Charles Delmotte February 28, 2018

TAXATION WITHOUT ROMANCE:

essays on the ethics and economics of a constitutional fiscal order

A dissertation for obtaining the degree of doctor of Law

Promotor: Prof. Dr. Jan Verplaetse

When they kick at your front door
How you gonna come?
With your hands on your head
or on the trigger of your gun

Joe Strummer

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INTRODUCTION

TOWARDS THE CONSTITUTIONALIZATION OF TAX POLICY

1. Introduction: The extension of fiscal competences

Over the last 60 years, we have seen an extension of legislative competences in many Western states. Tax policy is symptomatic of this increase in governmental power. Naturally, the proliferation of tax bases, and the rise in tax rates, are generated by an increased governmental activity, both in terms of number of functionaries and produced public goods. As repeatedly exhibited by public choice theorists, executive branches of government have a strong incentive to spend more – rather than less – money (Gwartney and Wagner, 1988). As shown by Buchanan and Brennan (2000b: 44-46) the politically 'most efficient' fashion to maximize revenue (i.e. raising 'least resistance') is to disperse the fiscal burden over the constituency through a very diverse range of fiscal measures. Indeed, the public choice model predicts that taxation has a 'natural' inclination towards diversity of fiscal bases and rates. These theoretic predictions have been materialized in the last 60 years, as we indeed have witnessed an ever-rising fiscal revenue, collected by a labyrinth of rates and bases, and even various fiscal assessment techniques. Nonetheless, the ever-expanding rules that realize governmental income do not simply mirror the increased financial needs of the state. Moreover, taxation has become one of the core instruments that governments use to execute their policies: legislative and executive bodies try to achieve redistribution, employment, innovation, (nature) conservation, urban development or health care improvement through the deliberate design of fiscal stimuli, for instance through the imposition of tax cuts and discriminatory-rate structures (Rosen, 2004). Taxation appears here as a policy vehicle to steer people's behavior in a moral, social, economic or ecologically optimal way. Other drivers of the complexity and expansion of our tax codes are the efforts of special interest groups (Buchanan and Tullock, 1999: 285-286). Generally speaking, when benefits exceed costs, particular economic or social groups are expected to organize themselves in the political arena, and influence the administrative regulations, enforcement practices and legislation (Boudreaux and Pritchard, 1993: 115). In terms of our subject, fiscal "rents" entail minor costs for the whole constituency and huge profits for the beneficiaries, and our tax codes have been very responsive to voting and lobbying strategies whereby parties capture political profits through special derogations (Butler, 2012: 58-64). Richter et al. found a correlation for the U.S. between tax lobbying and the effective tax rate: when US firms increase their lobbying expenditures by 1% in a given year, they reduce their effective tax rates by an average of 0.5 to 1.6 percentage points the following year. Another study confirms that fiscal lobbying is currently one of the most profitable businesses: Alexander et al. (2009) estimate the return on investment from political influence for the US Job Creation Act (2004) to be as high as 22,000%, meaning that every dollar invested in lobbying yields a return of $220. Brown et al. (2015) found that investing in relationships with tax policy makers (e.g., via PAC support) results in future tax benefits. Various sources like the U.K.'s House of Commons Committee of Public Accounts (2013: 10) and the Corporate Europe Observatory (2017) confirm systematic entanglement between the legislator and the private interests of wealthy individuals and corporations (so called 'pro-active-tax-planning') for Europe through big accounting or lobbying firms. The Center for Responsive Politics (2016) also underlines the interaction between the public lawmaking and private interests, for instance by revealing that 38 out of 42 Apple lobbyists previously held government jobs. This might explain why, legal-technically, we have seen a rise in special measures 'excess profit' tax scheme, 'patent boxes', 'controlled foreign company', 'foreign tax

credit' and 'active financing exemption', which help multinationals and wealthy individuals slash their global tax debt. Allison Christians (2017: 152) one of the most established tax lawyers of our time, describes the state of affairs as follows: "Special interests consistently exert influence on tax policy discourse through their advisors and within a broad spectrum of discrete and pooled capacities. This results in tax policy as favorable as possible to those who have the resources to shape it." The pressure of special interests on the democratic process is not only a rise in measures and complexity, but also has a socio-economic angle, according Shaun Hargreaves Heap (2017: 259): 'About the only thing we can say with much confidence about our currently complex tax systems is that they spawn an industry of tax accountants, lawyers and lobbyists who game the system for the benefit of their clients, who are mainly rich'. Nonetheless, it is important to note that fiscal exemptions have been 'democratized' and, converting large proportions of votes for political power, many factions of the constituency have contributed to the growth of new twigs, such as the mortgage interest deduction, company cars or stock options, on the ever growing fiscal tree. Richard Wagner (2016: 142) states these legal-political factors have generated 'a tax code so large that no one can read it and which creates nearly a unique tax liability for each tax payer'. In the US President's Economic Recovery Advisory Board (2010: 10), taxpayers and businesses spend 7.6 billion hours and incur related, out-of-pocket expenses, each year simply to comply with federal tax filing requirements alone. It makes one wonder what our economies would look like if individuals and businesses invested those resources in true productive activities.

That said, the governmental proclivity to maximize taxation, the ambition to achieve political goals via specific tax measures, or the partisan strive to tinker the tax code through voting and lobbying is not illegitimate *per se*. Nonetheless, a democratic system involves not only a judicial, legislative and administrative sphere where revenue can be maximized, behavior can be steered or fiscal profits can be realized; it must also monitor whether these administrative and legislative initiatives are operating in accordance with the constitutional rules. This constitutionalist perspective, that controls whether political actions are legitimate from the perspective of the underlying rules that govern this political-legal game, has gathered remarkably less attention in the international literature on taxation that this PhD addresses.

2. The constitutionalist outlook

2.1. Constitutions

The fact that we perceive some rules as fundamental, as defining how the game will be played, is expressed by our intuitive protest in the case that legislative bodies would dismiss them by means of a simple majority (Buchanan and Congleton, 2006: 19). Indeed, some rules constrain majorities, and are 'constitutive' for the order that gives legitimacy to the majority in the first place. The collection of those rules is what we call 'the constitution'. Boudreaux and Pritchard (1993: 112) point out that constitutions establish the 'higher law' in a country, meaning that the legislative and administrative measures that are the products of the legal-political sphere need to be in accordance with it. Constitutional law - by means of superior status – *structures* the 'hurly burly of daily politics' by providing 'the rules of the game' (Anderson et. al, 1990). If the essence of living under political authority is that some persons (e.g. a minister) or collective bodies (e.g. a parliament) can coercively define, alter and enforce the rules that apply to the whole community, then it seems apt to conceive of a constitution as 'the rules of the rules': a set of principles that delivers the conditions of legitimacy of rule-making in the polity. Indeed, living under political authority means that some people will be equipped with official, i.e.

'legal', powers to take property, put people in prison, produce specific goods funded by others, or transfer means to parts of the constituency. These practices, in respect of their coercive nature, are not without risk. History, empirical models and reason inform us that rulers are no saints, and that, in the absence of additional regulation, political agents are inclined to utilize the coercive processes to enrich themselves and their supporters, impose their life views on others, and/or harm individuals, minorities and even whole populations. Constitutions, both theoretically and historically, are *institutional responses* to the risk of living under political authority (Ostrom, 2008: 98-99; Buchanan and Brennan, 2000a: 27-33). They can be conceived as insurance mechanisms (Buchanan and Brennan, 2000b) to safeguard the interests of members of a political community, when some get vested with the power to make/execute decisions for/on the collectivity, or parts of it. Indeed, constitutions make up 'the contract' between the citizens and their government, and are aimed at regulating and minimizing the dangers that the establishment of the state, and the inequality of power correlated with it, exerts on its citizens.

Constitutions do so in a twofold fashion. Moreover we can distinguish between 'negative' constitutional rules and 'positive' constitutional rules. Negative constitutional rules insulate specific domains from collective decision-taking processes. By means of the recognition of 'rights', i.e. claims to certain goods or actions that create a correlative duty of non-intervention on all others (Hohfeld, 1913: 32), governments are prevented to impose decisions within certain spheres. As such, the meaning of 'rights' in constitutional theory is that they hold as 'fences', insulating jurisdictions of individual choice from the domain of collective choice. Within spheres that form the subject of the personal rights, for instance our physical body or religious affiliation, decisions or transactions typically occur on a *voluntary* basis. The recognition of these rights prevents governments to impose decisions in spheres where coercion would arguably be very harmful (Buchanan and Tullock, 1999: 63-85). Whereas the 'negative' rules thus *limit* the range of action of those who exercise governmental prerogatives, the 'positive' rules will regulate how they can actually reach legitimate decisions within their lawful jurisdiction. Such constitutional principles do not forbid governments to act, but *prescribe* the structures and procedures to be followed. Positive constitutional rules, such the duty to organize elections (introducing competition amongst politicians, see Boudreaux and Pritchard, 1993), the separation of powers (Ostrom, 2008: 99), the prevalence of a majority-rule (Buchanan and Tullock, 1999) or generality of the law (this PhD, essay 4) are designed so that the exercise of political power is oriented at the well-being of the citizenry, and, more negatively, minimize the possibility of oppression within those domains that fall outside the realm of individual choice (Boudreaux and Pritchard, 1993: 127), by regulating and conditioning the exercise of political inequality on the basis of history or empirical reasoning, these institutions increase the expected benefit of living with political power (Leeson, 2009; Ostrom, 2009: 96-99).

2.2. Constitutional thinking: a story of two tales

Whereas we can find some historical and normative consensus on the abovementioned description of what a constitution is, and does, such an agreement cannot be found among social scientists as to *how to detect the proper constitutional rules* that form its content. Moreover philosophers, economists and lawyers have formed different methodologies to establish the proper rights and principles that serve as a *benchmark* for constitutional analysis.

When it comes to revealing the proper constitutional checks that actually limit governmental action, two traditions have developed themselves separately.

2.2.1. The tradition of legal positivism

According to one tradition, the rules that constrain a specific politico-legal order, are the rules that the *order itself* recognizes as its constraints. When one wishes to evaluate the legal arrangements that parliaments and executives adopt, lawyers working in the positivist tradition will rely on the *prevailing* constitutional framework to scrutinize legislation or executive orders. Constitutional control is here a function of the broader 'hierarchy of norms' that applies in legal systems, and wherein constitutional norms traditionally take up the highest step (Bouckaert, 2004). Accepted legal scrutiny here commences from 1) the existing constitutional provisions as agreed by politicians 2) their meaning as established by judges, and 3) the related interpretations lawyers grant these judgments.

Often, daily contributions to constitutional law have a descriptive nature, and they try to disentangle the very meaning of the constitutional texts themselves, for instance in relation to sophisticated novel legislation. Indeed, due to the increasing legal complexity, contemporary lawyers have an educative task, and try to resolve the information asymmetry that divides the state and its citizens. But also when taking a more critical stance, and screening of, for instance administrative actions on their compatibility with specific provision, the constitutional lens as it appears in this custom, remains of a *endogenous nature*: to criticize enforceable rules of a legal order, one needs to 'look from within'. The path to check upon the validity of rules is to find other enforceable rules with superior status *inside* that system. With an analogy, if one wishes to criticize practices within a specific culture, one can only rely on principles that culture itself holds. Constitutional analysis, in this tradition, professes a sort of 'consistency audit': the measures enacted by a political system need to be in accordance with the set of rules that that system has declared as its own constraints. The proper content of those 'higher rules' depends on what the system itself declares, and falls outside the object of critical analysis. The methodological skills that emerge here are knowledge-accumulation and jurisprudential analysis. Due to an extensive knowledge of the existing framework of constitutional rules, combined with a mastering of the art of proper qualification and distinction between various factual elements, the legal positivist can check whether new taxes and administrative measures are in accordance with the underlying set of rules that currently governs the state. In this tradition, the legitimacy of a political measure (e.g. a property tax) gets derived from its accordance with a set of semi-fixed rules on which representatives vote.

Although the field of prevailing constitutional law is an important source of constitutional thinking, and recourse to constitutional rules is probably the most *effective* source to regulate governmental action, a healthy dose of intellectual precaution remains warranted regarding 'endogenous benchmarks'. Two empirical insights indicate why constitutional legal research might remain a kind of reservation regarding 'the rules-in-place'. Firstly, *even at their birth*, the 'official' constitutions – the one states uphold themselves - are highly imperfect tools for the goal they serve. The point of a constitution is to find a model of political power that serves the interest of each single citizen, and, in its ideal form, rests on universal consensus (Ostrom, 1997: 273). In reality constitutions are not contracted by all members of society, but rather by a small minority. Peculiarly, the minority deciding on the constitutional rules is precisely that group that the rules themselves are supposed to protect us against, i.e. politicians. The theoretic 'contractants' are in reality reduced to spectators, watching how state-officials limit

their *own* powers. Indeed, the rules, which are going to define the game, are mainly determined by one side, namely governmental officials. This highly imperfect procedure no doubt influences the constitutional content, which can be expected to be shaped in the interest of the political bodies. Secondly, *once a constitutional democracy has been set up,* it suffers from something we could call natural and 'gradual erosion of individual liberty under majoritarian democracy' (Gwartney and Wagner, 1988: 4). By this we mean that, after the establishment of a constitutional democracy, those in charge have an interest in undermining the system of constitutional protection, which is in everybody's long term interest. In order to execute the agenda, and try to uphold the promises made to voters and supporters, or often simply to secure power, politicians will have a strong incentive to engage in 'silent and gradual encroachments' of the constitutional constraints they face (Padover, 1953: 46-47). This becomes exacerbated by the fact that the politicians themselves are often vulnerable to pressure from specific groups that aim to manipulate the legal order to their benefit. While behind a veil of uncertainty, unaware of our future position, we all have an interest in the limitation of power, once the game has been set up, pressure will emerge to tinker with the constitutional order. These reasons might indicate why, over the last 200 years, we have seen an enlargement of the legislative and executive branches of government. Already in 1977, noble prize winner James Buchanan described the United States, notably the state with the strongest judicial review in the world, to be in a state of 'constitutional anarchy': 'where the range and extent of federal government influence over individual behavior depend largely on the accidental preferences of politicians in judicial, legislative, and executive positions of power' (Buchanan, 2000a: 19).

An awareness of the imperfect nature of prevailing constitutions, and the natural, 'gradual erosion' of a constitutional order, with statutory law and continental legislation freely overgrowing many parts of society, nurtures a curiosity to look *outside* that which has been decided *within* the realm of power.

2.2.2. The tradition of political economy and political philosophy

Inspired by the tradition of social contract thinking, a constitution is the agreement that minimizes the risk when free and equal individuals establish a government. Echoing Thomas Hobbes, individuals contract a government because the prospect of security is *pareto-superior* compared to the 'solitary, poor, nasty, brutish and short' (1976, chapter 13) life in the state of nature.[1] The risk is, of course, that the delegation of power to some individuals – that comprises 'the state' - forms an *extension* of the state of nature. How do we know for sure if the politicians and executives holding such monopolistic powers, will employ these for the benefit of those who gave them these powers in the first place? Hence, the individuals establishing the state - astute contractants - will negotiate the terms of their transfer of liberty, so that political action is oriented to their welfare (Rawls, 1999a: 3, 10).

The traditions of political philosophy and political economists make up the study of the agreements that free contractants *would make*, were they implied in contracting of the state. The constitutional test screens whether the existing political order could be legitimized "as if" it emerged contractually.[2] Where the legal positivist accepts the given politico-legal order as

[1] Pareto-superior means that (at least) one person benefits and no one is made worse off (David Friedman, 1990: 438).
[2] The 'contractarian' aspect of social contract theory is thus largely a metaphor. See Buchanan and Brennan, 1999a: 26; Brennan and Hamlin, 1995.

given, philosophers and economists will locate a normative benchmark as *exogenous* to the enforceable provisions of the system. Indeed, the existing legal framework is the object of evaluation, but does not itself form the yardstick for critical assessment.[3] But how to set up a framework that discovers the constitutional rules, requisite for the assessment of a legal system, outside of the 'official' rules of that system? Three traditions can be distinguished, although, these are largely intertwined, and many authors merge at least two of the three types of methods.

The analysis professed by political economy depicts rules as constraints for human behavior, as background settings against which individuals' strategies will emerge (Wagner, 2016: 53; Buchanan and Brennan, 2000a: 8-10). Building on Adam Smith (1976, book1: 28-30) rules are gauged on the effect they resort: 'The same individuals, with the same motivations and capacities, will interact to generate quite different aggregate outcomes under differing sets of rules, with quite different implications for the well-being of every participant.' (Brennan and Buchanan, 2000a: 4) Particular politico-legal institutions, such as property rights, redistributive programs or political decision rules, will be gauged with respect to the behavioral patterns these institutions will generate when self-interested individuals start acting upon them (Ostrom, 2014: 92). Ideally, the optimal rules – that form the content of a constitution - are met by a unanimity-requirement: only when each single individual *agrees* to a certain set of rules, can we make sure they optimally satisfy the preferences of all individuals.[4] Naturally, since in political reality unanimity cannot be achieved, this question remains a hypothetical one.[5] Hence, political economists establish models, empirical predictions and even experiments to *inform* us on the potential outcomes of specific legal arrangements. If a specific arrangement creates a positive-sum for each player (i.e. Pareto-superior) or if specific institutions promote the surface where no one can be made better off without making someone else worse off (i.e. Pareto-optimal); then political economists will reason that constitutional choice could embrace this rule, as it could count on unanimous consent (Boettke et al., 2011: 309).[6] For instance, Buchanan (2000a: 33-41) famously established that the option 'property rights' installs a better perspective for each participant than 'no property rights', hence, constitutional consensus can be reached on the acceptance of property rights. Another example is the work of Lin and Vincent Ostrom (2014) that leans on both field research and theoretic models, to conclude that 'fragmented' political authority is a Pareto-superior vehicle for governance than centralized authority.

Another domain connected with constitutionalist heritage is delivered by political philosophers. Philosophers, just like economists, will use rational arguments to estimate the content of the set of rules that ought to coordinate and monitor the political community. One stance of philosophers remains contractarian: the content of the constitution is that which is

[3] This somehow overstretches the distinction: often existing legislation will animate and coincide with philosophical or economic principles. However, political economy / philosophy does not use prevailing legislation as a benchmark as such.

[4] Buchanan established the unanimity principle in *Calculus of Consent* (see page 85 and further). His defense of this principle is directly connected with his rejection of interpersonal utility comparisons and his rejection of welfare economics' objective welfare function (Buchanan, 1959).

[5] The models from political economists are thus seen as 'estimations' of what could emerge from unanimity. Although unanimity is theoretically maximally efficient in terms of preference-satisfaction, its decision costs are too high. Hence, political economists screen which type of rules minimize negative externalities following from less-than-unanimity. See Buchanan and Tullock, 1999: 85 – 119.

[6] In other terms, how unanimity *could* revolve around specific rules (Buchanan and Brennan, 2000a: 23). In the end, however, the proper constitutional rules are those, which would effectively be chosen by participants, rather than argued for by economists, as only individual choosers know their own preferences. Therefore, the proposals of economists fall under the notion 'presumed efficiency' (Buchanan, 1959: 127).

contracted by its participants. Nonetheless, the setting of constitutional choice will be modified so that the chosen principles adhere to a non-utilitarian standard. Individuals are not just allowed to choose rules, they must choose under specific constraints. The most famous proponent of this view is John Rawls, who famously designed a hypothetical situation where the choosers lack any information over their personal characteristics, social position, and conception of the good (Rawls, 1999a: 11; Gaus and Thrasher, 2015: 46). Indeed, by creating a 'veil of ignorance' the constitutional principles that merge out of the 'original position' are not simply gauged on expected utility for its members, but will attain a standard of 'justice as fairness'. For Rawls himself, this means participants will opt for institutions that maximize the amount of economic goods for the least well off. One could say, where the political economists use models to 'simulate' real choices, and approximate what people would actually choose, political philosophers have an inclination to shape models, in order to proclaim substantive moral principles that people 'should choose'.[7]

Other philosophers will depart even more from the subjective-contractarian account to detect the constitutional content. The rules that ought to order a political community are 'natural laws', inherent in mankind itself. As the constitutional content can be revealed through an objective-rational analysis of human nature, the metaphor of the contract often vanishes in these writings.[8] Contributions like those of John Locke, Robert Nozick, Peter Vallentyne and Frank Van Dun, deduce normative principles from an essential appreciation of humans as autonomous agents. Coercive action is only justified when conceptually and/or logically compatible with the idea of each individual as a possessor of sovereignty over his own person. The fact that we are actively choosing beings who make their own plans is not a morally irrelevant observation, but justifies that people have certain 'domains' that are secluded from the enforceable claims of others.[9] (Mack, 1986: 487). These zones of discretion – typically one's own person and external objects - are the object of a 'right', i.e. claims that create duties of non-intervention on others, governments in particular (Mack, 1986: 491; Bastiat, 2011: 50). Generally speaking, the framework of natural law thus discloses the proper limits for governmental action through logical implications of the unique trait of humans to shape their own lives. Proponents thus derive legal institutions such as property rights or freedom of speech from deontic moral reasoning (Nozick, 2004).[10] Perhaps the most famous contribution here is that of Immanuel Kant, who used this methodology to pronounce the Categorical Imperative - moral principles must apply in the same way to all rational beings without exception - hereby giving rise to the constitutional constraint known as 'generality of the law', or 'the rule of law' (see essay 4).[11]

[7] This paragraph deliberately overstates the difference between Rawls and Buchanan. Buchanan added conditions to the setting of constitutional choice as well, (albeit of a more realistic nature) and Rawls, from his end, did not always employ fully idealized settings (Gaus and Thrasher, 2015).

[8] The agreement metaphor is not really necessary since all humans are expected to agree to the insights delivered by reason. Nonetheless, some natural rights authors still use it. See for instance Richard Epstein.

[9] Natural law, drawing on strong intuitions, is often much closer to the layman's normative thinking than the empirical framework the political economist will use. More importantly, its basic reasonings had enormous influence on positive law as well, for instance through the work of Samuel Pufendorf and Hugo Grotius.

[10] As expressed by, for instance, Robert Nozick (2004) utilitarian considerations of expected general welfare cannot justify the violation of natural law.

[11] Hayek and later Buchanan famously described the 'rule of law' as the constraint that laws will apply equally to all citizens. Using different justifications, this is simply a legal translation of the Kantian imperative that moral principles are the ones one can uphold regardless of the position one occupies under them.

3. Central Research Questions

This PhD represents an endeavor to connect the legal evolutions described under 1 (introduction) to the constitutional benchmarks as expressed in 2 (the constitutionalist outlook). Specifically the query has been to check whether both prevailing fiscal measures and normative ideas on taxation are in accordance with the set of constitutional rules that regulates the political process wherein taxation arises. The game-comparison is instructive here. The increasing fiscal revenue, the widening array of governmental techniques to fund state activity, the various strategies adopted by voters and interest-groups to minimize their burden, an accelerating number of tax lawyers and the increased relevance of the legal service-industry that wealthy clients use to circumvent their tax-obligations, are emergent patterns within 'our game' of fiscal politics. As partakers in that game, when we participate in collective choices (e.g. voting tax rules); in the execution of enforceable measures (e.g. working in a fiscal administration), in the education on taxation, or in the market of legal services (e.g. setting up a construction to minimize the individual tax burden), we acquiesce in the rules-of-the games, accept these as given information, and as such contribute to the patterns.

This PhD, however, demands an intellectual move away from the viewpoint of a specific player within a game (i.e. voter, bureaucrat, executive, attorney) to a perspective that is external to the game, from which we can evaluate its proper design. Moreover our concern is not simply to understand the rules that govern our system (i.e. positivist law education) or to advise the best strategy within a specific set of rules (i.e. legal services), the focus here is on *choosing the best set of rules* (Buchanan, 2000b: 369). In other terms, we aim to explore which tax rules are in accordance with the 'rules of the rules': the negative and positive rules that embody the interest of each single person, and form the content of the constitution.

But isn't tax policy overly complex and technical? How can we 'marry' a field so technical that only a handful of specialists understand it, with a domain so fundamental and philosophical as 'the rules of the rules'? Although one's personal tax debt is a phenomenon determined by a wide array of rules, exemptions and deductions, the fiscal essentials of any tax system are not manifold. Winer and Heitlich state that although 'actual tax systems are complicated and often elaborate, underneath their rather baroque appearance lies a simple skeleton, consisting of a limited number of parts'. Complexity did thus not emerge from taxation as a phenomenon, but from the complex array of answers the legislative and administrative machinery has given to them, over time. The main foundations of a tax system that will attract our attention are threefold: 1) what holds as an acceptable tax base; 2) how we can measure this base and 3) what type of rate-structure we should we apply to this taxable entity. The first question relates to the type of economic phenomenon (talent, income, consumption, etc.) governments can use as a *benchmark* for taxation. The second question concerns the debate on how to quantify a specific economic phenomenon, namely which methods can we use to *measure* for instance 'income'. The last question revolves around the *distribution* of the tax burden *amongst citizens*: should a regressive, flat or progressive rate apply, and connected, which credits, deductions and exemptions are to apply. The first question, on *what to tax*, has been disentangled in two issues. As both tax theory and tax practice tend to differentiate for labour and capital income, the first two chapters of this PhD have been divided into 'labour income' (dealing with both the tax base and measurement) on one hand and 'capital taxation' on the other. Hence, this PhD consists of four remaining parts. The word 'essay' is deliberately chosen here, as the coming chapters are *tentatively* addressing four constitutional questions:

Essay 1: How can a political system tax persons?

Essay 2: How can a political system tax capital?

Essay 3: How can a political system measure income?

Essay 4: Which rate structure should divide the fiscal burden amongst the citizenry?

4. Employed methodology

So far we have listed a couple of core questions that any tax system should answer. They form the *object* of investigation. But what is the *mean* of inquiry? Chapter 2 of this introduction advanced the different strands within constitutionalism. Before developing this methodology further (4.2.2.) it seems apt to have a look at how other academics deal with these issues. Moreover, this PhD should be read as an alternative approach to taxation, and each essay will criticize the fiscal strategies proposed by conventional tax theorists. But who is this conversant I am arguing against, and moreover, what deeper foundations inspire their framework? In other terms: where does the conventional tax theorist *come from*.

4.1. Conventional tax literature

4.1.1 Optimal Tax Theory

Optimal Tax Theory is the mainstream normative approach to taxation (Hamlin, 2017: 5). Its method of developing the best tax system can be depicted in a two-step sequence (Wagner, 2016: 34). First, 'the economy' is sketched. Property rights and freedom of contract are assumed, and peoples' *utility functions are known* through some scalar that displays the values they attach to specific transactions and goods (Buchanan, 2000b: 282-283). Consequently, economists describe how, under the presumption of fully informed rational agents, perfect competition turns this data into a 'mass point': a static equilibrium that embodies the optimum, in which goods and services are allocated to their most valid use (Altson et al., 1996). At this stage, the aggregate value of utility that all participants generate appears as a known number. Standard economists, however, agree that the prevailing economy is an incomplete version of the static ideal, as real-life private markets cannot produce public goods or find solutions to deal with negative externalities (Samuelson, 1954).

Once the static portrait of the economy has been sketched, politics comes into play to optimize the defective economy and steer the utility function in the proper direction (Wagner, 2016). The political sphere is often depicted as a kind of *additive, separate entity* from the economy, and 'political personages are thus reasonably analogized to mechanics whose task is to maintain the economy in the proper order' (Wagner, 2016). Optimal Taxation is thus the theory of fiscal tools that these mechanics can use to boost the welfare function. While other economists are concentrating on which types of expenditure increase overall utility, or on how to regulate market failure, tax theorists' role in the public fabric is to raise this money while minimizing the utility loss (Hettich and Winer, 1999: 102). Indeed, as each tax will both raise the price for a consumer and decrease the income for the seller, this will cause consumers and producers to substitute away from that activity (Myles, 1995). Hence, optimal tax systems reveal the type of tax structure that raises money for the political process, while minimizing these negative effects on economic output. Optimal tax theorists have thus favored "talent

taxes" as an optimal form of taxing labour (rather than true income, see **essay 1**) and have pleaded to tax capital through a "mark-to-market-approach" (rather than realized capital gains, see **essay 3**). When concentrating on existing tax systems in order to maximize output, policy advice typically builds on the 'private responses' to various taxes, and the proper (re)configuration of the tax system depends on parameters such as the elasticity of the taxed transaction and the income available for the taxpaying unit (Hamlin, 2017). As these private responses tend to vary for different persons, goods and services, 'in theory, every distinct transaction should be taxed at separate rate that takes into account all relevant direct and indirect effects on efficiency and distribution' (Hettich and Winer, 1999: 104). And indeed, optimal tax theorists have been proposing discriminatory rate policies in both income taxation and VAT (see **essay 4**) respectively, regarding height, skin color, gender, level of income, type of income; and regarding the type of product purchased. As fiscal policy is 'parasitical' to the economy, the ideal tax system envisioned by conventional tax theorists is as complicated as an economy in itself (Hettich and Winer, 1999: 105).

4.1.2 Tax Fairness Theories

Most Optimal Tax theorists give no explicit value to 'fairness'. The best tax system is the one that generates the least overall welfare loss. This narrow utilitarian view has been attacked by other economists and philosophers who believe taxation should play a broader role in society as an instrument to install distributive justice. By distributive justice, these theorists hint that the structure of ownership (income, wealth, consumption) must follow a certain *pattern* (Nozick, 2004: 155). Competitive 'free' markets generate a static equilibrium, in which the pattern of distribution does not adhere to any moral standard. According to this view, the task of taxation is to repaint the current distribution as displayed in a snapshot – i.e., some external criterion, not present in the 'free market', ought to install a certain order, and thus 'redistribute' the shares that 'the market' 'distributes' (Buchanan J and Brennan G, 2000a: 108-109). In other words, the taxing and spending process is a means through which the distributional results of the market may be modified according to more ethically legitimate patterns (Buchanan, 2000b: 145).

As a result of this viewpoint, revelations of the increasing wealth gap have triggered a 'new wave of egalitarianism'. Indeed, after the findings on capital accumulation, many studies added a 'tax fix', addressing how tax reform could prevent a possible capitalist dystopia. Moreover, various methods have been suggested to alter the distributive market forces. One famous example is Piketty (2014), who advocates a global property tax as the best way to promote equality in society. Piketty was joined by Tony Atkinson (2015) who also supports fiscal redistributionism. Specifically, Atkinson advocates a proportional or progressive property tax based on all up-to-date property assessments (see **essay 2**), a progressive lifetime capital receipts tax (a tax on inheritance and gifts *inter vivos*), and steeper progressive income taxation (see **essay 4**). Interestingly, philosophers have joined their colleagues from the social sciences in theorizing on the political role of taxation. For instance, Ingrid Robeyns' upcoming 'limitarianism' states that it is 'morally objectionable to be rich', and we have a moral duty not to have 'too much' (2016). Therefore, justice requires marginal taxation rates of 100% on everything we own or gain above a specific level (see **essay 4**). Lastly, leaning on both Piketty and Meade before him, Martin O'Neill wants to address the 'underlying patterns of ownership in society' and looks to 'restructure the economic game from the very start' (O'Neilll, 2017: 262-263). O'Neill pleads for steeper progressive taxation (see **essay 4**), taxes on intergenerational

transfers (both inheritance and *inter vivos*), and shifting the tax incidence from workers/consumers to companies and their shareholders (O'Neill, 2017: 263-266). His 'predistributive agenda' also has a non-fiscal chapter, which endeavors to put parts of the private economy under 'democratic control' and install more social forms of corporate governance (O'Neill, 2017: 264, 266).

4.2. Towards a constitutionalist approach

Different theories have different ways to come at the research questions that forms the focal point of this PhD. This PhD will demonstrate how an alternative approach to optimal and fairness tax theories yields equally alternative answers to the research questions. Being an applicatory work, bringing constitutional thinking to the domain of taxation, the following articles will not defend the use of our constitutionalist outlook as such. Hence, this introduction will juxtapose the different views on politics and taxation that nurture the conventional and the constitutional approach, respectively. In other terms: where does the conventional tax theorist (both the optimal and the fairness-flavor) *come from*?

4.2.1. On Taxation and Romance: the methodological shortcomings of conventional tax theory

The 'optimal' and 'fairness' accounts of taxation are clearly counterparts. Indeed, they depict a long-standing difference between utilitarians – who see it as a moral duty to enhance utility – and egalitarians – who believe the principle of equality (in all its forms) has inherent value. Nonetheless, for our purposes, we could describe their discussions as an example of the 'narcissism of small differences'. The focus lies on seemingly important variations, while from a distant perspective the antagonists are actually equals. Both theories **lack what we could call "a constitutional reflex"**: nowhere in these approaches does one find traces of the dual idea that governmental competences should be checked by 1) rights that limit its lawful domain and 2) rules that restrain its operation within the sphere it is allowed to act. Indeed, if optimal tax theorists propose a different treatment for nearly each different kind of transaction, or if redistributive theorists wish we could seize 100% of income (see **essay 4**), what is their deeper understanding of the fiscal process? We are less focused on what a state may need to enhance; here, we pay more attention to the underlying assumptions regarding the machinery that will generate this enhancement. Moreover, we focus on what ontological and epistemological qualities both theories – bundled as conventional tax theory – attribute to the state, and to the institution of taxation in particular.

First, both theories present a specific causal sequence between 'the market' and 'politics'. Taxation – and politics at large – is presented as independent of the economy. The outcome generated by 'the pure market' can be captured through a static photo, a snapshot, which delivers the first imprint of an economy (Wagner, 2016: 35). The economy, however, is secondary to politics, and taxation is a toolkit to repair and perfect the results of human actions that take place through market processes. The image that emerges in traditional fiscal writing is that politics, and **taxation** in particular, can **unilaterally determine the economy**.

Second, the market and politics are populated differently. Where the modeling of the market will typically assume various self-interested agents, tax policy is portrayed as something a 'single agent' can choose (Buchanan and Brennan, 2000a: 128). More importantly, this monolithic entity is assumed to be a **benevolent actor**: when fiscal competences are proposed to serve a moral goal, the policy-maker is assumed to act 'automatically' according to

that goal (Buchanan and Brennan, 2000b: Xiii-Xiv). Indeed, tax theorists seem to assume that potential political actors will share their own genuine motivations, and thus powers will be employed 'with a single-minded dedication to follow the dictates of welfare economics' or distributive justice (Wagner, 2016: 13). Empowering governments to maximize utility or re-organize the patterns of welfare is not evaluated on how they deal with opportunistic behavior, as the political subjects are presumably programmed to only shape competences according to the objective quality taxation *ought to* realize. Buchanan and Congleton had this methodological blindfold in mind when they stated (2006: 87): 'nowhere in the whole of this approach to taxation is there any recognition that persons and groups will invest valuable resources in the politics that may operate to produce favorable or unfavorable tax treatment'.

Lastly, optimal tax theorists' models imply some specific epistemological assumptions. First of all, when constructing the equilibrium, objective values for consumption, labour or capital are imputed in the model. In other words, ' "utility", or "that which is maximized," has presumptive existence that is independent of any exercise of choice itself' (Buchanan, 2000b: 281). Equally, in order to enhance the economic outcome (or redistribute alongside an ideal pattern), the specific private responses (e.g. the substitutability of a certain good or service) to a certain tax appear as a 'given' to the political actor. Both create the image that the political agent has perfect knowledge of the economic requirements to optimize the economic outcome. In other terms, the policy-maker is not simply a benevolent actor; he is **an omniscient benevolent** actor.

Traditional tax theorists' proposals are related to their precise understanding of the nature of the process: a single, independent, benevolent and omniscient actor vested with the task of creating a superior economic or distributive state. According to their interpretation of the problem, the phenomenon of taxation is portrayed such that fiscal policy appears to be a logical, feasible and effective engineering enterprise. Nonetheless, once we try to disclose the properties of taxation, it seems that the methodological assumptions of conventional tax theory are shaky, to say the least. Taxation does not shape the market like a chemical analyst can improve vaccines in the lab.

The analyst is first of all **not causally separate** from his object of investigation. The idea of a policy-maker working with an economy displayed through a point mass equilibrium feeds the idea that this policy-maker would somehow be 'outside of this process' (Wagner, 2016: 48). However, policy-makers and citizens occupy the same social space (Wagner, 2016). 'Taxmakers' spend their lives among their object of investigation, as they (and their friends and families) are most likely taxpayers themselves. Taxpayers 'are not just objects to be acted upon by some policy maker, but rather exercise their own initiatives, and *talk back* to the so-called policy-makers.' How taxpayers react to the 'political responses' relates to the second matter (Wagner, 2016: 60).

Traditional tax theory has always assumed that policy-makers have a divergent motivational structure, and that they stand above the normal forces that drive individual action: whereas in the market we assume self-interested species, the analysts who 'run the lab' are modeled as benevolent individuals focused on the common good, i.e. maximizing welfare or distributive justice. However, observations, knowledge of everyday life, and empirical reasoning insists that political actors are not less self-interested than other private persons, and will actually *respond* to taxpayers' opportunistic strategies when doing so serves their self-interest (e.g. staying in office, winning the next election). The analyst is thus not ontologically different from

his object. As such, the implicit behavioral 'asymmetry' implied by tax theory is not empirically or theoretically plausible (Butler, 2012: 77). There is no evidence that people undergo a personality transformation when they enter the political arena, thus there is no reason to assume fiscal policy-makers would be more benevolent than common citizens (Gwartney and Wagner, 1988: 7). As opposed to the motivational romanticism of traditional tax scholars, we propose to apply the **self-interestedness postulate** within politics.

Lastly, the epistemological properties of Optimal Tax Theory's models incorrectly portray the economic reality. The value of a specific good or service, or its precise substitutability, is not like measuring the time of a run. These are unknown facts, similar to guessing how people would value watching a running race, or what they would do if the price of a particular good changed (Wagner, 2016: 38). The fact that entrepreneurs engage in various costly statistical tests and marketing studies to acquire a risky, imperfect, estimation of such data, signals that something remarkable is going on here. Why would we assume governments to have information no single person can acquire? On the assumption that we know these things, economists engage in 'demonstrative reasoning' and showcase how specific policies enhance the common good. From this point on, economics trickles down to a pure mathematical exposition. The show, however, is one of an illusionist nature: things do not get value because some third party says they do. In reality, the values we attach to goods and – connected – the way we respond to price-changes (i.e. a tax), are subjective matters that are revealed through the choices we make. In other terms: welfare economists engineer a process on the basis of information, which is in reality the *outcome* of that very process. One of the genuine reasons for actually having a market system is because our 'utility scalars' and the 'substitutability' of one thing for another, are not things directly known to any of us (Kirzner, 1985). Against the epistemic romanticism of traditional tax scholars, we propose '**epistemic subjectivism**': when it comes to the value we attach to goods or our precise reactions to changing prices, we have no prior objective knowledge. Such knowledge is only tacitly present and scattered over millions of people, who will reveal the answers through the choices they make under specific constraints and ever-changing circumstances (Hayek, 1945). This insight reveals why even a simple question, like whether a surtax on soda would increase general welfare, is simply unsolvable. We do not know how much value people attach to soda until we can observe it from their responses to such a tax.

4.2.2. 'After-Romance': the meaning of constitutional regulation

Most of this PhD will focus on specific fiscal policies, i.e. answers on question 1-4. We will dive into specific and technical fiscal matters, for instance whether a state can use market values to calculate a taxable income (see essay 3). The articles do not permit us to reflect much on methodological foundations. The purpose of this essay is exactly to reveal the philosophy behind the competing methodology. The purpose of this introduction is to convey that different approaches (optimal vs. constitutional) mirror a different *view on taxation* itself. When optimal tax theorists propose to include 'potential income' to the domain of governmental exaction, or when redistributive scholars theorize taxation up to 100%, they do so with respect to specific *assumptions* on taxation. In particular, the wide range of flexibility it grants fiscal authorities, is spurred by a romantic image of the state, the latter view being an artifact from aristocratic times (Wagner, 2016: 34). In this anachronistic and idealized account, governments are single actors, secluded from society, with supra-human traits in terms of morality and knowledge. Why restrain an independent, omniscient benevolent government? When it comes to the "efficiency" models of optimal tax theorists, Buchanan and Brennan

(2000b: 225) sketch their romanticism by means of an analogy on neighbors' discussing how to restrain their dog:

> *It is costly to build a fence or to purchase a chain. It is possible to prove that the no-fence, no-chain solution is more efficient than either, provided that we model the behavior of our dog in such a way that he respects the boundaries of our property. As we have put this example from personal experience, the exercise seems, and is, absurd. But is it really very different from that procedure which argues that tax structure X is more ``efficient'' than tax structure Y provided that we model the behavior of government in such a way that it seeks only to further efficiency in revenue collection?*

Once we have modeled tax-makers as naturally motivated to enhance our welfare, the model predicts that unlimited competences will favor general welfare (Buchanan and Brennan, 2000a: 47). Similar burdens rest on the epistemic romanticism. It's possible to conceptualize government as having all data on what we find valuable and our responses to possible fiscal stimuli. Indeed, the idea of "limited government" becomes a proposition of ignorance once we model governments as omniscient. Constitutional constraints are like limiting professional doctors in performing simple operations that save people's lives.[12]

The idea of 'constitutionalism', an underlying contract that regulates political action, gains particular relevance in the light of the political realism as described above. The challenges the knowledge and incentive problem exert on centralized politics, nurture the debate on the proper scope of government. A constitution, which should be seen as a contract that serves the interests of all participants, forms the general framework that mediates the prospective risks of political power. It was in this sense, Hume (1963: 117-18) suggested that we do not model constitutions on romantic presumptions, but rather on the opposite:

> *In constraining any system of government, and the several checks and controls of the constitution, every man ought to be supposed a knave, and to have no other end, in all his actions, than private interest.*

This methodological insight has increased in relevance throughout history, when events clarified that political models established on highly unrealistic behavioral or epistemological accounts, theoretically in the possibility to design Utopias, in reality generated Infernos. Whereas the conventional approach immediately jumps to what governments 'should' do, the constitutional approach starts off from background assumptions on what they reasonably 'will' do. Only if normative legal theory models the world as it is, can it be said that its proposals have any real value.

On a non-ideal account, tax makers are self-interested individuals who are not causally independent from taxpayers and who face severe epistemological constraints to do good. The image of the state changes from a 'benevolent omniscient despot' into something like a 'peculiar investment bank' (Wagner, 2016: 162). Policy makers are not angels but rather bankers, albeit with the special prerogative to raise money through the use of *coercion*. As these public bankers are subject to restraints – electoral competition in particular – they will bestow the public resources on those groups whose support is necessary to retain power (Gwartney and Wagner, 1988: 10). Through this non-ideal lens, the risk appears to be that the institution of taxation divides society in a number of 'contributors' and a group of 'beneficiaries'

[12] For an illuminating analysis of the equation between the domain of science and that of politics, Buchanan and Brennan, 2000a: 43-48.

(Buchanan and Tullock, 1999: 132-149). It was this potential 'bug' in the democratic system Madison (Padover, 1953: 40-41) had in mind when he said:

> It remains to be enquired whether a majority having any common interest, or feeling any common passion, will find sufficient motives to restrain them from oppressing the minority. If two individuals are under the bias of interest or enmity against a third, the rights of the latter could never be safely referred to the majority of the three. Will two thousand individuals be less apt to oppress one thousand or two hundred thousand one hundred thousand?

Indeed, when we depart from the romantic view on politics, an unregulated taxing and spending process allows the politically powerful to enrich themselves through imposed transfers from the relatively powerless. Fiscal policies will turn into exploitative processes whereby governmental officials and their supporters enrich themselves by taking from less powerful citizens.[13] The potential harm through a 'tyranny of the majority' gets exacerbated by democracies' inclination to favour small minorities. Moreover, politicians are more likely to be successful when defending the intense, concentrated interest of a few groups (e.g. farmers) rather than the weak diffused interests of the constituency as a whole (Gwartney and Wagner, 1988: 19). Normatively speaking, not only are the majoritarian and minoritarian rent-seeking activities unfair as they embody pure 'takings', they demand economic investment (e.g. lobbying) which is otherwise allocated more usefully, they distort prices (cf. arbitrary tax exemptions) and hence generate a reduced size of the economic pie for all (Butler, 2012: 58-62).

In absence of the benevolence-assumption, we have to admit there is no 'invisible hand' inherent to democratic processes that assures the 'taxing and spending' state will transfer money to those groups that merit it either morally or economically (Buchanan and Tullock, 1999). In constitutional-contractual terms: there is no guarantee that the power to tax, simply backed by some majority-requirement, will serve the interest of all participants. Additionally, even if we would assume the existence of benignly motivated officials, these would lack proper knowledge to execute moral or economic policies, as they often do not have access to the informational requisites. At the post-romantic stage, the need for an insurance policy to restrain possibly malevolent and fallible governments appears: a constitution is the regulatory device that defines the basic structure of the political process, in order to safeguard the interest of all players. It is an insurance mechanism that protects the constituency, and the *least powerful participants in particular*, against fiscal exploitation or ill-informed policies. It does so by creating permanent or quasi-permanent rules additional to the majority-requirement (Buchanan, 2000b: 147). Non-retro-activity of the law, the duty to organize elections (and thus electoral competition), generality of the law (non-discrimination against specific groups) or freedom to establish a political party (e.g. one that proposes less exploitation) are all positive constitutional principles that protect tax payers against exploitative tendencies through **regulation** of the political sphere. This set of rules aims to organize the political sphere so that the fiscal outcome does not harm those tax payers outside the realm of power. The right to private property, or the right to physical integrity, are negative constitutional principles that protect taxpayers by **limiting** the scope of fiscal authorities. They demarcate legal barriers to the propensity of powerful groups to realize political profits or counter-productive policies. Personal rights limit the outreach of taxation as such, by allocating certain spheres within the

[13] To the extent that the amount of political power is a function of the economic power, richer citizens will be able to 'buy' lower taxes.

domain of individual choice. Together, this set of rules forms the content of the fiscal constitution, which appears necessary on a non-romantic account of the political process. Its purpose is to avoid that when self-interested individuals with limited knowledge on the preferences of others, would act against the interest of the public at large.

5. Four central research questions – revisited

It's one thing to see why, *generally*, government should be limited and regulated in their actions, it's another thing to, *specifically*, elucidate the constitutional principles and analyze *how they restrain the fiscal process*. Once we achieved access to the empirical worldview that grounds a constitutional perspective, the stage is set for such "analytical constitutionalism". This PhD is an exploration on how the constitutional method regulates the fiscal process, and moreover, how it points to conclusions that differ from the ones given by the conventional method. Specifically, we will analyse how a couple of rights and principles shed light on the abovementioned issues. The central research questions form the skeleton around which we build our constitutionalist approach. We will examine how precisely the right to one's body and mind influences the tax incidence (**essay 1**), how the right to private property rules out certain forms of capital taxation (**essay 2**), how the right to autonomy constrains governments in their measurement of capital income (**essay 3**), and how the positive principle of generality of the law regulates rate-policies. (**essay 4**). To disclose the proper benchmarks for constitutional analysis, and reveal the proper principles that the constitutionalist perspective employs to tackle fiscal politics, a pluralist methodology has been utilized:

> **Essay 1** hinges on the natural law tradition to uncover a notion of 'rights over the self'. By means of logical deductions from the axiom that 'every person has a claim to pursue his own ends', we disclose the 'natural' claim each person has over the use of his own physical and mental capacities. Analytical deductions will show us how precisely this personal right disciplines the fiscal authorities in their inclination to tax labour income.
>
> **Essay 2** transfers the right to private property to the discussion concerning capital taxation. To the extent that this institution is acknowledged by most Western constitutions, and it's meaning has been has been shaped by Positive Roman Law, this essay blends elements of legal positivism with the conceptual narrative of natural law theory. This methodological fusion will be used to distinguish between capital and capital gains taxes.
>
> **Essay 3** elaborates further on the subjective notion of value, which has already been touched upon in the previous essays. Moreover, this section combines economic insights on price theory with analytical insights on the right to autonomy, to explain the limits governments face when measuring income.
>
> **Essay 4** bridges normative requirements from political philosophy with behavioral insights from political economy to reveal the proper meaning of "generality of the law" in fiscal issues. This empirically driven essay will explicitly address the challenge of self-interested intentions within the fiscal process when scrutinizing rate-policies. Resonating the observations that formed the introduction of this PhD, and integrating the findings from the previous essays, this conclusive essay will reveal the fiscal alternative this PhD proposes to both prevailing fiscal reality and the romantic theories that co-established it.

6. On constitutionalist co-travellers and interdisciplinary approaches to law and public policy. An afterword.

Within legal research, this thesis presents itself as an alternative approach to the positivist one, in the sense that we took recourse to the domains of both philosophy and economics to reveal constitutional benchmarks. Within tax literature, this thesis tackles both the optimal tax and the tax fairness theorists, in the sense that we advance on an alternative, non-idealized image of government. The previous could somehow give the impression that there is but one scholar going against a tide, the latter carrying the masses of 'methodological traditionalists'. While it is true that the coming essays contribute a different way of thinking *within tax literature*, much of what the reader will encounter is the result of various contemporary influences I had the chance to undergo, and the coming essays try to build on research traditions that have been established for decades at various universities around the world, notably Ghent University itself.

My first degree, 'Moral Sciences', embodies a curriculum set up at this University in the early 60's of the former century. Its founders, such as the late Professor Leo Apostel, were convinced that if philosophers wanted to theorize on social phenomena, such as law and politics, knowledge of philosophy, and the great historical contributions, did not suffice. The tradition of applied philosophy established here in Ghent, was inspired by an interdisciplinary methodology, and protagonists such as the late Jaap Kruithof, Etienne Vermeersch, Freddy Mortier or Johan Braeckman, have made original contributions to normative thinking in Flanders and beyond, by borrowing insights from both social and natural sciences. Additionally, this PhD was completed at the Department of Interdisciplinary Studies of Law, Private Law and Business Law. The endeavour to build on social sciences and philosophy is no personal initiative, but a product of the rich tradition this Law Faculty has built up during the last decades. In this way, my 'meta-juridical' approach surfs on the academic wave that was created here thanks to the thinking of the late Koen Raes, who had a strong influence on me as a student, the empirical research tradition added by Boudewijn Bouckaert and the critical perspective that also marks the work and thinking of Frank Van Dun, Dirk Heirbaut, Mark Van Hoecke, Marc De Vos, my own promotor, Jan Verplaetse, and many others. In a way, Ghent University's Law Faculty fulfilled a pioneering role, as the interdisciplinary methodology emerged here decades before the international trend that we witness today arose, and which is currently influencing many Universities around the world.

Connected, the constitutionalist window that forms the backbone of this thesis, did not emerge in a vacuum, but came about in interaction with many scholars around the globe. Moreover, since a few years, philosophers such as Jerry Gaus and David Schmidtz (University of Arizona) are no longer specializing in 'ideal theory', depicting what the world could look like if only men were altruistic or possessed all knowledge to do good. Conversely, the philosophers I met during my research visit at Arizona are building up models that explicitly acknowledge that human species act under specific motivational and epistemological constraints. My position as an Adam Smith Fellow at George Mason University, has enabled me to work together with economists such as Peter Boettke and Don Boudreaux, which gave me a deeper understanding of the 'PEE-school' (politics, philosophy and economics) of thought that goes back to the 18th and 19th century's writings of Adam Smith, Jeremy Bentham, John Stuart Mill or Karl Marx, when there was no clear distinction between jurisprudence, economics and political philosophy. On this account, studying law always has an evaluative side to it, and invites us to find new and better ways of living together in peace and prosperity. In other terms, legal

research is essentially entangled with social contract theory. Other scholars like Mark Pennington and Carmen Pavel, too, engage in normative evaluation of specific institutional structures while using realistic behavioral models borrowed from political economy. Indeed, many scholars from the Department of Political Economy at King's College London, where I had the chance to work for a semester, exemplify how one can scrutinize specific legal-political arrangements by means of normative insights delivered from philosophy, and empirical constraints borrowed from economics. Furthermore, someone like Richard Epstein (New York University) is demonstrating the constitutional perspective for decades now, with his normative analysis being founded in both neoclassical economics and natural rights theory.

Hence, my legal background has facilitated scrutiny of fiscal measures, but the employed methodology has many intellectual mothers and fathers. The interdisciplinary approach to legal phenomena was nurtured by my education in Moral Sciences and the tradition present at Department at which this PhD was completed. The realistic approach to governmental action, and the specific awareness of the risks of governmental failures that nurtures the constitutional perspective, was shaped by various interactions and a thorough personal study of the field of political economy. Combining insights from political philosophy with an empirically based, post-romantic image of politics nurtured by political economy, these inspirers, academic visits, fellowships and, especially, the study of many contributions, have equipped me to try to give a tentative answer to that one simple question:

"which kind of fiscal principles could reflect agreement for all members of the body politic?"

ESSAY ONE: ON THE TAXATION OF PERSONS AND LABOUR

WHAT IS WRONG WITH ENDOWMENT TAXATION: SELF-USERSHIP AS A PREREQUISITE FOR LEGITIMATE TAXATION [14]

1. Introduction: towards a theory of legitimate taxation

From a normative perspective a tax system can be assessed in two ways. A first kind of inquiry deals with the question 'Why should society levy taxes?' This research investigates the acceptability of the goals of public expenditure. Some of these are widely accepted, such as provision of public goods and funding of social security, while other objectives remain more debatable, such as correction for market failure and redistribution of wealth (Rosen, 2014: 252-262). A second kind of inquiry deals with the question 'How should society levy taxes? '. If we assume that society agrees on (some of) these goals, an important issue remains how public authorities can attain these finalities in a *legitimate* way? Both questions should be treated separately. As a matter of principle, public spending should not only contribute to the abovementioned goals, a priori it should realise its funding through procedures that are compatible with people's fundamental moral rights and liberties. The significance of this 'legitimacy question' originates from the classical philosophical and legal insight that governmental action can only be undertaken within the boundaries set by people's fundamental rights and liberties. As echoed by political philosopher John Tomasi (2012: 76), these rights and liberties are the 'prerequisites for the *legitimate* exercise of democratic authority'. In order to be normatively tolerable, a tax system should not only be efficacious and have the best intentions, it needs to be legitimate as well (Vallentyne, 2012a: 291-301).

In an age of distrust, when residents seem increasingly unwilling to pay taxes, this 'legitimacy' requirement demands more attention.[15] If public authorities want to restore the damaged relationship with their citizens, the rules that guide taxation ought to be justified within a balanced theory that addresses taxpayers as active holders of rights and not merely as welfare-contributors. Hoping to re-establish a solid and durable relation between spending authorities and sponsoring citizens, the latter's fiscal duties cannot simply be a function of economic efficiency models. Conversely, a new fiscal contract that aims at increased compliance requires – among other things – a theory of *legitimate taxation* that examines taxpayers' particular moral rights and their relevance within fiscal policy. Surprisingly, up to now tax scholars dedicated little to no attention to this 'legitimacy ' requirement. In search for the ideal tax system, the dominant Optimal Taxation Theory focused mainly on considerations of efficiency – often supplemented with some notion of equity. Whether the suggested policy also adheres to people's moral rights and liberties seems to be neglected in current literature (Slemrod, 1990; Shaviro, 2007; Piketty and Saez, 2012; Bankman and Shaviro, 2015). One of the best

[14] This first essay was published as: Delmotte and Verplaetse (2017). As mentioned there, in footnote 1, this contribution is written by Charles Delmotte and Jan Verplaetse, and the ideas and concepts expressed in this contribution were developed by Charles Delmotte.

[15] The current context of taxation is one of rising distrust between taxpayers and tax administrations. For further analysis of the notion of trust see Kirchler et al. (2017: 355-376) and Christians (2017: 151-172). The latter sketches the present time as follows: 'Academics, watchdogs, journalists, and activists express deep scepticism about the motives of elected politicians with respect to tax policy in the context of multinationals that are simultaneously large political donors, outsize influencers of legal reforms, and direct beneficiaries of tax largesse. This scepticism … is arguably the source of a deepening distrust within societies regarding the design and implementation of the tax system'. See also Christians (2013: 1373-1414). For more information on the fiscal crisis and the rise of tax avoidance see Avi-Yonah (2000: 1573–1676). Related, the EU (2015) estimates that European tax administrations lose annually about € 1 trillion due to tax evasion and avoidance. The OECD (2015) provides more empirical material on current tax base erosion due to tax planning strategies.

examples of this myopic search for an ideal tax system is the idea of an endowment tax, or taxing citizens on whatever their *talents* (and thus not their actual income) could make them earn. Already in the '70s, leading economists like Akerloff (1978), Mirrlees (1971) and Musgrave and Musgrave (1989) promoted taxation of one's innate earning ability as the ideal tax base. This century, leading tax scholars like Shaviro (2000), Stark (2005), Kaplow (2008), Zelenak (2006), Logue and Slemrod (2008) and Mankiw and Weinzierl (2010) defend taxation of potential earnings as the optimal tax base. Endowment taxation offers an excellent illustration of how a certain tax proposal can at the same time be normatively most appealing (since it would gather the necessary revenue in a highly efficient way) and normatively most horrendous (since it might degrade citizens into passive welfare-donators). In our view, taking people's talents as the proper benchmark for taxation constitutes a multiple violation of people's moral rights. By pinpointing what is wrong with this measure, we like to uncover the *normative minima* that any taxation policy should respect. These conditions demarcate the operative field for public authorities, wherein they ought to realise the abovementioned goals in a maximally efficient way.

In this contribution, we first (section 2) clarify the idea of an endowment tax, the arguments of efficiency and equity that are raised in favour of it and the two most heard – but unconvincing – objections. Next (section 3) we introduce a novel moral principle (*self-usership*) to which any taxation system should adhere. Derived from the concept of autonomy, self-usership will guarantee that each person has a (limited) controlling power over his own body and mind. Once we have stipulated what particular rights persons do have over their selves and their activities, we will identify the infringements of ET and its illegitimacy. We will argue (section 4) that any taxation policy that is based on the assessment, valuation and taxation of personal characteristics (body, mind, capacities) – or the activities resulting from the use of these characteristics – is at odds with self-usership. At the end of this chapter (section 5), we address some possible objections, and simultaneously, formulate some conclusions that involve *income taxation*. We will make clear which kind of income taxation will be in line with the right to self-usership – and thus possibly legitimate.

2. What is endowment taxation?

Imagine John, who works as a local police officer after graduating from high school. He is not keen on his job, but considering his average talents, it is the one that pays him the most. He works 200 hours a month, and earns €4,000. Every day, on his way to work, he passes David, who is gifted with extraordinary mathematical talents that have allowed him to build a successful and well-paid career as a civil engineer in a construction company. Because David likes to spend more time pursuing his lifetime interest in philosophy, he decided to cut back on his engineering work. To fund this shift, a part-time job of 40 hours a month will easily suffice. Since David is a valuable engineer, the company still wants to pay him €4,000 a month.

Most taxation systems will tax John and David equally. A taxpayer's actual income, rather than his *possible* income, serves as the common tax base. However, leading academics want to abandon this basic principle of tax policy. For a few decades, economists (Akerloff, 1978; Mirrlees, 1971 and Musgrave and Musgrave, 1989) and more recently, tax scholars (Shaviro, 2000; Kaplow, 2008; Stark, 2005; Zelenak, 2006) and some philosophers like Ronald Dworkin (1981) John Roemer (1993) and Stuart White (1999), have questioned the justification of using actual income to calculate taxes – and stress the significance of a person's potential income. They claim that tax systems should envisage a person's (innate) ability to

earn a certain income, rather than his or her actual achievements, as the proper standard for taxation. These scholars advocate endowment taxation instead of income taxation, and argue that we should tax David and John differently – that is, at their potential market income – even if they both earn €4,000 a month.

Even if endowment taxation sounds too utopian to apply in current society, proponents still find that taxing people on their (maximum) earning ability should guide us as a normative ideal (Shaviro, 2000; Kaplow, 2008: 96-104). There are several reasons for this. A first and purely economic reason is that such a tax promises to be an efficient way to collect the necessary revenue (Shaviro, 2000; Stark, 2005; Kaplow, 2008; Zelenak, 2006; Logue and Slemrod, 2008; Mankiw and Weinzierl, 2010). In principle, an endowment tax overcomes a well-documented discouraging side effect of income taxation that results from the central precept that higher income equals higher taxation. Since this tax is detached from people's actual economic choices – and income – it avoids the so-called deadweight loss problem, that arises when skilled workers are discouraged from applying for well-paid yet highly taxed jobs. Taxing people on their market potential can be considered economically superior since it maximises overall welfare gains. In the literature, this reason has been called the 'allocation efficiency argument'. A second reason is rooted in ethical considerations. Most proponents also praise taxing talents for reasons of equity. Superficially, it seems quite unfair to require the same financial effort from both John and David. Why demand an equal tax contribution when their talents, skills and competences are so unequal? In order to enhance equality of opportunity and disregard the impact of undeserved circumstances as much as possible, this fiscal measure simply translates a basic assumption of 'luck egalitarianism' from political philosophy into tax policy (Dworkin, 1981; Roemer, 1993; Stuart White, 1999). If tax law depends more on a person's potential income than his actual income, this will compensate for bad luck in talent and grant less-gifted persons more equal chances to acquire income, leisure and job satisfaction. According to this distributive equity argument, it is appropriate to classify David and John in different fiscal regimes.

In response, opponents launched attacks to challenge the presumed superiority of a talent tax. Two of these arguments seem appealing at first, but are nonetheless invalid. The first objection concerns the underlying assumption that talents, competences and skills can be objectively measured (Rawls, 2001: 157-158; Bankman and Weisbach, 2007: 789; Saez, 2002). If this assumption is flawed, then the entire project is in danger. However, recent progress in genetics, neuroscience and cognitive neuropsychology might soon offer workable instruments, which allow us to assess a person's endowment. Indeed, some tax scholars (Logue and Slemrod, 2008: 852) believe that science can already validate an 'endowment index' based on personal genetic information. Van Parijs (1997: 63-68), Rakowksi (2000: 267), Murphy and Nagel (2002: 121-125) and others have mounted a second, more conceptual, ethics-based attack, known as the 'slavery of the talented'. This argument claims that taxing endowment violates people's free choice of occupation. Though any taxation system will obviously limit personal choices to a certain degree (due to the non-negotiability of the general tax regime itself and the incentives it creates), supporters of this argument assert that an endowment tax disproportionally infringes on personal freedom by coercing gifted people to realise their potential. According to this line of thinking, talented individuals (like David, who prioritises philosophy) would be unable to pursue a different life due to the high taxes they would be obliged to pay. Yet this criticism can be directed to tax systems more broadly, not just to endowment taxes. Take, for instance, a country in which it is expensive to live, even if it is possible to fulfil basic human needs. In this case, an income tax of 50 per cent would certainly

affect the occupational choice of its citizens. In such a country, John, who might have preferred a lower-paid job, will lose his freedom if he does not become a police officer, if he wants to survive. Thus the notion of 'slavery' – meaning violation of one's free choice of occupation – does not uniquely target endowment taxes. In addition, 'slavery' only applies to *some forms* of endowment taxes, but not the concept as such. If an endowment tax system yields sufficient tax revenues – to the extent that a maximum taxation rate for talented people like David does not exceed, say, 20 per cent of their earning capacity – then few people would find themselves obliged to change jobs. Admittedly, David may need to work a bit more than 40 hours a month to pay his tax debt, but thanks to the low overall tax rate, he may cut his engineering hours substantially, and he would not be forced to perform this job at all.[16] In a mild endowment tax regime there would be no enslavement at all.

So if anything is wrong with this measure, the 'slavery of the talented' argument does not explain why. We follow a different approach and show that this project violates a fundamental concept of rights, which we name *self-usership*. This notion is a weak form of the libertarian concept of self-ownership, which is immune to some of the latter's radical and undesirable conclusions, yet self-usership remains solid enough to retain and integrate valuable moral intuitions concerning respect, autonomy, privacy and personal rights. After conceptualising the principle of self-usership, we will demonstrate that endowment taxation is highly problematic, as it violates this right not once but thrice (section 4).

3. Self-usership: exploration of an account of autonomy

3.1. The nature and foundation of the right to self-usership

So why would it be wrong to demand that people contribute an amount commensurate with their potential to earn? Rather than referring to the effect of such a requirement on occupational choice, we argue that there is a more basic problem: an endowment tax entails an a priori violation of people's rights over their own body and mind, regardless of the weight of such a tax. But what specific rights do people have over themselves?

The traditional conception of self-ownership has been discredited by controversial conclusions about the philosophical status of the human body (Nozick, 1974; 331). Critics and supporters alike have used self-ownership to justify or criticise extravagant personal rights over the human body, such as the right to sell vital body parts or to sell oneself into slavery (Steiner, 1994: 232-234; Feinberg, 1986: 71-81; Vallentyne, 2012: 160; Nussbaum, 1987: 32-33). Accounts of self-ownership have thus mostly equated personal rights over the human body with full property rights over a material object (Cohen, 1995: 86). Given that self-ownership includes possession and usage of body and mind, it also includes a full property right to one's income, meaning that all forced taxation is illegitimate, at least prima facie (Nozick, 1974: 169; Rothbard, 2006: 37-45). Additionally, even the left-libertarian position does not offer us a way out, since it accepts full ownership rights over the self (full rights to income, right to transfer), merely endorsed in combination with an egalitarian distribution of natural resources (Otsuka: 2000, Vallentyne: 2012b, 152).

Rather than warranting a complete dismissal of self-ownership, these counterintuitive rights strengthen the need for a subtler conception that manages to avoid these unpalatable

[16] A shift towards ET enlarges the tax base, since it relates to the maximum earning capacity and conversely severely decreases the tax rate. In the example of John and David, who have a maximum earning capacity of € 4,000 and € 20,000 a month, respectively, an ET of 17 % suffices to attain a government income of € 4,000.

implications. Indeed, such a concept is very important if we are trying to capture the fundamental difference be-tween an individual's rights over his or her *own body* and his or her rights (or lack thereof) over the *body of others*. Why do we need special permission to touch someone else's body, whereas such an authorisation is absurd if we want to touch our own body?[17] Why can we decide to join a football team ourselves, but not force our neighbour to do so? Intuitively, we accept that people have the right to make decisions regarding their own body and mind, and do not have such a right regarding the body and mind of others. Hence a precise conceptualisation of rights is required to clarify the scope and limits of these personal rights (Dickenson, 2007: 14; Munzer, 1990: 41-56; Christman, 1994: 148-154). We believe that the notion of *self-usership*, which stresses the (more limited but undeniable) value of usage and disposal of one's body and mind, performs this task excellently. We define self-usership as an individual's right to control the use of his or her own personal characteristics – including body parts (e.g., brain and other organs) and mental and physical capacities (e.g., intelligence, athletic abilities) – and to make (legal) arrangements concerning activities (e.g., writing a paper) that exploit these personal characteristics as he or she sees fit.

However, why should we recognise this right? The right to self-usership emanates from a notion of autonomy, which entails that each person has the right to pursue his own ends. This axiomatic right encloses many specific principles in different spheres, such as freedom of religion, the right to private property or the guarantee for (social) security. In our view the right of each person to use her or his personal characteristics as he or she sees fit, is equally inferred from the generic right of each to pursue her or his own distinctive goals.

Now, if we say that 'each person' has the right to pursue his or her ends, then this concerns *real existing persons*, not some philosophised imagination of them. The right to autonomy relates to how people *are* – not to how they could or should be. Each person is that individual entity who he or she is because of her or his particular mental and physical make-up – the indivisible building blocks of each person. And the ends each person can pursue are not the ends of 'humanity' or 'rationality', but the specific goals of that particular person. If you recognise that David has a right to pursue his own goals, you recognise David as he is, including his unique characteristics (e.g., mathematical skills) and his personal objectives (e.g., writing a book on philosophy). Hence, autonomy ultimately encompasses a notion of 'personhood'.

If one's characteristics are an essential component of a person, control over these characteristics is equally vital. A person who is bound to a chair, locked up in prison, forced to eat or reduced to a sex slave, has been deprived of his personhood. A person is descriptively a person in terms of his specific goals and characteristics, but he is normatively a person to the extent that he or she has freedom over the elements that construct his personhood. Autonomy thus supervenes on a notion of personhood and re-quires recognition of each person's control over the elements that design that person. Moreover, since each woman or man is – via her or his person – *embodied* by her or his characteristics, autonomy entails at least a right to control the use of these characteristics. One cannot force David to use his characteristics to construct bridges and still maintain he can live up to his own goals (e.g. to write a book on philosophy). The liberty to use another person's body and mind without their consent would chain these persons to the ends of others. Self-usership is thus not a trivial construct; it is a meaningful notion derived from the somewhat vague and abstract concept of autonomy.

[17] The acceptance of a right to mere possession over one ' s own body, and a consequential condemnation of trespass, is widespread and will be assumed.

As self-usership equals control over one's person and activities we can also indicate the boundaries of this concept. Controlling something means deciding what will happen to it. Controlling a car signifies that one can decide whether to drive it, lend it or use it for taxi services. Likewise, self-usership means that individuals can decide on the use of their personal characteristics. However, this right to decide cannot be confounded with a right to all economic benefits others are willing to give (Christman, 1994: 129-135; Waldron, 1988: 431-439). The economic profits that are correlated with some particular activities (the ones valued by others) do not follow from the right to control one's person; they follow from a right to transfer economic goods – such as money.[18] Self-usership relates to controlling rights that give an individual governance over what will happen to his person, but this principle does not found any right to all the economic valorisations others wish to attribute to a decision. Consequently, as will be elaborated further (section 5.2), income taxation is not necessarily illegitimate from the viewpoint of self-usership.

Since control rights must be carefully distinguished from transfer rights, this principle also excludes self-enslavement – possible under the traditional conception of self-ownership. Self-usership gives persons the right to legal actions that control the use of their personal characteristics, and e.g. permits John to make arrangements that he will work nightshifts. A contract that states that John will sell his own heart to David, or that John will become David's property (who can then do with him whatever he wants, e.g., lock him up, beat him, kill him or sell him) is clearly different. Such acts do not fall under an individual's right to decide how to use their personal characteristics. Rather, they permanently relocate such decisional power to others and consequently annihilate all personhood.[19] Self-enslavement and the sale of vital body parts are not expressions of our right to decide about the usage of our personal characteristics; both are instead expressions of a questionable right to transfer this sovereignty to others.

3.2. Self-usership: a bundle of rights

Now that we know how self-usership corresponds to autonomy but differs from self-ownership, what exactly does it mean when someone has the right to use the personal characteristics he has at his disposal? What kinds of rights can David invoke to secure a life as a philosopher rather than as a successful engineer?

Before unpacking the particular rights that self-usership entails, it is illuminating to distinguish between active and passive rights (Tuck, 1979: 5-6; Weinar, 2011). An active right concerns the holder's own action, while a *passive right* demands a certain action – or rather the abstinence from it – of others. For example, if an individual has the active right to possess a lawn, but the government has the active right to expropriate it without reason, he might end up disappointed about the scope of his property right. Hence, the right to property will entail *immunity* against expropriation that curtails his liberty to exploit his property. An analysis of basic rights thus typically does not stop with expressing active rights, granting possible actions

[18] In an economic exchange of labour for money, the explanation for a certain income does not lie in one's self-control, but stems from the fact that the labourer and the employer grant differential economic value to this labour, which gets expressed in their consent of a certain sum of external goods. See for example Gaus, 2010 : 89.

[19] A sale contract does not establish an effective transfer. The effective donation depends on the seller executing the right. Thus a sale contract of vital body parts leaves a person at the permanent will of someone else, and is to be seen as a variation of a slave contract.

to its holders, but also limits the active rights of others with passive rights. A right is futile unless it goes with a claim to exclude others.[20]

Thus, if David has the right to self-usership, which permits him to pursue his philosophical passion, his particular 'SU'-active rights are:

(a) a *liberty right* that enables him to use his personal characteristics (body, mind, capacities) in activities of his choice, in the absence of (legal) obligations.[21] For example, if David wants to use his mental capacities for metaphysics, rather than to construct buildings, he has the right to do so.

(b) a *management right* that allows him to make (legal) agreements such as contracts with others regarding the use of his personal characteristics (body, mind, capacities) in activities. For example, David not only has the right to rely on his mental capacities; he also has the right to sign a contract in which he stipulates that he will use his mental capacities to write a book. This right should be distinguished from a transfer right; the latter does not concern agreements concerning the use of one's characteristics, but the permanent transfer of this power to others.

Both liberty and management rights rule out legislation that prohibits activities and legal agreements within the scope of one's self-usership. However, these rights are insufficient to fully describe the right introduced here. Self-usership not only safeguards the permissibility of actions and contracts; it equally outlaws subtler intrusions onto one's personal domain. Two passive rights secure the domain of personal governance:

(c) a *non-intervention right* that protects the personal domain against interferences with the *activities* in which one is engaged.[22] Apart from outright prohibitions that tell a person what to do or not to do – which would violate one's liberty – an individual's personal sphere might suffer from more discrete interventions, created by measures intended to affect their decisions. For example, a government that introduces a tax or administrative barrier to discourage philosophers still repudiates one's self-usership by steering people away from certain activities. The non-intervention right precludes such practices as it establishes the duty on legislative processes not to intervene with the type of activities a person opts for.

(d) an *immunity right* that protects individuals against intrusions onto the *personal characteristics* themselves. This passive right secures the personal sphere so that these items cannot serve as a basis for legal interference. For example, a government that taxes good looks violates this right since it disfavours a certain personal characteristic. The immunity right guarantees one's self-usership, as it excludes the legislator's power to impose duties on the basis of one's characteristics.[23]

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[20] Put in other words: an active right without a passive right is a pure ' liberty ', as it only entails a right to act, but not a claim to forbid others from acting. See Hohfeld (1913: 31-32) and Schmidtz (2010: 80).
[21] Liberty points here at the absence of legal obligations. This right is respected when one is not obliged to do anything (Hohfeld, 1913: 32-34).
[22] A non-intervention right is, in Hohfeldian vocabulary (1913: 32), thus a claim-right, as it establishes a specific duty in others.
[23] The use of the word 'duty' is important, as we endorse that those persons who have clear dysfunctional personal characteristics (because of a handicap, sickness or accident) can have additional claims (subject of a right), e.g. financial benefits, so that a decent threshold will be reached. This does not interfere with any user decisions, but rather guarantees self-usership for all. Importantly, in order to be legitimate, the financing of such a redistributive mechanism cannot be at the detriment of the self-control of others.

So, importantly, as none of the rights is interchangeable, it is possible to violate someone's passive rights without violating his or her active rights. Imagine a state that forbids philosophy as either a waste of time or a dangerous activity. Looking for sanctions to get rid of philosophy, the government imposes a 10 per cent extra income tax on any practitioner. This anti-philosophers' tax does not infringe on people's liberty right to philosophise. Philosophising citizens are still free to practise their philosophers' skill, as long as they are prepared to pay for it. However, since it penalises certain activities that belong to the immediate personal realm of the self, such a tax violates the passive right of non-intervention. Or, envisage a racist government that imposes a tax on the basis of the colour of one's skin. This measure does not infringe upon one's liberty right, and does not interfere with any activity. Yet the personal sphere is intruded upon, for its elements are taken as a source of obligation for ends that are distinct from the person's.

4. Endowment taxation: a threefold infringement of self-usership

This conceptualisation of self-usership allows us to scrutinise the moral permissibility of a talent tax step by step. This project necessarily involves the following processes: (a) devising a process of endowment assessment (assessment), (b) attributing a tax base to a person according to his market opportunities (valuation), and (c) formulating a tax rate that will levy a part of that value (taxation). We will argue that in each process of this tax, a particular right derived from self-usership is in trouble.

4.1. Endowment assessment

Endowment taxation requires information about an individual's capacities. Intelligence is often mentioned, and Rawls (1999a: 54) also mentions the significance of health, vigour, imagination; Nussbaum (2001: 78-80) includes her well-known capabilities (practical reason, play, affiliation, etc.). Tax scholars such as Shaviro (2000: 406) supplement this list with sound judgement, self-discipline, emotional intelligence and good looks, and Plug et al. (1999: 207) also target creativity, cooperative and commercial ability, and leadership. Clearly, in order to be able estimate our endowment, we have to provide tax authorities with relevant information. Aside from technical matters that will complicate assessment of endowment, the real issue is how far such an investigation intrudes upon the private realm protected by self-usership. In contrast to the sources for calculating one's income or consumption, the basic information needed to assess the determinants of an individual's potential income is simply not directly available. It requires active participation in numerous activities such as tests, screenings and experiments. If tax authorities require information that goes deeper than consumption behaviour, monthly salaries or dividends, they will need instruments and practices to delve deeper into someone's privacy.

However, if the required information would have to be gauged by tests and (genetic) screenings, and a tax authority coerces an individual to participate in the screening, this obligation represents an infringement of his liberty right.[24] The liberty right regarding one's characteristics implies that no one – including tax authorities – has the right to force an individual to use his personal characteristics in a specific way, and therefore to overrule his refusal to participate in the assessment process. Thus the liberty right reinforces the

[24] Since one 's personal characteristics are non-rival goods (you cannot be forced to engage in tests and write a paper at the same time), another person using your characteristics without consent necessarily entails a duty on you, and thus an infringement of the liberty right.

individual's right to oppose and refuse participation in a practice that entails activities regarding their personal characteristics, regardless of whatever noble purposes the assessing authority intends to fulfil.

So, the real trouble with a tax on endowment is not that cheaters will attempt to conceal their true taxable talents, which is a pragmatic concern that Roemer (1994: 132) and Dworkin (1981: 324) repeatedly put forward. Rather, the problem is of a more principled nature and targets those who spontaneously grant authorities access to private information and demand such openness from others. Prior to the question 'What to do with cheaters?' one needs to address the more basic issue 'Can administrations legitimately demand access?' According to our liberty right, the answer is clear: self-usership grants us the moral right to deny others access or (to abstain from) activities that are intended to provide others with endowment-relevant information.

One objection might be that tax authorities are allowed to use less-intrusive information sources to assess an individual's endowment, such as tagging or proxies. *Tags* deliver information based on personal characteristics that are difficult to hide such as gender, health, height or age (Akerlof, 1978: 8; Mankiw and Weinzierl, 2010: 186). Tags are normally *beyond our control*, and are believed to be correlated with more hidden capacities (Akerlof, 1978: 9). If tax authorities use information based on *voluntary achievements* to assess an individual's endowment, they are using *proxies*. For instance, a person's intellectual potential can be inferred from the proxy 'obtained university degrees' (White, 1999: 621), 'SAT score' (Zelenak, 2008: 1180) and 'money earned during previous jobs' might indicate their economic potential.

We do not think this method of indirect assessment is a successful strategy for accomplishing an endowment tax. Since by definition there is no necessary link between a proxy and a person's endowment, using proxies as a tax base can be as arbitrary as using an individual's income as a tax base, which defenders of this measure reject as inefficient and unfair. Why tax someone for obtaining a university degree if doing so may be a matter of lucky inborn talent? Some people work extremely hard to become an engineer, while others combine these studies with a time-consuming interest in philosophy. A university degree does not indicate a person's intellectual potential. A similar argument can be made with regard to tags. If a tax system uses tags, one does not tax possibilities but involuntary traits, which only on average correlate with these possibilities. After all, correlations do not guarantee that low-endowed individuals will enjoy a more favourable tax regime, as endowment taxation promises.

4.2. Endowment valuation

Before effectively taxing someone using a particular rate, we have to attribute a certain value to the object of taxation. If authorities skirt around the information problem and collect relevant data in a morally acceptable way, they will still *valorise* our endowments. Given that authorities aim to minimise deadweight losses and equalise people's economic opportunities, a tax base will be imposed according to people's potential market benefit, i.e., what a person's physical appearance, emotional talents and cognitive skills allow them to earn (Dworkin, 1981: 316).

That taxing these hypothetical market benefits might result in the 'slavery of the talented' is only a minor element of critique. The principle problem with endowment valuation is that people's *tax obligations* are determined on the basis of their personal characteristics, moreover according to their market value. This price will – of course – not necessarily correspond to the

taxpayer's personal ends. Rather, the market price is the aggregate of the valorisations of all consumers in a market, and reflects *their* ends (Stigler, 1987: 12). So, if David dislikes his own mathematical skills, an endowment tax will nonetheless impose a tax base that reflects the general desire of others that he continues to work as an engineer. Or take a beautiful girl who profoundly hates the beauty industry she refuses to join. Nonetheless, her taxes will be calculated on the price others would be willing to pay to see her as a supermodel.

Admittedly, an individual's liberty or management right might not be violated by this imposed value. An endowment-sensitive tax base as such does not forbid individuals from using their personal characteristics in another way. The violation of their right to self-usership is of a different nature here. This procedure establishes a duty on a person merely on the basis of his personal characteristics. The fact that administrations found fiscal duties on one's personal characteristics – and the general desire of others towards them – clearly invades the immunity right, that rescues personal characteristics from being a basis of obligation. Without any prior consent of the person over the use and value of such characteristics (e.g. through labour-contracts and agreed income see section 5.1.), this fiscal procedure intrudes upon an area demarcated as the personal domain.

4.3. Endowment taxation

After the tax base has been imposed, specific rates will levy a portion of that value. While the immunity right avoids interference on the level of personal characteristics, the non-intervention right protects *the activities* in which people use these personal characteristics. Again, it does not do so in a straightforward way (which is a job that the liberty or management right fulfils), but by assuring a realm of non-inference that rules out subtler interventions. Tax authorities that respect this right refrain from interfering with people's personal decisions on how to use their bodies and minds. Any tax policy that indicates a preference for some behavioural choices, for example via variable tax rates for particular occupations or consumption patterns, intrudes upon the personal domain. According to the non-intervention right, tax policies have to be *user blind* and must condemn discrimination aiming to facilitate or hamper behavioural options.[25] As self-usership does not include the right to income (because income does not relate to control of one's activities *sensu stricto*, see above), an income tax can escape such a violation if it is blind to a person's particular activities. Many tax codes – typically those that discriminate on the basis of occupational choice, legal entity or type of consumption – are at odds with the duty of non-intervention.

Since an endowment tax will tax a *potential activity* (i.e., the one that yields the biggest revenue), it obviously interferes with one's activities and it fails to treat income user blindly. For example, John and David – both earning €4,000 – will be taxed at totally different rates. John, performing his highest paying occupation, will be rewarded with an effective tax rate of 17 per cent, whereas tax authorities will impose on David's current lifestyle a rate of 85 per cent.[26] Consequently, we can say an endowment tax constitutes a *tax benefit* for those who opt to undertake the activities the market would favour them to do, and a *tax raise* for those who choose not to live according to the market-preference. In this way, endowment taxation's

[25] The non-intervention right means that a particular activity cannot legally influence the tax rate. It does not imply that each particular activity should have the same economic consequence as such. We thank Martin O ' Neil for his critical remark, which enabled clarification.

[26] John and David have a maximum earning capacity of respectively € 4,000 and € 20,000 a month, so an ET of 17 % would suffice to attain a government income of € 4,000. This would result in an income tax rate of 85 % on David's real income, and in only 17 % of John's real income.

discriminatory treatment of income in light of one's potential activity influences occupational choices and thus violates the right of non-intervention.

5. Some objections

5.1. Endowment and income: immunity and consent

One criticism might be that the liberty or immunity right not only constrains governments' tax policies but also precludes particular labour market practices. Are companies that are testing future employees' skills also guilty of endowment assessment? And should we accuse a business of endowment valuation when it proposes a salary to a worker? Our answer is no. The most important difference is that people engage in economic and social ventures on a consensual basis, in contrast to endowment taxation's coercive information process and its enforcement of non-consented values for personal characteristics. The principle of self-usership permits people to participate in interviews and tests. After negotiation and consent, they might accept certain legal and financial arrangements concerning the use of personal characteristics, which will involve an *income*. However, as long as David does not agree to undergo measurement of his capacities and does not effectively accept a certain level of income, tax authorities lack the right to act according to such measurements and prices.

Therefore, from a philosophical perspective, income taxation aligns better with autonomous personhood than endowment taxation. This kind of taxation does not intrude on the realm of one's body and mind but concerns a levy on economic benefits that supervene on this domain. Additionally, a *realised income tax* does not one-sidedly dictate specific values but merely replicates consented valorisations as a taxable basis. Under such a system, David will not be taxed on controversial values regarding his innate talent, but on external (monetary) benefits he explicitly accepts.

So, self-usership guards autonomous personhood and makes sure that no one is forced to partake in certain activities (e.g. assessment procedures) or has duties imposed on her or him on the basis of personal characteristics. Moreover, if taxation wants to respect self-usership, it needs to ensure people's consented actions. The legitimacy of an income tax emerges from the fact that it does not impose any alien valorisations regarding one's personal domain, but founds fiscal obligations in consented and external (economic) benefits. Admittedly, for most people the market value of their endowment will have a crucial impact on their occupational choices and – consequently – their income. If people consent to arrange their lives according to these opportunities, then taxation of these extra-personal benefits is legitimate. However, if they do not, authorities and markets should respect this choice and refrain from any political initiatives that mortgage one's personal domain.

5.2. Consent isn't everything: non-intervention as an expression of neutrality

Taxation must supervene upon our personal characteristics and activities without interfering with them. If someone uses his personal characteristics to trade financial products, rent apartments or perform manual labour, this *choice* cannot be the subject of a legitimate tax policy. However, nothing is wrong with a government that imposes taxes on the *economic outcomes* of this choice. Yet the imposition of such taxation ought to be disconnected from the activities one undertakes.

But what about taxes that aim to discourage harmful or polluting activities? Do these conflict with the user-blindness requirement as well? Not necessarily. One might justify the taxation of

such activities along independent lines of reasoning. The damage done to others might be so clear that the taxed activities simply fall outside the scope of liberty rights, and consequently outside the scope of passive rights. Since no one has the liberty right to harm or endanger other people, one cannot claim that taxing to deter potential perpetrators is illegitimate. However, this does not mean that taxation is a useful tool with which we can discourage any kind of harmful action. When damage is caused by a limited number of identifiable people, individual liability claims remain the best way to obtain compensation (Shavell, 2004: 177-207). However, if damage to public and natural goods is caused over the long run by people who are difficult to identify, taxation can be an effective instrument of deterrence and compensation (Baumol, 1972; Harrison and Theeuwes, 2008: 68-80). If so, the principle of self-usership will not reject the possibility that taxation might be legitimate in these cases. Obviously, if authorities use taxes to favour a particular way of life *within* the vast domain of reasonable and respectable ways of life, they violate the requirement of user-blind non-interference. That alcohol and tobacco excite one half of the population while the other half is irritated by drunken people and spoiled air is not a good enough reason for a special tax concerning these substances. The core philosophy behind self-usership is to guarantee people the right not to prefer the most profitable or the most innocent option in life. So, this principle prevents taxation from becoming a tool for pushing people towards economic optima and welfare end-states. When people harm others, damage property and destroy natural resources, they place themselves outside the protective realm of self-usership. However, its protection persists when people do not seek to eliminate risks or hindrances that obstruct the road to perfect welfare. That the best possible world is not legally enforceable is the price we pay for the liberty that offers self-usership.

6. Conclusion

Philippe Van Parijs (1997: 63-68) raised the example of Lovely and Lonely, two identical twins with identical preferences but one difference: Lovely, unlike Lonely, is blessed with extraordinary looks. This talent enables Lovely to earn lots of money as a stripper in peep shows. Lonely, however, has no such options. That an endowment tax might coerce Lovely to work in peep shows, a job she profoundly hates, is the main reason why Van Parijs opposes such measure.

Intuitively, many people will indeed judge something to be wrong when authorities start taking people's market potential as a fiscal target. The popularity of endowment taxation embodies tax literature's neglect of the repercussions of people's moral rights within tax levying procedures. In an attempt to supplement current consequentialist framework within taxation theory, we have tried to uncover the problematic nature of this fiscal strategy. By pinpointing the relevance of people's rights within taxation policy, we tried to initiate a deontological view on taxation, in which taxpayers are considered natural persons who have obligations but equally hold moral rights.

In this contribution we argued that the problem of endowment taxation is of a more principled nature than in Van Parijs' argument. The boundaries of permissible governmental action are delineated by peoples' moral rights and liberties, and taxing endowment simply transgresses these limits. The illegitimate nature of taxing people on their talent can be understood once we uncover a specific right of control, which each person has over himself. From a more abstract notion of autonomy, one can deduce a specific form of self-ownership that claims that all people have at least the right to control their own person. Self-usership bundles several control

rights such as the liberty right, management right, non-intervention right and immunity right. After introducing and explaining these sub-rights, we demonstrated how several breaches constitute the illegitimacy of endowment taxes. The screening and test procedures required to determine potential income establish certain obligations that infringe on the liberty right; defining the tax base according to one's personal characteristics violates the right to immunity; and taxing endowments interferes with the way someone uses his personal characteristics and thus violates the user-blindness requirement of the non-intervention right.

Respect for each person's self-usership serves as a prerequisite for legitimate taxation – that consequently ought to stay away from the personal sphere. As income does not belong to the person itself – and his private domain – but is rather a product of consensual economic interactions, it serves as a legitimate benchmark for taxation. Governments are therefore allowed to impose fiscal and other duties on one's realised income, as long as these are detached from the choices people make on how to use their bodies and minds. With the exception of activities that indisputably harm others or damage public goods, taxes cannot be used to instruct how people should lead their lives. Respect for the value of autonomy and, accordingly, the right to self-usership curtails theorists' and legislators' aspiration to shepherd taxpayers towards specific ideological objectives via income taxation – unfortunately a common practice these days.

ESSAY TWO: ON THE TAXATION OF CAPITAL AND CAPITAL INCOME

WEALTH TAXES, CAPITAL GAINS TAX AND THE RIGHT TO PRIVATE PROPERTY: A CONSTITUTIONAL ANALYSIS OF THE FISCAL TREATMENT OF WEALTH[27]

1. Introduction and overview

Throughout the centuries, the secular state replaced God more and more as the designer of society – with its interventions appearing more and more visibly. According to Benjamin Franklin: "In this world, nothing can be said to be certain, except death and taxes." Despite the many historical tax revolts, tax politics have very rarely been the subject of intense public debate in the last 50 years. Western governments were primarily judged on results, i.e. prosperity for everyone. The way in which fiscal rules contributed to this was left to the specialists' discretion. Partly due to the extreme technical nature of the subject, the annual assessment notice was for many years considered a necessary evil.

This changed with the publication of Piketty's *Capital in the Twenty-First Century* (2014). In his bestseller, the French star economist observed a concentration of wealth amongst the richest groups in many Western societies. According to the French economist, this evolution could be explained by the role of capital in our economies. In particular, he pointed to the unequal spread, the intrinsically accumulative nature, and also the fiscally preferential treatment of for example shares, bonds, immovable property, intellectual property and savings as the cause of increased economic inequality.

The book created an academic, political and public polemic on fiscal justice, mainly marked by the demand for higher taxes on the richest 10%. This discourse, which also took place here in Belgium as a result of the debate on the "tax shift", distinguished, among other things, two concrete proposals: wealth taxes and (higher) capital gains tax rates. The first tax is a certain levy on the market value of a person's wealth, the second measure includes a levy on the income realised from one's capital. This article can be regarded as a contribution to the above-mentioned academic and societal discussion. In particular, said proposals will be explained from the perspective of the right to private property, in an article made up of four parts.

The following part (**2.**) will reflect on the growing wealth inequality and the role of taxation in this evolution. In particular, the proposal of either having wealth taxes or capital gains tax will be situated in the debate on economic inequality.

Next, I will attempt to outline the potential role of the field of jurisprudence in this discussion (**3.**). From the constitutional point of view, political measures are only acceptable as far as they are compatible with specific human rights. Whether certain legislation is legitimate – and hence permissible – depends on its relationship with fundamental human rights. The discipline of normative jurisprudence will therefore evaluate legislative initiatives in light of certain individual rights. The remainder of this paper constitutes a specific application of similar normative intent.

The right to private property will be used as the normative benchmark. I will therefore present in part three an analysis of the right to private property (**4.**) – a conceptualisation which does

[27] This second essay concerns a translation of the original publication: Delmotte (2016).

not necessarily correspond to its organisation into national or supranational legislation. Here I will argue that this fundamental right consists of five sub-rights (or dimensions), i.e. possession, use, modification, management and transfer, between which there exists a hierarchical relationship, and this in two ways. Each sub-right provides *a progressive sphere* of control over a good.[28] Sub-rights such as possession or use contain minimal legal capacity, and are hardly controversial. Management and transfer, on the other hand, constitute more extensive types of actions – sometimes less evident. Furthermore, the recognition of those basal sub-rights, such as for example possession or use, also constitutes the *foundation* for the higher dimensions: elements such as management or transfer presume the recognition of the right of possession or use. One could therefore view property as a pyramid, with its base containing the more evident sub-rights – which are in addition fundamental to the subsequent aspects.

Lastly, the preceding parts converge in a final chapter (**5.**). Using the submitted analysis of the basic right to private property, I will determine a different qualification for both tax measures. Wealth taxes are the most serious violation of the right to private property. After all, the taxation of the market value of a person's wealth removes a part of a good (which is subject to his property right) and hence damages the most fundamental sub-right: the right to keep something physically and exclusively for oneself (right of possession). Furthermore, the remaining dimensions of private property are based on this right of possession, so this violation equally constitutes a violation of the other aspects of property. Capital gains tax is more compatible, as this possibly respects all dimensions of private property. As the taxation of realised income purely concerns the *economic surplus* that *results* from certain sub-rights, specifically the sub-rights of management and transfer, it does not necessarily constitute a violation of these aspects of control.

2. Background: wealth inequality and the call for redistributive reforms

2.1. The vexed question of taxation

By way of introduction it has to be pointed out that there is an increasing societal interest in taxation. Where tax law, until a few years ago, was solely the domain of specialist lawyers, the technical nature of the material no longer deters public interest. Since the 2014 elections in Belgium, the theme of taxation has been in the news on a weekly basis.

First of all, most of the Flemish political parties (Green Party, 2014: 76; Socialist Party, 2014; Christian Democratic Party, 2014) presented a series of tax reform proposals in the run up to the 2014 elections. For months afterwards, public opinion put pressure on the elected government to meet the electorate's demands for a higher contribution from the richest 10 %. The demand for this kind of tax shift became the glue that held together a series of union demonstrations during the so-called "hot autumn". Subsequently, the Walloon Socialist Party (PS) submitted early 2015 a concrete bill for a general wealth tax – a proposal previously defended by the Confederation of Christian Trade Unions (ACV). In its annual report of February last year the OECD (2015) criticised the high taxes on labour and – indeed – the low capital gains tax rates in Belgium. This organisation was not alone: already in 2014 the parliamentary commission tasked with fiscal reform (2014: 71) suggested higher capital gains

[28] In this article, in order to distinguish between a right, and the object of that right, for the latter we use the word 'good'. Hence, the term 'good(s)' will refer to both immovable goods like real estate and movable goods like shares. This text does not (directly) address intellectual property rights.

tax rates. In the meantime, the Heart before Head (Hart boven Hard) movement made tax justice its key topic for debate during spring 2015. In the same period, even the Belgian umbrella organisation for environmental associations (Bond Beter Leefmilieu) rode the same wave briefly by translating its traditional point of view to fiscal terms (i.e. greener taxes, Bienstman, 2014-15: 33-37). Finally, the summer of 2015 marked a temporary end to the undoubtedly continuing discussion. The government opted for a shift: only partially towards capital and mainly towards consumption, especially tobacco, diesel, electricity and alcohol.[29]

Whereas the government opted for a shift towards consumption, this paper will consider the above-mentioned ideas which (for the time being) did not make it into policy: on the one hand the introduction of a general wealth tax, and on the other hand higher capital gains tax rates, measures which will be defined in greater detail in 2.4. Moreover, as the prevailing tax law already mentions certain forms of wealth taxes as well as capital gains tax, equally, this paper could be considered a normative evaluation of certain measures already in place.[30]

2.2. The (re)emergence of relative inequality

The preliminary question however is this: where is this heightened attention for taxation coming from? How to explain the fact that wealth became the subject of many ideas regarding taxation? The fiscal justice debate is – in my opinion – the result of a heightened interest in relative inequality.

There are two possible normative judgements of economic distribution. One possibility is the evaluation of the *absolute economic level* of individuals. From this angle, an economic situation is fair as long as everyone is well off and therefore has enough (Frankfurt, 1988: 134-158). Vice versa, it goes against the grain to see people in poverty, sickness or without any access to welfare. The measures of affluence of different groups are considered here. The evaluation is considered positive if those measures, and the level of the least well-off in particular, meet certain standards (e.g. maximizing the amount of primary goods, see: Rawls, 1999a: 57-64). This vision can be described as welfare thinking.

The other possibility is the evaluation of welfare in *relative terms*. Not the wealth of individuals as such – but the relationship between the levels they attain is where the focus lies. What we consider unfair from this perspective, is not the economic situation of a person, but the underlying differences between their individual circumstances (Temkin, 2000: 126-161). The evaluation is positive where the differences between individuals are minor. In this view, it is not the number of resources available to people which is of primary importance, but the fact that some have more than others.

The star of welfare thinking – for many years promoted by the World Bank, the IMF and more or less all Western leaders – seems to be waning at the moment. Where during the happy 90s growth and general increase in welfare were being stressed, there is now a growing interest in the specific welfare relationship between individuals, i.e. relative inequality (De Vos, 2015: 6-15). The re-emergence of relative inequality – with inequality between individuals as the primary focus – can be illustrated by e.g. the extensive coverage in the popular media in recent years regarding the percentage of wealth that reaches the richest 10 or 20%. The Belgian

[29] Wet houdende maatregelen inzake versterking van jobcreatie en koopkracht, 2015.
[30] Existing real estate taxes ("roerende voorheffing") display enough similarities for it to be labelled as wealth taxes, and this will be discussed towards the end. Various taxes can be considered capital gains tax, as far as they address the realised income from capital, e.g. the Belgian withholding tax.

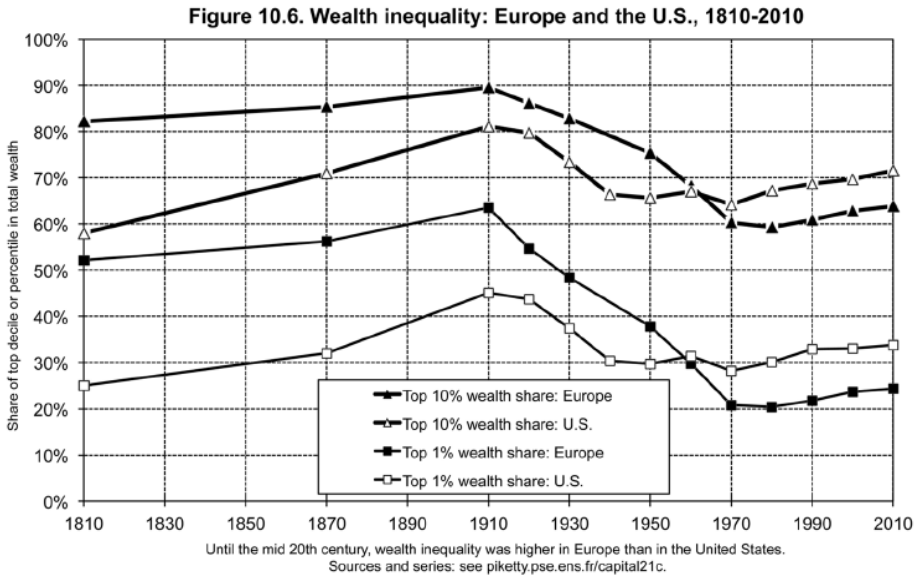
newspaper *De Standaard* (8-13 september 2014) put inequality in the public spotlight with its weeklong series 'De Kloof' ('The Gap') in 2014, and included, among others, numbers on income inequality in Belgium. It is also telling that even the political leader of the United States is talking about relative inequality: President Obama (2013) denounced the fact that the top 10% in the US represent half of the income. Furthermore, at annual meeting of the - generally not so egalitarian - World Economic Forum (2015), the rise of global inequality was the top item on the agenda. Equally surprising, the IMF (Lagarde, 2014) launched the idea of "inclusive capitalism", whereby the fruits are being shared (more) honestly.

2.3. Thomas Piketty and the rising wealth inequality

The second introductory question looks at the cause of the reclaimed interest in economic inequality between individuals. Where is this heightened interest in the economic relationship between individuals coming from?

The reason for the change in economic outlook is indubitably the publication of the sensational and ubiquitous *Capital in the Twenty-First Century*, by the French economist Thomas Piketty. In a nutshell, the book, which topped bestseller lists in 2014, contains two elements: an observation and an analysis. Amongst the researched Western societies, Piketty observes that the richest 10% - and certainly the richest 1% - take an increasingly bigger share of wealth. Where during the period after WWII there was an evolution towards relative equality, the economist clearly demonstrates an increasing wealth inequality between individuals throughout the last four decades. The richest 10% in France currently represent 60-65% of the wealth (Piketty, 2014: 340), the same segment accumulating up to 70% (an increase of approximately 10% since 1980) in the UK (Piketty, 2014: 344), and the richest 10% in the US represent 75% of wealth (Piketty, 2014: 348).

The diagram below shows a compression of the empirical findings for the US and Europe (Piketty, 2014: 349).



The explanation for the regained focus on relative inequality lies primarily in the fact that Piketty uncovers the rise of wealth inequality by analysing data previously not available.

Consequently, the public has become aware of the concentration of wealth in the economic top layer of society in several Western nations since the 70s.

Capital in the Twenty-First Century is not just purely a work of observation. The impact of the book has to do with the fact that the economist connects the above observation to an economic explanation. According to the French economist, the cause of the increase in wealth inequality lies in the role of capital – as opposed to labour. Whereas salaries in recent decades only rose piecemeal, private gains from capital (shares, bonds, intellectual property, savings and real estate) increased enormously (Piketty, 2014: 199-237). Piketty provided the supporters of economic equality with a clear scientific theory: the explanation for the uneven distribution of wealth is *a priori* due to the uneven distribution of capital, which in addition has an accumulative nature. In absence of corrective measures, the distribution and nature of capital (again: from assets not originating from labour) will lead to pre-War inequality levels, according to Piketty.

2.4. Taxation as a corrective mechanism

According to the economist Paul Krugman (2014: 3), Piketty has caused a revolution in our thinking. This revolution is not limited to the focus on relative inequality, but also includes a political-normative aspect. Where once welfare thinking often proposed higher minimum wages, better education and measures regarding equal opportunities to create a desirable economic situation, the emphasis has now shifted. In the final part of *Capital in the Twenty-First Century* Piketty again placed taxation at the centre of public, political and academic debate. Consequently, the revolution in economic thinking matches a call for fiscal measures to keep the rising inequality in line. Now, to halt "the indefinite increase of inequality of wealth" (2014: 518) Piketty himself proposes a *wealth tax*. To some extent, marginal wealth taxes exist in Flanders in the form of real estate taxes (or: 'onroerende voorheffing'). Piketty's wealth tax needs to be distinguished from the current tax on property in three ways. First of all, it concerns a universal tax: Piketty targets all types of capital, including savings, shares and bonds. Secondly, the Piketty-tax considers the taxation of the net value of a property, and not of a (minimum) assumed income, as used in many countries. Finally, Piketty's wealth taxes are characterised by a progressive rate structure: the higher the market value of an individual's wealth, the higher the rate.

Thus, these kind of wealth taxes are not simply the same as the existing real estate taxes. Despite this, the legitimacy of the latter will be dealt with towards the end of this text.

The second idea often introduced as part of the discussion, is the introduction of / increase in *capital gains tax* rates.[31] Considering the fact that it is precisely capital income which causes the widening prosperity gap, the OECD (2015), President Obama (2015), the Flemish Socialist Party (2014) and Green Party (2014), but also a huge number of economists like Mirrlees et al. (2011: 331-359) and Diamond and Saez (2011: 165-90) argue for more ambitious and more consistent taxation of non-labour related income. With this in mind, higher taxes on the

[31] Obviously, types of capital gains tax already exist, for example the Belgian withholding tax (or: 'roerende voorheffing'). Many types of capital income are actually either differentially or even not taxed. As such, capital gains on shares situated within the sphere of everyday management of private wealth (see for instance art. 90, 9th WIB ('Wetboek inkomstenbelasting', i.e. Belgian Income Tax Code) are exempt.

income realised from capital, including stocks, shares, real estate, liquid assets and funds, are envisaged.[32]

To conclude, it can be stated that increased concern for economic inequality has led to an increased interest in taxation, which in turn has generated two redistribution proposals:

1. wealth taxes: specific taxation of the net worth of an individual's wealth;
2. capital gains tax: taxes on the income or profits generated by wealth.

3. Between legislation and constitutionalism: towards an examination of legitimacy

3.1. Individual rights as constitutional constraints

How can the discipline of jurisprudence contribute to this debate?

Economic inequality is generally speaking not a decisive argument for introducing random measures. It is not because a certain evolution is considered negative, that any random form of legislation to pursue a more desirable state is justifiable. The judicial point of view does not consider society as one big building site waiting for an architect. The constitutional perspective leans towards the opposite: every individual has certain rights allowing him to shape his own life. In other words, the legitimacy of political remedies in constitutional thinking – as opposed to a purely economic frame – is limited by the contours of human rights.[33] In this regard Tomasi (2012: 76) states: "The basic liberties are prerequisites for the legitimate exercise of democratic authority".

Therefore, the battle against radicalisation, for instance, will be limited by the right to freedom of religion, and, for example, the struggle for equal opportunities will be limited by the right to family life, which allows different upbringing – and hence also the development of different, often unequal talents. The need for taxation and the wish for redistribution are in this respect no exception: individuals have certain rights regarding certain goods and the authorities can only intervene within the boundaries set by these laws. Despite the fact that, historically, large-scale expropriations proved to be the most efficient strategy to attain economic equality, for instance in the U.S.S.R., not many will consider this measure admissible.

From the constitutional perspective, a potential law is only legitimate as long as it is compatible with the fundamental human rights. It is important to note that a definition of the latter does not necessarily correspond to the presentation of human rights in current constitutional law. If the sources for analysing the legitimacy of legislative acts were solely to be determined by

[32] This article focuses on the taxation of realised profits – and does not mention the taxation of latent capital gains, whereby a mere increase in market value also constitutes "income". For more information and a defence of the idea of taxation of latent capital gains, see Brown (1996) and Shakow (1986). See also essay three.

[33] See also for example John Rawls's famous principle of "(lexical) priority" (Rawls, 1999a: 53-54), which maintains that between individual basic rights (incl. freedom of expression, freedom of assembly, freedom of person, free choice of employment and the right to personal freedom) on the one hand, and economic (re)distribution and equal opportunities on the other, there exists a hierarchical relationship. According to the most influential political philosopher of the last century, the latter goals are secondary and only pursuable within the limits dictated by the basic freedoms.

the law itself, independent scrutiny of political action would be out of the question.[34] Furthermore, there is no guarantee that the current constitutional law will further an acceptable vision of constitutionalism.

Essentially, both inheritance and gift taxes determine different tax rates, depending on the relationship of the beneficiary or recipient in relation to the testator or donor. It is worth noting that in the case of donating or leaving something via a will to non-blood-relatives – incidentally the most authentic form of altruism biologically speaking – tax rates are comparatively high(er). To illustrate, until recently, if a person wanted to donate immovable property to his child, the highest rate was 30%.[35] Donating to the advantage of a non-blood-relative (e.g. in the context of donating to a godchild) was virtually impossible, with marginal tax rates up to 80%.[36] Regarding inheritance tax, should the testator prefer not to donate in a direct line, but for example donate to his orphaned nephew, the legislator increases the highest rate from 27% to 65%.[37] It is arguable whether the legislator is right in this case. In effect, these differential tax rates are at odds with the right to private property. Especially, an essential aspect of this fundamental right is the right to transfer, or the guarantee of being able to indicate a new owner of his *own choosing* (see 4.1.). The provision, which determines different succession and donation rights according to the "recipient" is a marked infringement of this principle. The legal practice whereby the donation and testation outside of the direct line is fiscally punished therefore contravenes with the right to private property. The latter fundamental right is being prevented as such to play its autonomy-promoting role.

The discrepancy between fiscal legislation and personal rights is also noticeable elsewhere. For instance, the legislator decides on differential rates for different forms of income. If person A depends on labour for income, he will be facing a much higher tax rate than person B – who receives income from property rentals, capital (e.g. interest) and the selling of shares. From the perspective of personal rights, where everyone has a claim to deploy their resources (talent, property, knowledge) as they see fit, one can only speculate on the legitimacy of this preferential treatment. Indeed, the individual freedom to strive for one's (economic) happiness requires absence of legislative manipulation in this regard. Deciding which action or activity an individual will use his body and goods for is part of an individual's personal sphere of control and does not constitute ground for discrimination. As long as the rights of others are being respected, individuals are free to use their talent or property for those activities which, according to the circumstances, appear optimal. Whether someone's wealth increases due to investments made (dividends), decisions made regarding savings (interest on capital) or the application of one's body (labour) is a personal matter and not a government decision. In that sense, the often extremely unequal fiscal burden for different activities can be considered from the principle of freedom of person, and the non-discrimination principle which it generates.

As the previous examples show, a critical constitutional approach will not assign biblical status to prevailing law. *A contrario*, if the field of normative jurisprudence has the ambition to undertake critical research on the current tax system – and any of its linked potential changes

[34] From the beginning of the 20th century, it is possible to observe a dominance of similar "legal positivism", whereby the methods for analysing law solely depend on institutionally acknowledged sources. Nevertheless, critical approaches to law survive under the denominators "philosophy of law", "economic law" and "political philosophy". Regarding the danger of legal positivism for the rule of law, see among others Hayek (2011: 342-366).
[35] Art. 2.8.4.2.1 former Flemish Tax Code, or 'Vlaamse Codex Fiscaliteit'.
[36] Recently this discrimination has been mitigated somewhat, with rates of 27% and 40% respectively. See art. 26, para. 1 Decreet houdende bepalingen tot begeleiding van de aanpassing van de begroting 2015 (1) van 3 juli 2015.
[37] Art. 2.7.4.1.1 former Flemish Tax Code, or 'Vlaamse Codex Fiscaliteit'.

– it has to establish itself independently of the prevailing legal (tax) system. The discipline of normative jurisprudence attempts to benchmark the (potential) legitimacy of government(al) action against constitutional principles, irrespective of whether these have been recognised by lawmakers (Van Dun, 2008). Considering the distinction between "legislation" (regulation by institutionally recognised bodies) and "constitutionalism" (morally acceptable 'rules of the game' embodying the interest of each single individual), the personal rights which serve as a benchmark can be discovered through independent rational reasoning. Axiomatic principles such as the right to autonomy, liberty of person and protection of property, the duty to keep one's promises and pay compensation, or the guarantee to a decent living standard can be accepted, irrespective of their recognition by the legislator. Although our legal system often partly recognises these principles, they are also equally ignored for unclear or unconvincing reasons.

3.2. Individual rights: conventional agreements or pre-political rights?

It is clear that this analysis is not the only one in legal theory. The submitted vision can be distinguished from – currently popular – opinions, whereby the individual rights are political conventions, owing their existence to the public structure within which they are recognised. Concerning this present subject, Murphy and Nagel (2002: 173) argue for example, that property rights are an example of similar conventional institutions. Our claims on property are not determinable prior to legislation, but are really specific products of the government and its legislation. Indeed: "In the absence of a legal system supported by taxes, there couldn't be money, banks, corporations, stock exchanges, patents or a modern market economy- none of the institutions that make possible almost all contemporary forms of income and wealth." (Murphy and Nagel, 2002: 32). In the words of the soul mates Holmes and Sunstein (1999: 60): "A liberal system does not merely protect and defend property. It defines and hence *creates* property." To put it differently: taxes are the prerequisites for property rights and hence cannot intervene with them (Banham, 2012: 339-441). In their famous book, Murphy and Nagel argue that indeed, it is impossible to, for example, dismiss income taxes based on the right to private property: there are 'no property rights antecedent to the tax structure' (Murphy and Nagel, 2002: 74), hence – our only claim is on *net income* (see also: 32-33). Conclusion (Gaus, 2010: 260): "Without us, there would be no property, so you have no property claims against us!"

Without getting too profoundly involved with underlying theoretical approaches to law, two points nevertheless need clarification.

First of all, the above argument by Murphy and Nagel goes back to a mix-up between the *existence* of a right and its *content* in respect of its protection.[38] Their statement indicates that, without a state, there would be no provisioning of protection to the right of private property. In this situation of judicial chaos these rights would be less secure, and their content reduced. However, this does not mean we would not have any rights, or that these are pure conventions. The fact that there is no state to protect rights does not mean we are allowed to randomly confiscate anything produced or gained by others. We could refer to the right to life. In a way, we all owe our lives to the state, just like our goods: without the guarantee of safety, many of us would again – literally – fall prey to others. Without the organisation of a preventive and

[38] Content of a right refers to the "object" related to the right. Right to private property is a right, the specific goods upon which we exercise property rights then constitute the content of that right. Note that we can have rights without an object: as such we are equally entitled to freedom of expression, when we have no specific opinion at a given time.

repressive criminal law, it is feared that many of us would not be able to cope for very long. In that sense our *life* is a product of the state. However, this does not mean that our *right to life* is the same. When governments are absent or not effective, and this right is not protected, it is assumed that this right is still valid, even if its content has become less secure.

The idea that rights do not exist until governments say they do, is quite hard to believe. Besides, Murphy and Nagel do not have to follow me – their own justice system also disagrees with them: "That to *secure* these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed." From the declaration of independence it is clear that there are a series of moral claims, and that a state has got the political task to guarantee them, i.e. "secure" (Locke, 1948).

A second, more plausible, mitigation of Murphy and Nagel's argument could then read as follows: our rights can exist in a rational sense, but will only receive content as a result of the execution and protection by government. This alternative interpretation is indeed less incongruous, but again questionable. The marking and respecting of territories covered by usufruct, is older than the state itself – and not limited to Homo sapiens (Pipes, 1999). Even though the actual legal training sometimes gives the impression that the rules which exist between individuals are being created by legislation, the opposite also seems to have been the case. Anthropological study demonstrates that the mutual respect for each other's goods, and the coordination possibilities that follow, has been a spontaneous process, leading to the rise of property rights through custom in our societies (Bederman, 2010; Malinowski, 1978). Children, early sedentary societies, native population groups and postmodern urban environments all acknowledge the right to control things and deny others the right to "free entry" (Ridley, 1997: 227; Diamond, 1993: 267). In that sense, governments seem to have usurped – rather than "invented" the tasks of legal protection.[39] And only partially: even today, the majority of the protection of our rights is still in private hands: usually one does not contact the authorities to prevent a crime, but entrusts that task to a series of social mechanisms. Therefore, phenomena such as education or social control in certain relationships have a priceless preventative value.

Within this context it can be concluded that the content of our rights is influenced by the stately institutions erected in recent centuries. This factual conclusion does not in any way touch the existence of pre-political moral right, which is rationally defensible, and the effective protection of which is the reason why states are accepted. In that sense individual rights are the one – and perhaps only– criterion against which to evaluate stately conduct.

4. The right to private property: a jurisprudential concept

Given the previous discussion (part 3 in particular), the current contribution will not attempt to legitimise prevailing fiscal law nor rely on how Belgian lawmakers describe the right to private property. By means of an independent view on this fundamental right, a normative frame will be created to judge the current and potential legislation.

A democracy is traditionally a system that opts for an individualised distribution of property. Control over goods in society is not concentrated in the hands of a select group of politicians and bureaucrats, but property rights are decentralised and scattered across millions of individuals and the legal entities they form. It is no surprise that in our regions, the

[39] According to part of the jurisprudence, the monopolisation of legal protection by the state is a bad decision, and this for various reasons. See among others Coase (1960) and Ellickson (1991).

development and deepening of the right to private property came about in the same period as the development of other human rights, such as freedom of religion (Rose, 1996: 329-369). John Gray (1993: 315) points out that also the right to private property allows us to arrange our life according to our own judgment and preference. As pointed out repeatedly in light of its constitutional acknowledgment, for example in the US, the right to private property protects individuals against the influence of political and other elites and preserves the freedom of certain minorities to live according to their own judgment (Tomasi, 2012: 12-16). In that sense, for example, the culture and even influence of the alternative youth movements from the 60s and 70s are greatly indebted to the right to private property. Even though they undoubtedly thought differently, their alternative way of life was only possible in a judicial system where books, records and clothes could be owned, used and traded freely. Hence religious and other minorities are also being protected against the possible oppressing influence of the majority by means of the constitutional protection of their goods, which they can use for an alternative way of living.

In this respect property is the solace of a constitutional order; no one is guaranteed a world according to his own ideals, but everyone has the certainty of being able to shape his own part of his ideal world. However minimal the amount of goods we have under our control – within that sphere one has the opportunity to live according to one's own judgment.

According to the legal philosopher Jeremy Waldron (2010: 3), nobody seriously contests the legitimacy of the right to private property anymore. Nevertheless, despite the fact that mainly private bodies manage the goods in our society, it is not easy to compose a definition of property. Imagine a new state is established, and it starts looking for a new constitution and needs a precise description of the right to private property. In the search for the correct definition, one can ask:

Which different types of legal capacity to act fall within the right to private property?

In other words: what can the owner do with the goods at his disposal? Two important points of interest regarding the definition will be provided here. First of all, my understanding of the concept of property is independent of the fact that individuals can contractually transfer certain sub-rights to each other. It deals with an original concept of property – preceding possibly more complex property arrangements (Grey, 1980: 69-85), which can be set up through agreements, and whereby different parties hold different property claims (e.g. a loan, a lease…). Secondly, following similar initiatives submitted elsewhere (Waldron, 1988; Munzer, 1990) my understanding of the concept of property is not a copy of its current organisation in Belgian law, but, as stated, an independent conceptualization.

Generally, it could be argued that having property rights indicates a form of control one has over a certain good. This control can encompass different actions and therefore there are *different sub-rights* of private property (Hohfeld, 1913; Honore, 1961: 107-147; Becker, 1977: 7-22 ; Waldron, 1988: 431-439; Van Oven, 1948: 1-595). Each sub-right (or dimension) contains a specific *form of control* over a good. In order to being able to distinguish the different dimensions, two types of property rights have to be isolated: primary and secondary property rights (Attas, 2006: 119).

4.1. Primary property rights

The primary property rights contain the **direct actions**, those operations a person can undertake with a good. Five primary sub-rights can be differentiated:

- a property right starts with the right of *possession*. This dimension is quite basic, and merely means we can keep something exclusively for ourselves, and thus exclude others of physical occupation. When I own a house, I am at least entitled to enter the property, and I can deny others such action;

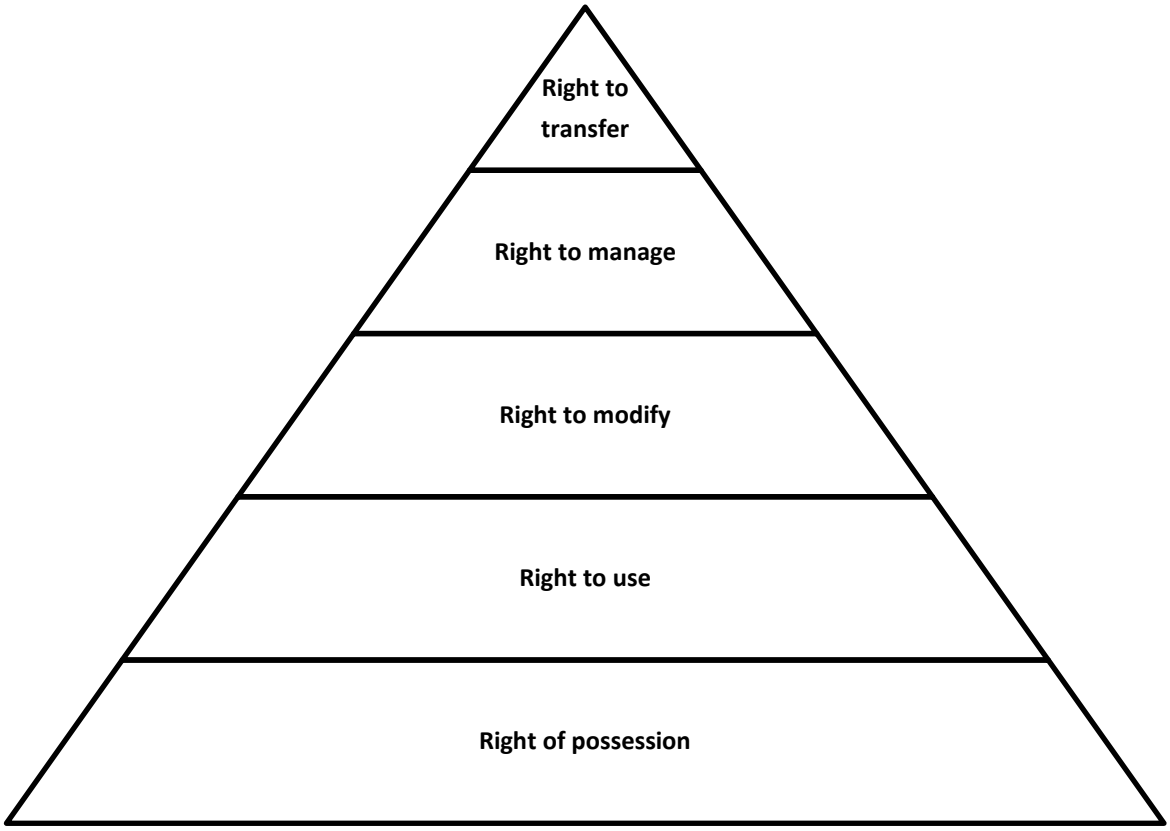
- the second dimension is the *use* of a property, not only can you enter your house, you can also engage in a real activity and use it or consume it: the owner of a house may for instance live in it;

- the third sub-right contains the right to *modify*, which is a right to change the composition of a good. The owner of a house can, for example, construct a Buddhist temple inside the house;

- fourthly, there is the right to *manage*: I can decide to let other people use a good by means of contracts. Should I wish to open a bed and breakfast, I have the possibility to offer others use of the dwelling via the right to management;

- the final primary dimension is the right to *transfer*, which is the right to appoint a new owner. Should I wish to hand over full control of the property to someone else, I can appoint this person via a contract or unilateral disposition as the next owner.

An internal hierarchy exists amongst the dimensions discussed there, and property can therefore be summarised in the schematic diagram below:



The internal hierarchy is caused by two – mutually connected – relational characteristics of the sub-rights:

4.1.1. Each dimension provides a progressive form of control

The fact that each sub-right provides more control progressively, has possibly become intuitively clear to the reader. The right of possession is a quasi-empty sub-right referring purely to "retention": an owner may keep a good exclusively for himself and can exclude others from occupying it, or taking it away. 'Use' is an extensive form of pure possession: the fact of simply owning a property switches to the right to live in it. The right to modify then goes one step further: it is not just about using a good, but it is also about altering its composition. The right to manage is an extended form of use and encompasses the right to allow others to use a property via contracts. The right to transfer is the most extended form of control: to denounce control and entrust it to another person.

Rights in rem provide certain individuals with the capacity to act with regard to a good. When dissecting the right to private property, one can see a progressive structure gradually emerging: each distinct dimension adds a more extensive form of control, resulting in a gradually increasing realm of action for the property-holder. The right to private property can be regarded as a pyramid, in the sense that, from basic aspects like possession to more extensive actions like the transfer of a property, each layer adds a more extensive capacity regarding a specific good.

As part of this progressive nature, whereby each sub-right provides additionally more extensive authority, the acknowledgement of the more basic sub-rights is evident, whereas the more peripheral rights are sometimes more debatable. As a consequence, the right of possession is the most obvious dimension; the owner's claim to right of possession concerns a "logical starting point" of a private property right. In that sense it is difficult to imagine a society where individuals do not even have a right of possession, and where one can simply appropriate anything.[40] Also, a situation where there is no regulation regarding who can use what, is one of chaos. For scarce goods or materials which can only be used a limited number of times, the recognition of individual rights of use is fundamental. As these basal sub-rights constitute minimal aspects of property, which consider "isolated" actions (containing no interaction with others), even less property-friendly regimes move towards recognising them.[41] Therefore, communist regimes also guarantee the little disputed rights of use and possession. In the case of children's toys for example, one will often acknowledge the base of the pyramid, and recognise possession and use. Or in the case of soft drugs, simple rights of possession and use are not prosecuted but instead the "higher sub-rights" are envisaged.

The more far-stretching rights of management and transfer are not purely concerned with how a person enjoys a property, but how one allows others access. Because of this "social" or "interactive" characteristic, these sub-rights are often less irrefutable, and lawmakers will impose conditions on the owner (permit, certain age, certain study) or the product (not

[40] Lita Furby (1991: 457-463) established the universal importance of possession via cross-cultural and intergenerational research, and explained this through the facilitating role of this sub-right for personal control over the world. The universal importance of private possession and use is that – as owners have a vested interest in the conservation of goods – it counteracts overconsumption and destruction. See Ridley (1997).

[41] The right of possession, use or modification contain actions, which are not related to others, and impose simply a non-intervention duty on non-owners.

containing any damaging substances, clear information). These rights also influence the distribution of goods in a society, and therefore lawmakers will intervene via tax policy, for example in the form of excise duties, gift- or succession taxes. Communist societies deny individuals these more extended forms of control and will delegate the management and transfer to bureaucratic administrations. But also in Western societies state organisations will now and again extract management and transfer from individuals, for example for goods (security, health) which are subject to positive state obligations.

4.1.2. Each dimension assumes the presence of the previous one

Not only does each sub-right provide a more extensive form of control, the higher dimensions *encompass* the more evident ones. For instance, the right to use something also includes the right of possession. And in order to being able to temporarily assign something to others (management), I myself need to own the right to use. Finally, the right to transfer incorporates all preceding rights: therefore, a classic sale agreement will transfer the possession, use and management. Except in the case where they were divided amongst different individuals, the "higher" sub-rights build further on the previous ones and incorporate the more basic sub-rights. To use the old French adage: "Qui peut le plus peut le moins", or "he who can do more can do less": 'use' presumes 'possession', 'management' presumes 'use', etc.

Therefore we have to appreciate property for a second time as a pyramid*: the more basal sub-rights constitute the foundations for the "higher" ones*. A right to manage is quite pointless without the recognition of a right to use or possess. Because of the relationship outlined here, the more basal sub-rights are not just evident (see 4.1.1.), but their presence is at the same time the *foundation* for the higher dimensions. Because of this hierarchy, a violation of a more basal right also constitutes a violation of the "higher" sub-rights. For example, if the authorities seize my house in case of an emergency, then this not only touches my first sub-right – the right of possession – but also my right to use. And in the same way, if an administrative decision declares my home uninhabitable, this touches my right to use, but also to manage: I can no longer rent it out for residential purposes. The Latin expression *a minore ad maius* encompasses the second hierarchical relationship: if the smaller is prohibited, the greater is also denied, or to put more positively: each 'higher' sub-right only exists if the lower dimension is recognised.

The reverse is clearly not true: a violation of the higher rights does not necessarily touch the more basal rights. It is not because there exists a restraint on alienation of my house, that my right to modify or use is interfered with. It is not because children are not allowed to lend their toys (management) that they themselves cannot play with them. Because the property pyramid adds something to the previous dimension each time, intervention at the top will not touch the base.

4.1.3. Consequence: the more basal the dimension, the more absolute its effect

If your house does not comply with urban development regulations, a few administrative sanctions could be considered: 1) one has to comply with the requirements at the point of selling a house, 2) one can no longer live in the house until it complies with the rules, 3) an expropriation is issued.

Intuitively, most of us will consider the latter measure the most serious one, and "opt" for the first sanction. The dual relationship between the sub-rights, with the resulting pyramidal

structure, allows us to set up a normative framework to assess governmental interventions regarding the right to private property. Moreover, the "low" sub-rights incorporate less disputable claims, which do not include any 'interactive' aspects, and which embody minimal aspects of the right to property. Importantly, these "low sub-rights" are constitutive of everything that follows. Indeed, because the high sub-rights also encompass the low ones, a violation of the base also impacts upon the rest, and needs to be considered a more severe intervention. When we wish to limit a person's possession (we issue an expropriation) the authorities will usually need better justified reasons than when we limit his right to sell (we exercise a pre-emption right). Therefore the introduction of an anti-discrimination provision in the tenancy legislation which states that I also have to let my property to members of minority groups (right to manage), will again be considered a less serious violation than a change in the land-use plan, which states that I can no longer live in my house (right to use).

To put it more positively: because the base of the pyramid encompasses evident aspects of property, which are furthermore fundamental to the subsequent aspects, this will be vigorously protected in the recognition of the right to private property.[42] Once it is understood that the right to private property can contain different dimensions of legal capacity, various dimensions of control, it then becomes clear that the right of possession constitutes an evident starting point which performs a *pivotal function* for all subsequent, more peripheral sub-rights. Without the right of possession, all other sub-rights become unthinkable. In order for a judicial system to recognise the right to private property, it has to grant near-absolute protection to the *conditio sine qua non* of this fundamental right. Therefore, Belgian lawmakers protect the right of possession against the authorities via the expropriation law (whereby the exclusive possession can only be taken away in well-defined situations) and against fellow citizens via civil orders in the Criminal Code (e.g. in the case of theft).

This quasi-absolute effect of the right of possession becomes clearer as the inadmissibility of a violation is in principle not a question of seriousness, duration or proportion. The most basal sub-right will recognise a certain object as belonging to the exclusive territory of an individual, and a violation is simply a matter of *entering or removing* part of that domain. When someone trespasses, this is an unacceptable violation of the right to possess; whether this entry lasted 5 hours or 20 minutes is of no importance.[43] And even though everyone would probably rather have EUR 1,000 than EUR 10,000 stolen, this value has no influence on the legitimacy of the action: a minor theft is no less a "theft". The violation of the basis of property is in principle a matter of all or nothing: either your right is being infringed or not.

To understand the normative origin of this quasi-absolute effect, one can draw a parallel with the concept of 'property in one's own person'. Self-ownership can indeed be considered a chronology of increasingly progressive sub-rights: from excluding others from penetrating one's body (i.e. possession), to doing sports (i.e. use), to working in exchange for money (i.e. management). Indeed, the simple right of possession is again self-evident (quasi-"empty" sub-right unrelated to others, and rarely contested) and fundamental to other rights. As a consequence, the use (e.g. sports) or management (e.g. labour) of our person, for example, is impossible without the security of a preceding right of possession. The right to self-ownership

[42] Likewise one can detect within "the right to a decent living" the "right to sufficient food". This sub-right forms an evident starting point – which is also constitutive of all other possible sub-rights, e.g. the right to housing, the right to education or the right to develop oneself. Because of this dual relationship the "right to sufficient food" will also receive more absolute protection.

[43] In comparison with the more relative and higher rights: the rights to manage are e.g. often being restricted by the necessity for permits, which are often considered not to be an unjustifiable violation.

is then also awarded quasi-absolute guarantee. For many, the violation of our body is unacceptable, regardless of whether this concerns a small interference ("it was only a slap") or is of short duration (the rape was over quickly). The involuntary removal of a body part is also unjustified, regardless of whether this concerns an organ (kidney) or a part of our body, which grows back (our hair or nails). Self-ownership is the cradle of our general freedom, and we seem to only very rarely allow violations.

Therefore we can conclude that, due to both its evident nature, and the constitutive role within the general structure of the right to private property, the base of the pyramid will be granted an almost absolute effect. The right of possession is not only an evident partial aspect of property, but it is also the basis for all other dimensions of control. This explains why we rarely consider unacceptable violation as a matter of gradation, but rather as all or nothing.

4.2. Secondary property rights

Naturally, there also exist secondary rights. The secondary rights do not encompass the direct actions with regard to a good – they are not decisions concerning a good as such – but relate to the **economic advantages** generated by exercising the primary rights.[44] Given the internal hierarchy of the concept of property, primary and secondary rights run in parallel. In other words: each primary right has got economic consequences:

1. the right to possess something gives entitlement to the *fruits* via *natural evolution*;

2. the right to the use of something grants the owner the *pleasure and satisfaction* that this entails;

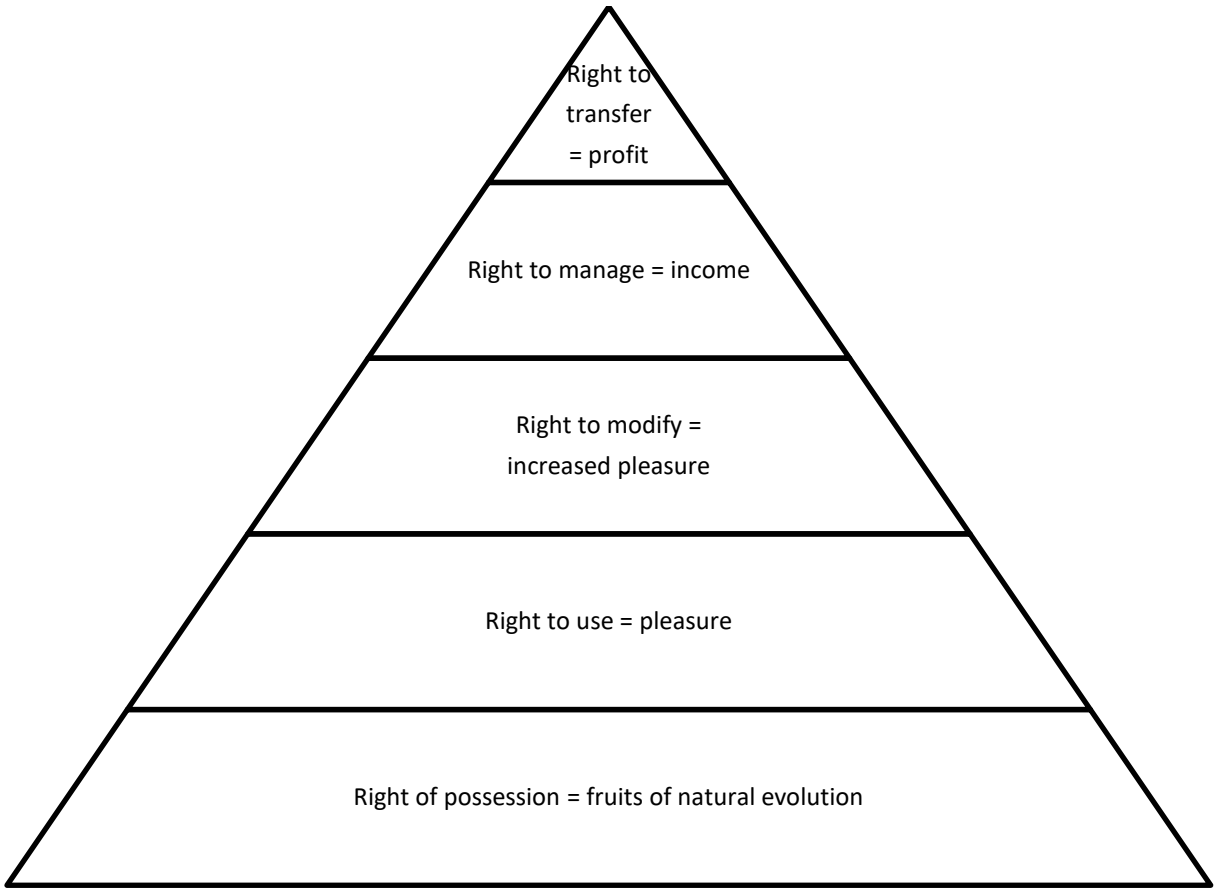
3. the right to modify gives entitlement to *improved personal pleasure* as a result of that modification;

4. the right to manage then provides real *income* resulting from contractually establishing the use of a property, for example rental income;

5. the right to transfer then provides certain *profits* which can result from the difference between purchase and sale price.

Within this pyramidal structure of property the secondary rights can be expressed as follows:

[44] The distinction between control (here: the primary rights) and income can, albeit in other terminology, also be found elsewhere, see among others Attas (2006: 142); Vallentyne (2012a); Christman (1994: 129-35); Waldron (1998: 431-439).



Important to what follows is that the rights of possession, property and use only provide intrinsic advantages: as no real financial flow is being created, the advantages of the rights of possession, use and modification coincide with the actions themselves. The secondary rights cannot be distinguished from the primary ones. As owner, if you are entitled to modify (e.g. to construct a porch), then you are also entitled to the resulting advantages: for example, the higher pleasure provided by this porch. Or it is difficult to claim that I am allowed to live in my own house – and hence I have the right to use – but I do not have the right to the pleasure resulting from this.

It is different for the right to manage and the right to transfer: when we rent out or alienate a property, the economic advantages are conceptually different from the primary right, and hence from the actual management and transfer. If I temporarily hand over my liquid assets to a specific party (e.g. a bank) by investing and I agree to receive a certain income (i.e. an interest), then that income is to be separated from my actual management action. For instance, I could also have transferred my capital for free (e.g. a loan with inflation as the only interest). Parallel: if I sell the house I inherited from my parents and realise a profit of EUR 100,000, then this sum can be distinguished from the right to transfer itself: I could have transferred the house for free.

For the two highest sub-rights we can therefore observe that the primary and secondary rights do not converge, as there is a kind of external revenue, not identical to the original action regarding a good. From the economic perspective this revenue is the result of a different appreciation of a good in a commercial transaction (Callahan, 2002: 69). In plain English: the

reason I realise a profit from a sale is not a result from the transfer, but from the fact that the buyer attributes a higher subjective value to the house than I do. When we manage and transfer goods, the economic benefit is not a result of the primary action itself, but of the economic surplus generated by the fact that both parties valorise a good differently.

For what follows, it is crucial to stress that, for the two highest sub-rights of management and transfer, there exists a distinction between the primary right (the action regarding a good, the transfer of a good to someone else whether or not temporarily) and the secondary right (the resulting economic benefits). A similar distinction concerning the lowest three sub-rights is not possible: here, the direct action and the economic benefit coincide.

5. The fiscal treatment of wealth: towards a legitimacy-test

Let us return to the beginning, namely the issue of wealth inequality and the role of taxation as a means of redistribution. How does the analysis of the right to property help us when judging the legitimacy of wealth taxes and capital gains tax? Let me explain by means of a simple casus: a 60-year old lawyer with some liquid assets and real estate, with an aggregate value of EUR 1 million.

5.1. Wealth taxes

A wealth tax - as advocated by Piketty and the Walloon Socialist party (2015) - is a certain levy on the net worth of a person's wealth, calculated according to market value.

Understanding the right to private property as a pyramid, we cannot situate this kind of taxation at the level of management or transfer. Given our conceptualisation presented above, this type of measure does not even intervene with the right to use. When considering property as a gradual accumulation of increasingly more extensive sub-rights, one notices that wealth taxes target the foundation itself: the pure possession. As described, this sub-right will accredit a certain object to the exclusive territory of an individual. Wealth taxes can be considered as entering and removing a part of this domain. If the lawyer, for example, is confronted with a wealth tax rate of 2%, then he will have to transfer some capital into the government's bank account, or deploy different methods to meet his tax obligations. In practical terms, the tax authority will extract EUR 20,000 from that which is subject to his exclusive right of possession. A wealth tax in itself is simply an expropriation: the good which is subject to a property right is being removed. Furthermore, as the higher sub-rights absorb and expand the more basal ones, and build on these, wealth taxes constitute at the same time also a multiple violation: the eliminated part can no longer be used, managed or transferred.

To conclude, one could argue that wealth taxes constitute the most serious violation of the right to private property. As the right of possession constitutes an evident starting point of the right to private property, which in addition supports the remainder of the pyramid, it has an almost absolute effect. An unacceptable violation of the building block of property is not a matter of degree or assessment, but – as is the case with the penetration of someone's body – a principal matter. Apart from in emergency situations, violations cannot be justified. Just as a small theft will not all of sudden become legitimate, there is no principal difference between a wealth tax rate of 20% or 2%.

5.2. Capital gains tax[45]

How can one evaluate capital gains tax against the right to private property?

Capital gains tax does not concern itself with possession, but with the income or profits as a result of the temporary or permanent transfer of goods (e.g. liquid assets shares etc.) to others. When we consider this from our conceptualisation of the right to private property, we need to connect capital gains with the right to manage and transfer.

The first observation (follows from 4.1.) has to be that – considering the pyramidal nature of the right to private property – the taxation of income respects the basal rights. As the property pyramid each time adds something to the previous, an intervention at the top will not touch the base. In terms of self-ownership: taxes on the wages of a footballer will not violate his rights of possession or use of his feet. Likewise, the taxation of capital interest (act of management) will not interfere with someone's exclusive possession or use (e.g. as method of payment) of the actual capital.

To come back to the example of the lawyer: suppose he sells his apartment and, following the deduction of costs, he generates a profit of EUR 100,000. Under a potential capital gains tax rate of 20% he will have to pay an amount of EUR 20,000. As per the hierarchy described earlier, this measure leaves the more basal sub-rights intact: a tax of EUR 20,000 on the profits resulting from the alienation of his house will not disturb the lawyer in his exclusive possession of that house, nor with him living in it, nor with, for example, any renovations he might be planning. Because of this hierarchy, we observe that a wealth tax of EUR 20,000 (example 5.1.) constitutes a more serious violation than capital gains tax of EUR 20,000: where the first measure removes an object from someone's exclusive territory, the second tax purely imposes a levy on *the surplus* realised as a result of alienation of an object from exclusive territory. As the greater does not touch the lesser, the latter taxation does not touch the first three primary rights: the right to possess, use or modify is not being violated by capital gains tax. It is not because you are required to pay taxes on the profits resulting from selling a house that your rights regarding possession, use or modification are affected.

A second observation (follows from 4.2.) is that capital gains tax possibly does not intervene with the actual rights to manage and transfer and therefore leaves the "higher" primary rights intact. After all, regarding management and transfer, one can distinguish between the primary right (the original action regarding a good, i.e. the transfer to someone else) and the secondary right (the income this generates, i.e. the rental income or profits resulting from a sale). A capital gains tax rate of 20% on profits resulting from a sale does not intervene with the right to transfer his apartment itself. Not the fact that he appoints a new owner, but the realised economic surplus is being taxed: if the property was transferred for free, this (hypothetical) measure would not actually apply. Similarly, taxes on the income from letting a residence will not in itself violate someone's right to manage: not the temporary transfer of use, but the irregular income constitutes the taxable basis. Therefore, on *condition* that taxation purely targets *realised income*, it does not intervene with the rights of management or transfer, and capital gains tax will leave all primary sub-rights intact. This kind of taxation only skims part of the secondary aspects of property: that is, the potential economic surplus resulting from the two highest primary sub-rights. As this measure respects the entire pyramid of primary

[45] As already evident, again, I am not strictly discussing an existing arrangement, but the general concept of capital gains tax.

property rights, it cannot be qualified as illegitimate, and one needs to consider it as at least preferential in relation to wealth taxes.

It is important to note that not every tax fulfils this condition. If I have to pay taxes purely because I transfer or let my property – independent of any income – then a violation of the primary rights of management and transfer has taken place. So, for example, gift taxes or registration duties are a much more serious violation than capital gains tax: the tax basis being the transfer itself, not some kind of resulting economic surplus. Therefore, an imposed contribution in order to be able to put a property on the market is again a more serious violation than pure capital gains tax: it concerns the actual management and not any potential income from managing. Finally we observe that prevailing real estate taxes constitute a very serious violation: taxes on fictional income intervene with the possession of a property and consequently will be considered illegitimate, just as with the previously discussed wealth taxes.

6. Conclusion

Justice John Marshall, US Supreme Court judge from the early 19th century and supporter of far-reaching constitutional control over the legislative work, stated (6 March 1819, McCulloch / Maryland: 17 U.S. 316): An unlimited power to tax involves, necessarily, a power to destroy; because there is a limit beyond which no institution and no property can bear taxation. Unlimited fiscal competence creates the possibility to solve many problems, but, at the same time, poses risks, as specific measures have the ability to destroy our goods and the autonomy it facilitates.

Wealth inequality, as addressed by Piketty, is a problem that requires solutions. But, as maintained by Justice Marshall, there exist limits which render certain measures inadmissible. One of the tasks for scholars within the field of jurisprudence is – apart from the study of current legislation – to reveal the limits of political action. From this point of view I attempt to clarify that property is a concept with an internal hierarchy, a pyramid, whereby certain aspects fulfil a more fundamental role.

From this perspective, capital gains tax does not at all appear to be a destructive measure, as it does not target the primary sub-rights of property, but purely addresses the economic surplus resulting from certain actions. Moreover, this article does not only indicate capital gains tax as the preferential taxation in the battle against inequality. Part 3.1. suggests that an equal treatment of income from labour on the one hand, and income capital on the other, flows from a recognition of equal freedom of the person.

Wealth taxes on the other hand, such as the existing real estate taxes or the proposal by Piketty, touch the evident base of the property pyramid, which all other aspects lean on. As wealth taxes penetrate the most evident aspects of property, which moreover form the foundation for all other aspects, they have to be considered unacceptable. If the government wants to increase the taxation of wealth - while respecting the demands of constitutionalism - it has to ban all wealth taxes – in its current as well as recently proposed form - from the codex and opt for capital gains tax.

After all, as the late Chief Justice suggested, taxes – whichever noble cause they have in mind – are subject to certain limitations. In my own words, economic justice can only be attained by respecting the fundamental rights, if not, it is nothing more than an injustice.

ESSAY THREE: ON THE MEASUREMENT OF CAPITAL INCOME

THE RIGHT TO AUTONOMY AS THE MORAL FOUNDATION FOR THE REALIZATION PRINCIPLE IN INCOME TAXATION[46]

1. Thomas Piketty and the Manifestation of Relative Inequality

There are two basic normative assessments for an economic distribution. The first analyses peoples' absolute level of welfare. One approach states that what matters is not that people have the same level of income or wealth, but rather that they have enough, according to some standard of sufficiency (Frankfurt, 1988: 134–58). The prioritarian tradition aims higher and states that we should target economic distributions that maximize the level of the least well-off (Rawls, 1999a: 57-64). When judging a particular economic situation, an underlying system is valued positively if it benefits those who are worst off more than an alternative system does, in terms of some particular standard (Tomasi, 2012). A third application targets the maximization of welfare gains, without any particular regard for the distribution between persons (i.e. outcome utilitarianism, see: Sen, 1979: 468).

An alternative way of scrutinizing a specific distribution uses relative terms—that is, it does not matter how much people have; what matters is their economic relation. To judge a situation we do not look at what level of welfare people attain; what is important is whether others have more or less then they have (Temkin, 2000: 126–61).[47] A situation will be deemed to be positive if the differences between people's holdings are small, and deemed to be negative if there are huge differences between people's holdings (Parfitt, 1997: 202–21).

Applied to income—the accretion of wealth—the following comparison of alternative social situations can trigger our proper intuitions regarding the matter:

Society A	**Society B**
Richest 10% earn £30,000 per year	**Richest 10% earn £100,000 per year**
Poorest 10% earn £10,000 per year	**Poorest 10% earn £20,000 per year**

Some of us will intuitively opt for Society B as being the preferred situation, if we focus on *absolute* figures: a prioritarian approach would value Society B for yielding the most benefit for the least well-off, and a utilitarian approach would value it for generating the most overall welfare. Within this framework it does not matter that the richest 10 per cent own more than 80 per cent of the assets of Society B; what matters is how well off 'the poor' are, or how well off society as a whole is in terms of absolute numbers.

Others will opt for a *strict egalitarian standard*, and will choose Society A as the preferred situation. What people have is only relevant with respect to how much others have, and our final goal is to mitigate inequalities. Within this framework it does not matter that the poorest 10 per cent are above a certain standard of living and able to acquire a decent income; what

[46] This third essay was published as: Delmotte (2017).
[47] Many other political philosophers defend such a comparative view on equality, albeit one that is limited in scope. Welfare inequality between persons is deemed principally wrong, but only to the extent that it is caused by inequality of endowment or opportunity for welfare. See Dworkin (1981: 283– 345) and Roemer (1993) 146– 66.

matters is that the richest 10 per cent do not earn five times as much as them. Equality thus has value in itself.

Although for many years the International Monetary Fund (IMF), the World Bank, and almost all Western leaders promoted economic growth, and consequently focused on welfare gains in absolute numbers as a normative evaluation for an economic system, the ideal of maximizing standards and absolute numbers is currently fading. In the aftermath of the financial crisis in the first decade of this century, public attention shifted from a focus on growth and absolute welfare gains to an analysis of the distributive character of economic gains in relative terms. Many popular contributions have addressed this issue in terms of what part of 'the pie' goes to which percentile, confirming the relevancy of a notion of relative inequality.[48] It is significant that public authorities mirror this moral conversion and express political indignation at huge economic gaps. President Obama (2013) stated that 'the basic bargain at the heart of our economy has frayed' in response to the fact that the top 10 per cent of the population in the United States yields 50 per cent of the national income. Furthermore, at the World Economic Forum (2015) this year the subject of relative economic inequality was promoted as the core topic and the preferred economic prism, thus dethroning the notion of a maximizing analysis. Prior to this, the IMF (Lagarde, 2014) had already launched the idea of 'inclusive capitalism', aiming at a better distribution of profits between the members of society.

Among many factors, the revival of an egalitarian normative outlook was certainly caused by a series of studies informing us of a tendency towards the accumulation of wealth and income in the hands of a few over the last few decades. The Organization for Economic Co-operation and Development (OECD) recently reported a concentration of wealth since the 1970s, and found that since around the year 2000 in many Western countries the bottom 50 per cent of the population has been holding a small fraction of the national wealth, while the top 10 per cent often holds about 50 per cent of it (Fredriksen, 2012: 5-6). Credit Suisse (Global Wealth Report, 2014: 37) confirms this observation and has identified a concentration of wealth over the last 40 years, when the relative share for the top 10 per cent started rising in the United States, in eight European countries, and in Australia. Concerning the highly correlated issue of income inequality, the OECD (Cingano, 2014: 9) found that the gap has never been so high: in its member countries today, the richest 10 per cent have an income 9.5 times the size of the poorest 10 per cent, whereas this ratio was only 7.1 in 1980. Davies et al. confirm this concentration of wealth, and estimate on the basis of research in thirty-nine countries that the top 10 per cent of the population in 2000 held 71 per cent of all holdings (Davies et al., 2011: 250). Last but not least, Piketty's research in *Capital in the Twenty-First Century* certainly corroborates this current normative transition, revealing that for many Western countries, since the 1970s the top 10 per cent—and certainly the top 1 per cent—are holding an increasing proportion of national wealth (Piketty, 2014: 336-376).

Piketty provides us not only with numbers but also with a causal analysis of the growing inequality of wealth, which together form an important empirical justification for certain theoretical (fiscal) measures (see part 2 of this paper) that can oppose this trend. The central thesis of his book is that over the last forty years the return on capital—by which Piketty means income from stocks, bonds, participations, shares, annuities, intangible assets, and real estate—has exceeded public economic growth (Piketty, 2014: 199-234). This explains why wage earners have seen their wealth accrue to much smaller proportions than that of the capital

[48] An illustration of the growing public importance of relative inequality can be found in: Dorling (2014) , Lansley (2012) Ingraham (2015); Fletcher (2015).

owners; capital is highly unequally distributed and—given its cumulative nature—it is getting progressively more so. This corresponds with the findings of the Global Wealth Report (2014: 34), which emphasizes the correlation between the capital assets of a household and its wealth level. Furthermore, the OECD points in the same direction, showing a noticeable effect of inclusion of capital gains on the share of the top one per cent of incomes in countries for which information was available (OECD, 2011: 349, 359). This further coincides with the findings of Davies, which indicates that a disproportionate number of high incomes are derived from capital assets (Davies, 2009: 137).

We can thus observe the manifestation of economic inequality on two levels. First, empirically speaking, wealth is unequally distributed, and a tendency towards greater inequality can be observed in many Western countries. Capital plays a key role in this evolution, yielding relatively high revenues when compared with labour, leading to a concentration of wealth. Second, normatively speaking, by underwriting the problematic nature of this evolution, academics and public discourse are—often implicitly—adhering to an egalitarian standard, as they are confirming economic inequality to be intrinsically bad.

This development in economic philosophy cannot be perceived as an isolated matter—Piketty's analysis of relative inequality has already sparked a widespread debate on the political measures that should be taken, especially with regard to the key role that taxation should play.[49] Moreover, if taxation is supposed to be levied in accordance with the ability to pay, Piketty (2014: 495–6) has raised awareness of tax codes' failure to reach capital owners. In the light of current economic inequality, Piketty and others (Davies, 2009: 143; McMahon, 2004: 993–1128; Fredriksen, 2012: 16–18; Hoeller, 2012: 9-11) underline how current policies exacerbate this effect, and highlight the preferential treatment of capital income.

2. Taxation of Capital and the Mark-to-Market Ideal in Income Tax Theory

Piketty thus triggered a debate on tax justice, causing politicians, organizations, and academics alike to examine measures to increase the fiscal burden on the wealthy. The debate has specifically revolved around examining various measures that could be upheld to increase fiscal contributions from capital owners. In order to conduct a specific analysis of tax justice, at least *three different types of taxation of capital* should be distinguished.

In order to overcome 'the indefinite increase of inequality of wealth', Piketty himself proposes the first type, the *wealth tax*: a levy on the value of one's holdings, irrespective of whether any revenue is being gained. In the absence of any transaction, a wealth tax is ideally levied on the market value of one's assets.[50]

Another possibility for targeting accumulative capital is to increase the taxation of revenue. Rather than taxing one's holdings, a capital gains tax is a form of income taxation, targeting

[49] In response to the regained interest in taxation from the prism of relative inequality, the New York University School of Law and the UCLA School of Law hosted a symposium on *Twenty-First Century* on 4 October 2014, with the papers being published in the Tax Law Review in 2015. Another illustration of tax scholars' reaction is: Paul Caron and James Repetti (2013) and Paul Caron (2015); Shi-Ling Hsu (2015).

[50] Limited forms of this wealth tax exist in many countries. For more information see Lehner (2000: 615-692). Piketty (2014: 517) however, endorses a global and universal wealth tax, which includes not only real estate but also all the components of capital, such as stocks, bonds, participations, shares pensions, annuities, intangible assets, and real estate; see Piketty, n. 15, 517. Such taxes exist in France and were, for example, proposed by the Belgian Francophone Socialist Party (2015), who brought a wealth tax bill into parliament to address the growing inequality. For academic elaborations on wealth taxes in the light of inequality, see Repetti (2001: 825–73); Maloney (1988: 601–35) and Stefan Bach et al. (2014: 67–89).

only the gains that one's assets yield (Piketty, 2014: 495–6; Bankman and Shaviro, 2015: 505; Wijtvliet, 2014: 642; Mirlees et al., 2011: 331–59; Diamond and Saez, 2011: 165–90; Obama, 2015). Capital gains taxation can take two forms depending on how income is assessed—and taxed.

One is the *market-to-market* capitals gains tax, which constitutes the second form of taxation of capital. This measure will tax capital as it accrues, and accordingly targets the annual increase in market value of one's holdings. The event that constitutes taxation is thus the passing of a year and the increase in market value. This tax resembles the wealth tax in its assessment technique of focusing on the market value, but it remains an income tax nonetheless; a decrease in market value for a specific period will exclude taxation.

Finally, there is the *realization-based* capital gains tax, the third form of taxation of capital. Unlike the previous form of income taxation, which simply taxes value fluctuations, this measure presupposes the occurrence of a realization event, being the sale or exchange of an asset. The event that constitutes taxation is thus (agreement on) the receipt of a benefit (normally money) in exchange for the transfer of property. Both are income taxes and aim only to tax gains.

Within the theoretical distinction outlined above, this chapter deals primarily with the last two forms of taxation. The general increased interest in tax justice will thus be compressed to the issue of the taxation of capital income. To the extent that growing wealth inequality is caused by capital income and exacerbated by its preferential fiscal treatment, a primary solution appears to be increasing the use of the capital gains tax (Bankman and Shaviro, 2015: 505; Wijtvliet, 2014: 642).

Prior to any general increase in tax rates, one has to outline a particular conception of income. When do stocks, bonds, participations, shares, pensions, annuities, intangible assets, and real estate yield an income? Given the continued acceptance of—and renewed interest for—an income tax, one can detect a normative chasm in terms of which of the above-mentioned standards should apply in income taxation.

Most parts of current tax codes, and people's common intuitions alike, support the realization approach: income is the receipt—or at least a legal agreement over the receipt—of a tangible benefit (Kwall, 2011: 79; Schenk, 2004: 377). Consequently, one should only be taxed when actually receiving contemporaneous benefits from a sale or exchange of property, or at least agreeing to such a receipt.

In contrast, taxation theory defines income as the sum of (1) the market value of rights exercised in consumption, and (2) the change in the value of the store of property rights between the beginning and end of the period in question (i.e. 'Haig-Simons' concept of income: see Simons, 1938: 49–50; Haig, 1921: 27). This latter view on income includes the accretion of capital, and it consequently allows authorities to tax any increase in the market value of one's assets, irrespective of the occurrence of a sale or exchange (Scarborough, 1994: 1031–49; Schenk, 1995: 571–642; Shoven and Taubman, 1980: 211–13; Shuldiner, 1992: 781–93). Following this definition, scholars working in the field of income taxation embrace the *mark-to-market approach* as an ideal assessment method (Brown, 1996: 1559-680; Shakow, 1986: 1111-205). Whether or not one monetizes an increase of 10 per cent of one's fortune is of no importance to the ideal income tax. As income occurs with accretion, taxation merely demands an increase in market value.

Tax theory discerns the continued application of the realization principle in existing tax codes as 'the basic defect' of income taxation, and no serious scholar seems to ascribe it any normative foundation (Andrews, 1983: 278; Brannon, 1986: 1763-85; McCaffery, 2005: 889). Vilified for reasons of both equity and efficiency, the 'Achilles' heel of the income tax' even led a group of tax scholars to support a shift in tax base (Bankman and Weisbach, 2007: 789-803; Shaviro, 2004: 91-113). In particular, an impressive amount of contributions have criticized the 'deferral' of the taxation of economic gains until realization, for creating substantial investment distortions and inefficiencies (Brown, 1996: 1559; Cunningham and Schenk, 1992: 725-814; Halperin, 1997: 967-77; Land, 1996: 45–118; Schizer, 1998: 1549-626; Weisbach, 1999: 95-136). More specifically, the literature points at taxpayers' ability to manipulate their tax debt under the realization principle. In this sense the realization-based approach can be pinpointed as one of the elements causing inequality, as it enables capital owners to circumvent their tax duties. Imposing taxation only when investments generate gains leaves the possibility of debt-financed consumption (McCaffery, 2005: 888), strategic trading (Elkins, 2010: 375-407; Gergen, 1994: 209-68), the strategic timing of asset dispositions (Scholes et al, 2009: 185-9), and portfolio adjustments for financial investments (Bankman and Shaviro, 2015: 477-85).

Furthermore, the realization principle also conflicts with the traditional aims of equity, as it fails to treat different sources of income equally (Kwall, 2011: 93). Once one adheres to the view that economic advantages for assets rise with the increase of their market value, a realization-based tax can be seen as ignoring vital increases in one's well-being. The deferral of taxation until the moment of receipt is thus presented as a tax benefit in favour of capital (Engler and Knoll, 2003: 53-81). Reluctance to tax capital as it fluctuates primarily benefits those whose assets contain capital, and this contributes to economic inequality (Kwall, 2011: 93).

As hard as it will be to find a *principled* defence for the realization principle, many tax scholars do grant it some pragmatic support (For confirmation of the non-normative nature of the realization principle see: Engler, 2003: 1210; Heen, 1994: 549-618; Land, 1996: 45-118). As expressed in the seminal work of Robert Haig, the realization principle is to be pictured as 'merely a concession made to the exigencies of a given situation' (Haig, 1938: 65). In particular, two reasons are acknowledged in support of this 'rule of convenience' (Schenk, 2004: 358). First, the realization principle is deemed necessary because a tax on an increase in value without realization raises liquidity problems. Under a mark-to-market approach the event triggering the tax (the passage of a year and the increase in value) does not generate cash to pay the tax (Kwall, 2011: 98). Consequently, taxes on accrued market values force taxpayers to sell their assets or to borrow money (Brown, 1996: 1560). Second, a tax on accrued values requires an annual valuation of one's assets. In the absence of any actual receipt, tax administrators need to assess—and prove—the precise net value of one's gains. Moreover, many tax scholars recognize the difficulty and cost for tax authorities to monitor the market value of one's assets on a yearly basis (Schizer, 1998: 1594; Schenk, 2004: 630). Additionally, a market assessment might be difficult for some goods and might lead to much dispute with the tax authorities (Repetti, 2000: 612). Hence the realization principle lingers on in most parts of our income tax systems.

Dominant income tax theory balances the ideals of a mark-to-market approach and the reality of the above-mentioned 'concession'. Researchers nonetheless plead for a prudent shift towards market assessment. In this regard, scholars are trying to convince policymakers that the taxation of value fluctuations would disturb taxpayers' affairs less than the liquidity

argument assumes (Schenk, 2004: 360-436). Concerning the valuation problem, proponents of the mark-to-market approach believe that for most assets a stable, established market price can be detected, and the issue is less insurmountable than previously assumed (Schenk, 2004: 365-70; Schmidde, 2009: 711; Shakow and Shuldiner, 2000: 529).

3. Towards a Deontological Defence of the Realization Principle

If the Piketty revolution results in concrete political eagerness to adopt a more ambitious tax on income from capital, the previous section has already outlined a theoretic consensus on the ideal assessment method. Although much of taxation theory grants no direct priority to mitigate inequality, it nonetheless alerts us to the fact that the realization principle is a benefit for capital owners.[51]

Any tax (or redistributive) system relies on two questions: what should be taxed and how should it be measured? Assuming the appropriateness of an income tax, this chapter will try to deliver a deontological defence of the realization principle. By explicating the moral problems of a mark-to-market approach I contribute to the debate on tax justice. Moreover, I underwrite the moral impermissibility of a capital gains tax based on this assessment technique. To the extent that it relies on market values, the conclusions concerning the valuation standard for income also shed light on the permissibility of a wealth tax. Furthermore, by showing that the right to autonomy delivers a normative basis for the realization principle, I wish to challenge the consensus in taxation theory that the principle has no normative foundations.

The approach exemplified here will be different to the traditional normative framework governing taxation theory. Taxation will not be primarily presented as a means to optimize economic outcomes, but will also be seen as a matter of justice—here understood as legitimate (i.e. morally permissible) coercion. Rather than finding an *optimal* taxation, the aim here is to uncover a *just* taxation—a taxation policy that is consistent with people's fundamental rights and liberties. The latter are here accepted as 'prerequisites for the legitimate exercise of democratic authority' (Tomasi, 2012: 76) and create moral boundaries for governmental action. Correspondingly, the sort of tax policies that are permissible depend on a prior analysis of people's rights over their holdings and their person. Importantly, as will be elaborated in Section 3.6., the presented deontological framework does not disturb redistributive or efficiency-related reform, as it opens up strategies to revise the current interpretation of the realization principle.

This section will outline the constraints of the right to autonomy on the proper assessment standard of income. First, I will exemplify the common intuition of the presumption of liberty (**3.1.**), after which I will provide a general conceptualization of autonomy (**3.2.**). Next, I will present valorizations as a function of autonomy (**3.3.**). From this I will deduce the problematic nature of general market prices as a basis for interpersonal comparisons, and will articulate the normative basis for the realization principle (**3.4.**). Finally, I will outline how the presented theory relates to some concurring work in taxation theory (**3.5.**) and defend its unification with other aims in an integrated approach (**3.6.**).

[51] The traditional prior aim of the dominant 'theory of optimal taxation' is to reduce inefficiencies and market distortions imposed by taxation. See, for example, Slemrod (1990: 157-78). For an avowal on tax theories' disregard for relative inequality, see Bankman and Shaviro (2015: 455).

3.1. The Presumption of Liberty

Stanley Benn (1988: 87) raises the example of a person named Alan sitting on a public beach. He has a pebble in each hand and is enjoying splitting them. Benn asks us to envisage a second person, Betty, who prevents Alan from continuing his activity by handcuffing him or removing all the pebbles out of his reach. Benn notes that Alan would be within his rights to demand a justification from Betty, while Betty would not be within her rights to demand an explanation for Alan's pebble splitting. So while Alan might justifiably resent Betty's interference, Betty has no grounds for complaint against Alan. So if a third person were to observe this situation, she would not ask why Alan was splitting pebbles, but rather why Betty was preventing him from doing so.

Benn illuminates a basic *asymmetry* in our normative outlook: we seek justification not for why people act the way they do, but rather for why others would want to prevent them from doing so. The initial onus of justification lies not on the person acting but rather on the person interfering with those actions. Even if most people might find Alan engaging in a useless activity, they still think he is under no requirement to justify his actions. The onus lies on Betty, who will need to explain her justification for imposing restrictions on Alan's actions. This is exactly what Joel Feinberg (1984: 9) calls presumption in favour of liberty: 'liberty should be the norm, [while] coercion always needs some special justification.'

Interestingly, we have this attitudinal bias in favour of actions for *persons*. Imagine Betty interfering with some pebbles on a beach, preventing them from flowing back into the sea. An observer would not be inclined to ask her why she is intervening in the lives of the pebbles in the same way that would be asked if she were preventing other people from acting as they want. The principle of nonintervention that follows from the presumption of liberty is one we apply when we deal with adult persons. As long as there are no compelling reasons to intervene, all people have a moral claim to do as they wish until some justification is offered for limiting their liberty (Feinberg, 1984: 10). We do not ask why we can cross a border, why we can have consenting sexual contact, or why we can have the freedom to choose our occupation; rather, we would demand a justification if those liberties were curtailed.

3.2. The Right to Autonomy

But why is this the case? Why does the onus of justification lie on the interferer, rather than on the people who are acting the way they are? Why is freedom the norm, and why are we not allowed to act with people in the same way as we act with objects, plants, and animals?

The answer to these questions is tied to a fundamental quality of persons: *purposes*. We do not lie in a particular place in the same way that a pebble lies somewhere. We do not go and swim in the sea for the same reason that a crab does so. We consider humans to be 'persons' because their existence is not merely the outcome of external stimuli, but is embedded in 'purposes that [their] actions [are] designed to promote' (Brennan and Lomasky, 1993: 9).

We distinguish ourselves from objects and animals in this world because our actions are the outcome of intentions connected to personal goals. According to Benn this phenomenology of 'personal causation' delivers the moral underpinning of our conception of 'natural persons' (Benn, 1988: 91).

The axiom underlying the presumption of liberty is thus connected with an understanding that each person acts purposefully. The purpose underlying our actions is to attain our goals and the intention to do so is our motivation. However, this in itself does not entail a prescriptive attitude: one may, for example, hold the political view that every person's goals—and thus also their distinctive actions—should be matched to one common end. We can find the foundation of the presumption of liberty when we grant positive moral status to each person as a purposeful entity. Indeed, the right to autonomy arises from a normative appreciation of each person having an end of his or her own, which consequently acknowledges each person's *claim* to act in the light of this.

Hence, autonomy should be understood as the normative embodiment of purposeful behaviour. So, from an understanding that all people have their own purposes, we delineate the axiomatic right to act and live according to these. The reason that we do not demand justification for how Alan is acting, but rather for why Betty is intervening with his actions, is because each person has a separate end, and all people have the right to live and act accordingly (Gaus, 2005: 272-306). In terms of autonomy, the focus lies not on the content of the act but on the fact that it counts as *one's own*.

The scope of one's rights is limited by the equal rights of one's fellow man. Consequently, autonomy delineates a moral space around each person, which constructs the territory wherein interference is principally illegitimate (Feinberg, 1984: 53). Traditionally, the 'moral space' that demarcates people's sovereign domain is constructed by their body, their mind, and their property (Feinberg, 1988: 54). One's physical body parts, mental and physical capacities, knowledge, experience, and rightfully obtained external goods all form part of one's personal sphere, and can be used according to one's wishes in the pursuit of one's personal ends.[52]

The reason that we cannot forbid Alan to split pebbles or impose a religion on Betty, and that we oppose forced labour and prosecute rape, and even that we despise manipulation, is because we recognize each person as an embodied a choosing being with the right to pursue his or her own distinctive purpose. This fundamental axiom discloses the underpinning of more specific principles, such as freedom of religion, freedom of speech, and the free movement of persons. But it is also the case that contract law (where people are only bound by consent) or the precepts of tort law (where people need to compensate for damage to another's sovereign domain) are an elaboration of the right of each person to live according his or her own ends.

3.3. Valorizations as a Function of Autonomy

The right to autonomy justifies the radical diversity in people's actions: people opt for different subjects of study, strive for different jobs, and develop different hobbies. People want different things because they have different goals and preferences, and the principle of autonomy defends this variety as a consequence of people's moral rights. This also entails consequences regarding goods. As stressed by one of the founding fathers of the theory of marginal utility, goods have no intrinsic value themselves—people attribute value to their own ends and consequently carry this over to economic goods as a means of satisfying these ends (Menger, 1950: 116). Given the fact that people have different goals and preferences, they will assign different values to the same goods. Because of people's divergent ends, they adopt distinctive standards of value (or 'utility'), which lead to different rankings. For someone who embraces

[52] The rights over one's body, mind, or external property do not necessarily involve the full right to income, so income taxation is not necessarily a violation of the sovereign domain. See, for example Vallentyne (2012a, 291-301). For an elaboration of the difference between control and income ownership, see Christman (1994: 129-35).

rock and roll as the highest personal good, concerts might be the most important happening in a weekend, whereas another person might build his weekend around his football team. People's distinctive standards follow from their distinctive ends, which ultimately come down to their differing views on utility—and economically this leads to conflicting monetary valorizations. For the rock and roll fan, a £500 ticket to see the Rolling Stones might be a good buy, whereas a classical music adept might deride this price as a sign of the aesthetic decline of our times. Someone might consider the price of petrol to be absurd, given his preference for public transport, whereas a keen motorbiker might perceive it as a small price to pay for the feeling of liberty she gets from riding her motorbike. If everybody had the same goals and preferences then everybody would buy the same products, and goods sold to equally wealthy people would end up being the same price. Yet people assign different valorizations to goods and services, which reflect their different views on well-being flowing from their respective ends. For one person the £500,000 salary of a stockbroker would not compensate for the missed opportunity to follow her natural calling to be an academic, whereas being a stockbroker might be another person's dream job, and he would gladly accept half that salary to be able to do it. We thus see that the valorizations we attach to goods are a *function of our autonomy*.

From the perspective outlined here, market prices have no 'objective' status. Although in our everyday lives we see fixed prices as secure features of goods and services, these should rather be seen as compressions of different valorizations that people give to goods. Moreover, the market price is the aggregate of the valorizations of all the consumers in a market (Hayek, 1976: 76). As George Stigler (1987: 12) makes clear, these can be conceived as an election result, whereby everybody has some minimal influence on the outcome, even though the result does not reflect anyone's valorizations. The high wages of many football players and the low prices (compared to production costs) of academic books are signs of general consumer preferences in society, yet they do not reflect any individual valorizations. My personal ranking might put the purchase of an academic book much higher than obtaining a football ticket. Similarly, the low prices for real estate in the countryside express society's general preference to live in the city, but obviously individuals can have the opposite ranking of value.

General prices therefore do not tell us anything about the utility standards of potential suppliers. The high prices for corporate tax lawyers indicate the high value that many businesses attach to fiscal analyses. These do not spell out the value standard of a particular lawyer, who might prefer to deliver academic services for an average wage. And the high price of renting modern apartments in city centres merely informs us about the preferences of urban citizens and businesses to live or work in apartments—it does not give us any indication about the utility standards of the owners of these apartments, who might have completely different plans.

However, at the moment of effective *consent* over an amount of money in exchange for goods or services, prices transform into something that is more than sociological (the general market price) or psychological (a particular offer in an individual setting); they become information about people's utility standards. A consented price is a confirmation that a particular amount of money is seen as a valid valorization according to one's own utility standards. The fact that I effectively purchase an academic book confirms that I find this good valuable and I perceive the price as acceptable in view of my ends. And the fact that I accept a 'high' price for a house in the countryside counts as a confirmation of its value in the light of my somewhat deviant living preferences. So with regard to income, when the tenant of the city centre apartment effectively accepts the high rental price, she confirms this amount of money as a valid price

according her own utility standards. If the well-established academic changes his profession because of a changed purpose (e.g. if he now has a family and wants to provide them with as high a standard of living as possible), he confirms the high price for corporate tax services as an appropriate benefit within his own standards of value.

To summarize, we can say that because people all have ends of their own, they will also have value standards of their own. Consequently, the right to autonomy recognizes that each person has personal valorizations as a function of his or her own subjective ends. From this perspective we have to downgrade market prices as an aggregate of other people's standards. At the occurrence of an exchange of property or services for money, people express their subjective standards in terms of a quantifiable homogenous commodity: money.[53]

3.4. Autonomy and Taxation

Alan is not only a fan of pebble-splitting: he also works as an engineer for a medium-sized company. Considering his love for his family and his appetite for holidays and weekends, he did not opt for the highest-paying opportunity. Each year he earns £72,000 with his mathematical skills. Besides this he owns an apartment that he uses for artists' exhibitions, for which he paid £200,000. Additionally, he invested £20,000 to support his best friend's company.

During the hot summer months, however, a number of people discover Alan's capital (including his human capital), and express their value standards regarding some of his means. When he comes back he finds several offers in his mailbox. First, the raised general market value of his apartment translated into an offer: a local investor wishes to give him £400,000 to buy it and rent it to small businesses. Second, his friend's company managed to sign up a new big client, resulting in a doubling of the value of his shares. As if the summer has not already been profitable enough for Alan, an engineering company has tracked him down and given him an offer of working in a management position, earning three times his current wage. Finally, Alan has quite an unusual blood type, and an Indian businessman with an identical blood type offers him £1 million to buy his kidney via an intermediate company that commercializes human organs.

3.4.1. The mark-to-market approach

Most tax scholars will agree that Alan will come home a 'richer' man: income equals an increase in value of one's holdings for a period of time, and tax codes should not remain blind to Alan's very lucrative summer.[54] Concerning his external means, his shares undeniably went up £20,000 in value and the current market value of his apartment of approximately £400,000 means an increase in value of 100 per cent compared with last year. An ideal income tax, as supported in the cited literature, would include an end-of-year economic appreciation of these assets and would attribute Alan a capital income of £220,000. A tax targeting the value of his human capital, however, would not be advocated by most tax scholars due to the inevitable problems with conducting a proper valuation and to the possible lack of liquidity; a structural

[53] As mentioned in Section 3.6., the requirement of confirmation of a particular monetary benefit is not restricted to the sale or transfer of property.

[54] As mentioned above, for most tax scholars, a taxation of income merely demands an increase in market value. See for example Shuldiner (1992: 781) in which he states: 'The Haig-Simons definition of income, accretions to wealth plus the value of consumption, is generally accepted as an appropriate definition of income for purposes of a comprehensive income tax.' See also Schenk (2004, 572-3) where a global mark-to-market regime taxing accretions is presented as a normative ideal.

mark-to-market approach would seem insurmountable. It is indeed difficult to assess the market price of one's skills, and taxpayers who do not use their greatest earning potential would often not have the means to pay their tax debt. In our current example these 'administrative' concerns are not at stake, however: Alan has no liquidity problems (he inherited several million pounds) and we have a perfect example of the market price of his bio-capital (£1 million for his kidney and £216,000 for his mathematical skills).

Yet this analysis indicates that the absence of any valuation or liquidity problems does not overcome deeper normative objections concerning the *automatic* application of these market values in the assessment of income. From the perspective of autonomy, the challenge for the accretion-based tax is identical in all four of the above situations. As we saw, valorizations are a function of autonomy. The prices for Alan's kidney, apartment, and shares reflect the desires of others who want to acquire these means, and the price for his skills stems from people's wish to rely on his skills. All of these prices, however, conflict with Alan's own purposes: he does not perceive his kidney as a commodity and would not sell it at any price. He enjoys his current job and does not perceive three times his wage to be sufficient compensation for the loss of free time that the new job would entail. Likewise, he bought the apartment to cultivate his aesthetic passions and fund young artists, and the money the investor is willing to transfer does not fit into any of his plans. Finally, he sees his shares as a financial support for his friend, and so has no plans whatsoever to sell them; this rise in share value reflects the interest of other investors in the company rather than any of Alan's own interests.

The economist's view on taxation might stress the fact that Alan has come home to a new situation: given the valorizations for his apartment, shares, kidney, and skills his economic 'position' has changed. By contrast, the current subjectivist normative outlook would claim that *nothing* has changed for Alan; he has rejected all of these offers and has not altered any of his plans—these valorizations have no meaning from the perspective of his own utility standard.

Commencing from a viewpoint of people as active, choosing entities we can see that valorizations are embedded in a subjective life plan. Each price reflects particular decisions in the light of further ends, which are often unknown to others. Assigning valorizations that reflect decisions that one does not plan, and preferences that one does not hold, is incongruous to autonomy. Moreover, it defines one's tax liability according to a value standard that could be completely contradictory to one's own. In general, when we take market prices as the assessment basis for interpersonal comparisons, we ignore people's own vision of well-being and impose valorizations that are alien to their own. Under a mark-to-market approach, Alan's tax base is nothing more than a representation of what of others would like him to do; even if he had no liquidity problems, he would object to paying taxes on £1 million for his kidney, on £216,000 for his job offer, on £20,000 for his shares, and on £200,000 for his apartment. His objection would rely on the principle of autonomy, claiming that he was being assessed in terms of subjective utility calculations that were completely alien to the standards by which he governed his own life. The content of one's duties (the tax base) gets one-sidedly defined by prices reflecting other people's intentions over one's means. From the perspective outlined here, we can coin this practice as a *heteronomous tax base*: the taxpayer is being ordered to comply with fiscal duties on the basis of unconsented valorizations.

From this perspective, we can recast the commonly raised problems regarding a mark-to-market approach. The problem is not that one might not have the cash to pay one's tax debt,

or that tax administrators might have a difficult time assessing a true market value. Rather, the fundamental problem is that there is no 'true value' in the sense that nothing has an intrinsic, objective value; consequently, mere market valorizations can conflict with one's own standards. When we grasp how this measurement technique attributes unconsented valorizations, the disturbing nature of the mark-to-market approach in the taxpayer's life, for example in terms of liquidity issues, is simply an unsurprising consequence.

In summary, our right to autonomy discloses our intuitive protest against a mark-to-market approach. Valorizations are a function of autonomy, and by calculating tax obligations on the basis of non-shared valorizations the market-to-market approach dictates the standard of the market and ignores people's own vision of well-being.

3.4.2. The realization approach

Imagine that Alan changes his life radically in a couple of years: he remarries and adopts an exuberant lifestyle after having lost half of his means due to the messy divorce with his ex-wife. His consumption now exceeds his income, but despite his hedonistic lifestyle he does not want to withdraw from his responsibility regarding his children, and so plans to finance their university studies. Given this situation, Alan decides to sacrifice his shares and apartment in order to be able to fund his two children's degrees. On top of this, he wants to maintain his high-flying lifestyle by acquiring an apartment in an upmarket neighbourhood.

Despite his need for money, he sells his shares back to his friend at 25 per cent below the market price for just £30,000. Since he is one of the few friends who supported Alan during the last two years, he perceives this as a nice way to thank him. Furthermore, he uses his excellent negotiating skills to sell his apartment at £450,000, exceeding its market value. Putting aside any maintenance costs that he may have incurred over the years, he realizes a profit of £260,000 following these transactions.

Contrary to the previous situation, this figure is not a general market price but a monetary benefit that Alan consented to by means of his own value standard. Each of the figures involved arises from particular intentions with respect to his purposes (paying his children's studies, acquiring a new apartment, and thanking his friend). These figures do not reflect the estimations of what other people would want in order to acquire his means; rather, they resemble Alan's choices in the light of his subjective ends.

An appreciation of the right to live according to one's own purposes unravels the normative role of the realization principle. General prices reflect transactions and preferences that might or might not fit with one's ends. Real-life exchanges, on the other hand, consist of people's true actions whereby they exteriorize their own value standard. Consented prices are more than psychological information about other people's goals and preferences: they are confirmation of a particular valorization that is a function of autonomy. So the economic equilibrium reached when a person consents to a price reflects one's subjective preferences in terms of the most homogenous and quantifiable commodity: money. The importance of the receipt of a benefit in exchange for the use or sale of property is that through this event people signal their utility standard in an observable way. The value of the realization principle is exactly that such a method does not invade one's tax liability on the basis of other people's valorizations; instead, it replicates a person's subjective valorizations as expressed in consented monetary benefits. By submitting one's own valorizations as administrative input for tax authorities, taxpayers are not forced to live—and pay taxes—according to market preferences. Instead, they are only

required to pay a contribution according to their own value standard. The realization principle thus protects taxpayers' liability against external standards and guarantees that their obligations will be calculated in terms of their own utility calculations as expressed in market exchanges. Consequently, as the realization standard supervenes on their own consented valorizations, it will not impose any alien vision of well-being.

To summarize, we can state that the right to live according to one's own ends delivers normative justification for the generally reviled principle of taxation after realization. In particular, the right of each person to live according to one's own ends and preferences entails a duty for tax authorities not to impose any valorizations that one does not share. The moral status of the realization principle lies precisely in the fact that when people monetize certain assets and goods (such as via sales or transfers), they externalize their preferences in consented valorizations. So the realization event, meant as the contractual confirmation of a certain monetary benefit, is more than the point in time when one (Kwall, 2011: 80; Brown, 1996: 1559-1680 and Shakow, 1986: 1111-205) 'effectuates one's prior economic income' (i.e. when an asset merely increases in value); it is the *morally decisive turning point* when one confirms a price or offer as being consistent with one's ends. In the absence of any general objective measure of utility, monetization yields a confirmation of valorization according to a person's own standard. Before such a moment, tax authorities fail to have any reliable information on a person's preferences and valorizations, and will fail to construe a tax base without violating the autonomy principle. As the realization principle supervenes on one's own consented valorizations, it consolidates the taxpayer's own view on well-being within the domain of income tax.

3.5. Personal and Market Goods

In an excellent article Ilan Benshalom and Kendra Stead make a distinction that might have come to the reader's mind by now. On the one hand, they picture 'investment goods' like portfolio holdings and company shares; for these 'emotionally non-fungible assets' they state (2011: 68) that it is 'reasonable to assign tax liability for that asset's fluctuation in value according to a mark-to-market regime'. Aiming at an equal taxation of increased well-being (as measured by welfare), the authors qualify the market price as a good proxy. On the other hand, they envisage personal goods like inherited jewellery, self-created artwork, residential homes, and family businesses; for these goods they dismiss the mark-to-market approach as a 'bad proxy for well-being' (2011: 66). Moreover, the authors (2011: 64) are convinced that for personal goods the taxpayer's 'subjective value is radically different (that is, *significantly higher*) than the assets' market value'. Consequently, deferral until the time of monetization is required here, since the effective market return serves as a better standard for the extracted welfare. Benshalom and Stead (2011: 69) acknowledge that this partial realization principle would be an exemption that would cause distortions and inequities. Nevertheless, they note that personal assets represent a larger proportion of the wealth of low- and medium-income taxpayers than that of high-income taxpayers. Therefore, providing a tax benefit for personal assets would make the tax system as a whole more progressive (2011: 69).

Benshalom and Stead's analysis is both illuminating and bold. In a clear fashion they identify both the aim of progressivity and the special character of personal goods as a normative bedrock for an exemption of these assets from the generally embraced mark-to-market approach. Nonetheless, for two reasons an overall defence of the realization principle can be found more convincing.

First, there is no general theory available that can provide policymakers with a comprehensive list that differentiates a small number of personal goods from the bulk of investment goods. As Benshalom and Stead (2011: 68) acknowledge, the abstract distinction between personal and investment goods is in reality a continuum. However, no ordinal continuum can be established: even goods that the authors confidently put at the extremes can be ordered alternatively by individual taxpayers.

For instance, many young urban professionals perceive their home (qualified under 'personal goods', 2011: 65) as their only form of financial investment. Consequently, their purchase will often reflect their anticipation of an increase in market value. Furthermore, families might perceive their family jewelry as a form of savings that could be sacrificed in the event of certain needs, such as university fees. Concerning the 'investment goods', generally, people might hold business shares and financial investments for financial reasons, yet it is not clear-cut that their market value will always coincide with people's personal value standards. Many shareholders who help to establish a company will have an emotional affiliation with its economic philosophy and produced goods that will transcend purely economic figures. Regarding investment portfolios, there are a rising number of people who combine the pursuit of profit with nonfinancial incentives, thereby obtaining portfolios that also reflect ethical, social, and ecological purposes. Such assets are not easily fungible with their more commercial counterparts, and the market value is not the sole standard by which people valorize these assets. Furthermore, Benshalom and Stead qualify family businesses as personal goods. Nonetheless, many of these tend to be sold to bigger entities, and many large companies arise from family businesses, so this does not seem to exclude the relevancy of market value as such. Conversely, many small businesses without any familial character—which the authors perceive as investment goods—do have personal value. Moreover, as the authors acknowledge (2011: 68), most goods fall between both extremes, and it will consequently be arbitrary to qualify them as one or the other.

In other words, the reasons to reject a partial realization principle are similar to the reasons to reject the mark-to-market approach: the list of investments and personal goods upheld by policymakers and regulations will be incongruous to autonomy. The imposed distinction between market and personal goods will contain a standard of value that will often be inconsistent with the viewpoint of individual taxpayers and their ends. Many taxpayers will be taxed on the market value of goods that they hold for divergent reasons, and investors will obtain comparative benefits using the realization-based tax for so-called 'personal goods' (2011: 82). The optimal decision from the viewpoint of autonomy is to put the authority over the distinction between both types of goods with the taxpayers themselves rather than with the legislator. When people agree on the receipt of a monetary benefit (via a market exchange), they signal that goods are fungible and so provide administrators with a valorization that adheres to their personal value standard (i.e. the agreed price). Additionally, given the fact that people's intentions are multidimensional (e.g. Alan selling his shares to his friend) and that most goods are partly personal and partly financial, the exact agreed price serves as the best reflection of people's ends and consequent value standards.

Second, the right to autonomy serves as a better explanation for our moral resistance to a mark-to-market approach than the reasons suggested by Benshalom and Stead. Envision once more Alan's apartment, which went up £200,000 in market value and became worth £400,000. His neighbour, who held a similar apartment, wished to rely on this price and sold it to a law firm. Alan, however, wanted to continue to use his apartment to accommodate young artists and

their innovative exhibitions (prior to the break-up of his first marriage). He resented the reasons underlying the increased price (the corporate trend invading the neighbourhood) and perceived his decision as a way of rebelling against it. Our intuition tells us that it would have been very unjust to tax Alan on this increased market value. However, the real reason that we do not support Alan being taxed at a capital gain of £200,000 cannot lie in the fact that he attributed a 'higher value' to it than the current £400,000, as Benshalom and Stead endorse. This presumption would, for example, mean that he would be willing to pay a price for the apartment that exceeds this £400,000. But it could be perfectly possible that Alan would never consider buying his apartment at its current market price. Furthermore, the assumption of a higher market value does not justify our intuitive position against taxing Alan. If anything, it provides a mandate for taxing him at this higher value rather than not at all.[55]

The proper theoretical explanation as to why we should refrain from taxing Alan on the increased market value is because a price supervenes on the taxpayer's intention to sell or rent an asset. The attribution of a certain amount of money presumes the relevancy of a specific market exchange within the subjective life plan of the person. However, in the absence of any real exchange we have no proof that this valorization will be consistent with any of the person's ends. The reason that we oppose Alan being taxed on the increase of £200,000 is because this price arises from plans that Alan did not intend to undertake, and consequently tied him to these external purposes. At the time, Alan held a deviant preference and the market value was inconsistent with his ends. So the reason that we oppose attributing income in the absence of real financial gains for these personal assets is not because the market value is a 'bad' proxy—it is because it is simply no proxy at all. Alan's preferences lay on a metric of value that was not expressible in any market price, since he did not engage in any market transactions. Any market valorization would have been incongruous to his autonomy, as it would have imposed a value standard that was contradictory to his own.

3.6. Autonomy-Friendly Optimization of Income Tax

I have tried to demonstrate that the realization principle is more than a pragmatic element: the logic that persons are taxed only when agreeing to the receipt of benefits can be seen as elucidating the right to autonomy. When tax scholars and egalitarian reformers aim at the optimal taxation of capital, such an endeavour ought to be implemented within the boundaries set by people's right to autonomy—that is, with respect for the realization principle.

As mentioned in Section 2, the realization principle is nonetheless associated with practices such as the strategic trading and timing of asset dispositions, portfolio adjustments, and debt-financed consumption. These result in a decrease of the effective rate on capital-owners, causing inefficiencies and—among many other factors—adding to the accumulation of wealth, which egalitarian tax reformers wish to mitigate.

The theoretic framework elaborated here does not aspire to ignore these problems. Conversely, a renewed analysis can yield benefits in terms of how to deal with current defects. The realization principle protects taxpayers from liability for unconsented valorizations, not from taxation as such. Although the current contribution curtails authorities' taxing competences to some extent, it is not hostile to the promotion of efficiency or redistribution. Rather, an appraisal of the purpose of the realization principle can help to revise its current application in

[55] The granted exemption for personal goods is thus merely founded on the aim of progressivity, rather than on a higher attribution of value.

the light of these aims. Once we understand that confirmation of a certain monetary benefit is the prerequisite for an income tax, we can then begin to address its current problematic by-products.

For instance, capital cannot only be sold or rented, but can also be applied to finance the acquisition of new goods by serving as security for a loan. One of the corollaries of the current income tax system is its disregard for the resulting debt-financed consumption or investment. Alan can put his apartment at risk and utilize its market value to borrow money to acquire a new apartment—without paying any income tax. If taxation is only triggered by a net cash flow, then taxpayers can utilize their assets to acquire loans, which allow them to consume or invest untaxed money. Most fiscal regimes thus permit taxpayers to enjoy the benefits of capital in the form of borrowed money used for consumption or investment, without being subject to income tax. Not only does this circumvention entail inefficiencies, but McCaffery (2005: 888) also considers it to be a failure of the income tax 'to reach the propertied classes'.

A renewed understanding of the realization principle provides insights to foreclose this inequitable tax advantage that is often enjoyed by more affluent taxpayers. In a secured debt agreement people can utilize their assets in a commercial exchange, whereby an asset is being collateralized in order to obtain a loan. Collateralization refers to an asset's market value, which serves as a security measure in case of default. Within such contracts a capital owner thus agrees to the market value of an asset. To the extent that this value exceeds the initial purchase price, this qualifies as the receipt of a particular monetary benefit. So, if Alan mortgages his apartment to acquire a loan from the bank, he forfeits his initial protection from non-shared valorizations—and the condition for permissible taxation of the occurred gain is therefore fulfilled.

In summary, tax scholars' righteous objectives of equity and efficiency could be unified in a research project on an autonomy-friendly income taxation of capital, which would demand confirmation of a particular monetary benefit as a moral condition for taxation. However, this condition is not restricted to current applications of the realization principle. For instance, the utilization of an increased market value of capital in the conclusion of a secured loan can be qualified as a realization event. Consequently, when one's assets are being used as security for a loan, this permits capital gains taxation in an autonomy-friendly fashion. Rather than being the unilateral attribution of a market value, such taxation merely replicates the market value appropriated by the parties in an agreement. Additionally, by broadening capital-owners' tax base, this measure would increase the progressive nature of our tax system, as demanded by Piketty and others.

4. Conclusion

Thomas Piketty (2014: 493) stated that taxation is 'not a technical matter, but preeminently a political and philosophical issue, perhaps the most important of all political issues'. My analysis has advanced this insight and tried to implement a concept from moral and political philosophy to the domain of income tax. From the right of each person to live according to his or her own purposes I have codified a particular conceptualization of income. Moreover, I have shown that authorities cannot measure one's income with alien utility standards, and should instead rely on shared valorizations. The fact that a mark-to-market approach leads to liquidity problems is merely the tip of the iceberg in this matter. I have demonstrated that a general market price often arises from exchanges that conflict with one's own purposes. Consequently, the attribution of this valorization ignores a person's own view on well-being, as it dictates the

utility standard of the market. The value of the realization principle lies exactly in the fact that such a technique integrates with a person's autonomy, as it copies a person's consented monetary benefits within exchanges into the tax base.

By integrating normative insights from exterior domains, the current contribution has revealed a possible foundation for what is commonly described in taxation theory as a necessary evil. By clarifying acceptance over a monetary benefit as a moral prerequisite for income taxation, my deontological approach has tried to induce tax reformers to accomplish their aims *within* the boundaries of the realization principle, and to refute wealth and income taxation by means of a mark-to-market approach. Given this, I have presented the normative framework established here as not being hostile to egalitarian or efficiency-related perspectives. Rather, it is an appraisal of the right to autonomy as the proper foundation for the realization principle, which facilitates variations in its current interpretation in order to address the defects of the prevailing taxation of capital. An understanding of the normative bedrock of the realization principle, for example, underwrites the taxation of collateralized capital—a measure corresponding with the egalitarian aim of rendering our tax codes more progressive.

ESSAY FOUR: ON THE RATE STRUCTURE

TAX UNIFORMITY AS A REQUIREMENT OF JUSTICE[56]

1. Taxation: what is and what ought to be

Taxation is an essential aspect of governmental action that can be used to attain various goals. The basic justification, on which we can presume there is widespread consensus, concerns the sponsoring of public goods, provided by levies that adhere to some standard of fairness or efficiency (Buchanan, 2000a).[57] Additionally, the literature promotes taxation to achieve goals such as environmental protection, employment stimulation, health protection or the correction of all sorts of market failures (Rosen, 2004; Mirrlees, 2010). Whether one takes the first, minimalist, stance or attributes more extensive policy goals to public authorities, Western tax systems fail to live up to their *raison d'être*. A number of sources are signaling that tax policy, at least in the US and Europe, basically embodies an 'anything goes' regime, a political jungle in which well-organized sub-groups of society are successfully fighting for controversial privileges at the expense of (the welfare of) their fellow citizens. In this regard, Richter et al. (2009) found a correlation between tax lobbying and the effective tax rate: when US firms increase their lobbying expenditures by 1% in a given year, they reduce their effective tax rates by an average of 0.5 to 1.6 percentage points the following year. Another study confirms that fiscal lobbying is currently one of the most profitable businesses: Alexander et al. (2009) estimate the return on investment from political influence on the US Job Creation Act (2004) to be as high as 22,000%, meaning that every dollar invested in lobbying yields a return of $220. Brown et al. (2015) found that investing in relationships with tax policy makers (e.g., via Political Action Committee support) results in future tax benefits. Various sources like the U.K.'s House of Commons Committee of Public Accounts (2013: 10) and the Corporate Europe Observatory (2017) signal that there is systematic entanglement between legislators and the private interests of wealthy individuals and corporations (so-called proactive tax planning) through big accounting or lobbying firms. The Center for Responsive Politics (2016) confirms the interaction between public lawmaking and private interests, for instance by revealing that 38 out of 42 Apple lobbyists previously held government jobs. This policy structure might indicate why, in the last decade, there has been a rise in legislative measures like the 'excess profit' tax scheme, 'patent boxes,' 'controlled foreign company,' 'foreign tax credit' and 'active financing exemption,' which help multinationals and wealthy individuals slash their global tax debt. Furthermore, it is important to note that Western regimes have 'democratized' fiscal exemptions, and by converting large proportions of votes into political power, many factions of the constituency have been happy recipients of fiscal rewards, such as mortgage interest deductions, tax cuts on company cars and stock options.

Tax theorists and economists (Avi-Yonah, 2000; Mirrlees et al., 2010; Bhandari, 2017; Bankman and Shaviro, 2015; Christians, 2013, 2017; Essers, 2017; Jallai, 2017; Lemmens and Badisco, 2017; Vos, 2017; Green, 2017; Peeters et al., 2017) generally recognize that the structure of the prevailing tax systems does not adhere to its normative foundations, and that the legitimacy crisis associated with tax law that 'becomes increasingly unresponsive to

[56] This fourth essay was submitted to an international journal is currently under review. This paper builds on Public Choice Theory and was awarded as a finalist (last three) for the Ostrom-prize for 'best paper by graduate student' at the Public Choice Society 2017. See: https://publicchoicesociety.org/awards

[57] By 'consensus' I mean that nearly all people 'at least' accept this task. The field of public finance, however, traditionally goes further by including all four. See Rosen (2004). James Buchanan (2000a) famously limits the task of the state to the minimalist stance, which he calls 'the protective state.'

legitimate policy goals and increasingly out of touch with justice' (Christians, 2017: 152) has recently attracted attention within the tax literature.[58] One of the driving observations here is indeed the interplay between private groups and policy makers and the emergent fiscal exceptionalism and the complexity of the system (Tran-Nam and Evans, 2014; Hettich and Winer, 1999: 90). Richard Wagner (2016: 142) states that the 'public entrepreneurs' in charge of tax policy systematically interact with private investors, whereby 'at this point, fiscal politics enters to generate the proverbial flood of exceptions and exemptions that creates a tax code so large that no one can read it and which creates nearly a unique tax liability for each tax payer.' Allison Christians (2017: 152), one of the most established tax lawyers of our time, describes the state of affairs as follows: 'Special interests consistently exert influence on tax policy discourse through their advisors and within a broad spectrum of discrete and pooled capacities. This results in tax policy as favorable as possible to those who have the resources to shape it.' Christians' solution lies in transparency; she proposes mapping different groups' influence on tax policy in an open-access database. Shaun Hargreaves Heap (2017: 259) connects the emerging complexity with a failure to achieve any public policy goals: 'About the only thing we can say with much confidence about our currently complex tax systems is that they spawn an industry of tax accountants, lawyers and lobbyists who game the system for the benefit of their clients, who are mainly rich.' In order to prevent various private groups from tinkering with the tax rules, Hargreaves Heap proposes to transfer policy making competences to an independent tax authority, which should be responsible for implementing constitutional objectives such as redistribution or environmental protection.

This article originates from similar observations, and thus aims to supplement recent research on how to get public finance back onto a moral track. I focus on the essential requirement that the rules determining the division of the fiscal burden throughout the constituency adhere to a standard of justice. In the approach employed here, this demand arises from a contractarian-constitutionalist perspective on justice, according to which the fundamental rules and institutions that form the basis of the state need to be understood as part of an exchange of agreements between participating members of society (Rawls, 1999a: 3, 10; Buchanan and Congleton, 2006: 4). The essential test that the prevailing basic political institutions face is whether they could have been *contracted by* (rather than imposed on) rational individuals (Rawls, 1999a: 16). Moreover, individuals in a setting of constitutional choice accept limitations on their liberty (i.e. rules that involve coercion) when it advances their interests, and this exchange makes them better off (Rawls, 1999b: 52; Buchanan and Brennan, 2000a: 27-29; Rawls, 1999a: 12; Buchanan and Congleton, 2006: 28-29; Thrasher, 2014: 36). However, these contracting individuals are typically unaware of what their position will be under the different choice options, once the societal 'game' unfolds (Rawls, 1999b: 58; Buchanan and Brennan, 2000a: 35; Hayek, 2007: 113-115). As no party is able to tailor its specific position, participants will choose between alternatives in accordance with *generalized* criteria of 'fairness' and 'efficiency' (Buchanan and Congleton, 2006: 6-7; Buchanan 2000b:

[58] This involved a certain shift, as the tax literature neglected political reality for a long time. The standard books on public economics (Rosen (1999), for instance), do not mention the issue of legal complexity. A shift towards a normative assessment of existing tax systems was partly generated by the 2008–2010 economic and financial crisis and the subsequent fiscal crises in several European countries, which provoked a stricter form of fiscal orthodoxy, with a more stringent monitoring of compliance by taxpayers. At the same time, events like Swissleaks, Luxleaks, and the Panama Papers and Paradise Papers have revealed that many multinationals and wealthy individuals use various legal techniques to avoid paying national taxes. Lastly, and connected, the field of taxation has gained popularity through an increased interest in economic inequality via the immense popularity of Thomas Piketty's *Capital in the 21st Century*. The interest in the legitimacy of prevailing tax systems is mirrored in a number of contributions in Bhandari (2017) and in Peeters et al (2017).

146). This does not require a rule that each participant has to win simultaneously. Rather, over the whole set of political actions, its working properties must be 'broadly acceptable' (Buchanan and Congleton, 2006: 18; Buchanan and Brennan, 2000a: 35) regardless of participants' specific positions.

Looking through this constitutional window, the subject of this article appears more clearly. The fundamental rules governing the division of the fiscal burden need to be evaluated *as if* they could have emerged from unanimous contract by rational individuals who have limited knowledge about their later positions (Buchanan and Brennan, 2000a: 26; Brennan and Hamlin, 1995). Within a setting of constitutional choice, unanimity will only be reached on decision-making procedures that 'all can live with' (Rawls, 1980: 519), meaning they are acceptable regardless of the position one occupies under them (Kohlberg, 1981: 190-201). For instance, unanimity would not be reached to institute a political practice in which a dictator can exact all other citizens at his command (Buchanan and Tullock, 1999: 62–63; Buchanan and Brennan, 2000a: 35). Uncertain about one's prospective position, agreement is likely to revolve around rules that do not threaten specific groups, and offer protection against the abuse of political powers. Indeed, the legitimacy of a tax system depends on the presence of constitutional requirements that specifically prohibit political rulemaking of the kind under scrutiny here. As no player is certain about where he will be positioned in the political game, constitutional choice will oppose rules whereby the subset of persons who make government decisions can realize 'fiscal gains' at the expense of those outside the ruling coalition. Put positively, justice requires fiscal procedures that are acceptable to a wide range of positions, including those outside the realm of power.

Given this perspective of justice, I investigate the requirements for political rulemaking in order to shield the resulting policy from manipulation by affluent organizations and multinationals (who 'buy' the policy they find profitable), more modest economic parties (which extract public resources via their influence over voting procedures) and politically well-organized economic players (e.g., unions, the agriculture industry and lawyers) that are close to the decision-making process. Rather than describing the controversial rules or proposing a specific policy outcome (i.e., a specific division of the fiscal burden, for instance zero tax on the lowest income brackets), I focus here on the *procedural requirements* that define how a collective decision should be taken. Given the political reality as sketched at the start, and given the increasing attention paid to the justice of Western tax systems, I explore the following question:

> *Which formal requirements can turn tax policy – currently a domain with winners and losers, and rules that reflect the self-interest of one group over that of others – into a genuine collective project that takes into account the interests of all members of society?*

The rest of this article is divided into four parts. **Section 2** seeks to bridge between ideals of justice on the one hand, and fiscal reality (including our policy question) on the other hand. Translating the demands of justice into political reality requires us to model fiscal processes as determined by self-interested agents, acting under majority rule. Taking these behavioral and institutional constraints into account, **Section 3** sets up a behavioral model that predicts the legislative dynamics arising under a simplified version of our current tax system. In particular, tax exemptions under a weak majority rule requirement are predicted to lead to fiscal exploitation, inefficient public spending and rising general taxation levels. **Section 4**

investigates how the constitution can protect the legislative machinery from penetration by specific interests, and shape the legislative stage to be more oriented towards the goals of all citizens. In particular, I argue that in order to liberate taxation from fiscal exploitation, and to reconcile taxation and public finance with the general interest, taxation should follow the precepts of generality, of which of tax uniformity is the best account. **Section 5** connects the findings of this article with traditional theories of justice, and sets the stage for further research on the value of these theories within the domain of tax justice.

2. Bridging ideals of justice with fiscal reality: enter public choice

Since it is in the nature of philosophy to reveal general (moral) principles, and thus raise the level of abstraction, few political philosophers write *directly* on taxation. Although it is hard to find a systematic, detailed account on the issue, taxation remains at the heart of each theory of justice. Murphy and Nagel (2002) describe the tax system as the 'most important instrument by which a political system puts into practice a conception of economic or distributive justice.' In this sense, while philosophers tend to hide from the practical implications of their theories, fiscal principles inevitably appear on the horizon of any view of distributive justice. Sufficientarianism's view that the state must assure a certain minimum for all clearly provides the underpinnings of a tax-free income bracket (Frankfurt, 1988, 134-158). Luck-egalitarianism's appealing arguments, related to why unchosen elements should not define our opportunities, require (fiscal) governments to compensate for the effect of natural endowment within social environments, justifying a tax on the market value of people's talents (Dworkin, 1981; Roemer, 1993; White, 1999).[59] Equally, many Rawlsians depict progressive taxation as an elaboration of the difference principle, making those who are more fortunate contribute to those who are less well off (Thorndike and Ventry, 2002: 17).[60] An interesting newcomer in recent decades is left-libertarianism, which holds that whereas distributive justice ought to leave the gains generated by our personal labour untouched, resources like land, animals, water, minerals or coal are to be distributed equally. The latter boils down to marginal rates of 100% on what a person appropriates in excess of his equal share of the world's natural resources, and a 0% tax on profits generated by using those resources or one's personal talent (Vallentyne, 2000: 11-14).[61] Finally, Ingrid Robeyns' upcoming 'limitarianism' (2016: 1) states that it is 'morally objectionable to be rich,' and we have a moral duty not to have 'too much.' Justice, in other words, 'equals a top marginal taxation rate of 100%' (Robeyns 2016: 33) on everything we own or gain above a specific level.

All of these accounts of justice clearly condemn current fiscal politics. Each theory can provide separate moral arguments as to why our current tax codes – in which one's power in the

[59] Various fiscal proposals have been worked out by luck-egalitarians to compensate for luck in talent: Dworkin proposes an obligatory insurance system that makes the more talented pay a polis that gets transferred to the less talented, Roemer's egalitarian planner wants to divide the population into groups according to talent and apply different rates, and White's egalitarian earnings subsidy scheme equally applies rates on actual earned income that differentiate by earning potential.

[60] I mean here that some authors connect the difference principle with progressive taxation, and that indeed an argument *can* be made, as is done by Thorndike and Ventry (2002). Fried (1999: 184–186) also suggests that progressive taxation sits well within the Rawlsian framework. It has to be mentioned that many different tax systems can be part of a just Rawlsian society, and Rawls (1999a: 246) himself mentioned a preference for a consumption tax. Whether the difference principle is satisfied clearly depends on the overall social and economic structure of a society, not on taxation alone. As Freeman (2007: 229) points out, the appropriate tax scheme is defined by 'the application of these principles to the particular circumstances of a well-ordered society.'

[61] This is the classical form of left-libertarianism, which dates back to Henry George and Thomas Paine. It seeks to correct for the unfair appropriation of the world's resources through property taxes. It normally does not entail income taxes, as it does not wish to hamper the incentive to make use of these resources.

political process is the decisive element for the division of the tax burden – are unjust. Yet these theories proclaim alternative distributive *outcomes* that are completely independent of the decision structure that generates these results. Distributional objectives are debated in isolation, and taxation appears as a sort of 'black box' that can be called upon to install the normative goals 'without the need to consider the more detailed properties of the 'black box' itself' (Hamlin, 2017: 2). Disregarding how prevailing institutions actually make decisions, Buchanan and Brennan (2000a: 128) describe distributive justice as the question: 'If I were assigned the task of dividing the pie, what should I do?' Whether the answer lies in liberating those in need (sufficientarianism), compensating for circumstantial luck (luck-egalitarianism) or abolishing the wealth of those who have too much (limitarianism), distributions indeed appear to be something a single agent can choose (Buchanan and Brennan, 2000b: vxii). Likewise, in advancing distributive ideals, the orthodox philosophical approach often implies what we could call 'the benevolence postulate': certain state competences are necessitated by the distributive ideal, and this distributive agent is assumed to act spontaneously according to that goal (Wagner, 2016: 13) and fill in the given competences with a single-minded dedication to follow the dictates of distributive justice. The government's powers to tax talents, expropriate the rich, or define 'sufficiency' are seldom examined in the context of how it deals with opportunistic behavior, as the political subject(s) is – often implicitly – modeled to only slice the pie according the distributive ideal. Theorizing on romanticized tax theories, Buchanan and Congleton (2006: 87) state: 'nowhere in the whole of this approach to taxation is there any recognition that persons and groups will invest valuable resources in the politics that may operate to produce favorable or unfavorable tax treatment.'

Although these accounts can enlighten and guide properly motivated individuals, and be the subject of philosophical analysis, ideal distributive outcomes do not form a helpful point of departure for our more practical normative endeavor. Looking at how to improve real-world decision processes in fiscal matters, recommendations of justice commence with a descriptive analysis (Thrasher, 2014). If we want to carry the requirements of justice to the political level, we need to trace the empirical elements that actually characterize political reality (Buchanan, 2000b: 133). Modeling the political world that is actually deciding on the issue at stake requires taking into account at least two matters that are neglected in the traditional philosophical model. First, distributive decisions are never unilateral choices. Although despotic regimes are conceivable, the distribution of 'the pie' in democratic regimes is not decided by a single agent. In democracies, the division of fiscal obligations 'emerges' from a complex interaction of various individuals. Moreover, different parties will come to an agreement under the majority requirement. Their agreement will not be identical to any individual's preferred outcome, but will consist of a 'meshing' of the preferences of various parties.[62] In this sense, the democratic process is only expected to lead to a specific ideal outcome if all parties forming a majority hold it as their personal preference. The second neglected matter is that, although benevolence in politics is theoretically conceivable, fiscal reality illustrates that this assumption is shaky. More precisely, the question I am trying to resolve arises from the observation of the opposite, as empirical data reveals that distributions are no pure realization of any distributive ideal, but often result from the attempts of individuals who are decisive in the process to attain their own self-interest. Though a thorough description of the controversial tax rules that typify our current tax codes is beyond the scope of this article, the introduction reveals that the 'distributive agent' is not benevolent, and that individuals and groups adopt various strategies

[62] Just like many other social outcomes. Although no individual driver wishes a traffic jam, traffic jams do emerge from the sum of all behaviors of drivers under specific incentive structures.

to influence the distribution of fiscal shares in order to acquire private gain. Hence, I do not assume people undergo an ontological metamorphosis when they enter the political arena, and will therefore advance the 'economic postulate' within the legislative process (Buchanan and Musgrave, 1999). The sphere in which people find themselves does not alter their motivations, and the political arena (like the marketplace) can be consistently modeled as an environment with self-interested agents.[63] In this sense, the democratic process is only expected to lead to a specific ideal outcome if this ideal outcome also happens to serve the self-interests of the decisive parties. This rejection of the 'benevolence postulate' in public finance has two important implications. First, concerning benefits (i.e. public spending), the members of a society are expected to influence the political process to acquire the type of public goods they desire, and to maximize the amount (Buchanan and Tullock, 1999: 132–149). Second, in terms of costs (i.e. taxation), people will avoid expenses they do not want, and try to minimize the amount. This necessarily means that, under the assumption that their consumption of public goods remains equal, citizens will try to minimize their tax share (Buchanan and Congleton, 2006: 90).

On the basis of these assumptions, with the goal of modifying fiscal decision processes so that the outcome embodies the interest of all parties involved along the contractarian-constitutional requirements of justice, I address the phenomenon of rulemaking in fiscal matters. In particular, I examine how the rule requirements – the rules that regulate the validity of legislation – are constitutive for the behavior of legislators within fiscal processes, and thus for the type of consecutive legislation that will prevail in a democracy (Buchanan and Brennan, 2000a). In particular, I analyze the legislative dynamics under one form of rule requirement (**Section 3**). Based on this analysis, I elaborate what type of constitutional regulation is required (**Section 4**) to safeguard the general interest in tax matters.

3. The political economics of tax exemptions

3.1. Legislative patterns under a simplified majority constraint

In our search for the proper constraints for rulemaking, the following step models how individuals will behave under one type of fiscal decision rule. Moreover, I focus on a much-celebrated constraint in Western politics: the majority requirement. Under this requirement, for a tax policy to be legitimate, it needs to be approved by a majority of the voters. The operation of fiscal exemptions under this requirement deserves particular attention. According to the constitutional choice perspective mentioned in the introduction, rational individuals will want to have insights into the legislative patterns that tend to emerge when majorities dominate rulemaking and are allowed to tax different groups of people in different ways. As in Buchanan's *Calculus of Consent*, and later work from which I draw inspiration, I employ four simplifications (1999: 132-149). First, I assume a situation of direct democracy, in the sense that each citizen can vote on the legislation in question, in order to avoid addressing information problems or other complexities in a representative democracy. Second, I assume no constitutional control over the produced legislation: I isolate the emerging patterns under the majority rule. Third, I assume that a very strict spending policy prevails. Assuming the production of public goods that create an equal value for each citizen, I focus on the taxing part

[63] Note that this does not mean individuals have no other motivations. All that is required for studies of different consequences of different rules is that self-interest is *one among several* motivational factors. To focus on how different rules create different outcomes given the self-interested postulate, we are required to isolate the former, and thus model individuals as being *uniquely* self-interested.

of the 'fiscal exchange.'[64] Lastly, in order to focus on the particular incentives that different groups face, I limit the imaginary polity to three political and economic groups (Buchanan and Congleton, 2006: 30). How this stark and simplified model is valid to understanding real-world problems, as mentioned in the introduction, is discussed Section 3.2.

Imagine now the following situation: a Township has liberated itself from external dominance and is free to organize its own public system. Its spending policy is assumed to generate an equal amount of goods (for instance security, general road maintenance or a basic income) for each citizen.[65] The Township's funding decisions are to be decided by an unrestrained majority rule: policies that are supported by more than half of the inhabitants (i.e. 51%) are implemented. The Township has an economic product of 100,000 and can be socio-economically divided into three subgroups: **20 entrepreneurs**, each of whom earns 2,000 (40,000 total); **20 fisherman** (earning 1,750 each or 35,000 total) and **20 workers** (1,250 each or 25,000 total). For reasons of simplicity, I assume no economic growth. Due to the inheritance of previous legislation, a flat tax of 20% currently prevails, which raises 20,000 for the government. However, having gained sovereignty, new arrangements are possible. The outcome value of the government activity is estimated at 23,000 – raising a value of 383 per capita. From a public choice perspective, this levying rule would be particularly unstable. As I will describe, successive cycles of majorities will tend to emerge, which can be predicted to minimize their tax debt by using fiscal exemptions.

A first coalition is made between the fisherman and the workers, who historically had close ties. Forming a government – called 'labour' – they decide to put the general tax up to 22% (exacting 8,800 from the entrepreneurs) but to lower taxation for their own two groups to 19%. The general revenue during coalition labour is now 20,200, but the members of the majority contribute proportionally less.

Table 1: Coalition Labour

Group	Outcome from public action
Workmen	+145,5
Fishermen	+50,5
Entrepreneurs	-17

After a four-year term, the entrepreneurs manage to convince the workers to form a new alliance, called 'freedom.' They increase general taxation to 25% (extracting 8,750 from the fisherman) but 'in order for the economy to prosper', they opt for specific measures: the workers (4,750) maintain the tax break from labour, but the entrepreneurs (7,600) get a 'freedom break' of up to 19%, and can henceforth minimize their fiscal costs. Due to the extra contributions from the minority, the overall revenue increases – but this only causes a small increase in spending value to 23,500.

[64] Buchanan also isolates the funding part of the exchange from the expenditure. For instance, Buchanan and Tullock (1999: 137) focuses on spending decisions by a majority under the presumption of an equal property tax on all citizens, in, and on the reverse situation. Nonetheless, I acknowledge the two-sidedness of the fiscal account, i.e. that taxation is part of public economics *sensu latu*, and that the justice of taxation depends on the consequent distribution of public goods among the constituency. See for instance: Buchanan (2000b: 133-149).

[65] For reasons of simplicity, I also assume they realize the same subjective value from this consumption of public goods.

Table 2: Coalition Freedom

Group	Outcome from public action
Workmen	+154
Fishermen	-46
Entrepreneurs	11,5

The next term is ruled by a new coalition between the fisherman and the workers. Their project is called 'social justice.' To raise the level of basic income, they put a 'fairness tax' on entrepreneurs of 32% (12,800), and the fisherman (7,000) and workers (5,000) get a 'fairness exemption' down to 20%. The additional revenue – now 24,800 – gets spent poorly (value: 24,000). Collective action is a societal loss, but is profitable for members of the majority, who pay 12,000 but consume 16,000. This is in sharp contract with the entrepreneurs, who pay 12,800 but consume only 8,000.

Table 3: Coalition Social Justice

Group	Outcome from public action
Workmen	+150
Fishermen	+50
Entrepreneurs	-240

Before the Township loses its sovereignty, due to bad economic results and internal struggles over fiscal issues, a final coalition is made between entrepreneurs and fisherman called 'green.' Their tax program abolishes both the 'fairness exemption' for workers and the higher basic income, and introduces a general 'environmental tax' of 35% (extracting 8,750 from the workmen). However, to give entrepreneurs the leeway to adopt new ecological techniques, they get a tax break of 22% (8,800). The fishermen (7,000) are able to retain their 'fairness exemption' in this government. These fiscal measures do not create any surplus, and the value of public spending falls back to 23,000. At this stage, public policy ceases to be beneficial, *even for the majority*, since it consumes 15,333, but contributes 15,800. Nonetheless, the coalition is soothed by the fact that the fishermen maintain their tax breaks, and that the entrepreneurs better their situation sharply: whereas they lost 4,800 under the 'social justice' scenario (paid 12,800, consumed 8,000), this cost is now minimized to 1,134.

Table 4: Coalition Green

Group	Outcome from public action
Workmen	-54,5
Fishermen	+33
Entrepreneurs	-57

The previous cycles of coalitions are instructive to understand the political behavior that will occur under a weak majoritarian restraint. *Ab initio*, the entrepreneurs, workers and fisherman all agree to taxation to provide some public goods: they all calculate some public provision of

security, general road maintenance or a basic income to exceed possible costs. However, this initial prospectus gets trumped by the opportunity of coalitions under majority rule: while all parties could benefit from cooperation, each individual party could benefit maximally by shifting the costs of the public goods onto the other party. The following patterns emerge under the unrestrained majority rule:

1. Since there is no substantive constraint, each party is tempted by a 'take-all scenario.' Under the hypothesis of an equal benefit model, self-interested agents are incentivized to engage in *fiscal exploitation*, meaning they build coalitions until a majority has been formed, and realize profits by transferring the cost of public goods to the minority (Buchanan and Tullock, 1999: 139). This is exemplified by the labour coalition.

2. This dynamic leads to a situation in which Pareto-inferior public activities become profitable for majority coalitions (Buchanan and Tullock, 1999: 141-142, 168; Gwartney and Wagner, 1988: 18). Since the (fiscal) revenue exceeds the spending value, at the societal level collective action is loss making for the community. Nonetheless, as they can shift the fiscal burden onto those outside the realm of power – i.e. fiscal exploitation – public action continues to be cost effective for those in government, as illustrated by the 'tax justice' coalition.

3. Flowing from the previous, the practice of discriminatory taxation tends to encourage public overinvestment (Buchanan and Tullock, 1999: 166; Gaus, 2011: 544). The ruling majority will only appreciate its own marginal costs when judging increments in public spending. Since these costs can be minimized due to externalization via tax exemptions, there is an incentive for deficit spending. For instance, the tax reform from the 'tax justice' coalition is not profitable, meaning that total revenue (24,600) exceeds total spending value (24,000), yet it appears so for the majority.

4. Importantly, over time, this process will turn tax policy into a *negative-sum game*, even for the majority (Gaus, 2011: 542; Gwartney and Wagner, 1988: 19). The horizon of possible options of each member is dominated by the justified fear of ending up in the minority, which can only be avoided by being in the majority (Buchanan and Congleton, 2006: 91). Once they end up in the majority, members of each coalition have a strong incentive to shift the fiscal burden onto the minority. Within a dynamic perspective, the chain of successive formations of fiscal exploitation will cause rising general taxation. As the 'green' coalition illustrates, this leads to the point at which majorities do not even gain in absolute terms, but simply profit by avoiding an even bigger loss. Public policy turns into a game of cost minimization, rather than creating advantages for each member.

As the above-mentioned scenario points out, fiscal legislation under majority rule can be simplified as a variant of the prisoner's dilemma: while cooperation pays, cheating is encouraged. Moreover, since there is no assurance that the other party will not cheat (i.e. create a tax benefit) in the next round, each government is pushed to create a fiscal benefit when feasible. Table 1 depicts the dilemma of one-shot majoritarian coalitions.

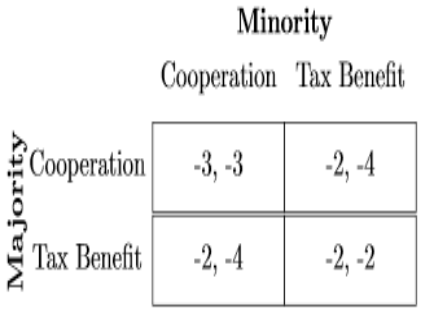
Figure 1: Tax exemptions as a prisoner's dilemma in a one-shot scenario

		Minority: Cooperation	Minority: Tax Benefit
Majority	Cooperation	1, 1	-1, 2
Majority	Tax Benefit	2, -1	0, 0

A and B represent a majority and a minority, respectively. Majority A can think of a cooperative scheme that equates the costs of public goods for society as a whole, represented by Cell I. Although cooperation pays, the majority can benefit the most by lowering taxation on its own group and shifting the costs of public goods onto the minority. Moreover, rational agents are expected to opt for the options mirrored in Cell III. As highlighted by Buchanan and Congleton (2006: 28), prospective majority coalitions will always select an alternative that will generate distributional advantages for their members. The result is that legislation takes the form of a 'taking': one party wins by extracting from the other.

Figure 1 only partly describes the mechanisms produced by majority rule, as it focuses on the one-shot scenario, in which a game of winners and losers emerges. Importantly, given the occurrence of various cycles, the institutionalization of tax benefits as exemplified by successive governments creates a dynamic whereby *everybody loses* – even those in the majority (Gaus, 2011: 542). Moreover, everybody will be in the minority at some point, and thus become subject to fiscal extraction. What is more, the game established by tax exemptions under a weak majoritarian constraint creates a 'downward spiral.' As mentioned by Hayek (2011: 441) and Gaus (2008: 195), majorities lack incentives to explicitly consider the long-term significance of their decisions. In the competitive and aggressive competition for tax exemptions, the biggest threat is being in the minority. Short-sightedness is rational, and the agents of each successive government have a strong incentive to cheat. In the long run, this 'rational' succession of tax exemptions, ever-rising tax rates and public overinvestment (due to the externalization of costs) will render the provision of public goods a negative-sum game, leading to situation in which all members will lose in absolute terms, though they will lose relatively different amounts (Gaus, 2011: 545). Within each game (i.e. one-shot majoritarian coalitions) parties will compare their tax level with that in the former government and with that of the other group, rather than with point 0 or some economic optimum. Although the 'green' coalition contributes more than it receives, it is still better off than the minority. So, after a sequence of games, collective action will tend to represent an absolute loss, which will inevitably turn out to be an absolute loss for each member, i.e., both the majority and minority. Figure 2 depicts the options the players face at that point.

Figure 2: Tax exemptions as a prisoner's dilemma after various cycles of majoritarian coalitions



3.2. Legislative patterns in a complex majoritarian democracy

Why would rational participants be hopelessly trapped in the game? After all, individuals have a certain interest in withholding from fiscal exploitation, as they are aware that political gain in this round can be met with severe extraction in the next one (Buchanan and Brennan, 2000a: 135). The incentive to overcome the dilemma is strengthened by the long-term destructive effects of exploitative majorities. Indeed, empirical work (Ostrom and Ostrom, 2014: 167-209) suggests that groups are actually creative and often solve social dilemmas by setting up complex arrangements that monitor and sanction the use of common resources. For a couple of reasons, prevailing politics do not, and are not predicted to, solve the conflict. As repeatedly found in institutional economics (Buchanan, 1965; Ostrom and Kizer, 1982: 71), the emergent individual strategies are also determined by the *number of individuals*. Because of the intimate relationship between one's own behavior and the expected choices of others, small groups foster cooperation (Ostrom et al., 1994: 319). However, with an increase in the size of the group, individuals become anonymous parts of big entities, and realize that their own 'ethical' choices do not increase the probability that others will follow the norm (Buchanan, 1965: 9). Hence the possibility of enforcing cooperative strategies through social interaction diminishes starkly in a polity of millions of people (Ostrom and Ostrom, 2014: 190). The incentive to defect further increases as the *number of factions* grows. In a three-group game, the fiscal duty of each party and the costs of fiscal exploitation are both identifiable and substantial. As society becomes more complex, majority legislation is expected to take the form of a compromise between various successful groups, and to involve adopting a list of tax benefits that result in huge profits for the beneficiaries and small costs for everyone else (Butler, 2012: 62). Self-governance through communication and informal sanctioning becomes highly unlikely in a complex legal order in which an interminable range of exemptions, obtained by unidentifiable individuals, exerts marginal and incalculable costs on the total group (Ostrom and Ostrom, 2014: 181, 193). This effect is exacerbated by the institution of *representative democracy*, whereby individuals secure their interests indirectly by trading votes for fiscal favors (Butler, 2012: 58-59). This 'exchange' decreases the chances of monitoring, as information asymmetry results in a situation in which the vast majority has no knowledge of the fiscal rules, or their destructive effect.

So reality is no doubt more complex than the model, but, unfortunately, not in the sense that we could expect a solution to merge out of the game endogenously. Despite the prevalence of some constitutional principles, or real-life examples of successful political reform, I believe the

model successfully explains the *essence* of tax policy in a majoritarian democracy. The behavior of political agents and subsequent legislative patterns are a function of the rules that define when a valid agreement has been reached (Buchanan and Brennan, 2000a: 3). Moreover, any system in which economic matters are decided by anything less than unanimity, in the absence of any other constitutional requirement, creates the possibility of private gains for some, at the expense of others (Buchanan and Tullock, 1999: 85-96). In fiscal matters, the opacity of an unrestrained majority rule regarding the division of fiscal shares creates and attracts profit-seeking political groups (Buchanan and Tullock, 1999: 285-286). An infinite array of political profits appears on the calculus of different groups in society, as fiscal extraction can be realized by finding partners with which to build a majority that adopts various fiscal privileges for the respective groups, the costs of which can be shifted to the rest of the constituency. This pressure for private gains from majoritarian procedures helps us understand the prevailing fiscal institutions described by the tax literature (Peeters et al., 2017). In particular, the aggressive struggle for benefits, the emergence of the booming lobbying industry, the segregation of the electorate into voting blocs, the ability of small interest groups to capture concentrated benefits while dispersing marginal costs, a chaotic tax code riddled with a maze of exemptions and deductions, and the appearance of many loopholes are patterns generated by an unrestrained majority rule. In the emergent state of legal anarchy, a general distrust in (fiscal) politics complicates the situation even further (Ostrom and Ostrom, 2014: 192).

4. Tax uniformity as a constitutional tool

4.1. The quest for justice: enter the constitutional perspective

The majoritarian scheme induces parties to engage in fiscal extraction from the rest of society – ultimately transforming collective action into a negative-sum game. This procedure degrades politics to an arena of conflict in which all parties enter into an exploitative logic – to the detriment of the whole community. This analysis brings us back to our main aim: to create a sphere of fiscal politics that is immunized against these exploitative activities and generates acceptable results for all participants. Given the former, we need to focus on which types of constraints can rescue the game so that the players are not programmed to engage in exploitation. While each member of the Township will participate in a 'downward spiral' at the political level, at the constitutional level discussed in the introduction, each member wants to design a system of collective action that cultivates prosperity and promotes the overall interests of all participants (Buchanan and Tullock, 1999: 285; Thrasher, 2014: 37). To help answer this question, it is useful to refocus on the problematic case. Looking at both the Township and current fiscal politics, there are two crucial elements at work.

First, each player has *knowledge of his or her own situation*. The Township and our society are composed of combative interest groups that are formed around particular characteristics such as income and type of business. Economic characteristics are prevalent, and members with equal legal (workers, entrepreneurs, functionaries or unemployed groups) or economic (earning power) status will coalesce into separate political parties, factions within a party, lobby groups or more informal interest groups. Cartels will thus revolve around a shared characteristic, which will form the benchmark for each faction to calculate the potential pay-offs of the political measures at stake. As evident in the situations of fiscal anarchy described above, each group will *isolate its situation* in order to calculate its profit on a particular issue.

The observation of this process relates to what John Rawls had in mind when he construed his 'veil of ignorance' behind which rational agents would be ignorant about their social position,

income, talent, ethnicity or view of the good life (Rawls, 1999a: 11). Indeed, the 'original position' distinguishes itself from the Township and our societies because, due to a lack of knowledge regarding their own economic or ethical interests, individuals in the original position cannot advance proposals tailored to their personal situation (Gaus and Thrasher, 2015: 46). Instead, these individuals are optimally positioned to choose the principles of justice, meaning that 'no one is able to design his principles to favor his particular condition' (Rawls, 1999a: 11). Rawls' contribution indicates that from a contractarian-constitutional perspective, procedures where dominant partisan interests determine the division of the fiscal burden are not acceptable.

While the endeavor of this paper is Rawlsian in many regards, it has a more practical objective.[66] Rawls models an imaginary constitutional choice process, populated by participants who are blinded on whether they are workmen, fishermen or entrepreneurs. In this paper, constitutional principles are chosen within a more realistic contractual setting, in which participants are aware of whether they are workmen, fisherman or entrepreneurs, yet logically uncertain about their position under prospective majoritarian cycles and their future income streams.[67] Another nuance relates to the content of the agreement. Whereas Rawls identifies the conclusive principle that ought to regulate the distribution of economic shares in society, I examine which *procedural constraints* could improve the democratic choice process *when its members are deciding* on a distributive issue. Therefore desired end-state distributions of income, for instance those maximizing the amount of goods for the least advantaged, do not represent my first aim. I am looking for rules that promote the interest of all players, irrespective of the substantial conception of justice that will drive their future factions.[68] While modeling decision-makers as ignorant of their position, talent and view of the good life is theoretically powerful, it remains a thought experiment: participants deciding on the distribution of fiscal shares are not actually choosing behind a veil of ignorance. Thus while looking for procedural regulations that could enhance the operation of real-world decision processes, I have to acknowledge that collective action will be decided by people with knowledge of their own situations. Nonetheless, a second element is at stake in real-life situations and in the Township. Not only do people tread on the political level with knowledge of themselves, cartels are formed around rules that cover this particular situation. What defines the individual calculus in the political arena is not only that participants know themselves, but equally the *responsiveness* of legislation *to* this situation. The type of legislation that emerges in the Township – and in our current tax codes – distinguishes between locational, professional, financial, industrial and behavioral elements. Indeed, where thought

[66] By this I mean that constitutional principles can only be discovered by a rational choice process in which participants choose principles under some form of uncertainty. See Gaus and Thrasher (2015).

[67] In other words, in order to reveal the true principles of justice, Rawls employs 'ignorance' – a condition under which imaginary choosers have no knowledge of their own identity. Here, I introduce a realistic yet limited form of 'uncertainty': players have full information on their current circumstances, yet, due to the permanent or quasi-permanent nature of constitutional rules, they are unaware of their specific position under the operation of the prospective alternatives, and thus of the precise effect of the alternatives on their future situation. Yet remarkably, Rawls did not always assume a veil of ignorance. In 'Justice as Fairness' (Rawls 1999b: 47–72) he characterizes the original position as a setting in which players have full information of their circumstances. See also Gaus and Thrasher (2015), Buchanan and Brennan (2000a: 46) and Buchanan (2000b: 146, footnote 7).

[68] By this I do not mean that the situation of the poor should be maximized, or that the gap between rich and poor should be minimized. The requirements of justice I am aiming for need to be compatible with individuals holding various (unknown) preferences over specific outcomes. Therefore my test does not aim to 'create' a specific outcome, but merely to 'discover' practical procedures that avoid outcomes as characterized in the introduction and, more positively, to promote outcomes that are acceptable to all positions. On procedural evaluation and value subjectivity, see Brennan and Hamlin, 1995: 290–291. I further discuss the effect of material principles of justice in Section 5.

experiments rule out knowledge regarding personal characteristics, these elements are brought into existing politics as decisive yardsticks for the application of rules.

It is one thing to accept that people enter the political arena as real people, with knowledge of their circumstances and goals, yet it is quite another to accept that these particularities are objectively embedded in the law as decisive conditions for the differential application of a rule. This leaves us with one remaining possibility – to cut the string on the rules side. The rule requirement that deserves attention is not that rules are created by people who are ignorant of their characteristics, but that the *rules themselves* do not refer to such characteristics, and hence apply to all members equally (Rawls, 1999b: 54).[69]

4.2. The virtues of generality in taxation

The range of options that arises when parties negotiate on legislation is a product of the procedural rules that define a valid agreement. And a participant's calculus can be expected to revolve around such options that emerge on the horizon of possible agreements. But what if the object of that calculus (i.e. prospective legislation) is required to be indifferent to any personal, economic or worldview-like characteristics, and to apply to all members of a given jurisdiction equally?

4.2.1. Generality as an ethical certificate

This generality requirement builds a minimal ethical standard into legislation (Rawls, 1999b: 54).[70] It precludes the assignment of privileges, where those in charge take advantage of their momentous power to promote only their liberty or restrict only the behavior of others. Whereas majority ruling will always entail both rulers and legal subjects, the constraint at stake assures that the rulers respect the fundamental notion of equality – and thus create rules that apply to all members equally. The type of agreements that will subsequently govern society will be reciprocal: the legislative rights and duties will be distributed equally to both the majority and minority. The ethical value of generality, and its implications for the assignment of equal liberties, is clear-cut. Imagine, for instance, an Islamophobe party using the political field to halt the influence of Islam in public. One very effective measure might be to limit the freedom of speech for any kind of opinion that relates to the Koran – a possibility under the unrestrained majority rule (Buchanan and Congleton, 2006: 6). Under the requirement of generality, such a measure vanishes as a possible agreement, even if it had majority support. The only variant of the measure could be to limit the freedom of speech for all worldviews equally. The Islamophobe factions in society can only restrain Muslims in a mutual exchange in which they forfeit their own worldview in an equal fashion. It is easy to see that generality forms an important ethical check on the political–legislative stage. The demand that governments and legislators need to formulate Kantian maxims rather than discriminatory measures rules out the most severe forms of injustice that the rather amoral majority rule could produce. It ensures that minorities will be respected in matters in which majority members would like to be respected themselves.

[69] Rawls, when employing a model affiliated with the one here, equally stretched the importance of the requirement of generality: '… each person will propose principles of a general kind which will, to a large degree, gain their sense from the various applications to be made of them, the particular circumstances of which being as yet unknown' (1999b: 54). For an extensive elaboration, see Gaus and Thrasher (2015: 45). Here I investigate the specific value of these kinds of requirements.

[70] See 'Justice as Fairness' in Rawls (1999b: 54): 'having a morality must at least imply the acknowledgment of principles as impartially applying to one's own conduct as well as to another's.'

4.2.2. The meaning of generality in tax matters

The Kantian demand to think of legislation that would be desirable as universal law is more than a pure deontic maxim. The fundamental precept that decisions generated by the subset of persons that make up the government need to 'apply equally' to everybody is intended to promote the interests of those who are outside that membership, alongside the contractarian-constitutional demands outlined in the introduction. Nonetheless, the precise translation of generality into tax matters remains unresolved. To engender outcomes acceptable to all positions, decisive majorities can only pass tax rules that do not distinguish between personal circumstances, and apply equally throughout the constituency. But how do we operationalize that demand? Furthering on the dominance of income taxation in many legal systems (Bhandari, 2017: 2), I analyze the constraint that majorities 'need to tax income equally': what proposition demands universal application here? I explore three options here: (1) an equal rate, asking the same proportion from each participant; (2) an equal absolute number, asking the same amount of money from each participant; or (3) an equal progressive structure, applying the same system of differentiated rates for different income brackets, to each participant. The alternative patterns in fiscal outcomes this generates will be illustrated by going back to the Township.

1. Tax uniformity

I define generality as **tax uniformity** or the equal-rate principle (rather than, for instance, an equal absolute contribution or progressive rate structure). A majority can impose any tax rule, as long as it consists of a tax rate that applies to all members' incomes equally. Each faction is now determined to calculate its preferred policy within the confines of a strictly uniform applied rate.

Figure 3 : Distributive options under tax uniformity

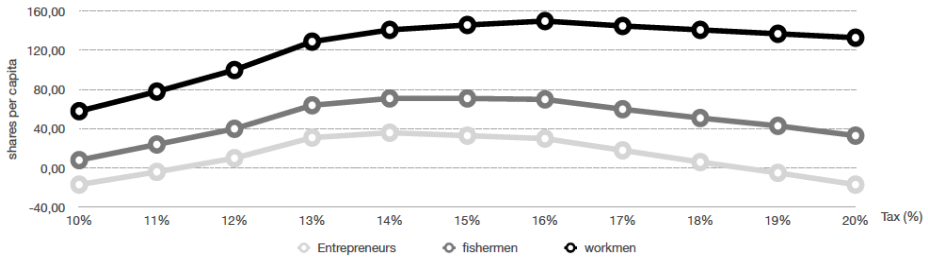


Figure 3 shows the consequence of the strict symmetrical distribution of tax shares : a tax rate that is profitable for one group tends to create acceptable results for other groups as well.

Table 5: Distributive options under tax uniformity

Revenue	Spending value	Shares per Entrepreneur (input vs.output)	Shares per Fisherman (input vs.output)	Shares per Workman (input vs.output)
10% tax	11.000	200 and 183 (-17)	175 and 183 (8)	125 and 183 (58)
11% tax	13.000	220 and 216 (-4)	192 and 216 (24)	137 and 216 (78)
12% tax	15.000	240 and 250 (10)	210 and 250 (40)	150 and 250 (100)
13% tax	17.500	260 and 291 (31)	227 and 291 (64)	162 and 291 (129)
14% tax	19.000	**280 and 316 (36)**	245 and 316 (71)	175 and 316 (141)
15% tax	20.000	300 and 333 (33)	**262 and 333 (71)**	187 - and 333 (146)
16% tax	21.000	320 and 350 (30)	280 and 350 (70)	**200 and 350 (150)**
17% tax	21.500	340 and 358 (18)	297 and 358 (60)	212 and 358 (145)
18% tax	22.000	360 and 366 (6)	315 and 366 (51)	225 and 366 (141)
19% tax	22.500	380 and 375 (-5)	332 and 375 (43)	238 and 375 (137)
20% tax	23.000	400 and 383 (-17)	350 and 383 (33)	250 and 383 (133)

Table 5 depicts the feasible options (the columns display the inputs and outputs of each group, and the optimal tax level is indicated in bold) for each group for a certain rate, under the general observation of both increasing and decreasing marginal utility (cf. 'spending value') of public goods.

As discussed previously, under the unrestrained majority rule, an interminable range of legislative measures can potentially produce pay-offs for each group. Moreover, each majority formed could literally 'invent' endless legislation to improve its situation. Table 5 reveals how the landscape of possible political agreements for coalitions is sensibly limited by the uniformity restraint. Moreover, uniformity demands strict symmetrical contributions from all members: when a proportion of income is exacted from one member of society, the same share will be imposed on other members. This crucially alters the legislative dynamic in three ways:

1. The optimal tax rate for each group is not undetermined or dependent on how much one can make others pay, but appears a priori as a *given number* (i.e. the 'single-peaked preference,' which is indicated in bold for each group). Crucially, this preference *automatically determines* the tax duty for the other groups. The workmen's preference does not depend on in-game negotiations: their desired rate is 14%, and uniformity will force them to propose 14% for the entrepreneurs as well.

2. It is particularly remarkable that the preferred tax rates for the three different groups tend to congregate around the same point. Where in the previous situation the range between different rate levels greatly enlarged (e.g. entrepreneurs paying 35%, the rest contributing 22%), the confines of uniformity limit this range to only 2% (between 14 and 16). It is easy to see how any majority coalition would put taxation within that range. Henceforth, majority under a generality will more heavily favor the median voter's preference (Buchanan and Congleton, 1999: 137).

3. Whereas under an unrestrained majority rule the optimal options for one group represent severe losses for another group, here the optimal numbers for each group separately are also profitable options for the other group. Moreover, the 'minimum optimum' (i.e. entrepreneurs favoring 14%) and the 'maximum optimum' (i.e. workers favoring 16%) both include profitable options for each member.

Abstracting somehow from our Township, the precise economic effects of uniformity undisputedly depend on the distribution of income throughout the population, the given preferences regarding the activities of the state and the value of the public goods produced. At the level of constitutional choice, individuals do not have knowledge of these matters. From their perspective, they will need to screen three general working properties of uniformity:

1. Uniformity *minimizes fiscal exploitation*. Moreover, no player can abuse his political power by purely taking from the relatively powerless. In respect of the symmetrical distribution of tax shares, any rise in taxes on minorities will be paralleled by an equal proportionate rise in tax shares on the player's own group (cf. Figure 3). As such, generality-as-uniformity tends to promote ***fairness*** since the harm a measure could cause to *others* becomes internalized in the calculus of the rulemaker as a *personal* cost.

2. The majority will extend the size of the budget only to the point at which marginal benefits to the majority are estimated to equal marginal taxes on the majority (Buchanan, 2000b: 142). Since governments properly internalize their costs, generality induces efficiency throughout public action. This means that overall, loss-making projects (cf. coalition 'tax justice') become equally costly for majorities. The ruling majority will contribute proportionally when judging increments in public spending, which *discourages overinvestment* (Gwartney and Wagner, 1988: 18).

3. Although there is no assurance that each application will always be beneficial to each income group, since such benefits depend on specific political-economic particularities, uniformity, as a general rule, promotes *positive-sum games*. Under the symmetrical assignment of tax shares throughout the constituency, options that appear profitable to the government have a relatively high chance of being beneficial to those outside the realm of power (Cf. Figure 3). As such, the uniform application of tax rates throughout the constituency promotes **general efficiency**, as it spurs majorities to opt for policies that hinge on the direction of the Pareto frontier.[71]

2. Lump sum taxation

The second option regards the equal distribution of an absolute number, often coined 'lump sum taxes.' The expected outcomes are a function of the rules defining how majorities can make valid fiscal legislation. Looking at the Township, which pattern of outcomes can be predicted when majorities are restrained by the universal distribution of an absolute number? In Table 6, the rows represent the same overall revenue and personal benefits from public action as in the previous option, yet now this is generated by the universal exaction of an equal amount of money (cf. 'input').

[71] Efficiency is conceptualized here as the Pareto norm: no one can be made better off without making someone else worse off (Gaus: 2010). Uniformity compensates for the departure from the unanimity requirement within a majoritarian democracy (Buchanan, 2000b: 145–146).

Figure 4: Distributive options under lump sum taxation

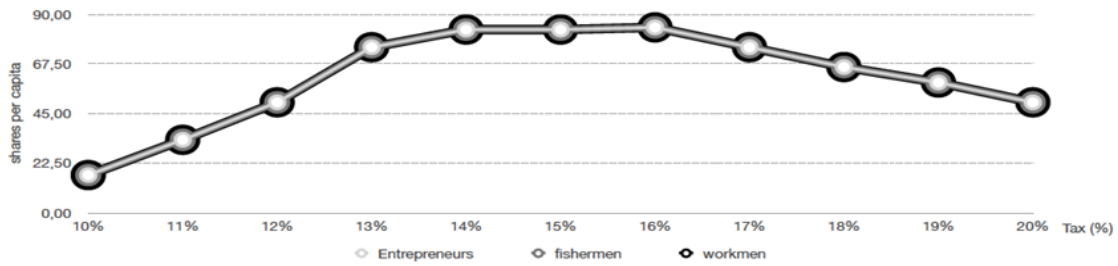


Figure 4 shows the consequence of demanding an equal absolute number from each group : each tax policy generates the same absolute amount of profits each group.

Table 6: Distributive options under lump sum taxation

Revenue	Spending value	Shares per Entrepreneur (input vs.output)	Shares per Fisherman (input vs.output)	Shares per Workman (input vs.output)
10% tax 10.000	11.000	166 and 183 (17)	166 and 183 (17)	166 and 183 (17)
11% tax 11.000	13.000	183 and 216 (33)	183 and 216 (33)	183 and 216 (33)
12% tax 12.000	15.000	200 and 250 (50)	200 and 250 (50)	200 and 250 (50)
13% tax 13.000	17.500	216 and 291 (75)	216 and 291 (75)	216 and 291 (75)
14% tax 14.000	19.000	233 and 316 (83)	233 and 316 (83)	233 and 316 (83)
15% tax 15.000	20.000	250 and 333 (83)	250 and 333 (83)	250 and 333 (83)
16% tax 16.000	21.000	**266 and 350 (84)**	**266 and 350 (84)**	**266 and 350 (84)**
17% tax 17.000	21.500	283 and 358 (75)	283 and 358 (75)	283 and 358 (75)
18% tax 18.000	22.000	300 and 366 (66)	300 and 366 (66)	300 and 366 (66)
19% tax 19.000	22.500	316 and 375 (59)	316 and 375 (59)	316 and 375 (59)
20% tax 20.000	23.000	333 and 383 (50)	333 and 383 (50)	333 and 383 (50)

Table 6 depicts the feasible options (the columns display the inputs and outputs of each group, and the optimal tax level is indicated in bold) for each group for lump sum taxation, under the general observation of both increasing and decreasing marginal utility (cf. 'spending value') of public goods. The optimal tax level for each group is indicated in bold, being a contribution of 266.

The distributional outcomes generated by lump taxes have much in common with uniform taxation. The optimal tax level for each group is single peaked (each group has only one preference), and discretion over another's tax liability is foreclosed: what is optimal for one group automatically generates the tax duty for the other groups. Even more, the optimal tax level now is simply the same for each group (i.e. 266, the equivalent of a 16% tax in the previous example). Lump sum contributions put taxation on a par with markets, as taxes function as 'shadow prices for goods and services provided by the state' (Fried, 1999: 160) and henceforth limit overinvestment (Buchanan and Congleton, 2006: 93).

Yet a careful analysis of Table 6 reveals that some change *did* occur. The optimal tax level is now a universal exaction of 266. Compared to a uniform tax, which generates the same amount of output benefits for each member (i.e. 350, see row 16% in Table 5), lump sum taxation involves a tax cut for entrepreneurs of 54 (they pay 320 under a uniform tax) and a tax raise up to 66 for the workmen (who pay 200 under the uniform tax). From a comparative perspective, a lump sum tax holds as a transfer of liabilities to the lower-income groups. But even when assessed on its own merits, taxation in absolute numbers fails to hold as an 'equal treatment'. Due to its insensitivity regarding how much a person earns, taxation in absolute numbers is specifically harsh on the workmen: 250 out of 1,250 vs. 250 out of 2,000 for the entrepreneurs.[72] Although no one can precisely draw the curve, the existence of a negative marginal utility of income is intuitively and empirically sound: the first dollar earned has a higher subjective value than the 2.000th dollar earned. Admitting the variance in interpersonal utility curves, at a general level, one can nonetheless state that under lump sum taxes, the lower an individual's income flow, the more value they will transfer to the common fund.[73] Because of this, the first working property of lump sum taxes is – again, generally speaking – that they create at least some *distributional bias in favor of the higher-income groups*. A second operational element is, however, more relevant to the current discussion. Not only do lump sum taxes entail a distributional bias, at the extreme, lump sum taxes empower the richest group to squeeze the lowest-income groups dry. Even in our fairly income-even Township, the entrepreneurs and fishermen can put the tax at 1,250, to the detriment of the workmen. Now imagine the workmen earn 1,000, the fisherman 20,000 and the entrepreneurs 50,000. Here the latter two groups can put the lump sum at 1,000, hereby expropriating the workmen of all income, without experiencing severe losses themselves. Interestingly, such an unfair practice is ruled out under uniformity: taking everything from the workmen is checked by being stripped oneself.[74] Hence, due to the *unequal effect* (caused by its blindness regarding how much a person earns), not only will a lump sum tax realize distributive gains for the higher-income groups. When they fall outside the dominant coalition, lump sum taxes put the *lowest-income groups at the political mercy of the rest of the constituency*. From a contractarian-constitutional perspective, when selecting procedures leading to outcomes that are acceptable to various positions, parties will want to prevent this risk.

3. Progressive taxation

The higher one's income flow, the less one is affected by an absolute contribution. But does this insight not demand us to go further than a universal rate structure? One could say 25% of 1,000 is not the same as 25% of 10,000. Indeed, the negative marginal utility of income has also been advanced to justify progressive taxation: the higher the income, the less one sacrifices, and thus the higher the required marginal rate (Diamond and Saez, 2011; Hettich and Winer, 1999: 112). Additionally, if not a translation of equal treatment, its justification lies in redistribution: progressive rates as a means of demanding more from those who are more fortunate, arguably an application of the demands of fairness (Thorndike and Ventry, 2002: 17).[75]

[72] A seminal insight of this kind convinced J.S. Mill to state that everybody should bear the same utility loss and to elaborate his 'equal sacrifice' principle. See Mill (1917: 804).
[73] In other words, the estimation is that the interpersonal variance in utility curves does not suggest that individuals, choosing the constitutional principles of taxation, would deny this insight.
[74] Majorities could do this when they are able to discriminate in terms of spending, which they are not in my example. See Buchanan and Brennan (2000b).
[75] See footnote no. 6 in Section 2.

I do not seek here to determine whether these theoretic justifications do in fact support progressive taxation.[76] I focus instead on *expectable* outcomes once tax rules are unleashed in real life. It is possible that those deciding on the distribution of tax incidence will be dedicated to the principle of marginal utility, and the doctrine of equal sacrifice when voting on tax brackets and tax rates. They might also be inspired by theoretic schemes of redistribution, stating the point at which the richer classes should transfer higher amounts to the common fund. But this paper started with the observation that groups are often driven by more profane considerations. Progressivity crucially alters the nature of the alternatives that appear on an individual's calculus. In particular, the ability to tax different income brackets at different rates gives majorities renewed power to transfer the fiscal burden onto other groups. Going back to the Township, the constraint of progressivity allows the workmen and fishermen to, say, put a rate of 15% on the 'first' 1,750 any person earns, and a universal rate of 76% on the second bracket, above 1,750. Note that this would create exactly the same distribution as under the 'social justice' coalition: workers' pay 5,000, fisherman 7,000 and entrepreneurs 12,800, with societal overinvestment and severe losses for the entrepreneurs re-occurring in the public domain.

Table 7: Distribution under progressivity

Group	Outcome from public action
Workmen	+150
Fishermen	+50
Entrepreneurs	-240

The example above signals progressivity's weaknesses *compared to* the uniformity account. Moreover, the legislative liberty to tax different income brackets at different rates will generate asymmetrical distributions of tax shares between different income-groups. As the choice of one's own tax liability does not automatically determine the excise applicable to other income groups, politically dominant coalitions have discretion to realize pure distributive gains. As the example suggests, lower- and middle-income groups are incentivized to maximize profits by shifting the burden of public action onto the high-earning minority. This reignites, albeit to a more limited degree, the issues to which uniformity appeared as a check, since fiscal exploitation, overinvestment and the problem of inefficiency (meaning the rule does not promote outcomes that are beneficial to all members) will characterize the domain of public action. Nonetheless, compared with the practice of fiscal exemptions and the prevailing legal arrangements, progressive rates, when applied universally, clearly represent an improvement. First, groups are only allowed to differentiate the applicable rate on the basis of one element: income. Second, the differentiation of fiscal duties is clearly limited, as it only applies to a proportion of the income of a specific group, i.e. the portion that exceeds a specific benchmark cut-off, here 1,750. This means that under progressivity, fiscal extraction becomes more visible

[76] In particular, equal sacrifice does not necessarily entail progressive taxation, as proportional (or uniform) taxes could 'catch' the effect of decreasing marginal utility, since proportionality clearly demands more from those who have higher income flows. The elasticity of marginal utility needs to be relatively high for it to justify progressive taxes, and many authors gauge uniform taxation to be sufficient to satisfy the equal sacrifice principle. See Young (1990: 255); Samuelson (1947: 247).

as it demands comparatively high rates. In current politics, progressive rates on all income would be a step towards more generality, and represents a reasonable account of generality.

The essential question that remains is thus whether risk-averse contractants with limited knowledge about their future position prefer the 'political security' not to be discriminated against and the economic benefits offered by uniformity, or whether they opt for 'socio-economic security' for low- and middle-income groups to benefit from the distributive bias delivered by progressivity. Answering this question requires gauging both the negative and positive spillovers of both institutions, and thus falls outside the scope of this article. The true answer may even be beyond the scope of theory, as the very trade-off it implies can only be performed by real people. After all, rational choice models are nothing but a simulation of real choice.

5. On distributive justice and taxation: some concluding remarks

Barbara Fried is right: to the extent that distributive justice is about proclaiming distributive ideals, tax uniformity fails to be *any* account of justice. And those ideals are not without value: *if* we could divide the pie ourselves, we would likely not ask the same proportion from people holding different sized pies. The particular insensitivity that tax uniformity generates with respect to each person's biological endowment, economic level or source of income seems to run against the core of many theories of justice that have been developed in recent decades.

That said, Amartya Sen (2009: 22, 67, 86) claims that theorizing about justice needs to focus on how social structures *actually* work – and not on how we imagine they work in thought experiments. In this way, tax justice is not something 'out there', waiting to be objectified by a benevolent despot. In reality, there is not only one person slicing, and the majority that makes up the slicing committee likes pie too. The relevant question is not to imagine what one would do 'if' only he were decisive in the slicing process. Although once in a while academics go into politics, if tax justice is ever to be realized, it will 'emerge' from a process in which multiple, mainly self-interested, agents settle the distribution of tax shares against a prevailing set of rules. Justice, according to this account, is not some independent ideal but relates to the *internal quality* of the very rules that will determine how that process takes place. Theorizing on fiscal justice involves screening which effect competing tax rules will exert on those who are in a position to determine the distribution of fiscal shares. Rules that are 'just' are the ones that generate outcomes that are 'broadly acceptable' and appear beneficial to all prospective positions.

Once we have unveiled the black box, and properly mapped the machinery that generates the distribution of tax shares within a democratic community, the stage is set for further research. In order to gauge the value of traditional theories of justice (cf. Section 2) within the domain of taxation, a proper estimation of the type of transfers they would generate in a democratic environment with self-interested agents is needed. Future research should explore the effect of tax rules implied by, for instance, sufficientarianism or limitarianism, on the dominant majority. If the political power to determine a tax-free income bracket, or to tax a specific income bracket at 100%, creates fiscal outcomes that hold as a good proposal for all prospective positions, they satisfy the constitutional requirements as articulated in this article. Ideal theories involving tax rules that put groups outside the ruling coalition at risk of fiscal oppression are likely to be refuted.

This article illustrates how generality-as-uniformity satisfies this constitutional test, as it generates fiscal outcomes that benefit those inside and outside the realm of power, alongside generalized criteria of fairness and efficiency. As explained in Section 4.2.2 (and displayed in Figure 3 and Table 5), these working properties flow endogenously from the rule itself, whereby fiscal harm to others is likely to damage the rulemaker. Choosing behind a veil of uncertainty, generality-as-uniformity thus ensures participants that those deciding on the distribution of fiscal shares will produce a policy pattern acceptable to all players, regardless of their position. To the extent that distributive justice entails assuring an outcome that 'all can live with' (Rawls, 1980: 519), tax uniformity stands as an account of justice. In that regard, Fried is wrong.

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SUMMARY

Background: the emergent state of fiscal anarchy

Most people – both scholars and laymen – seem to agree that *prevailing* Western tax codes do not approximate any ideals of efficiency or justice. Moreover, governmental inclination to maximize revenue, the political ambition to achieve dozens of policy goals through tax rules alone and the partisan attempts to tinker with the tax code through voting and lobbying have created (Wagner, 2016: 142): 'the proverbial flood of exceptions and exemptions that creates a tax code so large that no one can read it and which creates nearly a unique tax liability for each tax payer'. Indeed, 'our game' of fiscal politics is characterized by an ever-increasing fiscal revenue, a widening array of governmental techniques to fund state activity, various strategies adopted by voters and interest-groups to minimize their burden, an accelerating number of tax lawyers and the increased relevance of the legal service-industry that wealthy clients use to circumvent their tax-obligations. In our capacity as a voter (trying to acquire lucrative tax exemptions), executive (maximizing fiscal revenue through custom-tailored taxes), functionary (executing fiscal measures), or attorney / consultant (e.g. monetizing legal complexity through fiscal optimization schemes) we all play our role hence we often *acquiesce* in the rules-of-the game. Indeed, as players within the game, we are required to safeguard our self-interests, and our behavior will often contribute to the labyrinth of tax bases and rates - paralleled by a maze of exemptions and derogations – that has emerged over time, the totality of which eludes the understanding of many lawyers, let alone that the taxpayers who are demanded to obey these rules fully grasp them.

Back to basics: four research questions

This PhD, however, mirrors the aspiration to 'step out' of this arena, and reflects on the fundamental rules that define fiscal politics. The domains of philosophy and political economy offer us techniques to move away from one's position as a specific player (i.e. voter, functionary, executive, attorney) to a perspective that is *external* to the game, from which we can try to disclose arrangements 'all can live with' (Rawls, 1980: 519). Trying to approximate a more impartial perspective by using philosophical methods and behavioural models, we are driven by the question: "*Which kind of fiscal principles could reflect agreement for all members of the body politic?"* When it comes to the basics of a fiscal constitution, it appears that the pillars – which are also our research questions – are threefold: **1)** what can we tax (i.e. the tax base; **2)** how can we measure that base (i.e. measurement-technique) and **3)** what type of rate-structure we should we apply to this taxable entity (e.g. with exemptions or 'uniform'). As the first question can be unraveled into two – respectively the admissible tax base for persons and capital – the four essays of this PhD will revolve around four questions.

Conventional tax literature

Dominant tax literature advances two ways to look at taxation. The first tradition is known as the *theory of optimal taxation*. Using a welfare-economic framework, scholars like Shaviro and Mankiw reveal the type of tax structure that raises money for the political process, while minimizing the negative effects on economic output. The outcome of these utilitarian flavoured models support a variety in tax bases, measurements according to market values and various discriminatory rate policies in both income taxation and VAT, for instance regarding height,

skin color, gender, level of income, type of income; and in terms of the type of product purchased. The second stream is made up by *tax fairness theorists*. Scholars like Piketty, O'Neill or Robeyns attribute a redistributive role to the institution of taxation: in order to install a more fair distribution of wealth they propose the introduction of wealth taxes, measurement according to market values and highly discriminatory tax-rates, up to 100% for 'the rich'.

Taxation without romance

This PhD was written against the background realization that these dominant theories of taxation are romantic approaches to the issue, in the sense that their framework is only viable on (at least) two conditions: benevolence and omniscience. By this we mean that conventional tax theorist often assume that the tax rules will be executed by people who are exclusively motivated to do good, and are spontaneously oriented towards these (tax) rules' moral goals (rather than to their own interests), and, secondly, these benevolent political players will have access to the necessary information to do so. These highly idealized presumptions in terms of motivation and knowledge explain why these theories often support wide types of governmental discretion, and hereby, in fact, contribute to the type of injustice and emergent anarchy that marks fiscal reality.

The constitutionalization of tax policy

Nurtured by a non-romantic perspective on the issue, this PhD explores the 'avenue not taken' by the conventional scholars. Assuming that the political sphere will be characterized by self-interested individuals who, additionally, face severe information-constraints, we intend to bring 'the constitutionalist approach' to fiscal thinking. This methodology is characterized by the dual idea that governmental competences should be checked by 1) *rights* that limit its lawful domain and 2) *rules* that restrain its operation within the sphere it is allowed to act. Whereas the introduction of this doctorate will *justify* this methodology, the four essays that comprise this PhD will *demonstrate* this approach. Using both insights from philosophy and economics, each essay will establish specific rights or constitutional principles, and employ these to resolve the four research questions. The *ensemble* of these essays tentatively formulates the principles of a 'constitutionalized fiscal policy', the alternative to the present anarchy: a uniform (i.e. 'flat') tax rate applied to all realized income, both from labour and capital.

VERTAALDE SAMENVATTING

Achtergrond: fiscale anarchie in de rechtsstaat

Er heerst een consensus onder de meeste mensen – academici en leken – dat de vigerende Westerse fiscale systemen niet beantwoorden aan idealen van rechtvaardigheid of economische efficiëntie. De neiging van de overheid om fiscale inkomsten te maximaliseren, de politieke ambitie om dozijnen beleidsdoelen te verwezenlijken via belastingen en de druk van belangengroepen op het fiscaal recht creëerden (Wagner, 2016: 142) : "een spreekwoordelijke vloed van uitzonderingen en derogaties die leidden tot een fiscale wetgeving die zo uitgebreid is dat niemand hem kan lezen, en een schier unieke fiscale aanslag voor elk individu." Inderdaad, 'ons spel' van fiscale politiek bestaat uit een steeds stijgend overheidsbeslag, een steeds breder amalgaam van fiscale maatregelen om overheidsactiviteit te financieren, specifieke strategieën van het electoraat en belangengroepen om hun fiscale lasten te minimaliseren, een toenemende hoeveelheid fiscalisten en de stijgende relevantie van juridische dienstverlening die rijke cliënten gebruiken om hun fiscale verplichtingen te omzeilen. In onze hoedanigheid van stemgerechtigde (trachten een lucratieve fiscale behandeling te verkrijgen), uitvoerende macht (maximaliseren van inkomsten via gerichte maatregelen), ambtenaar (doorvoeren van het overheidsbeslag) of advocaat / consultant (aanmunten van de fiscale complexiteit, o.a. via fiscale optimalisatie) spelen we allen onze rol, en aanvaarden we de regels van het spel. Inderdaad, als spelers zijn we genoodzaakt ons eigenbelang na te streven, en ons gedrag zal vaak bijdragen tot het labyrint van belastbare feiten en toegepaste tarieven die door de jaren heen ontstaan zijn, en waarvan de totaliteit het begrip van de meeste juristen ontsnapt, laat staan dat van de rechtsonderhorigen die geacht worden deze regels te gehoorzamen.

Back to basics: vier onderzoeksvragen

Dit doctoraat belichaamt de aspiratie om uit dit spel te stappen, en te reflecteren over de fundamentele regels die onze fiscale politiek bepalen. De gebieden van politieke filosofie en politieke economie reiken ons technieken aan om ons te verplaatsen van onze positie als specifieke speler (i.e. stemgerechtigde, bureaucraat, minister, advocaat, consultant, ..) naar een positie extern aan dat spel, van waaruit we beginselen kunnen trachten te ontwaren 'waar éénieder mee kan leven' (Rawls, 1980: 519). Wanneer het aankomt op de fundamentele beginselen van ons fiscaal systeem – tevens de onderzoeksvragen van dit doctoraat - kunnen we drie zuilen onderscheiden: 1) wat kunnen we belasten (i.e. belastbaar feit); 2) hoe kunnen we deze basis valoriseren (i.e. meettechniek) 3) welke type belastingtarief wordt er toegepast (uitzonderingen of uniform ?) Gezien de eerste vraag kan worden ontdubbeld in twee – de aanvaardbare fiscale basis voor respectievelijk personen en kapitaal – bestaat dit doctoraat uit vier essays aangaande vier onderzoeksvragen.

Traditionele fiscale literatuur

De internationale literatuur levert twee manieren aan om naar fiscaliteit te kijken. De eerste traditie is gekend als *Theory of Optimal Taxation*. Op basis van een kader uit de welvaartseconomie, identificeren economen zoals Shaviro en Mankiw het soort fiscale regels die de financiële opbrengsten voor de staat maximaliseren, én tegelijkertijd de verlieseffecten binnen de economie zouden minimaliseren. Hun utilitaire modellen beargumenteren

verscheidenheid in belastbare grondslagen en discriminatoire tarieven, zowel in de inkomstenbelasting als de BTW, bijvoorbeeld op basis van hoogte, huidskleur, gender, inkomensniveau, oorsprong van het inkomen; of type product dat wordt geconsumeerd. De tweede stroming bestaat uit *tax fairness theorists*. Bijdragen zoals die van Piketty, O'Neill en Robeyns hameren voornamelijk op de herverdelende rol van belastingen: om een eerlijkere verdeling van de welvaart te bekomen stellen ze vermogensbelastingen voor, alsook een valorisatie volgens pure marktwaarden; en hogere tarieven op het inkomen van "de rijken" (tot 100% van het inkomen).

Belastingen zonder romantiek

Dit doctoraat werd geschreven vanuit de realisatie dat deze dominantie theorieën romantische perspectieven betreffen, in de zin dat hun methodologie twee voorwaarden omvat: goedheid en alwetendheid. Hiermee bedoelen we dat de conventionele belastingtheorie veronderstelt dat belastingregels zullen worden uitgevoerd door mensen die uitsluitend gemotiveerd zijn om 'goed te doen', en die spontaan gericht zijn op de morele doelen van deze belastingregels (eerder dan op hun eigenbelang) en, ten tweede, dat deze welwillende individuen toegang zullen hebben tot de nodige informatie. Deze geïdealiseerde assumpties in termen van motivatie en kennis verklaren waarom deze theorieën vaak erg ruime discretionaire bevoegdheden betogen, en hierdoor in feite indirect bijdragen tot de onrechtvaardigheid en fiscale anarchie die we in de realiteit vaststellen.

De constitutionalisering van het fiscaal recht

Gevoed door een niet-romantische benadering, verkent dit doctoraat de 'vergeten route' binnen de traditionele literatuur. Veronderstellend dat de politieke sfeer zal worden gekenmerkt door op eigenbelang gerichte individuen die, daarenboven, beperkt zijn in kennis, brengen we de 'constitutionele methode' binnen in het fiscaal denken. Deze aanpak is gekenmerkt door het dubbel idee dat de bevoegdheden van de overheid dienen te worden beperkt door 1) *rechten* die haar legitieme handelingssfeer beperken 2) *constitutionele voorschriften* die haar acties gaan reguleren in de sfeer waarbinnen zij toegestaan is om te handelen. Daar waar de inleiding van dit doctoraat deze methodologie zal *justifiëren*, zullen de overige vier essays van dit doctoraat deze methodologie gaan *toepassen*. Op basis van modellen uit de politieke filosofie en gedragseconomie zal elk essay een recht of constitutioneel voorschrift aantonen, en deze vervolgens aanwenden om één van onze vier onderzoeksvragen op te lossen. De totaliteit van deze essays tracht de beginselen van een 'geconstitutionaliseerd fiscaal beleid' vast te leggen, het alternatief voor de huidige anarchie: een uniform tarief toegepast op elk gerealiseerd inkomen, zowel uit arbeid als kapitaal.