



# The Three Distributive Questions of (a Non-Ideal) Tax Theory

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Ilan Benshalom

Hebrew University of Jerusalem

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## THE THREE DISTRIBUTIVE QUESTIONS OF (A NON-IDEAL) TAX THEORY

*Ilan Benshalom*

**Abstract:** Despite the vital importance of taxation in determining the outcomes of distributive and allocative questions, the mutual impact of the tax and redistributive literatures on each other has been minor. This state of affairs skews the tax policy debate away from moral discussions about what are essentially normative questions regarding the scope of inequality in modern society. It results from the very limited manner in which tax scholars view normative reasoning—as one engaged solely with highly abstract and idealized theories, such as Rawls’ Theory of Justice. They neglect the re-emerging scholarly interest of important liberal political philosophers, such as Sen, that highlight the role of non-ideal theories in philosophic inquiries.

This article reviews the novel scholarship of *non-ideal theory*, and places it in the context of redistributive taxation. It familiarizes the legal-tax reader with some of this literature’s basic concepts, and argues that there is a particularly urgent case for exploring its relevancy in the tax context, given the recent rapid growth of inequality. It explains why the non-ideal framework offers certain promising avenues for developing a more sophisticated and relevant distributive analysis of taxation. It then applies its analysis, and argues for a novel non-ideal distributive tax theory, which breaks down the tax distributive questions into three related but separate questions. It ends by explaining how tax theorists and policymakers should integrate the fiscal answers to these three distributive questions into a single, morally coherent, fiscal system.

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## Introduction

Taxation is a critically important government function that raises fundamental normative and distributive questions.<sup>1</sup> Yet, as shall be demonstrated, the political philosophy distributive analysis that frequently accompanies questions of taxation is typically ill suited to address these moral questions. Accordingly, this Article offers a different (non-ideal) theoretical framework, that breaks down the tax distributive question into three related, yet distinct, questions concerning the use of various fiscal instruments, and explains how integrating these three questions creates a more sophisticated and policy-relevant distributive philosophical tax discourse.

The fiscal system adopted by various societies reflects their normative identities, and the sets of responsibilities and obligations that individuals share with each other. Despite the many normative questions that the tax system raises and its vital importance to the functioning of the state, the study of taxation has received comparatively little attention in the philosophical

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<sup>1</sup> Helmut P. Gaisbauer, Gottfried Schweiger and, Clemens Sedmak, *Outlining the Field of Tax Justice*, in PHILOSOPHICAL EXPLORATIONS OF JUSTICE AND TAXATION NATIONAL AND GLOBAL ISSUES 1 (Helmut P. Gaisbauer, et al. eds., 2015).

literature. Compared with other fields of philosophical inquiry of state operations (such as rules of war, human rights, criminal punishment, welfare spending and environmental regulation), taxation has the (undeserved) reputation of being an overly complex and boring field of study.<sup>2</sup>

Taxation affects many economic aspects of modern life—including a wide range of individuals' behaviors, the scope of intrusive enforcement mechanisms, macro-economic effects, and more. Taking into account all these potential effects is bound to produce a highly complex system, and it is admittedly difficult to theorize all these aspects under a single overarching theory of tax justice.<sup>3</sup> Nonetheless, it is still true that there are certain aspects of taxation that can, and should, be morally theorized. In particular, taxation is widely recognized to be a major tool for promoting distributive justice, and as one of the few policy tools that a state can use to reduce acute inequality.<sup>4</sup>

In an era of growing inequality, there is special interest and urgency in conducting a moral evaluation of the goals and the mechanisms of redistribution. While much has been written in contemporary political philosophy about the various justifications of distributive justice, significantly less attention has been devoted to analyzing the institutions through which this justice should be delivered. In the past fifty years or so, the vast majority of liberal political philosophy on redistribution has concerned itself with *ideal theory*—leaving others (such as politicians, regulators and lawyers) to craft suitably just institutions in light of those ideals. Ideal-theory analysis has focused on striking a balance between norms under idealized conditions that are, in reality, unobtainable. Like the lost mythical city of Atlantis, ideal theory settings might provide a source of inspiration, but they can never be visited, examined or even tangibly perceived.

The focus on ideal theory has had substantial effects on the study of taxation. There appears to be a gap between the broad understanding that tax institutions offer important distributive tools, and the lack of moral analysis that directly addresses its distributive impact.

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<sup>2</sup> DANIEL HALLIDAY, *THE INHERITANCE OF WEALTH JUSTICE, EQUALITY, AND THE RIGHT TO BEQUEATH* 185 (2018).

<sup>3</sup> *Id.* at, 186.

<sup>4</sup> David G. Duff, *Tax Policy and the Virtuous Sovereign: Dworkinian Equality and Redistributive Taxation*, in *PHILOSOPHICAL FOUNDATIONS OF TAX LAW* 167, 167 (Monica Bhandari ed., 2017); Linda Sugin, *Theories of Distributive Justice and Limitations on Taxation: What Rawls Demands from Tax Systems*, 72 *FORDHAM L. REV.* 1991, 2014 (2004); Liam Murphy & Thomas Nagel, *Taxes, Redistribution, and Public Provision*, 30 *PHIL. PUB. AFF.* 53, 54 (2001); Daniel N. Shaviro, *The Mapmaker's Dilemma in Evaluating High-End Inequality*, 71 *U. MIAMI L. REV.* 83, 134 (2016).

This disconnect between tax policy and political philosophy discourses has not produced a distributionally neutral tax scholarship. Indeed, the absence of a tax philosophical discourse has resulted in a tax scholarship biased in favor of a particular normative agenda associated with economic analysis—namely, *utilitarianism*.<sup>5</sup> Furthermore, the ideal-theory focus of philosophers has persuaded most public-finance economists and legal tax theorists that the *only* relevant type of redistributive philosophy they should be concerned with is ideal-theory political philosophy.<sup>6</sup> Hence, the main benchmark used when applying normative analysis to the study of taxation has been to argue how particular tax arrangements may be ranked according to a given normative agenda (such as utilitarianism, or *luck-egalitarianism*). Philosophers engaged in analyzing the tax system (and normatively-minded tax scholars) spend considerably less time calibrating their models and arguments to a more complex metric of considerations and constraints.

This Article offers a different type of distributive philosophical analysis that can prove valuable for analyzing taxation—namely, *Non-ideal theory*. In doing so, it seeks to make the case for providing a non-ideal theory analysis of redistributive taxation. After examining some of the features of the emerging interest in non-ideal theory within contemporary political philosophy, it argues that there is a need for new concepts in order to develop a non-ideal distributive tax theory. It then proceeds to substantiate this claim by explaining how modern tax regimes should balance and coordinate different distributive objectives between indirect-consumption, income and wealth tax instruments.

The Article offers three main contributions. First, it explains why a non-ideal theory of taxation is highly warranted and how an integration of the non-ideal theory framework may go a long way to improving philosophical and tax scholarship. Non-ideal theory literature focuses on how feasibility considerations should affect our moral evaluations and actions. While the tax regime fulfills a vital government function, it also raises many questions of feasibility—such as is it politically possible to levy an assumingly efficient head tax or ability tax. Using non-ideal theory principles to analyze the operation of the tax system requires interaction between normative arguments and relevant facts and institutional limitations. This raises many new normative questions that do not have a straightforward answer—such as what are the (morally)

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<sup>5</sup> Anne L. Alstott, *Equal Opportunity and Inheritance Taxation*, 121 HARV. L. REV. 474–475 (2007).

<sup>6</sup> XXX

salient facts, and how does one recognize institutional limitations. However, raising these questions, and searching for suitable answers, should result in a more nuanced and sophisticated tax and distributive scholarship—which in turn may help to produce a more normatively informed tax policy. Most importantly, it recognizes that engaging in non-ideal theory is a difficult, yet important, moral exercise. Accordingly, by introducing non-ideal theory feasibility constraints into the normative distributive analysis of tax systems, this Article aligns tax scholarship with cutting-edge political philosophy.

Second, this Article outlines some of the characteristics that such a non-ideal distributive tax theory should take into account. More specifically, it focuses on some of the feasibility constraints that a non-ideal distributive tax theory should address.

Finally, and most importantly, this Article offers a potential structure for such a non-ideal tax distributive theory. In a novel analysis, it breaks the tax distributive inquiry into three different questions, and explains how each of them relates to a specific type of fiscal instrument. The analysis then explains how the fiscal answers to these three different types of questions should be integrated into a single, morally coherent, distributive fiscal system. In doing so, the Article goes beyond the comfort zone of criticizing current scholarship for not paying sufficient distributive philosophical attention to the field of taxation, and tries to take a first step toward providing a positive account of how tax redistribution can be better addressed. In an era of growing economic inequality, this offers a non-trivial contribution to the immensely important endeavor of subjecting distributive fiscal questions to normative analysis.

Part I provides the context for the (renewed) interest in non-ideal theory in contemporary political philosophy and explains the concept of *feasibility constraints* within non-ideal theory. Part II puts forward the special case for a non-ideal tax theory. Part III integrates the analysis of the previous sections, by briefly explaining why a non-ideal distributive tax theory should be kept separate from an analysis of spending. It then outlines the three main distributive tax questions that such a non-ideal theory should present, and discusses how the design of the tax system should incorporate and prioritize these questions. Part IV briefly concludes.

## I. Ideal versus Non-Ideal Theory

### A. The Debate in Contemporary Political Philosophy

This section presents the recent non-ideal theory literature, and places it in the context of existing political theory, in a bid to lay the groundwork for the Article's subsequent discussion of taxation. For this reason, it cannot address the entire debate between ideal theory and non-ideal theory—which is vast and has been ongoing for centuries. Instead, I will address this debate only in reference to liberal political philosophy, and not with respect to other branches of political philosophy (such as Marxist theory). The reason for this is that much of the most relevant scholarship today on distributive justice stems from more recent liberal political philosophy.

The contemporary ideal-theory versus non-ideal theory debate is essentially a controversy over the purpose of political philosophy.<sup>7</sup> In particular, it is about the extent to which (liberal) political philosophy should seek to evaluate actual moral dilemmas, and provide moral directives to guide agents in concrete situations. This paper focuses on the relationship between political philosophy and distributive tax policy dilemmas. Accordingly, it concentrates on describing the features of non-ideal theory, and avoids taking sides in the debate over whether ideal theory or non-ideal theory should be prioritized.

Non-ideal theory is a realistic counter-reaction to the dominance of ideal-theory scholarship in post-Rawlsian political philosophy.<sup>8</sup> The interest in non-ideal theory has been triggered by the difficulty in extracting moral guidance to relevant contemporary dilemmas based exclusively on ideal-theory analysis.<sup>9</sup>

The relationship between ideal-theory and non-ideal theory approaches is a complex one, and philosophers have invested considerable intellectual resources in recent years to map the distinction between them.<sup>10</sup> Ideal-theory methodology is much more familiar, and indeed many

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<sup>7</sup> MICHAEL WEBER & KEVIN VALLIER, *POLITICAL UTOPIAS: CONTEMPORARY DEBATES* (Michael Weber & Kevin Vallier eds., 2017).

<sup>8</sup> Enzo Rossi & Matt Sleat, *Realism in Normative Political Theory*, 9 *PHIL. COMPASS* 689, 692 (2014); Paul Raekstad, *Two Contemporary Approaches to Political Theory*, 5 *INT'L CRITICAL THOUGHT* 226 (2015).

<sup>9</sup> Ingrid Robeyns, *Ideal theory in theory and practice*, 34 *SOC. THEORY PRAC.* 341(2008); A. John Simmons, *Ideal and Nonideal Theory*, 38 *PHIL. PUB. AFF.* 5, 32 (2010); David Wiens, *Political Ideals and the Feasibility Frontier*, 31 *ECON. PHIL.* 447, 448 (2015) [hereinafter Weins, *Political Ideals*].

<sup>10</sup> David Enoch, *Against Utopianism: Noncompliance and Multiple Agents*, 18 *PHILOSOPHERS' IMPRINT* 1, 11–19 (2018); Matt Sleat, *Realism, Liberalism and Non-Ideal Theory or, are there Two Ways to do Realistic Political Theory?*, 64 *POL. STUD.* 27, 28–30 (2016); Laura Valentini, *Ideal vs. Non-Ideal Theory: A Conceptual Map*, 7 *PHIL. COMPASS* 654 (2012) [hereinafter Valentini, *Ideal vs. Non-Ideal*].

of the seminal scholarly works in liberal political philosophy—which were written in the latter half of the twentieth century—adhere to an ideal-theory framework.<sup>11</sup> Ideal-theory philosophers tend to argue that political philosophy should focus on isolating key features in the basic structure of society.<sup>12</sup> They tend to be less concerned with whether or not their theoretical solutions are achievable—and consequently pay little (and in some cases, no) attention to questions about the feasibility costs of just solutions.<sup>13</sup>

In contrast, non-ideal theory philosophers seek to evaluate, prioritize and guide actions with respect to concrete questions and policy alternatives. The interest in non-ideal theory has been driven by the concern of prominent philosophers such as Sen, who were concerned that adhering exclusively to ideal theory would deprive political philosophy of its relevancy.<sup>14</sup> Accordingly, non-ideal theory philosophers wish to push political philosophy beyond the comfort zone of ideal theory, in a bid to address a much more chaotic reality, where there is a need to strike a balance between multiple ideals and constraints.<sup>15</sup> To this end, they seek to provide rules of comparison and prioritizing between various *available* (as opposed to utopian) options,<sup>16</sup> and call for more fact-sensitive assumptions, that are closer to those actually faced in a given society.<sup>17</sup>

Rather than being a binary doctrinal distinction between non-ideal and ideal theory approaches, there seems to be a broad spectrum of non-ideal theory and ideal-theory parameters.<sup>18</sup> However, they both apply normative reasoning that addresses the questions of

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<sup>11</sup> For example: Ronald Dworkin, *What is Equality Part 2: Equality of Resources*, 10 PHIL. PUB. AFF. 283 (1981); JOHN RAWLS, *A THEORY OF JUSTICE* (1999).

<sup>12</sup> Amartya Sen, *What Do We Want from a Theory of Justice?*, 103 J. PHIL. 215, 217 (2006).

<sup>13</sup> Anca Gheaus, *The Feasibility Constraint on the Concept of Justice*, 63 PHIL. Q. 445 (2013) ; David Schmitz, *A Realistic Political Ideal*, 33 SOC. PHIL. POL'Y 1, 7–8 (2016).

<sup>14</sup> Sen, *supra* note 12, at 217.

<sup>15</sup> Raekstad, *supra* note 8, at 233–234.

<sup>16</sup> Robeyns, *supra* note 9, at 348–349; Sen, *supra* note 12, at 216.

<sup>17</sup> Alan Hamlin & Zofia Stemplowska, *Theory, Ideal Theory, and the Theory of Ideals*, 10 POL. STUD. REV. 48, 49–52 (2012).

<sup>18</sup> Many philosophers view the ideal-theory and non-ideal theory as being on a spectrum based on a number of parameters, and argue that philosophers should recognize that answering different problems often requires different methodologies of argumentation. Hamlin & Stemplowska, *supra* note 17, at 58–59; Andrew Mason, *Justice, Feasibility and Ideal Theory – A Pluralist Approach*, 33 SOC. PHIL. POL'Y 32, 52–54 (2016); Laura Valentini, *On the Messy “Utopophobia vs. Factophobia” Controversy a Systematization and Assessment*, in POLITICAL UTOPIAS: CONTEMPORARY DEBATES 16–19 (Michael Weber & Kevin Vallier eds., 2017) [hereinafter Valentini, *On the Messy*]; Eva Erman & Niklas Möller, *Practices and Principles: On the Methodological Turn in Political Philosophy*, 10 PHIL. COMPASS 533 (2015); Valentini, *Ideal vs. Non-Ideal*, *supra* note 10, at 660; David Wiens, *Prescribing Institutions without Ideal Theory*, 20 J. POL. PHIL. 40, 54–59 (2012) [hereinafter Wiens, *Prescribing Institutions*].



which moral principles should guide the development of social structures. Despite this apparent connection, non-ideal theory philosophers focus on the realization of these values, while ideal-theory analysis tends to focus on how to strike a balance between values in very idealized settings.<sup>19</sup> Hence, it is often the case that non-ideal theory philosophers seeking to provide an answer to concrete moral questions may not have to resort much to ideal-theory analysis to provide those answers.

## B. Non-Ideal Theory and Feasibility—or the Nature of Constraints

Distinguishing non-ideal theory (liberal) political philosophy from ideal theory lies in how non-ideal theory philosophers treat feasibility constraints. Ideal-theory philosophers attribute little moral weight to social conditions—which change over time, and across cultures and societies.<sup>20</sup> In contrast, non-ideal theory philosophers emphasize the need to account for these constraints. They do so in order to minimize the risk of generating irrelevant normative theories that are infeasible because they clash with commonsense morality.<sup>21</sup> For example, consider the question of distributive justice between different nation states. An ideal theory would question the source of the distributive obligation, and ask whether the existence of nations changes the analysis.<sup>22</sup> A non-ideal theory would consider the type of moral redistributive obligations that may exist between nations, given that individuals show a much greater tendency to engage in redistributive transfers to their own compatriots.<sup>23</sup> However, unlike the ideal-theory inquiry, the non-ideal theory framework would take certain feasibility constraints as given—such as public attitudes toward international redistribution—rather than merely assume that they do not exist.

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<sup>19</sup> Sen, *supra* note 12, at 218–226 (2006). For a similar analysis in the economic realm, *see*: Richard G. Lipsey & Kelvin Lancaster, *The General Theory of the Second-Best*, 24 *REV. ECON. STUD.* 11, 13 (1956).

<sup>20</sup> Consequently, they often have little to say about how to accommodate the moral costs of feasibility constraints. Wiens, *Political Ideals*, *supra* note 9, at 447.

<sup>21</sup> Valentini, *supra* note 10, at 659.

<sup>22</sup> For example, consider these important works about international justice: Charles R. Beitz, *Cosmopolitan Ideals and National Sentiment*, 80 *J. PHIL.* (1983); David Miller, *Against Global Egalitarianism*, 9 *J. ETHICS* (2005).

<sup>23</sup> This is fundamentally different from a positive inquiry that seeks to describe these constraints, and the power dynamics behind them (which is often associated with political science). The non-ideal theory inquiry is a moral one, which considers what ought to be done morally in a given situation. XXX

While most political philosophers subscribe to the principle that “*Ought implies can*,” they disagree considerably over how to define what “can” be done. Almost everyone accepts that normative theories should take into account biological and physical constraints (such as, humans cannot fly, and are mortal).<sup>24</sup> Hence, non-ideal theory philosophers differ from their ideal-theory colleagues by questioning whether a normative position is not only desirable, but also morally justifiable, given other alternatives.<sup>25</sup>

The inquiry over the nature of morally relevant constraints opens up scope for disagreement on several fronts.<sup>26</sup> First, in order to morally evaluate options, philosophers must have some type of reasonable estimate as to the effects of various actions.<sup>27</sup> However, identifying the relevant facts (and ignoring irrelevant ones) is never easy, so non-ideal theory philosophers may often disagree over the empirical findings that the assumptions over the existence of constraints are based upon.<sup>28</sup> The best that non-ideal theory philosophers can do about this is to accept that social science has an integral role in providing normative evaluations and action-guiding directives in non-ideal circumstances.<sup>29</sup> Since empirical considerations are context-specific, they are addressed with respect to taxation in the following sections.

Second, non-ideal theory requires the introduction of “soft” constraints—which raises the question of how these should be morally weighted.<sup>30</sup> Basic logic, laws of physics, and human biology, all impose “hard” rigid constraints on normative political philosophy, which are binary. Even extreme ideal-theories tend to subscribe to hard constraints—simply because failing to do so would shift the inquiry into the realms of fiction.

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<sup>24</sup> Pablo Gilabert & Holly Lawford-Smith, *Political Feasibility: A Conceptual Exploration*, 60 POL. STUD. 808, 813 (2012).

<sup>25</sup> Schmitz, *supra* note 13, at 3–4.

<sup>26</sup> Tyler Cowen, *The Importance of Defining the Feasible Set*, 23 ECON. PHIL. 1, 3–6 (2007).

<sup>27</sup> Robert Jubb, *Norms, Evaluations, and Ideal and Nonideal Theory*, 33 SOC. PHIL. POL'Y FOUND. 393, 410 (2016).

<sup>28</sup> DANIEL HALLIDAY, *supra* note 2, at 15.

<sup>29</sup> Non-ideal theory analysis therefore needs to rely on the most reliable empirical findings generated by social sciences. This raises other questions (beyond the scope of this paper) about the threshold of empirical accuracy that moral arguments should require before incorporating them into moral arguments. David Wiens, *Against Ideal Guidance*, 77 J. POL. 433, 444–445 (2015).

<sup>30</sup> The terms *soft constraints* and *hard constraints* were coined by Gilabert and Lawford-Smith. See: Pablo Gilabert & Holly Lawford-Smith, *supra* note 24, at 808, 813.

Unlike hard constraints, “soft constraints” do not invoke binary questions of impossibility, but rather questions about the degree of feasibility.<sup>31</sup> These constraints arise from the difficulty of promoting morally-just policies in heterogeneous societies, where it is necessary to achieve cooperation among individuals who hold different norms and practices. Norms are dynamic and mutable. They evolve in certain social contexts, and as such vary considerably from one society to the next. Hence, these soft constraints have a probabilistic and uncertain component. Philosophers who evaluate them must recognize that even though these constraints can be changed, any attempt to overcome them in pursuit of a particular vision of justice may involve certain feasibility costs, compromises and failures.<sup>32</sup>

Feasibility requires considering whether adopting a certain (possible, and largely desirable) policy is justified, given the comparative costs and benefits of this decision, and other (possible and less/more desirable) available options.<sup>33</sup> Determining these options requires the construction of a *feasibility function*, based on empirical research that can help reveal the feasibility limits.<sup>34</sup> In a world of limited economic and political resources, many moral dilemmas require philosophers to evaluate the trade-offs of various options, and evaluate which ones are preferable. Hence, even when values are not in dispute, philosophers may disagree considerably over which values and principles should be applied, given the different costs associated with the various options.<sup>35</sup> While the process of determining the costs and the benefits of a specific course of action is (largely) a fact-based (empirical) research effort, the ranking of various possibilities requires moral prioritization.<sup>36</sup>

Third, the transition from questions of possibility to feasibility may spark disagreements over the question of what type of constraints are morally relevant. To challenge, rather than justify, the status quo, non-ideal theory philosophers must determine whether certain soft constraints that relate to social conditions and human nature should be taken into account in their moral

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<sup>31</sup> Pablo Gilabert, *Justice and Feasibility a Dynamic Approach*, in POLITICAL UTOPIAS: CONTEMPORARY DEBATES 95–100 (Michael Weber & Kevin Vallier eds., 2017).

<sup>32</sup> Gilabert & Lawford-Smith, *supra* note 24, at 814; Zofia Stemplowska, *Feasibility: Individual and Collective*, 33 SOC. PHIL. POL'Y 273, 274 (2016).

<sup>33</sup> Rääkkä & Juha, *The Feasibility Condition in Political Theory*, 6 J. POL. PHIL. 27, 31–38 (1998).

<sup>34</sup> Wiens, *Political Ideals*, *supra* note 9, at 456.

<sup>35</sup> Mason, *supra* note 18, at 44–48 (2016).

<sup>36</sup> For example, if, in a given cost, three different egalitarian values could be promoted (e.g., improvement of public health, reduction of poverty, reduction of inequality in opportunities/education), the pressing moral question is how to prioritize between those different goods.

analysis.<sup>37</sup> They cannot rely solely on empirical findings, and must generate a clear and transparent set of moral considerations to determine which constraints they wish to accept, and which to defy.<sup>38</sup> This is a very broad discussion, with many intriguing trajectories, which this Article cannot fully address.

By taking constraints into account, non-ideal theory philosophers recognize that a considerable amount of morally relevant decision-making takes place at the macro state- or institutional level. Agents making these macro decisions face complex social settings, which involve directing the actions of other agents whose viewpoints they do not control, or necessarily share. Soft constraints lie at the heart of these macro settings, and make them most challenging and interesting from a moral perspective. While human nature is not biologically fixed, it is still the case that while “*human affairs can change significantly along some dimensions... they can not [or typically do not] change limitlessly along all dimensions.*”<sup>39</sup> Hence, non-ideal theory philosophers often center their inquiry on what can be done given a certain social context, rather than what is technically possible at the individual level.

There are several such soft constraints that arise in a macro social setting. Budgetary and resources constraints are one obvious example: faced with scarcity, using resources to promote one-policy options clearly entails certain opportunity costs.<sup>40</sup>

Strong empirically documented cognitive constraints and psychological biases provide another example. Although they are not as biologically fixed as humans’ inability to fly or to achieve immortality, they are very relevant in assessing the costs and benefits of promoting a given desirable policy. Psychological biases suggest that many people have difficulties processing certain types of information, or responding to certain incentives—and this failing may affect the feasibility of certain policies that seek to promote behavioral changes in large groups.

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<sup>37</sup> Lisa Herzog, *Distributive Justice, Feasibility Gridlocks, and the Harmfulness of Economic Ideology*, 18 ETHICAL THEORY MORAL PRACT. 957, 958–959 (2015).

<sup>38</sup> Valentini, *On the Messy*, *supra* note 18, at 25–26.

<sup>39</sup> William Galston, *Realism in Political Theory*, 9 EUROPEAN JOURNAL OF POLITICAL THEORY 385, 407 (2010).

<sup>40</sup> These costs and benefits are, of course, dynamic, because the pool of available public resources is not fixed, but depends, in part, on the set of social policies imposed.

## II. The Case for a Non-Ideal Distributive Tax Theory

### A. Institutional Constraints

Non-ideal theory philosophers provide moral analysis of the social structures at work.<sup>41</sup> Examining existing structures requires them to consider the various relevant constraints in different settings—as in the case of countries with different cultural political and historical backgrounds. However, non-ideal theory philosophers’ ambition to provide “local” justice is not confined to addressing the social attributes of different societies. It is also relevant with respect to institutions. Institutional structures are often difficult to distinguish from cultural and political attributes of a given society, because they render social norms that govern a society into practices, thereby both reflecting and reinforcing social attitudes.<sup>42</sup>

Translating conceptions of justice into public policy requires specialist institutions, that regulate specific activities that are relevant to those values. These institutions provide the expertise and social background by which public services and regulations are delivered. They are key to the operation of government decision-making, because many of the conflicts of values and interests are balanced through the ongoing operation of institutions. They also operate by certain rules and principles, and create special social relationships that may not have existed otherwise. These relationships, in turn, give rise to certain practices, norms, and psychological biases, that function as constraints.<sup>43</sup>

An analysis of real-world government institutions is often not the focus of ideal-theory analysis. An ideal-theory philosopher can often point out that institutions are the product of arbitrary historic events (and the sequence of ensuing path dependencies). On the other hand, non-ideal theory philosophers note that, in reality, institutions precondition justice—which makes institutional analysis important in a number of ways.<sup>44</sup>

Institutional constraints include internal norms and hierarchies, as well as work practices and methods of analysis. These constraints determine the feasibility of various policy options,

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<sup>41</sup> AMARTYA SEN, *THE IDEA OF JUSTICE* 15–22, 67–68 (2009).

<sup>42</sup> Herzog, *supra* note 37, at 962; Andrea Sangiovanni, *How Practices Matter*, 24 J. POL. PHIL. 3, 22–23 (2016).

<sup>43</sup> Andrea Sangiovanni, *Justice and the Priority of Politics to Morality*, 16 J. POL. PHIL. 137, 158 (2008) [hereinafter Sangiovanni, *Justice and the Priority of Politics to Morality*].

<sup>44</sup> *Id.* at 147.

because they affect how people in the relevant institutions approach various problems. In addition, given the key role played by certain institutions in various aspects of the modern state, any change in their norms and rules can have a substantial impact on how society addresses various moral problems. If one thinks that moral philosophy should help promote a more just society, one (or perhaps *the*) effective way of fulfilling that duty would involve taking part in the process of institutional design.<sup>45</sup>

An important aspect of non-ideal theories attempts to look into actual constraints involves focusing on institutional constraints, and the moral tradeoffs associated with their operation.<sup>46</sup> This Article focuses on one of these institutions—the tax system. Within the scope of this paper, I cannot explain all aspects of existing normative tax literature, the empirical attributes of relevant moral constraints that shape it, and the considerations that such non-ideal tax theory should develop with respect to those constraints. Nonetheless, I argue that such a non-ideal theory is merited on the grounds that it is currently lacking, and crucially important, given current trends of wealth and income inequality. Hence, this Part offers some thoughts on how non-ideal theory philosophers and tax scholars should consider the set of institutional constraints and the feasibility frontier of a non-ideal distributive tax theory.

The normative foundation of contemporary tax scholarship is vague, incomplete, and above all, fragmented.<sup>47</sup> While philosophers, economists, and legal scholars have theorized that the tax system should promote redistribution, few have evaluated their theories in light of the tax regimes of the modern welfare state. As a result, political philosophy provides little theoretical standards by which to morally evaluate existing tax regimes in light of growing inequality, or any guidance on how to design tax regimes that better meet the normative challenges of inequality.

Policymakers use the tax system to regulate many aspects of modern society, and taxes affect countless aspects of modern markets. Most importantly, the structure of the tax regime

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<sup>45</sup> Geoffrey Brennan & Philip Pettit, *The Feasibility Issue*, 278 in *THE OXFORD HANDBOOK OF CONTEMPORARY PHILOSOPHY* (Frank Smith Jackson, Michael ed. 2007).

<sup>46</sup> Hamlin & Stemplowska, *supra* note 17, at 60.

<sup>47</sup> Daniel Halliday, *Justice and Taxation*, 8 *PHIL. COMPASS* 1111, 1111 (2013).

determines the size of government, and who pays for it—and as such has vital consequences for the overall amount of resources and their distribution in society.

Even though many philosophers consider the tax system to be a major distributive tool, few write about how distributive agendas should shape existing tax regimes. For years, tax theorists emphasized two ideas.<sup>48</sup> The first—benefit taxation—suggests that taxpayers’ tax payments should correlate to the benefit they derive from government services. The second—ability to pay— suggests that tax payments should grow proportionately with taxpayers’ financial abilities.<sup>49</sup> These two concepts played an important role in past policy debates,<sup>50</sup> but are less relevant today, and play only a minor role in contemporary academic tax policy discourse.<sup>51</sup>

Philosophers have criticized these tax fairness standards, but have not filled in the gap with a more sophisticated form of non-ideal distributive tax theory. Leading ideal-theory philosophers such as Rawls and Dworkin have recognized the importance of the tax system in realizing their visions of distributive justice. However, they have done little to understand how real tax systems work, or in trying to explain how their notions of distributive justice might be meaningfully integrated within them. The most ambitious tax philosophy efforts are ideal-theory works—which use tax policy to promote broader arguments about justice, but avoid grappling with the daunting questions of how to promote justice within a constrained reality. The most outstanding example for this is Liam Murphy and Thomas Nagel’s justly acclaimed *The Myth of Ownership*.<sup>52</sup> While *The Myth of Ownership* addresses libertarian arguments against taxation, it

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<sup>48</sup> See Joel Slemrod, *The Consequences of Taxation*, 23 SOC. PHIL. POL'Y 73, 73 (2006); see also Joseph M. Dodge, *Theories of Tax Justice: Ruminations on the Benefit, Partnership, and Ability-to-Pay Principles*, 58 TAX L. REV. 399, 401 (2005).

<sup>49</sup> See KENNETH STASAVAGE & DAVID SCHEVE, TAXING THE RICH: A HISTORY OF FISCAL FAIRNESS IN THE UNITED STATES AND EUROPE 26–33 (2016). Hence, ability-to-pay could be seen as comprising two components: *horizontal equity* (people with the same ability should pay the same tax) and *vertical equity* (e.g., people with more ability should pay more). See Find citation

<sup>50</sup> See Ajay K. Mehrotra, *Fiscal Forearms: Taxation as the Lifeblood of the Modern Liberal State*, in THE MANY HANDS OF THE STATE: THEORIZING POLITICAL AUTHORITY AND SOCIAL CONTROL 291–292, 299–300, (Kimberly J. Morgan & Ann Shola Orloff eds., 2017).

<sup>51</sup> Some original new accounts in favor of these standards has been voiced in contemporary tax scholarship. For example see: Brian Galle, *Tax Fairness*, 65 WASH & LEE L. REV. 1323 (2008); David Elkins, *Horizontal Equity as a Principle of Tax Theory*, 24 YALE L. & POL'Y REV. 43 (2015); Ira K. Lindsay, *Tax Fairness by Convention: A Defense of Horizontal Equity*, 19 FLA. TAX REV. 79 (2016).

<sup>52</sup> The authors argue that tax theorists should focus on the proper allocation of after-tax income, rather than on appropriate tax burdens. They critique the concept of before-tax income, arguing that private property is not a natural phenomenon, but a state-created social-legal convention. Hence, they argue that no property is truly “private,” and therefore the public may have an entitled claim to all property. LIAM MURPHY & THOMAS NAGEL,

does little more. The authors conclude that *any* tax mix is acceptable, as long as it meets the state's consequentialist redistributive aims.<sup>53</sup> In so doing, they opt for ideal-theory insights, and neglect the many distributive considerations that are associated with the design of the tax mix. Their theory therefore offers little philosophical insight for theorists or policymakers seeking to analyze and address distributive dilemmas.<sup>54</sup>

The book's inability to provide a framework for normatively informed tax policy is a classic example of ideal-theory's avoidance of dealing with the normative dilemmas of constrained reality. The dominant position of ideal theory in distributive liberal political philosophy has had a major impact on tax scholarship. With few exceptions,<sup>55</sup> tax theorists trying to implement distributive normative arguments could rarely, if ever, find guidance within ideal-theory scholarship as to how its ideals might be rendered into institutions.<sup>56</sup>

The lack of non-ideal theory distributive tax scholarship raises certain questions. First, is it possible that the absence of a workable framework for evaluating the distributive goals of various tax measures has induced tax scholars to evaluate tax policy (almost) exclusively on the grounds of utilitarianism/welfarism, which is the normative framework commonly assumed by public finance scholars?<sup>57</sup>

Second, why is tax theory different from other areas of policymaking (such as government spending, trade, private law and criminal punishment), where philosophers find it much easier to address non-ideal theory dilemmas?

Third, has the lack of a non-ideal theory normative philosophical discourse contributed to the change of public discourse of taxes and to the role that tax scholars have played in it? In the past,

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THE MYTH OF OWNERSHIP (2002); Colin Farrelly, *Taxation and Distributive Justice*, 2 POL. STUD. REV. 190 (2004) (providing a summary of the book).

<sup>53</sup> MURPHY & NAGEL, *Id.* at 98–99.

<sup>54</sup> See Sugin, *supra* note 4, at 1991, 2014.

<sup>55</sup> See BRUCE ACKERMAN & ANNE ALSTOTT, *THE STAKEHOLDER SOCIETY* (1999); S. Stewart Braun, *Liberty, Political Rights and Wealth Transfer Taxation*, 33 J. APPLIED PHIL. 379 (2016); PETER DIETSCH, *CATCHING CAPITAL: THE ETHICS OF TAX COMPETITION* (2015); Kristi A. Olson, *The Endowment Tax Puzzle*, 38 PHIL. PUB. AFF. 240 (2010); Sugin, *supra* note 4.

<sup>56</sup> See Jonathan Wolff, *Political Philosophy and the Real World of the Welfare State*, 32 J. APPLIED PHIL. 360 (2015).

<sup>57</sup> See Alstott, *supra* note 5, at 474–475; Alex Raskolnikov, *Accepting the Limits of Tax Law and Economics* 98 CORNELL L. REV. 523, 526–527 (2013).



tax scholars used equity considerations to justify tax policymaking;<sup>58</sup> today, however, much of tax scholarship focuses on how various policies should be promoted, given a certain set of assumed preferences—without trying to determine their normative desirability (or the possibility of changing them, if they are considered morally undesirable).

Fourth, is normative philosophy’s silence about the distributive implications of tax scholarship partly to blame for the tax regime’s inability to counter recent trends of rising wealth and income inequalities? It is, of course, impossible to prove any causality. However, one may wonder why, in an era of soaring inequality (a trend that began in the 1970s) much of tax scholarship has been focused on optimal tax theory modeling, which assumed a large degree of homogeneity, focused on incentives, and sought to increase overall welfare.<sup>59</sup> I argue that these questions justify a more serious philosophical inquiry into what a non-ideal distributive tax theory would entail.

## B. The Major Constraints of a Non-Ideal Distributive Tax Theory

Tackling the distributive tax challenge requires non-ideal theory philosophers and tax theorists to consider the feasibility constraints of a non-ideal distributive tax theory. While the philosophical literature about how to evaluate constraints has been developing rapidly,<sup>60</sup> there are, to date, no agreed methodological conventions on how to identify morally relevant constraints. Nonetheless, a few anchoring thoughts might be noted. First, any non-ideal theory treatment of institutions will have to assume less than full compliance, and address their moral consequences.<sup>61</sup> In a non-ideal theory framework, normative arguments are intended to improve moral behaviors, rather than convince every agent to adopt perfect moral behavior.

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<sup>58</sup> Mehrotra, *supra* note 50, at 291–292, 299–300.

<sup>59</sup> Peter Diamond & Emmanuel Saez, *The Case for a Progressive Tax: From Basic Research to Policy Recommendations*, 25 J. ECON. PERSP. 165 (2011)..

<sup>60</sup> For examples of such literature, see: Erman & Möller, *supra* note 18, at ?; Sangiovanni, *Justice and the Priority of Politics to Morality*, *supra* note 43, at 148–150.

<sup>61</sup> Enoch, *supra* note 10, at 6–11.

Second, non-ideal theory philosophers and tax theorists should consider (philosophical) opportunity costs when determining the boundaries of their institutional analysis.<sup>62</sup> Like any other institution, tax institutions were developed for a specific purpose (generating revenues), but also to realize certain ideals. The progressive income tax system, in particular, was founded to promote income redistribution by placing a higher tax burden on affluent taxpayers. Theorists may find it difficult to distinguish the distributive impact of the tax system from other government measures (such as welfare spending and certain types of regulations).<sup>63</sup> However, trying to apply non-ideal theory to all types of government redistributive measures will reduce the ability to say anything morally meaningful when analyzing the tax system—which is one of the most effective tools for redistribution.

Third, non-ideal theorists should take into account that government agencies tend to have a certain amount of independence in their field of expertise.<sup>64</sup> Institutional independence, along with the specific goals and ideals that each institution is focused on achieving, helps develop unique attributes (such as institutional norms and unofficial conventions, and its perception in the eyes of the public). While institutions such as the tax regime may affect many aspects of a country's public and economic realities, a non-ideal-theory normative analysis will seek to evaluate the moral values that are most central to its mission. In the case of modern direct-tax systems, the manner in which they promote different visions of distributive justice is a key aspect of their societal function. Under a non-ideal theory approach, the actual practice of taxation is very relevant to the question of distributive justice, so that different tax measures may be evaluated and ranked according to how they promote values of distributive justice. Unlike *The Myth of Ownership*—which dismisses tax measures as instrumental technicalities—non-ideal theory philosophers would recognize their actual distributive impact, and analyze it independently of other redistributive policy options.

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<sup>62</sup> Wiens, *Political Ideals*, *supra* note 9, at 454.

<sup>63</sup> Xavier Landes, *Why Taxing Consumption? Justifications, Objections and Social Cooperation*, in PHILOSOPHICAL EXPLORATIONS OF JUSTICE AND TAXATION NATIONAL AND GLOBAL ISSUES 101, 102 (Helmut P. Gaisbauer, et al. eds., 2015).

<sup>64</sup> These fields may overlap, and occasionally this independence may result in inconsistencies, but there are several justifications (such as the need for bureaucratic and operational specialization, and the costs of coordination between different government branches) for permitting such independence of various government entities. *See*: David A. Weisbach & Jacob Nussim, *The Integration of Tax and Spending Programs*, 113 YALE L. J. 955 (2004).

Finally, in order to define the feasibility frontier of their analysis, non-ideal theory philosophers and tax theorists should take into account public perceptions of taxation and distributive justice, and several related empirical considerations.<sup>65</sup> These include: What are the other-regarding distributive preferences that people hold? How do these preferences relate to their opinions about the causes of inequality? How sensitive are these distributive preferences to the type of policies that promote them—specifically, how much are individuals supportive of tax-based redistribution (in comparison with other distributive measures)? Are people good optimizers of their preferences, and what framing manipulation and cognitive biases are they susceptible to in the context of the debate about tax policy? How, and when, do people reconsider their preferences?

All these considerations are crucial to enabling non-ideal-theory philosophers to morally analyze and rank various policy options. At an individual level, misguided perceptions and biases, or immoral preferences, may offer little or no moral justification. However, at the aggregate societal level, feasibility assessments require that these considerations be taken into account. Hence, *morally* ranking the costs and benefits of various tax policy options requires policymakers to be aware of these factors, and the casual mechanisms by which they have contributed to shaping the status quo.

Like any other institution, the tax regime is constantly mutating in the public perception of the aims it should promote, and the means it should use to promote them. The complexity of various institutions and of the regimes they regulate essentially means that they develop a “life of their own.” The moral distributive discourse surrounding taxation is very different from the one surrounding health and welfare—even though government spending is obviously related to the tax regime financing it.

Taxation is a basic and vital policy tool, that all other state functions depend upon.<sup>66</sup> Hence the tax system’s ability to raise revenues fairly and effectively justifies a serious moral investigation. There are many ways to evaluate what is the most feasible and desirable alternative. How much political and material resources should be invested in promoting a given distributive value (at the expense of promoting other values)? What is the second-best desirable

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<sup>66</sup> Mehrotra, *supra* note 50, at 285.

tax reform alternative: that which brings society closest to an ideal, but is static—or one that which is further from the ideal, but is expected to be less stable, so it may allow for progress toward the ideal over time? These are normative questions that require answers, for which existing ideal-theory literature provides little help or inspiration. To address these questions, philosophers and tax theorists must re-examine tax theory through non-ideal theory lenses, and provide a distributive theory that goes beyond the principles of benefit, and ability to pay.

### III. Building the Foundations of a Non-Ideal Distributive Tax Theory: Constraints and Prioritization Rules

#### A. The Three Major Tax-Distributive Questions

The analysis of this Part explores the type of non-ideal theory constraints that philosophers dealing with tax redistribution (as well as normatively minded tax experts) should adopt. I start by describing one major constraint that, in my view, any non-ideal distributive tax theory should accept—then turn to describe the normative scholarly inquiries that ensue from adopting it.

The major constraint of any non-ideal theory dealing with redistribution is that tax questions should be separated from questions about spending. This relates to the psychological difficulty of many (voters, policymakers as well as economists and legal scholars dealing with taxation) in forming even an approximate tangible link between specific tax policies, and how the money is spent.<sup>67</sup> This constraint goes against the main premises of optimal tax theory (the leading theoretical approach to economic research of public finance), which assumes that the only thing tax scholars should be concerned with is the overall amount of utility and its distribution. It also runs counter to the ideal theory of egalitarian political philosophers (such as Murphy and Nagel, as discussed in Part II.A), which focuses on the overall consequential aspects of distributive tax-spending efforts by the government.

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<sup>67</sup> LARRY M. BARTELS, *UNEQUAL DEMOCRACY* 27, 128–130 (2008).

Despite the lack of significance that ideal-theories in political philosophy (and public finance) assign to the institutional distributive measures taken by the state to meet these objectives, most people attribute key importance to how redistribution is achieved.<sup>68</sup> In fact, the tax system is one of the only mechanisms in which government is required to treat individuals differently, based on their financial characteristics.<sup>69</sup>

While some commentators have considered this preference to be a non-consequential normative commitment,<sup>70</sup> under the non-ideal theory framework it can best be seen as a psychological (or political) constraint.<sup>71</sup> Admittedly, from an ideal-theory analytical perspective, some may find it difficult to argue why discussions about the distributive impact of taxation should be kept separate from the discussions about spending. Nevertheless, from a non-ideal theory perspective, the opportunity cost argument is relatively straightforward: A complex social phenomenon such as inequality involves many government policies—only a few of which can be dealt with at any one time.<sup>72</sup>

The integration of tax and spending requires levels of abstraction far beyond the capabilities (or inclinations) of the vast majority of people—including many tax experts. The answer as to whether, from a moral distributive perspective, corporate or inheritance tax should be raised or reduced, appears to be largely independent of the question of marginal spending. Even if one can (logically and practically) trace the marginal increase or decrease in public spending that such tax raises/cuts would achieve, the vast majority of relevant normative parameters that relate to these two questions can be answered even without knowing precisely how those revenues would be spent.

For this reason, a normative inquiry in a bid to analyze the outcomes of taxation and to take part in the public debate about tax policy should be subjected to the constraint of identifying principles that directly apply to the tax system. Establishing the empirical validity of this point requires a thorough review of the literature on public perceptions of inequality and taxation. I have explored this empirical body of work at length, and made the argument in favor of

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<sup>69</sup> Jeremy Bearer-Friend, et al., *Taxation and Law and Political Economy*, 83 OHIO ST. L. J., 26 (forthcoming, 2022).

<sup>70</sup> Zachary Liscow, *Toward Democratic Law and Economics: Moral Commitments & Inequality* 19-21 (2020).

<sup>71</sup> Lee Anne Fennell & Richard H. McAdams, *The Distributive Deficit in Law and Economics* 100 MINN. L. REV. 1051, 1055-1056(2016).

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bifurcation in a different article.<sup>73</sup> In that paper, I argued that the bifurcation constraint is necessary to allow tax theorists and political philosophers to develop a non-ideal distributive theory that can normatively evaluate the tax regime. The focus of the current Article is different: rather than arguing for this specific constraint, it sketches the overall set of constraints that a non-ideal distributive tax theory would have to adopt.

An examination of taxes separately from spending may cast a misleading light on redistributive tax dilemmas—because the distributive effect of taxes and spending may be inconsistent.<sup>74</sup> Hence, a non-ideal theory of taxation requires a set of proxies that allows for a more accurate moral evaluation of tax policy options. These proxies should focus on the major distributive questions that the tax system addresses. To have a more meaningful normative and policy discussion about these issues, there should also be a priority mechanism to address how these different proxies relate to one another.

The second constraint is that tax redistribution is a multidimensional concept, which involves various normative goals, and as such raises (at least) three major normative distributive questions, which are related but distinct.<sup>75</sup> The first question is: What is the correct size of government (i.e., what is the optimal, or normatively-just scope and scale of a government's operation)? Tax is the result of government spending. Hence, the amount and type of government spending on public goods has a tax price, which requires extracting public resources that may otherwise have been privately controlled. This is a different approach to the integration of tax and spending. As previously noted, the question of what public goods the government should supply involves many details that cannot be fully integrated into tax scholarship (given public perceptions and human cognitive constraints). Hence, asking this question in a much cruder way—namely, the desired overall size of the government, rather than questioning the desirability of specific spending policies—provides a more tangible link, which is more suited to the context of tax scholarship. While the answer to this question has certain empirical aspects to it, it is

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<sup>74</sup> Consider, for example, a government that runs a very small budget, and provides very little by way of public services.

<sup>75</sup> For a related analysis that breaks down the tax distributive question, *see*: Edward J. McCaffery, *The Conflicting Masters of Tax*, USC LEGAL STUDIES RESEARCH PAPER SERIES NO. 21-41, 30-47 (2021).

essentially a normative question about the appropriate role of politics-versus-market forces in determining the allocation of economic resources among individuals in a given society.

The second question is: What level of ownership are individuals entitled to with respect to assets that they own (and to the income they generate)? The question of moral entitlement to certain assets and income flows is a complicated normative one, which requires an elaborated analysis of the sources of wealth and income. Again, this question has certain empirical aspects to it, such as questions of how taxes incentivize people’s behavior.<sup>76</sup> Nonetheless, the question of “desert” (what a person morally deserves) is essentially a distributive moral one that has been debated intensively in modern political philosophy.<sup>77</sup>

The third question is: What are the normative implications of inequality? It has widely been recognized that high levels of inequality may be associated with certain negative social outcomes.<sup>78</sup> At certain psychological and financial margins, it may affect the well-being of people—resulting in social coordination and cooperation problems, and may also have troubling implications for the democratic political process.

The above three questions are by no means an exhaustive list of the distributive dilemmas that stem from the use of the tax system, and one can think about a few additional ones (such as the distributive impact of using Pigouvian taxes, as well as global justice questions that are relevant to international taxation).<sup>79</sup> However, in the domestic sphere—in which most of the tax scholarship and policy concerned with redistribution revolves—the above three questions are probably the most significant ones.

Every tax has a revenue *and* distributive impact. This is true even when the tax has no direct distributive objective (such as a Pigouvian tax on pollution). Hence, when non-ideal theory philosophers think about redistribution in the context of tax policy, they should be aware that it responds to all the above (major) normative distributive questions. In contrast, ideal-theory

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<sup>76</sup> David Gamage, *How Should Governments Promote Distributive Justice?: A Framework for Analyzing the Optimal Choice of Tax Instruments*, 68 TAX L. REV. 1, 5-6 (2014).

<sup>77</sup> ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 149–174 (1974).; Dworkin, *supra* note 11.

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philosophy dealing with redistribution and fiscal policy rarely recognizes the distinctions and links between these various questions.<sup>80</sup>

Much of the political philosophy literature on redistribution is solely about what type of redistributive spending the government should support. Hence, most of the literature on distributive justice touches indirectly only upon the first question (about the correct size of government), while hardly addressing the question of how government spending should be financed directly (leaving it to the government to raise the funds necessary to finance just social spending schemes). Conversely, political philosophy ideal theory on taxation responds mainly to the second question (regarding what people deserve to own). Occasionally, few philosophers address the third question directly—but to the best of my knowledge, very few works address all three aspects of using certain fiscal instruments to achieve multiple redistributive goals.<sup>81</sup>

The third constraint is that democratic countries are likely to use different tax bases to try and attain their revenue and tax-distributive ends.<sup>82</sup> This “constraint” is actually supported by several strong efficiency and tax administration arguments, which maintain that the use of multiple instruments reduces inefficient behavioral responses to taxes, and in particular makes tax planning responses more difficult and costly.<sup>83</sup>

Acknowledging this constraint, along with the second one, results in an interesting insight: Policymakers trying to design the tax system to meet these different distributional goals may face powerful institutional constraints.<sup>84</sup> These constraints arise from the difficulty of coordinating different fiscal instruments to reach different goals.<sup>85</sup> Regardless of whether these coordination costs result from cognitive biases, sociological and institutional factors, or from the costs associated with the political-legislative system—the point remains the same: Effectively

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<sup>80</sup> For example, a welfarist would see all three questions as indirectly addressing issues of how to maximize welfare so that welfarists (that is, primarily economists) would try to translate these questions into frameworks of what increases, or decreases, welfare.

<sup>81</sup> ACKERMAN & ALSTOTT, *supra* note 55, at ? .

<sup>82</sup> Stanley L. Winer & Walter Hettich, *The Political Economy of Taxation: Positive and Normative Analysis When Collective Choice Matters*, 22 (Carleton University, Economic Working Paper No. 02-11,2003), <https://tinyurl.com/y2m6jz59>.

<sup>83</sup> David Gamage, *How Should Governments Promote Distributive Justice?: A Framework for Analyzing the Optimal Choice of Tax Instruments*, 68 TAX L. REV. 1, 10-15(2014); David Gamage, *The Case for Taxing (All of) Labor Income, Consumption, Capital Income, and Wealth*, 68 TAX L. REV. 355, 401-402(2015).

<sup>84</sup> *Id.* at 2.

<sup>85</sup> For a discussion over the importance of coordination costs *see*: David A. Weisbach & Jacob Nussim, *The Integration of Tax and Spending Programs*, 113 YALE L.J. 955(2004).



and flexibly using all fiscal tools to meet all tax redistributive goals is an improbable political outcome. Any context-dependent attempt to morally evaluate and analyze the distributive impact of the tax system must recognize this difficulty. The assumptions about the government's ability to comprehensively integrate tax and spending, or its reliance on a single tax redistribution instrument to meet one redistributive goal are all extreme simplifications (and unrealistic). Relying on these assumptions may prove counterproductive, whenever the metric and purpose of redistribution is more complicated.<sup>86</sup>

It is important to stress that these three distributive questions are (obviously) inter-related, and that the use of each fiscal instrument will at least partly impact the answer to all of them.<sup>87</sup> That said, contemplating these questions individually may often yield conflicting unintuitive answers, and involve the use of different fiscal instruments. For example, all taxes contribute resources that allow government spending (thereby affecting the first question about the size of the government). This is an important part of a tax-redistributive framework, because government-supplied public goods may be distributed more equally than market goods and services.

One of the most important fiscal mechanisms (in terms of collecting revenues) that governments increasingly rely upon is broad-based direct taxes on mostly labor (and business) income, along with indirect consumption taxes (namely VAT/GST taxes).<sup>88</sup> Hence, the focus on the size of government provisions marginalizes the role of other taxes.<sup>89</sup> More specifically, the focus on revenues may overshadow the importance of certain highly redistributive taxes—such as income taxation on capital income and wealth transfer taxes—which may only have a relatively minor impact on the overall amount of resources available to the government. Nonetheless, these taxes are crucial to other aspects of tax redistribution, which are significant because they address another tax-distributive question. Hence, the question over the desirable

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<sup>86</sup> For example, whenever the purpose of redistribution is not only to reduce inequalities in income, a tax system may wish to employ a wide variety of distributive tools, rather than relying only upon income-tax and transfer mechanisms. See: Zachary Liscow, *Reducing Inequality on the Cheap: When Legal Rule Design Should Incorporate Equity as Well as Efficiency*, 123 YALE L.J. 2478, 2504 (2014). Liscow argues against the more traditional position of Kaplow and Shavell, see: Louis Kaplow & Steven Shavell, *Should Legal Rules Favor the Poor? Clarifying the Role of Legal Rules and the Income Tax in Redistributing Income*, 29 J. LEGAL STUD. 821(2000).

<sup>87</sup> For this type of analysis see: Ari Glogower, *Taxing Inequality*, 93 NYU LAW REVIEW 1421, 1465 (2018).

<sup>88</sup> See: OECD. Revenue Statistics <https://www.oecd.org/ctp/tax-policy/revenue-statistics-tax-structures.htm>

<sup>89</sup> Ajay K. Mehrotra, *Envisioning the Modern American Fiscal State: Progressive-Era Economist and the Intellectual Foundations of the U.S. Income Tax*, UCLA L. REV. 1793, 1797 (2005).

level of government spending is not necessarily related to the issue of whether or not governments should use tax policies to limit the concentration of wealth.<sup>90</sup>

More specifically, wealth transfer taxes (or wealth taxes) are of relatively minor importance in the budgets of those countries that use them.<sup>91</sup> However, because they are very progressive tax bases, using them directly impinges upon the second and third normative questions (about individuals' entitlement, and about the effects of inequality). If large estates result in negative outcomes (such as dynastic wealth that threatens democratic sovereignty), governments should consider using wealth transfer taxes more intensively.<sup>92</sup> Moreover, the right of individuals to transfer the assets they generate over their lifetime to their descendants through gifts or bequests is a separate normative discussion, which relates to the second question of how much a person "deserves" to control a given asset.<sup>93</sup>

The case for and against different types of wealth transfer taxes raise conflicting moral answers to all three questions. Wealth transfer taxes appear to have only a minor role when discussing the first normative-distributive question with respect to the overall size of the government. Supporters of "big government" may therefore care little about it. However, people concerned with inequality—especially of the dynastic kind—would approve of it very strongly. Those concerned with questions of *desert* (and in some respects also incentives) may be more ambivalent about it. Some of them may argue that individuals have the right to transfer the product of their efforts to their descendants, free of tax, while others may point out that many of the assets accumulated in these estates are not the product of merit or efforts, but of luck and privilege.

This Article cannot resolve these highly controversial moral questions—only to highlight that *these are three different discussions*. One fiscal system might reflect normative support for a

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<sup>90</sup> Murphy & Nagel, *supra* note 4, at 71.

<sup>91</sup> Magnus Henrekson & Daniel Waldenström, *Inheritance taxation in Sweden, 1885–2004: The role of ideology, family firms, and tax avoidance*, 69 THE ECONOMIC HISTORY REVIEW 1228, 1243 (2016).

<sup>92</sup> DANIEL HALLIDAY, *supra* note 2, at 2.

<sup>93</sup> Since there is no consensus as what individuals deserve to own, this debate has attracted significant normative attention in recent decades. For different opinions on this debate *see*: Anne L. Alstott, *Equal Opportunity and Inheritance Taxation*, 121 HARV. L. REV. 469(2007).; Lily L. Batchelder, *Leveling the Playing Field between Inherited Income and Income from Work through an Inheritance Tax*, in TACKLING THE TAX CODE: EFFICIENT AND EQUITABLE WAYS TO RAISE REVENUE 48 (2020); MICHAEL J. GRAETZ & IAN SHAPIRO, DEATH BY A THOUSAND CUTS THE FIGHT OVER TAXING INHERITED WEALTH (2005); Edward J. McCaffery, *The Uneasy Case for Wealth Transfer Taxation*, 104 YALE L.J. (1994).

large government and avoid adopting wealth transfer taxes—on the grounds that these would not extract sufficient revenues, or because they would do so immorally (according to the normative values of that society). Conversely, a different fiscal system might reflect an opposition to a large government, but support wealth transfer taxes if it is designed to diffuse concentration of wealth, because such concentration may have a negative impact on the democratic process. This analysis opens a debate over whether wealth transfer taxes really do counter economic inequality (or whether there are more effective measures for such purpose—such as wealth taxes), and whether or not they in fact inappropriately infringe upon notions of *entitlement*.<sup>94</sup> This requires philosophers and tax scholars to carefully define the types of inequalities they are concerned with, and to establish a tangible connection between their reasoning and the fiscal instrument they propose to address these inequalities.

The wealth-transfer taxes example highlights that a distributive non-ideal tax theory should clearly underline the constraints that normative and fiscal scholars should consider; identify the various layers of distributive concerns that arise from these constraints; and—most importantly—develop a framework for answering the normative questions about the appropriate use of fiscal instruments to balance between multiple tax distributive goals. This framework would not provide an equation aimed at pointing to a specific distributive outcome, but provide a set of conventions and priority rules that coordinate between the above three distributive questions.

## B. Designating and Prioritizing the use of Fiscal Instruments

As noted in Part II.A, institutions and institutional reasoning are important from a non-ideal theory perspective because of their role as the state’s primary means to “deliver justice.”<sup>95</sup> Hence, the manner in which the tax system views and coordinate its different tax instruments will most tangibly reflect how its society answers the above three tax-distributive questions.

This section provides a general framework for how a normative discussion over the role of the tax system should address these above constraints. It focuses on the effect of each specific

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<sup>95</sup> Galston, *supra* note 39, at 393.

fiscal instrument on a specific distributive goal, and integrates this into a broader framework in which the two other distributive goals and other fiscal instruments are accounted for. The framework introduces two principles: *specialization* and *coordination-prioritization*.

The specialization principle argues that while each of the three distributive tax questions may be addressed by multiple tax (and non-tax regulatory/spending) instruments, due to coordination-costs constraints it is best to morally analyze the effect of each fiscal instrument in resolving the distributive question most relevant to it. In other words, it argues that in order to assess the distributive impact of the tax system fiscal instruments should be “earmarked” to a specific tax-distributive goal. It demonstrates how this linkage helps to convey and assess the distributive impact of a specific tax instrument more accurately.<sup>96</sup>

The coordination-prioritization principle relates to the tension involved in coordination. It aims to systematically address the need to evaluate different tax bases and instruments according to the normative proxy they represent, and the need to assess the tax system as a whole. In a non-ideal setting, this is necessary because all the varied elements of the tax system factor in at least one crucial question: How much money can the government spend on various public goods? This article argues that this challenge should be addressed through a prioritizing rule, in which the tax distributive questions of justice and democratic desirability of tax redistribution are not only distinct from the question of overall government spending, but also resolved before it. In a non-ideal normative analysis of tax redistribution, the question over the appropriate level of government provisions should be answered last, to supplement the revenues needed after taking into account those that were raised from fiscal instruments used to attain the other two distributive goals.

The starting point of the analysis is the specialization principle, which requires earmarking fiscal instruments to their major distributive function. Developed countries have three main types of tax bases that they can draw upon to reach their revenue and distributive objectives: indirect (cash flow) consumption taxes, direct active income (labor and business) taxes, and various direct-tax instruments aimed at taxing capital (including taxes on capital

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<sup>96</sup> On the topic of earmarking see Manoj Viswanathan, *Rethorizing Progressive Taxation* TAX L. REV, 49-51 (forthcoming, 2021)

income, wealth transfer taxes, and wealth taxes).<sup>97</sup> Typically, indirect consumption taxes are taxed at uniform tax rates, while income taxes on active income are based on some form of tax rate progressivity. The tax rates on wealth, income, and wealth transfers vary.

Modern indirect cash-based consumption taxes (typically GST/VAT) are used in most of the world, and account for a growing percentage of tax revenues in most developed countries.<sup>98</sup> As indirect consumption taxes—which are generally imposed at a uniform tax rate—they are sensitive to taxpayers’ living standards, but relatively regressive in comparison to other (direct tax) fiscal instruments.<sup>99</sup> The main advantages of these taxes are that they are broad-based, easy to collect, and (relatively) difficult to manipulate.

Another major source of revenues in developed countries are the personal income taxes imposed on active (labor and business) income. While direct income taxes are also imposed on capital income and corporate income, the lion’s share of income tax revenues comes from progressive taxes imposed on the active income of individuals.<sup>100</sup> As recognized by many scholars, in the past fifty years the realization-based income tax regime has not been very successful at keeping wealth economic inequality in check.<sup>101</sup>

In a different paper, I argued that tax scholarship has “overloaded” the income tax base, by requiring it to accommodate the answer for all three normative tax-distributive questions.<sup>102</sup> Given its declining role in providing revenues (compared with the growing role of indirect consumption taxes) and its limited success in reducing wealth and capital income inequality, this overload may require reconsideration. Hence, when discussing the rate structure of the income

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<sup>97</sup> Landes, *supra* note 63 at 113.

<sup>98</sup> See OECD, *supra* note 88.

<sup>99</sup> Consumption is positively correlated with economic resources so that rich taxpayers pay more consumption taxes (in absolute amounts). However, the uniform tax along with the fact that affluent taxpayers consume a relatively smaller percentage of their overall resources, makes this fiscal instrument regressive in comparison to the other two bases.

<sup>100</sup> In a sense, the income tax on capital income and corporate income was in many cases devised as a mechanism to protect the individual labor income tax base. The ability of affluent taxpayers, especially entrepreneurs, to convert the return to their human capital into capital gains (in the form of stock appreciation), or capital income has dictated a set of fiscal rules that will prevent such a leakage. See: Diamond & Saez, *supra* note 59, at 171 & 181; Isabelle Joumard, et al., *Less Income Inequality and More Growth – Are they Compatible? Part 3. Income Redistribution via Taxes and Transfers Across OECD Countries*, 29 926 ECO/WKP(2012)3 (2012).; Thomas Piketty & Emmanuel Saez, *A Theory of Optimal Capital Taxation*, 33 NBER WORKING PAPER NO. 17989 (2012).

<sup>101</sup> McCaffery, *supra* note 109.

<sup>102</sup> XXX. For a somewhat similar arguments see: McCaffery, *supra* note 75 at 1-2; Viswanathan, *supra* note 96 (with respect to income tax progressivity).

tax, tax theorists (and policymakers) should focus the debate on whether or not taxpayers are entitled to the active income they generate by using their human capital. This framing links the policy dilemma about income tax progressivity to the second tax-distributive normative question about individuals' moral desert with respect to their earnings. This framing does not necessarily lead to any specific conclusions about the desired level of income tax progressivity, but it does narrow this important question to where it is relevant and tangible.<sup>103</sup>

The final important set of fiscal instruments is that concerned with the taxation of wealth, or wealth transfers. While these taxes obviously generate revenues, unlike the other two instruments (that are imposed on the majority of the population), they are elite taxes. Hence, the overall amount of revenues they raise is relatively low (as a percentage of the GDP, and the overall tax mix). In a different paper, I argued that the primary normative concern that these taxes should address is associated with the costs that extreme inequality and concentration of wealth impose on democratic cooperation.<sup>104</sup> From a normative perspective, the justification for these taxes does not depend on classic distributive justice questions about whether or not taxpayers are entitled to their income, or on whether or not the government has a duty to provide a given set of public goods. Rather, if one believes that inequality hampers the ability of a democratic society to function properly, its reduction is warranted regardless.

If, as some research suggests,<sup>105</sup> extreme wealth inequality has serious (social, political or “democratic”) costs, wealth and wealth transfer taxes may be justified even if the revenues needed to fund government expenditures may be collected in other more efficient ways. Furthermore, they are justified even if individuals are (by and large) morally entitled to their (after income tax) property and earnings (for example, because it is a product of their efforts). There is, of course, no easy normative answer to any of these questions. It is unrealistic for this paper (or in fact any single book or article) to simultaneously answer what is the correct level of

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<sup>103</sup> The tax rate structure on income from labor and from active business income bears upon this question: part of the difficulty in imposing high marginal income tax rates today results from the reluctance of many in society to impose such rates on income that is (at least in part) the result of talents and efforts. This may reflect utilitarian considerations that focus on the social costs associated with the incentive effects of high marginal tax rates.

However, it is also the result of differences in views about equity considerations—in particular, the requirement of individuals to a share in the income they generated. For example, some may argue that individuals are not entitled to attributes such as talent which, like inheritance, is also the product of luck—while others may disagree.

<sup>104</sup> In that paper I argued that annual wealth (rather than estate or inheritance) taxes would be best in fulfilling this function. However for the purpose of this paper it is not necessary to accept or reject this position. XXX

<sup>105</sup> Id.

public spending, the entitlement of individuals to the product of their labor, and the state's proper tax treatment of wealth concentration. These are different questions, which involve different considerations for which one cannot expect unanimous agreement—and people may have different answers to each of these questions. The important thing is to recognize that, just as no single article can address all three issues, no single fiscal instrument could be expected to do so satisfactorily, either. It is therefore important for non-ideal theoretical purposes (as well as for more practical policy ones) to link different considerations to their respective instruments.

Accepting the specialization principle does not solve the question of how the tax system should coordinate between the various fiscal instruments and its distributive objectives. Like the specialization principle, the prioritization principle does not argue for either a specific overarching ideal theory of justice, or provide specific answers to any of the major distributive questions posed earlier. Instead, it explains how these various tax-redistributive debates should be addressed in a world in which there is no consensus over any single comprehensive theory of justice benchmark. Unpacking this seemingly complex question means differentiating between the two main functions of redistributive taxation—promoting certain goals of redistribution and providing the government with necessary resources to finance public goods.<sup>106</sup> When the government uses the tax system to reduce concentration of economic power (e.g., by enabling for better democratic cooperation), or to divide property rights in a more just manner, revenue collection is merely the byproduct—not the goal itself.

In a state that has no problems of power concentration and where there is a completely just allocation of rights over property and income entitlements, the government should avoid employing any type of redistributive taxation. Instead, it should be concerned only with collecting sufficient taxes to supply the just amount of public goods, in the most distributive neutral and efficient manner. However, in a world where redistribution is warranted (to promote objectives of distributive justice, democratic-cooperation, or both) revenues from redistributive taxes should be subtracted from the overall amount of revenues needed to provide the public goods. In more practical terms: First, wealth and income taxes should be applied, to achieve the agreed levels of economic power diffusion and just redistribution of assets. Then, once the government's tax redistributive apparatus is satisfied through direct taxation on income and

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<sup>106</sup> MURPHY & NAGEL, *supra* note 4, at 66.

wealth, the remaining amount should be collected using efficient indirect consumption taxes (such as VAT), to support the government expenditure apparatus.

In terms of prioritizing between the distributive justice entitlement to labor income and the need to defuse concentration of economic power, the question of distributive justice should be addressed first. The normative question about labor income entitlement will determine the scope of the labor (and business) income tax base, as well as the progressivity of the income tax rates imposed. While the goal of making these determinations is to promote just entitlement of assets and income, they are bound to have important consequences for the concentration of economic power. Hence, the use of wealth tax instruments to reduce the adverse effects of economic power concentration is likely to be sensitive to the distributive justice vision that a given society possesses with respect to labor income.<sup>107</sup> However, the normative debate over the question of moral entitlement is distinct from the third distributive question about the negative impact of wealth concentrations.

One fiscal system may support the normative position that entrepreneurship is a morally desirable personality attribute that should be encouraged, and therefore endorse applying a low marginal tax rate on the active income of entrepreneurs. At the same time, such a fiscal system may also apply a wealth (or wealth-transfer taxes) on super-successful entrepreneurs such as Jeff Bezos, if the fortunes they accumulate have a negative impact on the democratic process (for example, because it allows them to obtain uncompetitive rents). The costs of vast wealth concentration may not be directly related to whether the fortune of superrich individuals is inherited or self-made, or whether it was a byproduct of privilege luck or efforts. Even though low marginal taxes on entrepreneurs and high wealth taxes may seem contradictory, this system may actually be very coherent in its design, inasmuch as it seeks to promote different distributive values through different tax instruments by tailoring those instruments to specific tax-distributive functions.

As Winer and Hettich have noted, the tax mix of a given tax regime represents an equilibrium outcome, which should be expected to change frequently to suit external factors,

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<sup>107</sup> It seems rational to assume that economic concentration of power is more likely to occur in a fiscal system that defines a narrow income tax base and applies low marginal tax rates, than in one that defines a broad base and applies high marginal tax rates.



which change the supply and demand of different revenues.<sup>108</sup> Nevertheless, in a world with constant disagreement, the two principles of specialization and coordination-prioritization provide a stable non-ideal normative theoretical framework for approaching the three major tax redistributive questions. This non-ideal framework analyzes how to use the main fiscal instruments in a system with multiple moral-distributive goals, in a manner that allows all these considerations to be integrated into one coherent and realistic fiscal system.

### C. Summary and Qualifications

The above framework is not the only form of non-ideal tax theory one can imagine. Instead, it is one that is developed to address “only” one type of moral evaluation—the manner in which a certain tax mix properly addresses the major (different) distributive considerations in the domestic context. One can imagine other types of non-ideal frameworks that would allow other moral evaluations that are associated with taxation—such as frameworks involving considerations of international relations (international taxation) and gender relationships (the taxation of family units). One can also imagine a non-ideal theory that tries to incorporate more nuanced settings in its analysis—such as the taxation of corporate entities, or various Pigouvian taxes. There is no single correct non-ideal theory—different moral evaluations require different emphases, and different levels of abstraction.

This article advances the argument that we should engage with non-ideal theory evaluations of the distributive impact of the tax regime, because ideal-theory-philosophical discussion of distributive justice is not the only type of discussion we should be having. The attempt to find a new ideal-theory setting that balances between various abstract values, or the attempt to prioritize certain fiscal arrangements according to a given idealized theory, are all relevant moral conversations that we can, and should, be having. However, they are definitely not the only ones we should consider. Tax law involves real problems, real money, and real people. It has vital ramifications with regard to economic inequality, and is one of the only institutions that may be effective in limiting high-end inequality in modern democratic societies.

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<sup>108</sup> Winer & Hettich, *supra* note 82 at 1.

Hence, given its potential role on reducing economic inequality, the tax regime indirectly affects how other democratic institutions function.

Philosophers and philosophy-minded tax scholars must meet the challenge of evaluating the moral distributive impact of various tax policy trajectories, while taking into account the context in which they occur. At the very minimum, they should be open to the possibility of multiple distributive fiscal objectives, and avoid making simplistic assumptions about a single ideal to guide policymakers (such as welfare maximization, or endowment taxation). They should also avoid pursuing the ideal tax base/fiscal instrument that will simultaneously satisfy all revenue needs and distributive objectives.<sup>109</sup> Instead, they should embrace the challenges and constraints of what appears to be a complex tax system with multiple moral distributive objectives, and (imperfect) fiscal instruments that can be used to promote them. This recognition may result in an intellectually richer, and perhaps more policy-influential distributive tax scholarship.

#### IV. Conclusions

This Article explores various aspects of the non-ideal theory literature, and explains its potential relevance to the redistributive tax scholarship. It points to the enormous potential of diversifying our philosophical toolkit to include non-ideal theories, as well, which emphasize the importance of constraints on our moral understandings and actions in the tax distributive context.

It offers a basic unified framework of moral evaluation that helps to integrate various distributive questions associated with contemporary tax dilemmas. This framework distinguishes between the different normative issues, while also providing a more complicated metric that allows tax scholars to analyze and morally evaluate the tax system as a whole.

Serious and complex distributive problems require effective normative, evaluative, and action-guiding norms. In the context of contemporary tax practices, these norms are unlikely to be generated by any single thought experiment.<sup>110</sup> Instead, they are likely to emerge by

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<sup>109</sup> Edward J. McCaffery, *Taxing Wealth Seriously* 7-8 (USC L. Legal Stud., Research Paper No. 16-10, 2016), <https://ssrn.com/abstract=2738848>.

<sup>110</sup> AMARTYA SEN, *THE IDEA OF JUSTICE* v, 410 (2009).

examining the function and impact of actual political and institutional structures. This requires tax scholars to identify the relevant social conditions that affect the feasibility constraints on fiscal policy, and to morally evaluate them.

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