] The latter rationale is obviously more compatible with equality of resources than the former.

For those favouring personal consumption or expenditure taxation, on the other hand, tax fairness is best measured by reference to the resources that one consumes during a taxable period, rather than the income that one earns during any period (which may be spent on current consumption or saved in order to finance future consumption) – on the grounds either that individual welfare ultimately depends on personal consumption rather than income,[130] or that judgements about legitimate distributive shares properly concern the resources that one withdraws from society through personal consumption rather than the resources to which one is entitled by virtue of one's labour and investment.[131] Consumption tax advocates also challenge the fairness of the income tax, arguing that it discriminates against persons who choose to save rather than spend[132] – differentiating between individuals who are equally situated *ex ante* based solely on their preference for future consumption over current consumption,[133] and imposing a "double tax" on saving by taxing the returns that compensate savers for deferred consumption.[134] On these grounds, proponents argue, a personal consumption or expenditure tax is

University Press, 1921) 27 at 55, defining income as "a flow of satisfactions or intangible psychological experiences."

[129] Alvin Warren, "Would a Consumption Tax Be Fairer Than an Income Tax?" (1980), 89 *Yale L.J.* 1081 at 1091, citing Rawls, *A Theory of Justice*, *supra* note 2 at 72-74, 100-108 and 310-15. See also Charles R. O'Kelley, Jr., "Rawls, Justice, and the Income Tax" (1981), 16 *Geo. L. Rev.* 1. A similar understanding appears to play a role in Henry Simon's view of the personal income tax, which he regards "as a means of mitigating economic inequality" and defines "largely in the light of considerations of justice" including the absence of "any justification for prevailing inequality in terms of personal desert." Simons, *supra* note 123 at 18 and 41.

[130] See, e.g., Irving Fisher, *The Nature of Capital and Income*, (London: Macmillan, 1906).

[131] See, e.g., Edward J. McCaffery, "The Uneasy Case for Capital Taxation" in Ellen Frankel Paul, Fred D. Miller, Jr., and Jeffrey Paul, eds., *Taxation, Economic Prosperity, and Distributive Justice*, (Cambridge: Cambridge University Press, 2006) 166 at 167 and 168, arguing that "the moment of spending … is the right time to make social judgments over the appropriate level of taxation" and that "our ordinary and reflective moral intuitions ought to consistently run out to the *uses* of material resources, and not to their *sources*." For a much earlier version of this argument, see Thomas Hobbes, *Leviathan* (1651), ed. By C.B. Macpherson (Harmondsworth, UK: Penguin, 1985) at 386-87, arguing that "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."

[132] See, e.g., Edward J. McCaffery, *Fair Not Flat: How to Make the Tax System Better and Simpler*, (Chicago: University of Chicago Press, 2002) at 35, arguing that: "The very concept of an income tax is biased against saving and in favour of spending."

[133] See, e.g., Bradford, *supra* note 124 at 315; and Fischer, *supra* note 130 at 249-53.

[134] See, e.g., Andrews, *supra* note 124 at 1167, arguing that an income tax "imposes an excessive burden on deferred consumption"; and McCaffery, *Fair Not Flat*, *supra* note 132 at 36, arguing that an income tax imposes a "second tax on savings." See also J.S. Mill, *Principles of Political Economy, Books IV and V* (1848), (New York: Penguin Classics, 1985), ch. 2 at 162-69.

both fairer and more efficient than a personal income tax.[135] As with the taxation of personal income, therefore, arguments for personal consumption or expenditure taxation invoke both welfarist and non-welfarist conceptions of distributive justice.

This is also the case with arguments for personal wealth taxation and ability or endowment taxation. The former, for example, is defended both on the welfarist grounds that wealth confers a form of ability to pay that is not recognized in most measures of income or consumption,[136] and on the non-welfarist basis that wealth taxation can curb extreme concentrations of wealth which can threaten democratic institutions, social stability and economic growth and prosperity.[137] The latter is similarly supported on the welfarist basis that earning ability corresponds more closely to individual welfare than income, consumption or wealth,[138] and the non-welfarist basis that earning ability is a better measure of unjustified economic inequality than proxies such as income, consumption or wealth – which reflect the combined effect of one's ability or endowment and one's choices regarding work or leisure and savings or consumption.[139]

With its emphasis on *ex ante* equality and its reliance on a principle of ethical individualism that distinguishes a person's choices from their circumstances, one might have expected that equality of resources would regard a consumption or expenditure tax or an ability or endowment tax as the ideal tax base for personal taxation. Indeed, Dworkin's conclusion that equality of resources is not violated if a person obtains more or less resources than others by deliberately taking or not taking risks, by winning or losing intentional gambles, or by saving rather than spending,[140] would appear to support consumption or expenditure taxation as an

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[135] See, e.g., Bankman and Weisbach, *supra* note 6.
[136] See, e.g., Richard M. Bird, "The Case for Taxing Personal Wealth," in *Report of the Proceedings of the Twenty-Third Tax Conference*, (Toronto: Canadian Tax Foundation, 1972) 6 at 8, arguing that personal wealth affords advantages of "opportunity, flexibility and security" beyond the income that it may generate; and Shakow and Shuldiner, *supra* note 125, arguing that "substantial income from wealth effectively goes untaxed under the current income tax system" which generally does not apply to gains until they are realized and does not apply to so-called "imputed income" from assets that are not used to generate a market return.
[137] See, e.g., James R. Repetti, "Democracy, Taxes, and Wealth" (2001), 76 *N.Y. L. Rev.* 825; and Thomas Picketty, *Capital in the Twenty-First Century*, (Cambridge, MA: Harvard University Press, 2014) at 515-34.
[138] See, e.g., Dan Shaviro, "Endowment and Inequality" in Joseph J. Thorndike and Dennis J. Ventry Jr., *Tax Justice: The Ongoing Debate*, (Washington, D.C.: The Urban Institute Press, 2002) 123 at 128-29, explaining that an individual with greater earning ability is better off than a persons with a lower earning ability even if the former chooses to work less and earn less income. See also Zelenak, "Taxing Endowment" *supra* note 126 at 1149-1153, reviewing utilitarian arguments for endowment taxation
[139] see, e.g., Shaviro, "Endowment and Inequality" *supra* note 138 at 140, arguing that "endowment as a tool for measuring inequality … remains closer to bedrock than the proxy standards"; and Zelenak, "Taxing Endowment" *supra* note 126 at 1154-55, reviewing the *prima facie* liberal-egalitarian case for endowment taxation
[140] Dworkin, *Sovereign Virtue*, *supra* note 20 at 74-75 and 479, note 8. See *supra* notes 95-97 and accompanying text.

ideal tax base, while his insistence that equality of resources allows the distribution of resources to be "ambition-sensitive" but not "endowment-sensitive"[141] seems to support ability or endowment taxation as an ideal tax base. Not surprisingly, therefore, advocates of each of these tax bases have referred to Dworkin for support.[142]

In fact, however, Dworkin rejects endowment, consumption and wealth as ideal tax bases for redistributive taxation and explicitly endorses the income tax for this purpose.[143] Regarding endowment, Dworkin objects that talents and ambitions are "too closely intertwined" to differentiate for tax purposes,[144] and that requiring people to pay for their talents would require those with high earning abilities to "purchase leisure time or the right to a less productive occupation at the cost of other resources" – violating equality of resources by causing those whose skills and talents command the highest economic returns to envy those whose earnings abilities are less.[145] Consumption and wealth, on the other hand, are rejected on the grounds that the former would exclude investment returns which are presumed to reflect more than "preferences for later consumption,"[146] while the latter would impose an additional burden on income that a person chooses to save rather than spend.[147]

Although welfarists are generally sympathetic to the idea of ability or endowment taxation on the grounds that it would eliminate tax disincentives to work,[148] most liberal-egalitarians share Dworkin's aversion to this tax base on the grounds that a tax on earning abilities would force those whose skills and talents command the highest economic returns to engage in these pursuits for a period of time in order to pay the tax – interfering with their freedom to conduct their lives as they choose within a framework of equal justice.[149] As others have observed,

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[141] *Ibid*. at 89. See *supra* note 93.

[142] See, e.g., Edward J. McCaffery, "Tax's Empire" (1996), 85 *Georgetown L.J.* 71 at 141-141-44, relying on Dworkin's "political-interpretive approach" to support a progressive consumption tax, but not referring specifically to Dworkin's work on equality of resources; and Shaviro, "Endowment and Inequality" *supra* note 138 at 140-42, reviewing liberal-egalitarian arguments for redistributing income from high-endowment to low-endowment individuals.

[143] Dworkin, *Sovereign Virtue*, *supra* note 20 at 90-91 and 478-79, note 8.

[144] *Ibid*. at 91, observing that" "Talents are nurtured and developed, not discovered full-blown, and people choose which talents to develop in response to their beliefs about what sort of person it is best to be."

[145] *Ibid*. at 90.

[146] *Ibid*. at 479, n. 8, assuming that investment income "reflects skill in investment as well as preferences for later consumption."

[147] *Ibid*., arguing that a person's decision "to spend rather than save" is "precisely the kind of decision whose impact should be determined by the market uncorrected for tax."

[148] See, e.g., Walker, *supra* note 126; and Mirrlees, *supra* note 4.

[149] See, e.g., John Rawls, *Justice as Fairness*, (Cambridge, MA: Harvard University Press, 2001) at 158, rejecting an endowment tax on the basis that it would violate our basic liberties"; Eric Rakowski, "Can Wealth Taxes Be Justified?" (2000), 53 *Tax L. Rev.* 263 at 267, n. 10, arguing that "it seems wrong to compel somebody to pay taxes on the value of his talents – capacities that came to him naturally or incidental to some voluntary activity and not by his design – if he chooses not to use

however, if liberal-egalitarians consider it acceptable for a tax system to require people to work longer hours or in particular occupations in order to obtain sufficient after-tax income in order to satisfy their consumption preferences,[150] it is not clear why it is unacceptable for a tax system to require people to work at least some hours in some occupations in order to satisfy the requirements of a redistributive tax.[151] While an answer may lie in a distinction between market returns that are realized though social interaction and potential returns that are not realized through market exchanges, this argument requires further elaboration.[152]

Even if ability or endowment taxation is considered normatively indefensible (and administratively infeasible), however, it might be possible to imagine specific features of a tax and transfer system that might aim to track Dworkin's distinction between a person's ambitions and their endowments in ways that are both administratively feasible and normatively acceptable.[153] Public health insurance, for example, arguably redistributes along one dimension of endowment by transferring resources from the healthy to the sick,[154] as do disability support programs which transfer resources from the "able" to the "disabled". The same may also be said of public pension plans, which redistribute resources from "the short-lived to the long-lived."[155] Others have proposed endowment-related taxes that would vary according to average parental income during childhood,[156] or Scholastic Aptitude Test (SAT)

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them productively" since this "would effectively enslave the able, by forcing them to put their highly taxes talents to some lucrative employ, on pain of sitting in a debtors' prison, however unpalatable the person found compensated work"; and Murphy and Nagel, *supra* note 1 at 122, identifying a "moral objection that endowment taxation would effectively force work on those who could otherwise survive without wage earnings and likewise force many people who would prefer a lower-paying position into careers that they have no interest in."

150 In this respect, liberal-egalitarians differ from classical libertarians, who – as Nozick argued – regard redistributive income taxes as "on a par with forced labor." Nozick, *supra* note 13 at 169.

151 See, e.g., Kirk J. Stark, "Enslaving the Beachcomber: Some Thoughts on the Liberty Objections to Endowment Taxation" (2005), 18 *Can. J. L. & Juris.* 47 at 49, arguing that "there is no difference in kind or in degree between the interference with liberty occasioned by the two types of taxes" – "unless one assigns greater moral value to non-market activities than to market activities (a position arguably in tension with the liberal principle of neutrality as between alternative visions of the good life"; and Shaviro, "Endowment and Inequality" *supra* note 138 at 133. As Stark and others emphasize, however, this conclusion may not apply if labour markets are "lumpy" so that a particular level of income can be obtained only by working full time. Stark, *supra* note 151 at 59, n. 64; and Shaviro, "Endowment and Inequality" *supra* note 138 at 138-39.

152 For an argument along these lines, see David M. Hasen, "Liberalism and Ability Taxation" (2007), 85 *Tex. L. Rev.* 1057 at 1113, arguing that legitimate redistributive in a liberal society should extend only to "resources that would be created in the system of social cooperation".

153 See, e.g., Zelenak, "Taxing Endowment" *supra* note 126 at 1172-1181, examining various schemes of "partial endowment taxation".

154 See, e.g., Kyle Logue and Ronen Avraham, "Redistributing Optimally: Of Tax Rules, Legal Rules, and Insurance" (2003), 56 *Tax L. Rev.* 157 at 226-27.

155 *Ibid*. at 227, n. 211.

156 Bruce Ackerman and Anne Alstott, *The Stakeholder Society*, (New Haven: Yale University Press, 1999) at 155-77, referring to such a tax as a "privilege tax".

scores achieved in high school[157] – though these approaches might well raise the same concerns about "talent slavery" that motivate liberal-egalitarian concerns about ability or endowment as an ideal tax base. More appealing, perhaps, are tax rules that would provide graduated cost recovery for investments in education and training, thereby reducing the tax on returns from these investment, on the basis that the income derived from the skills and talents acquired through these investments is more closely related to ambitions and efforts than endowments and circumstances.[158]

Dworkin's opposition to consumption or expenditure as an ideal tax base is more puzzling given the emphasis that equality of resources places on *ex ante* equality,[159] and his conclusion that taxation should not alter the distributive consequences of individual decisions to take risks or gambles or to save rather than spend[160] – arguments that are often used to support the taxation of personal consumption or expenditure.[161] With respect to risks and gambles, however, Dworkin acknowledges that "paternalistic" considerations might affect this conclusion, so that a hypothetical insurance market might compensate persons who suffer the consequences of bad option luck as well as bad brute luck.[162] Indeed, to the extent that the gambles involved in most investments entail both known risks and unknown risks, these gambles are apt to combine elements of option luck and brute luck, justifying at least some *ex post* redistribution from winners to losers. For both reasons, equality of resources might reasonably reject a yield-exemption consumption tax as incompatible with distributive justice.[163]

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[157] Zelenak, "Taxing Endowment" *supra* note 126 at 1180, observing that "if SAT scores depend on some combination of social privilege and genetic endowment, a tax based on SAT scores might come closer to a tax on overall endowment than at tax based on social privilege alone."

[158] See, e.g., David S. Davenport, "Education and Human Capital: Pursuing an Ideal Income Tax and a Sensible Tax Policy" (1992), 42 *Cas. W. Res. L. Rev.* 793.

[159] *Supra* note 102 and accompanying text.

[160] *Supra* notes 97-97 and accompanying text.

[161] *Supra* notes 129-31 and accompanying text.

[162] Dworkin, *Sovereign Virtue*, *supra* note 20 at 75 and 77. See *supra* notes 111 and 115 and accompanying text, suggesting that these paternalistic considerations might be integrated with Dworkin's idea of equality of resources by imagining what additional insurance individuals in a hypothetical position of equality might have purchased if cognizant of the risks of not insuring against bad option luck.

[163] For a similar argument against a yield-exemption consumption tax, see Graetz, *supra* note 124 at 1600-01, arguing that "lucky gamblers are not the same as unlucky gamblers" and that "the tax base must distinguish those who are lucky from those who are unlucky, even though they might have been in the same position with respect to their expectations before the gamble." This conclusion assumes that a tax system can, in fact, apply to returns to risk – which economic analysis demonstrates is not the case in a flat-rate income tax with full loss offsets in which investors can borrow at the risk-free rate of return in order to increase the size of investments that are subject to taxation in the event of success and loss offset in the case of failure. See, e.g., Evsey D. Domar and Richard A. Musgrave, "Proportional Income Taxation and Risk-Taxing" (1944), 58 *Q. J. of Econ.* 388; Joseph Bankman and Thomas Griffith, "Is the Debate Between and Income Tax and a Consumption Tax A Debate About Risk? Does it Matter? (1992), 47 *Tax L. Rev.* 377; and David A. Weisbach, "The (Non)Taxation of Risk" (2004), 58 *Tax L. Rev.* 1. Since the assumptions on which this conclusion rest are unlikely to apply in practice, it seems reasonable to conclude that "reports of the death of principles taxation of risk

Since a cash-flow consumption tax would apply on an *ex post* basis to all investment returns that are used for personal consumption, it is not vulnerable to this objection to the yield-exemption approach.[164] By excluding saved income from tax, however, the effect of a cash-flow consumption tax is to exempt the risk-free return on invested capital, which is included in the base of an income tax.[165] Although consumption-tax advocates often argue that this risk-free return should be exempt from tax on the basis that it merely compensates savers for deferring their consumption to a later period,[166] others have challenged this theory of the risk-free rate of return on the grounds that individuals wanting to smooth their consumption over different taxation periods might reasonably save income for this purpose without requiring any return[167] – suggesting that positive returns on invested capital are due entirely to the productivity of capital rather than compensation for deferral.[168] As well, if the risk-free return on savings should be exempt because it compensates for deferred consumption, one might argue that labour income should also be exempt on the basis that it compensates workers for giving up leisure time.[169]

Although Dworkin's rejection of a personal consumption tax does not consider these tax policy arguments for or against personal consumption as an ideal tax base, his assumption that investment returns reflect more than "preferences for later consumption" is consistent with the tax policy argument that these returns are attributable to the productivity of capital and are therefore properly included in the base of a redistributive tax. More generally, his support for income as a tax base and his view that that the purpose of this tax is to insure against the risk of low market returns reflect a clear rejection of the argument by some consumption tax advocates that redistributive taxation should address the resources that one withdraws from society through personal consumption, rather than the resources that one receives

premium … have been greatly exaggerated." Lawrence Zelenak, "The Sometimes-Taxation of the Returns to Risk-Bearing Under a Progressive Income Tax" (2006), 59 *S.M.U. L. Rev.* 879 at 915.

164 See, e.g., Edward J. McCaffery, "A New Understanding of Tax" (2005), 103 *Mich. L. Rev.* 807 at 812, arguing that a "postpaid" or cash-flow personal consumption taxes are fairer than a "prepaid" or yield-exemption personal consumption taxes because the former "can and do burden the yield to capital."

165 For a numerical demonstration of this result, see Warren, *supra* note 129 at 1102-1107.

166 See especially Irving Fisher, *The Theory of Interest as Determined by Impatience to Spend and Opportunity to Invest It*, (New York: Macmillan, 1930). For a helpful review of this "supply-side" account of the origin of interest, see Mark Kelman, "Time Preference and Tax Equity" (1983), 35 *Stan. L. Rev.*. 649 at 658-670.

167 See, e.g., Warren, *supra* note 129 at 1100, suggesting that a rational consumer might reasonably treat consumption in each period equally: "Marooned on a desert island with a lifetime store of goods, a consumer might well allocate an equivalent amount of goods to each of the remaining years of his life."

168 *Ibid*. at 1100-1101, suggesting that "the discount observed *ex ante* is due entirely to the productivity of capital, which permits the augmentation of consumption through deferral and investment." See also Kelman, *supra* note 166 at 670-675, reviewing "demand side" accounts of the origin of interest based on the productivity of capital.

169 Warren, *supra* note 129 at 1107.

through labour and investment.[170] On the contrary, as one critic of personal consumption taxation has argued:

> There is … a sense in which consumption taxation is less consistent with individual freedom than is income taxation. The distributive premise of the consumption tax is that quantitative consumption decisions are for collective, not individual, judgment. It certainly does not seem obvious that this premise shows more respect for individual liberty than does the income tax view that distribution of product is for collective decision. A persons 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 [or her] last resource.[171]

For this reason as well, a redistributive tax based on personal income seems more consistent with equality of resources than a redistributive tax aimed at personal consumption or expenditure.

In contrast to personal income, on the other hand, liberal-egalitarians generally oppose wealth as an ideal tax base on the grounds that a personal wealth tax would impose a tax on income that individuals choose to save rather than spend.[172] Unlike a personal income tax, which applies to the return from saved income, a personal wealth tax would apply to saved income itself – imposing a second tax on saved income that would not apply to income that is devoted to consumption in the same taxation period. For this reason, Dworkin rejects personal wealth as an ideal base for redistributive taxation, concluding that "[s]omeone's decision to spend rather than save … is precisely the kind of decision whose impact should be determined by the market uncorrected for tax under this analysis."[173]

Crucially, however, this conclusion depends on the assumption that income is subject to redistributive taxation before it is saved or spent, and that inheritances are also subject to a system of just redistribution, so that personal wealth is justly held.[174] To the extent that neither assumption holds, which might be true of an income tax that generally does not apply to unrealized gains, equality of resources might contemplate a role for personal wealth taxation as a supplement to an income tax or a tax on the transfer of wealth. Equality of resources might also contemplate a role for personal wealth taxation to reduce extreme concentrations of wealth, on the basis that equally-situated individuals participating in a hypothetical insurance market might reasonably have insured against a society of extreme inequalities in which they might suffer the "distinct harm of occupying a low tier in the class

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[170] *Supra* note 131 and accompanying text.

[171] Warren, *supra* note 129 at 1120-21.

[172] See, e.g., Rakowski, *supra* note 149.

[173] Dworkin, *Sovereign Virtue*, *supra* note 20 at 479, n. 8.

[174] These assumptions are implicit in Dworkin's view that equality of resources requires that individuals be situated equally *ex ante*. Although Dworkin notes that he does not consider "the problem of later generations" and the role of inheritance or estate taxes in his analysis of the personal tax base, he addresses this issue separately. *Ibid*.

system."[175] In principle, however, Dworkin and other liberal-egalitarians appear to regard well-designed income and inheritance taxes as sufficient for this purpose.

Finally, it is useful to reiterate two important aspects of Dworkin's proposal for a redistributive income tax: that it should be levied at progressive rates, and that revenues should be devoted exclusively to benefits paid to those whose skills and talents command low market returns. Although Dworkin's rationale for progressive rates relies on a principle of diminishing marginal utility of income, which equally-situated individuals are assumed to take into account in a hypothetical insurance market,[176] equality of resources might also favour progressivity on the basis that higher market returns are more likely to reflect an element of brute luck than ordinary returns – a presumption that is consistent with the phenomenon of "winner-take-all" markets in which certain positions offer returns that greatly exceed those available to marginally less successful competitors.[177] It might also contemplate higher rates on speculative gains that are also apt to reflect a significant element of brute luck (combined with option luck).

As for the idea that income tax revenues should be devoted exclusively to redistributive transfers, this approach would contradict both traditional public finance theory which rejects the idea of dedicated taxes, and prevailing practice in most developed countries which adds revenues from income taxes to general tax revenues. It might also suggest a more limited role for progressive income taxation as part of a tax system in which governments rely more extensively on other taxes including sales taxes and benefit-related taxes in order to finance public goods and services.[178] At the same time, however, dedicating income tax revenues to redistributive transfer programs might provide a more compelling rationale for progressive income taxation than welfarist rationales based on ability to pay which do not adequately account for individual entitlements.

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[175] *Ibid*. at 348, in the context of taxes on estates or inheritances. A personal wealth tax along these lines might be consistent with the view that an egalitarian society should place constraints on the extent to which markets are allowed to produce extreme inequalities. See, e.g., Anderson, *supra* note 122.

[176] *Ibid*. at 100-101. Although Dworkin's reliance on this principle might seem to suggest that his justification for progressive tax rates is ultimately based on individual welfare or utility, Dworkin emphasizes that the "the point of the strategy is fairness to individuals" who are presumed in this respect to take into account the impact of different income levels on their welfare. *Ibid*. at 349-50.

[177] See, e.g., Robert H. Frank and Philip J. Cook, *The Winner-Take-All Society*, (New York: Penguin Books, 1995). For an application of the theory to progressive taxation, see Martin J. McMahon, Jr. and Alice G. Abreu, "Winner-Take-All Markets: Easing the Case for Progressive Taxation" (1998), 4 *Fla. Tax Rev*. 1.

[178] See, e.g., Michael J. Graetz, *100 Million Unnecessary Returns: A simple, Fair and Competitive Plan for the United States*, (New Haven: Yale University Press, 2008), recommending a reduced role for the income tax as an explicitly redistributive tax alongside a broad-based sales or value-added tax; and David G. Duff, "Benefit Taxes and User Fees in Theory and Practice" (2004), 54 *U.T.L.J.* 391, supporting benefit taxes and user fees as an element of a tax system that includes redistributive taxes.

B. Inheritance Taxation

In addition to a progressive income tax, Dworkin argues that equality of resources would also favour "an inheritance tax, at a steeply progressive rate."[179] Although fiercely opposed by some commentators on the welfarist grounds that taxes on the transfer of wealth allegedly discourage capital accumulation and impede economic growth,[180] and the non-welfarist basis that these taxes constitute a "double tax" on hard-working and thrifty donors who managed to accumulate wealth during their lifetimes,[181] these taxes are widely supported by liberal-egalitarians on the grounds that substantial transfers of wealth from one generation to another are essentially unearned by their recipients, undermine ideals of fair equality of opportunity, and perpetuate dynastic concentrations of wealth that undermine social, economic and political equality.[182] According to Rawls, for example, progressive gift and inheritance taxes are necessary "not to raise revenue … but gradually and continually to correct the distribution of wealth and to prevent concentrations of power detrimental to the fair value of political liberty and fair equality of opportunity."[183] Dworkin's argument for a progressive inheritance tax is broadly consistent with these concerns, though his emphasis on ethical individualism as a principle of distributive justice dictates that his account turns on considerations of individual right rather than collective good.

For Dworkin, the argument for inheritance taxation requires a reconciliation between two "competing demands" of equality of resources: (1) that individuals are generally free "to spend what is rightfully theirs" after tax as they choose – "on expensive cars or art or travel, for example" – without restriction through "further

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[179] Dworkin, *Sovereign Virtue*, *supra* note 20 at 348.
[180] See, e.g., Edward J. McCaffery, "The Uneasy Case for Wealth Transfer Taxation" (1994), 104 *Yale L.J.* 283; and David A. Ward, "The Case Against Capital Taxes" (1980) 2 *Cdn. Tax'n* 31. Notwithstanding these claims, empirical evidence suggests that wealth transfer taxes have relatively little impact on capital accumulation – a finding that is consistent with theoretical analysis suggesting that the motives for transferring wealth are mixed, including accidental bequests on which taxes have no impact and altruistic gifts and bequests for which wealth transfer taxes can actually encourage increased accumulation in order to maintain a targeted gift or bequest after tax. See, e.g., Wojciech Kopczuk and Joel Slemrod, "The Impact of the Estate Tax on Wealth Accumulation and Avoidance Behavior" in William G. Gale, James B. Hines and Joel Slemrod, eds., *Rethinking Estate and Gift Taxation,* (Washington, D.C.: Brookings Institution, 2001) 299; and David Joulfaian, "The Behavioral Response of Wealth Accumulation to Estate Taxation: Time Series Evidence" (2006), 59 *Nat. Tax J.* 253. For an excellent summary of the literature, see Lily L. Batchelder, "What Should Society Expect from Heirs? The Case for a Comprehensive Inheritance Tax" (2009), 63 *Tax L. Rev.* 1 at 36-38.
[181] See, e.g., Edward McCaffery, "Grave Robbers: The Moral Case Against the Death Tax" (1999), 85 *Tax Notes* 1429 at 1436-40.
[182] See, e.g., David G. Duff, "Taxing Inherited Wealth: A Philosophical Argument" (1993), 6 *Can. J.L.& Juris.* 3; Eric Rakowski, "Transferring Wealth Liberally" (1996), 51 *Tax L. Rev*. 419; Anne L. Alstott, "Equal Opportunity and Inheritance Taxation" (2007), 121 *Harv. L. Rev.* 469; and Miranda Perry Fleischer, "Divide and Conquer: Using an Accessions Tax to Combat Dynastic Wealth Transfers" 57 *B.C.L. Rev.* 913 (2016).
[183] Rawls, *A Theory of Justice*, *supra* note 2 at 277.

taxes";[184] and (2) that "it is unjust when some people lead their lives with less wealth available to them, or in otherwise less favorable circumstances, than others, not through some choice or gamble of their own but through brute bad luck."[185] Taking both principles into account, Dworkin rejects the idea that gifts and bequests should be prohibited altogether,[186] but concludes that "people may be taxed on what they give or leave to others because this … form of expenditure … produces injustice in the next generation."[187]

In order to fully justify and specify the form of this tax, Dworkin resorts to the same device that he employs to justify a progressive income tax, imagining "another hypothetical insurance market in which hypothetical people may all buy insurance on equal terms."[188] According to Dworkin:

> Inheritance insurance would make sense … to guarantee … against the … harm of occupying a low tier in a class system – against, that is, a life in a community where others have much more money, and consequently more status and power, than they do and their children will.[189]

On this basis, he maintains, equally-situated individuals would insure against "bad inheritance luck" – accepting a structure of premiums that would "rise … steeply from zero in the case of modest gifts or a modest estate to a very high marginal proportion of very great wealth."[190] In addition, he suggests, since "it falls to income taxes" to finance medical benefits and redistributive transfers to individuals whose

[184] Dworkin, *Sovereign Virtue* Revisited" *supra* note 63 at 125; and Dworkin, *Sovereign Virtue*, *supra* note 20 at 347. Although Dworkin is not clear on this point, the general prohibition against "further taxes" that he contemplates presumably would not exclude broad-based sales or value-added taxes or more targeted benefit taxes or user fees that finance public goods and services, nor regulatory taxes such as environmental taxes that are deliberately designed to discourage behaviour that imposed negative externalities on others. In contrast, equality of resources would appear to exclude luxury taxes that might be designed to discourage "conspicuous consumption".
[185] *Ibid*.
[186] Dworkin, *Sovereign Virtue* Revisited" *supra* note 63 at 125. Emphasizing Dworkin's "envy test" as an essential element of his theory, some critics have argued that equality of resources demands "extremely strict regulation of gifts and bequests … to ensure that nobody benefits to a greater degree from such gifts and bequests than anyone else." See, e.g., Otsuka, *supra* note 122 at 52. Dworkin's response seeks a balance between two demands of equality, taking into account the position of those who wish to transfer wealth to others gratuitously, as well as the position of those in subsequent generations whose opportunities and social position are affected by these transfers. For a more detailed effort to balance these competing demands in the design of an inheritance tax, see Duff, "Taxing Inherited Wealth" *supra* note 182.
[187] Dworkin, *Sovereign Virtue*, *supra* note 20 at 347.
[188] *Ibid*. For a critical assessment of Dworkin's reliance on a hypothetical insurance market for inheritance, see Daniel Halliday, "Inheritance and Hypothetical Insurance" in S. Sciaraffa and w. Waluchow, eds., *The Legacy of Ronald Dworkin*, (Oxford: Oxford University Press, 2016) 99-114, arguing that Dworkin's commitment to an inheritance tax may also be supported by a commitment to independence that justifies a constraint on unrestricted inheritance to prevent class stratification and prejudice.
[189] *Ibid*. at 348.
[190] *Ibid*. at 347 and 348.

skills and talents command low market returns, inheritance tax revenues should be used "for improved public education, education and training loans for would-be professionals, and other programs that ease the impact of whatever economic stratification remains after the tax has been levied."[191]

While Dworkin contemplates that these premiums would be paid by donors, in the form of a gift and estate tax that is "measured by the assets given or bequeathed,"[192] liberal-egalitarians generally favour donee-based taxes that are measured by the assets that individuals receive by way of gift or inheritance.[193] Since a donee-based tax would apply tax-exempt thresholds and progressive rates to the value of assets received by beneficiaries rather than the value of assets accumulated by donors, it is more finely attuned to concerns about unequal inheritance than a donor-based tax – imposing the largest tax obligations on the most fortunate beneficiaries who receive the largest gifts and inheritances, encouraging donors to distribute their wealth more widely, and thereby reducing the impact of gifts and inheritances on unequal opportunities and the dynastic concentration of wealth.[194] For these reasons, a donee-based gift and inheritance tax should also be easier to justify as a tax on the fortunate beneficiaries of substantial gifts and inheritances, rather than a tax on hard-working and thrifty donors, and less vulnerable to the criticism that it constitutes double taxation of accumulated wealth on which tax has already been paid.[195]

Although Dworkin does not consider these arguments for a donee-based tax on the intergenerational transfer of wealth, his justification for a progressive inheritance tax is arguably more compatible with gift and inheritance tax levied on donees than it is with a gift and estate tax levied on donors – since it seems most reasonable to assume that hypothetical individuals would pay for insurance against the risk of "bad inheritance luck" with premiums corresponding to the manifestation of "good inheritance luck." Indeed, in a subsequent comment on his

[191] *Ibid*. at 349.
[192] *Ibid*. at 348. See also *ibid*. at 349, arguing that "a steeply progressive premium would assure them [donors] that their own work and success would benefit their children; the only sacrifice they would risk, by insuring at a high progressive premium, would be an inability to make their children very much richer than their contemporaries."
[193] See, e.g., Rawls, *A Theory of Justice*, *supra* note 2 at 277, suggesting that "the progressive principle might be applied at the beneficiary's end" in order to "encourage the wide dispersal of property which is a necessary condition, it seems, if the fair value of the equal liberties is to be maintained." In principle, such a tax would apply to all gifts and inheritances received by individuals over the course of their lifetimes, in the form of a Lifetime accessions tax. See, e.g., Duff, "Taxing Inherited Wealth" *supra* note 182.; Rakowski, "Transferring Wealth Liberally" *supra* note 182; and Alstott, "Equal Opportunity and Inheritance Taxation" *supra* note 182.
[194] See, e.g., David G. Duff, "Alternatives to the Gift and Estate Tax" (2016), 57 *B.C. L. Rev*. 893 at 911-912.
[195] Michael J. Graetz and Ian Shapiro, *Death by a Thousand Cuts: The Fight over Taxing Inherited Wealth*, (Princeton: Princeton University Press, 2006) at 255.

inheritance tax proposal, Dworkin appears to accept that this tax should "fall not on the donor, … but on the recipient of the gift or bequest."[196]

Finally, Dworkin's argument that inheritance tax revenues should be devoted to public education and other programs designed to reduce economic stratification seems reasonable given that a central purpose of these taxes to reduce unequal opportunities – though one might also imagine other uses such as the payment of a "social inheritance" to individuals reaching the age of maturity,[197] and is important to recognize that additional resources should also be devoted to public education and other programs to support advanced education and training on the grounds that these programs constitute public services that confer societal benefits in addition to those enjoyed by individual recipients. As with Dworkin's argument for the dedication of income tax revenues to redistributive transfers, this approach to the use of inheritance tax revenues would contradict traditional public finance theory and prevailing practice in most developed countries that levy taxes on transfers of wealth,[198] but could help to enhance public understanding and support for inheritance taxation as an essential element of a just tax system.

IV. Conclusion

While this article does not endorse all aspects of Dworkin's theory, it argues that equality of resources provides a more compelling account of distributive justice than welfare-based theories, Rawlsian theory and classical libertarianism – combining a conception of economic equality with principles of individual freedom and responsibility in a way that affords better recognition to both sets of values than these other approaches. On this basis, it examines Dworkin's arguments for redistributive taxation, building on his brief remarks to defend progressive income and inheritance taxes for this purpose.

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[196] Dworkin, "Ronald Dworkin Replies" *supra* note 36 at 353. In a footnote to this comment, Dworkin appears to suggest that this approach would include gifts and inheritances as "income" to the donee. *Ibid*., n. 41. See also the brief discussion in Ronald Dworkin, *Is Democracy Possible Here?* (Princeton, NJ: Princeton University Press, 2006) at 117-118, remarking that "it does seem unprincipled to tax an estate at the same rate without regard to the number or wealth of its beneficiaries" and suggesting that "it would be much fairer … to treat substantial gifts of any form, including bequests, as income subject to ordinary taxes." Although the income-inclusion approach is one way to tax donees on the value of gifts and inheritances, the aggregation of gifts and inheritances with ordinary income and the taxation of these aggregate amounts at income tax rates is arguably inappropriate for the taxation of inherited wealth and is incompatible with Dworkin's argument for a distinct tax on inherited wealth. For a critical assessment of the income-inclusion approach to taxing gifts and inheritances, see Duff, "Alternatives to the Gift and Estate Tax" *supra* note 193 at 910-911.

[197] See, e.g., Akerman and Alstott, *supra* note 156 at 21-64.

[198] Over the past few decades, several countries have scaled back or repealed taxes on the transfer of wealth, which Dworkin suggests "may well be unjust." Dworkin, *Sovereign Virtue*, *supra* note 20 at 349. For an account of the repeal of these taxes in several countries, see David G. Duff, "The Abolition of Wealth Transfer Taxes: Lessons from Canada, Australia and New Zealand" (2005), 3 *Pitt. Tax Rev.* 71.

To the extent that justice is the first virtue of social institutions, it follows that a just society should attend to the distributive justice of its tax system as its first or sovereign virtue. Relying on Dworkin's conception of equality of resources as a guide, a just tax system would include progressive income and inheritances taxes.