

An Account of Contributive Justice

by

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A dissertation submitted in partial fulfillment
of the requirements for the degree of
Doctor of Philosophy
(Philosophy)
in the University of Michigan
2018

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For my mother.
And in memory of my father
("well you go up we follow you but you
go up we follow you but you go up we
are
following you but you are gone last"
- Frank O'Hara, "For David Schubert").
And for family.

ACKNOWLEDGEMENTS

I've been the fortuitous beneficiary of a lot of luck. And while it was luck that consistently positioned me as a beneficiary, over and over again the benefits in question were entirely deliberate and voluntary expenditures of time, effort, and compassion on the part of others. I've got a lot of people to thank. I'll try to not do it too effusively.

What follows will be characterized by some measure of organization and grouping, though perhaps not very much of it.

I owe much to the members of my committee, without whom there wouldn't be much of a dissertation: to Liz, whose incisive feedback helped to mould me in the image of a more competent philosopher. The feedback in question was always turned around with impossible speed. To Peter, to whom I owe the initial germ of this very dissertation. If there's even a sapling's worth of work here—to needlessly press the plant analogy—I owe it to Peter. Peter's abundant generosity with ideas helped me through corners into which I'd written myself more times than I could count. To Dan, who has believed firmly in what projects I've brought to him—this firm belief has, in turn, buoyed me through those projects—and who is unfailingly generous with his time and encouragement. Thank you for your incredibly many kindnesses. To Ishani, for consistently perspicuous dissertation feedback. To Allan, for remarkable and kind encouragement over the years.

Thanks are owed for departmental support: to Laura Ruetsche, who gently shepherded me through the entirety of my time here. I'm not sure how I had the good fortune to warrant your guidance from my first year onward—guidance that was unfailingly patient, humorous, and sometimes conveyed from exceptionally remote locales—but it's no exaggeration to say that it

got me through the degree. To Jude, who has allowed me to pester her for the better part of a decade now: thank you for warm conversation, supportiveness, and your willingness to navigate steep driveways for sake of my occasional lapses in bipedalism (more on that later). To Molly: thank you emphatically, for *everything*—for less solitary Thanksgivings, for Californian solidarity, for warmth and support of the familial stripe. Thanks are also owed to Annette Bryson, who is an absolute *paragon* of strength and fortitude. And thanks are owed to Johann Hariman for meaningful conversations.

And thanks are owed for institutional support: to Ida Faye Webster and Jean McKee, without whom my (literal) degree completion would've been impossible. Thank you both for your compassionate intervention. To Charlotte O'Connor, who helped me figure out more effective ways to work: thank you for your warmth and willingness to be troubled on weekends. To Mika Handelman, for all of her work.

I also wouldn't be anywhere without my earliest mentors at the California State University of Los Angeles, which I attended through the auspices of the Early Entrance Program. David Pitt was the professor with whom I took my very first philosophy course as an undergraduate. He continued to advise and support me through two subsequent undergraduate institutional moves, and I couldn't have asked for a more affable introduction to philosophy. His course is the only reason why I have any grasp of Lockean substratum at all. Henry Mendell was the professor who first cued me into the realization, at age fourteen or fifteen, that something had to change dramatically about my writing if it was to be up to (philosophical) snuff ("Kimberly, this [style of writing] is *self-indulgent*."). He was also responsible, in large part, for my eventual move to Tufts—I owe him much for this.

And thanks are owed to my professorial mentors at Tufts University. Stephen L. White for devoting *inordinate* amounts of time to the facilitation of at least one independent study, the design of an Analytical Marxism course, and an entire graduate school admissions cycle. Thank you for your patient mentoring. I certainly wouldn't have ended up at Michigan without it. And many thanks are owed to George E. Smith as well, who contributed considerably to the

sharpening of my philosophical wits. And to Jody Azzouni, with whom long conversations helped to unravel philosophy of language for me.

Thanks are also owed to Paul Gowder, who influenced the decision to re-ally myself with political philosophy, even after I'd spent some time thinking of myself as a potential meta-ethicist.

Much gratitude is owed to James Molnar, Anthony DiClaudio, and Kabir Soorya—to friends. And to Jack Rohman, who I still think about often.

Thanks are owed to climbing friends. I suspect that what may have happened here were the inadvertent effects of climbing itself as a selection factor: talented climbers, belayers and spotters—which all of you unequivocally are—have to be people who appreciate the gravity of being positioned to maim or kill one's climbing partners. One possible consequence of such selection is that you've all been, individually and collectively, an extraordinary community. Thank you, Ken Garber, for always inquiring and extending earnest help and support. Thanks are owed to Hugh Garton for kindly shepherding me to the hospital when I folded my foot into my shin and temporarily found myself peering at the bottom of my own sole. To Billy, Matt, and Emory for warm company and solemn concern that evening as my ankle ballooned and reached the proportions and color of a cantaloupe. To Matthew Schiffert, for contending, patiently and compassionately, with the stir-crazed outcomes of my being unable to walk for nearly two months. To Carson Schultz, Chari Cortez, and Timothy NeCamp for remarkable friendship and climbing company.

And my inordinate gratitude for family. For my mother, who traded in her own prospects entirely for the possibility of advancing mine. I wouldn't really be anything—or be anywhere, for that matter—without her. For Damian Wassel, who, for years and years was an absolutely indefatigable source of support, and who is, unequivocally and genuinely, family. Whenever I'm working, I'm always—in the back of my mind—trying to hold myself to emulating the sort of clarity that you evince in your own work.

For Jeffrey Yang, Phoebe Lee, Uncle Vigor Yang, Aunt Dorothy Chuang, and (presently, though soon-to-no-longer-be) wee Claire: Jeff, I remember clearly meeting you and your mother over dinner in Boston, very much aware that you were the extent of extended family that I had Stateside. The same uncertainty applies here too: I'm not sure how, exactly, I struck you then as someone in whom to invest time in the form of careful, and sometimes boisterous, mentoring. The good results of your influence are too many to list, and so I'll only mention a couple: (a) that earnest, well-motivated ambition isn't hubris, and (b) that I'm at least a bit more capable than I think myself to be. Phoebe, thank you for compassionately fielding the various kerfuffles into which I've gotten myself, and for your indefatigable good cheer. Uncle Vigor and Aunt Dorothy Chuang: thank you, thank you for being so good to me.

For Jonathan Bye, who I had the exceptionally good fortune to meet in this past year. Our shared inventory of rites that we've endured individually includes: one, a Californian bar exam (to which I cannot claim to have contributed to in any way), and, two, the possible completion of a doctorate. In my case, I'm not sure that I would've gotten through these last few months without your help. The outcomes, in any case, would've been questionable. I hope sincerely that you do not perish on a mountainous peak. Pursuant to that hope, I hope also that my saying that doesn't constitute some horrifyingly prescient omen.

And to anyone I inadvertently omitted: please forgive me, the final submission deadline for this dissertation is nearing.

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ABSTRACT

In *The Myth of Ownership*, Liam Murphy and Thomas Nagel argue that achieving fairness in taxation is principally a matter of distributive justice.¹ Distributive justice can be understood as being concerned with *what is owed to people* as a matter of justice. For Nagel and Murphy, fairness in tax schemes is subsumed to the question of distributive justice: fairly allocated tax liabilities are just those that are compatible with the preferred theory of distributive justice. Subsuming assessments of tax fairness to distributive justice, however, overlooks the following possibility: that the question of how we ought to divvy up tax liabilities, and the burdens associated with running a society more generally, requires different, non-distributive considerations of justice. These are considerations of justice that aren't essentially about distributive justice at all. I argue here that the division of burdens in a society is specifically a matter of *contributive justice*. Contributive justice is concerned with *what people owe* as a matter of justice, rather than *what is owed* to them. It makes the division of burdens itself evaluative salient in assessments of fairness. Even a comprehensive specification of distributive justice leaves indeterminate how the burdens of running a society should be fairly divided up.

Each of the chapters in this dissertation develops one part of an account of contributive justice. I first make conceptual space for an account of contributive justice. By taking Murphy and Nagel's lead, and working within the post-distribution, a distinctive need for principles of justice in contribution can be shown. Murphy and Nagel decline to introduce non-distributive principles for guiding the provision of post-distributive public goods. Instead, they favor efficiency in determining the provision of post-distributive of public goods. I show that contributive justice is genuinely distinct from both efficiency and distributive justice. I also

¹ Arguably, they're not alone in this conviction. A number of other legal and political theorists—Richard Epstein and Gerald Gaus among them—also believe that the fair allocation of individual tax liabilities is principally a matter of distributive justice. They, too, start from a distributive justice framework in order to figure out what a fair allocation of tax liabilities ought to look like.

identify one respect in which principles of contributive justice should bear: that of determining the financing and delivery and civic cultural public goods.

I then argue that a principle of contribution in accordance with *ability* (a principle of “ability-to-pay”, or “ability-to-contribute”, for short) stands out as a candidate principle of contributive justice. The version of ability-to-pay that I defend is, in particular, a deontic principle of ability-to-pay. I show that a deontic principle of ability-to-pay is more closely allied with a view of society as a cooperative enterprise than utilitarian versions of ability-to-pay. An account of *ability* to contribute is developed by grafting a notion of opportunity cost onto Amartya Sen’s capability theory.

Lastly, I incorporate contributive justice in an account of *contributive legitimacy*. Contributive legitimacy gives us a set of conditions under which the state’s use of coercive force to extract tax contributions is legitimate, and hence justified. Drawing on empirical evidence from the development and fiscal sociology literature, I show that contributive legitimacy in a state’s tax extraction practices is essential to rule of law, and the avoidance of kleptocratic authoritarianism. Contributive legitimacy supplements our understanding of conventional notions of political legitimacy and helps us identify possible failures of political legitimacy. These are failures that might be overlooked were we to focus solely on distribution.

CHAPTER ONE

MAKING CONCEPTUAL SPACE FOR PRINCIPLES OF CONTRIBUTIVE JUSTICE

I. Introduction

My goal here is to show that there's conceptual space for an account of contributive, rather than distributive, justice. A preliminary distinction can be drawn between distributive and contributive justice: distributive justice is primarily concerned with identifying principles that either directly or indirectly guide the allocation of goods to members of a society. The goods in question can be freedoms, opportunities, or the material gains from social cooperation.

Contributive justice addresses a complementary set of issues about what contributions are owed by members of society as a matter of justice. These can be contributions that are required for the continued operation of just institutions, or, as will be the focus here, contributions that are required for the provision of certain public goods.

I show that there's conceptual room remaining for an account of contributive justice through an initial rejection of Murphy and Nagel's arguments for efficient determinations of public goods in a post-distributive world— where a post-distributive world is one in which principles of distributive justice are assumed to be in place. Rejecting Murphy and Nagel's arguments about efficiency sets up the case for contributive justice. Murphy and Nagel favor a criterion of efficiency in the post-distributive determination of public goods. By their account, there are three features typically constitutive of a scheme of public goods: type, level and

provision.² All three features are to be determined according to what's most efficient, where efficiency is understood in terms of a voluntary exchange account of public economy. According to the voluntary exchange theory, a revenue-expenditure outcome is efficient when the level of public expenditure is such that it equalizes the marginal valuation for public and private expenditure for any given taxpayer.³

The particular line of response I intend works within the same post-distributive world in which they advance their arguments. If I can show that the determination of public goods provision in the post-distribution requires principles other than efficiency, which, assuming a need for any principles at all, is implied by a rejection of efficiency as a suitable criterion for public goods-determination, then such principles will necessarily be non-distributive. Principles that can arise in the post-distribution raise non-distributive issues: the distributive concerns have already been settled already in the post-distributive baseline.

In this essay I show not only that there's conceptual room for further principles, principles that are neither about efficiency nor distributive justice, but that these principles should be contributory. I have in mind one particular principle of contributive justice: a principle of ability-to-pay (contribution in accordance with ability to contribute). The principle of ability-to-pay is a traditional tax fairness norm. I develop ability-to-pay as a principle of contributive justice in the second dissertation chapter. I argue there that the contributions participants to cooperative projects are responsible for ought to be determined in accordance with a principle of ability-to-pay. In this chapter, I focus on just the task of space-making.

The argument that I intend here hinges on an examination of public goods. I show that certain types of public good, where these must be public goods that persist in the post-

² (Murphy and Nagel, pg. 83)

³ (Murphy and Nagel, pg. 77)

distribution after distributive issues have been sorted out, resist determination by efficiency criteria. To this end, I identify three types of public good: public goods that are demanded by justice, public goods that are required for the promotion of a certain civic culture and national identity, and public goods that satisfy private wants. I argue that contributory criteria are more suitable for determining the cost allocation of civic cultural public goods than efficiency criteria. In order to narrow down the particular respects in which contributive principles might apply to post-distributive public goods, I also spend some time constructing a working account of public goods from the existing literature. The resulting account is a departure from conventional public finance accounts of public goods. It also rejects the Murphy and Nagel analysis of public goods, in which public goods are decomposable into mere type, level, and cost allocation features.

By looking to public goods, we can also identify the particular respects in which guidance from further, contributory, principles is needed. Identifying the respects in which further principles are needed will also help us specify the functions that would be served by these further principles, and make headway toward showing that these functions are most suitably discharged by distinctively contributive principles.

II. Public goods

Public goods are goods that generally have two features: they're (i) indivisible (jointly consumed and non-rival), and (ii) non-excludable. Two definitions of public goods can be built around these characteristic features. One is an account of public goods often given in the public finance literature.⁴ This account takes both indivisibility and nonexcludability to be categorical traits that are individually necessary, and jointly sufficient for something to be public good. A second account is truer to how public goods actually occur in the public sector. This second

⁴ (Ostrom and Ostrom, pg. 12)

account takes indivisibility and nonexcludability to each be features that can be present to varying degrees in a public good. A good is *more like* a public good to the extent that it has features of indivisibility or nonexcludability, or both, and to the extent that it has either of these in features in large measure.

For the most part, both accounts share the same definitions of indivisibility and nonexcludability. Indivisibility can refer to two possible attributes, both of which capture the “jointness characteristic” of public goods: a feature of collective consumption, and a feature of non-rivalry.⁵ Collective consumption means that the provision of a share of good to one person entails that additional qualitatively and quantitatively identical shares be provided to others at no additional cost.^{6,7} Non-rivalry refers to the fact that one person’s consumption of her share of public good leaves everyone else’s individual shares undiminished.⁸ Collective consumption and non-rivalry are related: the fact that a good must be parceled out in identical shares, and that the provision of one share entails provision of additional shares to others, suggests that non-rivalry is also in place—that one person’s consumption of a good doesn’t diminish anyone else’s potential consumption of that good. We can infer nonexcludability from indivisibility understood in the collective consumption sense. If identical shares of a good must be made available to everyone, then no one can be excluded from consumption. The inference of non-excludability from indivisibility gives us a strong conceptual reason why public goods must also be nonexcludable if they’re already indivisible. It accounts for why, at least according to the first account of public goods, indivisibility and nonexcludability are treated as individually necessary and jointly sufficient conditions.

⁵ (Head, pg. 228)

⁶ (Desmarais-Tremblay, pg. 69)

⁷ (Samuelson 1955, pg. 350)

⁸ (Samuelson 1954, pg. 387)

Practical reasons for the nonexcludability of public goods are available too. Public goods may be practically non-excludable because it's either too costly or simply infeasible to exclude select individuals from consumption. Examples of public goods for which nonexcludability is a matter of infeasibility include national defense and clean air. Since the second account is more interested in devising an account of public goods informed by public goods as they actually are, we can reasonably expect the second account to appeal to these practical reasons, rather than reasons of conceptual necessity, for nonexcludability.

Indivisibility and nonexcludability figure differently in the first and second accounts of public goods. In the first account of public goods, intended to represent conventional public finance accounts of public goods, indivisibility and nonexcludability are features that (i) are either decisively present or absent, (ii) must be both decisively present in order for a good to count as a genuine public good (that is, indivisibility and nonexcludability are individually necessary and jointly sufficient for something to be a public good). Other types of good—goods that fall short of being public goods—are either indivisible or nonexcludable, but not both. Indivisible and excludable goods, where indivisibility is understood specifically as non-rivalry, are goods from which select people can be barred access. However, once access to the good in question is granted, consumption is non-rival. Indivisible and excludable goods lend themselves to tolls: eligibility to use the good is acquired by paying some cost of entry. Examples of such goods include movie theatres and cable television.⁹ By contrast, nonexcludable and divisible goods are goods that can be furnished and consumed in different quantities, and goods for which consumption is rival—one person's consumption diminishes someone else's potential consumption of that same good. At the same time, no one can be excluded from consuming the

⁹ (Ostrom and Ostrom, pg. 12)

good in question. Examples of nonexcludable but divisible goods include depletable natural resources like fresh groundwater, or fish from a neighboring body of water.¹⁰

According to the second account of public goods, it's inappropriate to think of either indivisibility or nonexcludability as necessary or jointly sufficient conditions. Even unequivocally public goods may fail, in actuality, to be *categorically* indivisible, nonexcludable, or both. Public roads, for instance, are for the most part nonexcludable and indivisible. Even then, public roads may have features of both excludability (tolls at certain checkpoints) and divisibility (the use of public roads may be rivalrous in the sense that one person's use contributes to congestion and thus detracts from use by others).

There's also a third feature often associated with public goods: that of being publicly, rather than privately, provided. Provision consists in separate dimensions of financing and delivery. The provision of a good requires both revenue-collecting and distributive functions. In turn, financing and delivery can each be either public or private: *public financing* is usually mediated in some way by the government.¹¹ Revenue for a particular good is generated through taxation, which is often compulsory, and individual contributions are pooled. Goods that are publicly financed are in this way funded "collectively".¹² *Private financing* means that revenue is instead raised through individual transactions for the relevant good or service that occur at a price.¹³ The influence of market forces on the pricing of individual transactions in privately financed goods is arguably greater than it is on the determination of individual tax shares in publicly financed goods. The prices at which individual shares of privately financed goods and services are purchasable are primarily market-determined. By contrast, the determination of

¹⁰ (Ostrom and Ostrom, pg. 12)

¹¹ The public vs. private *financing* and public vs. private *delivery* distinctions are from John Donahue's *The Privatization Decision* (Donahue, pg. 7).

¹² (Donahue, pg. 7).

¹³ (Donahue, pg. 9)

individual tax shares for publicly financed public goods responds to a combination of factors in addition to market forces. Such factors include fairness norms, budgetary needs, public perception, and so on.

Delivery, the distributive dimension of provision, concerns the production and distribution of goods. *Public delivery* means that the good in question is produced or delivered by the government—in particular that production or delivery is carried out by civil servants—rather than private contractors. *Private delivery* means that production or delivery is carried out by non-governmental entities whose responsibilities are specified by “competitive output-based” contracts.¹⁴ Again, market forces act differently on modes of public, as opposed to private delivery. Private delivery responds to market forces of “economywide...competition”—private contractors are under persistent threat of replacement to perform—and private contractors are internally regulated by owners who have a pecuniary interest in the success of the company.¹⁵ By contrast, the public delivery of goods and services is largely insulated from market forces, because goods that are typically suited to public delivery resist market valuation. Civil servants are often involved in the production of goods for which the means of production matters more than the final product, and for which a comprehensive specification of the relevant good is impossible. Evaluative criteria for goods, especially evaluative criteria for purposes of market pricing, are hard to come by if a specification of the good can’t be given in the first place.

Issues of public goods provision, in terms of both financing and delivery, are separately introduced because they’re not definitional of public goods in the way that indivisibility and nonexcludability are. Rather, an independent normative case must be made for favoring either public or private options in financing and delivery decisions (this is especially the case for the

¹⁴ (Donahue, pg. 82)

¹⁵ (Donahue, pg. 40)

second account of public goods). Whether public or private modes of financing or delivery should be favored is a matter that requires some independent justification. Each of the two accounts of public goods given so far makes this normative case differently.

We do get a normative case for public provision out of most conventional public finance accounts of public goods. The case that can be made for public provision, however, isn't an *independent* case: public provision is justified as an extension of indivisibility and nonexcludability. Additionally, provision according to conventional public finance accounts fails to address the dimension of delivery.¹⁶

For the first account of public goods, the indivisibility and nonexcludability features of public goods together require public provision—by which proponents of this first account mean *public financing*, to the exclusion of delivery—because of a worry about free-riding. Public financing here is understood specifically as compulsory taxation for financing public goods. The argument proceeds in the following way: assume, first, that public goods are generally funded by a large number of individual contributions (collectively financed), and second, that public goods are nonexcludable.¹⁷ We can see the first assumption of collective financing as deriving from indivisibility. The presence of indivisibility in a good might by itself require collective, though not compulsory, financing of that good. Individual market transactions usually involve goods that are consumable in different quantities (divisible goods) that have the same per unit price. Categorically indivisible goods may resist funding by individual transactions since they have to be instead made available as goods consumable in the same quantities, at individual shares that are differently priced.¹⁸

¹⁶ (Musgrave and Musgrave, pg. 54)

¹⁷ (Musgrave, *Voluntary Exchange Theory of Public Economy* pg. 219n5)

¹⁸ (Musgrave, pg. 12)

Adding a condition of categorical nonexcludability to collective financing, as entailed by indivisibility, is what transforms mere collective financing into compulsory collective financing. These two characteristic features of public goods interact to disincentivize voluntary contributions to funding public goods. The fact that revenue for financing public goods is generally drawn from a large number of contributions has the following effect: the absence of any given taxpayer's contribution won't, usually, be missed.¹⁹ The absence of a single contribution won't make a difference in what overall levels of public good can be funded, or whether the public good is provided at all.²⁰ Because public goods are nonexcludable, however, even non-contributors are still beneficiaries. Thus, from the perspective of individual contributors, there's little incentive to remit payment for funding public goods, and substantially greater incentive to free ride. According to the first account of public goods, if indivisible, nonexcludable goods are to be made available at all, then they must be publicly financed.

The conventional public finance account of public goods is relatively silent on when a particular mode of *delivery* for public goods should be preferred, or why that mode should be preferable. Generally, no normative case is made by the first account for a particular mode of delivery, though at least one account recognizes that private delivery isn't incompatible with public financing.²¹ No inferences can be made about delivery from the core features of

¹⁹ An exceptional case is one that involves step-level public goods: goods for which a certain funding threshold must be met in order for any level of good to be supplied at all (a bridge being one such example of a step-level good). With step level goods, the absence of a single contribution can matter greatly, depending on where that single contribution falls in the sequence of individual contributions. Assuming that individual contributions to a publicly financed good are each some non-zero sum, and that contributions are made sequentially, then one contribution will be decisive in meeting the funding threshold. The absence of that decisive contribution means that the funding threshold remains unmet, and no level of public good is supplied at all.

²⁰ (Musgrave, *Voluntary Exchange Theory of Public Economy*, pg. 219)

²¹ In *A Theory of Public Finance*, Musgrave leaves room for the possibility that public goods might be privately delivered: "[public goods] need not be produced under the direct management or supervision of the government" (Musgrave, pg. 15). Still, Musgrave's account remains firmly in the camp of conventional public finance accounts of public goods. For one, Musgrave's account of public goods is committed to public financing as a necessary condition for public goods, as an entailment of indivisibility and nonexcludability. An additional feature of public goods unique to Musgrave's account is that they must have the quality of being "supplied free of direct charge to the user". Both of these properties preclude the possibility of *privately financed*, publicly delivered goods, which is an option explicitly recognized by the second account of public goods.

indivisibility and nonexcludability either—indivisibility and nonexcludability don't, individually or jointly, militate in favor of either public or private delivery. Even highly indivisible and nonexcludable goods like national defense can still be contracted out in the form of private delivery. Highly indivisible and nonexcludable goods might not be fundable via individually priced transactions, but the provision of those goods can still, in whole or in part, consist in specifiable goods and services.

By contrast, we do get an independent normative case for both the financing and delivery dimensions of provision out of the second account. Part of the reason why the second account is better positioned make cases for both, is because it sets comparatively less store by indivisibility and nonexcludability in defining public goods. Rather than distinguishing public from private goods on the basis of differences in consumption as the first account does—indivisibility and nonexcludability ultimately describe variations in how goods might lend themselves to consumption—the second account focuses on differences in provision to distinguish public from private goods. Public goods are public mostly in virtue of being publicly provided in one or other dimension. If a good is either publicly financed or publicly delivered, then this is generally sufficient for it to be a public good according to the second account.

The normative case for publicly financing a good according to the second account is mainly procedural, though other possible justifications for public financing, such as the cost allocation for a publicly financed good being contributively just, are available too. For the most part, the public financing of a good is justified if there's sufficient popular endorsement for publicly financing that good—endorsement as expressed through the appropriate political, usually democratic, channels. This is all assuming, of course, that the relevant political channels are free of critical defects, such as voters being problematically ignorant of the issues that they're

voting on, representatives positioned to enact the relevant policies being elected by problematically gerrymandered districts, political corruption, and so on.²² The specific contours of a proposal for publicly financing some good bear on the likelihood of that proposal's being justified, and vice versa.

The normative case for public, rather than private delivery, turns on contractual considerations. Public delivery and private delivery each correspond to distinctive forms of contract, according to the second account. Public delivery is characterized by contracts of *employment*.²³ A contract that circumscribes the public delivery of a good or service describes the responsibilities that attach to positions involved in the production of that good or service. By contrast, private delivery is characterized by *output-based contracts*: rather than contracts specifying the terms of employment (input-based contracts), public delivery is focused on productive outcomes.²⁴ Remuneration for private delivery is contingent on satisfactory production of the relevant good or service.

According to the second account, a good is better suited for public, over private, delivery if it has certain attributes. There are two such categories of attributes: the presence of the first type militates in favor of public delivery. The presence of the second militates in favor of private delivery. If a public good has a preponderance of attributes from one or the other category, then there is good reason to think that that good ought to be provided through the corresponding mode of delivery. I discuss attributes here that are especially relevant for public goods that promote a particular kind of civic culture and national identity—the subject of arguments in later sections.

²² (Donahue, pg. 31)

²³ I don't mean to imply that employment contracts are limited to the public sector. Clearly profit-seeking institutions regularly hire people on the basis of *employment contracts*, who are compensated for their inputs rather than their outputs. Even in the private sector, however, the reasons that militate in favor of *employing* people, rather than contracting them for outputs, apply: if hirees can't be easily replaced (because the skills required for the relevant position are too narrow or sophisticated), if outputs aren't readily specifiable and lack clear evaluative criteria, etc. (Donahue, pg. 79).

²⁴ (Donahue, pg. 79)

The attributes that follow are best understood in the context of a principal-agent problem, after John Donahue's analysis in *The Privatization Decision*. Donahue argues that the decision to opt for either public or private modes of delivery for public goods can be framed in terms of a principal-agent problem.²⁵ The principal is the party commissioning the relevant public goods, who is the eventual recipient and beneficiary of those goods. In the case of public goods, principals can be either those who directly or indirectly fund public goods, usually via fees and taxes, or the immediate beneficiaries of the relevant public goods.²⁶ Agents are the parties to whom principals delegate tasks, who carry out these tasks on behalf of principals. For public goods, agents are the deliverers and manufacturers, either public or private, of goods.

Conventionally, the principal-agent relationship has a number of properties that make the possibility of a productive relationship in which “[agents] are fairly compensated”, and “[principals] are fairly served, less likely.”²⁷ This is the problem feature of the principal-agent relationship. One such property is the imperfect alignment of agent and principal interests: principal and agent interests not only diverge, but each has only partial access to the interests of the other.²⁸ In addition, principals can exercise only limited control over agents. Within these limits, agents have a measure of autonomy to realize their own interests, including those interests that may be opposed to the interests of the principal. Resolving the principal-agent problem depends on brokering a suitable relationship between principals and agents in the form of a

²⁵ (Donahue, pg. 38)

²⁶ This possible divergence between who commissions the good, and who benefits from the good, is another difference between public and non-public goods that comes through when we frame the delivery of public goods as a principal-agent problem. For non-public goods, identifying a principal will be usually less complicated: commissioners and beneficiaries are generally one and the same. We might see this divergence in commissioner and beneficiary for public goods as deriving from the feature of nonexcludability that most public goods have to at least some degree. Since excluding people from the consumption of public goods is either difficult or expensive, commissioners and beneficiaries of *public* goods can diverge in at least the following ways: tax evaders may nevertheless enjoy public goods funded from tax revenue, people ineligible to pay taxes can still be beneficiaries of public goods, some taxpayers may not agree to their tax dollars being used for certain ends, but will exercise little control over the choice of public expenditure, and so on.

²⁷ (Donahue, pg. 38)

²⁸ (Donahue, pg. 38)

binding contract. Employment contracts involving civil servants (public delivery) and output-based contracts involving private contractors (private delivery), each describe a possible type of principal-agent relationship. Choosing the right principal-agent relationship for the delivery of public goods guards against dysfunction in the delivery of public goods.²⁹ Dysfunctional principal-agent relationships are characterized by the delivery of inferior products because of corners being cut, or the use of morally objectionable or unjust means of production for the goods or services to be delivered.

The first relevant attribute is the absence of clear evaluative criteria for outputs. A public good is better suited for public delivery if either devising evaluative criteria for the eventual product is an innately difficult task, or if principals are unlikely to possess or employ the relevant evaluative criteria.³⁰ In particular, some goods may resist being associated with concrete evaluative criteria because either production of the goods in question involves a high level of risk and uncertainty, or because there's significant disagreement about what constitutes evaluative criteria for those goods. Clear evaluative criteria for goods and services are necessary for specifying the terms of output-based, private contracts. Agents in these contracts are compensated on the basis of how well the products they deliver meet those criteria. Education, for instance, is better suited to public delivery because principals, in the sense of immediate beneficiaries, may be poorly positioned to assess the quality of the good being delivered. Usually

²⁹ Certain public goods may lend themselves to dysfunctional principal-agent relationships if the wrong mode of delivery is chosen: if there's a mismatch between the relevant attributes of the public good, and the mode of delivery that those attributes militate in favor of, and the actual mode of delivery that is chosen. Elder care, for instance, has attributes that militate in favor of public delivery—universal evaluative criteria are hard to devise, the relevant tasks entail a lot of uncertainty and may be difficult to specify contractually, principals are ill-positioned to assess the quality of service they're getting, etc.—and so the private delivery of care services for the elderly is likely to grow dysfunctional. The very same attributes that militate in favor of public delivery may facilitate exploitation of principals if private delivery is chosen: the quality of service being delivered may be subpar because evaluative criteria and proper assessment are lacking, a failure to financially account for risks and uncertainties in contracts may lead to agents cutting corners on services (because agents may be already spread too thin financially, or because agents wish to save in anticipation of future risks and uncertainties), there may be inadequate competition for agent positions in the care of the elderly because of the difficulty in specifying profitable contracts, and so on.

³⁰ (Donahue, pg. 41)

those presently being educated are in the process of acquiring the very skills and capabilities they need in order to assess the quality of education that they're getting. Evaluative criteria for education might also just be inherently hard to come by: devising a set of criteria for what counts as a satisfactory education, in particular a set of criteria that can garner a consensus, is an elusive goal.³¹

A second attribute that militates in favor of public delivery is when the means of producing the good or service matter as much as the eventual product. The means of production may matter if a public good has a certain symbolic or expressive function: if, for instance, a private contractor uses prison labor to minimize costs in the construction of a public monument, this will interfere with the intended expressive function of that monument. In cases where the means of production for a particular public good might not matter as much, private delivery is more suitable. Unless constraints on the means of production are required by a public good, such constraints can be rather limiting: constraints on *how* a good or service is produced also indirectly constrain both the degree of permissible innovation in the production of a good or service, as well as what motives agents can have. Innovation, and the profit-maximizing motives that drive it, are arguably both merits of the output-based private contract. An important venue for innovation in the delivery of goods and services is the production stage for those goods and services. Output-based private contracts, by definition, impose requirements on the eventual product rather than the means of production. Since agents in private delivery contracts can enhance their profits by producing goods and services at less than the contractually estimated costs of production, private contractors are incentivized to innovate cheaper means of production. This innovation can be genuinely meritorious in some cases. However, profit-

³¹ We might take the intermittent changes to federal standards for education—changes that often coincide with turnover in political incumbents—as evidence for this (Rudalevige, pg. 65).

motivated innovation also carries the risk of subverting the intended functions that might be attached to particular public goods.

A final attribute that militates in favor of public delivery is one instance of the information asymmetry often characteristic of principal-agent relationships. Such an asymmetry is implied by the partial access that principals and agents each have to the others' interests. For the delivery of some goods, it will generally be the case that principals know more than their agents do about the good or service to be provided. For other goods, the information asymmetry will be reversed: agents will have greater expertise than their principals. Usually, knowledge asymmetries militate in favor of writing contracts in which greater control is given to the more knowledgeable party.³² The delivery of legal and medical goods exhibit the latter sort of information asymmetry: lawyers and doctors, respectively, often know more about the tasks that they're delegated than the principals on behalf of whom they carry out those tasks. Thus, the services of lawyers and doctors are often through contracts in which they have relatively greater autonomy.

I focus here on the former sort of knowledge asymmetry that favors principals. The presence of a knowledge asymmetry in which principals know more about the public good being delivered is reason to favor a mode of public delivery. Knowledge asymmetry is distinguishable from both of the previously attributes discussed. The presence of a knowledge asymmetry in which principals are more expert than their agents, for instance, doesn't entail the second attribute— that the means of production for a public good might be just as important as the eventual product. Having greater knowledge and expertise about the relevant public good or

³² Admittedly the *kind* of knowledge in which the asymmetry consists matters: there may be cases in which principals have a more rigorous background understanding of a good—its history, the conventions by which it's governed, etc.—but agents might have a greater knowledge of *possible innovations* that can be undertaken, to the exclusion of a background understanding. If knowledge of innovation is prioritized over knowledge of conventional practices, then this might justify handing the reins to the agents, e.g. in cases where outside consultants are brought in as innovators (Sturdy, Clark, *et al.* pg. 628).

service might include knowledge and expertise about the means of production, or it might not. A principal may be more knowledgeable about other features of a public good, like the values that the good ought to reflect, or the role of that public good in macro-level social or economic projects. It's also not the case that when the means of production for a particular public good matters more than the ends, then the principal necessarily knows more than the agent on the means of production.

The knowledge asymmetry attribute is also distinguishable from the first attribute discussed—the relative absence of clear evaluative criteria for a particular public good. A principal may know more about a public good in the sense that she has robust ambitions for what she'd like to see the public good accomplish, but these ambitions needn't translate into clear evaluative criteria. In cases where a knowledge asymmetry between principals and agents fails to translate into clear evaluate criteria for contractual outputs, there's good reason to favor public delivery. The relative lack of clear evaluative criteria for outputs, coupled with a greater desire for control over those aspects of the public good that the principal is more knowledgeable about, militates in favor of the employment contracts that are characteristic of public delivery. In employment contracts, principals issue *instructions* that circumscribe the roles of their employees, rather than mere output criteria. All in all, employment contracts facilitate greater control by principals over their agents.

A normative case for favoring public over private financing, or public over private delivery in the provision of public goods can be constructed from some of the reasons given here. While I've described only a subset of the properties that militate in favor of public delivery, and an even smaller subset of reasons that militate in favor of public financing, the properties given here are, for the most part, divorced from considerations of efficiency.

II.i How do the first and second accounts of public goods interact? How can they be reconciled?

I should pause here to make a few clarifying remarks on the relationship between the first and second accounts of public goods. I don't mean to claim that the two accounts of public goods given so far are entirely independent of each other. For instance, the second account of public goods can help itself to the justification for publicly financing certain goods on the grounds that those goods are indivisible and nonexcludable, and thus susceptible to free-riding. Thus the case for public financing given by the first account remains potentially salient for the second. The second account remains free to appeal to reasons other than indivisibility and nonexcludability in making a case for public or private financing and delivery, which it does for the most part.

There is, however, a worry about the second account's focus on features of public provision in defining public goods. Any account of public goods must effectively individuate between public and non-public goods. By taking indivisibility and nonexcludability as non-necessary conditions, and instead as mere features that are present to some degree, the second account runs the risk of being less able to discharge this individuating function. Say that there was a very small group of beachfront property-owners who successfully lobbied for intervention by the Natural Resources Conservation Service to retard the erosion of shoreline immediately bordering their properties—an effort to secure the value of their individual properties.³³ The service provided would be highly excludable (it would benefit only that small number of beachfront property-owners), publicly financed, and potentially publicly delivered. Would merely being publicly provided be still sufficient for the erosion intervention to count as a public good? Likely not.

³³ A service that one might reasonably ask of the federally funded Natural Resources Conservation Service under the auspices of its Emergency Watershed Protection Program (Office of Management and Budget, pg. 117).

Still, there are good reasons for continuing to take indivisibility and nonexcludability as non-necessary, non-categorical conditions for public goods. The first account of public goods is too restrictive. It altogether rules out the possibility of privately financed, publicly provided public goods, because such goods are necessarily neither indivisible nor nonexcludable. One notable example of privately financed, publicly delivered goods are those provided by the United States Postal Service (USPS). The operating costs of the USPS are funded entirely through revenue from private transactions for its goods and services (the USPS also draws on limited sources of public financing to cover its operating deficits and subsidized services).^{34,35,36} In order for the USPS to be privately financed through individual transactions for its goods and services, the relevant goods and services that it provides must be purchasable, and thus excludable. Excludability, in turn, entails divisibility: if a good is such that some people can be excluded from enjoying it—in this case because they’re either unable or unwilling to pay—then it cannot be the sort of good that must be provided to everyone in equal measure. In virtue of being purchasable, goods and services provided by the USPS meet neither of the necessary conditions for public goods set out by the first account. However, there’s a strong case for continuing to treat good and services provided by the USPS as public goods: the delivery of USPS goods and services is carried out in an unequivocally public way. Postal workers are civil servants who are compensated on the basis of inputs—the degree to which they fulfill the responsibilities set out in their employment contracts—rather than outputs. In ruling out goods and services provided by the USPS as distinctively public goods, the first account also fails to effectively individuate

³⁴ (Donahue, pg. 8)

³⁵ (United States Postal Service, Corporate Communications)

³⁶ The USPS draws on some limited sources of public financing: the USPS is eligible for loans from the U.S. Treasury to cover deficits in operating costs, and is the beneficiary of appropriations by Congress. In addition, Congressional appropriations subsidize the delivery costs of mail addressed to rural areas of the United States, as well as the mailing costs of overseas voting and the use of mail services by the blind (Office of Management and Budget, pg. 1330 and pg. 1332).

between public and non-public goods. In particular, it fails to count goods and services that ought to be considered public goods, as public goods. The second account of public goods seems to have the upper hand in this case.

A compromise account of public goods, one that incorporates features from both accounts, is more likely to be defensible. This is the working account of public goods that I adopt here. Public goods are those that have two necessary features: first, the feature of being, *to some distinctive degree*, indivisible and non-excludable, and second, the feature of being either publicly financed or publicly delivered. Mitigating shore erosion, for the benefit of just some beachfront property-owners, like the example above, would lack any degree of nonexcludability or indivisibility. Decisions to favor public over private options in either financing or delivery should also generally be accompanied by a separate normative case for why that decision is justifiable. At the very least, such an independent normative case should be available.

III. Reconstructing the Murphy and Nagel argument

In *The Myth of Ownership*, Murphy and Nagel assume an account of public goods slightly at odds with the one used here. A scheme of public goods, on their account, can be decomposed into three component features: (a) a specification of the *type* of public good, (b) a specification of the *level* of public goods-provision, and (c) a pattern of *cost allocation* (via taxation) for that public good.³⁷ The delivery dimension of provision is entirely absent from their conception of public goods. Financing considerations are covered by the inclusion of a cost allocation feature, which is understood specifically as an analogue of *public* financing.³⁸ Aside from this distinctive way of organizing schemes of public goods, Murphy and Nagel subscribe to

³⁷ (Murphy and Nagel, pg. 83)

³⁸ Murphy and Nagel do not discuss the possibility of privately financed but publicly delivered public goods.

the first account of public goods given earlier: public goods are those that are necessarily indivisible and nonexcludable.³⁹

Murphy and Nagel argue that in a post-distributive world—one in which distributive justice is assumed to obtain—efficiency should be our main criterion for determining all three of the features in which schemes of public provision typically consist. Efficiency, for them, is understood in terms of the voluntary exchange theory of public economy: revenue-expenditure outcomes are efficient if they equalize marginal value between private and public expenditure for individual taxpayers. In determining the cost allocation for a particular public good, each individual contribution should be set at a price no more than, and ideally equal to, that taxpayer's subjective valuation of her share of public good (this is the 'reserve price').⁴⁰ Remitting taxes for public provision is thus an act of voluntary exchange: valuation of the public good—as represented by the reserve price amount—should be no more than what value could've been instead derived from putting that same amount toward private expenditure.

An efficient allocation of the costs of public provision, in turn, tells us the level at which public provision ought to be made available. The total sum of individual, unequal, tax contributions makes up the budget for overall public provision. The level of overall public provision is whatever can be financed from this budget and divvied up in such a way that each individual's share of public good—where all of these shares must be equal, since public goods are by definition indivisible—confers greater or equal marginal utility than equivalent private expenditure. According to efficiency, determinations of cost allocation and the level of public provision occur together. And if cost allocation and level of public provision are determined in accordance with efficiency, then efficiency indirectly constrains what types of public provision

³⁹ (Murphy and Nagel, pg. 80)

⁴⁰ (Murphy and Nagel, pg. 83)

can be made available too. Some types of public provision will fail to raise enough total revenue from individual contributions—assessed at individual subjective valuations—because they’re worth too little in terms of individual reserve prices. Aggregating individual contributions will be either insufficient to hit the funding threshold needed to fund any amount of the public good (for step-level goods), or insufficient to fund enough of the public good such that individual shares are sufficiently marginally valuable.

My reply to Murphy and Nagel’s efficiency argument proceeds in the following way: first, I offer an objection that works within the Murphy and Nagel framework for public goods, in which public goods are understood to have type, level, and cost allocation features. In the first objection, I focus on the effects of adding a voluntary exchange account of efficiency to this framework: the voluntary exchange theory makes decisions about (a) what types of public good to provide, (b) the levels to which we should supply those public goods, and (c) the appropriate cost allocations for those public goods, necessarily interdependent. According to the voluntary exchange theory, decisions about public goods should, at each level, strive to emulate voluntary private transactions for non-public goods. Whether a taxpayer agrees to a newly proposed public expenditure (a decision about public goods *type*) depends on her prospective cost share for that public expenditure (a decision about *cost allocation*), and whether this cost share reflects her comparative marginal valuations of both the proposed public expenditure, as well as the potential private outlays to which she could otherwise devote her share of cost (where equalizing marginal valuations of public and private expenditure for any given taxpayer can be achieved, in part, by appropriately configuring the *level* of public goods-provision). Given this interdependence, I argue that there are strong procedural reasons for rejecting efficiency as a criterion for cost allocation. In a number of cases, efficient cost allocation will problematically influence what

types of public good should be provided, and the level at which those goods should be provided. I show that in these cases, a cost allocative influence on both type and level of public good violates a non-distributive criterion of procedural fairness. This procedural objection applies even in the post-distribution, where a baseline of distributive justice has been secured already.

The section that follows the procedural objection shows that, for at least certain categories of post-distributive public good, decisions about type, level, and cost allocation must be informed by considerations other than efficiency. For instances of the public good categories discussed (tokens of these public good-types), decisions at each level of type, level, and cost allocation are informed by justifications for the overall category of good. Considerations of delivery and financing open up a conceptual space in which normative considerations other than distribution and efficiency—considerations of distribution having been already settled in the pre-distribution—can be brought to bear. Once efficiency has been excluded as a suitable consideration in delivery decisions for the public goods considered here, I suggest that decisions about the delivery and financing dimensions of public goods are where principles of contribution will apply.

III.i Rejecting efficiency as the sole criterion for determining public provision: the procedural objection

A preliminary objection to efficient determinations of post-distributive public goods comes from considerations of procedural fairness. The procedural worry can be illustrated by an example. Suppose that a public provision package on a potential new public transit line is to be funded by a population of three taxpayers: taxpayer *A* who has an annual income of \$100,000, taxpayer *B*, who has an income of \$50,000, and taxpayer *C* who has an income of \$15,000. The new transit line is a step-level public good: a funding threshold must be met in order for the

transit line to be built. If the funding threshold is unmet, then the project will be scrapped.⁴¹ Here, \$75,000 must be raised for the construction of the new transit line. Individual valuations of the public transit package follow:

	Annual income:	Marginal valuation of the public good as a percentage of income:	Contribution:
A	\$150,000	10%	\$15,000
B	\$50,000	15%	\$7,500
C	\$15,000	30%	\$4,500

Table I.1 Taxpayer Contributions Given their Individual Marginal Valuations

C has the greatest marginal valuation of the proposed transit line, but makes the smallest absolute contribution in virtue of his income. *A* and *B* are each positioned to help the transit project reach its funding goal by increasing their individual contributions. However, if *A* and *B* each contributes only the amount that reflects the marginal value ascribed to the new transit line, then funding goals for the new transit line will remain unmet.

A generalization can be made from this case: since efficiency-based determinations of public provision make the issue of efficient cost allocation decisive—the possibility of any public good being provided hinges on whether an efficient cost allocation can be found—such determinations run into an issue of procedural fairness. Decision-making procedures that are meant to efficiently allocate cost for public goods disproportionately empower those who are positioned to make the greatest absolute contribution to financing public goods. Those who are so positioned will generally be a wealthy minority. What is objectionable here isn't that the provision of public goods is made to turn on the matter of sufficient revenue: the viability of a

⁴¹ (Miller 1993, pg. 509)

proposed scheme of public provision will often depend on whether the required revenue can be raised. Rather, what is objectionable is that the preferences of a wealthy minority for both a particular *type* and a particular *level* of public good are more likely to be prioritized when the provision of public goods hinges on a procedure of efficient cost allocation.

The degree to which their preferences are favored will vary; the actual degree of favoritism will depend on, among other things, how the marginal valuations of the wealthy pan out, and the total number of people over whom cost is allocated. Still, there will be some cases in which the wealthiest are given an effective veto over a public good proposal that has the endorsement of the less well-off majority. Disproportionate influence over the type of public provision— which includes an influence over whether or not certain goods are offered at all—is also more likely with step-level public goods. With public goods for which variable levels of provision can be given depending on funding, disproportionate influence may instead be exercised over the level of public provision that can be made available. If the bulk of funding for public provision is supposed to come from those who would strongly disprefer public over private expenditure, then only nominal levels of public provision may end up being funded.

Disproportionate empowerment of the wealthy in this way can be characterized as a violation of procedural fairness, even though this must be a sense of procedural fairness that's distinct from the distributive justice assumed to be in place already. It gives a preliminary reason for rejecting efficiency as a suitable criterion for determining the cost allocation of post-distributive public goods.

III.ii Rejecting efficiency as the sole criterion for determining public expenditure: proposing at least three different types of public good, two of which resist determination by efficiency

The procedural objection to efficiency gives us reason to reject efficiency as the right criterion for determining the type, level and cost allocation for post-distributive public goods. It remains agnostic, however, on a couple of questions: (i) whether determinations of type, level, financing, and delivery for public goods should each be made separately, or whether decisions for each should be interdependent in the way required by the voluntary exchange theory, and (ii) what criteria we should consult in lieu of efficiency for making determinations of type, level, financing, and delivery.

Here, I argue that for at least some categories of public good, decisions about type, level, financing, and delivery should be made separately—a separate case for favoring a particular mode of delivery, as we've seen, is already required. For these categories of public good, such decisions are also informed by criteria other than efficiency. Instead, the relevant criteria for adjudicating the type of public good, and the level at which the good should be provided, are generally drawn from justifications for that category of public good. Decisions about financing and delivery will be informed by why public goods of that kind should be provided, but they'll also be informed by features of the public good itself: whether the good lends itself to private financing, whether the good is such that deliver by civil servants makes more sense, and so on. Decisions about financing and delivery will, I suggest at the end of this section, be informed by at least one other consideration: whether they comply with principles of contribution.

I distinguish between three categories of public good in this section: public goods that are demanded by justice (referred to here as 'goods demanded by justice' for short), public goods that promote a certain civic culture and national identity (hereafter 'civic cultural goods'), and lastly, public goods that satisfy private wants, but that are, for various reasons, better provided

publicly.^{42,43} I don't intend these categories to be exhaustive. The first two categories of public good, goods demanded by justice and civic cultural goods, are goods that resist determination by considerations of efficiency alone. It might be the case that efficiency alone is sufficient for figuring out the type, level, financing, and delivery of public goods that satisfy private wants, but I don't say much more about them.

Before describing each type of public good, a preliminary note: since Murphy and Nagel situate their arguments for efficiency in the post-distribution, salient replies have to engage with this feature of their arguments. And since the claim in this section is that goods demanded by justice and civic cultural goods resist determination by efficiency criteria alone, I have to show that one or both of these categories of public good actually belong to the post-distribution. The relevant sense of 'belonging to the post-distribution' is this: a public good *belongs* to, or is constitutive of, the post-distribution if decisions to provide it are made in the post-distribution.⁴⁴ Post-distributive public goods will be public goods that aren't strictly necessary for distributive

⁴² (Miller, pg. 137)

⁴³ Brian Barry argues for a similar division of public goods, though he organizes public goods according to the characteristic conflicts that arise in the course of deciding whether those public goods ought to be provided. Barry distinguishes between public goods for which "there are competing views about the right answer" and public goods that are a matter of "conflicting wants" (*JJ*, pg. 148).

⁴⁴ This definition of 'belonging to' either the pre-distribution or the post-distribution seems almost too weak when used to describe the relationship between goods demanded by justice and the pre-distribution. And it's true that goods demanded by justice belong to the pre-distribution in a more robust sense: what seems to be important about the relationship between goods demanded by justice and the pre-distribution isn't just that decisions about the provision of such goods are made in the pre-distribution, but that the pre-distribution requires, constitutively, goods demanded by justice. The need for goods demanded by justice in the pre-distribution warrants decisions for the provision of those goods.

However, the same might not be true of the relationship between civic cultural goods and the post-distribution, which is why we might need a looser sense of 'belonging to' either the pre-distribution or the post-distribution, if the same sense of 'belonging to' is to apply to both goods demanded by justice and civic cultural goods. Here's one case in which the looser sense of 'belonging to' one or other distribution might be more suited to describing the relationship between civic cultural goods and the post-distribution: if we were uninterested in a post-distribution that either promoted or maintained a distributively just baseline—maybe because the operative account of Rawlsian distributive justice was strictly concerned with starting states, rather than outcomes—then civic cultural goods would certainly be unnecessary for those particular post-distributive aims. Civic cultural goods would then belong to the post-distribution in the loose sense that decisions to provide goods of that kind were left to the post-distribution.

If we were working instead with a version of Rawlsian distributive justice that required redistributive maintenance of distributive justice, where such redistribution takes place in the pre-distribution, then civic cultural goods might 'belong to' the post-distribution in the more robust sense characteristic of goods demanded by justice and the pre-distribution, in that civic cultural goods are necessary for redistribution.

justice. By contrast, some public goods are genuinely necessary for achieving and maintaining distributive justice—for ensuring equal basic liberties, fair equality of opportunity, and so on. Such goods will instead belong to the pre-distribution: decisions to provide these goods will take place in the pre-distribution. If both goods demanded by justice and civic cultural goods belong to the pre-distribution, then the Murphy and Nagel argument might stand: that efficiency is, after all, the main criterion we're left with after issues of distributive justice have been settled.

To start, the main difference between the proposed categories of public good is one of justification. Each category of public good offers up a distinctive justification for why public goods of that type ought to be provided. Decisions about which particular public goods ought to be provided—tokens of a public good type—can be made by consulting the overall justification for that category of public good.

Public goods demanded by justice are those that are justified by directly appealing to principles of justice.⁴⁵ Goods demanded by justice include both public goods that are required for the realization of principles of justice, public goods that promote, but that aren't necessary for the realization of principles of justice, and public goods that promote or realize the fundamental ideas and political values that underpin the principles of justice.⁴⁶ Goods demanded by justice are owed to the members of a community as a matter of justice.⁴⁷ They take the form of public goods either because the good in question is necessarily public—it's indivisible, nonexcludable, publicly financed, or publicly delivered—or because anything other than public provision is incompatible with the goal of promoting justice.

⁴⁵ David Miller also posits a category of public goods that are justified by appeals to justice, but doesn't elaborate on the various ways that we might appeal to justice in order to justify public provision, e.g. public goods that are justified because they're necessary for justice, public goods that are justified in virtue of promoting justice, etc. (Miller 2004, pg. 136).

⁴⁶ (Rawls *PL*, pg. 452 and pg. 224)

⁴⁷ (Miller *Principles of Social Justice*, pg. 197)

While goods demanded by justice ultimately benefit the individual members of a community, the form of benefit will vary. Some goods demanded by justice are *regulatory*. The corresponding benefits here are more systemic than discrete. Regulatory goods consist in systems of law, legislative policies or instruments of fiscal intervention that manage the basic structural institutions. Examples of regulatory public goods demanded by justice include fiscal intervention on the part of the Federal Reserve to forestall inflation, and anti-trust legislation.⁴⁸ Both of these regulatory goods help ensure that the economy operates in accordance with the principles of justice. The use of fiscal instruments by the Federal Reserve to redress inflation, for instance, avoids financial crises that could threaten the existence of a well-ordered society. Anti-trust legislation ensures that compliance with the difference principle is maintained (that benefits to the well-off don't float free of benefit considerations to the worst-off), that the fair value of political liberties is ensured (that great economic clout isn't translated into political clout), and that fair equality of opportunity—at least with respect to economic opportunities—is maintained.

Other goods demanded by justice exist as either direct or indirect transfers: benefits here accrue to the individual members of a community in a more concrete form. Such benefits usually fulfill essential needs of individual community members. These are needs that must be met in order for the principles of justice, or the more basic political values and ideas that underpin those principles, to obtain. Take, for instance, the set of basic liberties specified by Rawls's first principle of justice. Included in this set of basic liberties are "liberties specified by the liberty and integrity (physical and psychological) of the person."⁴⁹ We can reasonably infer that the fulfillment of physical health and mobility needs are implied by the requirement of physical and psychological integrity. Examples of existing public goods that directly fulfill such essential

⁴⁸ (Ver Eecke, pg. 61)

⁴⁹ (*JF*, pg. 44)

needs include federally-financed programs for prosthetic delivery to veterans, and benefit payouts from the Black Lung Disability Trust Fund.⁵⁰ Public goods that fulfill these essential needs less directly include the oversight services performed by the Food and Drug Administration (FDA)—though many of the FDA’s functions may fall into the class of regulatory goods too.

Both regulatory and transfer-type goods demanded by justice will be constitutive of the pre-distribution. In fact, all goods demanded by justice belong to the pre-distribution. This will be the case even though some demands of justice can be met equally well by different combinations of public goods, or by different variations on the same type of public good. An example of acceptable variations on the same type of good demanded by justice is variations on healthcare provision: we might think that both corporatist and social democratic systems of healthcare can each satisfy the demands of distributive justice equally well.⁵¹ The presence of either meets the requirement for an effective level of healthcare provision. Clearly, then, some public goods in the set of goods demanded by justice aren’t strictly necessary in the sense that they have to be present in every conceivable iteration of a distributively just baseline. Rather, public goods of this kind are substitutable, to an extent: they can be replaced by equally effective analogues, as long as the resulting society-wide set of public goods remains jointly sufficient for a just distribution. Different combinations of goods demanded by justice can be jointly sufficient for a just distribution, but no individual member of any given combination is strictly necessary. I take it to be the case that as long as a public good is eligible to be a member of a jointly sufficient set of public goods, then that public good is a good demanded by justice.

⁵⁰ (Office of Management and Budget, pg. 444)

⁵¹ I have in mind the social insurance system of social welfare provision under Otto von Bismarck in Germany (Esping-Andersen, pg. 31).

Recognizing that goods demanded by justice may be substitutable in this way helps us identify the full scope of what public goods fall into this category. By setting the requirement for being a good demanded at joint sufficiency rather than individual necessity, the set of goods demanded by justice ends up being rather expansive. All public goods that fall into the category of goods demanded by justice, however, will still belong to the pre-distribution. They remain ineligible as examples of the sort of post-distributive public good that can be used to resist Murphy and Nagel's arguments.

IV. Civic cultural goods

The second category of public good is genuinely post-distributive. These are civic cultural goods: public goods that are necessary for the production of a national and civic culture. Both national and civic culture, as cultures, are valuable as ends in themselves. They're valuable not just in virtue of their potential contributions to distributive justice, but rather as *shared goods* that enrich the lived experiences of the participants involved. Shared goods like cultures are produced and experienced collectively, and their value is grounded in a common recognition of their value. Because national and civic culture are valuable as ends in themselves, the provision of civic cultural goods can be justified non-distributively. Civic cultural goods ought to be provided because they promote something that is worth pursuing for its own sake—not as an instrument to distributive justice.

I discuss next, a bit, what I mean by national culture, and its relationship to national identity. I then argue that the provision of civic cultural goods cannot be determined by consulting efficiency considerations alone. I conclude the section by discussing the various distinctive features of culture itself, at which civic cultural goods aim, and why these features militate in favor of modes of public financing and delivery.

By cultural nationalism, I mean an instance of taking the nation—understood as not just a continuous political entity, but also a bundle of associated virtues, origin myths, languages, and convictions—as a shared point of identity for a group of people.⁵² Nations in this sense aren't required to be *states* under any of the conventional notions of statehood. They needn't, for instance, be situated within official state boundaries, or exist through administrative institutions, though they're often both.

The shared identity feature of cultural nationalism refers to the role of nationality in “making someone the person that he or she is”.⁵³ Nationality, as a bundle of virtues, origin myths, and convictions, is often constitutive of the personal (non-national) identities of people who consider themselves members of that nation. The degree to which nationhood is constitutive of the identity of any given member of that nation will vary. I leave unresolved some complex issues associated with taking nationality to be constitutive of personal identities: issues that include, for instance, whether the nationality component of personal identity is voluntarily acquired and internalized, and whether we should be troubled by the fact that nationality is often informed by fictitious origin myths.⁵⁴

⁵² (Miller 1996, pg. 17–47)

⁵³ (Miller, pg. 86)

⁵⁴ On this latter issue, we might be able to muster up a response modeled after how Rawls deals with comprehensive doctrines that are informed by false beliefs in *Political Liberalism*. With nationality, the issue here is whether we should set any store by the normative force of national identity, or the solidarities that depend on national identity, when nationality itself is sometimes comprised of false beliefs, including fictitious origin myths and tenuous territorial claims. A similar conflict arises between the idiosyncratic comprehensive doctrines that people hold, and Rawls's criteria for publicly justifiable reasons: in a well-ordered society, at least some members will endorse laws and policies for reasons that issue from the particular comprehensive doctrines that they subscribe to. At least some of these comprehensive doctrines will presuppose false beliefs. Reasons that issue from comprehensive doctrines, then, will at least sometimes run afoul of at least one criterion for public reasons: the “criterion of reciprocity”. The criterion of reciprocity requires that the reasons given in the content of public justification are “reasons we might reasonably expect that [citizens] as free and equal might reasonably also accept” (Rawls *PL*, pg. 578). Reasons that depend, in some way, on false beliefs are ostensibly not reasons that we can reasonably expect other free and equal citizens to accept. The conflict can be finessed by recognizing that even reasons that depend, in some way, on comprehensive doctrines that presuppose false beliefs can still give rise to reasons that meet the criterion of reciprocity. Members of a well-ordered society may still have goods reasons for endorsing certain laws and policies, and good reason to act, even if those reasons depend on some false beliefs (Freeman, pg. 219).

For sake of simplicity, the national communities I have in mind here coincide already with the existence of a state: we can locate these national identities within official national boundaries. The states I have in mind are conventional: they have reasonably sophisticated administrative means at their disposal, and many of the duties and obligations that originally arose through membership in a shared national identity have been codified in legal structures. In particular, membership in the national community is codified as citizenship given the presence of a state.

IV.i Arguments against efficient determinations of the financing and delivery of civic cultural goods

Reasons for rejecting efficiency as a criterion for determining the financing and delivery dimensions of civic cultural goods issue from the very nature of civic cultural goods themselves. To consult efficiency alone in making decisions about the financing and delivery of civic cultural goods—especially efficiency in the Murphy and Nagel sense of equalizing marginal value of public and private expenditure for individual taxpayers—would be to: (i) commit a category mistake about the kinds of preferences that are relevant in decisions about public goods of this kind, and (ii) subvert the very aims of public goods intended to promote a certain kind of civic culture and national identity.

The first reason for excluding efficiency as the sole consideration in financing and delivery decisions for civic cultural goods comes from a rejection of the preference homogeneity, or at least preference comparability, assumed in the Murphy and Nagel account of efficiency. In order for the marginal value of public and private expenditure to be equalizable, the preferences associated with private consumption must be comparable to the preferences associated with public consumption (the consumption of public goods). However, there's little reason to think

that preferences for public and private consumption are comparable in this way, or that preference satisfaction for public expenditure is necessarily a matter of consumption at all.

We can adopt Mark Sagoff's distinction between preferences *qua* consumer, and preferences *qua* citizen to make the point about preference-incomparability.⁵⁵ Preferences *qua* consumer are preferences that we have in our capacities as market participants. Preferences of this kind are usually self-interested—they're directed at the fulfillment of wants that issue from idiosyncratic conceptions of the good—and the value of satisfying these preferences can be priced at a market rate. Murphy and Nagel assume that preferences *qua* consumer are the only relevant preference-type, and thus the preference-type common to both private and public expenditure.

However, preferences *qua* consumer are neither the only relevant type of preference, nor the type of preference that should be associated with public goods. Preferences for public goods, in particular preferences for public goods that promote a certain kind of civic culture, are an example of preferences *qua* citizen. These are preferences that we have in virtue of being citizens of a particular society, or members of a particular community. Since these are preferences that are cultivated in our capacities as citizens and community members, they reflect both the shared values of those communities, as well as more idiosyncratic "citizen judgments"—what any given member of a community "thinks [that the community] should do".⁵⁶ Citizen judgments are one category of claims that citizens or community members might have on their respective states and communities: these are claims on the direction of society.

Moreover, preferences *qua* citizen can be satisfied without consumption. If a public goods outcome is consistent with the relevant community values, or satisfies the claim that

⁵⁵ (Sagoff, pg. 55)

⁵⁶ (Sagoff, pg. 55)

individual citizens and members have on their respective communities, then it's likely that this outcome is sufficient to satisfy individual preferences *qua* citizens. A citizen can derive satisfaction from the provision of a public good, for instance, even though she will never be a direct beneficiary of that good.

The second reason for excluding efficiency as the sole consideration in financing and delivery decisions for civic cultural goods is that consulting efficiency alone would yield financing and delivery outcomes that are inconsistent with the very aims of civic cultural goods. Civic cultural goods contribute to the formation of solidarities—shared values, mutual trust, felt commonalities across differences, and so on—that are necessary for the production of a national identity.

Both the intended function of civic cultural goods, and features of the civic cultural goods themselves, militate in favor of public financing and public delivery. Education, in particular, is an example of a civic cultural good that requires both public financing and public delivery. Schools are an important vehicle for reproducing the civic culture and national identity of a state: they instill children with the view that they're each citizens in a common enterprise, and furnish the content of the relevant national identity. They give the convictions, virtues, and origin myths associated with the relevant sense of nation, as well as an understanding of government procedures and functions, if the nation in question also coincides with a state. Privately financed schools that reflect idiosyncratic conceptions of the good—conceptions that are narrower than, or incompatible with, the civic culture—are less likely to successfully discharge this function of reproducing the civic culture. Instead, pervasive privately financed schooling is more likely to contribute to the fragmentation of communities along racial, ethnic, and religious lines.⁵⁷

⁵⁷ Caddell, Martha. "Private schools as battlefields: contested visions of learning and livelihood in Nepal." *Compare: a journal of comparative and international education*, 4 (2007): 463-479.

A similar case can be made for the public delivery of education. Ensuring that the content of education is such that it consistently reproduces the civic culture, requires that education be entrusted to civil servants who are compensated on the basis of inputs (discharging the responsibilities associated with the terms of employment), rather than private contractors who are compensated on the basis of outputs (delivering a product that meets clear evaluative criteria for outputs).

IV.ii Ways that culture itself, as a good, militates in favor of public financing and delivery

In this section, I look to the distinctive features of cultures *themselves*, as goods. The provision of civic cultural goods is in service of promoting national and civic culture. The distinctive features of cultures, as goods, militate against the private financing and delivery of civic cultural goods. These same features also suggest that principles of contributive justice may be more suited to determining the financing and delivery dimensions of civic cultural goods.

The first feature is that the value of culture as a good depends on a common recognition of its value. Cultures are goods that are both extrinsically valuable, and also valuable as ends in themselves. Goods that are extrinsically valuable depend, for their value, on the fulfillment of certain conditions. By contrast, intrinsically valuable goods are unconditionally valuable. The common recognition of value is a condition for the value of culture. The fulfillment of this condition of common recognition of value is what makes, culture, and all that culture consists in—“language, conceptual resources, a context in which to make choices, feelings of connection and meaning”—worth pursuing.⁵⁸ By ‘common recognition of value’, I mean the following: a culture is valuable not in virtue of its being valuable for you, or me, separately considered. Rather, a culture is valuable in virtue of its being valuable for *us*, collectively conceived. The

⁵⁸ (Levy, pg. 119)

sense in which something is valuable for *us* is more than the mere sum of individual instances of value-recognition. This understanding that culture is valuable for *us*, in turn, makes up the content of recognition that is held in common.⁵⁹

A second relevant feature of culture is that not all of its benefits are divisible.⁶⁰ Divisible benefits are discrete: they redound to particular individuals and can be parceled out into individual benefit shares. Many public goods have associated benefits that are divisible in this way. Education, for instance, is beneficial to the recipient of education. Its positive externalities are discrete too: a particular person gets to benefit from being able to employ the recipient of education. Although the presence of a culture does give rise to divisible benefits, these cannot be the only benefits associated with the good of culture. The benefits associated with the presence of a culture must also, essentially, be beneficial for *us*. Even the discrete benefits that might be associated with the presence of a culture depend, for their value, on there being non-discrete benefits. The cultural benefit, for someone, of being able to *identify* as, say, a Quebecker, depends not only on individual others also being able to beneficially identify in this way. More importantly, the individual benefit of cultural identity depends on that benefit's being beneficial for *us*. The essential non-divisibility of cultural benefits is related to the claim that what grounds the value of culture is a common recognition of its value: part of what is recognized in common is that the benefits associated with culture redound to everyone.

The final distinctive feature of culture as a good is its inseparability. What I mean by inseparability is this: the good of culture is inseparable from the producers of culture. A culture, once it is formed, is not something separate from the participants who gave rise to it. Rather, the

⁵⁹ (Taylor 1995, pg. 139)

⁶⁰ This is not to say that the benefits of culture are *indivisible* in the earlier sense of *indivisibility* associated with traditional public finance accounts of public goods. This earlier sense of indivisibility was one of collective consumption—that the benefits associated with public goods had to be provided to everyone, if they were to be provided to anyone at all. The *nature* of the benefit here is still divisible.

culture resides in its producers and participants. Most public goods do not have this feature of inseparability. Conventional public goods evince a separation between the deliverers of the public good, and the resulting public good itself. A private defense contractor, for instance, is separate from the vehicles that it provides the military.

Each of these features, individually and in combination, militates in favor of the public financing and public delivery of civic cultural goods. For instance, the essential non-divisibility of the benefits associated with the good of a culture—that these benefits must be beneficial for *us*, collectively conceived—make it unlikely that civic cultural goods that promote that culture can be privately financed. Privately financed public goods are those that are funded through individual transactions for shares of the public good or service in question. Usually only public goods that give rise to divisible benefits lend themselves to being financed in this way. Goods that give rise to divisible benefits lend themselves to purchasable shares,

The inseparability of culture from its producers militates, in turn, in favor of the public delivery of civic cultural goods. Culture, as we've seen, is inseparable from its producers. A culture resides in those who contribute to its existence—this includes the participants and adherents to the culture, as well as the deliverers of civic cultural goods that promote and maintain the culture. In order for civic cultural goods to succeed in promoting and maintaining a certain culture, the deliverers of those goods must be suitably allied with the project of the culture itself. When the culture to be promoted is a national and civic culture, then deliverers of civic cultural goods should be civil servants.

The distinctive features of culture, as a good, also suggest that the apportionment of burdens associated with the provision of civic cultural goods should follow a principle of contribution in accordance with ability. One condition for the value of culture, as a good, is the

common recognition of its shared value—of its value to *us*. We might, however, think that recognizing the value of a good—especially when that value is shared—gives rise to corresponding contributory obligations. These are contributory obligations to realize the good, or to facilitate the conditions for the realization of that good, to the extent that one is able. In this case, these are contributory obligations to realize the culture, or facilitate the conditions for the realization of the culture. We owe these obligations to those who also recognize the shared value of the good—our fellow co-participants in the culture.

If contribution is required to the extent that one is *able* to contribute, then demands for contribution from existing members of the culture may be especially exacting. Existing members may be particularly well-versed in the practices and language of a culture such that they have a relevantly greater ability to contribute.

V. Conclusion

In this paper, I've made space for an account of contributive justice. Assuming a post-distribution in which issues of distributive justice have been, by stipulation, settled, we can show that neither the financing nor the delivery dimensions of post-distributive civic cultural goods should be decided by consulting efficiency alone. Rather, further principles are needed. By looking to the distinctive features of national and civic culture, as goods, and the civic cultural goods that promote them, there's reason to think that these further principles might be contributive.

CHAPTER TWO

DEFENDING A PRINCIPLE OF ABILITY AS A PRINCIPLE OF CONTRIBUTIVE JUSTICE

I. Introduction

In *The Myth of Ownership*, Liam Murphy and Thomas Nagel argue that achieving fairness in taxation is principally a matter of distributive justice. We can think of distributive justice as concerned with *what is owed* to people as a matter of justice. Principles of distributive justice specify a currency of *what* is owed to people, and a *pattern* by which this currency ought to be distributed. The currency of distributive justice can consist in goods (particular freedoms, opportunities, or the material gains from social cooperation), services, or a certain kind of social standing.

Although Murphy and Nagel leave their preferred theory of distributive justice unspecified, their approach to assessing the fairness of tax schemes is notably limiting. For Murphy and Nagel, the fairness of a tax scheme is principally a function of how well its *distributive* features satisfy principles of distributive justice. These features can be either the after-tax distributive outcomes of the tax scheme—how the tax scheme bears on the what and how of what ought to be distributed—or how the tax scheme functions amidst other background socioeconomic institutions.

Murphy and Nagel deny that traditional norms of tax fairness, norms that guide the allocation of individual tax liabilities, can be independently meaningful.⁶¹ This rejection of traditional norms of tax fairness is an extension of their distributive justice-based view. Norms of

⁶¹ (Murphy and Nagel, pg. 173)

tax fairness are only instrumentally important when tax fairness is subsumed to distributive justice. According to a distributive justice-based view, how tax liabilities are allocated is of interest in assessing the fairness of a tax scheme only insofar as the allocation of tax liabilities has distributive implications. If the allocation of tax liabilities is so regressive, for instance, as to immiserate the less well-off for the benefit of the better-off, then such an allocation is objectionable on grounds of distributive justice. There is no independent salience to how tax liabilities are allocated on the Murphy and Nagel picture.

Subsuming assessments of tax fairness to distributive justice, however, overlooks the following possibility: that the question of how we ought to allocate tax liabilities, and the burdens associated with running a society more generally, requires different, non-distributive considerations of justice—considerations of justice that aren't essentially related to the question of *what is owed* to people at all. The allocation of burdens in a society is, I think, a distinctive matter of justice—specifically, a matter of *contributive* justice.

Contributive justice is concerned with *what people owe* as a matter of justice. Principles of contributive justice specify *how* the burdens of a cooperative project ought to be distributed. In some cases, principles of contributive justice may also specify *what* obligations of contribution (hereafter “contributive obligations”) can be ascribed to participants in those cooperative projects—although the content of contributive obligations is sometimes given in advance by the cooperative project in question. Contributive justice, in short, makes the allocation of burdens itself evaluatively salient in assessments of fairness. We can see this in contributive justice-based assessments of fairness in tax schemes. The allocation of tax liabilities is itself a matter of fairness with respect to contributive justice, and a tax scheme can be more or

less fair, overall, to the extent that its allocation of tax liabilities complies with principles of contributive justice.

Devising fairness criteria for the allocation of burdens isn't just non-distributive by stipulation. I show in the first dissertation chapter that justice in contribution is genuinely underdetermined by most theories of distributive justice. I assume, in the first chapter, a baseline of distributive justice—a state of affairs in which all matters of distributive justice have been, by assumption, settled already. From that, I make conceptual space for a theory of contributive justice distinct from considerations of distributive justice. I argue that even after we've achieved distributive justice—call what follows the achievement of distributive justice the “post-distribution”—there are still questions left about how, for instance, the burdens associated with the delivery of certain public goods ought to be allocated. Distributive justice at best only specifies some constraints on what this post-distributive allocation of burdens ought to look like. The allocation of burdens in the post-distribution, for instance, shouldn't violate principles of distributive justice, and it shouldn't run afoul of the feasibility and stability conditions for continued distributive justice. Beyond these constraints, distributive justice falls short of giving us even a partial specification of contributive justice. That questions of justice in contribution that persist in the post-distribution is evidence that there's conceptual space for a distinctive theory of contributive justice.

The division of burdens in a cooperative project is also *intuitively* distinct from considerations of distributive justice. The notion that each participant ought to do her *fair share* in bringing about a shared outcome is at least separable from what it is that each participant is *owed* in goods and services. What constitutes a fair share—the contribution that each participant ought to make—is the domain of contributive justice.

Murphy and Nagel are, in short, too quick to dismiss traditional norms of tax fairness. Traditional norms of tax fairness prescribe a fair allocation of individual burdens—of individual tax liabilities, in particular. This makes traditional norms of tax fairness candidate principles of justice in *contribution*, rather than principles of justice in *distribution*. As such, tax fairness norms should be accepted or rejected on non-distributive grounds: tax fairness norms should be assessed for their suitability as principles of contribution, rather than assessed on the basis of their distributive implications. This is part of what I intend to do here: defend a particular principle as both a suitable tax fairness norm, and as a principle of contributive justice more broadly. I do this on non-distributive grounds.

Here, I work off of the conceptual space that was made for principles of contributive justice in the first chapter. The continuing assumption will be that the conditions for distributive justice are already in place—that the project of identifying principles of contributive justice takes place in the post-distribution. I argue that whenever the cooperative project in question is one that takes its agents seriously, then we should endorse a principle of ability-to-pay (contribution in accordance with one's ability) as a principle of contributive justice. The specific version of ability-to-pay that we should adopt is deontic, rather than utilitarian. A utilitarian version of ability-to-pay aims at outcomes that maximize utility and minimize disutility. A deontic version of ability-to-pay regards the fair allocation of burdens as an end in itself, and is more closely allied with broadly Kantian notions. I develop a corresponding account of *ability* to contribute from grafting a notion of opportunity cost onto Amartya Sen's capability theory.

II. Background on traditional norms of tax fairness, and a rejection of the benefits principle

The traditional norms of tax fairness that Murphy and Nagel reject are meant to apply to allocations of individual tax liabilities. Tax fairness norms ensure the fair allocation of individual tax liabilities by specifying fairness criteria for at least two features of a tax scheme: the rate structure and the tax base. The tax base is the set of taxpayer attributes considered salient in the determination of tax liability. The presence or absence of these attributes factors into a calculation about how much an individual taxpayer, on net, owes.⁶²⁶³ Examples of conventional tax attributes include income, consumption, and capital.

The rate structure of a tax scheme specifies what portion of each tax attribute is owed as tax. Tax attributes will typically be features for which variation is possible: variation both with respect to their presence or absence in taxpayers, and variation with respect to the *degree* of their instantiation in taxpayers. Income, for instance, clearly illustrates variation along these dimensions. Three kinds of rate structure exist, and any given rate structure will tend toward one of these three kinds, allowing for the possibility that different tax attributes may be taxed at different rate structures: progressive rate structures, proportionate rate structures, and regressive rate structures.

A progressive tax rate is one in which rates increase as the tax base increases.⁶⁴

Progressive rate structures can vary with respect to steepness: in steeply progressive tax schemes on income, for instance, tax rates increase at a faster rate than the rate at which income increases.

⁶² The *presence* of tax attributes doesn't necessarily increase overall tax liability, and the absence of tax attributes doesn't necessarily decrease overall tax liability (Sanchirico, pg. 156). The degree to which a tax attribute is present, for instance, can have differential effects on overall tax liability. Consider the case of the Earned Income Tax Credit (EITC): the EITC is phased in up to a certain adjusted gross income threshold. Past that threshold, a phase-out of the EITC is triggered.

⁶³ I say "individual taxpayer" because this paper is about non-corporate tax entities. By "individual taxpayer", however, I mean non-corporate taxpaying units generally—with the possible inclusion of couples filing jointly.

⁶⁴ For sake of simplicity I take "tax rate" here to mean the average (effective) tax rate, which is the tax rate applicable to the relevant tax base as a whole—including both the income tax rate and the marginal tax rate. A rate structure may be progressive without evincing progressivity in its marginal rates: we can get very mild progressivity in average tax rates out of a flat tax plus an exemption (Blum and Kalven, pg. 420).

Proportionate rate structures, by contrast, are insensitive to increases in the tax base. Each dollar of the taxpayer is taxed at the same rate. Regressive tax rates are those in which tax rates are “graduated downward” with respect to increases in the tax base: someone with “ten times the income of another would pay something less than ten times as much tax”.⁶⁵

Traditionally, two candidate norms of tax fairness have existed: (i) a principle of benefit (taxation in accordance with the benefits that individual taxpayers derive from public goods and services), and (ii) a principle of ability-to-pay (taxation in accordance with the *ability* of individual taxpayers to remit taxes, where ability is generally understood in terms of income and wealth).⁶⁶ Norms of tax fairness have the function, in a tax scheme, of justifying the choice of a particular tax base, and the choice of a particular rate structure. I hereafter refer to the principle of benefit as the “benefits principle”, and the principle of ability-to-pay as “ability-to-pay”, for short.

The benefits principle tells us that the relevant tax base ought to be the degree of benefit from public goods and services funded by tax revenue. Since the degree of individual benefit is often difficult to quantify, approximations of benefit are used instead. Tax attributes that are used as approximations of benefit may be chosen because they reflect the direct receipt of certain kinds of benefit: property taxes, for instance, might be justified on these grounds. Adolphe Thiers argued early on that greater property ownership implied that the state incurred higher expenses to protect that property.⁶⁷ More recently, Schlunk argues that multinational business income—“income generated by business activity conducted in one country but beneficially owned by a person who resides in another country”—is taxable by countries in which business

⁶⁵ (Blum and Kalven, pg. 419)

⁶⁶ The benefits principle and ability-to-pay are recognized as distinctive tax fairness norms as far back as Edward Seligman’s *Progressive Taxation in Theory and Practice* (1908).

⁶⁷ (Seligman, pg. 169)

activity is conducted on benefit grounds: multinational business income directly reflects the economic benefits conferred by the country in which business activity is conducted.⁶⁸ Other candidate tax attributes under a benefits principle, like income and consumption, may be less informative about the specific benefits that are received, but are rather approximations of benefit received generally.

Depending on how benefits are thought to be distributed, the benefits principle can be made to yield any of the three rate structures just given. If it's assumed that one derives increasing benefit from public goods and services increases with increasing wealth—that the wealthier someone is, the more benefit they derive—then the benefits principle gives rise to a progressive rate. Such a distribution of benefits might be the case if we consider the regulatory public goods that “create and enforce property rights”, and that “ensure a stable and liquid market”.⁶⁹ Since the wealthier are likely to have more financial assets, and more assets generally, they might be plausibly considered greater beneficiaries of public goods of these kinds. By contrast, a proportionate rate structure issues from the benefits principle if everyone is thought to derive uniform benefits from the presence of public goods and services, income and wealth notwithstanding. A regressive rate structure issues from the benefits principle if the less well-off are thought to derive more benefit from public goods and services than those better-off. This might be the case if we thought that the less well-off ought to be taxed in proportion to the redistributive goods and services that they're the principal beneficiaries of.

Ability-to-pay takes the relevant tax base to be the capacity, understood in various ways, of taxpayers to remit taxes. In practice, tax attribute approximations of ability are generally used. Income and wealth are tax attributes commonly taken to be approximations of the ability to pay

⁶⁸ (Schlunk, pg. 2)

⁶⁹ (Kornhauser, pg. 1711)

tax. Traditionally, ability-to-pay proponents conceived of taxable ability in terms of “consumption rights” indexed to a specific period of time.⁷⁰ Taxable ability was the sum of a taxpayer’s stock of consumption rights (her savings), and the consumption rights she’d exercised (her consumption) during the taxable period. This definition of taxable ability had the limiting effect of excluding non-consumption uses that might plausibly factor into someone’s ability to remit taxes, like transfers of money and wealth.⁷¹

The norm of ability-to-pay has, traditionally, been most closely associated with a progressive rate structure. If income and wealth is the relevant sense of ability, then a norm of ability-to-pay implies something like a progressive rate structure: the more income and wealth that can be attributed to a taxpayer, the more *able* they are to pay, and the more they ought to pay (a higher rate of tax is justifiably imposed). A norm of ability-to-pay is generally incompatible with proportional rate structures that are insensitive to differences in ability—unless, as a matter of fact, the population of taxpayers is uniform with respect to taxpaying ability. And lastly, a norm of ability-to-pay is incompatible with regressive rate structures.⁷²

I reject the principle of benefit as a suitable principle of contributive justice in the third dissertation chapter. There, I propose a set of conditions for *legitimate* state extractionary regimes and argue that allocating tax liabilities in accordance with a broad principle of benefit is incompatible with legitimate state extraction. State extractionary regimes are the institutions through which states coercively extract sacrifices from their subjects, where the sacrifices in

⁷⁰ The “consumption rights” picture of ability is attributable to Henry Simons. Robert Haig had a similar picture of ability in terms of “economic rights”.

⁷¹ Joseph Dodge points out this shortcoming (Dodge 2016, pg. 536).

⁷² Reconciling ability-to-pay with a regressive rate structure would require either the addition of highly implausible assumptions or erroneous interpretations of ability-to-pay: if, say, the marginal utility of money was thought to *increase* with each additional dollar—an example of one implausible assumption that a norm of ability-to-pay might be coupled to—then we might end up with a regressive tax scheme. Alternatively, if taxation occurred on the basis of ability, but greater ability was thought to entail a *smaller* tax burden, then we might also end up with a regressive tax scheme.

question are those that are required, in one way or another, for the maintenance of the state. Examples of state extractionary regimes include emergency public health campaigns (especially those that respond to epidemics), military conscription, and taxation. Because sacrifices are extracted through the use of coercive force, there's a *prima facie* need to justify this use of coercive force. The conditions for legitimate state extraction I propose ensure that the state's use of coercive force to extract tax contributions, in particular, is justified.

The specific legitimacy condition that requires us to reject an allocation of individual tax liabilities in accordance with benefit is rule of law. We can think of rule of law as a meta-criterion for the kind of character that laws ought to generally have: laws ought to be such that they promote accountability for both their content and implementation. Rule of law requires that the *content* of law, and the reasons for which agents of the law act in the course of *implementing* the law be publicly accessible. Both the content and the implementation of law are made accountable through the possibility of public scrutiny. Laws that are insufficiently specific or vague cannot satisfy an accountability requirement. Insufficiently specific or vague laws are unlikely to be publicly intelligible, and are thus open to abuse by agents of the law, who may interpret the laws opportunistically.

Rule of law is relevant for the legitimacy of state extractionary regimes because extractionary practices are often codified in the form of laws, and carried out through the implementation of laws. Legitimate state extractionary regimes are those that also comply with rule of law.

I argue in the third dissertation chapter that allocating *tax* liabilities in accordance with a principle of benefit cannot give us an extractionary regime that complies with rule of law. In particular, the benefits principle fails to give us tax laws, and thus tax extractionary regimes, that

meet the rule of law requirement that laws be sufficiently specific.⁷³ The argument there is roughly this: the benefits principle would have us index individual tax liabilities to the magnitude of taxpayer “benefits received” from the existence of tax-funded goods and services—these being the “benefits” in question. There is, however, no plausible interpretation of either “benefit” (as either *discrete* or *systemic* public goods and services), or “benefits received” (as either objective cost of the good or service in question) on which the benefits principle acts as a determinate guide for the allocation of individual tax liabilities. That is, on any of these plausible interpretations of “benefit” or “benefits derived”, the benefits principle fails to give us a clear picture of what individual tax liabilities ought to look like. Tax laws that allocate individual liabilities only indeterminately fail the rule of law requirement that laws be sufficiently specific.

Another reason for rejecting the benefits principle is twofold: (i) that the benefits principle is itself incompatible with a view of society as a genuinely cooperative enterprise, and that (ii) the implications of the benefits principle, when borne out by policy, have had justifiably unpalatable outcomes. A more thorough rejection of the benefits principle is given in the third dissertation chapter. I briefly go over some of these reasons here.

The implications of the benefits principle can be brought out by first reframing the benefits principle as a biconditional:

An agent, y ought to make some tax contribution x if and only if y derives some benefit commensurable with x .

The implications of the benefits principle are given by both directions of the biconditional. Consider the first direction: that tax contributions are owed only if taxpayers have been the beneficiaries of public goods and services funded by tax revenue. The only basis for tax

⁷³ This might be framed as a failure of both rule of law *and* tax administrability as a condition of tax feasibility.

remittance, according to this version of benefits principle, is if taxpayers have already been the immediate beneficiaries of certain public goods and services. Other possible bases for owing tax are inadmissible.

If run in the other direction, the biconditional benefits principle expresses a desert claim: that in order for taxpayers to be beneficiaries of public goods and services, they must make the appropriate tax contributions. People deserve the benefits associated with public goods and services on basis of their contributions to financing those goods and services. The desert version of the benefits principle has had historically invidious implications. In 1956, presidential candidate T. Coleman Andrews objected to the racial integration of public schools on ostensible grounds of taxation: “black Southerners’ [claims] to equal schooling” were invalid, he argued, because they “did not pay equal taxes.”⁷⁴

Both versions of the benefits principle treat the state as principally a service provider—as the deliverer of certain public goods, and the allocator of the social surplus. Taxpayers stand in a transactional relationship with the state according to this view of society. Such a conception of the state is already opposed to the conception of the state in a view of society as a cooperative enterprise. In a view of society as a cooperative enterprise, the state acts as a mediator of the claims that participants have on each other. The nature of the claims that participants in a cooperative enterprise have on each other are non-transactional.

III. Utilitarian versions of ability-to-pay

The utilitarian version of a principle of ability-to-pay is worth discussing for two reasons: contemporary accounts of ability-to-pay are broadly utilitarian, and the utilitarian version of ability-to-pay serves as a natural foil for the deontic version of ability-to-pay that I defend here.

⁷⁴ (MacLean, pg. 146)

A discussion of the utilitarian version of ability-to-pay shows why a more deontic principle of ability-to-pay—one grounded in the family of broadly Kantian concepts like agency and treating persons as ends—is needed.

The origins of a contemporary principle of ability-to-pay can be traced back to John Stuart Mill’s *Principles of Political Economy*. Accounts of ability-to-pay since then have remained broadly utilitarian. Deriving a principle of ability-to-pay from initial utilitarian assumptions, however, isn’t so straightforward.⁷⁵

⁷⁵ There are at least two competing versions of a utilitarian account of ability-to-pay. The accounts arise from divergent interpretations of the following passage in *Principles of Political Economy*:

“For what reason ought equality to be the rule in matters of taxation? For the reason that it ought to be so in all affairs of government. As a government ought to make no distinction of persons or classes in the strength of their claims on it, whatever sacrifices it requires from them should be made to bear as nearly as possible with the same pressure upon all, which, it must be observed, is the mode by which least sacrifice is occasioned on the whole” (Mill, pg. 804).

Here, Mill appears to be arguing that the equalization of sacrifices associated with tax liabilities (that is, the equalization of individual disutility associated with paying taxes) is both necessary and sufficient for the minimization of “sacrifice...occasioned on the whole” (overall disutility). By allocating individual tax liabilities such that everyone bears the same magnitude of sacrifice, we can minimize overall disutility, and thus maximize overall utility.

Mill’s claim about equality, if understood in terms of the equalization of tax burdens themselves, will not always be true. Equalizing sacrifice will sometimes fail to minimize overall disutility. We can see this from the following toy example: assume that we have a world consisting in just two taxpayers, *A* who has a taxable income of \$100, and *B* who has a taxable income of \$5. Say that the total revenue need in this world is \$2, and that both *A* and *B* derive the same amount of utility from \$1 of income. Assume also that the marginal utility of money doesn’t decline for *A* and *B*. Such an assumption is not unfaithful to Mill, who argues that the diminishing marginal utility of money cannot be known with enough certainty as to be an assumption of policymaking (Milly, pg. 807). Equal sacrifice would require us to divvy up the overall tax burden (the “sacrifice...occasioned on the whole”) equally, so that *A* and *B* each remit a tax of \$1. Given the assumptions that *A* and *B* share the same utility curve, and that the marginal utility of money declines for neither, this division of tax burdens would be required by either sense of equal sacrifice as the equal remittance of utility or money.

This equalization of tax burdens would fail, however, to minimize the disutility incurred by taxation in at least one sense. Minimizing after-tax disutility might require that we collect the \$2 amount from *A* alone. *A* can forbear the loss of \$2 significantly better than *B* can forbear the loss of \$1. When \$1 is collected from both *A* and *B*, then each is left with utility levels of 99 and 4, respectively. If all of the revenue need is instead fulfilled by taxing just *A*, then *A* will be left at an after-tax utility of 98, and *B* will be left with a higher level of after-tax utility—5, rather than 4. The after-tax outcome that leaves *B*’s utility level as high as it can be, given that her utility level is already significantly less than *A*’s, would seem, intuitively, to be the sacrifice-minimizing outcome.

Equalization of sacrifice will consistently minimize overall disutility in only one case: when the specific sense of equal sacrifice is *equal marginal sacrifice*. Equalizing individual taxpayer levels of utility with respect to marginal units of income and wealth (“marginal income utility” for short) requires that everyone is brought, as nearly as possible, to the same level of marginal income utility through taxation. To an extent, the equal marginal utility conception of equal sacrifice requires the assumption that the marginal utility of money declines at some notably steep rate. If marginal utility for money doesn’t decline at all, and this is consistently the case across all taxpayers, then we would start with equal levels of marginal utility. Assuming that the marginal utility of money does decline at some notably steep rate though, equalizing marginal sacrifice requires that we “[lop] off the tops of

A utilitarian account of ability-to-pay starts with a view of what social and economic institutions in society, taxation included, should aim at: the maximization of net utility. The instruction to maximize distinguishes utilitarian theories from theories of justice, including both distributive and contributive theories of justice. While theories of justice are essentially concerned with *fairness*, no utilitarian theory—no aggregative theory, in general—could give us a familiar account of fairness. Fairness presupposes the “[distinctiveness] of persons”: the notion that people are distinct individuals characterized by distinct interests, as well as claims that reflect these interests.⁷⁶ On this picture, individual claims *each* elicit equal treatment and consideration of some kind.

Aggregative theories efface distinctions between persons. Utilitarianism, which is both aggregative and maximizing, is culpable of the same kind of effacement. This may happen in a number of ways. Utilitarianism may assume a uniformity of individual claims—that, say, everyone has the same claim to be considered equally in a maximizing aggregative procedure—such that the claims in question no longer reflect the distinctive interests of particular individuals.⁷⁷ Alternatively, maximizing procedures themselves may flout a requirement that

all incomes” that exceed some level of marginal income utility such that (i) individual taxpayers can be equalized with respect to their levels of marginal income utility, and (ii) revenue needs are met (Pigou, pg. 57). Equalizing marginal sacrifice *does* minimize overall sacrifice because those with higher income and wealth levels will bear the brunt of revenue burdens—presumably it is these taxpayers whose rates of marginal income utility will decline most steeply. Larger amounts of tax will have to be exacted from these taxpayers in order to bring them to desirable marginal income utility levels.

Because the equal sacrifice condition otherwise comes apart from the utilitarian condition of minimizing overall disutility, tax scholars have conventionally split up into two camps: (i) an equal sacrifice position that takes Mill to be emphasizing a condition of equality in sacrifice, and (ii) a minimum sacrifice position that instead hews to the utilitarian goal of minimizing disutility, even where doing so might contravene a principle of equal sacrifice.

The *equal* sacrifice position emphasizes the condition of equal tax burdens, sometimes at the expense of minimizing disutility. In order to remain broadly utilitarian, equal sacrifice proponents must usually resort to treating the equality requirement as an institutional virtue—in a rule utilitarian, rather than an act utilitarian, sense.

⁷⁶ (Rawls 2009, pg. 167)

⁷⁷ A more deontic justice-based view might argue that utilitarianism fulfills, in one sense, a requirement for equal treatment or consideration—that individual claims be treated or considered equally—but that the utilitarianism goes about equal consideration incorrectly. Utilitarianism has both: (i) the wrong account of what the *content* of individual claims are (the claims that people have cannot be just claims to be considered in an aggregative

claims be treated or considered individually. What matters in the maximizing procedure is that the sum or net total is the greatest that it can be.⁷⁸ One might also think that recognizing distinctions between persons may require taking seriously a notion of attributability or ownership over claims in a way that utilitarianism fails to do. That individual claims in theories of justice reflect distinctive individual interests implies a notion of ownership or attributability over those claims—claims are attributable to distinctive people. This notion of ownership or attributability is arguably lost in the outcome of a maximizing procedure: a social good is maximized, but this goodness is attributable to no one in particular.

Even if it's insisted that the utilitarian can give *an* account of fairness, what we can, at best, get out of utilitarianism is a derivative sort of fairness. A utilitarian account of fairness is just whatever is in service of utility-maximization. This is an account of fairness parasitic on the maximization of utility, where utility is understood to be a particular kind of social good. Any utilitarian account of fairness is, in certain ways, insensitive to what fairness is at all: fairness can be just anything, as long as it yields an outcome of utility-maximization. In light of this, we might say that utilitarianism gives us a *desideratum* for tax schemes—what it is that tax schemes sought to aim at—but not a criterion of fairness for tax schemes.

The utilitarian picture of taxation has to reconcile its goal of overall utility-maximization with an understanding of taxation as sacrifice. Surrendering taxes is seen as constituting a sacrifice on the part of the taxpayer—as incurring disutility. What is paid out in taxes is a cost borne by the taxpayer in various ways: as sheer diminished liquidity, as foregone opportunity (in that the same money could have instead gone toward satisfying individual preferences), and so

maximizing procedure), and (ii) the wrong conception of what equal consideration entails (it's not sufficient for equal consideration that everyone should count for one in an aggregative maximizing procedure).

⁷⁸ Averaging utilitarianism fails to take seriously the distinctiveness of persons in other ways, as Rawls points out (Rawls 1999, pg. 100).

on. The magnitude of individual sacrifice—the degree of individual disutility incurred by tax payment—is, in turn, a function of the amount surrendered in taxes.⁷⁹ Taxation is thus principally a source of disutility on the utilitarian picture.⁸⁰ In order to reconcile taxation with the utilitarian goal of maximizing overall utility, the disutility effects of taxation must be curbed.

Utilitarianism, then, requires that we tax in a way that minimizes overall after-tax disutility. One way to do this is through a principle of minimum sacrifice at the level of individual taxpayers: individual tax contributions should be indexed to whatever amount incurs only minimal sacrifice to individual taxpayers. This isn't necessarily to say that minimum sacrifices should be equalized across all taxpayers, although some readings of Mill have tended toward this interpretation.⁸¹ I consider this equal sacrifice account later. For now, it's clear that the principle of minimum sacrifice makes the utilitarian scheme of taxation at least somewhat sensitive to the situations of individual taxpayers.

Without a sense of which taxpayer attributes the determination of minimum individual sacrifices ought to be sensitive to (that is, *with respect to what* is individual sacrifice considered minimal?), the principle of minimum sacrifice remains fairly vacuous. Fortunately, the utilitarian picture of taxation does gesture at some account of what the relevant attributes might be. This is where a distinctively utilitarian principle of ability-to-pay falls out. By conceiving of tax remittance as sacrifice, the utilitarian already makes reference to at least one sense of ability. Ability is the complement of sacrifice—it refers to the total capacity of a taxpayer to withstand sacrifice.⁸² The minimum sacrifice that can be exacted from a taxpayer is a function of her overall *ability* to withstand sacrifice. Indexing individual tax liability to ability is necessary for

⁷⁹ (Musgrave, pg. 95)

⁸⁰ See Mill's passage on minimizing the sacrifice occasioned by taxation in footnote 4.

⁸¹ See footnote 4.

⁸² (Blum and Kalven, pg. 480)

satisfying the utilitarian demand that overall disutility be minimized. Requiring tax contributions that regularly exceed the abilities of individual taxpayers produces more overall disutility than the minimum permitted.

Utilitarians can mean two things by ability: (i) ability as the total level of utility from income and wealth (“absolute utility”), or (ii) ability as the marginal utility a taxpayer assigns to income and wealth.⁸³ Individual utility—as either total utility or marginal utility—is the relevant taxpayer attribute for both. On either sense of ability, individual tax liabilities are considered permissible depletions. If ability is conceived in terms of *total levels of utility*, then the correct measure of ability is the level of utility at which a taxpayer currently stands in virtue of her income and wealth. What is paid out in taxes amounts to a minimum magnitude of utility that can be permissibly exacted from the taxpayer. This exaction is experienced as a sacrifice—as a magnitude of disutility—on the taxpayer side. Sensitivity to the conditions of individual taxpayers is achieved by taking into consideration their individual levels of utility in determining permissible minimal exactions.

If ability is instead conceived in terms of *marginal utility*, then the correct measure of ability is the utility that a taxpayer ascribes to each additional (marginal) unit of income and wealth. Rather than conceiving of tax exactions as direct depletions of taxpayer *utility*, tax exactions here are instead ways by which to achieve some desired rate of marginal income utility in individual taxpayers. Tax exactions are made until a taxpayer falls somewhere desirable on the money-marginal utility curve, which maps the utility derived from each marginal dollar.⁸⁴ The

⁸³ (Musgrave, pg. 97)

⁸⁴ The money-marginal utility curve can be visualized in the following way (see Figure 1 on next page):

relevant sense of sacrifice, given an account of ability as marginal utility, is slightly different from that of utility as the relevant sense of ability. Sacrifice there is understood directly in terms of a currency of utility. Under an ability as marginal utility account, sacrifice can't be understood as a depletion of marginal utility—which is not a sense of utility that exists as a depletable reserve—but is rather an exaction of income and wealth such that a particular level of marginal income utility can be achieved.

A plausible account of utilitarian ability-to-pay as marginal sacrifice is usually paired with an assumption that the marginal utility of money declines steeply.⁸⁵ The diminishing marginal utility of money is the empirical claim that the worth someone derives from each marginal dollar declines given the amount of money that she has already. Someone who has more money will derive less utility from the marginal dollar than someone who has less money. The rate at which marginal money utility declines can vary. This has implications for what tax rate structure is implied by the marginal utility version of ability-to-pay. If marginal income utility declines at a rate faster than the percentage rate at which income increases, yielding a steeply declining money-marginal utility curve, then the marginal utility version of ability-to-pay

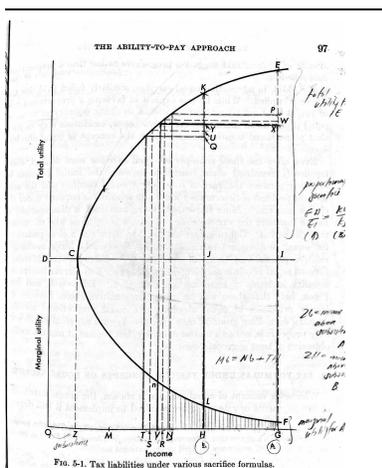


Figure II.A Say that taxpayer *A* derives marginal utility *GF* from her income, and taxpayer *B* derives marginal utility *HL*. *V* is the desired level of marginal utility. *A* will be taxed *VG*, and *B* will be taxed *VH*.

⁸⁵ Ability-to-pay might be thought to imply progressive rate structures by itself, but without an assumption of the diminishing marginal utility of money, it cannot do so.

will lead to a progressive tax rate.⁸⁶ Under these conditions, a relatively higher rate of tax can be imposed on those with higher incomes. Overall disutility in outcomes is minimized by raising the bulk of revenue needs from those with higher incomes. Those with higher incomes derive comparatively less marginal money utility. Correspondingly, they would suffer less disutility from higher tax exactions. *How* progressive the tax rate structure is will depend on the rate at which marginal income utility declines.

The marginal utility version of ability-to-pay yields less determinate results if marginal income utility doesn't decline. If marginal income utility remains constant, then utility from each marginal dollar remains constant. Individual levels of income and wealth approximate absolute levels of utility, and the marginal utility version of ability-to-pay is made indistinguishable from the earlier, absolute utility version of ability-to-pay. If marginal income utility increases, implausibly, and utility from each marginal dollar is more valuable than the last dollar, then a marginal utility account of ability-to-pay may militate in favor of a regressive tax structure.

Some commentators on Mill consider there to be another stipulation on a utilitarian account of ability-to-pay: not only does the relevant sense of ability have to be such that it is compatible with the minimization of overall disutility, but the allocation of individual sacrifice has to be *equalized* as well. Call this additional stipulation a condition of "equal sacrifice." The equal sacrifice position emerges from an alternate reading of Mill on taxation. Under the equal sacrifice reading, Mill is thought to argue that equality, as a condition in which "[sacrifices] should be made to bear as nearly as possible with the same pressure upon all" is an independent condition that bears on taxation. The equal sacrifice condition is an addition to the existing

⁸⁶ (Musgrave, pg. 99)

utilitarian condition that after-tax outcomes minimize overall disutility. We might see this as an effort, on Mill's part, to import a more familiar condition of fairness into utilitarianism.

The equalization of sacrifices across individual taxpayers, however, is generally incompatible with the goal of minimizing overall disutility (the goal of sacrifice-minimization). In some cases, it's clear that the utilitarian goal of minimizing overall disutility in after-tax outcomes would be better achieved by imposing the tax burden *solely* on those with greater wealth and incomes.⁸⁷ For instance: given a population of two taxpayers, one of whom is significantly better off than the other, equal sacrifice may militate in favor of dividing the tax burden equally—where the equal division in question may be equal divisions of monetary sacrifice or utility sacrifice. A sacrifice-minimizing condition, by contrast, might militate in favor of taxing *only* the wealthier of the two taxpayers to cover revenue needs. If the worse-off taxpayer is so badly off that *any* imposition of tax burden on the less well-off taxpayer would cause greater sacrifice than placing *all* of the tax burden on the better-off taxpayer, then sacrifice-minimization favors putting all of the revenue burden on the better-off taxpayer. Thus, the goal of equalizing sacrifice can come apart from the goal of sacrifice minimization.

The equal sacrifice condition can be reconciled with sacrifice-minimization in one case: when the relevant sense of sacrifice, and correspondingly the relevant sense of *ability* to sacrifice, is that of marginal income utility. Equalizing sacrifice here means equalizing sacrifices of *marginal income utility*. Assuming the diminishing marginal utility of money, this requires bringing everyone to the same marginal money utility—that is, bringing everyone to the same position on the marginal utility-money curve. It's clear that equalizing marginal money utility in this way is also a minimization of sacrifice, if we consider the tax exactions through which

⁸⁷ See footnote 15 for a more detailed example of this.

equalization is achieved. Given, again, a population of two taxpayers, one of whom is significantly better-off than the other, it is immediate that a dollar of tax from the less well-off taxpayer will occasion *more* sacrifice, given her marginal money utility, than taking that same dollar from the wealthier taxpayer. This is likely to also be the case with the second dollar, and the third, and so on. As long as a marginal dollar of tax incurs less sacrifice from the better-off taxpayer than that same exaction from the less well-off taxpayer, then sacrifice-minimization requires that the dollar be exacted from the better-off taxpayer. Taxation continues in this way until both taxpayers are at the same level of marginal money utility. At that point, both taxpayers have sacrificed equally.

IV. Why do we want a non-utilitarian principle of ability-to-pay?

A utilitarian principle of ability-to-pay cannot serve as a principle of contributive justice for a number of reasons. These reasons motivate the search for a non-utilitarian principle that can constitute a principle of contributive justice. I show in the next section that what we want, specifically, is a non-utilitarian principle of ability-to-pay.

It's worth preliminarily clarifying what the aim is in arguing for a lack of fit between a utilitarian principle of ability-to-pay and contributive justice. My goal here isn't to show that a utilitarian principle of ability to pay is unable to reach the same conclusions as a genuine principle of contributive justice. Rather, my aim is to show that a utilitarian principle of ability-to-pay, and utilitarian theories of taxation generally, start off on a different footing from what is needed to get a theory of contributive justice off the ground. This point can be made another way: utilitarianism and contributive justice each view things from a different kind of lens, and if they converge on the same principles and outcomes, it will be for different reasons that they do.

The earlier point about fairness and utilitarianism is one important respect in which utilitarianism and contributive justice start off on different footings: utilitarianism, as an aggregative theory, does not take *individuals* as its focus. Theories of both distributive and contributive justice, insofar as they remain theories of justice, do.⁸⁸ Identifying a principle of contributive justice involves not only distinguishing contributive justice from distributive justice, but also distinguishing contributive justice from utilitarian theories, generally.

Consistent with this earlier point about fairness and utilitarianism, any utilitarian version of ability-to-pay is necessarily an instrumental principle. It doesn't really express a notion of fairness at all. And if it is insisted that utilitarian ability-to-pay expresses an attenuated notion of fairness, it would still be the case that any allocation of burdens prescribed by a utilitarian principle of ability-to-pay could only ever be instrumentally valuable.⁸⁹ The fair allocation of burdens in a cooperative enterprise would only be valuable as a means to utility-maximizing outcomes. By contrast, contributive justice considers the fair allocation of burdens in a cooperative enterprise to be *non-instrumentally* valuable. The fair allocation of burdens is,

⁸⁸ Though I clarify later that contributive justice is focused on individuals in the following sense: it takes as its focus individuals with respect to other individuals—agency in the presence of other agents with whom one is collaborating in the context of a cooperative project.

⁸⁹ A proponent of utilitarian fairness might argue that a utilitarian principle of ability-to-pay *does* express a notion of fairness—specifically one of fairness as extrinsically valuable. I argue next that this is the notion of fairness expressed by a contributive justice principle of ability-to-pay. Utilitarians can't, generally, help themselves to a distinctive notion of extrinsic value. All extrinsic value is instrumental on their view.

specifically, valuable as an end in itself.^{90,91} We know that fairly allocating burdens in accordance with principles of contributive justice isn't just instrumentally valuable because it isn't justified solely by reference to its outcomes. Whatever good outcomes a fair allocation of burdens might lead to, we would have reason to prefer a fair allocation of burdens even if there were other means to achieve those same good outcomes.⁹² I argue later that the main reason to prefer fair allocations of burdens is that fair allocations of burdens—ones that comply with principles of contributive justice—take individual agency seriously. That contributively just allocations of burdens take individual agency seriously isn't a product of such allocations, but is, rather, a feature.

Under contributive justice, the possibility is left open that a fair allocation of burdens might still be *extrinsically* valuable: that it might be valuable only under certain conditions, and that the source of its value might be located elsewhere, like in the value of democracy. A utilitarian principle of ability to pay would efface the possibility that fair allocations of burdens

⁹⁰ Here I use Korsgaard's distinction between (i) intrinsic-extrinsic goodness and (ii) instrumental goodness and goodness for its own sake. The intrinsic-extrinsic goodness distinction refers to a difference in "the location or source of goodness" for a thing. Something is intrinsically good if the source of its value is located in itself. Intrinsically good things are also unconditionally good: in virtue of having its value located in itself, intrinsically good things are good *unconditionally*. By contrast, something is extrinsically good if its goodness is located outside itself, thus making the goodness in question *conditional*. The distinction between instrumentally valuable things and things valued for their own sakes refers to a difference in the "way we value things" (Korsgaard 1983, pg. 170). Instrumentally good things are *means*: they're good in virtue of the ends that they serve. Things that are good for their own sake are valued as *ends*. By distinguishing intrinsic-extrinsic goodness from means-end goodness, Korsgaard makes room for the possibility of extrinsically valuable goods that are nevertheless ends in themselves. These are goods that sought for their own sake, but only conditionally valuable. Korsgaard gives, as an example of extrinsic goods that are good for their own sake, the example of elaborately enameled frying pans (Korsgaard 1983, pg. 185).

⁹¹ I remain agnostic about the possibility that fairly allocating of burdens, and contributive justice itself, might be *intrinsically* valuable. The post-distributive variety of contributive justice that I develop here is unlikely to be intrinsically valuable. That it requires an assumption of distributive justice is evidence that its value depends on at least one condition being met: the condition that distributive justice first be achieved. This alone makes post-distributive contributive justice *extrinsically* valuable.

⁹² (Anderson 2009, pg. 225)

could be extrinsically valuable in any non-instrumental sense. All extrinsic value is instrumental value on the utilitarian view.⁹³

Utilitarian and contributive justice views diverge in another respect: contributive justice, as a theory of justice, takes agency seriously by treating people as ends. This is an extension of the fact that theories of justice take individuals as their focus, reflected in the corresponding notion of fairness by which theories of justice are characterized.

Another reason why a utilitarian principle of ability to is ill-suited to a project of contributive justice also issues from utilitarianism itself. Utilitarianism is generally thought to fail to take agency seriously by failing to treat people as ends. Most forms of this criticism—the charge that utilitarianism fails to take agency seriously can be made in various ways⁹⁴—have a conception of *individual* agency in mind. While I think that utilitarianism does fail to take individual agency seriously—I clarify the specific sense in which it fails to do this next—I also think that the utilitarian failure to take agents seriously at the level of individuals has limiting implications for how utilitarians can conceive of cooperative projects.

⁹³ Utilitarianism does this by reducing all matters of extrinsic value to instrumental value (Korsgaard 1983, pg. 173). There's no conceptual space for a notion of intrinsic-extrinsic goodness independent of means-end value in utilitarianism. Utility, as either hedonic psychological states or preference-satisfaction, is the only thing that is good as an end. Everything else is valuable only to the extent that it promotes utility-maximization—that is, to the extent that it is a *means* to utility-maximization. The only sense in which something could be *conditionally* (extrinsically) valuable, then, is as a *means* to utility maximization. The value of anything is conditional on its being a means to utility-maximization.

⁹⁴ Utilitarianism has been thought culpable of failing to treat people as ends in various ways. Objections that attribute to utilitarianism a failure to treat people as ends are usually grounded, in some way, in Kant's Formula of Humanity as an End in Itself ("Formula of Humanity", for short): that we ought to "treat humanity as an end", and never as a "mere means" (Korsgaard 1986, pg. 197). One version of the objection that utilitarianism fails to treat people as ends understands the failure distributively: utilitarianism fails to treat people as ends because it allows for the possibility of uncompensated losses (Brink, pg. 255). We're allowed, on the utilitarian account, to make uncompensated exactions from some people for common benefit. This is a violation of the Formula of Humanity because uncompensated exactions: (i) are losses that would not be rationally appointed as ends by those from whom exactions are made, and (ii) treat some people as mere means for the benefit of others. I avoid this distributive understanding of the Formula of Humanity for two reasons: (a) it risks reducing contributive justice to a distributive matter—that unfair allocations of the burdens associated with a cooperative project are objectionable on principally *distributive* grounds—and (b) it militates in favor of adopting a benefits principle as a principle of justice in contribution—compensating people for their losses would avoid treating them as mere means, and presumably also satisfy the conditions for treating them as ends.

Act-utilitarianism, at least, fails to treat people as ends in the following sense: it fails to properly recognize the “value-conferring” capacity of practical reason—the capacity to reason about and to appoint ends.⁹⁵ It also fails to properly value the ends that agents would appoint for themselves, which are valuable in virtue of being the objects of practical reason.⁹⁶ Treating people as ends requires attending to the value of both their capacity to rationally appoint ends—the capacity for practical reason—and as well as the ends that are chosen. A non-utilitarian version of ability-to-pay would fare better in these respects.

Traditionally, Kantians take the capacity of practical reason to be intrinsically valuable, and the ends that are objects of practical reason to be “objectively good”. Objective goods are goods that are conditionally valuable—they’re extrinsically valuable goods—but the conditions of their value are currently met.⁹⁷ Properly valuing both practical reason and its ends are the bases for the Humanity formula: that one ought to treat humanity as an end, and “never merely as a means”.⁹⁸

We don’t need to be committed to the intrinsic value of practical reason in order to show that there is a need for a non-utilitarian account of justice in contribution, and a non-utilitarian principle of ability-to-pay. All that needs to be shown is that utilitarianism disvalues any sense in which people ought to be treated as ends, and that this carries over into its impoverished view of cooperative projects. Utilitarianism can, at best, treat practical reason and its ends as instrumentally good. Practical reason is instrumentally valuable insofar as its exercise is a *means* to utility. There’s no room for the non-instrumental value of practical reason in the utilitarian

⁹⁵ (Korsgaard 1983, pg. 183)

⁹⁶ (Korsgaard pg. 196—197)

⁹⁷ “Objective goodness” can be cashed out in terms of intrinsic and extrinsic goodness. Something that is objectively good is *conditionally good*, and thus extrinsically good, but its conditions of extrinsic goodness are fulfilled. Intrinsically valuable things are also objectively good, because they’re *unconditionally good*. The conditions of their goodness are always satisfied.

⁹⁸ (Kant, 4:429)

conceptual landscape, because nothing else can be non-instrumentally valuable aside from utility itself. This is likewise the case for the ends that are objects of practical reason. There's no conceptual space in utilitarianism for these ends to be non-instrumentally valuable either.

The major shortcomings of a utilitarian conception of cooperative projects are as follow. First, utilitarian cooperative projects fundamentally lack any familiar sense of accountability that participants in cooperative projects might have to each other. We can think that participants in cooperative projects are accountable to each other in the following way: participants are authorized, in virtue of their joint commitment to the cooperative project, to treat each other as *responsible* beings. In particular, participants are thought to be responsible for their behavior with respect to the common project. Those who fail to live up to the standards associated with the common project merit the censure of their co-participants.⁹⁹ This notion of accountability can be cashed out in terms of claims: participants in cooperative projects have claims on one another to each do their part in order to realize the shared project. These claims are grounded in the possibility that participants *can* be held accountable for their actions—that they are responsible for their behavior.¹⁰⁰ Treating agents as responsible for their behavior is, in effect, a recognition of their capacities for practical reason; it is one way of treating agents as ends.

⁹⁹ Margaret Gilbert argues that the specific sense of censure here needn't be *moral* in nature: when we object that others aren't doing their fair share in cooperative projects, it isn't necessarily a *moral* objection that we're issuing in. *Contra* Gilbert, I think that if the failure to do one's fair share in a cooperative project can be characterized as a violation of justice in contribution, and I eventually argue that it can be characterized as such, then in some sense this failure *is* a moral matter, and our objections to it would reflect this moral quality. A failure of contributive justice is a distinctive kind of failure with respect to *justice*, and thus a kind of failure of *rightness* (Gilbert, pg. 35).

¹⁰⁰ The relationship between accountability and the distinctive claims that participants in cooperative projects have on each other is a bit nebulous. Accountability is clearly a condition of the claims that participants in cooperative projects have on each other: claims of this kind can't be meaningfully made without assuming that the recipients of those claims are responsible, and thus accountable, beings. At the same time, claims on other participants to live up to the standards of the cooperative project are, in certain ways, *claims of accountability*. These are claims on participants in cooperative projects to see themselves as responsible beings. I later argue that what this means in the context of a cooperative project is to see oneself as standing in a unique relationship with respect to one's capability set—as capable of contributing to the cooperative project to the extent that one is *able*.

Second, utilitarian conceptions of cooperative projects may fail to make intuitively plausible distinctions between cases of genuine cooperation and non-cooperation.¹⁰¹ This second point is related to the first about accountability. A participant in a cooperative project who fails to make good on the claims that other participants have on her to live up to the relevant standards of participation is, in a meaningful sense, not cooperating. She has failed to satisfy an essential condition of cooperation. Her presence as a non-cooperator also makes the common project less of a genuinely cooperative one. There may be some unavoidable vagueness about this effect of non-cooperators on the overall cooperative project. The presence of at least one non-cooperator within a cooperative project is enough to make the overall project *less* cooperative—assuming that the expected marginal contribution of the non-cooperator in question is inessential—but it may take the addition of several more non-cooperators, depending on the scope and the nature of the project, in order for the project to cease to be genuinely cooperative at all.

Utilitarianism is insensitive to nearly all cases of non-cooperation that fail to affect outcomes, and even some cases of non-cooperation that arguably do affect outcomes. Most cases of non-cooperation simply fail to register on the utilitarian view. As an outcome-oriented theory, utilitarianism is insensitive non-cooperation that fails to affect outcomes. This includes cases in which collective undertakings no longer meet any intuitive standard of cooperation—non-cooperation has been sufficient to render the project no longer cooperative—but where best outcomes ensue anyway. Because the non-cooperative outcomes are identical to what would've

¹⁰¹ Don Regan discusses a number of cases in which utilitarianism would fail to diagnose cooperative failures in shared projects (Regan, pg. 124–145). In some of these cases, utilitarianism is unable to properly diagnose the cooperative failure at hand because of its nature as an outcome-oriented theory. In cases where participants to cooperative projects achieve the best outcome “in spite of themselves”—where participants arrive at the best outcome through the wrong motivations, erroneous beliefs, or criticizable dispositions—utilitarianism is insensitive to these failures in cooperation because of its focus on outcomes alone (Regan, pg. 127).

been brought about through genuine cooperation, such cases are not criticizable from the utilitarian point of view.

Utilitarianism is also insensitive to instances of non-cooperation that arguably *do* affect outcomes. This second kind of insensitivity to non-cooperation is implied by Don Regan's argument that utilitarianism is an "[exclusively] act-oriented" theory: that utilitarianism is interested in identifying the set of actions that an agent ought to undertake, *in light of* circumstances that are treated as brute, immutable features.¹⁰² All utilitarianisms, including rule utilitarianism, evince this feature of act-oriented exclusivity.¹⁰³ In cooperative projects, the exclusively act-oriented quality of utilitarianism requires that participants treat the behavior of their co-participants as likewise brute, immutable facts. If one of my co-participants to a cooperative project fails to contribute in such a way that the achievement of best outcomes is precluded, then the act-oriented exclusivity feature of utilitarianism requires that I make the best of the situation given my co-participant's defection. This requirement is symmetrical, even if the roles are reversed: if *I* defect in a way that precludes overall best outcomes, then my co-participant is the one required to make the best of the situation. If we *both* follow this rule though, then achieving the best outcome will be impossible. In this way, utilitarianism, given its insensitivity to what genuine cooperation requires, may sometimes even undermine its own goal of achieving best outcomes. Regan and I diagnose this utilitarianism insensitivity a bit differently. Regan argues that utilitarianism goes wrong here because of its failure to include a proper decision-making procedure for the identification of co-cooperators. I think that utilitarianism lacks a sense in which participants in cooperative projects are *accountable* to each

¹⁰² (Regan, pg. 105)

¹⁰³ (Regan, pg. 90)

other. Regan's proposed solution brackets off accountability considerations by requiring that we curate the members of cooperative projects such that they consistently cooperate.

One final reason that a utilitarian principle of ability-to-pay is ill-suited to contributive justice is that specific versions of a utilitarian principle of ability-to-pay are incompatible with the contributive justice project itself. Ability-to-pay as equimarginal sacrifice, for instance, answers the contributive question (how burdens ought to be allocated) distributively. A principle of equimarginal sacrifice aims at a particular *distributive* outcome, even though the distinctively distributive qualities of this outcome are obscured by their being cashed out in terms of utility. Equal marginal sacrifice requires an outcome in which levels of marginal utility are equalized. What it requires is, in effect, a *distribution* of income or wealth such that levels of marginal utility are equalized. A desirable allocation of burdens, according to ability-to-pay as equimarginal sacrifice, is just one that brings about an equalization of marginal utilities. The question of contributive justice, of *how* burdens ought to be allocated, is collapsed into a matter of distribution.

Note that my claim here isn't that equimarginal sacrifice counts as a theory of distributive *justice*, or that an outcome of equimarginal sacrifice is distributively just. Equimarginal sacrifice outcomes are made a goal of equal marginal sacrifice accounts of ability-to-pay not because such outcomes embody or reflect justice. Rather, according to equal marginal sacrifice proponents, such outcomes are required for aggregative and maximizing reasons. This is consistent with the earlier point that justice-based and utilitarian theories fundamentally come apart with respect to fairness.

V. Affirming common projects as shared ends

A non-utilitarian principle of contribution in accordance with *ability* can be derived directly from what is entailed by affirming, as a shared end, some cooperative project. The argument here is broadly Kantian in its use of hypothetical imperatives.

By cooperative project, I mean an undertaking that requires the coordinated participation of multiple people in service of a shared goal. I take it that we can impute to any individual participant in a common project something like the following hypothetical imperative:

If x , a participant in a cooperative project, wills the shared end of the cooperative project e , then x ought to undertake the means to e .

Hypothetical imperatives, generally, enjoin those who will a particular end to also undertake the means to realizing that end. Failing to undertake the means to an end that one wills is to be culpable of a kind of inconsistency, according to Kant.^{104,105} When someone fails to undertake the means to a willed end, then there's some reason to wonder whether they really will the end in question at all.

We can look further to the ought claim—that x ought to undertake the means to e —that the hypothetical imperative allows us to impute to participants in a cooperative project. This ought claim has, as its basis, the willing of e —that undertaking the means to e is an entailment of e being willed. The fact that e is the shared end that characterizes a cooperative project, however, also grounds the ought claim elsewhere: in the claims that agents in a cooperative project have *on each other*. A participant in a cooperative enterprise can make a claim on other participants that—insofar as they, too, will the shared end—they undertake the means to that end.

¹⁰⁴ What *kind* of inconsistency one might be culpable of in willing an end *without* undertaking the means is, in part, a function of *how* the means are thought to relate to the willed end (this is also a question of what, exactly, is meant by “means”). If the means in question are thought to be *conceptually constitutive* of the willed end—say, undertaking the means is just part of what it means to will that kind of end—then the relevant kind of inconsistency might be a sort of *contradiction*. If, instead, the means in question have a *causal* role in producing the outcome of the willed end, then the relevant kind of inconsistency might be a sort of instrumental irrationality.

¹⁰⁵ (Korsgaard, pg. xvii)

Cooperative projects governed by a hypothetical imperative of this kind are the sort of thing that, by their very nature, allow participants to make claims on each other for the realization of the cooperative project. Failure on the part of any given participant to undertake the means to the willed end makes her not only inconsistent in the general sense, but also criticizable for her failure to live up to standards of participation in the common project.

It's within the ought claim that much of the work for deriving a principle of ability-to-pay can be done. Start with ought claims generally: ought claims are commonly taken to imply claims of 'can'.¹⁰⁶ What we *ought* to do must also be what we *can* do. And what we can do can plausibly be thought to consist, in some sense, in our *abilities*. Having uncovered a notion of ability embedded in ought claims generally, we can bring this notion to bear on the particular ought claim in the hypothetical imperative we've been looking at so far. The object of the ought claim here is undertaking the means to the willed end, *e*. The notion of ability directly constrains what means ought to be undertaken: whatever these means are, they must be within the abilities of the willing parties—the individual participants in the cooperative project. If we think of the means that ought to be undertaken by each participant as her *contribution* to the realizing the shared end of the cooperative project, then we end up with roughly a principle of ability-to-pay: participants in a cooperative project *ought to contribute in accordance with their abilities to contribute*. This also furnishes the content of the claims that participants in a cooperative project can make on one another. Individual participants in a cooperative project can each be reasonably asked to contribute to the extent of their ability to contribute.

¹⁰⁶ One notable passage in which Kant makes the 'ought implies can' claim can be found in *Practical Philosophy*: "But in a theory that is based on the concept of *duty*, concern about the empty ideality of this concept quite disappears. For it would not be a duty to aim at a certain effect of our will if this effect were not also possible in experience (whether it be thought as completed or as always approaching completion); and it is theory of this kind only that is at issue in the present treatise" (Kant *Practical Philosophy*, pg. 280).

VI. Beginning to construct an account of *ability* to contribute from capability theory

Giving substance to this derivation of a principle of ability-to-pay requires two things: (i) a definition of ‘ability’, and (ii) giving the relationship between the *means* that ought to be undertaken, and the willed *end* (we can think of this as both specifying *how* the means in question contributes to the realization of the willed end, and, in effect, as a way of defining the ‘means’). I start by sketching out an account of ability, since the relevant sense of ability ends up being an important determinant of *what* kinds of means ought to be willed, and *how* these means contribute to realizing the willed end.

The relevant sense of *ability* to contribute (*ability* to undertake the means) will depend, in part, on what the cooperative project being willed as an end is. Different cooperative projects will make different abilities of participants to those projects salient. A cooperative project like a barn raising in Amish and Mennonite communities, for instance, will draw principally on the physical capacities of its participants. Such capacities will include brute strength as well as cultivated skillsets like carpentry and woodwork.

I think, though, that a broad account of ability can be given that encompasses most possible senses of ability that could be salient to cooperative projects: this is an account of ability in terms of capabilities and their corresponding opportunity costs.^{107,108}

By ‘capabilities’, I mean the sets of *effective* opportunities that individual citizens—in particular, citizens in a society conceived of as a cooperative enterprise—have in order to

¹⁰⁷ Conventional economic notions of opportunity cost have some decidedly non-Kantian features: (a) opportunity cost is typically given in terms of the subjective valuation of alternatives, and (b) opportunity costs are outcome-oriented in a way that might be troubling to Kantians. I’ll ward off objections that might stem from either concern shortly by clarifying what, exactly, I mean by opportunity cost.

¹⁰⁸ Fleshing out a plausible sense of *ability* to contribute requires making reference to some account of well-being. Given the earlier rejection of a utilitarian version of the principle of ability-to-pay, we’re left with non-utilitarian accounts of well-being. Of the non-utilitarian accounts that remain, capability theory is, I think, the richest of the available options.

achieve certain valued goals. The account of capabilities I have in mind is largely faithful to the one advanced by Amartya Sen and Martha Nussbaum, but is adapted for use in a contributive justice context.¹⁰⁹ Capability theory was originally intended as a partial theory of distributive justice: as specifying a metric for what it is that people are owed as a matter of justice.¹¹⁰ Because we're working in the post-distribution, I assume that the demands of distributive justice with respect to capabilities have been settled already—that citizens have capability sets above some sufficientarian standard consistent with distributive justice. Capabilities, here, instead give us a measure of individual *ability* from which contributive obligations can be deduced. The few key divergences in the account of capabilities I intend here follow from its contributive, rather than distributive, role.

Effective opportunities, as capabilities, are those that people have a reasonable chance of accessing. We can contrast effective opportunities with merely *formal* opportunities—opportunities that exist for people as a matter of, say, legal possibility. Someone has a formal opportunity in this sense if they're not legally forbidden from pursuing that opportunity. The presence or absence of formal opportunities is insensitive to how likely the opportunity in question can be made use of.

Opportunities are made *effective* in virtue of two component conditions obtaining: a condition of ability, and a condition of resources. Someone who satisfies the ability condition for having an effective opportunity to do *x* evinces features—where these features may be innate physical endowments, or cultivated skills—that are necessary for her to make use of *x*. The resource condition refers to “external” goods and services that, in combination with the relevant

¹⁰⁹ As I later show, some of the core concepts of capabilities theory, can be adapted to flesh out a theory of *contributive* justice without necessarily reducing contributive justice to distributive justice.

¹¹⁰ (Sen 2010, pg. 242)

abilities, are necessary for the realization of the goals at which effective opportunities are directed.¹¹¹ The relevant resources can be goods in a conventional sense, social practices, or “political institutions” that ensure certain liberties.¹¹² Whatever these resources are, having a capability to do x means having both the external resources to do x , and being able to transform those ingredients into an achievement of x .

Capabilities are sensitive to individual differences to transform resources into goal-realization. The broad class of features that bear on the likelihood of successfully transforming available resources to goal-achievements are called “conversion factors”. Some conversion factors can be formulated as variations in ability or resources. Physical aptitude, for instance, is a conversion factor with respect to ability.¹¹³ Someone who is severely disabled is less able to convert resources, like a bicycle, into an achievement of mobility. Other conversion factors may take the form of neither abilities nor resources, but are, rather, social norms or practices that bear on the likelihood with which capabilities can be transformed into goal-achievements.¹¹⁴ By

¹¹¹ (Nussbaum 2000, pg. 243)

¹¹² (Crocker and Robeyns, pg. 64)

¹¹³ (Crocker and Robeyns, pg. 68)

¹¹⁴¹⁴ Conversion factors of social norms and practices—“social institutional” conversion factors for short—may resist being sorted into categories of either ability or resource. I assume here that it may be possible for social institutional conversion factors to be variations in neither abilities nor resources as at least a matter of conceptual possibility, although I recognize that in the majority of cases, even if social institutional factors are strictly variations in neither resources nor ability, they’ll nevertheless bear on the adequacy of ability or resources for a capability.

Some social institutional conversion factors are rightly considered resources. We can see the relevant social institutional factors at work in Nussbaum’s example of a woman “widowed as a child and...forbidden to make another marriage” in this way (Nussbaum 2000, pg. 234): if the social norms that circumscribe remarriage are so highly proscriptive as to be genuinely prohibitive of the widow remarrying, or if her remarriage is actually precluded by law, then this seems like a *resource* deprivation, and an instance in which social institutional conversion factors are a variation with respect to *resource*.

If the relevant social institutional conversion factors here were less proscriptive, however—say that the remarriage of widows was licit but sufficiently frowned upon such that widows would still be discouraged from remarrying—then we might consider this social institutional conversion factor a non-resource one. This isn’t to suggest that social institutional conversion factors that are decomposable into variations in neither resources nor abilities are any less real or significant. Rather, this is just to highlight a distinctive way, independent of resource and ability considerations, that social institutional conversion factors might interfere with the achievement of valued functionings—in this case something like a functioning of partnership and attendant socioeconomic security, in those regions where partnership enhances socioeconomic security.

taking conversion factors into consideration, capability theory is sensitive to individual variations in effectiveness of opportunity. Competing theories of distributive justice may not be sensitive to individual variations in this way.¹¹⁵

The account of capability here parts ways with canonical accounts of capability with respect to agency. According to Sen's canonical account of capability, capabilities are effective opportunities to achieve, as goals, states of well-being known as "functionings". In this sense, capabilities are "well-being opportunities". Well-being is understood alternately as personal "wellness", "advantage", or "welfare".^{116,117} Functionings are "well-being achievements"—they are states of well-being that have been achieved already.¹¹⁸ We shouldn't think that functionings and capabilities stand in a unique one-to-one correspondence with each other—that certain functionings can only be achieved singly through certain capabilities. The same functioning may be achievable via multiple capabilities and multiple possible combinations of capabilities.¹¹⁹

Limiting capabilities to the *advancement* of well-being states requires Sen to posit something else to account for goals that people genuinely have, but that do not aim at states of well-being—these are goals that may even be inimical to well-being. The notion of "agency" is meant to fill in this gap. Agency refers to either the effective opportunity to pursue ("agency freedoms"), or the achievement of goals ("agency achievements") that are genuinely chosen, but that are not clearly advancements of well-being. The addition of agency to Sen's theory of capability is meant to capture the importance of *who* chooses the goals that effective opportunities enable. Agency also captures the value that goals have in virtue of being chosen.¹²⁰

¹¹⁵ Resourcism is an example of a theory of distributive justice that is arguably insensitive in this way (Anderson 2010, pg. 87).

¹¹⁶ (Sen 1992, pg. 39)

¹¹⁷ (Crocker and Robeyns, pg. 62)

¹¹⁸ (Sen 1992, pg. 50)

¹¹⁹ (Crocker, pg. 175—178)

¹²⁰ This is consistent with the earlier Kantian picture of the value-conferring capacity for practical reason.

Adapting capability theory into something that can inform a theory of contributive justice, and in particular a theory of contributive justice as it applies to society as a cooperative project, requires reconsidering the notion of agency in capability theory. The picture of agency that I give is compatible with much of what Sen has in mind: agency and capabilities are mutually dependent but separable notions.¹²¹ The notion of agency needed for an account of contributive justice is nevertheless distinctive.

First, we should reconsider Sen's notion of agency in light of what contributive justice takes as its object. Contributive justice is principally a demand on agency as the capacity to *do*, and agents as *doers*.¹²² A demand for contribution is a demand for action of some kind. Actions, in turn, are exercises of agency. By contrast, distributive justice takes a more passive view of people as recipients of the relevant kind of distributive currency. The demand for contribution can be reconciled with the earlier Kantian picture of agency as consisting in the value-conferring capacity for practical reason. A demand for contribution is the demand that one's agency, understood as practical reason, be oriented toward contribution.

The contributive justice sense of agency is both more general than Sen's and cuts across his capability-agency freedoms distinction. Capabilities and agency freedoms name different

¹²¹ This is by contrast to versions of capability theory that argue for a more revisionist notion of agency: Rutger Claassen, for instance, argues that agency is a "meta-capability" consisting in effective opportunities to *deliberate*, and effective opportunities to *implement* the outcomes of one's deliberations (Claassen, pg. 1283). Agency in this sense is a condition of purposive action. Before anyone can act in service of some goal, they must first have the capability of agency in the following sense: (i) they must have both the *abilities* (e.g. cognitive wherewithal) and the *resources* (e.g. freedom from manipulation or influence) to *deliberate* about their goals, and identify means to their goals—where sufficient ability and resources are the component conditions for any effective opportunity—and (ii) they must have both the *abilities* (e.g. physical ability) and the *resources* (e.g. freedom from non-interference by others) to *implement* their goals (Claassen, pg. 1282).

¹²² Although the view of agency I have in mind might, at first, appear to resemble Nussbaum's, it is distinct from her treatment of agency: Nussbaum also takes agency to refer to the domain of "choice", and to coincide with "practical reason", but she then reduces her account of agency to one of capabilities (Crocker, pg. 160). "Practical reason" is just one of the items on her list of "central human functional capabilities" (Nussbaum 2000, pg. 231). The reduction of agency to capabilities is opposed to my own goal, which might be characterized as one of pulling agency further apart from the notion of effective opportunities—giving an account of agency independent of opportunities.

types of effective opportunity. They are distinguished on the basis of the achievement states at which the effective opportunities in question aim: capabilities are effective opportunities for functionings, and agency freedoms are effective opportunities for non-well-being achievements. Effective opportunities, however, are inert in such a way that they cannot be the subject of contributive justice.¹²³ Although the presence of effective opportunities are an obvious condition for the *exercise* of agency, opportunities themselves cannot respond to the demands of contributive justice in the same way that agency does. What's needed is the addition of a *doer* to the presence of capability sets. The more general notion of agency I have in mind does this. It supplies an account of something that *makes use* of what would otherwise be relatively inert opportunities.

The notion of agency as *doer* also cuts across Sen's intended capability-agency freedoms distinction. Since both capabilities and agency freedoms refer to effective opportunity sets, they both stand in need of the addition of something like the account of agency that I have in mind. Capability sets need the addition of an agent as *doer* who deploys her agency toward the achievement of the relevant functionings, given her capability set.

Reintroducing this notion of agency as *doer* may seem to be a regressive move. Rather than illuminating what agency might consist in, it makes agency into something more basic, and arguably more mysterious. The notion of agency as *doer*, however, captures what Sen intended to do with his own account of agency—namely, recognizing that choices are valuable, in part, *because* they are chosen.

¹²³ One implication here is that Sen's own account of agency as decomposable into effective opportunities for the exercise of agency (agency freedoms) and agency achievements fails to capture all that there is to agency. Taken together, agency opportunities and agency freedoms still fall short of giving some account of a *doer*, even though an account of a *doer* or *chooser* is part of what Sen intends to capture with his account of agency.

Second, Sen's account of agency should be reconsidered in light of the distinctive constraints on agency imposed by working within *cooperative* projects. Contributive justice is not just a demand on agency, generally, but rather a demand on agency in the context of cooperative projects, in particular. We've already encountered the distinctive claims that agents in cooperative projects have on each other: agents in cooperative projects that are characterized by shared ends have claims on one another to undertake the means to those shared ends. That agents have special claims on one another in cooperative projects is an entailment of the particular kind of agency salient to cooperative projects. Agency in the context of cooperative projects is, specifically, a matter of agency with respect to other agents.

We can see contributive justice as giving us one set of conditions under which the distinctive agencies of participants in cooperative projects can be reconciled. This can be put in more Kantian terms as well: contributive justice gives us the conditions under which agency, as what someone does, can be aligned with an agent's own status as an end, and the status that others have as ends. I focus principally on the alignment of exercises of one's own agency in the context of cooperative projects with the status of one's co-participants as ends in what follows next.

I believe that a contributive justice principle of contribution in accordance with a principle of *ability*, in particular, achieves an alignment of agency with one's own status, and the status of others, as ends. Assume first that participants to cooperative projects are each governed by the hypothetical imperative given earlier—one that characterizes participation in shared projects. One way that we can recognize the status that others have as ends is by attending to the value of the ends that they affirm. In the context of a cooperative project, this is the shared end that comprises the cooperative project. Attending to the value of this shared end consists in,

among other things, *enabling* the conditions for the realization of that shared end. Enabling the conditions for a cooperative project satisfies the earlier hypothetical imperative. Enabling the conditions for a cooperative project that one wills is a way to undertake the means toward realizing that cooperative project. Since the cooperative projects here are, in particular, schemes of willing contribution, the specific enabling conditions that participants ought to attend to are those that ensure the continuation of the scheme of willing cooperation.

Contribution in accordance with ability is one of the enabling conditions for a continued scheme of willing cooperation. When participants contribute to the extent that they're able, this helps to ensure a continued scheme of willing contribution. Contributing to the extent of one's ability in the context of a cooperative project is an alignment of one's agency with the status of others as ends in this way: one attends to the value of the ends affirmed by others by exercising one's agency toward the enablement of those ends.

Contributing to shared projects in accordance with a principle of ability is an alignment of agency with ends in another respect: by contributing in accordance with one's ability, one is exercising one's agency in a manner *justifiable* to other participants. Treating other people as ends involves seeing them as both sources of justification—as capable of providing reasons for the ends that they will—as well as beings to whom justification is *owed*.¹²⁴ When one behaves in a way that is justifiable to others, or that complies with principles that are justifiable to others, one treats others as beings to whom justification is owed. Contributing in accordance with a

¹²⁴ Kant gives us a way to do both—to satisfy both directions of justification involved in treating people as ends. If the ends we will are *justified* by universal reasons, where these are reasons that can be enshrined in universalizable maxims, then these are ends that could be willed by any other rational being. Acting in accordance with reasons that are justifiable is to treat other agents as beings to whom justification is owed. At the same time, acting in accordance with reasons that are justifiable is also to treat other agents as possible sources of justification—it is to recognize that other agents have value-conferring capacities for practical reason (that they have good wills) that are on par with one's own. Justified reasons are those that, by definition, cannot violate the unconditional value of the good will.

principle of ability allows a participant to a cooperative project to justify her behavior in the following way: she can say to others that she's both doing her part, and doing her best (given her capabilities).

The operative account of agency that I have in mind here—one of agency in the company of other agents, who are also ends—isn't fundamentally at odds with Sen's account of agency. It may even develop a notion of agency that is, by and large, compatible with capability theory. It is, however, a dimension of agency that has yet to be fully developed by Sen and other capability theorists. Sen's notion of agency is principally about the value of *individual* choice—specifically the *freedom* to choose—rather than choice in the context of cooperative projects. The value of having the freedom to choose, for Sen, is irreducible to considerations of well-being. This is the case even if what people freely choose is often the pursuit of well-being.

To be fair, Sen recognizes that notions of agency are complicated by social “interdependences”: exercises of agency are necessarily constrained by both the “intrinsic importance of well-being”, as well as the “agency aspect” of others.^{125,126} We're not told, however, how these social interdependencies bear on the exercise of individual agency. Specifically, we're not told how it is that we ought to differently exercise our own agency in the presence of the agency aspects of others. This is the project that I'm concerned with here: that of aligning our own agency with the status of others as ends, and in particular aligning our agency with the status of our *co-participants* to common projects as ends.

Sen's elaborations on agency as freedom also continue to work principally in a non-cooperative model of agency. On Sen's account, one can have the freedom to choose—can exercise agency—in at least two distinctive ways. The first is freedom as “procedural control”.

¹²⁵ (Sen 1985, pg. 211)

¹²⁶ (Sen 1985, pg. 216)

This is the freedom to not only choose an outcome, but to also exercise a causal role in the achievement of that chosen outcome. Having procedural control does not require that the chosen outcome be achieved; it requires only that someone has acted as a “lever of control” in the attempted achievement of that outcome. Procedural control is a matter of agents being free to try and causally bring about their individually chosen outcomes.

The other dimension of freedom, for Sen, is “effective power”.¹²⁷ This is an account of freedom that is, by contrast, insensitive to the achievement of chosen outcomes through one’s exercise of procedural control. Someone exercises effective power insofar as their chosen outcomes are achieved on their behalf, *because* they chose those outcomes.¹²⁸

Effective power allows Sen to extend his account of agency to institutions and groups: one can still have effective power in these contexts if the institution or group in question realizes the chosen outcomes *because* they are chosen.¹²⁹ Effective power gives an account of *how* agency might still be exercised even in situations where procedural control is impossible—like in policy or political action that has popular democratic support. Agents are unable to exercise procedural control in these cases, to the extent that any one agent’s causal influence may be immeasurably small.

Still, effective power falls short of giving an account of agency in cooperative projects. We can illustrate the difference between agency as effective power and agency in cooperative projects in the following way: effective power can be thought of as the exercise of agency on *behalf of* someone else’s agency. When someone exercises effective power through a group or institution, then agency is exercised on their behalf. The notion of cooperative agency that I’m

¹²⁷ (Sen 1985, pg. 208)

¹²⁸ Accidentally realizing someone’s chosen outcomes doesn’t count.

¹²⁹ Effective control also allows infants, the elderly, and anyone who might “[depend] on the care of others to exercise agency indirectly (Crocker, pg. 154).

interested in here is exercises of agency *in light of* the agency of others. Agency exercised in light of the agency of others—in light of their status as ends, in particular—gives us the desired alignment between exercises of one’s own agency and the ends of others. When one exercises agency *on behalf of* another agent in the manner of effective power, only the agent to whom effective power is attributable is exercising her agency. The agent acting on behalf of her is just a proxy. Exercising agency *in light of* others, by contrast, is to take exercises of one’s *own* agency as appropriately constrained by the agency of others.

VI.i Opportunity cost as a measure of ability

Since capabilities are ultimately still opportunities, we can identify the complementary *opportunity costs* associated with those opportunities. We should also be able to calculate the associated opportunity costs for particular contributive demands that are made of people (call these contributive demands “contributive obligations”, and consider “contributive obligations” to be interchangeable with justified state exactions), on the basis of their individual capability sets. An account of ability to contribute, I argue, can be built around the opportunity costs that accompany contributive obligations. I roughly sketch out next how we might arrive at a sense of ability to contribute from an account of opportunity cost parasitic on capability theory. I then go on to discuss the work that is done by such an account of opportunity cost—work that capability theory alone cannot do—and lastly develop opportunity cost in earnest as an account of ability to contribute.

Ordinarily, opportunity cost refers to the ‘cost’ of the foregone options whenever we have to make a choice between mutually exclusive options. The overall opportunity cost incurred by choosing a preferred option is a function of the value that we would’ve gotten out of the alternative (unchosen) choice options. In virtue of being foregone, the value of these alternatives

becomes, instead, a disvalue. Nearly all choice options have an associated opportunity cost. Chosen options often incur high opportunity costs when the next-best options are valued comparably to the chosen option. In high opportunity cost cases, picking some preferred option, *a*, entails that we forego other options comparable in value to *a*. Low opportunity costs, by contrast, often attach to choice options that have comparatively less valued alternatives—where the alternative options are significantly less valued relative to the preferred choice option.

While opportunity cost is conventionally a utilitarian notion—costs are given in terms of the subjective valuation of choice options—we can also adapt opportunity cost for non-utilitarian use as a measure of the *feasibility* of available opportunities. This non-utilitarian sense of opportunity costs is what I have in mind here. Feasible opportunities are those that have relatively low associated opportunity costs. Opportunities are *less feasible*, or *infeasible*, in virtue of relatively high attendant opportunity costs. The effective opportunities in which capability sets consist are, in this way, also feasible opportunities.

I'm interested in giving an account of the associated opportunity costs of particular contributive obligations. Opportunity costs give us a measure of demandingness in contribution. They reflect the fact that something is given up in the course of discharging a contributive obligation and approximate how much is given up. As a measure of demandingness, opportunity costs also give us a sense of the feasibility of certain contributive obligations—how feasible it is to ask that particular people make certain contributions. I argue later that a practice of asking for feasible contributive obligations is part of ensuring an overall scheme of continued willing contribution. Since opportunity costs in the sense that I intend will vary as a function of individual capability sets—what opportunities are foreclosed to someone in virtue of making good on a contributive obligation will depend on the composition of her individual capability

set—they also gesture at the extent of someone’s *ability* to contribute. Determining opportunity costs will reveal that some people would have to give up unreasonably more in the course of fulfilling certain contributive obligations.

This notion of opportunity cost supplements the existing account of ability as capability sets in a much-needed way. It allows us to meaningfully conclude that some people are more *able* to contribute than others, *given* their more expansive capability sets. We cannot conclude this from capability theory alone.

With capability theory alone, we can judge, at minimum, that some people’s capability sets are more expansive than others. Expansiveness can exist along at least two dimensions: some people’s capability sets will be more expansive in the sense that they consist in a wider array of effective opportunities. Others may have more expansive capability sets not in virtue of having *more* effective opportunities, but rather in virtue of having effective opportunities that are more accessible. Differences in expansiveness between individual capability sets will not necessarily be objectionable. Since we’re working in the post-distribution—under the assumption that distributive justice obtains—all capability sets will be above some sufficientarian standard required by distributive justice.

A few key items fail to follow from the mere observation that some people’s capability sets are more expansive, where these are each the starting components needed for constructing an account of contributive justice: (i) a claim that those with more expansive capability sets ought to make greater contributions (because they’re more *able* to contribute), (ii) a specification of how much *more* those with more expansive capability sets ought to contribute, and (iii) a specification of what kinds of contributive obligation, in practice, the state can permissibly

demand.¹³⁰ I discuss next why each of these items aren't inferable from capability theory alone, and how introducing the notion of opportunity costs helps fill in some of the gaps.

The first item that we can't get out of capability theory alone is the claim that those with more expansive capability sets ought to contribute more. One reason that this claim is non-inferable is because of capability theory's status as a theory of distributive justice.¹³¹ Capability theory principally does the work of distributive justice by gesturing at an above-sufficientarian level of well-being, understood in terms of capabilities (and agency, for Sen), that is owed to people. The specific account of well-being given by capability theory is one of what people *can do*—their well-being freedoms. What is needed for contributive justice is an account of what people *can contribute*. Although an account of what people *can do* is at least closely related to a sense of ability to contribute, it cannot constitute an account of ability to contribute. Prescriptive levels of well-being, even when the relevant metric for well-being is capabilities, tell us insufficiently much about what can or ought to be given up.

Opportunity cost can bridge the gap between what people *can do*, and what people *can contribute*. What can be contributed constitutes both the content of the claims that participants in cooperative projects have on each other, as well as what can be permissibly exacted by the state. Permissible exactions are *permissible* precisely because their *costs* are thought to be, in one way or another, within acceptable bounds. What we need is an account of costliness that capability theory itself does not provide.

¹³⁰ This point is an extension of the argument that theories of distributive justice *underdetermine* the question of contributive justice. A comprehensive specification of distributive justice, no matter what theory of distributive justice this is, fails to tell us how the associated burdens ought to be allocated—what people owe as a matter of justice, and how much they owe. These are distinctively questions of contributive justice.

¹³¹ Distributive theories of justice, I've argued, do not have immediate implications for matters of contributive justice, which are a distinctive matter of justice. We should expect capability theory, as a theory of distributive justice, to fare the same way.

As a metric of costliness—a metric of contribution—opportunity cost also furnishes another component of an account of contributive justice: a sense of *how much more* those with more expansive capability sets can contribute. Opportunity cost can give an interpersonally comparative sense of how much more some people ought to contribute, because it is an *objective* metric of contribution. Opportunity costs get this objective quality from its basis in capabilities theory, which itself provides an objective metric of distribution.

I briefly discuss here what, exactly, makes capabilities an objective metric of distribution. This illuminates how opportunity costs are also an objective metric of contribution. It also helps distance the account of opportunity cost I defend here from conventionally utilitarian notions of opportunity cost. Objective metrics are those that are defined independently of “subjective evaluative states”.¹³² Utility, as happiness or preference-satisfaction, is an example of a metric that consists in subjective evaluative states. The degree to which a subjective metric is present is privately determined and idiosyncratic. As such, subjective metrics of distribution will generally also resist interpersonal comparison. The degree of one’s person’s private satisfaction will be either incomparable with someone else’s, or sufficiently difficult to access as to preclude comparison. The account of opportunity costs that follows from utility as a distributive metric is likewise a subjective metric. The value of foregone alternatives is a matter of subjective valuation. Thus, the opportunity costs associated with chosen options will also be a matter of subjective valuation.

By contrast, capability theory offers an *objective* metric of distribution. This is because, first, capability theory presupposes an objective conception of *ends* that ought to be achievable through the effective opportunities afforded by capabilities. These ends comprise a set of

¹³² (Anderson 2010, pg. 85)

essential functionings, where essential functionings are both determined independently of subjective evaluation, and publicly knowable. The possibility of interpersonal comparisons for capability theory follows: we can tell which functionings have been achieved, how well they've been achieved, and how achievable the functionings in question are. What the set of essential functionings actually consists in will vary depending on such factors as the purposes of the individuals and groups involved, the stage of social and moral progress for which functionings are being determined, and the outcomes of social and political deliberation. If capability theory is coupled with an account of Rawlsian democratic equality, for instance, then the relevant functionings are those that are required for equal citizenship in a just society.¹³³ Regardless of what the actual set of functionings is populated by, capabilities theory says that people should have the capabilities with which to achieve these functionings, as well as the real freedom that consists in being able to choose which functionings to realize, and what combination of capabilities to undertake in order to realize those functionings.

Second, capabilities themselves—while remaining individually sensitive, to an extent—are also an objective metric. Capabilities must be objectively conceived in light of their relationship to functionings, which are objective. In many cases, an associated capability (how a functioning is achieved) will inform how successfully a functioning *can* be achieved (the “level of well-being achieved”), and whether the functioning in question is achieved at all. Consider a case of someone strong-armed into receiving medical treatment: this may allow the beneficiary of medical treatment to achieve a functioning of morbidity avoidance, but perhaps not as well as would've otherwise been possible.¹³⁴ Since the achievement of morbidity-avoidance is an

¹³³ (Anderson 2010, pg. 86)

¹³⁴ Sen gives morbidity-avoidance as one example of a possible functioning (Sen 1992, pg. 39).

objective state, the associated capabilities are also objectively evaluable with respect to how well they lead to the functioning of morbidity-avoidance.

The component conditions of individual ability and resources into which capabilities can be decomposed are also objective. What resources and abilities are needed in order for people to be able to exercise certain capabilities is not wholly idiosyncratic.¹³⁵ Capabilities are sensitive to variations in individual ability to convert resources to functionings, but the degree to which they're sensitive is limited by both considerations of resource availability, and the aims of the common political project. Capability theory precludes people from overstating their resource needs for achieving valued functionings.

When opportunity costs are determined with respect to capability sets rather than subjective evaluations of foregone alternatives, then they too constitute an objective metric. Making contributions requires either the direct or indirect use of abilities and resources, which include material resources, time, and effort. The abilities and resources that are required for contribution will often be depletable (or unique) in the following sense: expending abilities or resources toward a contributive obligation means that those same abilities and resources can no longer be used toward alternative options. Some resources are replenishable—given sufficient time, for instance, I could generate more revenue to make up for what I contributed in taxes, or given a night of rest I could return to the task of disseminating political literature with renewed vigor—but in the immediate aftermath of a contribution, the resources that were used toward that

¹³⁵ I have in mind here something like the problem posed by people with expensive tastes. An expensive tastes-type problem might complicate the conversion of resources to valued functionings if expensive tastes were included among the conversion factors that capabilities had to be sensitive to. Capability theory can avoid problems of expensive tastes altogether by specifying valued functionings that rule out the possibility that expensive tastes could be a relevant conversion factor. Achieving a functioning of equal political standing, for instance, is insensitive to variations in taste. Expensive taste cannot be a relevant conversion factor in the achievement of equal political standing because having more resources, resources that are more esteemed, or resources that are shinier, does not affect one's ability to achieve equal political standing.

contribution become unavailable. This means that those same resources cannot be put toward the realization of other opportunities.¹³⁶ Unchosen opportunities that would concurrently require the same abilities or resources are foreclosed. The unchosen alternatives that are foreclosed after remitting a contributive obligation are foreclosed opportunities that are part of one's capability set—keeping in mind that capability sets are comprised of not only the effective opportunities that are ensured by distributive justice, but also effective opportunities for functionings that are in line with someone's reasonable conception of a good life.¹³⁷

Opportunity costs that are attached to particular contributive obligations reflect these foreclosed alternatives. Thus, opportunity cost is a measure of demandingness not with respect to direct resource and effort expenditures—which may be both difficult to measure and resist interpersonal comparison—but rather with respect to an objective conception of valued functionings and their associated capabilities. How these foreclosed opportunities enter into a determination of opportunity cost, how costly the loss of these opportunities is viewed, is independent of mere subjective evaluation.

Demandingness here isn't *just* a measure of resource and effort expenditures, but rather a measure of the opportunities that would be foreclosed by expending one's resources and efforts in a particular way.¹³⁸ Resources are treated instrumentally, as conditions of effective opportunity. Foreclosed opportunities—opportunities that are given up—are instead the proper measure of contribution. This instrumental treatment of resources is shared with capability

¹³⁶ This is not to imply that distinctive capabilities will require correspondingly distinct abilities and resources. Necessarily, there will be overlap between the abilities and resources that are required for different capabilities. Money, or liquidity, for instance, is an example of a resource that can undergird numerous capabilities, including the capability for leisure, material self-determination, and so on (Nussbaum 2000, pg. 233).

¹³⁷ (Nussbaum 2011, pg. 200)

¹³⁸ We might think that the exercise of certain kinds of ability is intrinsically valuable, like in certain Marxist notions of work as self-realization (Elster, pg. 110). The notion of intrinsically valuable abilities is compatible with the account of opportunity cost that I have in mind here. An exercise of ability that *is* a form of self-realization constitutes a functioning—a valued end for which there should be associated effective opportunities.

theory: capability theory looks to not resources as the relevant metric of distribution, but rather the opportunities that are afforded by having resources.

A plausible account of contribution will have to be individually-sensitive, to some degree. One of the merits of capability theory is that it is both individually sensitive, while still affording the possibility of interpersonal comparisons. An account of opportunity cost built on capability theory should retain these merits.

Variations between people in the opportunity costs associated with the same contribution are not the result of variations in subjective evaluation. Rather, the more expansive someone's capability set is—where an objective sense of comparative expansiveness between individual capability sets can be given by capability theory itself, as discussed earlier—the more likely it is that: (i) no effective opportunities will be foreclosed to them as the result of discharging a contributive obligation, (ii) any foreclosure of opportunities will be unobjectionable because such foreclosures do not impede the achievement of valued functionings, and (iii) any foreclosure of opportunities will be unobjectionable because such foreclosures impede the achievement of functionings there is no good reason to value.¹³⁹ People with more expansive capability sets are likely to have correspondingly smaller opportunity costs associated with their contributive obligations. In this way, opportunity cost *qua* capabilities allows us to make the relevant interpersonal comparisons objectively—we can say that someone is *more* able to contribute in light of the smaller opportunity costs that contribution would incur to them without resorting to subjective evaluations in order to make this claim.

¹³⁹ This third tendency attributable to those with more expansive capability sets admittedly gestures at something slightly different. It indicates not so much that those with more expansive capability sets will have smaller opportunity costs associated with their contributive obligations, but rather that what opportunity costs that they incur deserve little or no recognition from the point of view of, say, publicity or democracy. I elaborate on this claim later with respect to the more expansive capability sets of the wealthy.

The antecedent claims tying a more expansive capability set with smaller opportunity costs can lead to a justification of progressive taxation. Two additional assumptions must be made in order for this to be possible: first, an assumption that possessing greater income and wealth confers a more expansive capability set and makes possible the achievement of a wider range of valued functionings. Second, an assumption that it is tax exactions of money, in particular, that have nominal effects on an already-expansive capability set.

The assumption that greater income and wealth confers a more expansive capability set doesn't require much defense. Having sufficient income and wealth is already a condition for the achievement of essential functionings like “[material] control over one's environment”. Beyond that, money enhances access to capabilities like effective opportunities for education or professional development when such advantages are purchasable. Having sufficient income and wealth is also a condition for distinctive functionings like security against financial risks.

I discuss the assumption that money should be the relevant *form* of tax exaction next. In what immediately follows, I take the relevant kind of contributive obligation to be tax exactions, in particular. I restore the originally intended scope of contributive obligations to include permissible *non-tax* state exactions later on.

Once capability theory is supplemented by an appropriate account of opportunity cost, then we can get out of it a specification of what *kinds* of tax contribution it is permissible for the state to demand. Using opportunity cost as a measure of demandingness militates in favor of *liquid* tax exactions, like money. Other things being equal, exactions of money will be comparatively less demanding than illiquid tax exactions. Illiquid forms of tax, like the exaction of in-kind goods and services, will generally incur higher opportunity costs. We can see this from examples of public works *corvée*, where labor is the relevant form of in-kind tax

exaction,¹⁴⁰ and examples of the direct appropriation of illiquid assets, like the requirement that soldiers be quartered in private homes. Even assuming that a practice of illiquid tax exaction is compatible with distributive justice, it's clear that these practices of illiquid tax exaction would pose greater interference with effective access to valued functionings like mobility and command over a private space, respectively.¹⁴¹ Still, it may be permissible, according to an analysis in terms of opportunity costs, for the state to make *non-tax* in-kind exactions of goods and services. I discuss cases of this later.

Given that tax exactions of money incur comparatively fewer opportunity costs, we can conclude that when tax exactions of money are coupled with the already-more expansive capability sets of the wealthy, then the ensuing opportunity costs on the part of the wealthy will be smaller. Tax exactions of money are less likely to foreclose effective opportunities of the wealthy, given their greater effective access to most opportunities. Even if tax exactions do foreclose certain opportunities on the part of the wealthy, this is unlikely to preclude the achievement of valued functionings by the wealthy. The wealthy are likely to have capability sets that are more expansive with respect to their *array* of opportunities as well. By comparison, tax exactions of money from the less wealthy are more likely to both foreclose opportunities entirely, as well as preclude the achievement of valued functionings.¹⁴² Taken together, these opportunity cost considerations militate in favor of a progressive rate structure.

VI.ii The loss of disvalued capabilities

There's one more reason to think that tax exactions of money from the wealthy have relatively smaller associated opportunity costs. This is in reference to the last tendency, given

¹⁴⁰ (Smith, pg. 21)

¹⁴¹ (Taylor, pg. 275)

¹⁴² Keeping in mind that these preclusions of valued functionings in the post-distribution will still be consistent with distributive justice.

earlier, that can be attributed to those with more expansive capability sets: that even if tax exactions foreclose certain opportunities entirely, at least some of these foreclosures of opportunity will be unobjectionable because they impede functionings that we have no reason to value. Strictly speaking, this isn't so much a claim that the wealthy have smaller opportunity costs associated with tax remittance. Rather, this is a claim that we can justifiably disregard some of the opportunity costs that might be incurred by tax remittance by the wealthy. The opportunity costs that can be disregarded are those that reflect the loss of capabilities we have no reason to value from the point of view of society as a cooperative enterprise, or, alternatively, from a democratic point of view. As such, the loss of these capabilities shouldn't count in the determination of opportunity costs intended to approximate a taxpayer's ability to contribute. A taxpayer's ability to pay tax is undiminished by the fact that she stands to lose access to capabilities we have no reason to value.

One capability that fits the bill here is the capability for unequal political influence. By this I mean, specifically, the capability for strategically using wealth in order to acquire political power. The capability for unequal political influence is almost exclusively evinced by socioeconomic elites for two reasons: first, because its attendant resource and ability conditions require high threshold levels of wealth. Second, because the capability for unequal political influence is commonly sought out by socioeconomic elites. Although capabilities for unequal political influence by socioeconomic elites are rightly disvalued and proscribed in popular governments—the exercise of such capabilities leads to plutocratic capture such that political outcomes cease to track the will of citizens at large—popular governments have nevertheless “eternally suffered attempts by wealthy citizens to manipulate politics to their own benefit”.¹⁴³ I

¹⁴³ (McCormick, pg. 15)

briefly discuss next why socioeconomic elites are disposed to seek out unequal political influence, and the mechanisms by which wealth can be transformed into political power.

Socioeconomic elites tend to seek out capabilities for unequal political influence—they make use of such opportunities where they exist, and may create them where they’re unavailable. Capabilities for unequal political influence are sought both instrumentally, and as ends in themselves. Instrumentally, socioeconomic elites engage in strategies of wealth and income defense through the use of political influence.¹⁴⁴ Through political influence, socioeconomic elites make it more likely that policies favoring the entrenchment of their rights to wealth and income are passed. This can be done by either persuading officeholders directly—through the deployment of lobbyists—or less directly, by electing officeholders sympathetic to elite interests. Another instrumentally attractive feature of political influence is this: socioeconomic elites may see the considerable prerogatives of government and political offices as potential sources of private privileges and indulgences.¹⁴⁵

Political influence may also be sought non-instrumentally, as an end in itself. This is especially likely if socioeconomic discrepancies are sufficiently large such that an “ethos of inequality” is in effect.¹⁴⁶ An ethos of inequality is one in which superior economic standing is widely conflated for superior moral standing (superiority with respect to intrinsic worth, intelligence, and so on).¹⁴⁷ Socioeconomic elites may seek out greater political influence as a

¹⁴⁴ The terms “wealth defense” and “income defense” are terms coined by Jeffrey Winters in *Oligarchy*. They refer to strategies, deployed exclusively by the wealthy, to guard “their fortunate material position against an array of threats to their property claims or rights” (Winters, pg. 22).

¹⁴⁵ (Sitaraman, pg. 236)

¹⁴⁶ (Sitaraman, pg. 234)

¹⁴⁷ The notion of an ethos of inequality has been widely discussed: Aristotle mentions it in his *Politics* (“For one lot thinks that if they are unequal in one respect (wealth, say) they are wholly unequal...”), and Rousseau develops the etiology of an ethos of inequality in his *Discourses on Inequality* (Aristotle, pg. 80). More recently, Christopher Hayes sketches out a meritocratic variation on an ethos of inequality: that, under conditions of apparent formal equality, those who rise to the top see themselves as winners of a “fair competitive system”, and thus superior with respect to “ability and drive” (Sitaraman, pg. 234 and Hayes, pg. 51).

natural extension of their felt superior moral standing: if greater wealth is a mark of superiority in all respects, then it must also be a mark of superiority with respect to the ability for governance.

It's clear, then, that the capability for unequal political influence exists in a few forms, since there are a number of mechanisms by which economic clout can be transformed into undue political clout. Some of the mechanisms for unequal political influence through the exercise of wealth are direct: socioeconomic elites may seek out and occupy political office by running more expansive political campaigns. Political powers and offices can also be purchased, in the manner of bribery or simony. Since direct exchanges of wealth for political influence are usually, at least formally, blocked in most states,¹⁴⁸ the mechanisms through which unequal political influence is exercised are usually less direct. Socioeconomic elites may instead constitute a "selectorate" — the dominant constituency whose preferences are most often reflected in electoral outcomes, and the constituency from which actual officeholders are drawn.¹⁴⁹ Officeholders who are themselves non-elites may be willing to advance the political interests of the wealthy selectorate in exchange for personal power. It's clear that socioeconomic elites have both a desire for capabilities of unequal political influence, as well as a variety of capabilities for unequal political influence at their disposal.

Imputing a capability for unequal political influence to socioeconomic elites gets us a mildly anti-plutocratic argument for progressive taxation. Since a steeply progressive tax scheme imposes a higher tax rate on the wealthy, we can conclude that at least some of the money that is taxed away from higher income and wealth brackets would have been instead used to acquire unequal political influence. Assessments of opportunity cost associated with the tax liabilities of

¹⁴⁸ (Walzer, pg. 100)

¹⁴⁹ (de Mesquita, *et al.* pg. 42)

the socioeconomically elite in a progressive scheme should not count the loss of capabilities for unequal political influence. Capabilities for unequal political influence are incompatible with democracy, as well as society conceived as a cooperative enterprise. The loss of these capabilities is really no loss at all. Socioeconomic elites cannot claim that the opportunity costs associated with their tax burdens under a progressive scheme are amplified by the loss of opportunities for unequal political influence. They cannot, in effect, claim that their ability to pay tax is diminished because of possible foreclosures in proscribed opportunities.

VI.iii Tying up loose ends in an account of ability to contribute in terms of opportunity cost

Introducing a complementary notion of opportunity cost to capability theory gets us a sense of *ability* to contribute that we'd be unable to get out of capability theory itself. When the opportunity costs associated with making a particular contribution are smaller for someone, then we can say that they're more *able* to contribute—that contribution would require them to give up less than someone who has higher opportunity costs associated with the same contribution.

An opportunity cost account of ability to contribute may seem like an unorthodox account of *ability* for the following reason: if we have any intuitions at all about what the ability to contribute might consist in, we tend to have something like a utilitarian account of ability in mind. This is, specifically, an understanding of ability as a depletable store of some kind. According to the utilitarian account, one possible sense of someone's ability to contribute is their absolute level of utility. This notion of ability as a depletable store gives rise to two additional intuitions about what an account of ability to contribute might be characterized by: first, that abilities to contribute can be compared *ex ante*, without yet knowing what the contributions in question will be. Second, that the *ability* to contribute, and the contributions themselves, must be

given in terms of the same currency. If contributions are depletions of utility, for instance, then the store being depleted must also be understood in terms of utility.

The opportunity cost account of ability does not clearly fit with an understanding of ability as a depletable store. This is another way that a contributive justice view diverges from conventional utilitarian and distributive justice views. Utilitarian and distributive justice views of contribution tend to conceive of the ability to contribute as a depletable store, because there's some post-contribution outcome being aimed at. For both utilitarian and distributive justice accounts of contribution, contribution can be required short of some acceptable depletion threshold. A contributive justice view, by contrast, is interested in whether people are adequately using their capabilities for contribution. It is not interested in any particular post-contribution outcome.

An opportunity cost account of ability notably diverges from the depletable store picture: for one, it's not clear that there we can have an *ex ante* sense of ability to contribute on the opportunity cost view—a sense of what people's abilities to contribute are without yet knowing what the contribution in question is supposed to be.¹⁵⁰ Opportunity costs are calculable with respect to particular contributions, and the potential effects of remitting those contributions on one's capability set.

Another divergence is with respect to currency: if we were to identify a shared currency in which both contributions and abilities could be given on the opportunity cost view, the obvious choice would be opportunity. But people aren't, strictly, contributing *opportunities* when they're making contributions. Rather, they're more likely to be contributing the conditions for

¹⁵⁰ The intuition that we should be able to compare abilities to contribute in the absence of knowing what the contributions will be may be a holdover from intuitions about levels of *well-being*. We can directly compare levels of well-being in a way that we might not be able to with abilities to contribute.

opportunity. And even if people are contributing opportunities themselves in some metaphysically unusual sense, their opportunity-contributions are unlikely to be the same as the opportunities that they give up—whereas an account of ability as a depletable store might require that what was being contributed be in the same currency as the corresponding depletions. Teaching someone to ride a bicycle, for instance—assuming that this constitutes an effective opportunity for bicycle riding, rather than furnishing the conditions for it—does not foreclose my own opportunities for bicycle riding, though it may foreclose other opportunities of mine.

An opportunity cost account of ability does, however, furnish a plausible account of *ability* to contribute. It gives genuinely holistic assessments of ability. Opportunity costs for particular contributions are assessed with respect to the entire capability sets of individuals, barring disvalued capabilities. The ensuing opportunity costs generalize across the various capabilities by which the set is populated.

It's worth noting why capability sets, by themselves, do not give us a sense of someone's ability with respect to *contribution*, though they give us a sense of ability, generally. Capabilities are sets of discrete items. They are populated by “vectors of functionings” that represent the “various alternative combinations of functionings from which [someone] can choose one combination”.^{151,152,153} Opportunity cost allows us to generalize across these different capabilities in an assessment of one's ability to contribute.

¹⁵¹ (Sen 1992, pg. 40)

¹⁵² (Sen 1992, pg. 50)

¹⁵³ The formal characterization of capabilities is this: for some person i , her capability set will be Q_i for some set of commodity vectors X_i .

$Q_i(X_i) = [b_i \mid b_i = f_i(c(x_i)) \text{ for some } f_i(\cdot) \in F_i \text{ and for some } x_i \in X_i]$
 b_i is a functioning vector. It is understood in terms of $f_i(\cdot)$, which is a “personal utilization function” that reflects one possible pattern of use of commodity vector x_i that i can undertake, and $c(\cdot)$, which is a function “converting a commodity vector into a vector of characteristics of those commodities” (Sen 1987, pg. 7). Capability sets consist in discrete functioning vectors, representing the various combinations of “beings and doings” that a person *can* achieve (Sen 1992, pg. 40).

VII. Implications of the opportunity cost view for income as tax base and the realization principle

The opportunity cost view of contribution has implications for more technical aspects of taxation as well—principally the choice of tax base, and the defensibility of a realization principle. First, the opportunity cost view gives us reason to reconsider some of the conventional motivations for choosing income as a tax base. Ordinarily, we might think that if opportunity cost considerations militate in favor of *liquid* forms of tax exaction like money, then we should also consistently favor tax bases that are themselves forms of liquidity, like income. In order to make the tax base and the *form* of tax exaction symmetrical with respect to liquidity, the understanding of income is limited to cash receipts. This excludes in-kind receipts of goods and services.¹⁵⁴ An account of income limited to cash receipts avoids the possibility of requiring some taxpayers to sell their illiquid receipts for sake of tax remittance.

Opportunity cost considerations of the kind I've discussed would reject an account of income limited to only cash receipts.¹⁵⁵ Rather than categorically excluding the in-kind receipts of goods and services, an opportunity cost analysis would require that we at least look at the conditions under which the good or service was received, the magnitude of the receipt, and the overall economic standing of the taxpayer. In light of how these considerations affect a taxpayer's capability set, a determination can then be made about whether the in-kind receipt in question ought to be taxed, and how it should be taxed. The opportunity cost analysis distinguishes, for instance, between property received as compensation for services, and property received as a prize—say, in the context of a drawing or lottery. With property received as

¹⁵⁴ (Dodge 1989, pg. 133)

¹⁵⁵ Limiting an account of income to just cash receipts may also promote tax evasion. Taxpayers may be encouraged to arrange for non-cash compensation—compensation in the form of in-kind goods and services—if doing so would thereby avoid an income tax (Dodge 1989, pg. 133).

compensation, the taxpayer has already expended her efforts and resources in the course of rendering the services for which compensation is owed. The in-kind receipt is expected remuneration. Tax remittance on in-kind receipts intended as compensation thus has a comparatively greater associated opportunity cost. Rendering the services for which compensation is owed has its own associated opportunity cost. Compensation is intended to mitigate at least some of the costs that have been incurred already. In addition, because compensation is expected, the taxpayer may have already planned outlays in anticipation of the receipt of compensation.¹⁵⁶

By contrast, property received as a prize is usually a windfall.¹⁵⁷ Other things being equal, tax remittance on in-kind receipts that are prizes will have smaller associated opportunity costs than the opportunity costs associated with taxes on in-kind receipts as compensation.¹⁵⁸ Fewer resources and efforts are generally expended in order to achieve eligibility for a prize—in order to participate in a lottery or a drawing—and there's likely to be less reliance on the receipt of the prize, since receipt of the prize (winning) could not be reasonably expected. Thus, on an opportunity cost analysis, it might be permissible to not only include non-cash, in-kind receipts as taxable income, but also to tax in-kind receipts like prizes at a higher rate than in-kind receipts intended as compensation.¹⁵⁹

¹⁵⁶ In order for these potential outlays to count in determinations of opportunity cost associated with tax remittance, they must be outlays that are not incompatible with the project of democracy itself.

¹⁵⁷ Merit-based prizes may be excluded from this category of windfall prizes. Prizes that are awarded on the basis of a competitive application may require significant effort and resource expenditures with attendant opportunity costs.

¹⁵⁸ Naturally, an opportunity cost analysis will also be sensitive to the features given earlier: the overall economic situation of the taxpayer, as well as the magnitude of the prize receipt. These will be reflected in the eventual opportunity costs associated with tax remittance. Someone who is already economically well off will suffer fewer opportunity costs as the result of a high rate of tax on her in-kind prize receipt than someone worse off.

¹⁵⁹ The results of an opportunity cost analysis are consistent with current tax doctrine in at least this respect: other things being equal, both accounts include, in taxable income, in-kind receipts intended as compensation and in-kind prize receipts (Dodge 1989, pg. 133).

Another respect in which the opportunity cost view of contribution has implications for taxation is this: an opportunity cost analysis challenges the tax convention of a principle of realization (a “realization principle”). The realization principle specifies *when* assets that appreciate value should be taxed. For assets that accrue value, but that do not yield returns by way of generating periodic “rents, interest, [and] dividends”, the realization principle defers taxing an asset’s value until its sale. Only at the point of sale is the value of the asset ‘realized’ in the form of cash receipts. The realized value of the asset is the difference between its sale value and its basis (what was paid to acquire the asset in the first place).

The realization principle applies principally to illiquid assets like property (including land, mineral interests, and intellectual property) and unrealized investments. An opportunity cost analysis and the realization principle diverge sharply on the tax treatment of illiquid assets. While the realization principle recommends deferring taxation of illiquid assets until sale, an opportunity cost analysis may authorize taxing the *unrealized* value of an illiquid asset, even if this forces the sale of an asset, or requires borrowing on the part of the taxpayer. I focus on the permissibility of forced sales of illiquid assets in what follows.

The realization principle is meant to guard against the possibility of such forced sales and borrowing by assessing tax *only* at the time of sale. This ensures sufficient liquidity for tax remittance. It is assumed that tax remittance is at least made possible by the recently completed sale. Tax assessment according to a realization principle can be contrasted with what may be required by an accrual method of tax assessment. An accrual method of tax assessment takes the market value of an asset within the tax period as the relevant tax attribute, even if this value is unrealized (non-liquid). This risks forcing the sale of an illiquid asset if a taxpayer has insufficient liquidity with which to remit tax on the asset. An opportunity cost analysis will

sometimes require an accrual method of tax assessment to the extent that it does not categorically rule out the possibility of taxing unrealized asset value.¹⁶⁰

In this way, both the realization principle and an account of income as cash receipts share the same underlying assumption that the forced sale of illiquid assets for tax remittance is prohibited.¹⁶¹ This prohibition is conventionally motivated by two considerations: inefficiency and unjustified financial loss on the part of individual taxpayers. With inefficiency, the worry is that forcing the sale of illiquid assets for tax purposes introduces significant economic distortions. Resources in the market may no longer be devoted to their most highly-valued uses given sufficiently many forced-sale transactions. At least some people will be involuntarily offloading their illiquid assets at lower prices than they might otherwise be willing to part with them. The market may suffer a surfeit of particular kinds of illiquid asset being offloaded at the end of tax periods—a source of depressed market demand for the asset in question.

The effectiveness of prices as information signals may, in turn, also be diminished. Prices are classically conceived as the result of interaction between forces of supply and demand.¹⁶² Their usefulness as information signals depends on their accurately reflecting an interaction between supply and demand, and thus a market “community [consensus on] the value at which the market is willing to buy and sell”.¹⁶³ In the presence of sufficiently many forced sales of

¹⁶⁰ According to current tax practices, some illiquid assets are, arguably, taxed on their unrealized value. Property tax is an example of this. Property taxes might, however, be reconciled with a realization principle in the following way: home ownership confers an imputed income in the form of foregone rental costs. In virtue of owning their homes outright, homeowners don’t have to pay rent. Property tax might be in this way considered an income tax on *imputed* income.

¹⁶¹ We might also think that the realization principle is straightforwardly entailed by a cash receipts account of income. If income is understood strictly in terms of cash receipts, then the unrealized value of an illiquid asset cannot be taxed—the unrealized value of an illiquid asset does not constitute income. Only the *liquid* value of assets—either as periodic rents, interest, or dividend yields, or from the sale of the asset—can be income by definition. Alternatively, the realization principle might be considered an independent constraint on taxation. Joseph Dodge, for instance, comes to treat the realization principle as an external constraint on taxation in his most recent publications (Dodge 2016, pg. 538).

¹⁶² (Orlean, pg. 209)

¹⁶³ (Orlean, pg. 208)

illiquid assets, prices cease to reflect mere supply and demand. A sudden market glut from multiple people offloading the same kind of asset will drive down prices. Consumers who capitalize on the sudden downturn in prices may benefit from purchasing at a bargain price well below their own reserve prices, gaining an illicit surplus.

The second reason for prohibiting forced sales is that they constitute impermissible “government intrusion into private decisions” regarding the disposal of assets.¹⁶⁴ The intrusions are especially objectionable because they’re likely to be financially disadvantageous for taxpayers: the forced sale of an illiquid asset, which happens on an abbreviated timetable, may take place at a loss. Sellers are unable to get within the ordinary market going rate for their assets, because sales must take place quickly, and there may be multiple people trying to simultaneously offload the same kind of asset.

Although an opportunity analysis cost may occasionally require the forced sale of illiquid assets, or require that a taxpayer borrow against the value of her assets in order to free up sufficient liquidity for tax remittance, it can do so defensibly. The opportunity cost analysis can adequately address objections to forced sales.

First, an opportunity cost analysis responds to concerns about market distortion and inefficiency. In short, it’s unclear that the forced sales of illiquid assets that may be required by an opportunity cost view of taxation have greater distortionary effects than those posed by the realization principle itself. The realization principle, arguably, treats illiquid assets favorably by deferring tax on such assets until sale. This may incentivize inefficient substitutions of liquid for illiquid assets: in order to defer tax, or avoid it entirely (for illiquid assets intended for bequest), taxpayers may choose to invest instead in illiquid assets.

¹⁶⁴ (Dodge 2016, pg. 547)

Any distortionary market effects issuing from an opportunity cost view of taxation will also be reined in by the very nature of an opportunity cost analysis. An opportunity cost analysis distinguishes between *types* of illiquid asset along at least two dimensions: (i) how closely-held an asset is, and (ii) the ease with which an asset can be liquidated. Some assets are more closely-held than others in the sense that liquidation of those assets would have correspondingly higher associated opportunity costs. Examples of such closely-held assets include, say, pension accounts. The opportunity cost analysis is unlikely to require that pension accounts be taxed on their unrealized value, thus risking the need for a forced sale.

An opportunity cost analysis will also be sensitive to the type of illiquid asset in question. Some illiquid assets are more easily disposed of than others in the event of a forced sale. In general, securities, and in particular stock holdings, will be more easily liquidated than, say, holdings of unimproved land. The very existence of stock exchanges is intended to enable the relatively frictionless liquidation of stock holdings.¹⁶⁵ The comparative ease of offloading stock holdings militates in favor of taxing them at their unrealized value: even if stock holdings have to be sold on short notice for purposes of tax remittance, the financial loss that would be suffered would be smaller than the financial losses likely to attend the forced sale of unimproved land. Taxing stock holdings on their unrealized value is a more justified practice than taxing unimproved land on its unrealized value, on an opportunity cost view.

The fact that an opportunity cost analysis would be sensitive, in its tax recommendations, to both how closely-held the assets in question are, and the *kind* of illiquid asset at issue, is some evidence that objections to the forced-sale entailments of the opportunity cost view overstate the financial losses that might be incurred.

¹⁶⁵ (Orlean, pg. 209)

VIII. In-kind non-tax exactions

Taking opportunity cost as the proper measure of contribution will not always militate in favor of liquid forms of contribution, like money.¹⁶⁶ In some non-tax cases, opportunity cost considerations will authorize in-kind exactions of skill and labor. Consider the persistent shortage of doctors in rural and remote regions. This is a problem of international scope, and numerous countries have devised compulsory service requirements as a condition of medical training and licensing.¹⁶⁷ Compulsory service requirements may be defensible under an account of opportunity costs *qua* capabilities. The justification for attaching compulsory service requirements to medical licensing and practice may be something like this: with a few exceptions, doctors generally earn incomes that are several times those of the gross national income per capita.¹⁶⁸ Requiring doctors to fulfill compulsory service requirements as a condition of medical licensing—as a contributive obligation—would have arguably acceptable associated opportunity costs.

IX. Conclusion

I've tried, here, to defend an account of contributive justice that consists in a principle of contribution in accordance with ability. The principle I have in mind is deontic rather than utilitarian. A deontic principle of contribution in accordance with ability, I've argued, better captures the agency of participants to genuinely cooperative projects—it better captures the ways that such agents are accountable to each other, and regards agents as ends.

¹⁶⁶ This is arguably a merit of the opportunity cost *qua* capabilities model: that it isn't limited to prescribing just tax contributions.

¹⁶⁷ See Frehywot, *et al.* *Compulsory service programmes for recruiting health workers in remote and rural areas: do they work?*

¹⁶⁸ The exceptions include Hungary, where doctors are regularly paid less than the gross national income per capita, though an informal system of patient-doctor gratuities may supplement baseline doctor incomes. See Kornai, 2000.

In the latter half of the paper, I developed an account of *ability* to contribute informed by capability theory. Using capability theory in service of an account of contributive justice required adapting it in certain ways: the operative notion of agency was reconsidered, and an account of opportunity cost was grafted onto capability theory. Opportunity cost, I argued, gave a measure of one's ability to contribute. An opportunity cost account of contributive ability, in turn, has implications for both the technical features of taxation, and for the possibility of requiring in-kind non-tax contributions.

CHAPTER THREE

TAX CONTRIBUTIONS AND POLITICAL LEGITIMACY

I. Introduction

Considerable evidence in the international development studies and fiscal sociology literature points to a close relationship between taxation and political legitimacy. The exact nature of the relationship, however, can be hard to pin down. It is commonly recognized that taxation—understood here specifically as a relatively centralized system of coercive revenue-raising—contributes to the formation of sophisticated bureaucratic states.^{169,170} And legitimacy is usually a predicate of states, rather than the subjects of those states. The presence of a system of direct taxation as a mode for raising state revenue has also been shown, in many cases, to make eventual democratization more likely.¹⁷¹ Paying taxes entitles subjects of the state to a claim on the direction of society. The state is inclined to remain accountable to its subjects insofar as it continues to rely on them for revenue, and this accountability underwrites at least one sense in which states can be legitimate.

These considerations of taxation can be brought to bear on traditional notions of political legitimacy. I argue here that we can draw on taxation to devise an account of legitimacy with respect to *contribution*—a theory of when the state’s demands for contribution from its subjects

¹⁶⁹ See (Tilly 1992, pg. 96—126); (Mehrotra, pg. 293—349)

¹⁷⁰ While both taxes and fees are revenue-raising, what principally distinguishes taxes from fees—as I discuss in the paper later—is modality. Taxes are comparatively inescapable. Fees are not. While someone can avoid fees by not availing themselves of the relevant services, this isn’t the case for taxation. As such, fees would not be considered an exercise of the state’s capacity to extract sacrifices.

¹⁷¹ (Tilly 2009, pg. 173—182)

is legitimate (henceforth “contributive legitimacy”). The intended account of contributive legitimacy is narrower than conventional theories of political legitimacy.

Conventional theories of political legitimacy, in one way or another, justify the general idea of a state’s exercise of coercive power.¹⁷² As such, these conventional theories are usually both more comprehensive (whatever justification is given, it must account for the state’s exercise of coercive power in all instances) and wider in scope (what is justified is the state’s exercise of coercive power *generally*) than the contributive legitimacy I have in mind.

Contributive legitimacy is meant to justify just one capacity in which the state can exercise political power: the capacity to extract sacrifices from its subjects, where these sacrifices are required for supporting and maintaining the state. Legitimacy with respect to contribution is an important, perhaps even necessary, feature of a more comprehensive account of political legitimacy. In order to avoid being taken too far afield, I remain agnostic on its necessity here. I ultimately argue that whether a state’s demands for contributions from its subjects is contributively just will often coincide with other, more comprehensive, kinds of legitimacy such as democratic legitimacy. When a state is not contributively legitimate (when it is contributively *illegitimate*), then that state is much less likely to exhibit features of, say, political participation and equal standing—features that are important to more comprehensive accounts of political legitimacy like democratic political legitimacy.

I.i What makes something assessable for contributive legitimacy

States can exercise their extractive capacities in a number of ways—where what is being extracted at any given point in time can vary from compliance with public health campaigns

¹⁷² There are, of course, accounts of political legitimacy that explicitly deny that political legitimacy is a project of justifying state power in general. A. John Simmons, in particular, grounds political legitimacy in a “morally significant relationship” between a subject and a *particular* state that can be secured only through express consent (Simmons, pg. 746). The account of legitimacy I have in mind here largely avoids the issues that he raises.

(especially in the case of epidemics), more episodic civic obligations (like voting, jury duty, and military conscription), to tax compliance. Questions of legitimate contribution might not arise for *all* exercises of the state's extractive capacities. However, we can identify some core features of sacrifices demanded by the state that, if present, make it more likely that a sacrifice will be assessable for contributive legitimacy, or invoke questions of contributive legitimacy:

- (a) **COLLECTIVE ACTION PROBLEMS:** If collective action issues are a feature of the sacrifice in question—that is, if high levels of voluntary compliance can't be reasonably expected.
- (b) **SCARCE INCENTIVES:** If incentives to remit the sacrifice in question aren't immediately available, or if there are significant disincentives to remit the sacrifice in question.
- (c) **PLAUSIBLE JUSTIFICATION:** If some justification, in the form of a plausible public narrative¹⁷³ must be given in order to both motivate voluntary (non-coerced) remittance of the sacrifice in question, and coerced remittance of the sacrifice in question (so that coerced remittance doesn't end up mobilizing sufficient resistance to the state's extractive practices—resistance that ends up eroding those very extractive capacities).^{174,175}
- (d) **PRIVATE INTRUSION:** If the sacrifice in question makes demands that encroach on what are broadly *perceived* to be the private domains of subjects.¹⁷⁶
- (e) **DISCHARGING STATE-LEVEL FUNCTIONS:** If the sacrifices in question function are in service of projects that are suitably entrusted to the state (e.g. projects that involve collective action problems), or if the sacrifices in question function to maintain or further the state in some way.¹⁷⁷

¹⁷³ (Lieberman, pg. 109)

¹⁷⁴ (Tilly 2009, pg. 144)

¹⁷⁵ (Lieberman, pg. 108)

¹⁷⁶ Lieberman, pg. 107)

¹⁷⁷ This is a scope-limiting condition on which sacrifices are relevant that I've given already.

None of these features are meant to be either necessary or sufficient for a sacrifice to be one that implicates issues of contributive legitimacy. The features just named, however, will generally be interrelated. Some of the relationships are immediate. For instance, when **SCARCE INCENTIVES** obtains, this will often ensure that **COLLECTIVE ACTION PROBLEMS** also obtains. If there's an absence of individual incentive to remit the relevant sacrifices, or the presence of significant individual disincentives to remitting the relevant sacrifices—like that the good being collectively brought about by the relevant sacrifices is non-excludable—then problems of collective action are especially likely to arise. Likewise, **PLAUSIBLE JUSTIFICATION** is largely a justificatory need that arises from **PRIVATE INTRUSION**—where the salient features of the private domain being encroached on may be behavioral (sexual contact and childbirth, when the relevant sacrifices being extracted are compliance with HIV and AIDS public health campaigns),¹⁷⁸ or material (with tax contributions). Given that encroachments into the perceived private domains of subjects will often be *prima facie* objectionable, the need for some plausible, and publicly available justification for that encroachment will be especially great.

Taxation, on which I focus here, has all of these features. Two properties of taxation make it especially vulnerable to **COLLECTIVE ACTION PROBLEMS**: first, taxation is a system of collective funding. Individual contributions are pooled, and the pooled revenue is in turn used to fund public goods and services. No individual contribution is likely to be missed.¹⁷⁹ And second, tax revenue often funds non-excludable public goods—goods for which it is infeasible, for one reason or another, to exclude people from consuming. Both of these properties also make it the

¹⁷⁸ (Lieberman 2009, pg. 15)

¹⁷⁹ An exceptional case is one that involves step-level public goods: goods for which a certain funding threshold must be met in order for any level of good to be supplied at all (a bridge being one such example of a step-level good). With step level goods, the absence of a single contribution can matter greatly, depending on where that single contribution falls in the sequence of individual contributions. Assuming that individual contributions to a publicly financed good are each some non-zero sum, and that contributions are made sequentially, then one contribution will be decisive in meeting the funding threshold. The absence of that decisive contribution means that the funding threshold remains unmet, and no level of public good is supplied at all.

case that taxation has the feature of **SCARCE INCENTIVES**: there's often greater incentive on the part of an individual taxpayer to evade or underreport her taxes, rather than remit them. Taxation often also has the feature of **PRIVATE INTRUSION**. Taxpayers may feel an entitlement to their pre-tax income or wealth, and see taxation as a material encroachment on what is appropriately theirs. For both reasons of **SCARCE INCENTIVES** and **PRIVATE INTRUSION**, the existence of a tax regime is thus often in need of **PLAUSIBLE JUSTIFICATION** to counteract the **COLLECTIVE ACTION PROBLEMS** that are likely to ensue. Lastly, taxation satisfies **DISCHARGING STATE-LEVEL FUNCTIONS**, to the extent that tax regime is commonly used to fund public goods.

II. Legitimacy as justification

Even though the account of political legitimacy I work with here—that I take contributive legitimacy to eventually be a species of—is justificatory, it's worth noting that not all theories of political legitimacy are justificatory. John Simmons, for instance, has notably defended an account of legitimacy in which legitimacy is grounded in a “morally significant relationship” between subjects and their states. Such a relationship cannot be established through justification alone. I do not assume here that political legitimacy can only be grounded in the kind of state-subject relationship that Simmons has in mind.

The theory of political legitimacy I have in mind diverges from contemporary theories in another respect: it is a *substantive*, rather a procedural, theory of legitimacy. Recent work on political legitimacy has tended toward more *procedural* theories. These theories justify the state's exercise of political power by appealing to the merits of procedures associated with the state's exercise of political power—either the procedures that give rise to *particular* exercises of political power, or the procedures that give rise to the state's exercise of political power broadly. These procedural merits can be of various kinds, and different theories of political legitimacy

will defend different procedural merits as essential. Candidate procedural merits may be prospective (that the procedure in question tends to produce outcomes that are true or correct) or intrinsic (that the procedure in question is meritorious by its very nature).¹⁸⁰ Whenever these merits are embodied by the political procedures that give rise to exercises of the state's power, then those exercises of the state's power are legitimate, according to procedural theories.

Procedural theories of legitimacy are, in this way, somewhat open-ended: because outcomes are legitimate in virtue of the procedures from which they issue, what legitimate outcomes actually look like is left uncertain. Substantive theories of political legitimacy, by contrast, stipulate *procedure-independent* criteria for legitimacy. These are criteria that are desirable, true, or correct for reasons independent of procedural considerations.¹⁸¹ Procedure-independent criteria are typically about outcomes: a state is politically legitimate to the extent that it instantiates the relevant set of procedure-independent criteria for legitimacy.

The substantive account of political legitimacy I work with here is adapted from Allan Buchanan. According to Buchanan's proposed schema, theories of political legitimacy are those that provide justifications of at least two kinds: (i) a justification for the state's exercise of political power (where political power is understood as the use of monopolistic coercive force over some given domain), and (ii) a justification for why subjects have sufficient reason to comply with the demands in which the state's exercise of power consists (where this justification is given by the sufficient reasons for compliance that subjects have).^{182,183} By furnishing

¹⁸⁰ (Estlund, pg. 69–70)

¹⁸¹ (Estlund, pg. 57)

¹⁸² (Buchanan, pg. 694)

¹⁸³ David Estlund also seems to include something like the second justificatory condition—justification at the level of subjects—in his account of legitimacy. What's doing most of the work in his account, however, are the subjects he has in mind. Sufficient reasons for compliance are only justificatory when they're sufficient reasons that could be held by "qualified points of view" (Estlund, pg. 41). What makes sufficient reasons for compliance justificatory, on my view, is instead their *content* rather than the kinds of subjects who are likely to have those reasons. This is consistent with the substantive account of legitimacy I have in mind here, as opposed to Estlund's procedural account of legitimacy.

justifications of both kinds, a theory of political legitimacy accounts for the two component halves of the state-subject relationship. States, if justified in their use of coercive power, are given some warrant for exercising this power over their subjects. Subjects, correspondingly, are warranted in their compliance with the state's demands if they have sufficient reason to comply.

A clarification about the sufficient reasons that subjects might have for complying with the demands of the state: not all reasons that can be given will contribute to the legitimacy of the state. The relevant sense of sufficiency here isn't just an outcome-oriented one—that a reason manages to secure compliance with the state's demands alone does not make it a reason that contributes to the legitimacy of the state. We can see this by considering a few examples of purely outcome-oriented reasons that wouldn't make the cut: a corrupt and dictatorial state may, for instance, launch a highly successful propaganda campaign that masks the worst of its ruthless tendencies, and that achieves high levels of compliance among its subjects. Subjects may have sufficient reason to comply with the state's demands in virtue of the—factually false—propaganda content to which they're exposed. We would not, however, consider such propaganda-given reasons as counting in favor of the dictatorial state's legitimacy.¹⁸⁴ Similarly, if subjects comply with the state's tax regime *only* out of fear for the state's aggressive auditing practices, this, too, couldn't be a reason that contributed to political legitimacy.

Since I intend contributive legitimacy to at least formally provide both justifications of the state's use of coercive power—with respect to its narrow tax extraction capacity—and sufficient reasons for compliance on the part of subjects, I'm obligated to say something more about what might count as the right *kind* of reason (call the set of sufficient reasons that subjects might have for complying with the state, where these reasons *also* contribute to the state's

¹⁸⁴ This isn't to rule out the conceptual or actual possibility that dictatorial states *could* be legitimate. I remain agnostic on the general legitimacy of dictatorial states.

legitimacy, “acceptable reasons”) in order to show that contributive legitimacy gives rise to acceptable reasons. With the possible exception of an acceptability criterion that tracks the truth—in order to guard against acceptable reasons being given by propaganda or misinformation—we should not expect a list of universal acceptability criteria for acceptable reasons. Such a list of acceptability criteria cannot be consistently given because acceptability criteria will largely determine the *kind* of justification that acceptable reasons provide. Some acceptable reasons will, in virtue of their conformity to the relevant acceptability criteria, provide justification that is more impartial—like reasons that are compelling to hypothetical contractors—while others will provide justification that tends more toward the partial.¹⁸⁵ These are reasons that are compelling in virtue of their appeal to contingent, idiosyncratic features of individual subjects (like the fear of auditing example given earlier). What reasons are thought to be acceptable, and, in turn, the justification provided by those reasons, informs the kind of political legitimacy we end up with. If acceptable reasons are those that are impartially justifiable, for instance, then the resulting model of legitimacy will be one that prioritizes something like justification to hypothetical contractors rather than justification to each subject.¹⁸⁶

The relationship between acceptability criteria and the resulting model of legitimacy is pronounced if our model of legitimacy is a justificatory one—if the relevant account of legitimacy is understood primarily in terms of its justificatory dimensions. One might easily think, though, that I’ve gotten things backwards. Rather than having our acceptability criteria at the level of justification-to-subjects bear on the overall account of political legitimacy, one might

¹⁸⁵ I treat reasons and their associated justifications somewhat interchangeably here. I make the simplifying assumption that reasons of *partiality*—reasons that issue from some particular connection or investment that an agent has in something, or reasons that respond to contingent, idiosyncratic features of an agent—give rise to correspondingly *partial* justifications more often than not. Likewise, *impartial* reasons—reasons that issue from looking at things from a more impartial point of view—give rise to *impartial* justifications more often than not.

¹⁸⁶ (Bertram, pg. 573)

think that what ought to happen is that we instead start with an account of political legitimacy that has entailments for the kind of justification—and, in turn, the acceptability criteria—that takes place at the level of justification-to-subjects. On this account, if our overall account of legitimacy happens to require the sort of impartial justification that could be compelling to hypothetical contractors, then this will specify the acceptability criteria for reasons at the level of justification-to-subjects. However, going this route would foreclose the possibility of a more pluralistic account of political legitimacy; it would ground political legitimacy in more or less a single basis, and take both the justification of the state’s coercive power, and the justification for subject compliance with the state’s demands to be given by reference to that basis. Pluralism in an account of political legitimacy is a merit worth keeping.¹⁸⁷ It’s likely to be the case that political legitimacy, as an empirical matter, is grounded in, and enhanced by, multiple factors.

Even though I don’t think that we ought to start with an overall account of political legitimacy, and let that determine the content of what justification we might have at the level of state and subjects, we can take something away from the objection just given. The objection affirms that whatever kind of justification—partial, impartial, or somewhere in-between—is associated with the given acceptability criteria for subject-level reasons for compliance, this justification interacts with the overall model of legitimacy. However it is that subjects might be justified in complying with the state, this justification cannot, at the very least, be *incompatible* with a plausible model of the state’s overall political legitimacy. This helps us limit the range of acceptable reasons, and at least begin to identify some rough set of acceptability criteria.

Assuming that plausible models of political legitimacy are exhausted by *procedural* theories of legitimacy and *substantive* theories of legitimacy, then we know that justifications at the level of

¹⁸⁷ (Simmons 1979, pg. 199)

subject-compliance must be compatible with one of these two types of legitimacy theory. I show next that if a theory of legitimacy is *substantive*—if it gives us procedure-independent criteria for what a politically legitimate state of affairs looks like—then the associated subject-level justifications can be *neither* wholly impartial *nor* wholly partial in nature. We can infer this by assessing wholly partial and impartial justifications for subject-compliance for compatibility with both procedural and substantive models of legitimacy.

Acceptability criteria that point toward wholly *partial* justifications for subject compliance are likely to be incompatible with *both* procedural models of legitimacy and substantive models of legitimacy.¹⁸⁸ This is because any model of legitimacy that took wholly partial justifications—justifications given in terms of reasons that were idiosyncratic or contingent—to be sufficiently justificatory for subject-compliance is unlikely to be a model of political legitimacy at all. Political legitimation is, by its very nature, public. At the level of subject-compliance, a condition of publicity can enter in as either itself an acceptability criterion, or a constraint on what acceptability criteria are admissible. In either case, acceptable justifications for subject-compliance are those that are appropriately informed by some publicity condition: they must tell some widely-shared story of how the subject relates to the state.¹⁸⁹

Acceptable justifications that are sufficiently public can make reference to the various ways that subjects are supported by their states, which may in turn help motivate compliance, but they may

¹⁸⁸ We might even more narrowly circumscribe our acceptability criteria with respect to personal reasons: acceptability criteria for reasons that justify subject-compliance with the state's demands should not only avoid *endorsing* personal reasons, they should also avoid *admitting of* personal reasons—they should rescind the permissibility of personal reasons as reasons sufficient to justify subject compliance—owing to the incompatibility between wholly personal reasons and any plausible model of political legitimacy.

¹⁸⁹ The requirement that acceptable reasons for compliance be sufficiently public is consistent with the earlier requirement of **PLAUSIBLE JUSTIFICATION** that applies to certain sacrifices demanded by the state. The difference between a publicity requirement that attaches to acceptable reasons and the publicity requirements associated with **PLAUSIBLE JUSTIFICATION** is just a matter of *to whom* justification is given, and *who* issues in the justification. Acceptable reasons that meet a condition of publicity are reasons that issue *from* subjects in order to justify their compliance to the state. These reasons may be directed at other subjects, or at the state. **PLAUSIBLE JUSTIFICATION** requires that reasons given *by* the state to justify the extraction of certain sacrifices, *to* those from which from those sacrifices are being extracted, meet a condition of publicity.

not consist in reasons that are *wholly* idiosyncratic or contingent. At the very least, a publicity condition requires that subjects issue in reasons for compliance that would remain recognizable if those same reasons were offered by other subjects.¹⁹⁰ Reasons that were wholly partial, and their attendant justifications, would fail such a test. As long as we want to end up with a plausible model of political legitimacy at all, acceptable reasons for subject compliance, and the attendant justification given by those reasons, cannot be wholly partial in nature.

Acceptability criteria that point toward wholly *impartial* justifications for compliance are likely to be incompatible with a substantive account of political legitimacy for at least two reasons. First, wholly impartial reasons are unlikely to motivate subject compliance with the state's demands. Assuming the existence of a pluralistic society, acceptable reasons that furnish an entirely impartial justification—one that abstracts away entirely from idiosyncratic, contingent considerations and that instead appeals to idealized hypothetical contractors—are unlikely to be sufficiently psychologically salient for actual subjects of the state.¹⁹¹

Second, wholly impartial reasons are usually a justificatory device for *procedural* theories of legitimacy—especially procedural theories of legitimacy that value the intrinsic fairness of procedures. That wholly impartial reasons are more characteristic of procedural theories of legitimacy isn't, by itself, sufficient to conclude that such reasons are incompatible with substantive theories of legitimacy. It does, however, give us reason to think that

¹⁹⁰ This is in the vein of a claim made by Thomas Nagel in *Equality and Partiality*: we can rule out objections to systems of redistribution that are entirely partial—that object to redistribution because the system “doesn't do enough for *me*”—because such objections would fail a condition of publicity (Nagel, pg. 76). The objection that a system of redistribution doesn't do enough for *me* wouldn't withstand the test of that same objection being offered by someone else. Someone who issues in the objection in the first place is unlikely to give the objection equal recognition were it to come from someone else.

¹⁹¹ From the set of wholly impersonal justifications that I have in mind, I exclude justifications like those given by Rawls's original position. I think we can plausibly classify the original position, and its attendant principles of justice, as providing justification of a kind that can be located somewhere between the *wholly* impersonal and the *wholly* personal—the original position incorporates features in its hypothetical decision-makers that are intended to capture *personal* considerations (like how well-off one would be left once the veil of ignorance was lifted) as well as, of course, the impersonal mechanism of the veil of ignorance.

incompatibility is likely. Procedural theories are often the result of a “retreat from substance.”¹⁹² Conventionally, a retreat from substance explains why we might want to move from collective decision-making over outcomes to collective decision-making over procedures—in particular, the move from decision-making about fairness criteria in *outcomes* to decision-making about criteria for *procedural* fairness. Circumstances may require a retreat from substance when no agreement can be reached about what the fair thing to do is, or what a fair outcome might look like. In these cases, a reasonable strategy is to shift the focus of collective decision-making backward, and to instead seek agreement over some *fair procedure* that gives rise to the relevant actions or outcomes. Criteria for procedural fairness is likely to be thinner, less substantial, than criteria for fairness in actions and outcomes—especially when the retreat to procedural fairness is meant to enhance the likelihood of reaching collective agreement.

We might see a similar retreat from substance giving rise to the need for wholly impartial justifications for subject-compliance—where it would be clearer to start working in terms of *reasons* here rather than the justifications given by those reasons. We know that acceptable reasons for subject-compliance that contribute to legitimacy must meet a condition of publicity. Whatever these reasons are, they must be *publicly* acceptable. Wholly partial reasons for compliance that respond to the contingent, idiosyncratic features of particular agents will not meet this condition of publicity. A retreat from substance can now be initiated. We can move toward reasons that are more likely to be publicly acceptable by extirpating features of partiality from the wholly partial reasons with which we began. If we retreat far enough, then we end up at reasons that are publicly acceptable in virtue of their being impartial—these will be reasons that are compelling not to particular subjects of the state, but to subjects of the state, *generally*.

¹⁹² (Estlund, pg. 70)

Subjects of the state, understood generally, are essentially hypothetical contractors. But any reasons for compliance that are given by a retreat from substance will be correspondingly thin—much thinner than would be suitable for a substantive account of political legitimacy. We should thus avoid adopting a set of acceptability criteria that points in the direction of *wholly impartial* reasons for subject-compliance—wholly impartial reasons are unlikely to motivate actual subject compliance, or lead us to a substantive account of legitimacy.¹⁹³

The conclusion that a substantive account of political legitimacy requires us to adopt subject-level justifications for compliance that are somewhere between the wholly partial and the wholly impartial is consistent with existing empirical work on political legitimacy. The feasibility and stability of any state requires that states provide sufficient reason for compliance on the part of its subjects—that states legitimate themselves through justification to their subjects. With modern states, a convergent set of reasons for subject-compliance emerges. Most modern states will furnish one or more reasons of the following kind for subject-compliance: (a) reasons issuing from service to the public interest, (b) reasons issuing from democratic or quasi-democratic procedure, and (c) reasons issuing from consent. All of these reasons provide attendant justifications that fall somewhere between being entirely partial and being entirely impartial.

In order to support the claim that reasons of these kinds exhaust the range of possible reasons for subject compliance, we don't have to look to a broad sampling of legitimation strategies employed by modern states. Rather, we can look at the narrower set of modern

¹⁹³ The move here is different from what was rejected earlier. The earlier objection was that we ought to take a top-down approach to identifying sufficient reasons for subject-compliance: that once a broad theory of political legitimacy had been identified, we ought to use this alone to inform which reasons for subject-compliance were justificatory. Here, all that I'm looking for is compatibility between reasons at the level of subject-compliance, and the account of political legitimacy that operates at a more macroscopic level. Justificatory reasons for subject-compliance must contribute to overall legitimacy, and to do so, they must be compatible with a plausible theory of political legitimacy.

authoritarian states. Authoritarian regimes will commonly employ legitimation strategies in order to ensure durability of rule.¹⁹⁴ Such legitimation strategies will generally include promoting reasons for subject-compliance on the basis of either service to the public interest, democratic procedure, or consent (where in the case of authoritarian regimes, these are unfailingly sham democratic processes). Although none of these reasons for subject compliance, if present in an authoritarian regime, could count as acceptable reasons—they'd fail the truth-tracking acceptability criterion immediately—the fact that even authoritarian regimes draw from this body of reasons is meaningful. It makes it more likely that the presence of one or more of these reasons for subject-compliance is genuinely essential for politically legitimate states.

A brief survey of legitimation strategies employed by actual authoritarian regimes confirms that appeals to these sorts of reasons are often made in authoritarian regimes. The first reason for subject compliance, that of service to the public interest, requires that authoritarian regimes either actually meet certain conditions of economic performance and public provision, or that they give the effective impression of meeting these conditions. For the sake of political feasibility and stability, I assume here that this is a condition that must, to some degree, actually be met. The condition of service to the public interest can be characterized as a condition of welfare-enhancement.¹⁹⁵ An availability of an array of welfare-enhancing goods is what grounds subject-compliance under this first reason. Such goods include conventional public goods (the components of any subsistence minimum), regulatory goods (rule of law and good governance)¹⁹⁶, and economic opportunities for socioeconomic mobility. The durable provision

¹⁹⁴ An even stronger claim can be defended: that in modern authoritarian states, *some* legitimation strategy is a necessary condition of any enduring authoritarian regime. Mere repressive exercise of coercive power over subjects, or even the coercive exercise of power to maintain essential resource monopolies is insufficient for an enduring authoritarian state (Gerschewski, pg. 18).

¹⁹⁵ (March, pg. 209)

¹⁹⁶ (Brady, pg. 435)

of these goods, in turn, requires a certain level of economic performance on the part of the authoritarian regime. We can see the delegitimizing effects of lapses with respect to state welfare-enhancing performance in the Chinese Communist Party (CCP) from 1978-1989. Under prior Maoist rule from 1949-1976, the CCP emphasized ideological goals, those of socialist “class struggle and thought reform”, over economic development—and, indeed, sometimes emphasized ideological goals at the expense of economic development. Slow-growth and stagnation on industrial, agricultural, and international trade fronts ensued.¹⁹⁷ The Deng Xiaopeng regime that followed in 1977 was faced with the delegitimizing effects of lapses in welfare-enhancing performance: subjects of the state felt that political elites had failed to deliver on their promises.¹⁹⁸ In order to reverse these delegitimizing effects, the Deng regime initiated a campaign of economic reforms that relaxed socialist constraints on industry, agriculture, and international trade instituted by the previous Maoist regime.

The second reason for subject-compliance often promoted by authoritarian legitimation strategies is that a democratic or quasi-democratic procedure has taken place. A number of authoritarian regimes maintain systems of political parties, legislatures, and elections—in emulation of representative democracies—even though actual decision-making power resides with just a handful of political elites.¹⁹⁹ Part of the reason for this is to invite subject-compliance by political elites: intra-elite conflicts and fragmentation are less likely if power can be shared through a natural division of labor, through the various branches of governance.²⁰⁰ Another

¹⁹⁷ (MacDougall, pg. 355–370)

¹⁹⁸ (Ding, pg. 21)

¹⁹⁹ (Gerschewski, pg. 18)

²⁰⁰ Magaloni argues that authoritarian regimes that maintain sham representative democracies, that evince an organization and division of labor characteristic of representative democracies, can better guard against the possibility of intra-elite conflicts and fragmentation for at least the following reason: a government that evinces the characteristic division of labor between the various branches will have more “[offices], perks, and spoils” that political elites can be bought off with (Magaloni, pg. 258). This ensures durability of the authoritarian regime by quelling potential conflict.

reason is that the appearance of democratic or quasi-democratic process grounds subject-compliance more generally: by giving the appearance that there are political channels through which subjects can influence political outcomes—albeit illusory channels—and by giving the impression that authoritarian incumbents enjoy popular support (sham elections characteristic of authoritarian regimes usually have authoritarian incumbents winning by “majorities greater than 75%”).²⁰¹

The final reason for subject-compliance often promoted by authoritarian legitimation strategies is that of subject consent. Both of the other reasons for subject-compliance commonly promoted by authoritarians—service to the public interest and the presence of a democratic or quasi-democratic procedure—can be used in service of promoting genuine subject consent in authoritarian regimes. Service to the public interest, as effected through welfare-enhancing measures like public provision and economic performance, makes it more likely that consent as a *quid pro quo* arrangement is present. Subjects consent to complying with an authoritarian state’s demands—where consent here supplies sufficient reason for compliance—because of the welfare-enhancing benefits that they stand to gain. By contrast, the presence of a democratic or quasi-democratic procedure, even a sham one, can maintain the illusion of procedural fairness: that even if actual outcomes were not ones that subjects would have agreed to, that the procedure—presumably one of equal political treatment and participation—was at least one that they all could have agreed to.

Authoritarian legitimation strategies will also sometimes promote subject consent independently of welfare-enhancing performance and democratic procedural considerations. Islam Karimov, former first president of Uzbekistan, made his own written works—a set of

²⁰¹ (Tilly, pg. 3)

numbered tomes known as the “Ideology of National Independence”—compulsory reading at all levels of education. In these works, Karimov solicits subject-compliance by ruling out the conceptual possibility of models of political governance other than his own.²⁰² Subject consent to the authoritarian regime is a matter of conceptual necessity; no other viable political models really exist, and so no other political models could be consented to. A similar consent-promoting strategy is employed in contemporary China: mass communication and media is used to circulate the message that the existing authoritarian state, while imperfect, is “the best one for the country”.²⁰³ Consent to the current regime is required, in this case, because it’s the most suitable regime available—this is a matter of practical, rather than conceptual, necessity.

Each of these candidate reasons for subject-compliance, taken either individually or in concert, furnishes a justification for subject compliance that falls somewhere between wholly impersonal justification and wholly personal justification. Reasons grounded in service to the public interest or welfare-enhancing performance may be the closest to wholly personal reasons for subject-compliance, since such reasons are consistent with the individual self-interest of subjects. That the state caters to the public interest is usually also individually welfare-enhancing. Even if the state’s servicing of public interests does give rise to wholly personal reasons for subject-compliance—reasons for compliance grounded in ‘what the state does for *me*’—these wholly personal reasons aren’t going to be the salient ones. Wholly personal reasons for subject-compliance will fail the condition of publicity given earlier. Suitably public, and thus admissible, reasons for subject compliance would instead be those grounded in ‘what the state does for *us*’. Such reasons give rise to justifications that are neither entirely personal, nor entirely impersonal.

²⁰² (March, pg. 209-210)

²⁰³ (Brady, pg. 436)

One more clarification is due about justification at the level of subject compliance: my goal here is to argue for an account of contributive *legitimacy* rather than *authority*. Authority is commonly thought to refer to the state's *right* to compliance from its subjects, where this right to compliance engenders a moral obligation to comply on the part of individual subjects. By contrast, the legitimacy I have in mind is about mere justifiability. When conditions of contributive legitimacy are met, then the state's coercive extraction of revenue from its subjects is justifiable. At the level of justifiability to subjects, this means that subjects have sufficient reason—reasons that meet some set of acceptability criteria—to comply with the state's extractionary demands. Such sufficient reasons need not be *reasons of obligation or duty*.

III. Two dimensions of contributive legitimacy

Contributive legitimacy consists in two parts: (i) a substantive criterion of just extraction (henceforth the “substantive criterion”), and (ii) a criterion of *perceived* just extraction. Each of the two parts roughly maps onto the earlier justificatory cleavage between justification of the state's coercive power, and justification for subject compliance. The substantive criterion of just extraction gives us a set of conditions under which the state's use of political power to extract tax revenue is justifiable. The criterion of perceived just extraction gives us a distinguishable set of conditions for when subjects have sufficient reason—where these reasons meet some set of acceptability criteria—to comply with the state's extractionary demands. In this way, contributive legitimacy *is*, formally, a theory of legitimacy—it furnishes both halves of a Buchanan-type scheme of political legitimacy. When a tax regime satisfies both the substantive criterion and the criterion of perceived just extraction, then that regime is contributively legitimate.

That said, both the substantive criterion and the criterion of perceived just extraction can each serve dual justificatory ends: if a state's tax regime satisfies the substantive criterion, and is thus justified in its use of political power to extract tax revenue from its subjects, then this will generally make headway toward its also satisfying the criterion of perceived just extraction.

III.i. Substantive component of contributive legitimacy

The substantive criterion constrains the state's use of political power to raise revenue from its subjects in three respects:

- (i) **Individual tax liabilities:** in the determination of individual tax liabilities
- (ii) **Mode of extraction:** in the *mode* by which revenue is extracted from subjects
- (iii) **Tax revenue use:** in the eventual use of tax revenue

The determination of individual tax liabilities, mode of extraction, and tax revenue use, are the main parts of any tax extractionary regime. Each part of a tax regime, in turn, corresponds to a particular condition of fairness—where the specific sense of fairness in each case will vary slightly. The state's use of political power to extract revenue is justified if, in each of its main respects, the corresponding condition of fairness is met:

(i₂) **condition of fairness for individual tax liabilities (a matter of contributive justice):** individual tax liabilities must be determined in accordance with ability-to-pay (where the relevant sense of ability is net income and wealth).

(ii₂) **condition of fairness for mode of extraction (a matter of rule of law):** revenue is extracted from subjects in ways that are consistent with regularity, publicity, and generality.

(iii₃) **condition of fairness for tax revenue use:** tax revenue is used for common benefit rather than the dispensation of class-based privileges.²⁰⁴

Lapses in any of these three respects—a failure to comply with the corresponding condition of fairness—is often sufficient to undermine the legitimacy of an extractory regime (and, as I show later on, the legitimacy of the state broadly). When each of these features of a tax regime complies with its corresponding condition of fairness, then the state’s exercise of political power to extract tax revenue is justified.

III.ii Determination of individual tax liabilities and contributive justice

The first feature, the determination of individual tax liabilities, is actually a matter of *contributive justice*—justice in what it is that subjects owe to the state. When the determination of individual tax liabilities conforms to principles of contributive justice, then a state’s tax regime is, in this respect, contributively just. I have two such principles in mind: a principle of ability-to-pay (tax remittance in accordance with ability, with net income and wealth as the relevant measure of ability), and the benefits principle (tax remittance in accordance with benefits received from society). In the public finance literature, both the ability-to-pay and benefit principles have been floated, canonically, as ways by which individual tax contributions ought to be determined.²⁰⁵

The two principles have been traditionally regarded as mutually incompatible in some significant ways, and adherence to one is often thought to entail opposition to the other. The benefit principle treats tax remittance as transactional: individual tax liabilities are indexed to

²⁰⁴ The class-based privileges I have in mind here are ones that result from treating the state as the conferrer of private, personal benefits—the kinds of benefit that redound principally to elites in a plutocracy or aristocracy. They do not include conventional redistributive measures, and social welfare provisions that principally benefit the less well-off. Another way to broaden this requirement that tax revenue be used for common benefit is to understand common benefit in the following way: these are benefits that people are not excluded from on basis of proscribed traits like race, birth, nationality, religion, and gender.

²⁰⁵ (Musgrave, pg. 61—115)

either the discrete and measurable benefits from public goods that accrue to particular taxpayers, or indexed to the more diffuse, collective benefits that issue from the very existence of the state itself (where precise measurability is unlikely). An individual subject's tax liability is the price she pays for her received benefits.²⁰⁶ Ability-to-pay, by contrast, does not treat individual tax liabilities as transactional. Instead, it indexes an individual's tax liability to her 'ability' to surrender tax remittance. Different accounts of ability have been defended: ability as utility from income (a notion associated with Mill), ability as the "impact" of tax remittance (as advanced by Seligman), and ability as natural endowment, or faculty (this yields a rather indefensible endowments tax).²⁰⁷ Here I take the relevant sense of ability to be net income and wealth, without implicating considerations of utility or faculty.

A substantive criterion for contributive legitimacy should make the principle of ability-to-pay, rather than benefit principle, the main guideline for determining **individual tax liabilities**. We should keep in mind that whatever justification can be given for the state's coercive extraction of revenue, this justification must also, in some way, contribute to legitimacy—a standard to which subject-level reasons for compliance are also held. In light of this, ability-to-pay is favorable to the benefit principle for a number of reasons: first, ability-to-pay is a clearer metric for determining individual tax liabilities.²⁰⁸ The benefits principle requires us to identify and price the relevant benefits that are being financed by tax contributions, since individual tax contributions are viewed as transactions for these benefits. The benefits in

²⁰⁶ According to some versions of the benefit principle (voluntary exchange versions in particular), an individual's tax liability—as a measure of the benefit she receives—should reflect not the *cost* to the state for provision of those benefits, but rather the subjective valuation of the individual taxpayer for the benefits in question.

²⁰⁷ (Cooper, pg. 416-429)

²⁰⁸ This relative clarity will help ensure that the *mode* of revenue extraction complies with rule of law—in that both (a) the *content* of laws governing revenue extraction are non-arbitrary, and (b) the implementation and enforcement of those laws is non-arbitrary (that the possibility of abusive or oppressive enforcement may be diminished by clearly specified, internally consistent laws).

question can be of either kind just given: the discrete and measurable benefits of certain public goods that redound to individual taxpayers, or the more systemic benefits of society itself. The price of these benefits can, in turn, be either a function of subjective valuation—the degree to which a taxpayer values the public good in question, relative to the potential private expenditures she could instead use her tax contributions toward—or the objective *cost* to the state of providing an individualized share of the public good in question.²⁰⁹ This yields at least four possibilities for calculating individual tax liabilities according to the benefit principle:²¹⁰

How individual tax liabilities ought to be determined, according to the benefit principle:	Yields indeterminate individual tax liabilities because:
<i>Subjective valuation of discrete, individualized benefits (from public goods).</i>	(i) requires that subjective valuation can be revealed with some measure of accuracy; (ii) incorrectly assumes preference-homogeneity for public and private expenditure on the part of individual taxpayers.
<i>Subjective valuation of systemic benefits (the benefit of society itself).</i>	(i) requires that subjective valuation can be revealed with some measure of accuracy; (ii) fails to individuate tax liabilities.
<i>Actual cost of providing discrete, individualized benefits (from public goods) by the state.</i>	(i) highly indivisible and/or nonexcludable public goods cannot be financed with a user fees model; (ii) may defeat the point of collectively financing certain public goods.

²⁰⁹ (Kornhauser pg. 1713)

²¹⁰ Notable recent defenses of the benefit principle resist being understood in any of these ways. Herwig Schlunk and Deborah Geier, for instance, both defend some version of the following: the benefit principle is to be understood as *grounding a claim* on the part of the state to the income and wealth of individual subjects, to the extent that the state has a beneficial causal role in the production of that income and wealth.

<i>Actual cost of providing systemic collective benefits (the benefit of society itself).</i>	(i) may fail to individuate tax liabilities; (ii) unclear how such cost-spreading would occur.
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Table III.1 Possible Interpretations of the Benefits Principle

All four ways of determining individual tax liabilities, I argue, yield indeterminate results. Any principle by which individual tax liabilities were assessed would need to give reasonably determinate results for both reasons of practical feasibility, and reasons of regularity in rule of law (I cover the reasons why rule of law favors principles that yield determinate outcomes in the next section).

To start, there are intractable problems with subjective valuation itself. Subjective valuation of any benefit associated with public provision requires that we be able to reveal individual taxpayer valuations of these benefits with some degree of accuracy.²¹¹ Accurately revealing individual taxpayer preferences for public goods is unlikely to ever be possible without exorbitant administrative cost; it’s especially unlikely for benefits-based taxation where tax liabilities are indexed to the individualized benefit of particular public goods. If the public goods in question are non-excludable, as public goods generally are, then there’s strong incentive for individual taxpayers to misrepresent their preferences. In doing so, they can continue to benefit from the provision of those public goods, while also paying less than they might otherwise. Determinate and accurate assessments of individual tax liabilities based on subjective valuations unlikely given these challenges with preference revelation.

²¹¹ Knut Wicksell’s proposal for benefits-based taxation avoids this need for preference-revelation by introducing a voting requirement. Proposals for public expenditure are to be coupled with various possible cost distributions for financing the public expenditures in question. These various cost distributions are, in turn, to be voted on, with either a majority or unanimity voting threshold that must be cleared for the adoption of any given proposal. The majority or unanimity voting requirement disincentives voters from misrepresenting their interests. By misrepresenting their interests, voters risk defeating proposals for public goods and services they might want (Wicksell, pg. 89).

Even if we could accurately reveal taxpayer preferences for various public goods, indexing individual tax liabilities to subjective valuations for *discrete public goods* incurs additional problems. Proponents of using subjective valuation to determine individual tax liabilities generally assume that valuations of public and private expenditure are comparable, and that the preferences associated with valuations of each expenditure-type are homogenous.²¹² This is unlikely to be true. Valuations and preferences associated with private expenditure are properly considered *consumer* valuations and preferences. Consumer valuations and preferences are those that subjects have in their capacities as market participants, rather than in their capacities as citizens. They're primarily a function of how well a given private expenditure satisfies the idiosyncratic interests of particular subjects. As a normative matter, consumer valuations and preferences are irrelevant to the determination of how public expenditures ought to be financed. Public expenditures are owed to the public, and they're generally collectively beneficial. The relevant valuations and preferences at stake in adjudicating the financing and delivery dimensions of public expenditure should be valuations and preferences *qua* citizen—preferences that taxpayers have in their capacities as citizens—rather than valuations and preferences *qua* individual consumers.²¹³ But if preferences *qua* citizen are the valuations we should consider in decision-making about the financing and delivery of public goods, then the right way to take those preferences into account isn't to price them and index individual tax liabilities to those prices. Rather, preferences *qua* citizen are recognized through the political processes—usually legislative—in which decisions about public goods are usually made. We might even think that preferences *qua* citizens altogether resist conventional pricing, to the extent

²¹² Richard Musgrave acknowledges a similar objection—that of equating “the nature of wants satisfied by public economy” to “the nature of wants satisfied by ordinary public outlays”. Ultimately, he doesn't think that the objection is credible, and he accepts the possibility of equating valuations and preferences for public and private expenditures (Musgrave, pg. 218).

²¹³ (Sagoff, pg. 64)

that prices are meant to give some measure of individual benefit: some subjects will have preferences *qua* citizen for public goods that they do not personally consume, but nevertheless recognize to be valuable.²¹⁴ Other preferences *qua* citizens will be for public goods that are principally valuable for their positive externalities.

The remaining subjective valuation-based determinations of individual tax liabilities will also yield indeterminate results: if we instead took the relevant metric for individual tax liabilities to be the subjective valuation of more *systemic* benefits, like that of society itself, then the relevant valuations would be even more difficult to quantify. It's clear that all subjects of non-oppressive states benefit immensely from the existence of those states, and so fine-grained distinctions between individual benefit, and thus fine-grained distinctions between individual tax liabilities, might be impossible.

We run into a slightly different set of reasons for indeterminacy if we look to the objective costs incurred to the state for providing the public goods and services in question. At first, the suggestion that individual tax liabilities be indexed to the objective costs of providing public goods and services seems plausible. After all, public goods like roads often have associated user fees in the form of tolls. Toll fees, in turn, are indexed to the actual costs of existing road maintenance, and to the construction of new roads.²¹⁵ Not all taxes, however, can be modeled after user fees. Indeed, an even stronger argument can be made here: that user fees aren't a form of taxation at all. Indexing individual tax liabilities to the actual costs of public goods conflates user fees with taxation.

²¹⁴ An example of this might be a subject's preference for, and willingness to contribute to the financing of, national parks that she has no intention of ever visiting. Such a subject might recognize the value of national parks for civic solidarity and national identity reasons, but her valuation resists conventional pricing, because the type of valuation in question is not a form of consumption value.

²¹⁵ (Chu and Tsai, pg. 458)

The weaker claim, that not all taxes will lend themselves to being modeled after user fees, follows from the very nature of certain public goods. Many public goods have features of both indivisibility (the provision of a share of good to one person entails that additional qualitatively and quantitatively identical shares be provided to others at no additional cost)²¹⁶ and nonexcludability (that no one can be feasibly excluded from consuming the good in question). User fees, by definition, are commonly associated with goods that have features of divisibility (the good in question can be purchased in different quantities), or excludability (if consumption has an associated cost barrier, then those who are unable to unwilling to pay will be barred from consumption). When consumption is mediated by user fees, prospective consumers can typically consume as much or as little as they want—by purchasing more or less of the good—or they can altogether forego consumption. Public goods that have properties of either indivisibility, or nonexcludability, or both, in significant measure, may not lend themselves to provision or consumption in purchasable shares. For instance, a functioning system of user fees requires at least some degree of excludability; potential users will be unwilling to remit the associated fees if they can consume the good free of charge. But it may be too costly to exclude certain people from the consumption of certain public goods, like clean air, to justify the use of a user fees model.

The stronger argument for rejecting a user fee model of taxation is that user fees and taxation are categorically different—that each model of financing has divergent, and incompatible aims. Charging either the actual costs of public goods to taxpayers, or costs that are closely indexed to the actual costs of public goods, defeats the point of public provision. Certain public goods, like medical goods and services, are publicly financed and delivered in order to

²¹⁶ (Desmarais-Tremblay, pg. 69) and (Samuelson 1955, pg. 350)

subsidize the actual costs that would otherwise be incurred by individual taxpayers. In this way, public goods provision often serves an insurance function. This allows users to enjoy goods and services that are magnitudes more valuable than their individual tax contributions. Another notable difference in aims exists between user fee and taxation models of financing: revenue generated by user fees is, by definition, earmarked for certain ends. Tax revenue need not be. While some taxes are hypothecated—their revenue is earmarked—tax revenue is generally flexible in a way that user fee-derived revenue isn't. The use of general tax revenue responds to public demands through legislative processes, and will often vary between fiscal years. Taxation regimes are opportunities for subjects to assert claims to the direction of the state through the use of public revenue. A user fee model does not have the same effect, since revenue uses are fixed.

If the possibility of equating taxation with user fee models of financing is altogether rejected, then it's unlikely that any model of taxation that indexes individual tax liabilities to actual costs will seem plausible. So we have sufficient reason for rejecting the final benefit-based determination of individual tax liabilities as well: indexing individual tax liabilities to the *actual* cost of society itself, rather than the actual costs of providing discrete public goods. We might think, though, that a proposal to treat taxes as cost-sharing for the price of *society* itself expresses something distinctive worth considering.²¹⁷ 'Society itself' could be taken to mean not just the public goods, services, and regulatory frameworks in which society consists, but also emergent properties above and beyond those goods, services, and frameworks, like comity and solidarity. The previously considered proposal, that of indexing individual tax liabilities to the actual costs of discrete public goods and services, wouldn't capture these emergent properties. Indexing

²¹⁷ The proposal to index individual tax liabilities to the *cost of society itself* can be derived from something like Supreme Court Justice Wendell Holmes's often-cited claim in his *Compania General de Tabacos de Filipina v. Collector of Internal* dissenting opinion that, "Taxes are what we pay for civilized society" (*Compania General de Tabacos de Filipina v. Collector of Internal*. 275 U.S. 87. Supreme Court of the United States. 1927).

individual tax liabilities to these emergent properties, however, is perhaps least likely to yield determinate tax liabilities. It's unclear which emergent properties are the relevant ones—the ones for which subjects ought to be taxed—let alone what the *actual costs* of these emergent properties might be. Benefit-based determinations of individual tax liability can, I think, be generally rejected on either these grounds of indeterminacy, or on grounds of problematically conflating user fees and taxation.

A second reason for favoring a principle of ability-to-pay is that it's more immediately compatible with a progressive tax rate structure—one that apportions tax liability to individual income and wealth. This guards against regressive taxation schemes that excessively burden the less well-off. Regressive taxation schemes are culpable of a sort of *contributive injustice*—those less well-positioned to contribute are made to contribute more than they can, while those better positioned to contribute may be contributing proportionately less. The benefits principle, by contrast, is less immediately progressive: if the relevant benefit is that associated with discrete public goods, then, depending on how the subjective valuations of individual taxpayers pan out, it may very well be the case that the less well-off benefit more from the provision of many public goods than the better-off do, even after we take positive externalities into account. If the less well-off are more greatly benefitted, then the benefits principle requires that they be taxed more, in light of their greater benefit. This would yield a regressive taxation scheme. Alternatively, if the relevant benefits were the collective benefits of society itself—understood to include the systemic benefits of regulatory goods like systems of law, legislative policies or instruments of fiscal intervention—then it might be reasonable to think that everyone benefits equally. In that case, a flat tax, the extraction of the same proportion of income and wealth from everyone, might

be suitable. Flat taxes, too, are regressive—they are more burdensome to the less well-off than they are to the better-off.

Historically, regressive schemes of taxation, in which tax burdens fall most heavily on the less well-off, have either hastened the delegitimization of both the state’s extractionary regime, and the political legitimacy of the state itself, or served as a reliable sign of existing political illegitimacy. Significantly regressive tax regimes often mobilize political resistance that erodes the state’s extractionary capacities. The French Revolution, for instance, was in part precipitated by taxation practices that disproportionately affected the poor. In the decades leading up to the French Revolution, the practice of exempting nobles and the Church from most direct and indirect taxes had significantly shrunk the available tax base. Nobles generally enjoyed exemption from the basic direct tax and taxes on the transfer of feudal property.²¹⁸ Nobles who were fortunate enough to be residents of privileged districts, like Brittany, were further exempt from region-specific indirect taxes and tariffs.²¹⁹ The Church, which owned nearly ten percent of the land in France, was also exempt from land taxes on its properties, and taxes on its tithing revenue.²²⁰ In order to identify additional sources of revenue, the French monarchy levied indirect taxes on “salt, tobacco, food and drink, and the movement of goods”—taxes that fell hardest on the poor.²²¹ The poor, who often only barely managed to maintain a subsistence minimum, felt these contributive injustices acutely. Regressive taxation contributed to the perception that the French monarchy was violating its “age-old commitment to keeping them [the poor] alive.”²²² While in the events leading up to the French Revolution, severely regressive taxation was itself a sign of political illegitimacy—France at the time was an absolutist

²¹⁸ (Doyle, pg. 27)

²¹⁹ (Doyle, pg. 4)

²²⁰ (Doyle, pg. 33)

²²¹ (Jones, pg. 35)

²²² (Doyle, pg. 58)

monarchy under Louis XVI, with fiscal matters adjudicated unilaterally by the Director of the Treasury—regressive taxation accelerated complete delegitimization with the deposal of the French monarchy.

A substantive criterion of just extraction should guard against delegitimizing contributive injustices like the presence of a highly regressive tax scheme. Determining tax liabilities in accordance with a principle of ability-to-pay gets us closer to a progressive tax scheme, and should thus be included in the substantive criterion.

III.iii Mode of extraction and rule of law

The second feature of taxation schemes that the substantive criterion constrains is the *mode* of tax revenue extraction. The *mode* of extraction refers to *how* subjects are taxed.²²³ *How* subjects are taxed is made up of two component features: the *kinds* of taxes that are levied (e.g. direct taxes, like those on income and wealth, as opposed to indirect taxes, like those on consumption), and the associated *enforcement mechanisms* (e.g. fines for tax infractions that merit civil penalties, and jail time for tax infractions that merit criminal penalties). These component features are typically specified through the legislative policies that enshrine a system of taxation.²²⁴ In a scheme of taxation that complies with the substantive criterion, the mode of taxation is circumscribed by the **condition of fairness for individual tax liabilities**, which I've argued to be a principle of ability-to-pay.

The **condition of fairness for mode of extraction** demands something distinctive. Taxation is enshrined in law, and the effects of the substantive criterion on the mode of extraction, and on the institution of taxation generally, are deeply tied up with rule of law

²²³ The matter of *how* subjects are taxed can be distinguished from, though it includes, the determination of individual tax liabilities—the matter of *how much* subjects are taxed.

²²⁴ In the United States at least, tax policies are constitutionally required to “originate” from the House of Representatives—specifically the Ways and Means Committee. This makes tax policy a principally legislative matter (Repetti, pg. 175).

considerations. We can think of the substantive criterion as imposing demands on the *legal* institution of taxation in two respects: on the *content* of tax law (whether tax law is devised with an eye toward avoiding disparate and discriminatory impact), and on the *implementation* of tax law (the enforcement of tax law by agents of the state).

The content-implementation distinction picks out something genuinely different from the kind-enforcement distinction that names the components of a mode of extraction: both the *kinds* of taxes that are levied, and the official *enforcement mechanisms* associated with those taxes, are parceled into the *content* of tax law. The *implementation* of tax law by agents of the state is a separate matter—an independent domain in which things can go wrong—and an important feature of rule of law. I argue that lapses in the *content* and lapses *implementation* of tax law each have the potential to undermine rule of law. The substantive criterion contributes to the maintenance of rule of law by guarding against lapses in both content and implementation.

We can look to recent revenue collection practices in Ferguson, Missouri, in order to see how illegitimate modes of revenue extraction undermine rule of law. Before discussing the specifics of these practices, an overview of the background features of the case: Ferguson is one of 90 municipalities in greater St. Louis County, with populations in individual municipalities numbering between 12 to 50,000. Although these municipalities are close to each other, and sometimes even spatially contiguous, nearly each municipality operates its own police department, city hall, and jail.²²⁵ This creates significant infrastructural redundancy between municipalities, with an attendant need for revenue—each municipality must collect enough revenue to finance the operations of its own judicial system and city hall.²²⁶ Less affluent municipalities like Ferguson have struggled to do this in recent years. In municipalities like

²²⁵ (Balko, pg. 16)

²²⁶ (Norwood, pg. 127)

Ferguson, revenue yields from traditional revenue sources, such as property and retail sales taxes, have fallen significantly. This has prompted the need to identify new sources of revenue.²²⁷ The result is that these municipalities, Ferguson included, have turned to penalties and fees collected by their municipal courts for revenue. Such penalties and fees include petty violations like traffic offenses, “noise ordinance violations, zoning violations for uncut grass or unkempt property, violations of occupancy permit restrictions, trespassing, wearing “saggy pants,” business license violations, and vague infractions such as ‘disturbing the peace’ or ‘affray’”.²²⁸

While it’s unclear when, exactly, the practice of co-opting penalties for revenue-generating ends began in Ferguson, the cumulative effects were racially disparate outcomes at all levels of judicial power: African Americans accounted for the bulk of vehicular stops by the Ferguson Police Department (FPD), African Americans were significantly more likely to receive multiple citations in a single incident, and African Americans received the bulk of arrest warrants issued by the municipal court to compel fine payments.²²⁹ A 2015 United States Department of Justice report summarized these findings: between October 2012 and July 2014, “African Americans accounted for 85%, or 30,525, of the 35,871 total charges brought by FPD—including traffic citations, summonses, and arrests. Non-African Americans accounted for 15%, or 5,346, of all charges brought during that period”.²³⁰

In cases like Ferguson, at least three rule of law requirements are salient: (a) a requirement of regularity, (b) a requirement of publicity, and (c) a requirement of generality.²³¹ The requirements are listed in order of lexical priority. If both regularity and publicity are met, where publicity entails regularity, then a weak form of rule of law is present. When all three

²²⁷ (Ordover, pg. 12)

²²⁸ (Balko, pg. 3)

²²⁹ (United States Department of Justice, pg. 66—68)

²³⁰ (United States Department of Justice, pg. 66)

²³¹ This is the account of rule of law defended by Paul Gowder in his book *The Rule of Law in the Real World* (Gowder, pg. 7).

conditions are met, then this is sufficient for a strong form of rule of law. I elaborate on each requirement in terms of the content-implementation distinction given earlier. Each requirement of the rule of law alternately bears on the content of law, on the implementation of law by agents of the state, or on the relationship between agents and the law.

The requirement of regularity bears directly on the implementation aspects of the law, and less directly on the content of law. Regularity is principally a constraint on implementation. It requires that agents of the state comply with the laws that circumscribe their roles and responsibilities “in good faith”.²³² Agents must carry out the explicit demands of the relevant laws, and take their conduct to be informed by only good faith interpretations of the law where explicit demands might be lacking—this means that agents cannot take, as reasons authorizing their actions, interpretations that are clearly not implied by the law. In this way, regularity defines suitable boundaries for the *discretion* of individual agents of the state. Regularity requires that the discretion of any given agent be no more expansive than what is explicitly described by law, and good faith interpretations of the law. A related function of regularity is “role separation”: the laws—both explicit and implied—that circumscribe the roles of particular agents of the state defines their role *qua* agent of the state. This role of the agent *qua* state, is to be distinguished from other non-state roles that the agent might occupy, and other non-state capacities in which the agent might act. Regularity prohibits overlap between non-state roles and state roles. This guards against, say, self-enrichment by agents of the state (an example of improper overlap between the agent’s role *qua* state and her role *qua* market participant).

Regularity requirements at the level of legal implementation, however, also have implications for the *content* of law, and the interaction between the content of law and agents of

²³² (Gowder, pg. 15)

the state. Laws define the domains over which these agents have discretion. In order to guard against abuses of discretion, the relevant laws must be sufficiently specific about what discretion agents have.²³³ This remakes the notion of discretion here from something more implementation-oriented into a relational matter between agents and the content of law: the content of law must be such that it facilitates implementation in good faith by agents of the state. The requirement that laws be sufficiently specific, or at least minimally vague, vindicates the earlier rejection of the benefit principle in the determination of individual tax liabilities on grounds of indeterminacy. If a principle of ability-to-pay gives us more determinate individual tax liabilities, then considerations of regularity militate in favor of adopting ability-to-pay. Indeterminately specified individual tax liabilities leave room for abuse by the relevant officeholders: tax collectors might, given vague laws about individual tax liabilities, have opportunity to overestimate the tax liabilities of subjects for purposes of personal retribution, self-enrichment, and so on.

The second rule of law requirement is publicity. Publicity attributes “a reasons-giving requirement” to agents of the state: agents must be prepared to disclose, and at times defend, the reasons behind their actions—in particular, the reasons behind their use of coercive force.²³⁴ Publicity positions non-state actors to demand justifications from state actors, and to evaluate the justifications that are given. And since evaluation by non-state actors isn’t very meaningful without the possibility of reform, publicity also requires that avenues exist for non-state actors to influence the interpretation and the application of the law if conventional interpretations and applications are found lacking.²³⁵ All of this functions as a check on both the content and the

²³³ (Gowder, pg. 13–14)

²³⁴ (Gowder, pg. 16)

²³⁵ In a democracy this would occur through voting or other kinds of influence on the legislative process, but the possibility of other avenues for influence by non-state actors is left open. Non-democracies, after all, can have rule of law too.

implementation of laws. The thought is that because agents of the state must be prepared to justify their conduct in terms of law-compliance, they'll be less inclined to flout the relevant laws, or carry them out in bad faith. This is a check on implementation. Publicity also functions as a check on content because it requires that the justificatory reasons given by agents of the state be sufficiently accessible to non-state actors. Reasons given by agents of the state must be intelligible to non-state actors, so that non-state actors can assess whether agents of the state are carrying out the laws in good faith. The content of law can't be so obscure that justifications given in terms of the law, or with reference to the law, are inaccessible to non-state actors.

The final rule of law requirement is that of generality. Generality is principally a constraint on the content of laws: laws that are sufficiently general are those that do not draw arbitrary distinctions between subjects.²³⁶ Relevant distinctions in the law are permitted. Relevant distinctions are those that can be justified according to public reason. When the laws are sufficiently general, then all subjects of the state are treated as equals—no subjects are singled out for different legal treatment on basis of their ascriptive identities or political standing.²³⁷ The generality requirement will be less important here, since many of the failures in rule of law that took place in Ferguson stemmed from violations of regularity and publicity.

In Ferguson, failures in all three requirements of the rule of law—regularity, publicity, and generality—occurred in various ways. Revenue collection practices in Ferguson are a strong contemporary example of an illegitimate extractive regime. The result of these failures in rule of law was an erosion of public trust in both the police force and the courts, and the

²³⁶ (Gowder, pg. 28)

²³⁷ (Gowder, pg. 33)

delegitimization of Ferguson’s municipal judicial system.²³⁸ Significant social unrest followed in August 2014, catalyzed by the police shooting of Michael Brown.²³⁹

Many of the respects in which Ferguson’s revenue-collection practices violated rule of law stemmed from a single underlying cause: the conflation of revenue-generating functions, which are principally legislative in nature, with judicial functions of levying penalties and fines. A quick point of terminology: a number of the offices that make up Ferguson’s justice system were harnessed to revenue-generating ends. This included police, city prosecutors, municipal judges, and county clerks. While prosecutors, judges, and county clerks discharge judicial functions, and thus fall neatly into the category of the judicial branch, the police are conventionally considered part of the executive branch. In order to be able to refer collectively to the various offices of the justice system that were involved in improper revenue-raising, I’ll sometimes group police, prosecutor, and judge offices together under the aegis of ‘judicial offices’ with associated ‘judicial functions’—to the extent that each office does have the function of promoting, to some degree, public security.

In Ferguson, penalties and fines, which are ordinarily punitive, took on a revenue-generating function—one ordinarily given to taxation. Penalties and fines do generate some public revenue, to the extent that yields from penalties and fines go into general funds, but that isn’t their main function. Rather, penalties can be distinguished from taxes on a few bases: (a) penalties and fines usually have the coercive backing of police enforcement, (b) penalties and fines are usually indexed to the costs incurred by the violations associated with those penalties and fees,²⁴⁰ (c) penalties and fines usually have a punitive expressive function, and (d) the

²³⁸ (United States Department of Justice, pg. 79)

²³⁹ (United States Department of Justice, pg. 80)

²⁴⁰ (Ordover, pg. 15)

issuance and administration of penalties falls properly in the domain of the justice system. None of these features are true of taxation.

Conflating revenue-generating functions and judicial functions gives rise to violations of appropriate discretion, and violations of the rule of law generally, in a rather unusual way.²⁴¹ It's not necessarily that agents of the judiciary—police, prosecutors, and judges—overstepped their legal discretion, though in Ferguson they often did.²⁴² I cover these more straightforward infractions of discretion and regularity a bit later. Rather, at least some of the ways in which illegitimate revenue collection in Ferguson undermined rule of law can be viewed as the result of proper *judicial* discretion being exercised in a *revenue-generating* context, with revenue-generating aims. Ordinarily, when we have failures with respect to one dimension of regularity—here, when agents of the state overstep the discretion of their offices—we can point to regularity failures in respects other than discretion, or failures of publicity, as being responsible. So when the FPD's aggressive policing practices had racially disparate outcomes, we might point to the vagueness of laws that circumscribe the responsibilities of police officers—where legal vagueness is vulnerable to abuse, and also a failure of regularity—or we might point to failures in publicity, such that non-state actors couldn't serve as a sufficient source of accountability for police conduct. I am not denying that straightforward failures of regularity and publicity were present in Ferguson. Ferguson's municipal justice system evinced grievous failures of regularity and publicity that were often underpinned by racism. Rather, I want to first focus on a slightly

²⁴¹ By “conflation”, I mean more of an inappropriate marriage between judicial functions and revenue-generating functions.

²⁴² Another argument that could be made—one compatible with what I have in mind here—is that the conflation of judiciary functions in Ferguson, like policing, with revenue-generating functions amounted to a powder keg state of affairs. Racially disparate effects have been demonstrated at multiple levels of the justice system. Race, for instance, has been strongly correlated with the increased likelihood of both dying from legal intervention, and receiving a capital sentence (*McCleskey v. Kemp*, 481 U.S. 279. Supreme Court of the United States. 1987). Given that the American justice system seems already inclined to racialized failures of regularity, publicity, and possibly even generality in these ways, marrying judicial functions with revenue-raising functions would have predictably exacerbating outcomes.

different species of failure in regularity. It seems to me that even if the laws circumscribing the offices of police, prosecutors, and judges were sufficiently well-specified and faithfully carried out, and that a condition of publicity was met, intractable problems of discretion (as a feature of regularity), and publicity would still arise. The mere conflation of revenue-generating functions with judiciary functions in a state is itself a problem for rule of law. This will be the case even if both judicial laws and revenue laws were sufficiently well-specified, and perfectly carried out by officeholders. I consider this claim first, before discussing the specific ways that the municipal justice system in Ferguson, in addition to problematically conflating revenue and judicial functions, also straightforwardly failed to meet various conditions of the rule of law.

Assume, for the moment, an idealized situation: that the content and implementation of laws circumscribing the judicial offices of police, prosecutors, and judges, is consistent with rule of law, but that judicial functions have nevertheless still been coopted to produce revenue. The means of revenue capture available to the various officers of the justice system would still be necessarily unsuited to generating revenue. Nearly all of the judiciary means of revenue capture—arrest, detention, prosecution, and the issuance of citations and warrants for arrest among them—are characteristically punitive. Mere arrest or detention, for instance, even when carried out within the boundaries of appropriate legal discretion, is harmful to the self-worth and dignity of detainees.²⁴³ In addition to harms of self-worth and dignity, being charged with municipal ordinance violations can cause durable harms like job loss, and ineligibility for federal housing and job assistance programs.^{244,245} Such harms may be less objectionable when they

²⁴³ Balko interviewed Anthony Morgan, an African American Ferguson resident, who was arrested for child endangerment after bringing his children to his hearing for municipal traffic violations. Morgan was unable to secure childcare during his scheduled hearing, and children are barred from Ferguson’s municipal court. Morgan said of his arrest, “I’m a good father...I own my own business. I provide for my kids. Do you know what it’s like for your own children to see you get arrested? For a cop to say, right in front of them, that he’s arresting you because you’re a bad parent?” (Balko, pg. 9)

²⁴⁴ (United States Department of Justice, pg. 3)

²⁴⁵ (Balko, pg. 13)

follow a genuine criminal infraction. They are, however, harms that are inconsistent with the bare aim of generating revenue. Nothing about the mere collection of revenue, especially when collection is done by legitimate extractive regimes, should entail the harms that generally accompany punishment.²⁴⁶ What's of interest in the idealized case is that while the practice of punitively collecting revenue looks, ostensibly, like a conventional case of judicial agents overstepping their discretion, diagnosing how rule of law is undermined here isn't so straightforward. If non-state actors were to reasonably object to the punitive nature of revenue-collection, they'd be unable to locate its causes in the content or implementation of the relevant judicial laws, since regularity and publicity have been assumed. Instead, what is objectionable—that revenue is being collected punitively at all—is solely the result of punitive judicial functions being subsumed to revenue-raising aims.

The claim that judicial functions should *never* be wedded to revenue-raising aims, however, may be, by itself, insufficiently persuasive. It may be indistinguishable from the more general claim that the conflation of any two distinctive governmental functions is already some violation of proper discretion and role separation. There's something especially problematic about bringing together revenue-raising aims and judicial functions though. And showing that the union of these two functions is especially problematic highlights the importance of having a proper mode of extraction in a legitimate extractive regime.

Subsuming punitive judicial functions to revenue-raising aims, I believe, has the effect of encouraging more conventional violations of rule of law. Agents of the justice system begin to overstep the discretion of their individual offices in the discriminatory ways seen in Ferguson. I

²⁴⁶ Punitive measures may properly follow when subjects renege on their tax responsibilities, e.g. tax evasion and fraud. But when punitive measures are due, they *follow* the establishment of failures at the level of individual tax remittance; punitive features ought not be *constitutive* of mere revenue-collection itself.

discuss these more conventional violations in the final part of this section. Part of the reason for this is that conflating judicial functions with revenue-generating functions gives rise to unusual failures in the publicity condition of rule of law. These won't, again, be failures of publicity in the conventional sense—failures of publicity within the set of laws that circumscribe judicial offices and functions. Conditions of regularity and publicity could be met by the relevant *judicial* laws while still failing to satisfy publicity in the ways that I have in mind here.

When judicial officeholders are entrusted with revenue-raising, they take on two component roles: (i) judicial officeholders become positioned to expand the tax base at their discretion (they become positioned to identify and tax new sources of revenue), and (ii) they become positioned to increase total revenue capture at will.²⁴⁷ Ordinarily, decisions about the tax base and decisions about how much revenue ought to be collected are determined legislatively, where the appropriate mechanisms for satisfying publicity are present. The legislative decision to expand the tax base by taxing a new form of investment income, for instance, can be justified by showing that expanding the tax base in this way is consistent with existing laws governing revenue extraction, and by showing that there was sufficient opportunity for input by non-state actors through the legislative process, via elected representatives. Likewise, decisions about overall revenue intake, which include not only decisions about *increasing* revenue intake, but also decisions about *refraining from* increasing revenue intake, like raising the debt ceiling, are also determined legislatively. Decisions about overall revenue, like decisions about expanding the tax base, fall appropriately in the legislative realm because they're bound up with questions

²⁴⁷ The second function, that judicial officeholders are positioned to increase total overall revenue at will, assumes that an aggregate revenue cap isn't imposed. In the idealized case I have in mind, all that's assumed is that rule of law in the justice system is present, and that the justice system has been entrusted with additional revenue-raising functions. Imposing a cap on the amount of revenue that can be permissibly generated by judicial enforcement would mitigate the possibility for further violations of rule of law, but a number of the problems identified already would linger: that mere revenue collection would be punitive, that expansion of the tax base would take place without sufficient public oversight, and so on.

of what public goods are collectively beneficial, and collectively desired. Input from non-state actors—either direct input in the form of voting, or private communications with elected representatives, or indirect input through the election of representatives—is appropriate here. The legislative process gives non-state actors sufficient opportunity for evaluating and influencing the content of decisions about public goods and overall revenue.²⁴⁸

By contrast, when judicial officeholders who are tasked with raising revenue decide to expand the tax base, they do this unilaterally, without sufficient accountability or oversight from non-state actors. We see this in Ferguson. By harnessing penalties and citations as consistent sources of revenue, the municipal justice system in Ferguson effectively expanded the tax base. The feature of having committed a municipal offense became salient for extractive purposes.²⁴⁹ Committing a municipal offense would bear on a subject’s financial obligations to the state—the presence of a municipal offense would increase one’s financial obligations with respect to *public revenue*—in the same way that, say, having increased investment income within the taxable period would. Judicial officeholders in Ferguson were also positioned to collect more overall revenue by increasing the frequency with which fines, penalties, and citations were issued, and by increasing the penalties associated with existing offenses.²⁵⁰

Insufficient accountability exists for decisions about the tax base and overall revenue when they’re made by judicial officeholders, because the appropriate accountability checks are legislative. Conventional *judicial* mechanisms of publicity include trials and appellate review.²⁵¹

²⁴⁸ We might think that decisions about overall revenue increases are *suited* to distinctively legislative mechanisms of publicity because legislative mechanisms are a better check on the *content* of legislation. Content is what matters when what’s at stake is a matter of which public goods are to be funded, and how they’re to be funded. There might also be legitimacy-enhancing outcomes associated with tying decisions about overall revenue intake with distinctively legislative mechanisms of publicity: in at least one study, when participants were given the opportunity to vote on the public goods toward which their taxes were going, there were higher levels of tax compliance. In this and other respects, we might see the substantive criterion of just extraction as making it more likely that the criterion of perceived just extraction is also met.

²⁴⁹ The feature of having committed a municipal offense came to be effectively considered a tax attribute.

²⁵⁰ (Department of Justice, pg. 10)

²⁵¹ (Gowder, pg. 13)

These are opportunities for non-state actors to both demand justifications for the use of coercion, and opportunities for non-state actors to challenge the interpretation and application of laws have been brought to bear on their cases. In situations where judicial functions have been coopted to generate revenue, however, these same judicial mechanisms of publicity are unlikely to uncover the relevant reasons on which public assessment *should* be brought to bear: that judicial officeholders have, as their reasons for action—where these reasons can be either implicitly or explicitly held—revenue-generating aims. Revenue-generating aims are unlikely to be revealed or challenged in trials for which the primary aim is contesting various features of the relevant offense.

We see here the odd sense in which publicity still fails in spite of *judicial* conformity with both publicity and regularity. Judicial officeholders are not required to give their reasons for employing coercion when these reasons are generally licit, but non-judicial—that is, when these reasons fall outside the realm of public security. This is because conventional judicial mechanisms of publicity are not, by their very nature, intended to reveal non-judicial reasons for action, let alone give non-state actors opportunity to demand and assess those reasons. Non-state actors would be unable to criticize these revenue-raising practices from within the justice system. So when judicial officeholders effectively expand the tax base by treating municipal penalties and fines as consistently revenue-generating, they do so unaccountably—even assuming that the justice system functions perfectly. Non-state actors cannot directly challenge or evaluate the inclusion of municipal offenses in the tax base, and no established judicial avenues are available for non-state actors to indirectly influence the decision to effectively expand the tax base. Likewise, when judicial officeholders extract more total revenue through heightened policing practices and by increasing the costs of existing fines, they also—though the claim is more

tendentious here, because possible failures of regularity are already present—necessarily fail to meet a condition of publicity because the requisite accountability measures are absent.

The next features of the Ferguson municipal justice system I look at are its more straightforward failures of regularity and publicity. Many of these failures in regularity were made more likely by the ways that a marriage of judicial functions with revenue-raising functions necessarily leaves a condition of publicity unmet. I leave behind the earlier idealized assumptions of a judiciary that complies with regularity and publicity in order to focus on the specific ways that Ferguson’s municipal justice system flouted regularity, and thus rule of law.

What I want to do next is trace these more straightforward violations in specifically *judicial* regularity and publicity to the unique failure of publicity just discussed—when the relevant reasons for coercive action by officials cannot be uncovered by inbuilt mechanisms of publicity. Failures in publicity that resulted from conflating revenue-raising and judicial functions lead to straightforwardly judicial violations of regularity and publicity. Roughly, the domination of revenue-raising aims in the Ferguson justice system *undermined* the very conditions for judicial regularity at the same time that it encouraged more straightforward violations of judicial regularity.

First, a defense of the claim about the domination of revenue-raising aims. Because revenue-raising aims could never be put to any conventional tests of publicity, illegitimate revenue-raising practices persisted in Ferguson. Residents of Ferguson and local municipalities were never given opportunity to know that judicial officials were acting on the basis of revenue-raising reasons, let alone assess the suitability of these reasons. Revenue-raising aims gradually dominated distinctively judicial functions of promoting public security and community trust. The domination of revenue-raising aims was effected by top-down bureaucratic influences:

Ferguson’s city officials—made up of a body of City Councilmembers and a City Manager with executive administrative responsibilities—actively budgeted for increasing revenues from law enforcement activities.²⁵² These budgets were devised in collaboration with the Ferguson Chief of Police.²⁵³ Through the influence of the Police Chief, these top-down influences percolated to the level of individual police officers. Police officers were exhorted by their Patrol Captains to maintain a minimum level of enforcement “productivity”, where productivity was solely a measure of terms of enforcement volume, without regard for public safety aims.²⁵⁴ Another route of top-down bureaucratic influence was through the appointment of justice system officials. City officials actively selected for judicial officials who demonstrated sympathy for a revenue raising agency, and a revenue-raising aptitude. The Ferguson Municipal Judge, for instance, who is appointed at the discretion of the City Manager and elected by the City Council, was one such position for which revenue-raising aptitude was considered a qualification. In a 2012 correspondence, the City Manager recommended reappointing then-Ferguson Municipal Judge, Ronald Brockmeyer, on the basis of his successful track record in raising revenue. The City Manager noted that, “[it] goes without saying the City cannot afford to lose any efficiency in our Courts, nor experience any decrease in our Fines and Forfeitures.”²⁵⁵

Prioritizing revenue-generating aims undermined the very conditions for judicial regularity in Ferguson.²⁵⁶ This happened in at least two distinctive ways, both of which had the

²⁵² (United States Department of Justice, pg. 9)

²⁵³ (United States Department of Justice, pg. 10)

²⁵⁴ (United States Department of Justice, pg. 11)

²⁵⁵ (United States Department of Justice, pg. 15)

²⁵⁶ We might also imagine the prioritization of revenue-generating aims over public security aims being differently achieved. The outcome in Ferguson was that greater discretion was given to individual agents of the state: either by effacing the content of the law entirely, or by making the content of the relevant laws *more vague*. What might’ve instead happened was that revenue-generating aims were carried out without changing the discretion wielded by agents of the state at all. The content of the relevant judicial laws could be rewritten in order to maximize revenue, without loss in specificity. In particular, there would be no change to the *discretion* that individual agents of the state might have—indeed, with increased specificity in law, there might even be diminished discretion on the part of individual agents.

effect of ascribing ever-greater discretion to individual police officers. Judicial regularity, as discussed earlier, principally concerns the dimension of legal *implementation*, though it also imposes requirements of specificity on the *content* of law. One effect of prioritizing revenue-generating aims in Ferguson was to not only make the content of the relevant judicial laws more vague, but to sometimes efface the content of those laws altogether. Fines issued by the municipal court for offenses, for instance, came to be imposed on a “case-by-case basis”.²⁵⁷ Rather than devising a consistent scheme of fines, ad hoc determinations of fines were instead made by the Prosecuting Attorney. These determinations were usually adopted directly by the Municipal Judge. Regularity, which requires that legal implementation be constrained by good faith interpretations of the law, is impossible absent some sort of *content* to the relevant law. Giving maximum discretion for the determination of fines to judicial officials had the effect of effacing the content of laws that regulated fines.²⁵⁸ Such laws no longer prescribed any particular schedule of fines, or practice of levying fines.

Another way that prioritizing revenue-generating aims undermined the possibility of judicial regularity was by stalling the proper *transmission* of laws to agents of the state. Agents of the state can’t act with appropriate discretion—they can’t carry out their responsibilities in ways circumscribed by good faith interpretations of the laws—when they don’t know the *content* of those laws, or that the relevant laws even exist. Regularity with respect to implementation is impossible when the laws circumscribing enforcement practices fail to be transmitted at all. In Ferguson, this particular failure of regularity was evinced by the police practice of issuing stop orders. A stop order, or “wanted”, is an identifying entry in a “statewide law enforcement

²⁵⁷ (United States Department of Justice, pg. 53)

²⁵⁸ Since meeting a condition of publicity entails that a condition of regularity is satisfied, violations of regularity entail failures of publicity. We might see granting maximum discretion to state officials as also a violation of publicity in this way: when state officials have maximum discretion in the implementation of laws, then the rationale for implementing laws is no longer *knowable* to non-state actors. Implementation of law becomes essentially a matter of whim on the part of state officials.

database” that recommends arrest when the person in question is located.²⁵⁹ FPD regulations require probable cause in order for a stop order to be entered. In practice, however, police officers are given “minimal training and supervision” on when stop orders can be justifiably recorded, and some officers reported that “they may have heard about wanted in the training academy”, but “received no formal training” on the issuance of stop orders.²⁶⁰ Stop orders were often entered without probable cause, and arrests were often made on the basis of such stop orders.

Lastly, many of the illegitimate revenue-generating practices in Ferguson were straightforward violations of regularity on the part of police, prosecutors, and judges. This was, in part, the result of the conditions for regularity being undermined in the ways just discussed: violations of regularity will generally follow where the conditions for regularity cannot be met. Many of these violations of discretion were straightforward violations of regularity with respect to *implementation*. In these cases, laws circumscribing the conduct of state officials existed—at both the constitutional level, and at the level of FPD departmental policies—but these laws no longer effectively bound the conduct of state officials. State officials here acted beyond the authority that they were conferred by law, and in active contravention of that authority.

One violation of regularity occurred with respect to the use of police force. In the use of force, police officers are bound by both constitutional requirements and local FPD departmental policies. The Fourth Amendment requires that excessive force be assessed against a standard of reasonableness—“from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.” In addition, FPD departmental policies state that use of police force is a last resort, to be employed only after “reasonable alternatives have been exhausted”, or if such

²⁵⁹ (United States Department of Justice, pg. 22)

²⁶⁰ (United States Department of Justice, pg. 23)

reasonable alternatives would be “clearly ineffective”.²⁶¹ Actual FPD policing practices regularly violated both standards for excessive force. Officers deployed Electronic Control Weapons on civilians who posed no physical threat, canines on “nonviolent offenders, some of them children”, and sometimes employed excessive force punitively.²⁶²

Policing practices also regularly targeted African Americans in violation of the Fourteenth Amendment. African Americans were considerably more likely to be stopped, arrested, and issued multiple citations in the course of a single encounter with police.²⁶³

The flagrancy of these violations of regularity makes it remarkable that they were allowed to go unchecked for so long. One cause of these violations of regularity was the failure to meet a condition of publicity discussed earlier: without publicity checks on their behavior, state officials were allowed to act in arbitrary, unaccountable ways. State officials were allowed to deploy their powers on the basis of whim, where the whims in question also happened to be racist and discriminatory.

Another reason for these violations of regularity can be located in what we might call a culture of impunity. Impunity, as I have it in mind here, is distinct from merely granting state officials excessive discretion—one of the ways it was argued that failures in publicity undermined the conditions for regularity. Impunity is a *product* of excessive discretion on the part of state officials. When state officials are given excessive discretion in some respects, this is likely to lead to other, more flagrant, violations of regularity. Violations of regularity are likely to beget further violations of regularity, in short. In virtue of this ensuing culture of impunity,

²⁶¹ (United States Department of Justice, pg. 29)

²⁶² (United States Department of Justice, pg. 29—33)

²⁶³ (United States Department of Justice, pg. 62)

Ferguson police officers felt especially justified in their unconstitutional use of arbitrary and discriminatory use of power. Impunity bears a close relationship to hubris.²⁶⁴

III.iv Tax revenue use and the condition of common benefit

The last component of the substantive criterion is the requirement that revenue drawn from taxation be used for the provision of public goods. This last part of the substantive criterion essentially requires the presence of a relationship between tax revenue and public goods intended for common benefit. In order for this relationship to obtain, two component conditions must be met: first, a direct system of taxation that serves as a significant source of public revenue must be in place, and what revenue is generated by this system must ultimately be used for common benefit. Second, public goods must be principally funded by tax-derived revenue.

A failure of the condition that tax revenue be used ultimately for common benefit will generally be sufficient to delegitimize an extractionary regime. Anything short of the use of tax revenue for common benefit implies that tax revenue is used to benefit only a select few, where these select few are presumably political elites. This is a violation of popular sovereignty. Popular sovereignty vests the subjects of a state with the “ultimate right to authorize laws” for the disposition of shared resources, including tax revenue, within the territorial jurisdiction of the state.²⁶⁵ Subjects of the state have ownership over shared resources within the territorial jurisdiction of their states to the extent that ownership is defined by property right, and property rights are circumscribed by property law. Subjects have the ultimate authority to authorize laws over shared resources, including property rights.

²⁶⁴ For a discussion of hubris as the product of failures in both regularity and publicity, see Gowder’s *The Rule of Law in the Real World*, pg. 18–19.

²⁶⁵ (Wenar, pg. 222)

By considering how subjects might authorize the disposition of shared resources, we can see why using shared resources for the benefit of a select few could never be compatible with vesting ultimate legal authority in subjects. Assume that popular sovereignty is a defensible account of power and authority where shared resources are concerned (popular sovereignty certainly seems to be the dominant contemporary account of political power and authority).²⁶⁶ From this, we get a natural set of constraints on what relationships—with respect to the disposition of shared resources—between subjects and the state are permissible. The extraction and use of shared resources is usually delegated to the state, because subjects are either unable or unwilling to be involved in the fine-grained details of resource disposition. The state, however, must discharge its responsibilities of extraction and use in ways that subjects either *do authorize*, or *could have* authorized. A number of possible relationships between the subject and the state are compatible with subject-authorization, and thus popular sovereignty. These are relationships that subjects could, collectively, authorize, or relationships that leave room for the exercise of subject authority. The state could, for instance, stand in a principal-agent relationship with its subjects. Subjects would retain ownership of shared resources, and the state would manage those resources in service of its subjects.²⁶⁷ Alternatively, the state could serve as an effective trustee for the shared resources that subjects have jurisdictional authority over. In the trustee-beneficiary relationship, the state acquires a legal title to the shared resources, but subjects either retain ownership over the benefits that issue from the shared resource, or subjects have a *right* to the state's beneficial use of shared resources.²⁶⁸ The use of shared resources for the common benefit

²⁶⁶ Since popular sovereignty is explicitly enshrined in both the Charter of the United Nations, as well as in the individual constitutions of most nations, I take it to be the dominant theory of authority and power. Violations of popular sovereignty are *prima facie* objectionable (Wenar, pg. 182).

²⁶⁷ (Wenar, pg. 223)

²⁶⁸ The actual nature of the trustee-beneficiary relationship between the state and subjects will depend on what rights and obligations we take the trustee-beneficiary relationship to consist in (Penner, pg. 482).

is, necessarily, a feature of any relationship between the subject and state compatible with popular sovereignty. Any other alternative, like the use of shared resources to benefit only a select few, could not be collectively authorized by subjects of the state.

States that use public revenue for the principal benefit of a select few political elites are generally kleptocracies. Subjects of kleptocratic states no longer retain any meaningful ownership over their shared resources. They lack both direct ownership over shared resources and any entitlement to the benefits that might issue from these shared resources. In kleptocracies, subjects never voluntarily cede their ownership of shared resources; rather, shared resources are seized for the personal enrichment of political elites. They're spent on either luxuries, or political stabilization measures: military expenditures to enhance the coercive force of the kleptocratic state, and bribes to purchase the cooperation of state officeholders.²⁶⁹

Hefty political stabilization expenditures are needed because kleptocracies are rarely politically stable. And by making use of measures like coercion and bribery to promote political stability, kleptocracies are inclined toward authoritarianism.²⁷⁰ It's clear why authoritarianism is a persistent risk if we think of taxation in the following terms: a system of taxation effectively asks subjects to forego revenue that could have been instead spent on private expenditure. Naturally, subjects will want to influence the use of the public revenue to which they're being made to contribute, and the state's dependence on its subjects for revenue will give subjects political leverage over the state. The mere existence of a system of taxation will have the effect of both politically mobilizing and politically empowering subjects.²⁷¹ The stable extraction of

²⁶⁹ (Wenar, pg. 33); (Wenar, pg. 36)

²⁷⁰ Alternatively, authoritarianism precedes kleptocratic tendencies, but the point is that kleptocracy and authoritarianism are often coextensive.

²⁷¹ The long-term political mobilization effects of taxation are well-documented in both the international development and sociological literature. Tilly, for instance, notes that when states implement tax extraction regimes, this usually precipitates an "intervention-resistance-repression-bargaining" cycle of events:

revenue from subjects requires that revenue be used for common benefit, and that subjects be positioned to influence what form those public benefits take. The kleptocratic seizure of tax revenue for the benefit of a select few, by contrast, is directly at odds with what subjects generally want, and requires excluding subjects from political participation so that they're unable to leverage publicly beneficial uses for tax revenue. In order to continue extracting revenue from subjects, a resort to authoritarianism is generally needed to keep kleptocratic incumbents in power. Kleptocratic incumbents will eventually have to make their political power absolute, because their interests are opposed to the interests of their subjects. Any measure of power-sharing with subjects risks destabilizing the kleptocratic regime. Maintaining absolute power requires deploying characteristic authoritarian strategies of intimidation and subordination: examples include the coercive suppression of dissidents, buying off certain key constituencies, and the formation of relationships of patronage and clientelism.²⁷² Often little public revenue is left over for public goods expenditures in authoritarian kleptocracies, even if the kleptocratic regime is inclined to placate its subjects through the provision of public goods.²⁷³

The kleptocratic political arrangement is almost never durable. More enduring kleptocracies altogether avoid drawing significant revenue from taxation, or otherwise depending on their subjects at all. Instead, these kleptocracies rely primarily on natural resource rents for public revenue. States can extract and sell their natural resources without involving subjects in either process: foreign firms are brought in to extract natural resources, and transactions for the sale of resources are completed with foreign buyers. The exclusion of subjects from the principal

“...state agents demand payment, citizens resist, the government applies armed force, but in the process of overcoming resistance kills off some leaders, buys off some others, and announces justifications for the present intervention that imply rules for proper interventions in the future—in short, repression combines with bargaining.” (Tilly 2009, pg. 180).

²⁷² (Magaloni, pg. 99)

²⁷³ (Wenar, pg. 42)

means of generating revenue means that the state has no impetus to politically empower its subjects, or involve them in political decision-making.

The mere presence of a system of taxation from which public revenue is principally drawn, then, makes it more likely that a condition of common benefit is met—that public revenue is used for public goods. In the long-run, the presence of a system of taxation thus undermines the conditions for authoritarianism. Taxation encourages political power-sharing through its political mobilization and political empowerment effects. Eventual democratization, either in whole or in part, often follows the establishment of a tax regime.²⁷⁴ Taxation opens up avenues for subjects to influence political outcomes, and for states to be held accountable to their subjects. These democratization effects are sometimes self-reinforcing. States may be motivated to enhance the productive output of their subjects, and thus their overall revenue intake, through the provision of certain public goods like education. A more educated population, in turn, is more likely to act as an effective accountability check on the state.

The requirement that public revenue be used for common benefit runs in the other direction: common benefit, in the form of public goods, must be funded principally by public revenue drawn from taxes. When public goods are principally funded by tax revenue, this cements the state's dependence on its citizens for revenue, with the attendant accountability-promoting and anti-authoritarian effects of such dependence. Public goods are also more likely to be provided *efficiently* when they're funded by tax revenue. The existence of a centralized and well-administered system of taxation is a rich source of economic information about the activities of individual subjects, corporations, and industries. It also ensures that such economic

²⁷⁴ The mere presence of a provincial system of taxation, for instance, may not be sufficient to democratize an entire state, but even local taxation will “activate a mechanisms that [subjects] the state to public politics and, to a small degree, [facilitate] popular influence over public politics” (Tilly 2007, pg. 144). An example of this local democratization was seen from 1992—1993 in Renshou, Sichuan, China.

information continues to be made available by promoting good recordkeeping and accounting practices by taxpaying entities.²⁷⁵ Without this information, the state is limited in its ability to identify which public goods might be most needed, and whether existing public goods have been effectively made available. We can see problematic information loss of this kind in cases where the provision of public goods is funded by non-tax revenue—these are also usually cases for which the existing tax regime is underdeveloped or dysfunctional. One notable example is Saudi Arabia in the aftermath of its 1970s oil boom. The temporary abundance of oil revenue at the beginning of the boom caused the suspension of nearly all tax collection shortly thereafter. Without tax collection responsibilities, the Saudi Arabian extractive bureau atrophied: in discontinuing the collection of taxes, it also ceased to keep track of which companies were the beneficiaries of government contracts, the profit turnovers of private sector entities, import and trade numbers, and even what private sector entities existed.²⁷⁶ By the mid-1970s, distributive branches of the government—branches tasked with the distribution of public goods—were directly affected by the loss of economic information. Livestock subsidies, for instance, could no longer be distributed to livestock producers because “accurate information on individual and tribal [livestock] holdings” were unavailable.²⁷⁷

In this section, I’ve discussed the demands that the substantive criterion, and contributive legitimacy broadly, makes on the uses of tax revenue. Tax revenue must be principally put toward public goods intended for common benefit. Anything short of common benefit risks kleptocratic and authoritarian tendencies in the state. Public goods, in turn, should be principally financed by tax revenue, where this condition is included in order to ensure both the continued

²⁷⁵ (Chaudhry, pg. 164)

²⁷⁶ (Chaudhry, pg. 165-166)

²⁷⁷ (Chaudhry, pg. 167)

need for a system of taxation, and the efficient provision of public goods. The mere presence, in a state, of a system of taxation from which public revenue is principally drawn, however, is some assurance that **condition of fairness for tax revenue use** will be met: the mere presence of a system of taxation makes it more likely that tax revenue *will* be used for common benefit.

IV. The criterion of perceived just extraction

The other half of contributive legitimacy is the criterion of *perceived* just extraction. This second criterion corresponds with the second kind of justification for the state's exercise of coercive power that theories of political legitimacy ought to furnish—a justification for subject-compliance with the state's demands. The criterion of perceived just extraction, if satisfied, provides subjects with sufficient reason for complying with the state's extractory demands, where these are demands for tax remittance, in particular. The reasons that subjects have for complying, and the associated justification given by those reasons, must be neither wholly impartial nor wholly partial in nature.

The criterion of perceived just extraction ensures that at least some of these reasons consist in public perceptions of fairness—that subjects of the state see its extractive practices as generally fair. By requiring that legitimate tax regimes satisfy a condition of perceived fairness, the criterion of perceived just extraction ensures the feasibility and stability of legitimate tax regimes in at least one respect: limiting the incidence of tax evasion by promoting voluntary compliance with tax remittance. Some measure of voluntary compliance will be necessary for any feasible and stable state extractory regime. The criterion of perceived just extraction secures the feasibility and stability of state extractory regimes, while also ensuring their contributive legitimacy.

The need for a criterion of perceived just extraction—the very inclusion of the criterion—and the content of what it requires is, in large part, an empirical matter. I next recruit evidence to support the claims that, one, a condition of perceived just extraction is needed at all, and two, that this condition should consist, specifically, in perceptions of fairness *as reciprocity*.

Substantial empirical evidence exists to support the claim that perceived fairness on the part of taxpayers is an essential feature of tax compliance. Fairness is a motivation for tax compliance distinct from individual self-interest. According to individual self-interest theories of tax compliance, taxpayers will approach tax remittance with the sole aim of outcome-maximization.²⁷⁸ Tax compliance will be determined by a cost-benefit analysis of the certain loss of tax payment against the expected losses of punishment for tax evasion.²⁷⁹ Tax compliance here is determined by an exchange limited in scope to the tax authority and the taxpayer.

Fairness assessments, by contrast, are independent of outcome-maximization considerations. They're also assessments that can be made of exchanges that are much broader in scope—exchanges that involve more parties than just taxpayers and tax authorities. Fairness can also be a matter between taxpayers themselves. Before showing that perceptions of fairness are strongly linked to tax compliance, we have to first distinguish between the different species of fairness tested for in the tax compliance literature. Two particular species of fairness will be relevant here: (i) fairness as distributive justice, and (ii) fairness as procedural justice. Each kind of fairness can, in turn, be assessed at multiple “analytic levels” (that is to say, social units): (i) fairness at the level of individuals, (ii) fairness at the level of groups, and (iii) fairness at the level

²⁷⁸ For examples of the traditional tax compliance theory of individual self-interest, see Allingham and Sandmo, 1972 and Beck and Jung, 1989.

²⁷⁹ (Braithwaite, pg. 72)

of society.²⁸⁰ Perceptions of distributive and procedural fairness at the level of individuals, groups, and society itself have all been shown to influence tax compliance.

Distributive justice is usually operationalized in experiments as an assessment of resource allocations in outcomes—where resources here could include after-tax income, or opportunities for tax evasion.²⁸¹ Respondents in experiments that test for the effects of distributive justice are often encouraged to assess resource allocations with respect to considerations of desert or entitlement. Experiments that test for procedural justice, by contrast, focus on assessments of desert and entitlement in the processes leading up to resource allocation. The relevant sense of desert or entitlement here is procedural. Procedural justice is met when respondents feel that they've received fair treatment or consideration in resource allocation procedures, rather than outcomes. I use the terms procedural fairness and fair treatment here interchangeably, which is consistent with operative accounts of procedural fairness in the tax compliance literature.

A number of experiments support a role for fairness perceptions in promoting tax compliance. Some experiments focus on the effects of perceptions of distributive justice at the level of individuals in tax compliance. A 1980 study by Spicer and Becker assessed the role of perceptions of horizontal equity—that like incomes be taxed alike—in tax evasion. When participants were lead to believe that they were being taxed more than “the average tax rate” for those with the same income, rates of tax compliance decreased; tax compliance improved when participants were told that they were being taxed at either average rates, or less than average rates.^{282,283} Other experiments have looked to the effects of perceived distributive justice at the level of society—distributive justice as a wholesale assessment of whether the allocation of tax

²⁸⁰ (Wenzel, pg. 46)

²⁸¹ (Wenzel, pg. 45)

²⁸² (Spicer and Becker, pg. 173)

²⁸³ The Spicer and Becker study thus also shows that taxpayers who see themselves as being taxed at a favorable or advantageous rate are less likely to evade taxes.

burdens, public goods, or tax evasion opportunities is perceived to be fair—on tax compliance.²⁸⁴

Perceptions of improved distributive justice at the level of society has been correlated with a lower incidence of future intentions to evade taxes, and lower tax avoidance efforts.²⁸⁵

A subset of the experiments that look to distributive justice at the level of individuals assess for *exchange equity*, in particular. If we see tax remittance as transactional for public goods, then exchange equity is a measure of perceived transactional fairness—the degree to which taxpayers feel that they’re getting their money’s worth in the form of public goods. Exchange equity is a variable that is strongly correlated with self-reported tax evasion.²⁸⁶ Perceived exchange equity can mitigate the evasion effects of a tax rate increase if taxpayers continue to feel that the benefits they receive justify their increased tax burdens. By contrast, exchange equity can have the opposite effect of promoting tax evasion when exchange *inequity* is perceived to be the case—that is, when tax burdens are no longer felt to be justified by the public benefits received. In the event of felt exchange inequity, taxpayers may ‘correct for’ perceived transactional unfairness by reducing their tax burden and reestablishing exchange equity.

A 1995 study by Moser, Evans, and Kim observed an interaction between horizontal equity and exchange inequity caused by a simulated tax rate increase *without* a corresponding increase in the public goods being provided. When participants were made aware that tax rates were increased uniformly for all participants—that horizontal equity was present—then there was no appreciable increase in tax evasion rates. When participants were instead told that tax

²⁸⁴ (Wenzel, pg. 51)

²⁸⁵ Kinsey and Grasmick distinguished between (a) future intentions to illicitly avoid taxes, and (b) measurements of effort made by taxpayers to licitly minimize their tax burdens, e.g. expending more time to report all possible deductions. The incidence of both was diminished after passage of the 1986 Tax Reform Act. Perceptions of vertical equity also improved following the passage of the 1986 Tax Reform Act (Kinsey and Grasmick 1993, pg. 314—316).

²⁸⁶ (Porcano, pg. 59)

rates were increased for only some but not others—that horizontal *inequity* was present—then exchange inequity was associated with increased tax evasion. In both cases, an exchange inequity was present. Horizontal equity, however, offset the tax evasion effects that would have otherwise been caused by the presence of exchange inequity.²⁸⁷ A 1992 study by Alm, McClelland and Schulze tracked the effects of varying the exchange equity ratio on tax compliance rates. They found that when exchange equity rates were made more favorable to taxpayers—when the total pool of public goods to be allocated was increased—then rates of tax compliance generally improved.²⁸⁸

These last three studies support the effects of fairness as exchange equity on tax compliance. This supports the claim that what a criterion for perceived just extraction requires perceived *reciprocity*. We've seen already that perceived fairness, of various stripes, has a well-demonstrated role in the feasibility and stability of extractionary regimes. But many of the fairness parameters given already—distributive and procedural fairness, assessable at various analytic levels—can be characterized as one or other kind of reciprocity. And it's perceived *reciprocity*, in particular, that I think should be made the central aim of a criterion of perceived just extraction—just not perceived fairness, generally. When subjects of the state believe that taxes are exacted in such a way that reciprocity is fulfilled, then they have sufficient reason to comply with the demands of the state. Voluntary compliance with the state's extractionary demands, in turn, contributes to the feasibility and stability of extractionary regimes.

Outside of fairness considerations specific to taxation, attitudes of reciprocity and perceptions of reciprocity have a well-demonstrated role in the feasibility and stability of redistributive social welfare measures. Public support for a number of durable social welfare

²⁸⁷ (Moser, Evans, and Kim, pg. 632)

²⁸⁸ (Alm, McClelland and Schulze, pg. 34)

provisions like Social Security and Medicare can be attributed to the fulfillment of a condition of perceived reciprocity.²⁸⁹ The close relationship between social welfare provisions and taxation makes it reasonable to think that perceived reciprocity might also directly contribute to the feasibility and stability of taxation schemes by promoting tax compliance. Since taxation is the principal means of funding redistributive social welfare provisions, it's unsurprising that the attitudes of reciprocity that comprise public support for social welfare provisions are at least partly about taxation, and that tax compliance may have much to do with the perceived fairness of spending tax revenue on such provisions. Before looking to the evidence that supports a more direct role for reciprocity in promoting tax compliance, however, we should first construct a working account of what's meant by reciprocity.

IV.i Perceived just extraction as perceived *reciprocity*

Reciprocity, broadly, is the norm that concessions by one party obligates other parties, in turn, to make concessions of their own.²⁹⁰ Usually there's an expectation of parity between the concessions made by each party. My claim here is that there's sufficient evidence to justify ascribing a tax compliance-promoting function to reciprocity: when reciprocity is perceived to be met, then tax compliance is more likely. Correspondingly, a criterion of perceived just extraction should also concern itself with public perceptions of reciprocity. I discuss next the various kinds of reciprocity that might be included in a criterion for perceived just extraction.

The perceived fulfillment of reciprocity can involve different kinds of concessions, and can take place between different parties. Exchange equity at the level of individuals—where the experimental literature understands exchange equity as a species of distributive justice—for instance, can be most straightforwardly characterized as a species of reciprocity. Here, taxpayers

²⁸⁹ (Howard, pg. 87)

²⁹⁰ (Smith, pg. 226)

expect that the concessions they make in the form of tax remittance be repaid in at least somewhat equal measure by governmental concessions in the form of public goods. Exchange equity at the level of *groups* can also have the structure of reciprocity. Taxpayers may be sensitive to not just their individual shares of public good, but rather the overall shares of public good received by the *groups* in which they have membership.

Non-distributive species of fairness can also count as instances of reciprocity. Procedural fairness, for instance, might be seen by taxpayers as a sufficient concession on the part of the government or taxpaying authority for tax remittance. Fair treatment of taxpayers elicits tax remittance in return. Reciprocity as procedural fairness is distinct from reciprocity as exchange equity because the reciprocation in question isn't always transactional. Tax remittance in the context of reciprocity as procedural fairness isn't necessarily the perceived price of fair treatment; fair treatment may encourage tax compliance without taxpayers thinking that their taxes approximate the value of fair treatment.

Although the positive effects of perceived procedural fairness on tax compliance are well-demonstrated, the role of procedural fairness in tax compliance is never considered in terms of reciprocity. Still, at least some accounts of fair treatment in the tax compliance literature are clear instances of reciprocity. One comparative study of tax compliance in multiple Swiss cantons took the presence of direct democratic political structures to be indications of procedural fairness. The presence of direct democratic structures was, in turn, linked to greater tax compliance. In Swiss cantons with direct democracies, where citizens exerted control over governance through "obligatory and optional referenda", tax compliance was notably higher than average national rates of tax compliance.²⁹¹ In Swiss cantons with representative democracies,

²⁹¹ (Pommerehne and Weck-Hannemann, pg. 166)

tax compliance was lower than average national rates. We might see this as an instance of reciprocity that obtains between the taxpayer and government. Opportunities for democratic participation are the relevant concession made by the government, and tax remittance is the concession made by taxpayers.

Another study by Alm, Jackson, and McKee also tested the effects of procedural fairness as the presence of direct democratic procedures in a simulated voting scheme. Tax compliance was higher when decisions about the public expenditure uses of tax revenue was “decided by majority rule”, and when the results of the vote were known to participants.²⁹² Rates of tax compliance remained still high in the group for which public expenditure decisions were imposed, but where the public expenditures in question were known to enjoy popular support. The lowest rates of tax compliance were associated with the group for which unpopular public expenditure decisions were imposed. The results of the Alm, Jackson and McKee study also support a role for reciprocity as procedural justice in tax compliance. The relevant concessions on the part of the government here are like those revealed in the Swiss cantons study: opportunities for democratic participation, and perhaps equal consideration of one’s views, even if those views aren’t reflected in voting outcomes.²⁹³

Reciprocity also better captures the non-transactional, non-exchange equity, notions of distributive justice that have been tested for in the tax compliance literature. I have in mind here norms of horizontal equity (that like income be taxed alike) and vertical equity (that different

²⁹² (Alm, Jackson, and McKee, pg. 289)

²⁹³ We might think that the Alm, Jackson, and McKee study also offers support for exchange equity: in the experimental trial where public expenditures that were known to enjoy public support were imposed on participants, tax compliance was less than compliance in the majoritarian vote trial, but still greater than tax compliance in the trial where an unpopular public expenditure decision was imposed. We might reasonably infer that tax compliance in the trials where popular public expenditure decisions were imposed was at least partly a result of the perceived fulfillment of exchange equity as procedural fairness. Participants whose preferences were consistent with the public expenditure decision imposed were likely to pay their taxes. Participants whose preferences for public expenditure diverged from the decision imposed were likely to evade taxes.

incomes be taxed differently). In the experimental literature, horizontal and vertical equity are considered norms of fairness with respect to distribution, because the allocation of tax burdens is classed as a distributive matter.²⁹⁴ We might, however, more accurately see horizontal and vertical equity as a matter of reciprocity *between* taxpayers. As a non-exchange equity notion of reciprocity, reciprocity here wouldn't be satisfied by the perceived fairness of exchanges. Rather, reciprocity between taxpayers in this sense is satisfied when taxpayers perceive each other to be making concessions that are suited to their stations. These concessions may take the form of tax remittance, effort, or other productive contributions.²⁹⁵ Reciprocity as *horizontal equity* is satisfied when taxpayers see similarly situated taxpayers as making the same, or similar, concessions. Reciprocity as *vertical equity* is satisfied when taxpayers see differently situated taxpayers as making either greater or smaller concessions, depending on whether they're better-off or worse-off.

Another sense of reciprocity that is potentially salient for tax compliance is at the level of groups, rather than individuals. Perceived violations of reciprocity may encourage subjects to sort themselves into group-identities of reciprocators and non-reciprocators. A 'makers' and 'takers' ideology reflects these divisive group identities.

Reciprocity is, in short, a hybrid notion that can be met by various kinds of perceived fairness that have been established in the experimental literature on tax compliance. It is, however, a notion that reoccurs so often as to justify making it a centerpiece of a criterion for perceived just extraction.

The component fairness conditions proposed in the substantive criterion, if satisfied, make some headway toward ensuring that a condition of perceived reciprocity is also met.

²⁹⁴ (Wenzel, pg. 45)

²⁹⁵ (Zelenak, pg. 29)

Satisfying the **condition of fairness for individual tax liabilities**, for instance, means that individual tax liabilities are determined in accordance with a principle of ability-to-pay. This contributes to the satisfaction of vertical equity, and thus horizontal equity. If taxpayers are taxed differently on the basis of differing net income and wealth, then this implies that taxpayers of similar income and wealth standing are taxed similarly. The satisfaction of vertical and horizontal equity would, in turn, either directly promote reciprocity (since the mere satisfaction of horizontal equity alone has been shown to enhance tax compliance), or indirectly promote reciprocity by mitigating the effects of distributive justice exchange *inequities* at the level of individual taxpayers.

In addition, satisfying the **condition of fairness for tax revenue use**, which requires that tax revenue be used for common benefit, will generally make it more likely that exchange equity is also met. The mere use of tax revenue for common benefit in the form of public goods ensures that individual taxpayers—distributive justice at the level of individuals—are getting *something* for their tax remittance. Exchange equity alone has been shown to have a positive effect on tax compliance.

Even though satisfying the substantive criterion seems to largely also ensure that the criterion of perceived just extraction is also satisfied, the two criteria may come apart. Satisfying the substantive criterion, for instance, may take the form of a highly progressive income tax. The more we move toward satisfying the substantive criterion with a highly progressive income tax, however, the further we might move away from satisfying the criterion for perceived just extraction, understood as a condition of perceived reciprocity. A highly progressive income tax would be proportionally less burdensome on the less well-off. This might be perceived as a violation of reciprocity that exists *between* taxpayers: taxpayers who remit a proportionally

greater tax burden may see the less well-off—who remit a proportionally smaller tax burden—as contributing too little. In particular, the less well-off might be seen as contributing too little in light of the redistributive public goods benefits that they receive. Such a violation of perceived reciprocity is plausible given existing data on public attitudes toward social welfare beneficiaries.

Potential conflicts between criteria of substantive and perceived justice in extraction can be resolved through policymaking. A compromise between the principle of ability-to-pay and reciprocity—as grounding public perceptions of fairness—can be brokered by making the existing contributions of the less well-off more publicly salient. This can be done, first, by highlighting the existing tax contributions of the less well-off through consumption and payroll taxes, which are both typically regressive.²⁹⁶ Second, consumption taxes can be introduced that make the contributions of the less well-off more publicly salient. The relative invisibility of payroll taxes arguably doesn't publicize the contributions of the poor very well. The regressiveness of such a consumption tax can in turn be counteracted by directing the revenue raised to redistributive public expenditures.²⁹⁷

It's worth clarifying that consumption taxes aren't the only policy measure available for redressing failures in perceived reciprocity that are associated with progressive tax schemes. Some failures in perceived reciprocity shouldn't be redressed through tax policy at all. These are, for instance, perceived failures in reciprocity are the product of punitive attitudes toward the poor, and racism.²⁹⁸ Punitive attitudes toward the poor usually see the less well-off as failing

²⁹⁶ Payroll taxes cull a higher proportion of the income of the less well-off than they do incomes of the better off. In addition, someone less well-off expends a higher proportion of their income on consumption than someone better-off.

²⁹⁷ Regressive taxes may also have the virtue of politically mobilizing the poor: nations that raise a greater portion of their GDP from regressive taxes (consumption and payroll taxes) tend to provide more public goods and services (Timmons, pg. 562).

²⁹⁸ See Martin Gilens's book, *Why Americans Hate Welfare*, for extensive survey evidence that shows racial attitudes to be a significant determinant of attitudes toward welfare spending: poor whites are more likely to be perceived as deserving of welfare support, while poor blacks are more likely to be seen as lazy and undeserving of welfare support.

reciprocity in the following way: the less well-off beneficiaries of redistributive public expenditures or transfers are regarded as substantially greater net beneficiaries of public goods and services, given their tax contributions. We might see this as one kind of exchange *inequity*, and a failure of reciprocity between taxpayers. Because some people are substantially greater net beneficiaries of an exchange inequity, thus not everyone is making the concessions that they ought to. Reciprocity is unmet because not everyone's concessions are thought to be on par. According to these punitive attitudes, the greater net benefits attributable to the less well-off are made further objectionable because they're undeserved. The less well-off only contribute proportionally less, relative to the benefits that they receive, because they "do not try to help themselves," and "prefer to rely on the government for support".²⁹⁹ Mitt Romney's 2012 remark to a gathering of wealthy donors that "forty-seven per-cent of Americans pay no income tax" was an example of such punitive attitudes toward the poor.³⁰⁰ Sometimes these attributions of culpable dependence and, ultimately, laziness, are made on the basis of race.³⁰¹ The appropriate response to failures in perceived reciprocity that are the result of proscribable attitudes is campaigns of education and persuasion, rather than corrective tax measures.

Campaigns of education and persuasion should not just be limited to highlighting the contributions that the less well-off make through regressive taxes. At least some of the failures in perceived reciprocity that threaten the satisfaction of the criterion of perceived just extraction are grounded in views that the less well-off are making concessions that are not on par with the concessions that the better-off are making. This view may be grounded in exchange inequities thought to be favorable to the less well-off, or merely the perception that the less well-off are

²⁹⁹ (Gilens, pg. 66)

³⁰⁰ (Zelenak, pg. 471)

³⁰¹ (Gilens, pg. 69)

contributing too little proportionally. Perceived failures in reciprocity that are grounded in exchange inequities thought to selectively benefit the less well-off can be mitigated by highlighting the exchange inequities that selectively benefit the better-off.

One way this can be done is by drawing more attention to the “hidden welfare state” of tax expenditures that principally benefit the middle and upper classes. Tax expenditures are reductions in tax burden that can take the form of “tax deductions, tax credits, preferential tax rates, [and]...outright exclusion of income” from tax deductions.³⁰² Tax expenditures can be seen as an alternative way of providing social welfare goods and services—these are goods and services that are intended to either “guarantee a minimum standard of living” or “protect citizens against losses of income”. The conventional understanding of social welfare goods and services is that they’re provided in the form of direct expenditures. Direct expenditure social welfare goods and programs are characterized by the existence of dedicated social programs, usually administered by correspondingly state and federal agencies, that provide the goods and services in question (examples of social welfare goods and services provided through direct expenditure include Social Security, Medicaid, and unemployment insurance).

Tax expenditure social welfare goods, by contrast, work exclusively through the tax system. Tax expenditure goods arguably also discharge social welfare functions: exclusions for employee health insurance contributions, for instance, discharge a social welfare function of healthcare provision. Exclusions for employer contributions to pensions discharge a social welfare function of old age income security. Lastly, the mortgage interest deduction on owner-occupied housing serves a social welfare function of housing provision.

³⁰² (Howard, pg. 3)

Tax expenditures, however, are social welfare goods that operate less visibly than direct expenditure social welfare programs. For one, the operation of tax expenditures requires less legislative involvement. Direct expenditures are appropriations and thus subject to annual budgetary revaluation. By contrast, tax expenditures are features of the tax code, and largely insulated from annual appropriations proceedings. Some tax expenditures, like the mortgage interest deduction, enjoy the especially entrenched status of being a budgetary entitlement.³⁰³ The beneficiaries of tax expenditures are also less publicly known. Tax expenditures are claimed in the tax filing process, and returns cannot, as of the Tax Reform Act of 1976, be generally disclosed.³⁰⁴ Beneficiaries of tax expenditures may also mistakenly see their use of tax expenditure claims as entitlements, rather than a form of public goods transfer.³⁰⁵

The sheer magnitude of tax expenditure outlays alone makes a good case for tax expenditures as constituting a ‘hidden’ welfare state. Overall outlays on tax expenditures through foregone tax revenue are considerable: while estimates of federal spending on direct expenditures in 1995 was \$896 billion, estimates of foregone revenue for tax expenditures was between \$346 and \$437 billion.³⁰⁶ The home mortgage interest deduction, employer pension exclusion, and employer health insurance exclusion make up the bulk of tax expenditure outlays.³⁰⁷ The size of the hidden welfare state is attributable to the tendency of tax expenditures to expand. Most tax expenditures are intended to incentivize certain kinds of economic behavior, and the number of claimants of these tax expenditures increase over time. Relative insulation from legislative forces means that tax expenditures are more resistant to retrenchment cuts that would otherwise limit the number of beneficiaries.

³⁰³ (Howard, pg. 93)

³⁰⁴ (Lenter and Slemrod, *et al.* pg. 813)

³⁰⁵ (Zelenak pg. 495)

³⁰⁶ (Howard, pg. 26)

³⁰⁷ (Howard, pg. 26)

Whereas direct expenditures are either redistributive (principally benefitting the less well-off) or inclusively to the benefit of everybody (examples of which include Medicare and Social Security), most tax expenditures benefit the affluent. The majority of tax expenditure benefits are claimed by those above the median income.³⁰⁸ A few factors explain the relative affluence of tax expenditure beneficiaries: (i) the economic behaviors incentivized by tax expenditures are sometimes financially prohibitive acts of consumption like home ownership, (ii) deduction-type tax expenditures, like the home mortgage interest deduction or property tax deductions, can only be used by taxpayers who purchase or own sufficiently valuable homes,³⁰⁹ (iii) the value of a tax expenditure increases with income, and thus tax burden, and (iv) tax expenditures are more likely to be used by the wealthier (the higher the income bracket that a taxpayer occupies, the more valuable that a given tax expenditure becomes), and (v) tax expenditures for employer-provided benefits make the corresponding social welfare benefits available to only “workers in larger companies, unionized industries, and better-paying occupations.”³¹⁰

Highlighting the social welfare benefits that the better-off derive through tax expenditures, in order to promote public perceptions of reciprocity, may require not just campaigns of persuasion and education, but also making tax returns public. This would require overturning current legislation that prevents the disclosure of tax returns, and return information. Such a measure may be justified on the basis of its predictable effects in promoting public perceptions of fairness, and thus tax compliance.

V. How contributive legitimacy might relate to more comprehensive theories of political legitimacy

³⁰⁸ (Howard, pg. 31)

³⁰⁹ Their homes must be sufficiently valuable such that their itemized deductions exceed the standard deduction.

³¹⁰ (Howard, pg. 31)

The final feature, which is arguably a merit, of an account of contributive legitimacy is that it supplements our understanding of conventional theories of political legitimacy. In particular, contributive legitimacy helps us better diagnose and understand possible failures in political legitimacy that we might overlook if we focused solely on the distributive dimensions of states.

A state that fails to meet either the substantive or the perceived criterion for just extraction will often also be found lacking by more comprehensive theories of political legitimacy. Failures in contributive legitimacy, in this way, will usually also coincide with failures of more conventional political legitimacy. Moreover, such failures in contributive legitimacy will often be the *cause* of failures in political legitimacy. Illegitimate extraction practices in Ferguson, Missouri can be used to illustrate this point. The use of the justice system in Ferguson to generate revenue in arbitrary, discriminatory, and unpredictable ways caused corresponding failures of equal consideration and respect, as well as the erosion of basic political liberties. Neither of these latter failures would pass muster in a democratically politically legitimate state.

The Ferguson case is one example in which a failure of contributive legitimacy tracks a corresponding failure of democratic political legitimacy. While traditional theories of political legitimacy might not give us ways to clearly distinguish between more or less politically legitimate states, we can make these distinctions indirectly through an account of contributive legitimacy. The extent to which individual subjects are willing to contribute ends up having interesting purchase on questions of how societies might evolve.

VI. Conclusion

In this paper, I've defended an account of contributive legitimacy that consists in two parts: a substantive criterion of just extraction, and a criterion of perceived just extraction. Contributive legitimacy is than traditional accounts of political legitimacy. Rather than justifying the state's exercise of coercive power generally, contributive legitimacy is intended to justify the state's exercise of coercive power with respect to taxation alone. Legitimacy in this respect is nevertheless important.

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