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ENDOWMENT TAXATION AND EQUALITY OF RESOURCES

by

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ABSTRACT

This Article has two primary aims. The first is to provide an in-depth survey of recent legal academic literature on endowment (or ability) taxation, which is a tax on a person’s maximum potential earnings over a given period. This scheme of taxation, which has for some time enjoyed favor as an ideal among economists, has recently gained significant support from tax law scholars as well. The second aim is to demonstrate that a seemingly elegant justification for the endowment tax, which attempts to reconcile the demands of equity and liberty within a certain luck egalitarian framework—Ronald Dworkin’s “equality of resources”—is not ultimately successful. Thus, the firmness of the endowment tax’s normative foundations remains far from settled.

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INTRODUCTION

[F]rom each according to his ability, to each according to his needs!

—Karl Marx¹

From each according to his ability, to each so as to maximize total utility, or a weighted social welfare function thereof.

—Paraphrase of the Theory of Optimal Taxation²

What is endowment taxation? Whereas an income tax levies on a person's actual earnings, an endowment (or ability) tax taxes a person's potential earnings, which can be thought of as the maximum income a person *could* or *could have* earned over a given time period. Under this regime, the tax base therefore consists of an individual's genetic and socioeconomic endowment, as these factors are (at least believed to be) determinative of overall earning potential. To be sure, the endowment tax has struck some—and may, at least at first glance, strike the reader—as offensive, due to its apparently blithe commoditization of the taxpayer's personal attributes. Nevertheless, in recent years, a sizeable cohort of legal scholars, economists, and political theorists have rallied in defense of the endowment tax as a theoretical ideal, offering formidable economic and philosophical arguments in its favor. These scholars have generally upheld endowment as a “first-best” choice of tax base, superior to the traditional candidates of income, consumption, and wealth.

1. KARL MARX, *Critique of the Gotha Programme: Marginal Notes on the Programme of the German Workers' Party*, in MARX: LATER POLITICAL WRITINGS 208, 215 (Terrell Carver ed., 1996).

2. In the seminal presentation of his theory of optimal income taxation—a now standard model for quantifying those rates of taxation that maximize social welfare—Nobel laureate James Mirrlees writes, “One might obtain information about a man's income-earning potential from his apparent I.Q., the number of his degrees, . . . but the natural, and one would suppose the most reliable, indicator of his income-earning potential is his income.” J.A. Mirrlees, *An Exploration in the Theory of Optimum Income Taxation*, 38 REV. ECON. STUD. 175, 175 (1971). Thus, earned income is taken as a proxy for earning ability in Mirrlees's model. *See id.*

This Article makes two primary contributions. First, it presents an in-depth survey of the recent legal academic literature on endowment taxation and evaluates the most important arguments for and against this regime. Second, this Article argues that the (seemingly) most elegant theoretical justification for the endowment tax is not ultimately successful at resolving a core tension within the proposal; thus the soundness of the regime's theoretical basis is far from settled.

The Article proceeds as follows. After briefly addressing a preliminary concern about my project's practicality in Part I, I then in Part II consider two arguments in favor of endowment taxation that rely upon a utilitarian framework of analysis. According to the "standard economic argument," ability taxation is claimed to be economically efficient since it produces no substitution effects or accompanying deadweight losses (Part II.A). In addition, because an endowment taxation may function as an ideal Haig-Simons income tax, it may minimize distortions in investment decisions in human and physical capital, thereby leading to an increase in aggregate wealth and well-being (Part II.B).

Other arguments for the endowment tax, considered in Part III.A, draw upon non-utilitarian considerations, such as fair tax treatment for physical and human capital (Part III.A.1), the elimination of certain interpersonal differences in welfare (Part III.A.2), and state neutrality between preferences for leisure versus consumption (Part III.A.3). However, arguably the most fundamental pro-endowment tax argument is rooted in the normative theory of luck egalitarianism, which holds that distributive justice requires the elimination of inequalities that are due to factors beyond an individual's control, but permits for inequalities that arise from individuals' autonomous choices (Part III.A.4).

The most influential objection to endowment taxation draws attention to the tax's potential to infringe upon individual liberty: because an endowment tax may force an individual to adopt a high paying job that she dislikes solely in order to satisfy her tax obligations, it may deprive the person of freedom of occupation and make her a "slave to her talents." I turn to this criticism in Part III.B. Some commentators have challenged the import of this objection on the grounds that an income tax may also force a person to engage in more or different work in order to satisfy her tax obligations (Part III.C). Thus, no in-kind distinction can be drawn between endowment and income taxation. However, critics of the endowment tax may respond that endowment taxation

results in an objectionably different pattern of liberty infringements relative to an income tax (Part III.D), as well as to greater overall quantities of liberty costs (Part III.E). The viability of these strategies are considered in turn.

This dialectic comes to a head in Part IV. After providing the relevant theoretical background in Part IV.A, I take a closer look in Part IV.B at the most sophisticated attempt at reconciling endowment taxation's luck egalitarian motivation with a concurrent concern for individual liberty. The argument to be examined relies upon Ronald Dworkin's formulation of luck egalitarianism, which Dworkin refers to as "equality of resources." This argument seeks to show that, while the participants to Dworkin's version of the original position might opt for a tax regime where individual rates are based upon potential income, they would never set rates so high as to lead to talent slavery. This argument is important for at least two reasons.

First, Dworkin's theory, which has been very influential in political philosophy, has also been the subject of increasing attention from tax academics.³ Among liberal egalitarians, Dworkin's approach to distributive justice may be gaining ground vis-à-vis Rawlsianism because the former takes more seriously the distinction between the effects of chance versus choice, and thereby provides a greater role for individual responsibility than the latter.⁴ In addition (as to be seen below) Dworkin's formulation of the original position is substantially more detailed than Rawls's thought experiment, and therefore admits to a finer grained decision-theoretic analysis. (Indeed, it has been suggested that because Rawls's original position is a strategic choice under ignorance, rather than under risk, it does not admit to a unique solution.)⁵

Second, if successful, the argument considered in Part IV.B would show that the avoidance of talent slavery serves as an internally motivated constraint on the design of an endowment tax, which flows naturally from Dworkin's formulation of luck egalitarianism. This

3. See e.g., David G. Duff, *Tax Policy and the Virtuous Sovereign: Dworkinian Equality and Redistributive Taxation*, in *PHILOSOPHICAL FOUNDATIONS OF TAX LAW* 167 (Monica Bhandari ed., 2017).

4. See *id.* at 174.

5. See, e.g., MARTIN PETERSON, *AN INTRODUCTION TO DECISION THEORY* 63–64 (2d ed. 2017).

would neatly resolve the conflicts discussed in Part III, and thereby establish that the luck egalitarian motivation for endowment taxation and a proper respect for individual liberty are in merely *prima facie* tension with each other; when all is said and done, the two could be set in harmony.

However, as its second primary contribution, this Article argues that this attempted resolution does not succeed. In Part IV.C, I provide both external and internal challenges to the argument considered in Part IV.B. The external challenge will illustrate that Dworkin's thought experiment generates certain pathological results, which should cause us to lose faith in the device as a reliable barometer of distributive justice. The internal challenge, which for the sake of argument accepts Dworkin's theory as an appropriate normative framework for matters of distributive justice, observes that the argument considered in Part IV.B implicitly turns upon certain dubious empirical assumptions, and thereby fails to establish that Dworkin's set-up would rule out talent-slavery-producing tax rates under all plausible empirical circumstances. Thus, the conflicts between equity and liberty discussed in Part III resurface in the context of a slightly more complex dialectic. It turns out that the luck egalitarian motivation for endowment taxation and deference to individual liberty cannot be wholly reconciled.

In the conclusion, I provide a brief overview of the Article's main lessons and point to directions for future work.

I. AN INITIAL CONCERN: DIRECT AND INDIRECT OBSERVATION OF ABILITY

Before diving headlong into the murky depths of theory, let us first take a step back and consider a preliminary concern about our project's practicality. As a person's earning ability cannot be directly observed, it may seem frivolous to consider whether earning ability would constitute a sensible tax base. The thought here is that, because we do not inhabit a reality where endowment is readily transparent, one's time in the armchair is better spent devoted to more pressing topics.

This conclusion would be too hasty, however, since a person's socioeconomic and genetic endowment may be susceptible to indirect observation through the use of statistically reliable proxies and

indicator goods.⁶ Admittedly, it is probably unrealistic to suppose that these stand-ins could ever provide a particularly precise appraisal

6. For instance, parental income might be used to approximate those opportunities a child receives by virtue of her socio-economic endowment. Accordingly, Bruce Ackerman and Anne Alstott have laid out a proposal for a “privilege tax” based on the income an individual’s parents earn during her childhood. BRUCE ACKERMAN & ANNE ALSTOTT, *THE STAKEHOLDER SOCIETY* 155–77 (1999).

Other proxies, such as aptitude tests, measures of physical talents, and personality assessments, could potentially isolate components of earning potential attributable to innate ability. *See, e.g.*, Robert J. Willis & Sherwin Rosen, *Education and Self-Selection*, 87 J. POL. ECON. S7, S22 (1979) (using mathematics and reading test scores, as indicators of IQ, and measures of manual dexterity and mechanical ability to estimate potential income over a large sample of subjects); Lawrence Zelenak, *Taxing Endowment*, 55 DUKE L.J. 1145, 1180 (2006) [hereinafter Zelenak, *Taxing Endowment*] (suggesting the use of standardized test scores). Due to the immense impact a person’s scores on her standardized tests would have on her educational, social, and economic future, it is unlikely that she would significantly under-perform on these exercises in order to reduce her future tax obligations. Zelenak, *Taxing Endowment*, *supra*, at 1180. Moreover, some commentators have speculated that scientists may one day be able to appraise earning ability by analyzing a person’s genes. Kyle D. Logue & Joel Slemrod, *Genes as Tags: The Tax Implications of Widely Available Genetic Information*, 61 NAT’L TAX J. 843, 851–53 (2008). Differences in genetic endowment might also be indirectly compensated for through the adoption of certain non-tax rules, such as laws prohibiting health insurance companies from discriminating on the basis of a genetically determined illness. Kyle Logue & Rohen Avraham, *Redistributing Optimally: Of Tax Rules, Legal Rules, and Insurance*, 56 TAX L. REV. 157, 208–227 (2003).

The economist Emmanuel Saez has proposed that financial savings are also a reliable marker of earnings potential by virtue of correlating with education (which is itself an indicator of ability). *See* Emmanuel Saez, *The Desirability of Commodity Taxation Under Non-Linear Income Taxation and Heterogeneous Tastes*, 83 J. PUB. ECON. 217, 227–28 (2002). If Saez’s claim is correct, an income tax would more closely approximate an endowment tax than would a consumption tax, since under a consumption tax returns from savings are excluded from the tax base. *See id.* Furthermore, the strategic use of sales taxes placed on other indicator goods could be used to supplement an income tax regime, so that it even more closely approximates a tax on endowment. Zelenak, *Taxing Endowment*, *supra*, at 1179. Indicator goods are commodities that people of distinct ability levels consume differentially. *See* Joseph

of ability.⁷ But one way of working around such epistemic limitations might be to employ statistical correlates to create a rebuttable presumption of earning capacity, which could then be overcome by credible countervailing evidence.

Even if endowment were not susceptible to rough approximation through indirect observation, though, analyzing the fairness and efficiency of ability taxation under an assumption of transparency might still be a valuable theoretical exercise, since it could give us important insights into the normative structure of the tax system that have other acutely practical applications. Were we to discover that endowment taxation embodied elements of our ideal conception of distributive justice, the ability tax might serve as an important normative benchmark against which we measure the appropriateness of more practicable real world proposals.⁸

With these prefatory comments in mind, let us now examine some of the most influential arguments put forward in favor of ability taxation.

Bankman & David A. Weisbach, *The Superiority of an Ideal Consumption Tax over an Ideal Income Tax*, 58 STAN. L. REV. 1413, 1453–55 (2006). For example, buying tickets to an opera or a fine art museum plausibly indicates high ability, while purchasing cigarettes or lottery tickets may have the opposite statistical implication. Zelenak, *Taxing Endowment*, *supra*, at 1179.

Delving further into the empirical realm, Chris Sanchirico has used educational, demographic, and geographic data in an attempt to approximate the distribution of potential incomes across certain families for the 1989 and 2000 tax years. Chris William Sanchirico, *Progressivity and Potential Income: Measuring the Effect of Changing Work Patterns on Income Tax Progressivity*, 108 COLUM. L. REV. 1551, 1585–88 (2008). These computations are performed in an effort to determine the effect of the income tax's "implicit exclusion for nonmarket activity" (i.e., its failure to tax potential earnings) on overall progressivity. *Id.* at 1554. Sanchirico's main conclusion is that, while rates on earned income became more progressive over the 1990s, "[w]hen average tax rates are measured in terms of potential rather than actual income . . . the income tax shows a decline in progressivity during that decade. The discrepancy arises from a change in work patterns," which he describes therein. *Id.* at 1551.

7. See e.g., GARY S. BECKER, *HUMAN CAPITAL: A THEORETICAL AND EMPIRICAL ANALYSIS WITH SPECIAL REFERENCE TO EDUCATION* 97–98 (3d ed. 1993).

8. See, e.g., Francis A. Walker, *The Bases of Taxation*, 3 POL. SCI. Q. 1, 14–16 (1888).

II. UTILITARIAN CONSIDERATIONS

A. The Standard Economic Argument: Elimination of Substitution Effects

We'll first consider economic arguments that assume a utilitarian framework of analysis.⁹ According to classical utilitarianism, the goal of taxation (and of all social policy) is to maximize aggregate welfare. Distributive considerations are only instrumentally relevant to this calculus, since different distributions will tend to be correlated with distinct aggregate utilities. For instance, given the standard assumption of marginal declining utility of wealth, more equal distributions will (bracketing potential disincentives to work) tend to be associated with greater total well-being at a given moment in time.¹⁰

In order to analyze endowment taxation from a utilitarian perspective, appreciation of some elementary microeconomics is required. Pursuant to standard economic theory, income taxation creates two opposing incentives for a taxpayer.¹¹ On the one hand, because the tax leaves a person poorer than she would have been in the tax's absence, the individual is pushed to work more than she otherwise would have, so as to compensate for this deprivation. This is commonly referred to as the "income effect."¹² On the other hand, an income tax reduces a person's effective wages, thereby curtailing the opportunity costs to leisure and lowering leisure's "price" relative to other market-based commodities. Since the tax makes leisure "cheaper," the individual is given a conflicting incentive to work less than she otherwise would have. This is known as the "substitution effect."¹³ This change in the relative prices of leisure and consumption distort the taxpayer's behavior relative to a

9. In some cases, the economic arguments considered in this section could also be employed by a non-utilitarian welfarist. Welfarism is the view that the moral goodness of some state of affairs supervenes on people's well-being in that scenario. *E.g.*, MATTHEW D. ADLER, *WELL-BEING AND FAIR DISTRIBUTION: BEYOND COST-BENEFIT ANALYSIS* 53 (2012). Thus, utilitarianism is but one form of welfarism—namely, one that adopts an aggregative, impartial, and distributionally insensitive social welfare function.

10. *See e.g.*, HARVEY S. ROSEN & TED GAYER, *PUBLIC FINANCE* 262 (9th ed. 2010).

11. *E.g., id.* at 417.

12. *E.g., id.*

13. *E.g., id.*

no-tax baseline and deter her from engaging in what would otherwise be socially beneficial economic exchange. Substitution effects thereby produce deadweight loss.¹⁴

Whether an income tax will cause a *net* decrease or increase in the number of hours worked depends upon the comparative sizes of the tax's income and substitution effects.¹⁵ In turn, the ratio of these effects hinges on features of the taxpayer's utility function, such as how much she values consumption relative to leisure,¹⁶ and of the market, such as the prices of various commodities available for consumption. If an income tax's substitution effect outweighs its corresponding income effect, there will be net reductions in hours worked. In either event, however, the substitution effect may bring with it a reduction in social surplus.¹⁷

Perhaps the most common economic argument put forward on behalf of endowment taxation is that it lacks a substitution effect. Under an ability tax regime, tax liability tracks potential earnings, which are determined solely by a person's genetic and socio-economic endowment. Since a person's tax obligation is fixed by factors outside of her control, the individual cannot reduce her taxes by working less and substituting leisure for consumption. It is therefore claimed that an endowment tax is economically efficient since it avoids the deadweight loss caused by income taxation's substitution effect.¹⁸

It is worth noting that there is another commonly discussed tax known to exhibit these virtues. Because a head tax imposes an

14. See *id.* at 336, 341–43. The deadweight loss (also referred to as “excess burden”) here is equal to the amount of economic surplus forgone as a result of the tax discouraging socially beneficial exchange, less the government revenues collected by the tax. See *id.* at 337–43. In general, the economic surplus generated by the market transactions for a given commodity is equal to the sum of the buyer and seller surpluses. Buyer surplus is calculated by summing the amounts that buyers would be willing to be pay for the commodity, and subtracting from this the sum of the amounts that they actually pay, as dictated by the market price. *Id.* at 556–57. Conversely, seller surplus is calculated by summing the amounts that sellers actually receive for a given commodity, and subtracting from this the sum of the amounts that they would be willing to accept. *Id.* at 557–58. In the labor market, employees are regarded as sellers of their own labor, and employers as the buyers of this labor. See *id.* at 341–43.

15. *Id.* at 417.

16. *Id.*

17. *Id.* at 336.

18. See *id.* at 333–34.

obligation of a uniform fixed amount on all taxpayers, it also bypasses substitution effects and their accompanying deadweight losses.¹⁹ Nevertheless, the head tax is widely maligned on grounds of inequity.²⁰ As it makes each taxpayer liable for the same lump sum payment, irrespective of her income, the head tax is an inherently regressive regime. Those with less earnings would end up turning over a greater percentage of their overall income in taxes. Hence, it is argued that the head tax is even less fair than a flat tax, where a constant marginal rate is indiscriminately applied across all income brackets.²¹

An endowment tax is often viewed as the best of both worlds, since it realizes the head tax's efficiencies (by dispelling substitution effects), while avoiding its objectionable regressive features.²² Because ability taxation tracks differences among individuals in some purportedly morally relevant dimension (i.e., earning capacity), it is claimed to be strictly preferable to a head tax on grounds of fairness. Moreover, endowment taxation is fully compatible with a progressive rate structure, as greater marginal rates may readily be applied to higher brackets of potential income.

Though it might seem promising, the utilitarian case for endowment taxation sketched thus far is not cut and dried. Although ability taxation lacks a substitution effect, it will often exert a potent *income* effect.²³ In order to satisfy one's tax obligation, a talented but under-earning individual may be forced to work more hours, or to work at a higher paying profession, than she otherwise would have chosen under a system of income taxation. Economists have traditionally been unperturbed by this possibility: since income effects do not result from a change in relative prices between leisure and consumption, they do not cause the types of distortions in taxpayer behavior that produce standard deadweight loss. Nevertheless, there is another type of welfare effect that threatens to upset the endowment tax partisan's utilitarian

19. *Id.* at 332–33.

20. *Id.* at 333.

21. For an adroit critique of various arguments put forward in favor of proportionate taxation, see Barbara H. Fried, *Why Proportionate Taxation?*, in *TAX JUSTICE: THE ONGOING DEBATE* 149 (Joseph Thorndike & Dennis Ventry Jr. eds., 2002).

22. ROSEN & GAYER, *supra* note 10, at 333.

23. E.g., Linda Sugin, *A Philosophical Objection to the Optimal Tax Model*, 64 *TAX L. REV.* 229, 244–48 (2011).

calculus. If a person has an extremely strong aversion to the job(s) at which she earns the highest wages,²⁴ or to working longer hours, then compelling her to engage in more or different work could lead to a marked reduction in her individual well-being.²⁵ Call this the “aversion effect.” If this deprivation were sufficiently pronounced, it could even lead to a reduction in aggregate social well-being, net of the ability tax’s positive welfare contributions. This effect will be particularly salient when labor markets are “lumpy”—that is, where part-time work is frequently unavailable.²⁶ In such circumstances, a person may be compelled to work long hours at a high paying job that she finds eminently disagreeable just to pay her tax bill. This condition is commonly referred to as “talent slavery.”

On the other side of the coin, however, a person who under-earns relative to her true potential likely exhibits strong preferences for leisure over consumption. Since material consumption is not as important to her as it is for others, extracting wealth through taxation will not produce as great of a reduction in her overall well-being as it would in the case of a materialistic individual.²⁷ In some cases, this “extraction effect” may, from the perspective of society at large, neutralize those reductions in well-being caused by the former aversion effect. Which of these two opposing forces eclipses the other would depend upon the intensity of the under-earner’s work aversions, the lumpiness of the labor markets, and the strength of her preferences for leisure relative to consumption.

A further complicating factor in the utilitarian case for endowment taxation is that professions that are not highly remunerated by the market nevertheless may often yield significant positive social externalities.²⁸ Scientists, academics, teachers, social workers, clergymen, musicians, poets, and visual artists all come to mind as clear examples.

24. Or, more precisely, she has a *stronger* aversion to those jobs where she earns high wages than to those jobs where she earns low wages. See discussion below at Part IV.C.2.

25. Daniel N. Shaviro, *Inequality, Wealth, and Endowment*, 53 TAX L. REV. 397, 414 (2000) [hereinafter Shaviro I]. A slightly updated version of this paper appears in Daniel Shaviro, *Endowment and Inequality*, in TAX JUSTICE, *supra* note 21, at 123, 137 [hereinafter Shaviro II].

26. Shaviro I, *supra* note 25, at 414; Shaviro II, *supra* note 25, at 137–38.

27. Shaviro I, *supra* note 25, at 414; Shaviro II, *supra* note 25, at 138.

28. See LIAM MURPHY & THOMAS NAGEL, THE MYTH OF OWNERSHIP: TAXES AND JUSTICE 123–24 (2002); Sugin, *supra* note 23, at 246–48.

Positive externalities may also attach to certain activities that are conducted completely outside of the bounds of the marketplace (such as volunteering), while household work may yield significant imputed income.²⁹ Conversely, some jobs that are highly compensated by the market may involve the creation of substantial negative externalities. After all such externalities and imputed incomes are duly accounted for, an endowment tax that compels people to forgo low paid but socially valuable work in favor of higher paying positions may not always maximize aggregate welfare. Even from a utilitarian perspective, a world replete with investment bankers would not necessarily be preferable to the one that that we have.

In sum, while the standard economic case for ability taxation (i.e., absence of substitution effects) is sensible, it is not airtight. In fact, the overall utilitarian desirability of an endowment tax would seem to be highly context dependent. Whether an ability tax would maximize aggregate welfare in any given case is likely to turn on the interaction of numerous background facts about the society in question and the structure of taxpayer preferences; the matter simply cannot be determined *a priori*.

B. Endowment Taxation as Ideal Haig-Simons Income Tax

A distinct and important economic perspective on endowment taxation is offered by Louis Kaplow in his article, *Human Capital Under an Ideal Income Tax*.³⁰ There, Professor Kaplow defends the claim that a particular type of endowment tax would function as an “ideal income tax.” Kaplow is clear, however, that the “ideal” nature of this tax “does not

29. See Sugin, *supra* note 23, at 245–46.

30. Louis Kaplow, *Human Capital Under an Ideal Income Tax*, 80 VA. L. REV. 1477, 1477 (1994) [hereinafter Kaplow, *Human Capital I*]. Kaplow provides a summary (and, at points, clarification and elaboration) of the main points of this earlier article in Louis Kaplow, *On the Divergence Between “Ideal” and Conventional Income-Tax Treatment of Human Capital*, 86 AM. ECON. REV., no. 2., Papers & Proc., 1996, at 347 [hereinafter Kaplow, *Human Capital II*].

For critical discussions of Kaplow’s analysis, see John A. Litwinski, *Human Capital Economics and Income*, 21 VA. TAX REV. 183, 226–230 (2001); Lawrence Zelenak, *The Reification of Metaphor: Income Taxes, Consumption Taxes and Human Capital*, 51 TAX L. REV. 1 (1995) [hereinafter Zelenak, *Reification of Metaphor*].

refer to a normative ideal.”³¹ Kaplow states, “Rather, it refers to a concept frequently invoked as a point of reference in tax policy discussions”—that is, a fully general analytic extension of income tax principles.³² It is unclear whether Kaplow would actually endorse his ideal income tax as normatively desirable and, if so, on what grounds.³³ Therefore, in the following discussion, I adopt Kaplow’s descriptive thesis as a mere take-off point. As his functional analysis might be co-opted by a proponent of endowment taxation and accorded either utilitarian or deontological renderings, we shall explore the normative implications of his thesis from both perspectives, starting with the former.

A utilitarian might suggest, for reasons to be discussed below, that if an endowment tax in fact mimics an ideal income tax, it has the

31. Kaplow, *Human Capital I*, *supra* note 30, at 1479.

32. *Id.*

33. Lawrence Zelenak has argued that, on the most reasonable reading of Kaplow’s article, his ideal income tax is to be construed as (an attempted) *reductio ad absurdum* of income tax principles. To the extent that proponents of income taxation would be unwilling to bite the bullet and embrace this ideal tax on human capital, Kaplow’s analysis would serve as an argument in favor of a consumption tax. Zelenak, *Reification of Metaphor*, *supra* note 30, at 5. In advancing this reading, Professor Zelenak draws attention to the final sentence of Kaplow’s article, where Kaplow claims that “If . . . ideal treatment of human capital is rejected, it may be difficult to defend present and proposed treatments of physical and financial capital. In that case, the objective of taxing income may have to be abandoned.” *Id.* (quoting Kaplow, *Human Capital I*, *supra* note 30, at 1514).

In a subsequent response, however, Kaplow insists that his “articles are conceptual” and that “[t]heir purpose is to illuminate the comprehensive income concept . . . not to advocate either a particular regime for human capital or a specific tax system (such as a comprehensive income tax or a consumption tax).” Louis Kaplow, *The Income Tax Versus the Consumption Tax and the Tax Treatment of Human Capital*, 51 TAX L. REV. 35, 35 (1995). Elsewhere, Kaplow asserts that tax policy ought not be based upon a “stipulated definition of income,” Kaplow, *Human Capital I*, *supra* note 30, at 1513, but rather upon “a theory of distributive justice embodied in an explicit social welfare function,” Kaplow, *Human Capital II*, *supra* note 30, at 351.

If Kaplow would in fact endorse his tax on human capital, it is somewhat unclear what his normative basis would be for doing so. At different points, he seems to invoke both “conventional fairness arguments” as well as the minimization of distortions in investment decisions. See Kaplow, *Human Capital I*, *supra* note 30, at 1496, 1504, 1513.

potential to reduce distortions in investment decisions relative to both (i) a realization-based income tax, such as the one presently found in the United States (a “conventional income tax”), as well as (ii) a mark-to-market regime in which appreciation in the value of physical, but not human, capital is taxed on a real time accrual basis (a “partial mark-to-market tax”). Further, because minimizing distortions in economic behavior permits capital to flow to its highest valued uses, endowment taxation should lead to increased aggregate wealth and well-being.

To appreciate the logic of this argument, a guided tour of some more tax economics is in order. It is widely held that an ideal income tax would tax Haig-Simons income, which is defined as the value of consumption plus all accretions to wealth over a given period of time.³⁴ Such a regime is often thought to produce the fewest behavioral distortions (relative to a no-tax baseline) possible for an income tax. This ideal income tax is to be contrasted with the highly imperfect version presently employed in the United States. Due to the current system’s realization requirement, asset appreciation is not taxed in real-time. Instead, appreciation of an asset’s value is only included in taxable income upon a sale or other (non like-kind) disposition.³⁵ As a result, some accretions to a person’s wealth that occur during a given time period may not be included in the person’s income for that period. This failure to track Haig-Simons income leads to the creation of incentives that distort investment decisions relative to a no-tax baseline, and which in turn reduce total social wealth.³⁶ For instance, a conventional income tax provides an incentive to retain ownership over assets yielding sub-optimal returns in situations where (i) the present value of the tax payable upon the sale of such assets exceeds (ii) the present value of the increase in expected pre-tax yield obtainable by purchasing alternative assets with the sale proceeds.

In theory, these distortions could be mitigated through the adoption of a partial mark-to-market regime, in which the value of a taxpayer’s assets are constantly updated in light of current market value. Individuals would then be taxed on any appreciation in the value of their

34. HENRY C. SIMONS, PERSONAL INCOME TAXATION: THE DEFINITION OF INCOME AS A PROBLEM OF FISCAL POLICY 50 (1938). For some slight refinements to this common definition, see Joseph M. Dodge, *The Fair Tax: The Personal Realization Income Tax*, 19 FLA. TAX REV. 522, 536–37 (2016).

35. I.R.C. §§ 1001(a)–(c), 1031.

36. *E.g.*, Ilan Benshalom & Kendra Stead, *Realization and Progressivity*, 3 COLUM. J. TAX L. 43, 51 (2011).

assets, even if currently unrealized. This regime more closely approximates a tax on Haig-Simons income since it tracks accretions to wealth in the form of asset appreciation as they accrue. As a result, the taxpayer is denied the benefits of tax-free deferral (which is economically equivalent to an interest-free loan from the government) that she is granted under the conventional income tax.

With this background in mind, we now turn to Kaplow's main points of contention. For just as a partial mark-to-market regime taxes appreciation in the value of physical capital as it accrues, a true tax on Haig-Simons income would also tax appreciation on human capital in real time. As Kaplow observes, when an individual is born, she gains a great deal of capital in the form of her genetic and socio-economic endowment.³⁷ At this moment, the value of her endowment is equal to the discounted present value of all her potential future earnings.³⁸ This is the price that a person could hypothetically obtain if she were to sell herself into slavery on a perfectly competitive market. Under a theoretically ideal income tax, this asset appreciation would be taxed as it occurs, namely at birth.³⁹

That being said, due to valuation problems and a dearth of liquidity, taxation at this moment would likely prove infeasible.⁴⁰ In practice, some deferral could not be avoided. But the state could later recapture the value of this deferral through the strategic use of income multipliers applied to a person's earnings later in life.⁴¹ When an individual earned

37. Kaplow, *Human Capital I*, *supra* note 30, at 1483.

38. *Id.* In cases where there is no uncertainty about future cash flows, Kaplow describes the value of a person's endowment at birth as the "present value of future earnings." *Id.* But where the individual might fail to convert her potential income into actual earnings, the value of a person's endowment would be the discounted present value of all future income the individual *could* earn if she were to make all and only those decisions that *maximized* her expected earnings. This is the amount a person could theoretically receive were she to sell herself into slavery on a perfect market. If a person had strong leisure preferences, so that if left to her own devices she would significantly under-earn relative to her potential, or was otherwise incompetent to put her own human capital to its highest valued use, these tendencies would not impact the market price that the person could fetch for her slave labor, so long as perfect monitoring technology were both feasible and costless.

39. *See id.* at 1481.

40. *See id.* at 1506–07.

41. *Id.* at 1507–08.

income at a later time, her taxable income could be grossed up by an appropriate multiplier such that, when the relevant tax schedule were applied to the resultant sum, the value of the individual's tax obligations would approximate the value of the tax that she would have paid had she been taxed on the net present value of her future earnings at birth.⁴²

Under both a conventional income tax and a partial mark-to-market regime, taxation of endowment deviates from its treatment under Kaplow's ideal income tax. Under the former, the human capital a person receives at birth goes untaxed unless and until it is used to generate income. Even then, because the current system does not employ multipliers, the government never regains the value of deferral. Moreover, if the person under-earns relative to her potential, some portion of her endowment will never be subject to tax at all. Similarly, under a partial mark-to-market regime, only appreciation in the value of physical assets would be taxed as it accrues, while human capital received at birth would continue to enjoy those benefits described above.

Near the end of his article, Kaplow observes that "if investments in human and physical capital are treated differently (and in a manner that results in a different net burden), investment decisions may be distorted."⁴³ Pursuing this basic line of thought, one might surmise that,

42. *Id.*

43. *Id.* at 1513. "Thus," Kaplow immediately continues, "one might argue that capitalizing both foregone earnings and direct outlays for human capital investments is desirable because it is closest to how we treat investments in physical capital." *Id.* Such direct outlays for human capital investments would include education and job training costs. Earlier in the paper, Kaplow notes that under the present U.S. income tax, investments in human capital are often not deductible. *Id.* at 1491. This feature of the current system may distort investment decisions between physical and human capital. (For a recent discussion of some of these distortionary effects, see Michael Simkovic, *The Knowledge Tax*, 82 U. CHI. L. REV. 1981 (2015).) But much of this bias could be rectified, Kaplow argues, simply by applying "conventional tax treatment of physical capital to human capital" without moving to a full blown endowment tax. Kaplow, *Human Capital I*, *supra* note 30, at 1496.

In light of this solution, Kaplow observes that while a failure to implement his ideal income tax "would be inequitable from an ideal income tax prospective, behavior would not be distorted (except to the extent that prior decisions, such as choices to have children, may be affected)." *Id.* at 1496 n.31. This issue of potential impact on fertility is discussed below. Elsewhere, however, Kaplow describes some additional subtle behavioral effects

relative to Kaplow's ideal income tax, both a conventional income tax and partial mark-to-market regime could lead to a suboptimal allocation of resources. To approximate the results of true Haig-Simons income taxation, endowment should be taxed in the way that Kaplow specifies.

But it is hard to see exactly what types of behavioral distortions our utilitarian interlocutor may be worried about. After all, a person does not *choose* to invest in the human capital she receives at birth. Such capital is simply conferred upon her. Consequently (except to the extent the tax code may treat investment in physical and human capital differently), neither a realization-based income tax nor partial mark-to-market regime would generally bias the individual's investment decisions against physical capital.⁴⁴

If pressed, our resident utilitarian might instead propose that the failure to fully tax children on their endowment gives *parents* an inefficient incentive to invest in rearing offspring rather than in physical capital.⁴⁵ Still, because a child's income does not directly accrue to her parents, this argument is also problematic. Although parents undoubtedly reap psychological rewards from raising children, it is dubious to suppose that these pleasures are directly tied to the post-tax income of one's progeny in the way that would be required for the utilitarian's argument to be successful. If there were a significant and quantifiable correspondence between the utils that a parent receives from each post-tax dollar

that result from failing to adopt his ideal tax on human capital. See Kaplow, *Human Capital II*, *supra* note 30, at 350–51. In light of these comments, it is unclear to me just how much stock Kaplow would place in the efficiency argument for endowment taxation.

44. For similar observations, see Zelenak, *Reification of Metaphor*, *supra* note 30, at 13 (“Since human capital is a windfall, taxation cannot discourage its acquisition. . . . Efficiency concerns are important, however, to the considerable extent that human capital is acquired by investment rather than received as endowment.”).

Even if such a choice were available to those disembodied souls en route to the physical world, it is debatable whether tax considerations would factor heavily into such beings' decisions. Would a person choose a significantly lower IQ, degree of physical attractiveness, or social acumen all because some alternative investment (commodity futures, perhaps) provides a slightly higher post-tax yield? Could the value of the former be crudely reduced to cents and dollars? It is at least arguable that some advantages conferred by this human capital are incommensurable with monetary returns.

45. See Kaplow, *Human Capital I*, *supra* note 30, at 1496 n.31.

her child earns, and the welfare that the parent would herself have received from an additional dollar of her own income, then a conventional income tax or partial mark-to-market system could plausibly incentivize procreation over investment in physical capital, relative to an ideal income tax.⁴⁶ But the hypothesis that such a robust and mathematically precise link exists is highly speculative at best, and a blatant misconstrual of the psychology of parenting at worst.

If the creation of new human capital were instead viewed as *gift* from parents to children, and a tax on the value of a child's endowment were imposed on parents rather than children, the chances of discouraging fertility would admittedly be greater.⁴⁷ However, such treatment would not follow from ideal income tax principles,⁴⁸ nor even from the existing gift tax model.⁴⁹ Accordingly, it makes little sense to adopt this regime as a baseline by which to compare whether a conventional income tax or partial mark-to-market regime would affect incentives to procreate.

In sum, although Kaplow's functional description of the situation is instructive and largely accurate, it is hard to pinpoint any major behavioral distortions caused by the failure to adopt his ideal income tax on human capital.⁵⁰ While ingenious, his conceptual analysis

46. Since the former (presumably) extract less taxes from a child on her endowment. But see the discussion below at Part III.E for why tax obligations under an endowment tax may not always be higher than under an income tax.

47. Zelenak, *Reification of Metaphor*, *supra* note 30, at 16 n.66. Under current U.S. law, gifts are excluded from the income of the donee, who takes a carryover basis in the gifted property for purposes of determining gain upon a later disposition. I.R.C. §§ 102(a), 1015(a). Thus, it may be argued that taxing parents rather than children on the value of the children's endowment is analogous to gift treatment.

48. Kaplow, *Human Capital I*, *supra* note 30, at 1499.

49. The gift analogy is strained since at no time can parents actually use or consume their children's human capital; therefore, it would be improper to regard this human capital as income for the parents. Professor Zelenak observes, "The very creation of new innate human capital in a new human being alienates the human capital asset from the creators; the parents do not have the option of spending their children's human capital inheritance, as they do with other inheritance." Zelenak, *Reification of Metaphor*, *supra* note 30, at 16.

50. Kaplow suggests that failure to establish an ideal tax might lead to some subtle effects on intertemporal consumption choices, Kaplow, *Human Capital II*, *supra* note 30, at 350–51, but it seems unlikely that, when

ultimately fails to provide a wholly compelling utilitarian argument, predicated upon efficient allocation of resources, for a form of endowment taxation.

III. NON-UTILITARIAN CONSIDERATIONS

A. Fairness Arguments for Endowment Taxation

1. The Naïve Argument from Fairness: Tax Equity for Physical and Human Capital

Due to the economic similarities between physical and human capital, however, one might insist that as a matter of fairness the state should not discriminate between the two in matters of taxation. Kaplow gestures at this sort of argument when he suggests, “Whatever the rationale for taxing those with greater wealth (rather than higher earnings or consumption) more heavily, one can ask whether that rationale supports a significant distinction between human and other capital.”⁵¹ As both are forms of accretions to wealth, appreciations in the value of human as well as physical capital are properly includable in a person’s Haig-Simons income at the time they arise. This is so both as a matter of analytic consistency as well as of equity.

a. Reply: The Boundaries Between Property and Self, and the Social Meanings of Endowment Taxation

Unsurprisingly, perhaps, several allegedly pertinent moral distinctions between physical and human capital have been adduced that undermine this naïve argument from fairness. In particular, a number of commentators have argued that certain aspects of one’s endowment are not properly regarded as *property*, but are rather constitutive of the *self*.⁵² For instance, in the context of a broader discussion of wealth taxation, Eric Rakowski writes that some “characteristics are so intimately bound up with a person’s self, and so confusingly intertwined with his own

compared to those consequences of the endowment tax discussed above, these slight distortions could ultimately prove dispositive.

51. Kaplow, *Human Capital I*, *supra* note 30, at 1504.

52. See e.g., ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 228–29 (1974).

decisions and the highly personal, associational preferences of others, that they seem unfit objects of redistributive taxation.”⁵³ Connecting this basic thought to a broader literature on commodification, Tsilly Dagan argues that the endowment tax improperly treats “people as the sum of their marketable talents”⁵⁴ and may thereby threaten extra-market relationships that are “vital to personhood.”⁵⁵ Echoing related concerns, Linda Sugin warns that the endowment tax undermines “the vibrant nature of being a person”⁵⁶ and reduces “a person to a single dimension outside of her control.”⁵⁷

In addition, by “ignor[ing] other scales of valuation,”⁵⁸ the commoditization of human capital could adversely impact the social meanings of important non-market interactions. As part of her forceful cumulative case against the ability tax, Sugin maintains that synchronizing tax obligations to potential income leads to the assignment of a “greater moral worth to highly-compensated market activities”⁵⁹ and to a corresponding devaluation of socially productive but unpaid (or low-paid) work.⁶⁰

Such criticisms take much of the sting out of the naïve argument from fairness. In their wake, it is at the very least questionable whether norms appropriate to the taxation and redistribution of physical property should be blithely imported to the treatment of all human capital. But it is also important that we not be too rash to retreat to the opposite extreme. For as Dagan concedes, a stubborn refusal to commodify “is not without its pitfalls,” as it can “entail efficiency costs and undesirable distributive results.”⁶¹ Thus, whether the commoditization of some item is appropriate must turn on the tradeoffs between (i) the commoditization’s efficiency and distributional consequences, on the one hand, and (ii) the preservation of personal integrity and proper social meanings, on the other.

53. Eric Rakowski, *Can Wealth Taxes Be Justified?* 53 TAX. L. REV. 263, 267 n.10 (2000).

54. Tsilly Dagan, *Itemizing Personhood*, 29 VA. TAX REV. 93, 122 (2009).

55. *See id.* at 100.

56. Sugin, *supra* note 23, at 253.

57. *Id.* at 264.

58. Dagan, *supra* note 54, at 122.

59. Sugin, *supra* note 23, at 246–47.

60. *Id.*

61. Dagan, *supra* note 54, at 102.

To ascertain how these tradeoffs ought to be negotiated in the case of endowment taxation, we still need to get a firmer handle on the full range of the tax's effects. As we saw above, whether an ability tax maximizes *aggregate* social welfare will depend upon a concatenation of contingent facts about a society's markets and taxpayer preferences. The arguments we shall consider in the next few sections are primarily concerned with the tax's *distributional* consequences. If these arguments should prove successful, the overall balance of reasons could very well support the taxation of potential income in some instances.

2. Income Tax as Aggravator of Welfare Inequalities

In a highly influential article, Daniel Shaviro offers three important arguments for endowment taxation that are rooted in considerations of fairness. His first argument is that a failure to tax endowment is objectionable on the grounds that it aggravates existing inequalities in welfare.⁶² Shaviro's reasoning goes something like this:⁶³ call an individual that can earn high wages "HWE" and a person who commands lower wages "LWE." Should HWE choose to work an equal or greater number of hours than LWE, HWE will earn a larger total income than LWE. If the two individuals value consumption roughly equally—a reasonable default assumption—HWE will then be better off by virtue of the greater consumption her higher income affords her.

Conversely, should HWE choose to work fewer hours than LWE, this will be because HWE values leisure more than the income (and accompanying consumption) that she could have earned by working a greater number of hours. And since HWE's wages are higher than LWE's, HWE must also regard this leisure as more valuable than the income and consumption she could have enjoyed had she commanded LWE's wages instead. Thus, if they are roughly comparable generators of utility, HWE will be subjectively better off than LWE in this scenario as well, notwithstanding her lower earnings.

Shaviro concludes that (lacking contraindicating knowledge of the individuals' respective utility functions), we should generally infer that a person who can command higher wages will be better off than a

62. Shaviro I, *supra* note 25, at 406; Shaviro II, *supra* note 25, at 131.

63. See Shaviro I, *supra* note 25, at 403–6; Shaviro II, *supra* note 25, at 127–31.

person with lower wages, regardless of their respective earned incomes.⁶⁴ If she works more hours than LWE, HWE will tend to be better off, and if she works fewer, HWE will still typically fare better.⁶⁵

Adding salt to the wound, this inequality in welfare will only be aggravated by income (or consumption) taxation. Despite the fact that HWE is already subjectively better off than LWE when HWE's income is lower, HWE would nevertheless be taxed *less* than LWE in such circumstances. The income tax therefore functions regressively under these conditions, serving to increase existing gaps in subjective well-being. Endowment taxation is thereby to be preferred on grounds of distributional equity.

3. *Income Taxation as Discrimination Between Mere Commodity Preferences*

Following the late Princeton economist David Bradford, Shaviro further argues that an income tax unfairly discriminates between taxpayers on the basis of mere commodity preferences.⁶⁶ Shaviro and Bradford take as an axiom of sound public policy that the state should not arbitrarily discriminate between different commodity preferences. Furthermore, they continue, a taste for leisure over consumption of market goods is, in fact, a type of commodity preference, like any other. When an individual forgoes working an hour in order to enjoy an additional hour of leisure,

64. But for a challenge to the view that the wage rate a person can command on the market serves as a valid proxy for his well-being, see Ilan Benshalom & Kendra Stead, *Values and (Market) Valuation: A Critique of the Endowment Tax Consensus*, 104 Nw. U. L. REV. 1511 (2010). The authors develop their argument in greater generality and apply it to (what they call) "personal assets" in Benshalom & Stead, *supra* note 36.

65. Matters become somewhat more complex where one individual is a far more efficient utility generator than the other. If LWE is more efficient than HWE, this will tend to reduce the inequalities that Shaviro is concerned with. Where HWE is the more prodigious utility generator, such inequalities will be aggravated. When a large enough number of individuals are considered, however, such differences should likely offset each other, preserving the basic upshot of Shaviro's argument. Of course, this argument also presumes that utility is interpersonally comparable.

66. DAVID BRADFORD, UNTANGLING THE INCOME TAX 155–56 (2d ed. 1999); Shaviro II, *supra* note 25, at 123–24; *see also* ROSEN & GAYER, *supra* note 10, at 366–67; Sanchirico, *supra* note 6, at 154–55.

it is analogous to using her hourly wage to purchase one more hour of free time. It follows that, in the same way that the tax code should strive to remain neutral between a predilection for apples or oranges, it ought to refrain from offering gratuitous tax benefits to those who purchase greater leisure at the cost of enjoying additional market-based commodities, and vice versa.

But an income tax allows individuals to enjoy their leisure tax-free, while taxing any income earned to finance material consumption. (A similar charge could be made against the consumption tax.) Because it offers favorable tax treatment for leisure over consumption, income taxation therefore fails to reflect neutrality between commodity preferences. An endowment tax, on the other hand, does not allow one to purchase an extra hour of leisure tax-free; regardless of whether the individual chooses to (i) devote that hour to leisure, or (ii) work to finance greater material consumption, she will be taxed on her maximum potential wage-rate for that hour. Endowment taxation is therefore to be preferred on grounds of neutrality.

4. Endowment Tax as Embodiment of Luck Egalitarian Principles

Shapiro sketches one more fairness-based argument for endowment taxation, which is arguably the most fundamental and important of the lot. Shapiro's third argument is rooted in the normative framework of luck egalitarianism, one of the most influential contemporary approaches to distributive justice.⁶⁷ Luck egalitarianism is the view that justice requires (i) eliminating those inequalities that are due to brute luck,

67. Shapiro I, *supra* note 25, at 417–18; Shapiro II, *supra* note 25, at 140–41. Among the most influential accounts of luck egalitarianism are ERIC RAKOWSKI, *EQUAL JUSTICE* (1991) (defending “equality of fortune”); Richard J. Arneson, *Equality and Equal Opportunity for Welfare*, 56 PHIL. STUD. 77 (1989) (defending “equality of opportunity for welfare”); G.A. Cohen, *On the Currency of Egalitarian Justice*, 99 ETHICS 906 (1989) (defending “equal access to advantage”); and Ronald Dworkin, *What Is Equality? Part 2: Equality of Resources*, 10 PHIL. & PUB. AFF. 283 (1981) (defending “equality of resources”).

Important criticisms of luck egalitarianism are to be found in Elizabeth S. Anderson, *What Is the Point of Equality?*, 109 ETHICS 287 (1999); Barbara H. Fried, *Ex Ante/Ex Post*, 13 J. CONTEMP. LEGAL ISSUES 123 (2003); and Samuel Scheffler, *What Is Egalitarianism?*, 31 PHIL. & PUB. AFF. 5 (2003). For a nuanced reply to Anderson and Scheffler and a defense of “modest luck

while (ii) permitting those inequalities attributable to option luck. Option luck refers to the results of calculated risks or gambles consciously undertaken by autonomous agents.⁶⁸ Brute luck, on the other hand, “is a matter of how risks fall out that are not in that sense deliberate gambles”⁶⁹ and corresponds to those differences in outcome that befall people due to factors outside of their control.

Getting hit by a renegade bolt of lightning on an otherwise sunny day, or inheriting a rare genetic illness, would normally be clear instances of bad brute luck whose effects the just state should seek to eliminate. By contrast, the loss of wealth in a risky business venture or at the blackjack table would be attributable to option luck. Assuming that the effects of brute luck had previously been neutralized and that the agent thereby enjoyed a fair opportunity set vis-à-vis others, any intra-personal changes or inter-personal differences in wealth (or welfare) stemming from these deliberate gambles would be permissible from the standpoint of justice, since they flow from the autonomous choices⁷⁰ of the agent.⁷¹ In the philosophical literature, different “currencies” of

egalitarianism,” see Daniel Markovits, *Luck Egalitarianism and Political Solidarity*, 9 THEORETICAL INQUIRIES L. 271 (2008).

68. Dworkin, *supra* note 67, at 293.

69. *Id.*

70. See T.M. SCANLON, WHAT WE OWE TO EACH OTHER 248–67 (1998), for an influential discussion of different views on the moral significance of choice.

71. Although the distinction between brute and option luck is intuitively plausible, some commentators have intimated that determinism could threaten to collapse any alleged difference between the two. See RAKOWSKI, *supra* note 67, at 76–77; JOHN E. ROEMER, EQUALITY OF OPPORTUNITY 6–7 (2009); Richard Arneson, *Luck Egalitarianism Interpreted and Defended*, 32 PHIL. TOPICS 1, 9 (2004); Cohen, *supra* note 67, at 93; Fried, *supra* note 67, at 157–58 (2003); Daniel Markovits, *How Much Redistribution Should There Be?*, 112 YALE L.J. 2291, 2304 (2003). The worry is that, if individuals were physically caused by antecedent states of the universe to take ill-advised risks or gambles, then all cases of option luck might be recharacterized as instances of brute luck.

In order to avoid this quandary, a luck egalitarian who took the possibility of determinism seriously would likely have to subscribe to some form of compatibilism. See e.g., RAKOWSKI, *supra* note 67, at 114–15; ROEMER, *supra*, at 17; Arneson, *supra*. But see Markovits, *supra*, at 2304 (for possible reasons to think otherwise). Compatibilism is the view that determinism and free will (or at the very least, moral responsibility) are not always mutually exclusive.

distributive justice have been proposed for purposes of defining a fair opportunity set. While some have argued that the complete neutralization of brute luck would require an initially equal share of material resources,⁷² others have maintained that justice requires equal opportunity for welfare.⁷³ Still others have advocated for a hybrid position,⁷⁴ as well for an approach that views functional capabilities as morally fundamental.⁷⁵

According to classical compatibilism, as developed by the likes of Thomas Hobbes, John Locke, and David Hume, freedom of the will is synonymous with freedom of action, i.e., acting as one desires without coercion or constraint. *E.g.*, MICHAEL MCKENNA & DERK PEREBOOM, *FREE WILL: A CONTEMPORARY INTRODUCTION* 50–54 (2016). Accordingly, a compatibilist inspired by the classical tradition would generally hold that an act *A* performed by agent *S* is free where: (i) *S* desires to perform *A* and (ii) if *S*'s desires had been different, and she had instead desired to perform act *A'* rather than *A*, she would have then performed *A'*. *See id.* at 56–62. For a recent defense of a somewhat more sophisticated version of classical compatibilism by a prominent legal academic, see Michael S. Moore, *Stephen Morse on the Fundamental Psycho-Legal Error*, 10 CRIM. LAW & PHIL. 45–89 (2016).

Two of the other most important strands of contemporary compatibilist theory stem from the work of Harry Frankfurt and P.F. Strawson. *See* Harry G. Frankfurt, *Alternate Possibilities and Moral Responsibility*, 66 J. PHIL. 829 (1969) (constructing situations—dubbed “Frankfurt cases”—where a person lacks the ability to act differently than she actually does but is still intuitively responsible because she is an appropriate source of her own actions); Harry G. Frankfurt, *Freedom of the Will and the Concept of a Person*, 68 J. PHIL. 5 (1971) (arguing that a human being with the right sort of harmony between different aspects of her psyche can be viewed as an appropriate source of her own actions); Peter Strawson, *Freedom and Resentment*, 48 PROC. BRIT. ACAD. 1 (1962) (arguing that our social practices of assigning praise and blame do not require justification external to those practices themselves); *see also* John Martin Fischer, *Frankfurt-Type Examples and Semicompatibilism: New Work*, in THE OXFORD HANDBOOK OF FREE WILL 243–65 (Robert Kane ed., 2d ed. 2011) (providing a recent defense of Frankfurt's (1969) approach); Paul Russell, *Moral Sense and the Foundations of Responsibility*, in THE OXFORD HANDBOOK OF FREE WILL, *supra*, at 199 (surveying recent work on Strawson's brand of compatibilism). A widely read compilation of important contemporary essays on free will and moral responsibility is *FREE WILL* (Gary Watson ed., 2d ed. 2003).

72. Dworkin, *supra* note 67.

73. Arneson, *supra* note 67.

74. Cohen, *supra* note 67.

75. AMARTYA SEN, *INEQUALITY REEXAMINED* (1992).

With these pieces in place, the luck egalitarian's argument for endowment taxation proceeds as follows: we first note that one's genetic and socioeconomic endowment, and the potential earnings that this endowment makes available to the person, are clear cases of brute luck. As such, differences in earning potential that stem from differential endowments ought to be neutralized through redistributive taxation. Conversely, differences in earned income that result from people's autonomous choices for how to trade off consumption for leisure are clearly attributable to option luck. And so, because "the tax system should not treat . . . two equally able persons differently merely because one *chose* to work at a higher wage rate (at a less pleasant job) or to work more hours,"⁷⁶ earned income is not the proper object of redistribution. While luck egalitarianism favors "distributing income from high-endowment to low-endowment individuals," that "same rationale does not extend to earnings differences that result from differences in effort . . ."⁷⁷ Luck egalitarianism therefore favors an endowment tax over an income tax.

B. Rawls's Rejoinder: The Priority of Liberty

Shaviro's three arguments are compelling. Notwithstanding their force, many liberal egalitarians have not been swayed by the allure of endowment taxation. These egalitarians have recalcitrantly maintained that, while a refusal to tax endowment may lead to some apparent unfairness, this putative inequity is simply outweighed by the corresponding liberty interests of the well-endowed.

Indeed, this is more or less the route taken by John Rawls. In *Political Liberalism*, Rawls suggests that "free choice of occupation" should be considered a fundamental liberty.⁷⁸ As such, it ought, in the context of his theory, to enjoy lexical priority over competing economic interests. Recall that in Rawls's scheme,⁷⁹ the basic institutional structure of society is to be governed by two principles of justice, the first of which enjoys categorical priority over the second. Under the first

76. Zelenak, *Taxing Endowment*, *supra* note 6, at 1155 (emphasis added).

77. Shaviro II, *supra* note 25, at 141.

78. JOHN RAWLS, *POLITICAL LIBERALISM* 228 (1993). Elsewhere in that text, Rawls includes "free choice of occupation against a background of diverse opportunities" among the basic primary goods. *Id.* at 181, 308.

79. See JOHN RAWLS, *A THEORY OF JUSTICE* 52–78 (rev. ed. 1999).

principle, institutions are to be structured in order to provide each person with the most generous scheme of liberty consistent with similar liberty for all. Under the second principle, offices and positions are to be made available in accordance with fair equality of opportunity, and a society's economic system is to be organized so as to maximize the primary goods held by the worst off class (the so-called "difference principle"). Due to the two principles' lexical ordering, the government may provide for the worst off class only *after* the liberties protected by the first principle have been assured. If freedom of occupation were deemed a fundamental liberty, a person's right to arrange her own professional affairs could not be traded off for greater economic benefits to those who are worse off.

In concordance with this reasoning, Rawls maintains that, because endowment taxation "would force the more able into those occupations in which earnings were high enough for them to pay off the tax in the required period of time," and prevent them from entering "low-paying, though worthy, vocations and occupations," it would "violate the priority of liberty" and interfere with people's ability to "conduct their life within the scope of the principles of justice."⁸⁰ As endowment taxation leads to violations of a lexically prioritized right, it is unacceptable in Rawls's opinion.⁸¹

The political philosopher John Tomasi, who adopts a version of Rawls's theory emphasizing somewhat more robust economic freedoms,⁸² provides further defense of a fundamental freedom of occupation, arguing that a society that did not take this right to be a basic liberty would not "respect citizens as 'free and equal self-governing agents.'"⁸³ He goes on to state that:

People ordinarily spend a large percentage of their time engaged in their occupation. This is one reason why the choice of occupation is often a profound expression of

80. JOHN RAWLS, *JUSTICE AS FAIRNESS: A RESTATEMENT* 158 (2001).

81. *See id.* at 157–58 (stating that the liberty argument constitutes a "decisive objection" to the endowment tax).

82. JOHN TOMASI, *FREE MARKET FAIRNESS* 105 (2012) ("[O]nce adjusted to accommodate the importance of private economic liberty and the moral values that attend it, the Rawlsian scheme leads to a conception of liberal justice that I myself find most attractive.").

83. *Id.* at 77.

identity; as Aristotle once noted, *what we do influences who we are*. By choosing which occupation to pursue, we express our values. We say something about what projects we think are worthy of our time, how we value the monetary rewards of work compared to work's other rewards, and about how we balance the value of work with the other parts of our lives.⁸⁴

Other theorists have expressed worries, discussed below, about endowment taxation that, while not explicitly couched in Rawls's framework, draw upon similar liberty considerations. Because ability taxation may require well-endowed but non-materialistic individuals to spend their days toiling away at work they find execrable, the tax turns such individuals into bona fide "slaves to their talents." The potential for such serious infringements of individual autonomy seems to disqualify endowment taxation as a normatively viable proposal.

C. Stark's Libertarian Challenge

While Rawls's reasoning is initially plausible, Kirk Stark has argued that it is actually indistinguishable from that employed by Robert Nozick to oppose redistributive taxation in all forms.⁸⁵ In his libertarian manifesto *Anarchy, State, and Utopia*, Nozick famously claimed that the "taxation of earnings from labor is on a par with forced labor" since "taking the earnings of n hours labor is like taking n hours from the person; it is like forcing the person to work n hours for another's purpose."⁸⁶ Nozick continues:

If people force you to do certain work, or unrewarded work, for a certain period of time, they decide what you are to do and what purposes your work is to serve apart from your decisions. This process whereby they take this decision from you makes them a *part-owner* of you; it gives them a property right in you.⁸⁷

84. *Id.* (emphasis added).

85. Kirk J. Stark, *Enslaving the Beachcomber: Some Thoughts on the Liberty Objections to Endowment Taxation*, 18 CAN. J.L. & JURIS. 47, 49 (2005).

86. NOZICK, *supra* note 52, at 169.

87. *Id.* at 172 (emphasis in original).

If, in Rawls's opinion, compelling a person to engage in more or different work in order to satisfy his ability tax obligation would violate a fundamental right to autonomously arrange one's professional affairs, the question arises as to why *all* redistributive taxation would not constitute a similar infringement. After all, almost all taxes induce a person to perform some task for more hours or to work a higher paying job than she otherwise would have in the tax's absence.⁸⁸ Indeed, David Hasen has observed that:

The ubiquity of apparently uncontroversial tax-motivated work decisions again suggests that no nonarbitrary baseline is available to demarcate compulsion from inducement. . . . Once we accept that taxes may motivate work choices, we are unable to draw a principled line between taxes that are necessary to finance leisure time and those that are necessary to finance other activities.⁸⁹

In the absence of such a non-arbitrary baseline, Stark contends that income taxation would also infringe upon Rawls's proposed fundamental freedom of occupation.⁹⁰ Thus, if Rawls hopes to resist the ability tax while remaining internally consistent,⁹¹ Stark concludes that he must go the whole mile and repudiate the taxation of earned income as well.⁹² If the Rawlsian is unwilling to do this, he must accept that endowment taxation may at least sometimes be permissible.⁹³

88. For similar considerations, see TOMASI, *supra* note 82, at 77.

89. David Hasen, *Liberalism and Ability Taxation*, 85 TEX. L. REV. 1057, 1069 (2007). But see below for Hasen's attempt to draw just this sort of principled line.

90. See Stark, *supra* note 85.

91. It is worth nothing that, in *A Theory of Justice*, Rawls voices support for a flat rate consumption tax, though he does hold that steeply progressive income taxes may be justified in order to correct for the injustices of existing institutions. RAWLS, *A THEORY OF JUSTICE*, *supra* note 79, at 246–47. For discussion of this somewhat surprising stance, see Linda Sugin, *Theories of Distributive Justice and the Limitations of Taxation: What Rawls Demands from Tax Systems*, 72 FORDHAM L. REV. 1991 (2004).

92. Stark, *supra* note 85, at 65.

93. *Id.*

The literature reflects two possible kinds of reply⁹⁴ to Stark's attempted *reductio* of Rawls's position. The first insists that there is an important difference in the *pattern or type* of liberty infringements produced by endowment and income taxation, respectively, while the second contends that there is a morally relevant distinction in the *total quantity* of infringement generated by the two taxes. We will consider each strategy in turn.

D. Meeting the Challenge: Differences in Pattern of Infringement?

David Hasen has offered the most sophisticated version of the former argument.⁹⁵ In *Liberalism and Ability Taxation*, Hasen observes that many strands of contemporary liberalism (including Rawlsianism) operate within a contractarian political framework.⁹⁶ Following Hobbes, modern contractarians suppose that the purpose of government is to permit men to transcend the economic and socio-structural limitations present in the pre-political State of Nature.⁹⁷ To determine how society's institutions ought to be structured, the contractarian theorist attempts to ascertain what sort of social contract individuals in the State of Nature would have agreed to, assuming morally appropriate constraints were placed upon their negotiations.⁹⁸

The character of these constraints varies from theorist to theorist.⁹⁹ Whereas Rawls deprives the occupants of his original position of all knowledge of their identities and social status,¹⁰⁰ the libertarian philosopher Jan Narveson, drawing heavily upon the work of David Gauthier,¹⁰¹ argues that no additional epistemic constraints should be

94. See e.g., Kristi A. Olson, *The Endowment Tax Puzzle*, 38 PHIL. & PUB. AFF. 240, 242 (2010).

95. That being said, the kernel of the idea seems to predate Hasen's article. As discussed below, Mark Kelman puts forth a simple version of the Pareto argument in Mark G. Kelman, *Personal Deductions Revisited: Why They Fit Poorly in an "Ideal" Income Tax and Why They Fit Worse in a Far from Ideal World*, 31 STAN. L. REV. 831, 838–44, 842 n.31 (1979).

96. Hasen, *supra* note 89, at 1076.

97. See generally THOMAS HOBBS, *LEVIATHAN* (1651).

98. Hasen, *supra* note 89, at 1077.

99. *Id.* at 1078.

100. RAWLS, *A THEORY OF JUSTICE*, *supra* note 79, at 118.

101. DAVID GAUTHIER, *MORALS BY AGREEMENT* (1986).

placed upon the negotiations.¹⁰² That is, we ought to adopt those rules that would be chosen by actual individuals who were fully aware of their endowments and desires. Narveson surmises that such a procedure would inevitably yield a minimal state solution.¹⁰³ Falling somewhere in between Rawls and Narveson/Gauthier, the luck egalitarian Ronald Dworkin provides that the participants to his original position should be made ignorant of the wages their abilities could command, but granted knowledge of their tastes and talents themselves.¹⁰⁴

Although different strands of social contractarianism diverge on the question of what the appropriate parameters of the initial choice scenario are, Hasen maintains that all such theories must share an important feature: the post-contract society must be Pareto superior to the State of Nature.¹⁰⁵ That is, no individual in the post-contract world can be made *worse off* than she would be in the State of Nature, and at least some individual(s) must be made better off. In the absence of this Pareto superiority requirement, Hasen argues that the state's legitimacy would be called into question, since implied consent to the government's rule could not be reasonably inferred from those made worse off as a result of society's choice of institutions.¹⁰⁶

While the alleged necessary connection between contractarianism and the tacit consent theory of legitimacy might reasonably be questioned,¹⁰⁷ Rawls for one does seem to adopt the Pareto requirement when he stipulates that the task of a theory of justice is to determine how the gains made possible through social cooperation ought to be

102. JAN NARVESON, *THE LIBERTARIAN IDEA* 132–33, 154–55 (1988).

103. *Id.* at 154–84.

104. RONALD DWORKIN, *SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY* 93–94 (2000); Dworkin, *supra* note 67, at 316–17.

105. *See* Hasen, *supra* note 89, at 1079–80. Hasen suggests that the Pareto requirement may itself be a reflection of commitments to the principles of autonomy and neutrality. *Id.*

106. *Id.* at 1062, 1087. For philosophical background on consent theories of political legitimacy, see A. JOHN SIMMONS, *MORAL PRINCIPLES AND POLITICAL OBLIGATIONS* 57–100 (1979).

107. Indeed, those forms of contractarianism requiring *hypothetical* consent under the stipulated bargaining conditions are sometimes put forward as explicit alternatives to theories requiring *actual* (generally tacit) consent for state legitimacy. A related point will be discussed below in connection to the distinction between *ex ante* and *ex post* Pareto superiority requirements.

distributed.¹⁰⁸ Because only those gains generated from state potentiated coordination appear to be the permissible objects of redistribution, no individual can be made worse off than he would have been in the absence of the state.¹⁰⁹ Thus, in criticizing the taxation of native endowments, Rawls concludes:

The difference principle does not penalize the more able for being fortunately endowed. Rather, it says that to *benefit still further* from that good fortune we must train and educate our endowments and put them to work in socially useful ways that contribute to the advantages of those who have less.¹¹⁰

In the case of an income tax, the Pareto requirement would likely be satisfied in almost all circumstances. If rates were set so high that a person would be made worse off by entering the labor market, she could simply choose to subsist on her own imputed income. On the other hand, endowment taxation has the potential to *force* a person into the sphere of commerce in order to meet her tax obligations, lest she be thrown in prison.¹¹¹ Moreover, if the individual had a particularly strong

108. See RAWLS, A THEORY OF JUSTICE, *supra* note 79, at 6.

109. See *id.* at 109.

110. RAWLS, JUSTICE AS FAIRNESS, *supra* note 80, at 158 (emphasis added).

111. Mark Kelman emphasizes this as an unacceptable consequence, arguing that “there is a fundamental flaw in any [earning] capacity tax: The tax system ought not to force people into the market. . . . this would violate the simple libertarian principle that the state should not require people, directly or indirectly, to engage in particular activities.” Kelman, *supra* note 95, at 842. This principle, he continues, “may really be a political recognition of a basic human resistance to commoditization.” *Id.* But in the alternative, he speculates, the tenet might also be derived from the Pareto requirement:

Taking a libertarian-contractarian view of the formation of government and postulating that individuals make only those moves beneficial to themselves, one could argue that a tax should be imposed only when an individual chooses to reap the primary benefits of the state by entering into the state-supported and state-protected market economy. Capacity would not be taxed, for as long as the taxpayer produces only at the household level, arguably without the benefit of

aversion to a high paying line of work for which she showed talent, or exhibited preternaturally strong leisure preferences, or was highly self-sufficient, she could conceivably be made *worse off* than if left to her own devices. To the extent that endowment taxation thereby may lead to the violation of the Pareto superiority requirement, it is inconsistent with liberal contractarian thought.

Apart from the wholesale rejection of a contractarian framework, or the implied consent criterion of legitimacy on which Hasen's argument is premised,¹¹² at least three other objections may be offered in response to the Pareto argument.

First, one could reasonably question whether endowment taxation really has the potential to make a person worse off relative to his position in pre-political society.¹¹³ As Hobbes forcefully reminds us, life in the State of Nature is nasty, brutish, and short. Even if an individual were compelled to work 100 hours per week at employment she found utterly insufferable, she would still enjoy the security provided by the state's military and law enforcement systems,¹¹⁴ the society's public goods, and various solutions to coordination problems that would have infected the pre-political environment. Recognizing the force of such concerns, Hasen acknowledges a potentially limited role for endowment taxation in the funding of certain public goods that protect endowments and enable market transactions.¹¹⁵

the state, such a tax might make him *worse off* than he would have been without the state.

Id. at 842 n.33.

112. See SIMMONS, *supra* note 106, for an influential survey of the various theories of political legitimacy of offer. While the implied consent criterion, on which Hasen relies, has historically been one of the major contenders, it is far from the only game in town and is subject to numerous pressing objections.

113. For thoughts suggestive of this response, see Fried, *supra* note 21, at 153.

114. Kelman, *supra* note 95, at 842 n.33 ("There are limits to this [Pareto] argument: Because the household-producer receives state protection against taking, it is likely that the move to society-with-tax-on-house-hold-produced-goods is still an efficient change from a 'state of nature' where everyone must protect himself.").

115. See Hasen, *supra* note 89, at 1092–94. This acknowledgement surfaces in Hasen's discussion of so-called "minimal" contractarian theories that do not permit for redistribution.

Second, depending upon one's preferred construction of the initial choice scenario, the parties to these negotiations might plausibly opt for an institutional arrangement where: (i) there are *expected* gains to be reaped by each soul from behind the veil of ignorance, but (ii) there is the potential for some parties to actually end up worse off after the veil is lifted and they enter into political society. That is to say, even ex ante Pareto optimality may not always guarantee ex post Pareto superiority to the State of Nature. If, after engaging in the sort of utilitarian calculus we considered earlier, the participants to some original position concluded that endowment taxation would be more efficient than a system of income (or consumption) taxation, they might plausibly be swayed into voting for the former, notwithstanding the potential for some highly endowed individuals to end up worse off once the veil is dispensed with.

Responding to this worry,¹¹⁶ Hasen insists that given certain reasonable assumptions about the parties' risk aversion, the declining marginal utility of wealth, the proportion of talented under-earners in a society, and the criteria for receipt of redistributive payments, the bargainers would not agree to an endowment tax.¹¹⁷ Hasen's reasoning here is complex, and a detailed analysis of his argument falls outside the scope of this Article. However, his prediction is likely to hinge upon the demographics of the society in question, as well as upon the exact parameters of the choice scenario. In the alternative, a critic of ability taxation might argue that the ex ante Pareto superiority of an endowment tax for certain hypothetically situated actors is simply irrelevant for inferring

116. *Id.* at 1099–105. As a preliminary reply, Hasen argues if an individual's preferences were *lexically ordered*, being forced to work at a job that violated her core principles, or which prevented her from seeking her "ultimate ends," would yield "infinite disutility" and would therefore be "noncompensable in principle." *Id.* at 1099–100. Since the chance of being consigned to such a fate—no matter how small—would make an endowment tax less desirable from an expected utility perspective than an income tax, the former tax would never be agreed to in the anterior bargaining scenario. *Id.* Yet, even if we accept the possibility of such extreme preference structures, one could simply circumscribe the endowment tax's domain of application to exclude these individuals from its reach. *See id.* at 1100. While Hasen takes this restriction to be problematic, if such persons were few and far between, I fail to see how this accommodation would be a major theoretical concession.

117. *See id.* at 1100–05.

actual ex post consent to the government's rule, and, moreover, that only actual (as opposed to hypothetical) consent can deliver state legitimacy. If she were to take this line, however, it would be incumbent upon this critic to provide further defense of actual consent theories of governmental legitimacy, as these accounts are subject to numerous objections.¹¹⁸

Third, one might speculate that a tax instrument could be designed to achieve the substantive aims of ability taxation without actually forcing individuals into the sphere of commerce. In passing, Kaplow offers such a hypothesis, claiming that an income tax with "an upper limit of 90% of wages or income actually earned would almost completely achieve the ability tax result without literally violating the forced-labor constraint."¹¹⁹ But while this instrument would certainly not lead to violations of the Pareto requirement, Kaplow provides little reason to think that it would generally produce the same results as an endowment tax. In a society fraught with talented beachcombers, or with individuals who could earn significantly different incomes in distinct fields of employment, there is no reason to believe that Kaplow's tax on 90% of earned income would tend to mimic an endowment tax.¹²⁰ Without the aid of stringent and rather artificial assumptions about a society's labor demographics, such approximation would be nothing short of a miraculous coincidence.

E. Meeting the Challenge: Differences in Aggregate Infringement?

We shall now consider a second possible response to the libertarian's challenge to Rawls. Whether or not an ability tax leads to a qualitatively distinct type of infringement (i.e., violation of the sharply defined Pareto requirement), it may create a significantly greater quantity of liberty costs for taxpayers.

To appreciate the nuances in this approach, a bit more philosophical context is necessary. In response to Nozick's infamous claim that taxation is equivalent to forced labor, some egalitarians have attempted to distinguish between the two in the following way. Whereas compelling a person to engage in forced labor leaves the person with *no*

118. For important criticisms of actual consent theories, see SIMMONS, *supra* note 106, at 57–100.

119. Kaplow, *Human Capital I*, *supra* note 30, at 1506 n.71.

120. Zelenak, *Taxing Endowment*, *supra* note 6, at 1160.

options for how to spend a particular block of time, taxing her merely reduces her live options.¹²¹ When a person is taxed, she is deprived of the opportunity to engage in just those activities that, in the tax's absence, she would have had the combined time and wealth to undertake, but given the tax's existence, she lacks. Nevertheless, she may still engage in any other activities for which she possesses the requisite post-tax time and capital. Still, as (i) a tax increases in size and scope, and (ii) the master provides the enslaved individuals with progressively more options for how they are permitted to spend their leisure, the two phenomena draw closer to ultimate convergence. Thus, although Nozick has not shown that taxation is equivalent to forced labor, he has arguably achieved the more modest accomplishment of demonstrating that the two lie along a common continuum.¹²²

Recognizing the existence of this continuum, a liberal egalitarian might then argue that endowment taxation is objectionable because it forecloses *more* of the taxpayer's live options than does an income tax and therefore falls far closer to the forced labor end of the spectrum. Such a position has been staked out by Liam Murphy and Thomas Nagel in their influential book *The Myth of Ownership: Taxes and Justice*.¹²³ In the case of an income tax, if a person chooses a line of work where she earns below her maximum potential wages, she will merely be unable to finance some types of consumption that she would have otherwise been able to afford. By contrast, Murphy and Nagel observe, an endowment tax has the potential to give rise to the far more radical type of talent slavery described earlier.¹²⁴

As pointed out above, though, whether an endowment tax could force a person to work her maximum-wage job on a full-time basis will typically depend upon how lumpy employment markets are. Where quality part-time work is readily available, a talented individual would likely be able to meet her tax obligations by working such a job for only several hours per week. An ability tax's restrictiveness will therefore

121. MURPHY & NAGEL, *supra* note 28, at 123; JONATHAN WOLFF, ROBERT NOZICK: PROPERTY, JUSTICE AND THE MINIMAL STATE 91–92 (1991); *see also* H.L.A. Hart, *Between Utility and Rights*, 79 COLUM. L. REV 828, 834 (1979).

122. Nozick partially concedes this point when he admits to the possibility of “a gradation of systems of forced labor.” NOZICK, *supra* note 52, at 169.

123. MURPHY & NAGEL, *supra* note 28, at 121–25.

124. *Id.* at 123.

depend upon contingent facts about the society's labor markets. As an empirical matter, however, labor markets do tend to be quite lumpy, and so this retreat to (a rather unlikely) contingency constitutes a somewhat underwhelming rebuttal to the Murphy-Nagel stance.

There is a somewhat stronger reply to Murphy and Nagel in the vicinity. As Kirk Stark and Kristi Olson have observed, because taxing potential earnings leads to an expansion of the tax base relative to an income tax, it can spread the tax system's liberty costs more broadly throughout the society.¹²⁵ This may often lead to a reduction in the aggregate number of hours that a government must compel its citizens to work in order to raise a set amount of revenue. For instance, by taxing a single high-ability individual at a rate of 50% on maximum potential hourly wages of \$1000 for just one additional hour, the state could permit an individual with \$10 maximum hourly wages who is taxed at a 25% rate to reduce her total workload by 200 hours, all while maintaining constant revenue.¹²⁶

But this diminution in liberty costs need not accrue solely to those who command low wages. Generalizing Stark and Olson's point, the expansion of the base would allow the state to effectuate a reduction in the marginal rates for any number of bracket permutations, depending upon what it found most appropriate in the circumstances. For instance, if there were a concern that, under a sharply progressive income tax, talented high earners were shouldering a disproportionate burden as a result of the indolence of their talented but low-earning counterparts, the state could reduce the top marginal rates.

Crucially, a reduction in peak marginal rates could also serve to mitigate the problem of talent slavery for under-earners who were forced into the labor market (or a higher paying sector thereof). In much of the endowment tax literature, there seems to be the lingering presumption that, under an ability tax regime, top rates would stay roughly as they are under an income tax. But if under-earners represented a sizeable percentage of the total talent pool, moving to an endowment tax could significantly enlarge the base and (so long as the government did not need to substantially increase its own revenues) permit for the top rates to be dramatically lowered.¹²⁷ In that case, a talented

125. Olson, *supra* note 94, at 249–52; Stark, *supra* note 85, at 59–60.

126. $(50\% \text{ rate} * \$1000 \text{ hourly wage} * 1 \text{ hour}) = \$500 = (25\% \text{ rate} * \$10 \text{ hourly wage} * 200 \text{ hours})$.

127. See Hasen, *supra* note 89, at 1100–01.

under-earner—even if she would still have to work full time—might be able to choose a cushier job than her highest paying but more demanding vocation.

In light of these considerations, it becomes clear that, for the talent slavery objection to pose a serious challenge to the ability tax program, not one but two empirical assumptions must hold true. The first is that labor markets are lumpy. The second is that the “social endowment realization ratio” (SERR), equal to (i) total societal earnings under an income tax over (ii) total potential earnings, is not sufficiently low.¹²⁸ The lower the SERR is, the more the base will expand when we transition from an income to an endowment tax, and the more rates can be lowered.

To be sure, while an appeal to the rate reductions made possible by a low SERR provides the friends of endowment taxation with important resources vis-à-vis their critics, it will not offer the former parties a complete fix for their problems. In situations where the SERR is not sufficiently low to eliminate (or at least substantially reduce) talent slavery, moving to an endowment tax may continue to be objectionable on precisely those liberty grounds advanced by Murphy and Nagel. At best then, the SERR response shows that there are certain conditions—the prevalence of which is open to empirical investigation—under which the Murphy-Nagel objection will be inappropos, but not that their liberty concerns will fail to be pressing under any (or even most) circumstances.

Indeed, for the SERR response to be wholly persuasive, the endowment tax proponent would need to supplement her theoretical observations with a strong showing that the SERR will—perhaps due to certain deep psychological, sociological, or economic laws—nearly always be low enough to adequately guard against the specter of talent slavery. In the absence of such a showing, she should continue to take seriously the challenges posed by the possibility of “bad cases” where the SERR is clearly not low enough to accomplish this defensive maneuver. The friends of endowment taxation would also have reason to worry about a potentially vast swath of borderline cases, where it is simply unclear whether a moderate expansion of the base could adequately offset potential liberty costs.

128. Chris Sanchirico uses the term “realization ratio” to refer to the conversion ratio of potential income into actual income. Sanchirico, *supra* note 6, at 1568.

Given such theoretical indeterminacies, in order to ascertain an endowment tax's desirability in any particular case, a detailed breakdown of the relevant society's labor markets and human capital demographics would almost certainly be required to quantify the magnitudes of these counterbalancing phenomena. Yet in the absence of a plausible formula for weighing the trade-offs between endowment taxation's numerous equitable features, and its circumstantially attendant liberty costs, the liberal egalitarian may often be left in the somewhat embarrassing position of agnosticism. Is such a heuristic to be found?

IV. ENDOWMENT TAXATION WITHOUT TALENT SLAVERY?

Building upon the work of Ronald Dworkin, Daniel Markovits has proposed a procedure that could be used for negotiating this predicament. In *How Much Redistribution Should There Be?*,¹²⁹ Markovits lays out what is perhaps the most sophisticated argument for reconciling the endowment tax's luck egalitarian foundations with a concurrent repudiation of talent slavery.

As his normative starting point, Markovits adopts Dworkin's highly influential formulation of luck egalitarianism,¹³⁰ which Dworkin dubs "equality of resources."¹³¹ As discussed above in Part III.A, different versions of luck egalitarianism adopt distinct "currencies" of distributive justice for purposes of characterizing a fair (i.e., brute luck neutralizing) opportunity set. For Dworkin in particular, fairness requires an equal share of material resources.¹³² Furthermore, in order to determine what would constitute an "equal share," Dworkin makes use of a thought experiment resembling John Rawls's original position.¹³³ In Dworkin's version of this hypothetical pre-social choice scenario, individuals, who are deprived of knowledge of certain personal characteristics, sequentially participate in: (i) an auction to determine initial bundles of material resources, and then in (ii) an insurance market for

129. Markovits, *supra* note 71.

130. *Id.* at 2301.

131. *Id.* at 2316; Dworkin, *supra* note 67, at 283.

132. For Dworkin's attack on welfare-based views, see Ronald Dworkin, *What Is Equality? Part 1: Equality of Welfare*, 10 PHIL. & PUB. AFF. 185 (1981).

133. See Dworkin, *supra* note 67, at 338.

protection against the risks of disability and commanding low wages.¹³⁴ In this insurance scheme, tax payments are construed as the premiums used to fund the payout of benefits to those for whom the insured risks materialize.¹³⁵

Based upon a rather complex chain of decision-theoretic reasoning (which will be discussed below), Markovits ultimately concludes that in constructing a tax system to finance these insurance payments, the parties to Dworkin's choice scenario would never set tax rates (and corresponding benefit levels) so high as to lead to talent slavery.¹³⁶ While, at least on my reading, it is not entirely clear whether Markovits would ultimately favor the taxation of potential, rather than earned, income as ideal,¹³⁷ his argument can be readily co-opted by an endowment tax partisan for his own strategic purposes. As Lawrence Zelenak has astutely observed, if successful, this argument would serve to "situate[] the [avoidance of] talent slavery . . . as a constraint in the design of the endowment tax system, rather than as an argument against" an endowment tax in any form whatsoever.¹³⁸ In this way, the *prima facie* tensions between the endowment tax's luck egalitarian motivation and a proper respect for individual liberty could be neatly resolved: while the goal of reducing the effects of brute luck would continue to weigh in favor of an endowment tax, luck egalitarianism (at least as interpreted by Dworkin) would never permit for a rate structure that leads to talent slavery.

In light of these high stakes, and of the sizeable influence of Dworkin's theory, we will consider Dworkin's and Markovits's reasoning in some detail. While Markovits's analysis is both ingenious and illuminating, I shall provide both external and internal challenges to his argument (as co-opted by an endowment tax partisan). Externally, I shall argue that, under certain circumstances, Dworkin's thought experiment seems to generate pathological results, which should prompt us to question its status as a reliable barometer of distributive justice. The internal challenge, which for the sake of argument accepts Dworkin's formulation of luck egalitarianism as an appropriate framework for thinking about distributive justice, observes that Markovits's argument

134. *Id.* at 283–334.

135. *Id.* at 323–34.

136. Markovits, *supra* note 71, at 2306–10.

137. *See id.*

138. Zelenak, *Taxing Endowment*, *supra* note 6, at 1162.

tacitly relies upon certain questionable empirical presuppositions. As a result, Markovits cannot deliver his desired conclusion (regarding the avoidance of talent slavery) through a priori reasoning alone. This means that Dworkin's setup will not rule out a talent-slavery-producing tax scheme, at least under all plausible empirical circumstances. Therefore, the tensions discussed above cannot be fully resolved. To begin, however, we shall now examine Dworkin's theory and construction of the original position.

A. Dworkin's Auction and Insurance Scheme

In *What Is Equality? Part 2: Equality of Resources*,¹³⁹ Dworkin argues that an ideally just distribution of resources could be produced and sustained by the following two-stage procedure. In the first stage, an equal number of bidding tokens ("clamshells") would be distributed to the members of a new community, which Dworkin poetically envisions to be comprised of shipwreck survivors washed onto a desert island.¹⁴⁰ All of the island's resources would then be auctioned off to the settlers, in accordance with the following protocol:

The auctioneer . . . proposes a set of prices for each lot [i.e., bundled combination of resources] and discovers whether that set of prices clears all markets, that is, whether there is only one purchaser at that price [for each lot] and all lots are sold. If not, then the auctioneer adjusts his prices until he reaches a set that does clear the markets. But the process does not stop then, because each of the immigrants remains free to change his bids even when an initially market-clearing set of prices is reached, or even to propose different lots. But let us suppose that in time even this leisurely process comes to an end, everyone declares himself satisfied, and goods are distributed accordingly.¹⁴¹

139. Dworkin, *supra* note 67. This paper appears in substantially the same form in RONALD DWORKIN, *SOVEREIGN VIRTUE*, *supra* note 104, at 65–119. For the most part, I shall cite to the latter.

140. DWORKIN, *SOVEREIGN VIRTUE*, *supra* note 104, at 66.

141. *Id.* at 68.

According to Dworkin, this auction would guarantee an initially fair distribution for two reasons. First, no one would envy another's bundle of goods (the "envy test") since "by hypothesis" the would-be envier "could have purchased that bundle with his clamshells instead of his own bundle."¹⁴² Second, employing this market mechanism to partition the island's resources into the auctioned bundles would ensure that certain preferences are not discriminated against (the "non-discrimination requirement"), as "each person play[s], through his purchases against an initially equal stock of counters, an equal role in determining the set of bundles actually chosen."¹⁴³ Dworkin notes that various alternative procedures that pass the envy test nevertheless fail the non-discrimination requirement.¹⁴⁴

But while the initial allocation would be fair, such parity would be ephemeral. Although the settlers begin their new lives with equal resources, once they are left to their own devices, inequalities would quickly accumulate. Some of the settlers, through superior smarts, drive, or other talents, would out-produce their comrades or get the better of their exchanges. For some, business gambles would pay off in spades, while for others, ventures would backfire. Some would live long happy lives in full health. Still others would fall prey to debilitating illness.

In keeping with the luck egalitarian's credo, Dworkin provides that, given the initially equal division of resources, any such differences resulting from option luck would be unobjectionable,¹⁴⁵ while those stemming from brute luck would have to be rectified by the following supplementary procedure. It is here that Dworkin proposes his hypothetical insurance market, which Markovits adroitly utilizes. In constructing this device, Dworkin asks us to suppose that the members of his community (i) remain fully aware of their own tastes, talents, and the statistical distribution of incomes in their community, but (ii) are deprived of all knowledge of their own handicaps (if any) and of the

142. *Id.*

143. *Id.*

144. *Id.* at 67–68.

145. Therefore, such differences would not constitute a violation of an appropriately amended envy test, according to which "any resources gained through a successful gamble should be represented by the opportunity to take the gamble at the odds in force, and comparable adjustments [would be] made to the resources of those who have lost through gambles." *Id.* at 76.

wages their abilities could command.¹⁴⁶ Insurance policies for various forms of disability—including an inability to earn at a particular level of income—would then be sold by the government.

After this “thin” veil of ignorance were lifted, the state would provide those insurance benefits that would have been purchased by an average member¹⁴⁷ of the community from behind the shroud. At least as a theoretical ideal, these benefit payments would be endowment sensitive, and made in an amount equal to the insured coverage level less “what an applicant can plausibly argue is the highest income he can in fact command.”¹⁴⁸ Similarly, the entitlements would be financed by tax payments determined by a citizen’s earning capacity,¹⁴⁹ which Dworkin analogizes to the insurance premiums the parties would have paid for their chosen level of coverage. In this way, the effects of brute luck are transformed into option luck, since the choice to buy a certain level of insurance can be construed as a calculated gamble the members of the community *would have taken* if placed in Dworkin’s original position.

What level of income coverage would the members of the community select? Dworkin begins his answer with the observation that insurance policies generally must have negative expected monetary value for their holders. Otherwise, insurance companies could not afford

146. *Id.* at 77–78, 93–94. In contrast to Rawls, Dworkin provides the parties to his original position with as much self-knowledge as possible while still preserving the device’s claim to impartiality. Dworkin contends that permitting knowledge of one’s own tastes and talents is needed to avoid indeterminacy regarding the question of how much insurance an individual would have purchased. *Id.* at 93–94, 118. Further note that Dworkin attempts to distinguish between skills and handicaps, so as to permit for knowledge of the former, but not the latter. *Id.* at 77–78, 93–94.

147. This is a simplifying assumption. *Id.* at 478 n.5 (“The averaging assumption is a simplifying assumption only, made to provide a result in the absence of the detailed (and perhaps . . . indeterminate) information that would enable us to decide how much each handicapped person would have purchased in the hypothetical market. If we had such full information, so that we could tailor compensation to what a particular individual in fact would have bought, the accuracy of the program would be improved. But in the absence of such information, averaging is second best, or in any case better than nothing.”).

148. Or more precisely, less a co-insurance factor and the applicant’s highest possible income. *Id.* at 102.

149. *Id.* at 96. But see below at note 153 for a qualification in Dworkin’s position.

to sell policies *en masse*, as the companies would then (on average) end up losing money. Due to the declining marginal utility of wealth, however, such policies often provide positive expected utility to their holders.¹⁵⁰ When tragedy strikes, a person will tend to be very badly off, and so access to insurance proceeds in such a scenario (however unlikely) may be worth more to her than the premiums she pays for the policy when she stands better off.¹⁵¹

Now, Dworkin notes that parties might initially be tempted to purchase income insurance for a very high level of earnings. But upon further reflection, he continues, they would recognize that such a policy would be a losing gamble *both* in terms of expected financial value *and expected welfare*, and therefore (assuming normal attitudes towards risk) would not be selected. Roughly, this is because a policy holder that earns below a very high insured income level will, in many instances, still be rather well off. Thus—even assuming a declining marginal utility of wealth—the insurance proceeds would not typically bring the holder enough welfare to compensate for the policy’s extremely high premiums, which would eat through almost all of the plan’s proceeds in the normal case where the policy pays out, and would force the individual into talent slavery in those rare instances where she ends up capable of earning above the high insured income level. As Dworkin explains:

Since . . . the chances of “winning” [i.e., of the insurance policy paying out when a person falls below the insured talent level] are extremely high—very few immigrants will turn out to have that maximum earning power—the cost of the premium will be extremely high as well. It will approach the value of the projected return if the risk eventuates. So someone who buys this insurance faces an extremely high chance of gaining very little. Suppose he loses, however; suppose he is one of those who does have the maximum earning power. He is now in much worse position than if he had never insured, because he must now work at close to his top earning capacity just to pay the high premium for his insurance on which he collected nothing—just, that is,

150. As well as to the insurer who, due to its large capitalization, will typically be close to risk neutral.

151. DWORKIN, SOVEREIGN VIRTUE, *supra* note 104, at 95–96.

to break even. He will be a slave to his maximum earning power.

....

... This insurance decision would be [a] . . . financially disadvantageous bet of a **very small chance of a very great loss** [i.e., talent slavery when one ends up capable of earning an enormous income] in return for the **very large chance of a very small gain** [i.e., minor utility gain from the insurance proceeds net of very high premiums when one ends up earning below the insured level], and nothing in the literature of the psychology of gambling (except perhaps the literature of Russian roulette) supports the idea that bets of that character would be popular.¹⁵²

If Dworkin's economic reasoning is correct, then the parties would not insure for a level of income whose policy premiums resulted in talent slavery. Though the community could opt for an endowment tax,¹⁵³ the parties would not set rates so high that the well-endowed would

152. *Id.* at 96–97 (emphasis and bracketed comments added). For discussion of bolded text, see *infra* note 181.

153. It should be noted that, due to practical concerns about high administration costs, potential privacy violations, and errors in the appraisal of earning ability, Dworkin holds that the parties to his choice scenario might ultimately opt, as a “second-best approximation to the ideal,” for a scheme that “tied redistribution to actual earnings rather than to ability to earn,” *id.* at 102, and which was funded by an income tax rather than an ability tax. *Id.* at 100. I shall not, however, take these practical objections to be critical. Instead, I will continue to assume that the parties to Dworkin's choice scenario would, as he initially supposes, *id.* at 96, seek to establish a tax-and-transfer system tied to earning ability rather than to actual earned income, for three reasons.

First, in light of the discussion in Part I regarding the indirect observation of earning ability through the use of proxies and indicator goods, it would be premature to conclude that Dworkin's practical objections are in fact insurmountable.

Second, this Article is primarily an exercise in ideal theory, which helps itself to the assumption of costless observation of ability for the purposes of gauging whether an endowment tax should serve as a normative benchmark against which we measure the desirability of more practical policy proposals.

be forced to work at the highest paying jobs available in order to meet their tax obligations. Rather, they would settle on a level of insured income (and corresponding tax rates) significantly lower than this.

B. Markovits's Market Analysis

At this juncture in Dworkin's argument, Markovits intercedes to note that the highest earning level for which earnings insurance could possibly be purchased is far lower than Dworkin supposes. Although Dworkin blithely entertains the idea of his parties insuring for the highest projected incomes in the economy, this would not be actuarially feasible. In fact, "insurance against falling below the *mean* talent level is the *very most* insurance anyone could ever afford to buy."¹⁵⁴ Markovits explains that:

No insurer could ever afford to offer policies that insure (net-of-premiums) up to anything above the mean wage, simply because insurance at a higher level than the mean will, on average, *pay out more than it takes in*. If everyone buys policies against not having (net-of-premiums) higher than the mean talent level,

As such, I do not take the administrative obstacles that Dworkin envisions—even if formidable in the real world—to be contextually relevant to our present investigation. Indeed, it is a reasonable criticism of Dworkin that he indecisively wavers between first- and second-best analysis at numerous points. Given the myriad other idealizing assumptions employed in his thought experiment, it is unclear why he gives these particular pragmatic considerations so much weight. Better, in my view, to be consistent and idealize through and through, and to only later take potential administrative obstacles into account when we attempt to translate the results of our thought experiment into policies that are workable for the real world.

Third, perhaps taking these prior considerations to heart, Markovits continues to assume that the parties would contemplate establishing a tax-and-transfer scheme based upon earning ability. As he observes, an endowment tax would be required in order to fund insurance policies that provide for relatively high levels of income protection. See Markovits, *supra* note 71, at 2307–08. Thus, in order to properly engage with Markovits's analysis on its own terms, we must entertain the possibility that the parties would not find Dworkin's practical objections to an endowment tax prohibitive.

154. Markovits, *supra* note 71, at 2307 (emphasis added).

then the insurance company will be able to pay out on all the policies, and leave everyone better off than average, only by creating rather than just redistributing wealth, which it cannot do.¹⁵⁵

Moreover, policies that protected against earning below the mean wage would still have to be funded by an endowment tax with an oppressive premium structure.¹⁵⁶ To come out even, the insurer would have to demand as premiums “all wages the policyholder has the opportunity to earn above the mean wage level in case she has the good luck to be more talented than average.”¹⁵⁷ Consequently, anyone capable of earning an above-average income would be required to work full capacity her highest paying job. In light of this trade-off, Markovits argues that no reasonable individual would choose to insure at even the mean income level, for reasons similar to Dworkin’s:

[I]nsurance up to the mean wage level is affordable only if the policyholder always works up to her maximum earning potential and always pays any earnings above the mean to the insurance company as a premium. But someone in this condition is, as Dworkin observes, a slave to her talents. In order to maintain the mean wage level while also paying the premiums on her insurance policy (which depend on her earnings potential rather than her actual earnings), she must always work *flat out* and only at that job which, given her talents, pays most. She would be forced to work at this job, and this job only, even if she *hated* the work involved, had ambitions that she could fulfill only in another job, or just

155. *Id.* (emphasis added). In partial defense of Dworkin, in the passage quoted in the prior section, he appears to allow for a scheme in which individuals earning below the insured level still pay some portion of their income in insurance premiums. While handing back a part of those benefits received from one’s income insurance policy would appear to be economically pointless, it would allow for higher-than-mean nominal levels of insurance to be purchased. Markovits is quite right, though, that the highest net-of-premiums earning level one could ensure is the mean.

156. *Id.*

157. *Id.*

preferred the other job. . . . Buying insurance up to the mean wage level exchanges a **large chance of a moderate gain** (the difference, roughly, between a lower insured wage and the mean wage in case one is untalented) for a **large chance of a great loss** (being a slave to one's talents in case one is talented [enough to earn above the mean income]), which is a bad exchange on any accounting.¹⁵⁸

At what level of earning ability would the parties purchase insurance? They would choose the “maximum talent-slavery-safe level,”¹⁵⁹ says Markovits, which—though it would always fall below the mean—depends upon the exact distribution of talents in the society.¹⁶⁰

The potential ramifications of this result, if correct, are highly significant. For as Markovits observes, the eradication of all disadvantage from the bad brute luck of ending up untalented would require insurance that protects citizens up to the mean earning level.¹⁶¹ But since there are some earning levels below the mean that the parties to Dworkin's original position would *not* insure against, he concludes that the dual aims of luck egalitarianism (i.e., permitting for the consequences of option luck while fully expunging the effects of brute luck)

158. *Id.* at 2308–09 (emphasis added). For discussion of bolded text, see *infra* note 181.

159. *Id.* at 2310.

160. More precisely,

as the talent distribution becomes more dispersed, and particularly as the median and the mode of the distribution fall further below the mean (as the distribution develops a tail at the high end), insuring even at levels below the mean will require people to pay a greater proportion of their maximum wage as premiums, premiums a smaller range of jobs will enable them to support. For both reasons, the maximum talent-slavery-safe level of insurance will in such cases fall further below the mean.

Id. Based upon 1999 statistics for the wage distribution in the United States, Markovits offers some rough calculations suggesting that the parties would choose an income level more than 25% below the mean. *Id.* at 2311–13.

161. *Id.* at 2313.

cannot be simultaneously satisfied. To treat people as autonomous agents, by respecting the choice they would have made in Dworkin's original position, we must allow for some amount of brute luck to impact their fortunes. This is the primary theorem of Markovits's analysis.¹⁶²

Viewed from a slightly different angle, however, Markovits's refinements to Dworkin's insurance model also bear critically on the ability tax debate. As noted above by Zelenak, if Markovits's conclusions are correct, then the calibration of tax rates to avoid talent slavery could serve as an internally motivated constraint on the design of an endowment sensitive tax-and-transfer scheme.¹⁶³ Rather than an ad hoc concession, this calibration would follow naturally from Dworkin's influential formulation of luck egalitarianism. The endowment tax partisan would thereby advocate for a properly constrained system of endowment taxation on luck egalitarian grounds, all while taking a principled internal stand against talent slavery. This would significantly bolster the partisan's strategic position in the dialectic. By offering a unified theoretical framework that assigns appropriate weights to both equity and liberty, a truce can be drawn between the two, and their competing demands harmoniously reconciled. Call this the "Reconciliation."

C. Challenging the Reconciliation

Does Markovits's argument succeed in achieving this tall feat? In this section, I shall argue that his anti-talent-slavery conclusion can be resisted on grounds both external and internal to Dworkin's theory. In other words, I shall offer two distinct lines of objection to the Reconciliation, which respectively reject and accept Dworkin's theory as an appropriate framework for analyzing issues of distributive justice. These two sorts of challenges will be considered in turn.

1. The External Challenge

Let us first consider the external challenge to the Reconciliation. Clearly, for Markovits's economic analysis to carry its prescriptive force, one must fully embrace Dworkin's formalism. But while Dworkin's hypothetical insurance scheme has doubtlessly been influential, it is certainly

162. *Id.* at 2299, 2313, 2323.

163. *See* Zelenak, *Taxing Endowment*, *supra* note 6, at 1162.

not the only viable formulation of luck egalitarianism on offer¹⁶⁴—let alone of liberal egalitarianism more generally¹⁶⁵—and, indeed, has been criticized from several angles.¹⁶⁶ This Article shall focus on one such criticism, viz., that in certain circumstances, Dworkin's device appears to generate pathological results that should prompt us to question its claim to being a reliable standard for distributive justice.

There are two types of pathology that one might be on the lookout for. The first is a result whose moral badness can be ascertained by applying some normative theory T to a single society S (or set of parameters, or possible world) and examining T 's prescriptions for S . Call this an "intra-world pathology." The second—which we may refer to as an "inter-world pathology"—is a result whose perversity can only be determined by applying T to two or more societies $S_1 \dots S_n$, and then comparing the results. Whereas an intra-world pathology wears its affliction on its sleeve, an inter-world pathology requires a bit more detective work to unearth. In certain cases, none of T 's recommendations for $S_1 \dots S_n$ may, when considered in isolation, reveal itself as morally offensive. However, when T 's prescriptions for $S_1 \dots S_n$ are placed side-by-side and compared, a pattern of relational unfairness between some of the S_i s may emerge. As I shall argue, there are reasons to worry that Dworkin's hypothetical insurance scheme produces pathologies of both varieties.

a. Intra-World Pathology: Redistribution from the Disabled to the Able

The device's propensity to generate intra-world pathologies has been notably explored by the economist John Roemer. Utilizing a plausible

164. For competing versions of luck egalitarianism, see RAKOWSKI, *supra* note 67; Arneson, *supra* note 67; and Cohen, *supra* note 67.

165. See, e.g., RAWLS, A THEORY OF JUSTICE, *supra* note 79.

166. For important criticisms of luck egalitarianism, in general, see Anderson, *supra* note 67; Fried, *supra* note 67; and Scheffler, *supra* note 67. For criticisms of Dworkin's theory by some of his fellow luck egalitarians, see, for example, RAKOWSKI, *supra* note 67, at 136 (arguing, inter alia, that mere differences in risk preferences should not affect the tax burdens of otherwise similarly endowed individuals); and Cohen, *supra* note 67, at 918–39 (arguing, inter alia, that Dworkin improperly refuses compensation for those welfare related aspects of disability, as well as for involuntary expensive tastes).

mathematical model of Dworkin's hypothetical insurance market, Roemer demonstrates that where (i) the parties behind Dworkin's thin veil of ignorance (whom Roemer refers to as the "souls") are not highly risk averse, and (ii) wealth could be put to greater use in terms of generating utility by the abled than by the disabled, the souls may opt *ex ante* for an insurance scheme that perversely requires the *ex post* redistribution of wealth *from* the handicapped *to* the healthy.¹⁶⁷ This pernicious outcome arises where the souls are not "sufficiently risk averse to induce them to shift wealth into the bad state" of being disabled, and it is "more worthwhile (in terms of expected utility) to use wealth in the state when it can produce a lot of welfare (when a soul turns out to be [talented and healthy])."¹⁶⁸

Roemer contends that no true resource egalitarian should accept this result,¹⁶⁹ as it contravenes the highly attractive normative principle—call it "*P*"—"that *ceteris paribus*, disabled individuals"—that is, individuals who require a greater amount of wealth to achieve a given level of welfare—"should receive more transferable resources . . . than able ones."¹⁷⁰ He infers that there is a fundamental inconsistency between egalitarianism and veil-of-ignorance approaches to distributive justice, and that it is the latter that should ultimately be dispensed with.¹⁷¹ While veil-of-ignorance approaches tout the benefit of forcing impartiality in decision-making, they come with two steep costs.¹⁷² The first is that we must forfeit morally relevant information about the actual distribution of worldly resources, preferences, and talents in a society.¹⁷³ The second is that we must base our decisions, at least in part, upon a set of considerations whose moral relevance is far from obvious, viz., the risk preferences under uncertainty of certain hypothetically

167. John E. Roemer, *Egalitarianism Against the Veil of Ignorance*, 99 J. PHIL. 167, 177–84 (2002).

168. John E. Roemer & Alain Trannoy, *Equality of Opportunity* 11 (Cowles Found. for Research in Econ. at Yale Univ., Discussion Paper No. 1921, 2013), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2345357.

169. See Roemer, *supra* note 167, at 180.

170. *Id.* at 182.

171. *Id.* at 182–84.

172. *Id.* at 183.

173. *Id.*

situated actors.¹⁷⁴ If impartiality could be maintained by some other means, Roemer maintains that it would be desirable to dispense the veil-of-ignorance construct, so as to avoid these costs.¹⁷⁵

Completing his *reductio ad absurdum* of Dworkin's theory, Roemer observes that his critique of veil-of-ignorance devices poses special problems for Dworkin, because "unlike Rawls or [the utilitarian-economist John] Harsanyi," Dworkin "does not employ a veil of ignorance to argue for his political view, but rather, . . . to define what it consists in."¹⁷⁶ In other words, equality of resources for Dworkin is stipulated to be whatever distribution would be spit out by his hypothetical insurance mechanism. Hence, when faced with Roemer's counterexamples to *P*, Dworkin shall find that he lacks the independent theoretical resources required to dismiss or amend his device's objectionable recommendations. *Ex hypothesi*, a just distribution for Dworkin just is whatever his insurance market says that it is. But this, in the end, is intuitively unacceptable.

*b. Inter-World Pathology: Less Stringent Obligations
for Wealthy Societies*

I shall now argue that Dworkin's formalism also seems to give rise to an inter-world pathology, whereby a richer society is sometimes required to provide *less* care for its disabled citizens than a less wealthy society. This apparent possibility stems from the fact that the risk of handicap, which the souls in Dworkin's original position seek to protect themselves against by purchasing insurance, is also negatively correlated with a society's total wealth. *Ceteris paribus*, in communities with less talent and greater disability, there will be (i) greater antecedent risk of handicap from behind Dworkin's thin veil of ignorance, but also (ii) lower aggregate productivity and wealth. If Dworkin's souls were sufficiently

174. *Id.*

175. *Id.* at 183–84. Roemer suggests that SCANLON, *supra* note 70, is on the right track here. *Id.* at 184. For more on Roemer's own approach to distributive justice, see ROEMER, *supra* note 71.

176. Roemer, *supra* note 167, at 177 (emphasis added). Note that while Rawls offers his analysis of original position as one argument in favor of the difference principle, he provides a number of distinct arguments, which do not employ this device, for this moral precept.

risk averse, increasing the prevalence and risk of disability could conceivably lead to greater absolute levels of insurance being purchased, all while aggregate social wealth decreases. As a result, a poorer society may be on the hook for greater accommodations for its disabled citizens than a more affluent one.

To illustrate this worry, consider a very simple example. Suppose that Society *A* has a population of five citizens, of whom one is disabled and four are healthy. Further suppose that, knowing the statistical distribution of handicaps in their community, the souls in Dworkin's original position purchase insurance that provides the disabled citizen with benefits equal to some amount *X*. In Society *B*, we take away one of the healthy citizens, leaving the one disabled and three healthy citizens. The two populations are otherwise identical in all respects. It would seem that, in deciding upon a new level of insurance coverage to purchase in Society *B*, the souls would take two competing economic considerations into account.

On the one hand, the increased *ex ante* risk of disability ($1/4$ versus $1/5$) would weigh in favor of purchasing an insurance plan that provides the disabled citizen in Society *B* with benefits greater than *X*. Because a soul's chance of ending up disabled is now higher, the soul would want Society *B* to provide more generous accommodations to the citizen who ends up in the bad state. Call this the "risk effect."

Cutting the other way, because there is now one fewer healthy citizen to pay for these benefits, the average per-person premiums in Society *B* would have to be higher than in Society *A* to continue to fund benefits in an amount *X*. And in order to finance *increased* benefits for the sole disabled citizen, Society *B*'s three healthy citizens would, on average, have to be taxed at (perhaps significantly) higher rates than the four healthy citizens in Society *A*. This would weigh against purchasing an equal or increased level of coverage in Society *B*. Call this the "per capita cost effect."

A priori, the combined impact of the risk effect and per capita cost effect upon the souls' deliberations appears to be ambiguous. Whether a greater, lesser, or equal amount of coverage would be purchased in Society *B* would likely depend upon the exact parameters of the situation (e.g., utility functions, incomes, endowments, benefit levels).

For my purposes, though, it would suffice to establish that there is *some* possible set of circumstances under which Dworkin's insurance scheme generates an inter-world pathology. And as far as I can see, if the souls were sufficiently risk averse (though not full-fledged

maximiners¹⁷⁷), the risk effect may outweigh the per capita cost effect in at least some circumstances. In that case, the souls may settle upon a level of insurance in Society *B* that provides its disabled citizen with greater benefits than the *X* amount that this citizen would receive in Society *A*. But as with Roemer's counterexamples to principle *P*,

177. Thanks to Daniel Markovits for raising this point in conversation. The thought is this. Suppose the souls in my example were maximiners. Then, they would use as much of their income as needed to maximize their outcome in the worst-case scenario (i.e., ending up disabled). Because aggregate income is higher in Society *A* than in Society *B*, this means that *X*—the amount of benefits the one disabled citizen receives in Society *A*—would be greater than *X**—the amount that the disabled citizen would receive in Society *B*.

I believe that the same idea can also be articulated in the following way. Imagine that the souls in Society *B* were to purchase insurance providing benefit levels *X**, which maximizes the outcome of the sole disabled citizen there. Since there are a greater number of healthy individuals paying taxes to fund the social safety net in Society *A* than in Society *B*, the per-person premiums for an insurance plan providing *X** will be cheaper for the citizens of Society *A* than for the citizens of Society *B*. Each soul in Society *A* could therefore afford to purchase insurance providing benefits greater than *X**. And because they are all playing maximin, each will in fact do so, and opt for that level *X* which maximizes the disabled citizen's well-being in that scenario. Because the souls purchase greater insurance in Society *A* than in Society *B*, the inter-world pathology that I have envisioned does not occur.

In response, I think it doubtful that the parties in Dworkin's choice scenario would adopt maximin, since this heuristic is typically employed under conditions of ignorance—where probabilities cannot be attached to the various possible outcomes—rather than under conditions of risk, where the relevant probabilities are either known or can be derived through Bayesian reasoning. The allure of maximin is that it allows one to “transform a decision under ignorance into a decision under certainty,” since outcome probabilities are not required to maximize one's payoff in the worst-case scenario; all that's needed is a non-probability weighted list of the possible end states. PETERSON, *supra* note 5, at 45–46. Thus, maximin would be a plausible strategy in Rawls's original position, for instance, where ignorance prevails. But since the odds of ending up talented or disabled are known *ex ante* by the souls in Dworkin's thought experiment, maximin would be an unlikely choice. Since Dworkin's original position represents a decision under risk, the parties would (to the extent that they are rational) instead seek to maximize expected utility. See, e.g., *id.* at 65. In that case, the choice of maximin would require that the parties exhibit extreme risk preferences that are not supported by behavioral economics.

this outcome strikes one as highly perverse from the ex post posture. For surely Society *A*, in virtue of its greater aggregate wealth, owes a greater level of care to its disabled citizen than Society *B*, which is poorer overall.

Of course, I emphasize the conjectural status of this result. A rigorous mathematical demonstration lays outside the scope of this Article, and I simply offer the general economic intuitions for now. But Dworkinians must take this as a challenge in need of refutation, as the conjectured cases appear to be quite damning for Dworkin's account. For the principle—call it "*P**"—that, *ceteris paribus*, more affluent societies, in virtue of their greater means, owe greater accommodations to their disabled citizens than poorer societies, is at least as plausible as Roemer's principle *P*. Thus, if these cases were ultimately verified, Dworkin would find himself caught between Scylla and Charybdis, as his hypothetical insurance scheme would fall prey to comparably pathological tendencies if risk aversion were *either* too little or too great. If risk aversion was too slight, his device would succumb to Roemer's intra-world pathology and a violation of principle *P*. If, on the other hand, risk aversion was too high, then his device would confront my inter-world pathology and a similarly egregious violation of principle *P**.

This bind would be tragic for Dworkin, since it was hoped that intuitively just results would follow from his insurance market more or less independently of the souls' risk preferences, which are taken to be exogenous to his theory. Instead, the violations of *P* and *P** should prompt an impartial onlooker to lose faith in Dworkin's device as a

Of course, this possibility cannot be ruled out a priori. But nonetheless, it does not threaten my argument. The above reasoning suggests to me that the souls' decisions could plausibly track the following trajectory, under at least some parameters: when risk aversion is low, the risk effect would likely be outweighed by the per capita cost effect, and greater insurance would be purchased in Society *A* than in Society *B*; when risk aversion passes a certain threshold—call it *R*—the risk effect would outweigh the per capita cost effect, and greater insurance benefits would be purchased in Society *B* than in Society *A*; finally, when a second threshold for risk aversion is crossed—call it *R**—the parties in Society *A* would use their greater aggregate wealth to purchase more robust insurance there than in Society *B*. Recall that, for my purposes, it would suffice for Dworkin's insurance scheme to generate an inter-world pathology under at least *some* circumstances. So long that such a result occurs between *R* and *R**, my *reductio ad absurdum* of Dworkin's theory should emerge unscathed.

reliable gauge of distributive justice and to take seriously Roemer's general criticisms of veil-of-ignorance constructions. Furthermore, as discussed above, because Dworkin *defines* a fair distribution as one that comports with his hypothetical insurance scheme, he lacks the independent theoretical resources needed to amend his device's perverse prescriptions. In the face of these counterexamples, a true egalitarian ought therefore to jettison Dworkin's theory in favor of retaining both P and P^* .

Let us now tie a few strands together. Recall Markovits's conclusion that the souls in Dworkin's original position would only purchase insurance up to "maximum talent-slavery-safe level" of earning ability, which would necessarily fall somewhere below the mean.¹⁷⁸ Because Dworkin's formulation of luck egalitarianism must likely be rejected, Markovits's analysis—which critically relies upon Dworkin's apparatus—cannot be used to motivate a no-talent-slavery constraint on an endowment tax's rate structure. The Reconciliation therefore fails. This completes my exposition of the external challenge.

2. *The Internal Challenge*

I now offer an internal challenge to the Reconciliation. For the time being, I will assume *arguendo* that Dworkin's formulation of luck egalitarianism is an appropriate framework for thinking about matters of distributive justice—hence, the objections raised by the external challenge will temporarily be forgotten. Even granting this, I hold that the Reconciliation cannot be achieved as envisioned. I argue that, because Markovits's argument turns upon certain dubious empirical assumptions, it fails to establish that the souls would always reject a tax-and-transfer system that produces talent slavery.

To set the stage for this challenge, let us briefly rehearse Markovits's refinement to Dworkin's trade-off argument, quoted above in Part IV.B. Markovits first corrects for Dworkin's mistaken presumption that it would be actuarially feasible for the participants to his hypothetical insurance market to insure for earning levels above the mean. He then notes that, in the event that a person were to insure for precisely the mean wage, but later end up above average in talent, she would have to "work flat out and only at that job which, given her talents, pays most" in order to pay all of her potential "earnings above the mean to the

178. See discussion above at Part IV.B.

insurance company as a premium.”¹⁷⁹ This would be so “even if she hated the work involved, had ambitions that she could fulfill only in another job, or just preferred the other job.”¹⁸⁰ Given this characterization of the attendant risks, Markovits reformulates Dworkin’s trade-off argument as follows: in deciding whether one should insure up to the mean wage, he claims that no reasonable individual would accept:

- (i) a “large chance of a great loss (being a slave to one’s talents in case one is [above average in talent])” for

- (ii) a “large chance of a moderate gain ([an insurance payout equaling] the difference, roughly, between a [below-mean] wage and the mean wage in case one is untalented).”¹⁸¹

179. Markovits, *supra* note 71, at 2308 (emphasis added).

180. *Id.* (emphasis added).

181. *Id.* at 2309. The differences between Dworkin’s and Markovits’s welfare calculi, which can be gleaned from the bolded language in the block quotes in Part IV.A–B, are summarized in the following table:

	Dworkin (Insure for Very High Income?)	Markovits (Insure for Mean Income?)
Scenario (i) Fall Above Insured Earning Ability & Policy Does Not Pay Out	“very small chance of very great loss” [talent slavery for those with very highest ability]	“large chance of a great loss (being a slave to one’s talents in case one is talented)”
Scenario (ii) Fall Below Insured Earning Ability & Policy Pays Out	“very large chance of a small gain” [the insurance proceeds net of very high premiums]	“large chance of a moderate gain (the difference, roughly, between a lower insured wage and the mean wage in case one is untalented)”

The change from Dworkin’s to Markovits’s formulation of (i) and (ii) can be explained thus:

- (i) Since scenarios where an individual falls above the maximum insurable income level will be far more numerous under Markovits’s

From this, he infers that no one would insure for a near-mean earning level. The parties would only insure up to the maximum talent-slavery-safe level, which would fall significantly below the mean.

In response, one might challenge whether scenario (i) actually represents a “large chance of a great loss”¹⁸² for individuals who end up above average in earning ability. To begin, note that talent slavery has two negatively synergistic components: doing work of a sort that one dislikes and working very long hours (i.e., working “flat out”¹⁸³).

But we have been given little reason to believe that it would nearly always, or even normally, be the case that a person with above average talent would dislike the quality of the work at which she could earn the most income—that is, that the character of this work would generally be an economic “bad” for the employee, rather than intrinsically neutral or even a good. On the contrary, it is quite common for people find at least some fulfillment in work that they discover is particularly well-suited to their own talents and productive capacities. This is often so, even in circumstances where the employee may have had no antecedent attraction to the position and only warmed up to it upon discovering (or becoming properly attuned to) her own proficiencies.

At the very least, we have little reason to think that a person would tend to dislike the quality of her highest paying work *substantially more* than those jobs at which she could earn lower wages. If a person were to dislike the qualitative character of those employment options available to her with similar intensities, then having to work her highest-paying job would not constitute a great loss, relative to the range of feasible alternatives. To be sure, genuine cases of a person steadfastly revolting against her marketable talents are not to be denied—if it were otherwise, the talent-slavery objection would be no objection at

analysis, there will thus be a “large” rather than “small” chance of a very great loss (i.e., talent slavery).

(ii) Because individuals falling below the mean will tend to be worse off when their policy pays out than those who (per impossible) insure for a much higher income, the former’s utility gains from the proceeds may (due to the declining marginal utility of money) be “moderate” rather than “small.”

182. Markovits, *supra* note 71, at 2308.

183. *Id.*

all. But these cases seem to be somewhat of an exception rather than the rule.¹⁸⁴

And although I shall not go so far as to claim that a person's highest-paying job will nearly always be her most-preferred position,¹⁸⁵ working one's *n*th most-preferred job, in itself, simply does not constitute a "great loss"—at least so long as the work is found to be enjoyable, meaningful, or even just plain tolerable, and there is not a substantial discrepancy between the favorable attributes of this job and the person's most-preferred (feasible) position. If this were not so, then how many of us would have grounds for bemoaning the great losses that we have suffered? I would suggest, then, that in a majority of cases falling under scenario (i), the first component of talent slavery will simply not be present, at least to that degree required to accurately characterize the situation as constituting a great loss for the individual.

Thus, in order for scenario (i) to credibly represent a large chance of a great loss, talent slavery's second component must pick up the slack. In other words, it must be that a person would generally have to work oppressive hours in order to maximize her production and

184. There is credible empirical support for this claim: in his widely read survey of labor economics, George Borjas makes the simplifying methodological assumption that individuals choose "the level of human capital investments that maximizes the present value of lifetime earnings." GEORGE J. BORJAS, *LABOR ECONOMICS* 236 (6th ed. 2013). In support of this simplifying assumption, Borjas cites to an influential 1979 study which found that among a sample of 3,611 workers, the subjects *on average* (though *not always*) chose the schooling option—in this case, whether or not to attend college—that maximized the present value of their lifetime income. *Id.* at 262 n.28; *see also* Willis & Rosen, *supra* note 6, at S20, S28–S29. To estimate the workers' potential income, the study used four proxies for earning ability: mathematics and reading test scores (as indicators of IQ), as well as measures of manual dexterity and mechanical ability. *Id.* at S22.

If my claim were incorrect, Borjas's methodological assumption would be rendered dubious, and Willis and Rosen's finding would be difficult to explain. Unless people exhibited systematic preferences for greater material consumption over doing work that they found more enjoyable, or had more or less uniform preferences for work quality, which a competitive labor market incorporated into wages, maximizing lifetime earnings would not necessarily maximize utility.

185. But see the immediately preceding note for why this could sometimes be a useful simplifying assumption.

earnings, so that her life would be miserable even if she found the intrinsic character of her work otherwise acceptable. Call this the Max Earnings-Oppressive Hours (MEOH) Assumption. If this were not true, then Markovits could not establish that ending up above average in talent would constitute a *large* chance of a great loss. But while, for the reasons discussed below, this substantive-economic hypothesis seems plausible for individuals with either quite low or very high earning ability, it is less tenable for those with near-mean ability.

First consider those with either quite low¹⁸⁶ or very high earning ability. In both instances, we would not expect a person's marginal productivity to radically deteriorate as she works long hours. At the low end, this is because specialized skill (and, hence, physical/mental freshness¹⁸⁷) is not required for job performance. And at the high end, it's because the individual will tend to be extremely resistant to exhaustion and performance degradation.¹⁸⁸ We therefore have reason to surmise that both groups would tend to maximize their output—and, so long as earnings are roughly tied to production, their accompanying income—by working very high hours.¹⁸⁹ At least as a first approximation, then, the MEOH Assumption would likely hold true for these demographics.

But now consider cases falling between the two extremes. For individuals whose earning abilities fall closer to the mean, significant talent will generally be required for performance, but these persons will

186. The following reasoning would not apply to individuals with extremely low earning ability because such persons would, due to various handicaps, be incapable of performing even unskilled labor for significant periods of time.

187. An exception could be for jobs that are very physically demanding.

188. While there would certainly be some outliers, who enjoy very high potential income in virtue of extremely high hourly wages but who lack the stamina to work long hours, I doubt that such individuals are representative of very high earners in general.

189. Even this reasoning has its limits, however. After a certain point, chronic fatigue would lead to health problems, which in turn would lead to absenteeism and employee departures, resulting in reduced overall output. For a brief overview of the literature on the connection between long work hours and ill health, see JOHN H. PENCARVEL, *DIMINISHING RETURNS AT WORK: THE CONSEQUENCES OF LONG WORKING HOURS* 138–50 (2018). To the extent that stamina is a partial determinant of earning ability, *ceteris paribus*, I would expect this cutoff to generally occur at shorter hours for low earners than for high earners.

also tend to be more susceptible to fatigue and resulting deterioration in work performance. Often, the factors that separate a person from the highest levels of earning ability will not be differences in intellectual, social, or creative talents per se. Rather, this delta shall often be attributable (at least in part) to less physical or psychological stamina. For individuals with these constitutional limitations, there may often come a point, prior to working truly oppressive hours, at which working additional hours yields no greater, and perhaps even reduced, total output. Indeed, this conjecture is lent considerable empirical support by a recent study by the labor economist John Pencavel.¹⁹⁰

190. To investigate the effects of long work hours on productivity, Pencavel revisits a natural experiment from the early twentieth century. John Pencavel, *The Productivity of Working Hours*, 125 *ECON. J.* 2052 (2015); see also PENCVEL, *supra* note 189, at 68–95. After the outbreak of World War I, the British government rolled back regulations restricting the number of hours that employees could legally work in factories producing war-related materials. Pencavel, *supra*, at 2054. Pencavel analyzes a data set of observations on the work hours and productivity of British munitions workers from this period. *Id.* The workers' productivity was precisely measured by the number of shell pieces they produced. *Id.* at 2057. In addition, the employees' hourly earnings were "described as affording the workers a relatively high standard of living," and varied with the cost of living. *Id.* This suggests to me that the factory workers were neither at the very bottom (nor the very top) of the earning ability hierarchy; Pencavel's study therefore appears to pertain to that demographic currently of interest to us.

Pencavel's main findings can be summarized as follows: below 49 hours per week, output was approximately proportional to hours worked; above 49 hours per week, marginal hourly productivity started to decline; and at 63 hours per week (or 9 hours per day) output reached a *maximum* and the estimated marginal productivity of additional hours worked became *negative*. *Id.* at 2063–64. As a result, weeks where 70 hours were worked showed little difference in total output than weeks where only 56 hours were worked. *Id.* at 2063. Furthermore, the reintroduction of Sunday work and the "absence of a day of rest each week had damaging effects on output." *Id.* at 2069–70. And because some workers may have missed work entirely due to sickness brought on by long hours, the measurable effects of fatigue on productivity could have even been understated. *Id.* at 2058. All in all, then, Pencavel's paper—which has been described as the "only recent published article in economic literature" using "micro-level data [to estimate] optimal working hours"—lends support for my hypothesis that the productivity of employees falling between the two extremes in earning ability may often be maximized under work

Correspondingly, where an employee is incapable of performing consistently under stressful circumstances over long periods of time, an employer¹⁹¹ would often maximize the employee's output—or at least get her money's worth for the worker's labor—by providing the employee with considerable leisure and mental equanimity.¹⁹² In such circumstances, working at top earning capacity would not require working oppressive hours, or laboring in a pressure cooker environment. It would then, however, be improper to characterize the situation as constituting full blown talent slavery, or a “great” loss for the employee.

schedules that are not reasonably characterized as oppressive. Peter Dolton et al., *The Optimal Length of the Working Day: Evidence from Hawthorne Experiments 10* (Mar. 2016) (unpublished manuscript) (on file with the Royal Holloway Univ. of London Sch. of Mgmt.), [https://pure.royalholloway.ac.uk/portal/en/publications/the-optimal-length-of-the-working-day\(087310ae-b5c9-4d21-b31d-70f4697a311b\).html](https://pure.royalholloway.ac.uk/portal/en/publications/the-optimal-length-of-the-working-day(087310ae-b5c9-4d21-b31d-70f4697a311b).html).

Another recent (but presently unpublished) study, which analyzed data on the work hours and productivity of relay assembly and mica splitting workers from a Chicago factory during the years 1924–1932, found that output was maximized at even shorter hours than in Pencavel's study—specifically, “between 7.9 and 8.6 daily working hours depending on the production process.” *Id.* at 4. Since these factory workers were also plausibly medium-skilled (during the relevant time period), this study lends further support to my conjecture. And although they do not attempt to quantify optimal work hours, other recent empirical studies documenting fatigue effects on medium-skill employees include Tanguy Brachet et al., *The Effect of Shift Structure on Performance*, AM. ECON. J.: APPLIED ECON., Apr. 2012, at 219 (finding that the performance of paramedics deteriorates towards end of long shifts); and Marion Collewet & Jan Sauermann, *Working Hours and Productivity*, 47 LAB. ECON. 96 (2017) (finding that part-time call-center employees' marginal productivity decreased with increased work time, despite only working an average of 4.6 hours per day).

191. This will also be true in the case of self-employed individuals.

192. See Dolton et al., *supra* note 190, at 38 (“It can be shown that if workers suffer from fatigue which means their marginal productivity rises then falls over the course of the working day, then it is rational for the employer to fix the firm[’s] working hours at the point where the average value of the daily product (across heterogeneous workers) is maximised.”); Pencavel, *supra* note 190, at 2073 (“This article has suggested a different reason for an optimising employer to care about the length of working hours: employees at work for a long time experience fatigue or stress that not only reduces his or her productivity but also increases the probability of errors, accidents and sickness that impose costs on the employer.”).

These observations have significant ramifications for Markovits's trade-off argument. Once we tally up (A) all individuals with above mean earning ability for whom the MEOH Assumption does *not* strictly apply, group them in with (B) those above average individuals (who will tend to possess among the highest earning abilities) for whom the MEOH Assumption *is* descriptively accurate, and calculate the resulting *average* disutility from maximal capacity employment, it is far less clear that Markovits's trade-off argument succeeds on its own terms. If the type-*A* cases were sufficiently numerous relative to the type-*B* cases, Markovits's welfare calculations might then boil down to the claim that no reasonable individual would trade:

- (i) the large chance of an (on average) moderate loss,¹⁹³
for
- (ii) the large chance of moderate gain.¹⁹⁴

But it is far from clear that the veiled souls would in fact decline this gamble. If they would strike such a wager and insure for a near-mean wage, then in some percentage of those situations where a soul ends up capable of earning above the insured income level, and must therefore work at full capacity in order to foot her tax bill, she shall wake to find herself a slave to her talents. In particular, this will occur in those type-*B* cases where the individual ends up with very high earning ability.

We have established, then, that the participants in Dworkin's hypothetical insurance market could plausibly insure for a near-mean income, and in so doing opt for a tax-and-transfer scheme that permits for at least some amount of talent slavery. At the very least, because Markovits's trade-off argument implicitly turns on certain questionable

193. The average disutility suffered from working at maximum earning capacity when one is above mean in talent. In Markovits's prior formulation of the trade-off argument, scenario (i) represented the large chance of a great loss, since he implicitly assumed that the MEOH Assumption would apply for nearly all individuals with above-mean earning ability. But if the MEOH Assumption were only applicable to a subset of these cases (i.e., the very high earners), and inapplicable to the rest, then the disutility from full economic capacity employment could easily average out to a moderate loss.

194. "[an insurance payout equaling the] difference, roughly, between a [below mean] wage and the mean wage in case one is untalented." Markovits, *supra* note 71, at 2309.

empirical assumptions, his anti-talent slavery conclusion cannot be obtained from a priori reasoning alone. As such, his trade-off argument cannot be used to rule out talent-slavery-producing tax rates under all epistemically plausible circumstances. For these reasons, the Reconciliation—at least interpreted stringently as a claim about anti-talent-slavery constraints that must be placed on an endowment tax in all cases—fails.

This completes my presentation of both the external and internal challenges. In their wake, I maintain that the Reconciliation is not successful. Hence, absent some other argument, the demands of equity and liberty cannot be neatly harmonized within a luck egalitarian framework. The endowment tax therefore remains vulnerable to the aggregate liberty objection articulated by Murphy and Nagel—at least, as qualified in light of the social endowment realization ratio (SERR) response discussed earlier.¹⁹⁵ While an endowment tax partisan could, even in the absence of a low SERR, agree to lower rates to significantly curb talent slavery, the resulting revenue losses (and the loss of those public and private goods this revenue otherwise would have funded) would reflect an *ad hoc* concession on her part, rather than an equal part consequence of the ability tax's motivating normative theory (i.e., luck egalitarianism). This theoretical disunity should constitute at least a modest strike against the ability tax, as the friends of endowment taxation would be forced to partake in an irksome game of tug of war between equity and liberty. Indeed, if her concern were to avoid talent slavery, then the question would inevitably arise as to why an endowment tax partisan should feel the need to transition from an income tax to an endowment tax in the first place. At a minimum, by foiling the Reconciliation, I have deprived the friends of endowment taxation of an elegant solution to the ability tax's most-enduring objection.

V. CONCLUSION

I shall conclude the Article by first providing a brief synopsis of its main findings, and then by pointing to directions for future work.

I began by noting that, while direct observation of endowment is infeasible, earning ability may be indirectly observed through the use of various proxies and indicator goods, such as those discussed in

195. See discussion above at Part III.E.

footnote 6. The use of statistical correlates could perhaps be used to create a presumption of earning capacity, which may be rebutted where the taxpayer produces persuasive opposing evidence. But, even if earning ability could not be reliably estimated, it was conjectured that evaluating the desirability of an endowment tax under certain idealizing conditions might offer us important normative insights into the proper goals of tax policy, or provide a benchmark against which we compare more practical institutional alternatives.

I then considered various substantive arguments for and against the endowment tax.

From a utilitarian perspective: although, as the standard economic argument emphasizes, endowment taxation has no substitution effect, unlike a head tax, it carries with it a potent income effect, which may force certain individuals to perform work that they dislike. Whether or not an endowment tax is favored by the welfare calculus would likely turn on numerous contingent features of a society's economy, such as: (i) the lumpiness of its labor markets, (ii) the presence of positive and negative externalities for paid and unpaid work, and (iii) the intensities of talented but non-materialistic individuals' work aversions and leisure preferences. And although, as Kaplow observes, an endowment tax has plausible claim to functioning as an ideal Haig-Simons income tax, it is questionable whether deviations from this analytic ideal materially distort investment decisions for human and physical capital, and thereby lead to appreciable reductions in aggregate wealth and well-being.

From the standpoint of fairness: it is unclear whether the advantages of endowment taxation—such as its reflection of luck egalitarian principles and its equitable treatment of preferences for consumption versus leisure—outweigh the liberty interests of the talented. Any antagonist of the ability tax who invokes these liberty interests, however, must be prepared to distinguish her objection from similar modes of argumentation employed by libertarians to oppose redistributive taxation in *all* its manifestations. In response to this challenge, some liberal egalitarians have maintained that ability taxation leads to more troublesome patterns (i.e., violation of the Pareto superiority requirement), or to greater aggregate quantities of liberty infringement (i.e., talent slavery) than income taxation.

Responding to the former argument, a proponent of endowment taxation might reject the contractarian framework on which the argument is premised, try to establish that life under an endowment tax regime

would still be Pareto superior to the State of Nature, or litigate for the adoption of *ex ante* (rather than *ex post*) Pareto superiority requirement.

In evaluating the success of the latter argument, the lumpiness of labor markets and the prevailing social endowment realization ratio (SERR) will be highly relevant. Where the SERR is very low, transitioning to an endowment tax would significantly expand the tax base. Rates could then be lowered in order to ameliorate the problem of talent slavery; these observations would also bear on the utilitarian analysis discussed above. But it is unknown what the SERR is in the present-day United States. Consequently, it is similarly unclear how much ammunition this reply really provides an endowment tax partisan. Moreover, in the absence of some demonstration that the SERR will (perhaps due to certain deep psychological, sociological, or economic laws) nearly always be low enough to guard against the threat of talent slavery, the SERR-response does not provide a categorical solution to the aggregate liberty objection advanced by Liam Murphy and Thomas Nagel.

Arguably the most sophisticated attempt at reconciling ability taxation's luck egalitarian motivations with a concurrent concern for individual liberty can be culled from the work of Ronald Dworkin and Daniel Markovits. According to Dworkin's formulation of luck egalitarianism, which he dubs "equality of resources," an ideally just distribution of resources could be produced and sustained by a two-step procedure. The first step would involve auctioning off initial bundles of material resources to the citizens of a community, according a procedure that satisfies the (so-called) envy test and a non-discrimination requirement. The second step would involve asking how much insurance against the prospect of low earning ability the citizens of the society would have purchased if certain epistemic constraints were placed upon their deliberations.

Both Dworkin and Markovits contend that, because it would involve an unfavorable welfare trade-off between possible outcomes, the souls would not purchase insurance at a level that produces talent slavery. Correcting for an actuarial oversight on Dworkin's part, Markovits further observes that the most robust plan that could feasibly be offered would only insure up to the mean wage. Even this, however, would force those who could earn above the mean wage into talent slavery and would therefore not represent an attractive gamble *ex ante*; consequently, the participants would insure for significantly below the mean earning level. From this, Markovits infers that dual aims of luck egalitarianism—fully neutralizing the effects of brute luck, while also respecting citizens'

agency by effectuating the choices they would have made if placed in Dworkin's original position—cannot simultaneously be satisfied. If this analysis is correct, however, then the calibration of tax rates to avoid talent slavery would also constitute an internally motivated constraint on the design of an endowment tax regime, which flows from Dworkin's own articulation of luck egalitarianism, rather than an ad hoc concession on the part of an endowment tax partisan. I offered two challenges to this attempted Reconciliation of the demands of equity and liberty.

The external challenge sought to discredit Dworkin's theory by showing that his hypothetical insurance market appears to produce certain pathological outcomes. As John Roemer has demonstrated, in some circumstances, Dworkin's device requires the redistribution of material resources from the disabled to the abled. In addition, Dworkin's device may sometimes assign a richer society less robust obligations to its disabled citizens than a poorer society. The former "intra-world" pathology will occur when the souls' risk aversion is too low; the latter "inter-world" pathology may occur where it is too great. Because the normative principles violated by these outcomes—which I referred to as P and P^* —are more plausible than the axioms of Dworkin's theory, we should reject Dworkin's rendering of luck egalitarianism and take seriously Roemer's objections to veil-of-ignorance approaches to distributive justice more generally. This means that Dworkin's apparatus cannot be employed to achieve the Reconciliation.

The internal challenge, which accepted Dworkin's theory for the sake of argument, sought to foil the Reconciliation by showing that Markovits's analysis implicitly relies upon certain dubious empirical assumptions. For instance, it requires that a person's production and earnings will generally peak under oppressive work schedules. I called this Max Earnings-Oppressive Hours Assumption. While this hypothesis seems persuasive when applied to individuals with either low or very high earning ability, it appears less plausible for individuals whose earning abilities fall closer to the mean. If working at top economic capacity would not require working truly oppressive hours, however, it would not be a "great loss" for such individuals. When Markovits's trade-off argument is revised to reflect these observations, we arrive at the conclusion that the participants to Dworkin's insurance market might plausibly insure for a near-mean wage, and in so doing opt for a tax-and-transfer scheme that permits for at least some amount of talent slavery.

Thus, whether or not we accept Dworkin's normative theory, the Reconciliation does not succeed. While an endowment tax advocate

could, even in the absence of a low SERR, agree to lower rates to avoid talent slavery, the accompanying losses in tax revenue (and corresponding government spending) would reflect an ad hoc concession, unsanctioned by luck egalitarianism itself. The resulting theoretical disunity should constitute a moderate strike against the endowment tax and deprive its advocates of an elegant solution to the longstanding talent slavery objection. It should, moreover, raise the question of why a nominal endowment tax partisan who nevertheless seeks to avoid talent slavery would seek to transition from an income tax to an ability tax in the first place.

Where exactly does that leave us? Our main takeaway is a negative one: none of the arguments for or against endowment taxation considered in this Article is entirely conclusive. The desirability of an endowment tax seems to be highly context dependent. Under some confluence of background conditions, endowment taxation may appear to be justified; under others, it will not be. As such, the endowment tax cannot, contrary to our initial aspiration, be held out as an idealized standard against which we measure the desirability of other proposals, at least without holding fixed those parameters under which ability taxation will be most enticing.

In future work, I shall develop an additional theoretical argument that detracts from the overall normative desirability of an endowment tax, at least in its purest forms. In this Article, I have achieved the preliminary aim of establishing that there is no knockdown argument in favor of the ability tax. With the ground so cleared, I intend to re-enter the debate by presenting new challenges for the friends of endowment taxation.

