https://doi.org/10.1017/S0265052506060201 Published online by Cambridge University Press

TAXATION, THE PRIVATE LAW, AND DISTRIBUTIVE JUSTICE*

By Kevin A. Kordana and David H. Tabachnick

I. Introduction

Taxation is traditionally conceived of as the sector of the public law through which governments raise revenue needed for their justifiable distributive aims. The rules of tax law, in this view, control the manner in which governments raise revenue, while rules of transfer guide government spending. Distributive aims are understood to be met largely through selecting and implementing, from among competing "tax and transfer" schemes, that scheme which best serves the demands of a conception of tax policy. The question of what constitutes justified distributive aims varies, of course, from political theory to political theory. Some theories maintain, for example, that governments may rightly use systems of tax and transfer (only) for the provision of public goods (i.e., nonrivalrous, nonexcludable goods) and the protection of basic rights. Other theories maintain that governments might justifiably engage in additional taxation for the provision of goods that are not, strictly speaking, public goods (e.g., hospitals, schools, and the arts), as well as the provision of economic distributions to the poor or needy (e.g., food and housing subsidies).

Our aim in this essay, however, is *not* to directly weigh in on this debate (roughly) between libertarians and liberals over the proper aims of taxation. Instead, we intend to focus on somewhat more basic questions concerning "equity-oriented values"[1] and distributive justice, and their justificatory relationship to taxation and the private law. We are interested in the questions of what exactly constitutes the proper domain of taxation and what taxation's proper relationship is to the private law.[2] In partic-

* We are grateful to John G. Bennett, Harry Dolan, Edward McCaffery, and Ellen Frankel Paul for written comments on a previous draft and to Eric Mack, Fred Miller, Jeffrey Paul, A. John Simmons, and the other contributors to this volume for valuable discussions.

[1] We use the phrase "equity-oriented values" to mean values that serve as the basis for legal rules that are not justified solely by concerns of either (1) negative rights or (2) wealth-maximization. As we use the phrase, "equity-oriented values" include, for example, charity, beneficence, equality, and utility, and are not limited to matters of the moral value of *equality,* per se.

[2] We employ, for the purposes of this essay, the conventional distinction between public and private law: namely, on the one hand, areas of law in which the state is a party to legal actions (for example, taxation, criminal law, and constitutional law), and, on the other hand, areas of law where the state merely provides rules and judicial fora for the enforcement of legal action, but private parties conduct legal actions against one another (for example, tort

 © 2006 Social Philosophy & Policy Foundation. Printed in the USA.

https://doi.org/10.1017/S0265052506060201 Published online by Cambridge University Press

ular, can the rules of the private law, as a matter of principle, be justifiably leveraged in service of equity-oriented values and, if so, why? Taxation is traditionally conceived as an independent module limited to the rules of tax and transfer schemes. An interesting question arises, however, over whether the very values that serve as the normative underpinning of tax and transfer schemes, in particular a conception of *justice,* may also (as a matter of principle) serve as the normative basis for creating private-law rules that assist in meeting bona fide equity-oriented aims.

We maintain that the answers to our questions (unsurprisingly) turn to a large extent upon one's conception of political theory and—importantly—upon one's conception of private property. In addressing our questions, we distinguish between two important camps in contemporary political theory: on the one hand, those who hold deontic "pre-institutional" or (roughly) Lockean "natural right" conceptions of private property (for example, libertarians and Lockean liberals); and, on the other hand, those who hold maximizing "post-institutional" conceptions of property (for example, Rawlsians[3] and some utilitarians).

For deontic pre-institutional liberals, property claims derive their moral force from the commitment to a prepolitical or pre-institutional moral doctrine. In this view, the authority of a justified system of property law is derived from the moralized prepolitical account of natural rights in property. In contrast, political liberals who hold a maximizing post-institutional conception of property maintain that private property is a political institution constructed in service of distributive aims.

We argue that for such post-institutional theorists—for example, Rawlsians employing the difference principle (maximizing the position of the least well-off), or utilitarians employing the utility principle (maximizing general utility)—taxation cannot be *conceptually* independent of the private law. In post-institutional maximizing conceptions, the entirety of law must answer to the demands of the overarching distributive scheme. Our central claim with regard to post-institutional maximizing theorists is that there are no conceptually *independent* or distinct principles of taxation—

and contract). See, e.g., Jeffrie G. Murphy and Jules L. Coleman, *Philosophy of Law,* rev. ed. (Boulder, CO: Westview Press, 1990), 143–46.

[3] We consider Rawls's two principles of justice to be maximizing principles. They demand that the complete scheme of legal and political institutions adopted (in comparison with all other potential schemes) maximizes the position of the least well-off in terms of primary goods (subject to the liberty constraints generated by the maximizing component of the first principle and to the opportunity principle, taken in lexical priority). The principles of justice are properly viewed as not only consequentialist, but also maximizing, in this inter-schemic selection. This is correct even given the fact that the values embodied in the principles of justice are informed by deontic considerations (i.e., in the first principle, equal liberty, and, in the second, the egalitarian considerations embodied in the difference principle). It is correct even given the fact that people living within the selected scheme are not required to act so as to maximize anything (i.e., are not required directly to apply the maximands of the principles of justice). The principles of justice are thus consequentialist and maximizing in their application in the inter-schemic comparisons they make in selecting the complete scheme of legal and political institutions.

there is no philosophically interesting distinction between "taxation" and the "private law." For such theorists, we maintain that both taxation and the private law are matters of distribution.

In contrast, we argue that the situation is different for theorists who hold a deontic pre-institutional conception of property. Since such views do not conceive of justice as flowing directly from an overarching distributive scheme (or set of distributive principles) that defines a conception of justice, the private law does not answer to the demands of distributive justice. Thus, there *is* for such pre-institutional theorists *conceptual* space for a distinct body of private law—independent of distributive demands or aims. The private law for such pre-institutional theorists can claim a conceptual or normative independence from distributive aims. We argue, however, that this independence of the private law from distributive justice does not entail that, for at least some such pre-institutional views, the private law cannot reflect equity-oriented values. We maintain that while some such pre-institutional theorists may justifiably leverage the rules of the private law to reflect equity-oriented concerns, an interesting question arises as to whether or not meeting such concerns can properly be understood (for them) as a matter of *justice.*

In Section II, we discuss the maximizing post-institutional conception of taxation, property, and the private law. In Section III, we discuss the deontic pre-institutional conception of property and the role that taxation and equity-oriented values play in such pre-institutional schemes. Section IV provides a conclusion.

II. Taxation and the Private Law for Post-Institutional Maximizing Theorists

The traditional or conventional view of taxation holds that justified tax and transfer schemes must meet the demands of some independent conception of tax policy (e.g., the benefit principle[4] or the equal sacrifice principle[5]). In their philosophical treatment of tax policy, *The Myth of Ownership: Taxes and Justice,* Liam Murphy and Thomas Nagel argue against this conventional view, maintaining that tax policy is of only instrumental

[4] The benefit principle is the principle of tax policy according to which people should be taxed in proportion to the benefits they receive from the state. "Benefit" is typically understood as measured against the baseline of life in the absence of a state. See Liam Murphy and Thomas Nagel, *The Myth of Ownership: Taxes and Justice* (New York: Oxford University Press, 2002), 16.

[5] The equal sacrifice principle is the principle of tax policy according to which taxation should reduce the welfare of each taxpayer by the same amount, measured against a baseline of pretax market outcomes. Given the diminishing marginal utility of money, equal sacrifice does not entail equal or even proportional taxation in dollar terms. The equal sacrifice principle distinguishes taxpayers according to their income, creating post-tax incomes that equally reduce the welfare (given the diminishing marginal utility of money) of each taxpayer, as compared to a pretax baseline. Ibid., 24.

https://doi.org/10.1017/S0265052506060201 Published online by Cambridge University Press

https://doi.org/10.1017/S0265052506060201 Published online by Cambridge University Press

value to meeting the demands of the overarching requirements of distributive justice. Therefore, they argue, independent modules of tax policy analysis are morally irrelevant (indeed, incoherent). There are no questions of justice or fairness that are independent matters of tax policy.[6] While we have elsewhere argued that this claim is overbroad—that it is not true for all forms of political liberalism[7]—we have also commented that "Murphy and Nagel's argument is most powerful if one's conception of distributive justice is maximizing or teleological."[8]

Consider a conception of liberalism with a post-institutional view of property (i.e., property is viewed as merely conventional, rather than natural) and a maximizing theory of distribution (e.g., Rawlsianism or utilitarianism). Given that property is merely instrumental, and because the demands of distributive justice are maximizing, the tax system is required to satisfy (in conjunction with other institutions) the demands of the distributive principles. (Again, these principles might be Rawlsian or utilitarian, but their content is unimportant for present purposes. We will refer to them below as "the distributive principles" without specifying their content.) This implies that tax-specific notions of justice or fairness (e.g., perhaps those tied to the benefit principle, or to "fairness" in the tax base)[9] are irrelevant. To the extent that these notions conflict with a tax policy that violates their tenets but better satisfies the demands of the distributive justice aim, they will be ignored, and the tax policy violating their tenets will be implemented, in service of the overarching demands of distributive justice. This is what Murphy and Nagel mean when they argue that tax policy is merely instrumental to the aims of the distributive scheme.

Interestingly, in this view, tax policy, while merely instrumental, is immune to (new) charges of unfairness—even if, for example, it were to feature a striking absence of uniformity in the tax base.[10] This is because the conception of distributive justice *defines* fairness. The entire tax system is therefore suffused with "fairness"—it has been constructed in order

[6] Ibid., 98–99: "[C]hoice of tax base has only instrumental significance for economic justice. . . . [T]he issue of the tax base does not disappear, but it takes on a purely instrumental significance as far as justice is concerned: Different tax bases may be better or worse suited to the tax system's task of helping to secure just social outcomes."

[7] Kevin A. Kordana and David H. Tabachnick, "Tax and the Philosopher's Stone," *Virginia Law Review* 89, no. 3 (2003): 655–56.

[8] Ibid., 654.

[9] For example, it is sometimes argued that fairness requires a measure of equity in the tax base—i.e., in what is taxed (income, consumption, "sin," etc.).

[10] "Since justice in taxation is not a matter of a fair distribution of tax burdens measured against a pretax baseline, it cannot be important in itself what pretax characteristics of taxpayers determine tax shares." Murphy and Nagel, *The Myth of Ownership*, 98. "[Y]ou may still feel the force of the initial intuition: Isn't it *obviously* unfair to tax food more heavily than clothes . . . ?" Ibid., 108 (emphasis in original).

best to satisfy the demands of the distributive principles, which define justice or fairness.[11]

Importantly, however, this argument may be pressed even further. If tax policy is, for the post-institutional, maximizing theorist, understood as entirely instrumental to meeting the demands of distributive justice, then tax policy has lost any principled claim to play a unique role in distributive justice. For post-institutional maximizing theorists, *all* economic matters—not only the system of tax and transfer, but also matters of the private law (i.e., property, contract, tort, etc.)—are properly understood, conceptually and normatively, as distributive concerns.[12]

That is, for post-institutional maximizing theorists, there is no principled distinction between taxation and the sectors of what are traditionally understood to be matters of the private law. For such theorists, all economic matters, including matters of the private law, are to be constructed in service of the post-institutional distributive scheme. Therefore, theories that hold a post-institutional, maximizing conception of property lack the resources to draw a principled distinction between taxation and the pri-

[11] Kordana and Tabachnick, "Tax and the Philosopher's Stone," 664: "The reference to 'intrinsic fairness' and talk of 'instrumentality' diverts attention from the fact that, for Murphy and Nagel, the choice of tax base should be understood as *suffused* with fairness. It is this very fact that . . . makes arguments grounded in *new* fairness claims incoherent. In other words, we think that the best way to understand Murphy and Nagel's view is to imagine that the response to . . . fairness claims . . . is not the rather puzzling 'choices of the tax base are purely instrumental' but rather, 'fairness has been taken care of already'" (emphasis in original).

[12] To be clear, our discussion is limited to post-institutional theorists for whom the conception of private property is maximizing. This, however, is not exhaustive of all post-institutional views. There are nonmaximizing post-institutionalists; see, for example, Jean-Jacques Rousseau, *On the Social Contract*, in *The Basic Political Writings,* trans. Donald A. Cress (Indianapolis, IN: Hackett Publishing Co., 1987), bk. 1, chap. IX. One might object that Rawls is not a post-institutional maximizing theorist with regard to the private law, since the difference principle is the second of two lexicographically ordered principles and is itself constrained by conditions of fair equality of opportunity. This objection holds that considerations other than economic distribution are at stake. For instance, one might argue on the basis of Rawls's first principle that private law must be independent of economic distributive considerations (for Rawls, first-principle matters are distributive albeit not economic). Our response is this: for Rawls the construction of a property baseline is a second-principle (i.e., economic) matter, and since private-law constructions require a property baseline, contract and tort law must, therefore, also be second-principle matters. Rawls does allow that the first principle of justice constructs what he calls personal property, and we have argued elsewhere that (analogously) the first principle may require (at the most abstract level) that (at least) some contracting options be open. See Kevin A. Kordana and David H. Tabachnick, "Rawls and Contract Law," *George Washington Law Review* 73, no. 3 (2005): 609. Our point, however, is that the specific details of rights of ownership, transfer, and compensation for harm require a property baseline that is not available at the first-principle level; thus, the private law is, for Rawls, a second-principle matter constructed in service of maximizing the position of the least well-off. See John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971), 298. This point would seem to hold true for any post-institutional view of property constructed in service of maximizing distributive concerns. Since, in such a view, the details of the private law (e.g., transfer and compensation for harm) are constitutive of the property construction, independent (or pre-institutional) conceptions of private law are rendered incoherent.

https://doi.org/10.1017/S0265052506060201 Published online by Cambridge University Press

https://doi.org/10.1017/S0265052506060201 Published online by Cambridge University Press

vate law. For such theories there is no independent subject of taxation—there is simply government action that is instrumental to the distributive scheme and government action that is not. For post-institutional maximizing theorists, there is no public/private distinction in economic matters that patterns deontic pre-institutional commitments[13] and therefore no subject of tax law independent of all other areas of economic governance.

In this view, not just tax policy but all of a society's legal and political institutions[14] must be designed in instrumentalist fashion to the satisfaction of the demands of the distributive principles. Just as independent metrics of tax policy are rendered irrelevant by the demands of distributive justice, so too are independent metrics of justice in contract law (e.g., Charles Fried's contract-as-promise)[15] and bankruptcy (e.g., the principle of respecting prebankruptcy entitlements as much as possible).[16] Rules of contract and bankruptcy—as well as the rest of the private law—are constructed to serve, instrumentally, the demands of the distributive scheme. Such rules cannot coherently reflect commitments to other (independent) goals or values. Note as well that, due to the lack of commitment to other values, such bodies of law might not be constructed at all; that is, they would be constructed if and only if their existence were instrumental to meeting the demands of the distributive principles.

Thus, for the post-institutional maximizing theorist, distributive justice is not, at the level of principle or theory, tied to taxation and transfer.[17]

[13] For a contrasting view, see Arthur Ripstein, "The Division of Responsibility and the Law of Tort," *Fordham Law Review* 72, no. 5 (2004): 1814–15: "Tort law protects property as well as persons, however, so a Rawlsian account of its normative structure must take account of property, and explain how it can merit protection as a matter of justice. Justice requires that private law—tort, contract, property and unjust enrichment—have a certain kind of independence. . . . [P]articular transactions can be judged on their own terms, rather than being subordinated to distributive justice. The same point applies to property, and to the involuntary transactions governed by tort law" (footnote omitted).

[14] More precisely, this statement applies to the set of legal and political institutions subject to the domain of the distributive principles. It is possible that the maximand's domain might be limited. See Kordana and Tabachnick, "Rawls and Contract Law," 602 and n. 16.

[15] Charles Fried, *Contract as Promise: A Theory of Contractual Obligation* (Cambridge, MA: Harvard University Press, 1981), 17. Fried argues that what separates contractual liability from other forms of liability is the moral significance of a promise. Barring procedural defects, contracts are understood to be fair because they embody the "will" of the consenting (promising) parties. In Fried's view, the conception of justice in transaction (again, barring procedural defects) is *endogenous* to the "will" of the parties. External values (e.g., general welfare or economic efficiency) are not capable of imposing *contractual* duties or liability.

[16] Thomas H. Jackson, *The Logic and Limits of Bankruptcy Law* (Cambridge, MA: Harvard University Press, 1986), 27–33.

[17] Of course, the locus of equity-oriented moves might be concentrated, based on instrumental concerns, in a particular area of law. See, e.g., Louis Kaplow and Steven Shavell, "Why the Legal System Is Less Efficient Than the Income Tax in Redistributing Income," *Journal of Legal Studies* 23, no. 2 (1994): 667. Our point is that it is important to keep in mind that such a concentration does not arise as a matter of principle. It is the very lack of a principled distinction between tax and the private law that allows the evaluation of instrumentalist trade-offs to be made between the various bodies of law.

The entire scheme of political and legal institutions, including the private law, is subject to the demands of distributive justice. That complete scheme of political and legal institutions which best satisfies the distributive principles will be selected. Schemes of taxation and transfer are not the particular or exclusive domain of distributive justice.

To illustrate, take an example from the private law—bankruptcy—in conjunction with taxation, and consider how a post-institutional maximizing theorist would go about constructing a system of bankruptcy. There are various possibilities. First, and most simply, there might be no bankruptcy law. In other words, there need be nothing in the distributive principles that directly entails the existence of bankruptcy law. Second, to the extent that the scheme of political and legal institutions selected by the distributive principles were to have a fairly detailed system of private law in place, it seems likely that there would be some rules governing actions taken against insolvent persons and firms. For example, to the extent that a mandatory stay (of collection),[18] and/or a mandatory right to discharge of indebtedness in personal bankruptcy,[19] are welfare-enhancing, they might be required in order to (indirectly) satisfy the demands of the distributive principles. Thus, contracting options that might otherwise have been constructed as "open" or "free" (in the post-institutional sense) would be closed in order to make the stay and the right to discharge mandatory.

Thus, we can see that the post-institutional maximizing theorist cannot begin the inquiry into designing bankruptcy policy by appealing to an antecedently held (pre-institutional) conception of property or contract; nor can he begin within the framework of a traditional conception of bankruptcy law. Much of what jurists working within such a post-institutional scheme might come to deem "bankruptcy law" would arise through the opening and closing of contracting options, in service of the distributive principles. In other words, the distributive principles obliterate any notion of what bankruptcy law, or tax law, "should" look like (in pre-institutional terms). The distributive principles construct a complete scheme of political and legal institutions which, overall, best serves their demands. Lawyers operating within this scheme might label certain of its aspects "tax law" or "bankruptcy law" as a matter of their profession's division of labor, but there is no principled patterning of pre-institutional conceptions of property, contract, bankruptcy, or tax "fairness" in the post-institutional scheme. Instead, such bodies of law would have been selected for their usefulness in meeting the demands of the distributive principles.

The distributive principles might require that contracting options closed by traditional bankruptcy law (e.g., the mandatory stay) instead be constructed as open. In this case, the bankruptcy scheme might approximate

[18] Jackson, *The Logic and Limits of Bankruptcy Law,* 16–17.
[19] Ibid., 225.

https://doi.org/10.1017/S0265052506060201 Published online by Cambridge University Press

https://doi.org/10.1017/S0265052506060201 Published online by Cambridge University Press

something like that advocated by legal scholar Alan Schwartz, who advocates a more contractual approach to bankruptcy law, on grounds of its efficiency.[20] In contrast, if those contracting options were to be closed, it might look something like current law. In the latter case, the options might be closed for a variety of reasons—for example, those advocated by bankruptcy scholar Thomas Jackson or by the "traditional fairness camp."[21] But these last two illustrations are simply that—illustrations. The exact contours of bankruptcy policy (should it exist) need to respond to the demands of the distributive principles, not to pre-institutional values. The upshot is that taxation and transfer are not in any interesting philosophical sense distinct from other bodies of law: all are designed (in conjunction with one another) to best meet the demands of the distributive principles. For post-institutional maximizing theorists, all of law, not just "tax" law, is suffused with distributive aims and designed solely with those aims in mind.

To think otherwise, that is, to speak of whether a particular bankruptcy policy (or any other area of law) is more or less "fair" than another in isolation, would be to commit the fallacy of division. The modules of the private law, including bankruptcy policy, are not to be understood as fair or just in and of themselves; rather, each has a part in an overall scheme of distributive justice that is guaranteed to be fair.[22] The ultimate comparison is interschemic[23] (that is, between complete schemes, rather than between particular policies or subsets of distributive schemes).[24]

[20] Schwartz argues that the cost of capital is higher when lenders and borrowers face the application of mandatory bankruptcy terms in insolvency situations, rather than being able to select bankruptcy terms tailored to their particular situation. See Alan Schwartz, "Bankruptcy Contracting Reviewed," *Yale Law Journal* 109, no. 2 (1999): 344: "If there is a possibility that free contracting over bankruptcy systems would increase welfare, and if there otherwise is nothing wrong with free contracting, then free contracting should be permitted."

[21] Jackson argues that creditors face a "common pool" problem. That is, once a debtor is insolvent, creditors have an incentive to "race to the courthouse" to enforce their claims, which might result in the firm being dismembered piecemeal, even though creditors as a whole might be better off with a coordinated procedure (such as selling off the firm as a going concern). For Jackson, this justifies bankruptcy law's mandatory stay (of collection). Jackson, *The Logic and Limits of Bankruptcy Law,* 16–17.

The "traditional fairness camp" is concerned with job preservation, as being in the interest of workers and communities. Thus, its proponents tend to favor bankruptcy policies that will preserve a firm's operations as opposed to shutting them down.

[22] "[W]e cannot tell by looking only at the conduct of individuals and associations in the immediate (or local) circumstances whether, from a social point of view, agreements reached are just or fair. For this assessment depends importantly on the features of the basic structure, on whether it succeeds in maintaining background justice." John Rawls, "The Basic Structure as Subject," in Rawls, *Political Liberalism* (New York: Columbia University Press, 1996), 266–67.

[23] Thomas W. Pogge, *Realizing Rawls* (Ithaca, NY: Cornell University Press, 1989), 66–67.

[24] Of course, one could object that bankruptcy policies could be compared interschemically; that is, one policy could be compared to all other available policies. Our point here is that that independent judgment is only instrumentally relevant. The distributive principles must always adjudicate in favor of the overall or complete economic scheme that complies with the principles of justice.

https://doi.org/10.1017/S0265052506060201 Published online by Cambridge University Press

Thus, for post-institutional theorists, arguments about property, contract, bankruptcy, and tax policy per se are moot. The post-institutional maximizing theorist needs to select bankruptcy policy as part of the overall scheme that best satisfies the distributive principles. While this is a complex endeavor, a simple example can help explain the spirit of the analysis, and highlight the essential unity between taxation and bankruptcy policy in such a scheme. Consider an economy with four agents: (1) a lender, (2) an owner/manager, (3) a worker, and (4) a disabled person. The nongovernmental economic transactions in this economy consist of the following: at t_0 the owner/manager borrows money from the lender, and the owner/manager uses this money to hire the worker and to invest in a research project. At t_1 the project has a 90 percent chance of succeeding, in which case the lender is repaid and the firm remains in business with the owner/manager having profited. Assume that, given such an outcome, the distributive principles would demand the taxation of the owner/manager's profits (and perhaps those of the lender) in order to make a transfer payment to improve the position of the disabled person (who otherwise has no income). Perhaps the worker would receive transfer payments as well. At any rate, bankruptcy policy would not be relevant at t_1 if the project succeeds (of course, at t_0 it might affect the interest rate charged by the lender, which in turn could affect the probability of the firm's solvency at t_1).

There is, however, a 10 percent chance that the research project will fail. In this event, assume that the firm is to be liquidated (perhaps because its liquidation value is greater than its going-concern value). There are two creditors of the firm: the lender and the worker. Post-dissolution, the worker will be jobless, so his economic position will fall to that of the disabled person. Consider two (of the many) possibilities for how the creditors are to share in the liquidation value of the firm: they could be treated equally (i.e., receive an equal percentage of their claim), or the worker could be preferred in some manner to the lender. If the worker is so preferred, he will have more assets going forward, and thus, presumably, will not require as many transfer payments as will the disabled person. If the worker is not so preferred, he will have fewer assets going forward, and presumably will require more transfer payments going forward than if he were preferred.

Our point is that, in essence, the post-institutional nature of the maximizing scheme has obliterated the principled distinction between bankruptcy policy and taxation, vis-à-vis the choice to be made in the preceding example. There is no principled reason for the post-institutional maximizing theorist to have an *ex ante* bankruptcy policy commitment either to treat the lender and the worker equally or to prefer the worker. Moreover, a worker preference operates as, in essence, a tax (here, on the lender). The post-institutional maximizing theorist would compare the consequence of imposing that sort of tax on the lender with the conse-

https://doi.org/10.1017/S0265052506060201 Published online by Cambridge University Press

quence of not doing so—that is, the worker falling all the way to the disabled person's position in society, which would likely require the imposition of some sort of other taxation (and transfer). Thus, taxation and the private law can be traded off against each other in meeting the demands of the distributive principles. In other words, a tax policy and a bankruptcy policy would ultimately be selected, but they would be those policies that best satisfy, in conjunction with the other areas of government action, the demands of the distributive principles—not those policies that satisfy any tax-specific or bankruptcy-specific goals. In this sense, the private law, for post-institutional theorists, is "tax."

The latter point, we think, has been insufficiently appreciated in the literature. For example, bankruptcy scholar Robert Rasmussen, apparently sensing a discrepancy between the bankruptcy policies advocated by the "traditional fairness camp" and what a prominent category of post-institutional maximizing theorists—Rawlsians—*ought* to think about bankruptcy law, has argued that a Rawlsian "would enact an economically-derived bankruptcy regime rather than current law."[25]

In his analysis, Rasmussen appears to recognize that, for a Rawlsian, bodies of law other than bankruptcy may be constructed in order to advance the position of the least well-off in the overall scheme of political and legal institutions. For example, Rasmussen seems to suggest that tort law would be a likely candidate as a subject of equity-oriented distribution. It is his conjecture that the tort regime could aim at reducing accidents in a manner maximally beneficial to the least well-off.[26] Rasmussen goes on to argue that even under the assumption that current bankruptcy law "saves some jobs in firms which experience financial distress that would be lost under an economic approach,"[27] a Rawlsian would reject that employment-preserving aspect of the current bankruptcy regime out of a concern that the increase in interest rates that results from such a policy causes more job losses throughout the economy than it saves in bankruptcy.[28]

For Rasmussen, the preference for lower interest rates over specific instances of job preservation is an instance of a law-and-economics or wealth-maximization analysis. Rasmussen assumes that the bankruptcy regime that maximizes the position of the least well-off is the regime that embodies minimal overall unemployment. Rasmussen maintains that the law-and-economics approach to the design of possible bankruptcy schemes is the normative framework that, interestingly, produces the scheme

[25] Robert K. Rasmussen, "An Essay on Optimal Bankruptcy Rules and Social Justice," *University of Illinois Law Review* 1994, no. 1 (1994): 40.

[26] "[T]hose in the original position would consider . . . minimizing the number of accidents in the first instance." Ibid., 31. Note that Rasmussen is imprecise here. For Rawls, representatives in the original position merely select the two principles of justice, not the policies to be used to implement them.

[27] Ibid., 39.

[28] Ibid., 39–40.

https://doi.org/10.1017/S0265052506060201 Published online by Cambridge University Press

that best serves Rawls's difference principle. The law-and-economics approach to the design of bankruptcy would, by selecting the bankruptcy policy that embodies the least unemployment, be most consistent with Rawlsianism.

We have two objections. First, while not impossible, it seems highly curious that two maximizing principles with different maximands (wealth on the one hand, and the position of the least well-off on the other) would yield extensionally equivalent outcomes. Second, it is unclear to us why Rasmussen attempts to construct bankruptcy with only economic efficiency in mind, while assuming that all the equity-oriented work of maximizing the position of the least well-off will come in *other* areas of law.[29] Surely, maximizing the position of the least well-off will require *some* policy differences as compared to a pure wealth-maximization system, given the different maximands. For example, if the argument of the previous paragraph concerning unemployment is that the Rawlsian would prefer low interest rates to particular instances of job preservation (in an effort to create more jobs in total), then the same analysis should be regenerated with regard to tort law. However, Rasmussen assumes that the Rawlsian would construct tort law to result in fewer accidents, not more jobs. In other words, for Rasmussen, the Rawlsian constructs tort law to protect tort victims and bankruptcy law to promote job-creation (via lower interest rates).

However, it is unclear why the Rawlsian does not instead construct bankruptcy law to better protect tort victims (e.g., via granting them priority as creditors)[30] and tort law to promote job-creation. It is possible, for example, that there would be more jobs if more torts went uncompensated (through a reduction in liability and/or damages).[31] Thus, if, as Rasmussen assumes with respect to bankruptcy, job-creation via lower interest rates is the path to maximizing the position of the least well-off, perhaps tort law could be relaxed in a manner that would create jobs—for

[29] Kaplow and Shavell have argued that given a commitment to utility maximization, all equity-oriented distributive moves are most efficiently made via tax and transfer. Kaplow and Shavell, "Why the Legal System Is Less Efficient Than the Income Tax in Redistributing Income." Note, however, that *Rawls* is not concerned merely with the distribution of constitutional liberties and economic benefits and burdens, but focuses rather on what he calls "the objective index of the primary goods" (i.e., those goods that reasonable people would want independent of whatever else they want). Prominent among these goods, for Rawls, is "the social bases of self-respect." Thus, even if Kaplow and Shavell are correct—given a commitment to utility (or wealth) maximization—their argument need not hold for Rawlsianism. Assuming that self-respect might be affected by, for example, one's amount of leisure time, then even if the subjective utility of the least well-off were higher with less leisure, the Rawlsian difference principle might select a scheme with more leisure (which might arise from closing some contracting options), if it provided a higher level of the objective index of the primary goods. Kordana and Tabachnick, "Rawls and Contract Law," 617–18.

[30] See, e.g., Lucian Arye Bebchuk and Jesse M. Fried, "The Uneasy Case for the Priority of Secured Claims in Bankruptcy," *Yale Law Journal* 105, no. 4 (1996): 904; and Lynn M. LoPucki, "The Unsecured Creditor's Bargain," *Virginia Law Review* 80, no. 8 (1994): 1908.

[31] Recall the popular Rust-Belt bumper sticker: "No Smoke, No Jobs."

https://doi.org/10.1017/S0265052506060201 Published online by Cambridge University Press

example, jobs manufacturing luxury goods that are latently dangerous to the user.

Our claim is that taxation, in conjunction with the private law, is used to meet the demands of the distributive principles. There is no principled reason to think that distribution—in particular, the equity-oriented component of distribution—need be limited to taxation. To underscore our general thesis, there is no principled reason to think that equity-oriented distribution, for the post-institutional maximizing theorist, is done only in one module of the overall political and legal scheme. The overall scheme that best satisfies the distributive principles will likely include a number of equity-oriented distributive moves across the entire range of political and legal institutions.

III. Taxation and the Private Law for Deontic Pre-Institutional Theorists

There are (of course) a set of political theorists for whom private property is not simply a matter of institutional or political convention. Such theorists maintain that rights in private property are a pre-institutional or prepolitical matter.[32] Property rights, in this view, are taken (for various reasons) to be "natural" or among the set of basic or fundamental human rights, the existence of which does not depend upon any particular political institution. Indeed, in this view, the extent to which various political institutions respect and protect such pre-institutional rights in private property often serves (in part) as the benchmark for the moral evaluation of such political institutions.

This set of political thinkers is widely diverse—including egalitarians, moderate liberals, left-libertarians, and right-libertarians. Despite the theoretical space between these different theorists, they share the view that property arrangements are *moralized*. These thinkers hold that rights in property or property arrangements (for one reason or another) are derived from pre-institutional or prepolitical moral doctrine.

There is, of course, no general agreement among the various types of pre-institutional theorists over the strength of such pre-institutional rights in property. From the diversity of political views in this camp, however, it is clear that a pre-institutional conception of private property does not commit one to the view that rights in property are absolute. The dispute between pre- and post-institutional theorists, then, is not

[32] See, e.g., David Boaz, *Libertarianism: A Primer* (New York: Free Press, 1997); Loren Lomasky, *Persons, Rights, and the Moral Community* (New York: Oxford University Press, 1987), 120–21; Jan Narveson, *The Libertarian Idea* (Philadelphia, PA: Temple University Press, 1988); Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974); A. John Simmons, *The Lockean Theory of Rights* (Princeton, NJ: Princeton University Press, 1992), 222; and Peter Vallentyne, Hillel Steiner, and Michael Otsuka, "Why Left-Libertarianism Is Not Incoherent, Indeterminate, or Irrelevant: A Reply to Fried," *Philosophy and Public Affairs* 33, no. 2 (2005): 201.

over the substantive *strength* (or weight) of rights in private property but is instead over the source, justification, and derivation of such rights or arrangements.

For deontic pre-institutional theorists, property holdings that flow from an entitlement theory that includes the correct principles of acquisition, transfer, or rectification are taken to be legitimate.[33] There are, however, different conceptions of these principles. In what follows, we distinguish four types of pre-institutional views, focusing chiefly upon their respective conceptions of the principles of acquisition and the role that conceptions of justice play in each. We distinguish between what we call the "libertarian view," the "negative deontic view," the "mixed deontic view," and the "non–justice-oriented mixed deontic view."

In the libertarian view, property acquisitions can only be justified via principles in which negative rights (or liberty interests) exclusively determine holdings. In this view, values other than absolute negative rights (e.g., duties of beneficence or charity) are not included among the correct principles of acquisition, nor do they play a role in the ultimate justification of holdings. Legitimacy, in this view, is understood in terms of negative liberty interests. Liberty, however, is often thought not to be exhaustive of moral value, so proponents of the libertarian entitlement theory must explain away the seeming moral force of moral values that are not oriented toward the promotion of negative liberty (e.g., utility or beneficence).

Robert Nozick's strategy, for example, is to argue that non–negative-liberty-oriented values are of little (or no) relevance to the ultimate justification of rights in property.[34] Non–negative-liberty-oriented values are not included in the correct principles of entitlement or legitimacy that define Nozick's conception of justice;[35] nor are they capable of serving as "trumps"[36] over legitimate holdings. Nozick concludes that property rights are "essentially" absolute. Because property rights are (nearly) absolute and liberty-preserving, taxation cannot be justified, either as a matter of justice or of other values.

[33] "The legitimate means of moving from one distribution to another are specified by the principle of justice in transfer. The legitimate first 'moves' are specified by the principle of justice in acquisition." Nozick, *Anarchy, State, and Utopia,* 151 (note omitted).

[34] "The general outlines of the theory of justice in holdings are that the holdings of a person are just if he is entitled to them by the principles of justice in acquisition and transfer, or by the principle of rectification of injustice. . . . If each person's holdings are just, then the total set (distribution) of holdings is just." Ibid., 153.

[35] Rawls, for example, characterizes Nozick's view as follows: "It is maintained that the principles of just acquisition and transfer preserve the justice of holdings throughout the whole sequence of historical transactions. . . . The only way injustice is thought to arise is from deliberate violations of these principles, or from error and ignorance of what they require and the like." Rawls, "The Basic Structure as Subject," 263–64.

[36] Ronald Dworkin, *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1978), 184.

https://doi.org/10.1017/S0265052506060201 Published online by Cambridge University Press

https://doi.org/10.1017/S0265052506060201 Published online by Cambridge University Press

However, pre-institutional theorists holding a roughly Lockean view of property need not be drawn to Nozick's absolutist conclusion,[37] which turns on (1) the libertarian conception of entitlement and (2) the absolute nature of legitimate rights in property. A second type of pre-institutional theorist holds that property rights are a matter of pre-institutional entitlement, though non-absolute. This view can be divided into two subpositions: (1) those holding a "negative deontic view" and (2) those holding a "mixed deontic view." In the negative deontic view, the conception of justice is identical to that of the libertarian view—the entitlement theory is definitive of justice. The negative deontic view, however, is not absolutist with regard to claims of justice or legitimacy—which are capable of being traded off against, for example, weighty claims of utility or charity. Thus, the view is not absolutist with regard to property rights.

The mixed deontic view, in contrast, is distinct in that it allows for non–negative-liberty-oriented values to be enshrined in the principles of entitlement. To put the point differently, the principles of entitlement, for the mixed deontic view, are conceived of as autonomy preserving (i.e., legitimacy preserving) and are definitive of justice or fairness. However, the conception of autonomy is inclusive of values other than negative freedom.[38] The principles of entitlement, as a result, differ from those in the libertarian and negative deontic views. In the mixed deontic view, justice is also conceived of as non-absolute—it can be traded off against weighty non–justice-oriented values (e.g., utility).

For both the negative deontic view and the mixed deontic view, the entitlement theory defines justice. The concept of justice, however, is understood as only one of several sectors of morality or one of the many dimensions of a complete normative evaluation of institutions.[39] While justice is (perhaps) the sector of morality most prominently or chiefly concerned with the evaluation of rights, duties, obligations, institutional

[37] "Suppose, for instance, that justice in acquisition (or transfer) allows my taking the product of another's labor when I am in dire and unavoidable need. . . . To believe Nozick, we must have good reason to believe that honest industry, inheritance, and free transfer are just grounds of property in a fashion sufficiently strong to exclude conflicting or limiting grounds of other sorts." Simmons, *The Lockean Theory of Rights,* 323–24.

[38] "Charity . . . requires that our basic needs be met, and that the property of others be correspondingly limited or overridden. . . . [O]nly what we need for preservation is in principle immune to the claims of need. . . . Rights to charity are necessary, for instance, so that need is not allowed to make us subject to others' wills, make us dependent on them, or make us their vassals. The same reasoning in Locke that justifies rights of property or justice, then, also justifies rights of charity." Ibid., 332 (footnotes omitted).

[39] This conception of justice, interestingly, is shared by John Rawls, though he is not a pre-institutional liberal. See John Rawls, "Justice as Fairness," in Samuel Freeman, ed., *John Rawls: Collected Papers* (Cambridge, MA: Harvard University Press, 1999), 48: "Justice is not to be confused with an all-inclusive vision of a good society; it is only one part of any such conception. It is important, for example, to distinguish that sense of equality which is an aspect of the concept of justice from that sense of equality which belongs to a more comprehensive social ideal. There may well be inequalities which one concedes are just, or at least not unjust, but which, nevertheless, one wishes, on other grounds, to do away with."

arrangements, and property, to say of an action or institution that it is *just* or *fair* is to have evaluated that action or institution only along *one* normative dimension. Thus, it does not follow (merely) from the fact that an action or institution is just, fair, or legitimate that it is all-things-considered justified or morally sound. When one acknowledges that an action or institution is just, there is still more, morally speaking, to say about the matter.

There is a final pre-institutional view, which we term the "non–justice-oriented mixed deontic view." This conception is identical to the mixed deontic view, except that the entitlement theory is *not* definitive of justice. In this view, claims that arise from the entitlement theory are taken to be legitimate, but not definitive of justice. For those holding the non–justice-oriented mixed deontic view, justice is understood neither as a single sector of morality, nor as a single dimension along which institutions may be evaluated. Instead, justice is understood more loosely, as all-things-considered right action, or this view does not admit of a conception of justice. Justice is conceived of in a much broader fashion—or, indeed, it disappears entirely—compared to the other three views.

Now, consider the possible justification of taxation for these differing pre-institutional views. In the libertarian view, the conception of liberty enshrined in the entitlement theory rules out the possibility of non–negative-freedom-oriented values serving as the basis of just holdings, and the view is also absolutist about the conception of justice. Thus, for the libertarian conception of entitlement, there essentially can be no justification for taxation.

Return to the negative deontic view. Here, the justification of taxation must be understood as other than a matter of justice or distributive justice. Lockean political philosopher A. John Simmons, while not himself holding what we have called the negative deontic view, has drawn an instructive distinction between *legitimacy* and *justification.*[40] Claims of legitimacy can (at times) be "trumped" for reasons of justification, that is, general utility or beneficence. This distinction is helpful in understanding the role of taxation for theorists who hold the negative deontic view.[41] For the negative deontic view, the private law is best understood as embodying an account of justice or fairness that conceives of justice (solely) in terms of the preservation of a negative-freedom-oriented conception of entitlement. Taxation (if it is to exist) must be understood not as a matter of *justice* but rather as a matter of *all-things-considered morally right action.*

[40] A. John Simmons, "Justification and Legitimacy," *Ethics* 109, no. 4 (1999): 739; A. John Simmons, *Moral Principles and Political Obligations* (Princeton, NJ: Princeton University Press, 1979), 195–201.

[41] While Simmons appears to hold what we have termed the "non–justice-oriented mixed deontic view," the distinction between justification and legitimacy makes good sense for the negative deontic and mixed deontic views as well.

https://doi.org/10.1017/S0265052506060201 Published online by Cambridge University Press

https://doi.org/10.1017/S0265052506060201 Published online by Cambridge University Press

The crucial point is that taxation, in the negative deontic view, cannot be required or justified by appeal to claims of justice or distributive justice. For pre-institutional theorists holding the negative deontic view, the entitlement theory of justice *defines* the conception of justice,[42] and, therefore, sets the baseline of *just* entitlements. Taxation, because it upsets or alters this *just* system of entitlement, cannot therefore be justified by appeal to a (new or distinct) conception of *justice.*[43] It does not follow from this, however, that values exogenous to the conception of justice are irrelevant, *simpliciter.* Taxation may be justified by appeal to values that are independent of justice (e.g., beneficence or utility). With regard to the latter point, this entails that beneficence or utility, for example, are values independent of justice, rather than themselves conceptions of justice in competition with the negative deontic view. The result is that, for theorists holding the negative deontic view, taxation can be implemented, but not as a matter of *justice.*

From the perspective of justice, for the negative deontic view, taxation can be regarded as an unfortunate upsetting of the requirements of justice, itself required by some non–justice-oriented moral value. This has implications for how taxation should be implemented—namely, that justice should be upset only as much as is necessary to satisfy the other, trumping value(s). This does not imply, however, that tax assessments need to be *proportional* as assessed against the baseline set by justice. While proportionality is a feature of an important tax policy that might seem intuitively applicable—the equal sacrifice principle—it is not *required.* This is for two reasons: First, the proportionality requirement embodied in the equal sacrifice principle can itself be understood as an independent conception of justice; however, justice has already been defined by the entitlement scheme, which is now being trumped by other values (i.e., weighty reasons of utility, if the taxation is raising funds for the funding of important public goods; or beneficence, if it is raising funds to be redistributed to the needy). Second, taxation is, in this view, being implemented to achieve specific outcomes. Its aim is to yield net *benefits* for at least some against the baseline of justice, so it seems unmotivated to require proportionality or equal sacrifice in the assignment of tax "burdens" even to those who will, on net, benefit.[44] Since the equal sacrifice principle is not required, this leaves open the possibility that some of the aims of the trumping values could be accomplished through changes to

[42] See Kordana and Tabachnick, "Rawls and Contract Law," 628: "For the will theorist, a contract that is otherwise legitimate . . . but that contains one-sided terms is, by definition, fair."

[43] See, e.g., Murphy and Coleman, *Philosophy of Law,* 163: "In [Fried's] view, because contract is based on and enforces promises, courts are not entitled to use a dispute that arises in contract either to promote an independent ideal of *justice* by refusing to enforce hard or bad deals, or to further the economic or other aims of society as a whole."

[44] Murphy and Nagel, *The Myth of Ownership,* 25.

the rules of the private law, rather than only through the imposition of a tax and transfer scheme.

Return now to the mixed deontic view. In this view, non–negative-liberty-oriented values, such as beneficence or charity, can play a role in correct principles of entitlement, thereby defining legitimacy in holdings.[45] This suggests that the rules of property themselves may embody equity-oriented distributive values (e.g., meeting claims of beneficence) as a matter of *justice.* What are conventionally viewed as rules of tax and transfer could be used to create entitlements. That is, the rules of tax and transfer could be viewed as one aspect of property rules, just as the taxation of particular transactions renders the rules of tax that apply to such transactions (at least conceptually) part of contract law.[46] It follows from this that, to the extent that "tax" is constructed in service of the principles of entitlement that define justice, those rules of tax are *just,* because the principles of entitlement define *just* entitlements. Also, for the mixed deontic view, *additional* rules of tax and transfer could be constructed, in the same manner as for the negative deontic view, by appeal to values exogenous to the conception of entitlement or justice (e.g., general utility). Such appeals to exogenous values function for the mixed deontic view as they do for the negative deontic view: they construct rules that are matters of all-things-considered right action, but not by appeal to *justice.*

Consider now the role of taxation in what we have called the non–justice-oriented mixed deontic view. Here, as with the mixed deontic view, non–negative-liberty-oriented values can be drawn upon in constructing correct principles of entitlement. To the extent that the correct principles of entitlement embody equity-oriented values, the legal rules constructed in service of them may therefore also embody such equity-oriented values. Thus, the entitlement principles, as is the case for the

[45] "The important point for Locke is that the needy can have a right to the property of others (or what was formerly their property—i.e., the fruits of their honest industry)." Simmons, *The Lockean Theory of Rights,* 329.

[46] See Anthony T. Kronman, "Contract Law and Distributive Justice," *Yale Law Journal* 89, no. 3 (1980): 503–4 (criticizing the view that tax law is somehow unobtrusive vis-à-vis individual transactions).

Thomas Scanlon has distinguished between legal rules or legal rights and underlying values, maintaining that legal rules and rights can take many forms, but must ultimately be designed to account for the correct balance of values or principles:

> Rights, understood as institutional constraints and prerogatives, can "clash." . . . What we need to do in such a case is to adjust our understanding of these [legal] rights so as to make them coherent. This adjustment is not best understood, I think, as a matter of "balancing" [legal] rights against one another. . . . It is true, however, that in deciding which readjustment of these [legal] rights to accept, we may need to "balance" certain values . . . against one another. . . . [V]alues are balanced, [legal] rights are adjusted, or redefined.

T. M. Scanlon, "Adjusting Rights and Balancing Values," *Fordham Law Review* 72, no. 5 (2004): 1478–79. Given this view, there is no reason of principle that would require that equity-oriented aims be met via any specific body of legal rules or doctrine.

https://doi.org/10.1017/S0265052506060201 Published online by Cambridge University Press

https://doi.org/10.1017/S0265052506060201 Published online by Cambridge University Press

mixed deontic view, may serve as the basis of either taxation or private law rules that contain equity-oriented aims. In this view, the entitlement principles generate legitimate holdings; however, the non–justice-oriented mixed deontic view is importantly distinct from the mixed deontic view in that the conception of legitimacy is not definitive of justice.

Since, in the non–justice-oriented mixed deontic view, (1) justice is conceived of as all-things-considered morally sound action, or falls out of the picture, and (2) legitimacy is not viewed as absolute, it follows that taxation (or equity-oriented distributive aims) can be justified by appeal *either* to the equity-oriented aspects of the entitlement principles *or* by appeal to other non–legitimacy-based values. Justice, in this view, is found in the full working-out of the balancing between legitimacy and justification, or else is not of primary moral concern. In any event, through the full working-out of the balancing of legitimacy and justification, a possible source of equity-oriented values in either the private law or taxation arises.

The non–justice-oriented mixed deontic view, like the mixed deontic view, is non-absolutist in both of the two respects that Nozick's view is absolutist: (1) the duty of beneficence or charity is conceived of as a component of the correct principles of entitlement, and (2) claims of legitimacy can be overridden for reasons of justification (e.g., general utility). However, for the non–justice-oriented mixed deontic view, ultimate claims of *justice* are derived from the balancing of claims of legitimacy and justification, or justice has fallen out of the picture altogether. The result is a non-absolutist view of pre-institutional rights in property, a view which, when taken in its totality, is understood as all-things-considered morally right action. In this view, however, no isolated or particular sector of morality is conceived of as *justice* that may serve as the basis of taxation; in the strict sense of the term, as discussed (for example) by Rawls and Nozick, justice falls out of the picture.

The following passage may be instructive in illustrating the role of justice in these theories. In discussing the legitimate nature of consensual institutions and their relationship to a "liberal egalitarian" conception of justice, Simmons writes:

> [T]he libertarian consent theorist will simply reject the liberal egalitarian theory of justice that is alleged to have [certain] implications, arguing that if one cannot point to clear wrongdoing in the process that creates the polity, one has no grounds for claiming that the resulting polity is unjust.[47]

Here, Simmons appears to be positing what we have called a libertarian conception of legitimacy, pointing out that this conception of legitimacy

[47] A. John Simmons, "Consent Theory for Libertarians," *Social Philosophy and Policy* 22, no. 1 (2005): 354.

https://doi.org/10.1017/S0265052506060201 Published online by Cambridge University Press

or justice is inconsistent with a liberal egalitarian (e.g., Rawlsian) conception. Simmons continues:

> But suppose that one finds it difficult to follow the libertarian this far, committed as one might be to a more moderate, left-libertarian or liberal egalitarian conception of social justice. Even in that event, I think, there is nothing to prevent one from nonetheless accepting consent theory's standards for legitimacy.[48]

Simmons then writes:

> A liberal egalitarian theory of justice and a consent theory of political legitimacy can be consistently conjoined if one accepts the distinction between what I have called "justification" and "legitimacy"—which I take to be two kinds of favorable evaluations of political institutions within quite different dimensions of evaluation. General good qualities and virtues of a political society—such as benevolence or *justice*—are what is appealed to in *justifying* that society's existence, in showing why such a society is *a good thing*.[49]

The invited conclusion is that the consensual arrangement is *legitimate,* but ultimately not fully *justified.* Simmons, here, must be conceiving of "justice" as an areteic (or excellence-oriented) value for the purpose of evaluating the goodness or badness of institutions.[50] Our point is that, given our distinctions above, it is not possible to ground the claim that the consensual polity is *legitimate* but *unjustified* in a liberal egalitarian conception of justice qua rightness. In this case, there appear to be three possible conceptions of legitimacy at stake (given that absolutism is not at issue): what we have called the "negative deontic," "mixed deontic," and "non–justice-oriented mixed deontic" conceptions of legitimacy (or entitlement). It is true that, for each of these positions, claims of legitimacy

[48] Ibid.

[49] Ibid. (emphasis added on the word "justice"; footnote omitted).

[50] When Simmons, here, appeals to "justice" as a matter of justification, he is *not* conceiving of justice as a "function of [society's] specific interaction and [something that] consists (in part) in its having a particular set of rights over subjects," but rather as one of "the general good qualities and virtues of a political society" (ibid). This move renders Simmons's view consistent with our own. However, one must be clear that Simmons is appealing to "justice" as other than a sector of the concept of "right," as it is articulated in Rawls's schematic on page 109 of *A Theory of Justice.* It is true, of course, that Rawls does at times elsewhere write of "justice [as] the first virtue of social institutions" (ibid., 3), which would (contra the schematic) cast justice as an areteic (i.e., excellence-oriented) value.

Our point (consistent with Simmons's passage) is that once one sets out a conception of justice as a matter of "legitimacy," one cannot then appeal to a differing conception of justice qua rightness (as opposed to goodness) as a matter of "justification." However, why one would hold two differing conceptions of justice—one as rightness and the other as goodness—remains an open question.

https://doi.org/10.1017/S0265052506060201 Published online by Cambridge University Press

may sometimes be "trumped" by claims of justification (e.g., general utility). However, if one is to take seriously the conception of justice of any one of the three entitlement theories, it is difficult to ground claims of *justification* in a (distinct) conception of *justice.* The trouble is that the negative deontic and mixed deontic conceptions of entitlement each *constitute* a conception of justice, while the non–justice-oriented mixed deontic conception of entitlement is (itself) a *component* of a conception of justice—one distinct from the liberal egalitarian's conception of justice, or a component of all-things-considered right action in which justice plays no role. The result is that if one accepts any of the three entitlement conceptions, one cannot then appeal to an independent conception of *justice* as a trumping value. Our point is this: Something other than claims of *justice* (qua rightness) is required to advance the claim that the arrangement is (in Simmons's sense of the term) *unjustified.*

It also seems important to distinguish between (1) moderate Lockeans or left-libertarians and (2) liberal egalitarians. The former are pre-institutional theorists, who may hold either the negative deontic, mixed deontic, or non–justice-oriented mixed deontic conceptions of entitlement. However, if by "liberal egalitarian conception of social justice" Simmons were invoking a post-institutional liberal view of justice qua rightness such as Rawlsianism,[51] then the claim that the arrangement is *legitimate* but ultimately not *justified* seems problematic. As we saw above in Section II, the Rawlsian conception of justice qua rightness requires that all bodies of law serve, instrumentally, the demands of the principles of justice. If that is true, it does not appear that the liberal egalitarian has the resources to adopt consent theory in any meaningful way; entitlements instead must be constructed in a fashion instrumental to the demands of the distributive principles.

Return now to the four types of pre-institutional views we distinguished above. One difference between the non–justice-oriented mixed deontic conception and the other three conceptions appears to reflect a disagreement over the *concept* of justice itself, rather than a disagreement over competing *conceptions* of justice. In the latter three conceptions, justice is conceived of as the sector of deontic morality that is chiefly (or in the first instance) responsible for the evaluation of institutions and the manner in which rights, duties, and holdings in property are assigned. In this view, the concept of justice is exclusive of other sectors of morality. For those who hold this position there is, of course, disagreement over the *correct* conception of justice. For Rawls (though he is not a pre-institutional liberal), justice is conceived of as the principles that flow from the original position; for Nozick, justice is conceived of as the entitlement theory. Both, however, despite their disagreement over the correct principles of

[51] On the previous and subsequent pages, Simmons follows "liberal egalitarian" with "(e.g., Rawlsian)." Simmons, "Consent Theory for Libertarians," 355.

justice, view justice as a distinct and important sector of morality. That is, they appear (roughly) to agree over the very *concept* of justice.

In contrast, one who conceives of justice (roughly) as all-things-considered morally right action, or believes that the concept of justice plays no primary role in all-things-considered morally right action (the view of the non–justice-oriented mixed deontic pre-institutional theorist), appears not simply to disagree over the conception of the correct principles of justice, but rather over the very concept of justice itself.

Consider, again, the question of taxation. As we saw above, in the mixed deontic and non–justice-oriented mixed deontic conceptions, correct principles of entitlement reflect a commitment to positive rights, such as beneficence (or charity). These equity-oriented values may serve as the basis of equity-oriented legal rules. For these two conceptions, equity-oriented legal rules can also be implemented as a matter of justification. The negative deontic conception can only implement such rules as a matter of justification, as opposed to legitimacy (or entitlement).

It is interesting to consider what form these equity-oriented rules might take. One could hold (1) that these rules should include what are traditionally thought of as property rules (or other areas of the private law), or (2) that all equity-oriented moves should be made as a matter of "tax and transfer." Consider the well-known claim made by the law-and-economics scholars Louis Kaplow and Steven Shavell: that income taxation is more efficient than other legal rules in accomplishing equity-oriented ends.[52] While the claim has attracted critics,[53] assume for the sake of argument that it is correct. The conclusion it invites is that even though either position (1) or position (2) is *morally* justifiable, the second is preferable in terms of economic efficiency and should be chosen (given that morality is not at issue), as long as economic efficiency is taken to be of (some) value.

We think, however, that there are reasons to doubt that the Kaplow and Shavell claim applies to pre-institutional theorists.[54] We maintain, there-

[52] Kaplow and Shavell, "Why the Legal System Is Less Efficient Than the Income Tax in Redistributing Income."

[53] See, e.g., Chris William Sanchirico, "Taxes versus Legal Rules as Instruments for Equity: A More Equitable View," *Journal of Legal Studies* 29, no. 2 (2000) (constructing a counterexample to the Kaplow/Shavell thesis); and Helmuth Cremer, Pierre Pestieau, and Jean-Charles Rochet, "Direct versus Indirect Taxation: The Design of the Tax Structure Revisited," *International Economic Review* 42, no. 3 (2001): 797 ("differential commodity taxes *do* have a role to play as instruments of optimal tax policy—an optimal (general) income tax will not suffice"). But see also Louis Kaplow and Steven Shavell, "Should Legal Rules Favor the Poor? Clarifying the Role of Legal Rules and the Income Tax in Redistributing Income," *Journal of Legal Studies* 29, no. 2 (2000): 821 (contesting the significance of Sanchirico's counterexample); and Louis Kaplow, "On the Undesirability of Commodity Taxation Even When Income Taxation Is Not Optimal," National Bureau of Economic Research Working Paper 10407 (Cambridge, MA: NBER, 2004).

[54] This is not to suggest that Kaplow and Shavell believe that their thesis does apply in this context. See Kaplow and Shavell, "Why the Legal System Is Less Efficient Than the Income Tax in Redistributing Income," 667 n. 2: "Our discussion concerns the overall distribution of income or wealth, not entitlement to payment based on desert."

https://doi.org/10.1017/S0265052506060201 Published online by Cambridge University Press

https://doi.org/10.1017/S0265052506060201 Published online by Cambridge University Press

fore, that for such theorists, the private law may justifiably embody equity-oriented values. Kaplow and Shavell contrast tax and transfer with other "legal rules."[55] They compare the efficiency of a tort rule to the efficiency of an income tax with equivalent distributive effect.[56]

Kaplow and Shavell appear to assume the existence of an underlying system of property ownership and free markets. Our issue, however, is the very question of the form that *property* rules should take; that is, we are interested in the question of whether the equity-oriented values that differing theorists hold are best met through tax and transfer, or through (in part) the rules of property law. Thus, it is not clear that Kaplow and Shavell's discussion, which compares tax and transfer to a tort rule (in isolation) and concludes that tax and transfer is superior in terms of economic efficiency, would (also) apply to the question of the underlying set of property rules. In other words, one interpretation of Kaplow and Shavell is that *given* a system of property law, tax and transfer can more efficiently achieve an equity-oriented end than can the rules of tort. The underlying system of property law, however, may (or may not), it seems, reflect equity-oriented aims. Their discussion does not appear to directly address this question.

We claim that for certain pre-institutional theorists the rules of the private law can answer to equity-oriented concerns. Consider this claim in the context of legal scholar Ernest Weinrib's view that the private law ought to maintain a form of conceptual independence from the realm of the political and from distributive aims.[57] Weinrib defends what he calls "legal formalism," maintaining that sectors of the private law ought to take the form of moral values derived from Kantian moral philosophy.[58] Weinrib distinguishes between what he calls the realm of the "juridical" and the realm of the "political." The elements of the juridical realm are the set of legal concepts drawn from moral theory, while the elements of the

[55] They write: "For purposes of this article, the term 'legal rules' refers to rules other than those that define the income tax and welfare system." Ibid., 667 n. 1.

[56] Ibid., 669–74.

[57] "The choice of distributive program is therefore political in its nature. . . . Distributive justice implies that a political authority must define and particularize the scope or criterion of any scheme of distribution. . . . The situation in corrective justice [i.e., the private law] is categorically different. Corrective justice involves no decision as to the selection of a collective purpose. When construing a transaction in accordance with corrective justice, the adjudicator does not choose one scheme of correction over another but rather specifies the meaning of corrective justice with respect to the transaction in question. The contrast with distributive justice is stark. . . . The rationality of corrective justice is entirely immanent." Ernest J. Weinrib, *The Idea of Private Law* (Cambridge, MA: Harvard University Press, 1995), 211–12.

[58] "[O]ne understands a legal relationship through its unifying structure, or 'form.' Applied to private law, the thesis of immanent intelligibility is a version of legal formalism. . . . [The private law's] normative force derives from Kant's concept of right as the governing idea for relationships between free beings. For Kant, freedom itself implies juridical obligation. On this view, the doctrines, concepts, and institutions of private law are normative inasmuch as they make a legal reality out of relations of corrective justice." Ibid., 18–19.

political realm are those bodies of law that are properly constructed by the political process. For Weinrib, property, contract, and tort law constitute the "juridical," while distributive justice constitutes (in part) the "political." The point is that, for Weinrib, property,[59] contract, and tort law are to be derived directly from Kantian moral theory and are therefore, he believes, conceptually and normatively distinct from distributive justice and the political process.

Weinrib holds what one might view as a negative-rights-oriented[60] pre-institutional view of property, combined with a political conception of distributive justice. This appears to lead Weinrib to hold the view that what we have called equity-oriented concerns are all a matter of the political process and, therefore, a matter of distributive justice—not private law.[61] Given our arguments, however, one need not accept Weinrib's conclusion.

First, it is important to note that, in Weinrib's view, if distributive justice (as a sector of the "political") were to construct within the body of positive law a minimum wage requirement, that law would *not* be a rule of "contract law" as Weinrib conceives of the term and, thus, would not constitute a part of the private law.[62] For Weinrib, the "private law" is understood to be (as a conceptual matter) only that body of law that is derived from pre-institutional moral notions, which need not be coextensive with the body of positive law more typically thought to constitute the private law (i.e., laws regulating accidents, exchange, and holdings). However, even in Weinrib's view, the latter body of positive law *can* include equity-oriented moves (constructed by the demands of distributive justice). Therefore, even for Weinrib, the body of positive law typically understood as private law (though not so conceived by Weinrib's narrower and monistic conception) admits of equity-oriented moves.

[59] "Even the idea of property takes its normative character from the abstractness of right rather than the promotion of welfare." Ibid., 131.

[60] "[O]ne person's need does not serve as the basis of obligating another to satisfy that need; accordingly, there is no liability for nonfeasance, that is, for not providing another with a needed benefit." Ibid., 97.

[61] Weinrib, in other words, appears to hold that the private law protects negative rights, and that welfare is relevant "only inasmuch as it is crystallized in the holding of a right." Ibid., 131. He writes: "Under Kantian right two kinds of rights . . . are relevant to private law. The first is the right to one's bodily integrity. . . . The second kind of right is to external objects of the will. Rights to external objects, including rights to property and to contractual performance, are not innate to the actor but are acquired through the execution of a juridically effective act. . . . Because external objects are categorically different from free will, they can be owned without contravening the freedom of others under the principle of right. And their being owned entails an obligation in nonowners to refrain from their use." Ibid., 128–29.

[62] For example, Weinrib allows that values drawn from the "political" rather than the juridical (i.e., what he understands as a conceptual matter to be "the private law") can inform the content of accident law. He writes: "Assume . . . that one wanted to *replace* or *supplement* tort law by introducing a distributive scheme of compensation for personal injuries . . ." (ibid., 210; emphasis added). The point for Weinrib is that such replacement or supplemental values are not properly understood as a matter of his (narrow) conception of tort law.

https://doi.org/10.1017/S0265052506060201 Published online by Cambridge University Press

https://doi.org/10.1017/S0265052506060201 Published online by Cambridge University Press

Second, even if we accept Weinrib's conception of the private law, it is important to note that, as a conceptual matter, arguments about equity-oriented moves in the private law could still arise from within the juridical realm. This is because, as we saw above, there exist plausible arguments for incorporating positive rights into correct principles of acquisition. In other words, equity-oriented values can be drawn directly from moral theory as much or as little as can the negative moral values that Weinrib takes to define the realm of the juridical. The point is this: a pre-institutional liberal can maintain the claim that the private law is normatively independent of *distributive* aims, while at the same time holding that the private law can also contain rules that serve equity-oriented values.

IV. Conclusion

For post-institutional theorists (for example, Rawlsians and utilitarians), there is no principled reason for limiting the domain of distributive justice to tax and transfer. For such theorists, not only tax policy, but also the rules of the private law, are constructed in service of distributive aims. If our argument is correct, such theorists should have no commitment to any particular normative conceptions of the private law that are *independent* of their overarching distributive principles. While this conclusion with regard to utilitarianism is widely acknowledged, it is less well understood in the context of Rawlsian political theory.

In pre-institutional theories, in contrast, the private law derives from correct principles of entitlement and reflects no overarching distributive aims. Thus, pre-institutional theorists are free to derive conceptions of the private law from sectors of morality independent of distributive justice. If our arguments are correct, this does *not* entail that the private law, for all pre-institutional theorists, is sanitized of equity-oriented values. However, it is true that pre-institutional libertarians, given their lack of commitment to equity-oriented aims in general, may justifiably conceive of the private law as free of such values. We have shown, nonetheless, that nonlibertarian pre-institutional theorists who hold principled commitments to equity-oriented values are free to invoke *either* tax and transfer *or* the rules of the private law to attain these values. Thus, for such theorists, the private law can embody equity-oriented aims, and there is no principled reason to believe that all equity-oriented aims need to be pursued through the system of tax and transfer. We conclude, then, that for post-institutional (maximizing) liberals there is no principled distinction between tax and the private law, and that for nonlibertarian pre-institutional liberals the private law can contain equity-oriented values—such values need not be understood as pertaining only to the rules of tax and transfer.

Law, University of Virginia
Philosophy, University of Virginia