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ANALYZING FAIRNESS PRINCIPLES IN TAX POLICY: A PRAGMATIC APPROACH

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I. INTRODUCTION

Tax law is an important regulatory means for implementing our notion of the just society.[1] Do we value individual enterprise or preserving a

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1. The current political landscape makes clear the relevance of tax to the "big issues." Most of the recent debates on social policy, from family values to corporate welfare, focus on the tax system as both the cause of social decay and injustice, and a major hope for radical reform. *See, e.g.*, CONTRACT WITH AMERICA: THE BOLD PLAN BY REP. NEWT GINGRICH, REP. DICK ARMEY, AND THE HOUSE REPUBLICANS TO CHANGE THE NATION 85–90 (Ed Gillespie & Bob Schellhas eds., 1994) (discussing tax reform as the chief mechanism to implement new values); CHRISTIAN COALITION, CONTRACT WITH THE AMERICAN FAMILY: A BOLD PLAN BY THE CHRISTIAN COALITION TO STRENGTHEN THE FAMILY AND RESTORE COMMON-SENSE VALUES (1995); Eric Black, *Perot Stands Out on Taxes, Plan to Cut Deficit; But Positions on Other Major Issues Lack a Main Component: How Would He Do It?*, STAR TRIB., Oct. 18, 1992, at 16A; *Perot's Economic Pill Might Not Be All That Bitter*, BUS. WK., Oct. 12, 1992, at 30; Robert B. Reich, *How to Avoid These Layoffs?*, N.Y. TIMES, Jan. 4, 1996, at A21 (encouraging a tax-based carrot and stick approach to

decent life for all individuals? Are we social democrats or libertarians? The structure of our tax system reflects our answers to these basic philosophical questions. At its best, normative tax policy challenges these answers, by exploring their implications and contrasting them with other possible visions of the good life.

Despite its central role in connecting these most fundamental philosophical issues to actual legal structures, tax law has traditionally not attracted anywhere near the level of interdisciplinary attention enjoyed by other areas of the law.[2] It could even be said that tax law scholarship has developed as a theoretical Galapagos Islands, largely insulated by interdisciplinary movements affecting other areas of the law, though that has begun to change in recent years.[3] This does not mean that the prevailing methods are necessarily primitive. On the contrary, isolation can yield significant innovation. Tax scholars were engaged in economic analysis, for instance, long before economic analysis became so widely used in all other areas of legal scholarship.[4] No amount of sophisticated economic analysis, however, can help shed light on the kind of funda-

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promote greater "corporate responsibility"). Historically, of course, taxation was often the flash point for political and social change. *See* Edward J. McCaffery, *Tax's Empire*, 85 GEO. L.J. 71, 73–74, 121–28 (1996) (discussing the role of taxes in the American Revolution and the importance of tax issues to the authors of the *Federalist Papers*). Furthermore, the public's intense interest in tax policy can literally make or break a political candidate, as Steve Forbes's flat tax campaign attests. *See* Carl Rowan, *If Forbes Becomes President, God Help Us*, CHI. SUN-TIMES, Feb. 7, 1996, at 43 (noting Forbes's status as "the New Republican phenomenon" and criticizing him for emphasizing the flat tax plank of his political platform). Finally, congressional hearings on IRS abuses garnered national attention. *See* Andrew Sullivan, *The Tax That Could Revive Conservatism*, SUNDAY TIMES (London), Oct. 5, 1997, at 6.

2. Indeed, under some accounts of the hierarchy of disciplines within the legal academy, tax law ranks close to the bottom. *See* Deborah Jones Merritt & Barbara F. Reskin, *Sex, Race, and Credentials: The Truth About Affirmative Action in Law Faculty Hiring*, 97 COLUM. L. REV. 199, 266 (1997) (describing tax as a less prestigious area of scholarship).

3. Increasingly, the field is becoming much more interdisciplinary, with tax scholars bringing perspectives as diverse as libertarianism and feminism to reexamine traditional problems. *See generally*, BRUCE ACKERMAN & ANNE ALSTOTT, THE STAKEHOLDER SOCIETY (forthcoming 1999); Anne L. Alstott, *Tax Policy and Feminism: Competing Goals and Institutional Choices*, 96 COLUM. L. REV. 2001 (1996) (considering feminist goals in tax policy); Dorothy A. Brown, *Race, Class, and Gender Essentialism in Tax Literature: The Joint Return*, 54 WASH. & LEE L. REV. 1469 (1997) (describing the bias in the federal tax laws based on race, class, and gender); Marjorie E. Kornhauser, *The Rhetoric of the Anti-Progressive Income Tax Movement: A Typical Male Reaction*, 86 MICH. L. REV. 465 (1987) (arguing for progressive taxation based on feminist views of humanity); Edward J. McCaffery, *The UCLA Tax Policy Conference: Cognitive Theory and Tax*, 41 UCLA L. REV. 1861, 1861 (1994) (noting that cognitive theory "has much to offer the study of taxation"); Jeffrey A. Schoenblum, *Tax Fairness or Unfairness? A Consideration of the Philosophical Bases for Unequal Taxation of Individuals*, 12 AM. J. TAX POL'Y 221 (1995) (challenging the idea that fairness requires some taxpayers to bear more of the burden than others).

4. As demonstrated *infra*, Part II, tax scholarship's isolation from self-consciously interdisciplinary movements such as law and economics may have helped it avoid some of the problems associated with the broader claims of the law and economics movement. *See generally* RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE at xiv (1990) (acknowledging the Chicago School's "thin and unsatisfying epistemology").

mental philosophical issues that shape tax law at its most basic level. For these more philosophical questions, other strategies are required.

One possible strategy, of course, is to assume that such questions are basically unanswerable, that issues of fairness, justice and the good life are matters of the heart, not of the head, settled by emotions and not scholarly analysis.[5] Under this strategy, leaving questions of fairness unanalyzed is a perfectly legitimate way of conducting tax policy scholarship, even if tax law is *the* area of law where these questions need answering most. Employing this strategy in tax and other areas of the law may seem perfectly natural, reflecting as it does a view of the status of fairness claims quite deeply embedded in the intellectual culture at large.[6] As this article demonstrates, however, such a strategy is anything but natural, as it relies on a philosophical view of the status of fairness claims.[7] Once this particular philosophical view is abandoned, the availability of alternative philosophical approaches to fairness becomes clear.[8]

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5. This article uses the term "fairness" to encompass all issues of equity and distributive justice in tax policy.

6. In discussing broader methodological issues in tax law, this article tries to explain the persistence of formalism in the discourse that has been identified by others. *See, e.g.*, Thomas D. Griffith, *Theories of Personal Deductions in the Income Tax*, 40 HASTINGS L.J. 343, 343–45 (1989) (noting the lack of normative principles in the tax theories of several scholars); Louis Kaplow, *Human Capital Under an Ideal Income Tax*, 80 VA. L. REV. 1477, 1513 (1994) (explaining that tax design should not be formalistic but based on "fundamental moral principles or views of distributive justice"); Louis Kaplow, *A Fundamental Objection to Tax Equity Norms: A Call for Utilitarianism*, 48 NAT'L TAX J. 497 (1995) (recommending a utilitarian approach to tax policy); McCaffery, *supra* note 1 (identifying formalism in the discourse); Michael A. Livingston, *Reinventing Tax Scholarship: Lawyers, Economists, and the Role of the Legal Academy*, 83 CORNELL L. REV. 365, 386, 390 (1998) (identifying deficiencies in the current discourse and suggesting alternatives).

7. The philosophical view referred to here is "emotivism," which (as a corollary to "logical positivism") views ethical statements as cognitively meaningless. For a partisan account of the rise of logical positivism and emotivism, see HANS REICHENBACH, THE RISE OF SCIENTIFIC PHILOSOPHY at vii, 276–302 (1951). This view is so much a part of our intellectual culture that subsequent ethical views (like the pragmatism endorsed in this article) often define themselves by reference to it. *See* Russell B. Goodman, *Introduction* to PRAGMATISM: A CONTEMPORARY READER 1, 8 (Russell B. Goodman ed., 1995).

8. The downside of tax scholarship's isolation from the interdisciplinary debates in the legal academy lies here, in its treatment of fairness issues. It may be that, to change the traditional way of analyzing fairness issues in tax scholarship, the tax policy discourse must engage in the types of reflections on methodology that proliferate in jurisprudential scholarship. *See, e.g.*, Robert Justin Lipkin, *Beyond Skepticism, Foundationalism and the New Fuzziness: The Role of Wide Reflective Equilibrium in Legal Theory*, 75 CORNELL L. REV. 811, 874–76 (1990) (explaining the persistence of skepticism in legal reasoning); Pierre Schlag, *Law and Phrenology*, 110 HARV. L. REV. 877 (1997) (comparing the discipline of law to phrenology, and questioning its legitimacy as a discipline of knowledge). Indeed, these types of reflections are occurring more and more in the tax policy discourse. *See, e.g.*, Livingston, *supra* note 6; McCaffery, *supra* note 1; *see also* Thomas D. Griffith, *Should "Tax Norms" Be Abandoned? Rethinking Tax Policy Analysis and the Taxation of Personal Injury Recoveries*, 1993 WIS. L. REV. 1115 (recommending a normative approach to tax policy). This article also speculates on method. In doing so, it raises further issues (such as whether there is a pragmatic "method" which can avoid philosophical theory, taken up briefly in Part IV) that have also been addressed in the jurisprudential work. *See, e.g.*, Richard Rorty, *Pragmatism and Law: A Response to David Luban*, 18 CARDOZO L. REV. 75 (1996) (questioning the relevance of pragmatist theory to law).

One obvious candidate is philosophical pragmatism, which has been so influential in legal scholarship as well as the general culture. This article explains how a pragmatic method of evaluating tax policy questions might operate to improve analysis of fairness issues in the tax discourse.[9] Under a pragmatic analysis, for instance, fairness principles are not dismissed as "merely political," "fuzzy" or "cognitively meaningless." On the contrary, pragmatism shows that fairness principles can be just as "valid" as the result of scientific investigations, including quasi-scientific investigations such as utilitarian or econometric modeling. Pragmatism, in short, "denies absolute truth in order to make room . . . for humanized morality."[10]

This article takes a pragmatic approach in that it shows the usefulness of denying absolute truth in discussions of fairness in tax law. At a broader level, it also shows the usefulness of dropping philosophical concerns over the truth status of fairness claims altogether. In this way it echoes the pragmatist call to pay less attention to "the problems of philosophers" and more attention to "the problems of men."[11] In place of an absolutist or foundationalist view of truth, pragmatism takes a more holistic approach, evaluating a principle of fairness by reflecting on its coherence with our other principles and practical goals. Thus, pragmatism takes a big tent approach, bringing all considerations into play, including distributive justice as well as efficiency considerations. This big tent approach is clearly an established tradition in tax policy scholarship. Nevertheless, its free-floating, foundationless character may make some scholars feel that it is mushy, fuzzy or somehow nonrigorous. They may feel more comfortable with a more formalistic form of analysis, with just assuming a stock principle of fairness and plugging it into a neat analytical model. Under this formalist approach, principles of fairness or distributive justice operate in the same way that empirical facts or data operate in the natural sciences.[12] This article argues that applying the prag-

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9. There are (to say the least) significant variations within the pragmatist tradition. Contemporary pragmatists Richard Rorty and Hilary Putnam, for instance, have very different views of truth and rationality. *Compare* HILARY PUTNAM, REALISM WITH A HUMAN FACE 19–26 (James Conant ed., 1990) (describing how Rorty's position differs from his), *with* Richard Rorty, *Putnam and the Relativist Menace*, 90 J. PHIL. 443, 458 (1993) (asserting that he and Putnam are in the "same line of business"). In addition, pragmatists have different attitudes regarding the scientific method. *See* KAI NIELSEN, NATURALISM WITHOUT FOUNDATIONS 32 (1996) ("[I]f we get more precise [about the pragmatist scientific method] we discover that there is no such a thing as *the* scientific method but a cluster of different methods developed by various scientific disciplines for their various purposes and answering to their often quite different interests."); 5 CHARLES SANDERS PEIRCE, COLLECTED PAPERS 50–72 (Charles Hartshorne & Paul Weiss eds., 1960) (aligning pragmatism with the scientific method). *See generally* ARTHUR O. LOVEJOY, THE THIRTEEN PRAGMATISMS AND OTHER ESSAYS 1–29 (1963) (analyzing pragmatism as a loose collection of conflicting philosophies).

10. Goodman, *supra* note 7, at 8.

11. JOHN DEWEY, *The Need for a Recovery of Philosophy*, *in* 10 JOHN DEWEY: THE MIDDLE WORKS, 1899–1924 at 3, 46 (Jo Anne Boydston ed., 1980).

12. For a (much, much) more detailed account of the relationship between scientific approaches and social policy questions, see THOMAS A. MCCARTHY, THE CRITICAL THEORY OF

matist approach is not only philosophically defensible but in many cases more useful than formalist models in analyzing core tax policy issues. Accordingly, this article compares formalism to pragmatism in two areas of tax policy debate: the progressivity debate and the consumption tax debate. In addition, this article compares the pragmatist approach to some relatively recent attempts to take fairness issues seriously by applying explicit theories of justice developed by philosophers such as John Rawls or Ronald Dworkin. In both cases, this article shows that the pragmatic tradition is superior to both formalism and explicitly philosophical theories of justice in that it: (1) avoids analytical errors inherent in stuffing fairness analysis into a formalist paradigm and (2) provides a philosophical justification for tax scholars to examine fairness issues by their own lights without a Ph.D. in philosophy.

This article proceeds in the following manner. Part II describes the methodological strategy of the tax policy discourse at its most general level, identifying economic analysis as the master trope and examining how its rigid dichotomy between efficiency and fairness issues might discourage rigorous discussion of fairness issues.[13] Part II rejects the view, associated with critical legal scholarship, that economic analysis is, as a theoretical or ideological matter, inherently dismissive of fairness concerns or automatically supportive of the status quo. Part II acknowledges, however, that the sociological phenomenon of tax scholars in law schools "playing economists" may result in permanent deferral of fairness concerns even where, as in law schools, addressing such concerns would seem to be particularly appropriate. Part III describes in greater detail the formalist strategy for addressing fairness questions in the contemporary tax policy discourse, focusing on actual articulations in the two most important historical debates in tax policy: the consumption tax debate and the progressivity debate. As Part III shows, the formalist strategy is based on a foundationalist view of knowledge, the idea that the only legitimate knowledge is knowledge that is objectively grounded in something outside our historically and culturally contingent traditions and beliefs. The foundationalist orientation sees a formalist plugging in of stock fairness principles into models as the best we can possibly hope to do if we want to examine fairness claims. As Part III demonstrates, some tax scholarship even resists analysis of fairness principles altogether as a result of foundationalist preoccupations, marginalizing fairness principles on the philosophical level as unscientific, "'cognitively meaningless' 'pseudostatements'" about which real knowledge is impossible.[14] Part III rejects this foundationalism as philosophically problem-

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JÜRGEN HABERMAS 137–149 (1978) (summarizing Habermas's critique of attempts to use natural science methods in the social sciences).

13. As explained below, the methodology of economic analysis is defined as the application of the equity/efficiency dichotomy, which separates economic efficiency issues into separate baskets.

14. Goodman, *supra* note 7, at 8. The most this treatment of fairness claims can do is ask how the tax system stacks up against a posited (but not independently evaluated) fairness principle as in

atic and therefore regards the resulting formalism as unnecessary. Part III offers a nonfoundationalist, pragmatic approach that questions the need for objectivity in the first place by showing how we can analyze fairness issues by our best lights, seeing how we get on without any foundational guides or grand theories to point us in the "right" direction. Thus, Part III also distinguishes the pragmatic approach from the approaches of recent tax scholarship that use comprehensive philosophical doctrine to provide an overarching theory to adjudicate fairness and distributive justice claims. Specifically, Parts III and IV raise the question of whether such master theories relying on "reasonableness" (Rawls)[15] or "integrity" (Dworkin)[16] are necessary or even useful for serious examination of fairness in tax policy. To defend the pragmatic tradition in tax policy, Part IV questions the usefulness of recent attempts to rationalize tax policy analysis along the lines suggested by Dworkin and Rawls, by contrasting them with the nonfoundationalist/pragmatic approach that eschews overarching theory for a more ad hoc, provisional, and local form of analysis.

II. ECONOMIC ANALYSIS

More than any other identifiable method, economic analysis frames tax policy analysis at every level. Even in an introductory tax law course, some understanding of, for instance, deferral and deadweight loss[17] is important for understanding doctrine and policy. In more specialized forums, economic analysis often predominates;[18] every issue is broken down into two discrete and presumably manageable tasks, answering

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the formulation, "Given (fairness) principle X, our tax system is (or is not) desirable." In viewing this formalism as derivative of an underlying foundationalism, the diagnosis (and remedy) of this article is different than other recent accounts of formalism in tax policy analysis. *Cf., e.g.*, McCaffery, *supra* note 1, at 75–76 (taking a "political-interpretive" approach to tax analysis).

15. *See* William D. Andrews, *Fairness and the Choice Between a Consumption-Type and an Accretion-Type Personal Income Tax: A Reply to Professor Warren*, 88 HARV. L. REV 947, 950 & n.10 (1975) (using Rawls); McCaffery, *supra* note 1, at 83, 88–89 (using Rawls).

16. *See* McCaffery, *supra* note 1, at 82–83 (using Dworkin).

17. *See, e.g.*, WILLIAM A. KLEIN & JOSEPH BANKMAN, FEDERAL INCOME TAXATION 112–15 (11th ed. 1997) (discussing deferral); HARVEY S. ROSEN, PUBLIC FINANCE 328–33 (4th ed. 1995) (describing deadweight loss).

18. As previously noted, the tax policy discourse assimilated economic analysis well before the law and economics movement made economic concepts so familiar in other areas of the law. *See supra* note 4 and accompanying text. Indeed, it is fair to say that economic analysis is so much a part of the traditional approaches to tax policy that it hardly even represents an interdisciplinary approach at all, as it might when it occurs in torts, property, criminal law, contracts, or constitutional law. *Cf., e.g.*, Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972) (property); Charles J. Goetz & Robert E. Scott, *Enforcing Promises: An Examination of the Basis of Contract*, 89 YALE L.J. 1261 (1980) (contracts); William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325 (1989) (copyright); Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193 (1985) (criminal law); Gary T. Schwartz, *Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?*, 42 UCLA L. REV. 377 (1994) (torts).

questions of efficiency and questions of fairness.[19] Use of the equity/efficiency dichotomy raises two issues affecting the treatment of fairness in the tax policy discourse. First, it raises the specter of "law and economics," the use of which in other areas of the law has been sharply criticized as an ideology which distorts analysis of fairness. Second, it raises the practical question of whether tax scholars in the legal academy can safely adopt economic analysis without being redundant or derivative given the work of their colleagues in the economics departments. This Part argues that if there is a problem with using economic analysis in tax policy it is a practical rather than an ideological one.

It is worth considering therefore, even at a general level, a basic critique of law and economics as ideology to distinguish it from the practical critique favored in this Part. The point of this exercise is to distinguish the pragmatic orientation from ideology critique or critical legal theory in general. While pragmatism and critical legal theory share a skepticism about objective truth and ultimate foundations, the type of pragmatism offered sees little use in the term "ideology" and is much more accommodating in using all available modes of analysis—including economic analysis—if it gets us an acceptable answer. To distinguish pragmatism from critical theory, then, it is useful to examine critical theory's criticism of economic analysis more closely.

Consider, for instance, the claim that economic analysis is a conservative ideology.[20] Under this critique, economic analysis asserts highly dubious (usually conservative) normative claims while seeming to engage in objective, scientific reasoning.[21] An analysis supporting such a conclusion might take the following line. Economic analysis purports to tell us what legal rule is desirable by determining whether it maximizes aggregate utility. The tool of measurement it uses is the utilitarian calculus, where each person's utility is measured to determine maximum aggregate utility.[22] One problem for normative economic analysis, however, is that measuring an individual's subjective utility is a nearly im-

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19. Thus, to evaluate comprehensively the policy effects of a tax rule, tax scholars generally take the off-the-shelf methodology of public finance economics, separating and balancing efficiency and equity effects. *Cf., e.g.*, RICHARD A. MUSGRAVE & PEGGY B. MUSGRAVE, PUBLIC FINANCE IN THEORY AND PRACTICE 13, 95–96 (4th ed. 1984); PAUL SAMUELSON, MACROECONOMICS 23 (15th ed. 1997); Nohel B. Cunningham & Deborah H. Schenk, *The Case for a Capital Gains Preference*, 48 TAX L. REV. 319, 366–67 & n.207 (1993).

20. For examples of critiques of law and economics in the legal literature, see C. Edwin Baker, *The Ideology of the Economic Analysis of Law*, 5 PHIL. & PUB. AFF. 3 (1975); Morton J. Horwitz, *Law and Economics: Science or Politics?*, 8 HOFSTRA L. REV. 905 (1980); Mark Kelman, *Consumption Theory, Production Theory, and Ideology in the Coase Theorem*, 52 S. CAL. L. REV. 669 (1979); Arthur Allen Leff, *Economic Analysis of Law: Some Realism About Nominalism*, 60 VA. L. REV. 451 (1974). For the leading examination of ideology critique and critical theory in philosophy (in English), see RAYMOND GEUSS, THE IDEA OF A CRITICAL THEORY 4–26 (1981) (examining the claims of the Frankfurt School's critical theory).

21. *See* Leff, *supra* note 20, at 451–82.

22. *See* ROBERT S. PINDYCK & DANIEL L. RUBINFELD, MICROECONOMICS 571–73 (3d ed. 1995).

possible task. Thus, economic analysis often takes a shortcut, relying on objective manifestations of individual preference, such as monetary wealth. Ideology critique can focus on this compromise, characterizing it as a distortion that excludes nonmonetary expressions of value. Under this critique, using price as the measure of efficiency excludes, for instance, the value that poor people would place on commodities if they had the means (i.e., the money) to express such value, as well as any subjective utility we might get from realizing our egalitarian impulses. An ideology critique could claim that excluding powerless voices or nonmonetized values from the analysis makes an implicit value judgment that these voices and values are not worth counting.[23] Accordingly, under this critique, when economic analysis measures the desirability of a legal rule using a utilitarian calculus with a monetized domain set, it not only gets it wrong, but gets it wrong in a politically incorrect manner.

The problem with ideology critique is that it impugns economic analysis per se, throwing the baby out with the bathwater. If one recognizes the limitations of economic analysis, it can be used quite successfully. Tweak economic analysis a bit, for instance, and the philosophical problems lessen. This is, in fact, what tax scholars implicitly do already. Economic analysis in tax law either explicitly modifies the utilitarian model to account for these problems or recognizes its limitations by the constant disclaimer that fairness considerations might change the results. For instance, while economic analysis in tax law does use price as a measure of utility, it generally does so by taking into account the different value of dollars to taxpayers of differing wealth by assuming a declining marginal utility of income.[24] Far from supporting conservative political programs, economic analyses with declining marginal utility assumptions have historically been used to *justify* a progressive income tax structure.[25] Furthermore, even assuming that measuring preferences only in dollars (even with declining marginal utility assumptions) excludes important values, economic analysis has an out. By its own terms,

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23. For example, the claim is that if a poor person has only one dollar to spend on bread, it is misleading to say that when the poor person offers one dollar, that poor person values the bread less than the rich person who offers (and can pay) two. Thus, under this critique, economic analysis errs when it asserts that forcing the baker to sell the bread to the poor person for one dollar is inefficient in any meaningful sense of decreasing aggregate utility. *See* Leff, *supra* note 20, at 478–79 & n.77.

24. *See, e.g.*, HAROLD M. GROVES, TAX PHILOSOPHERS 29–30, 61–62 (Donald J. Curran ed., 1974).

25. *See, e.g.*, Walter J. Blum & Harry Kalven, Jr., *The Uneasy Case for Progressive Taxation*, 19 U. CHI. L. REV. 417, 456–58 (1952), *reprinted in* WALTER J. BLUM & HARRY KALVEN, JR., THE UNEASY CASE FOR PROGRESSIVE TAXATION 40–42 (Phoenix Books 1963) (1953) (noting the importance of the concept of marginal utility in justifying progressivity); Joseph Bankman & Thomas Griffith, *Social Welfare and the Rate Structure: A New Look at Progressive Taxation*, 75 CAL. L. REV. 1905, 1947 (1987) (assuming a reasonable degree of declining marginal utility in applying an optimal taxation model to support moderate progressivity).

economic analysis requires a further inquiry after the determination of the economic efficiency effects; one must ask, "But is it fair?"[26]

The point of this brief excursion into economic analysis is to distinguish critical theory from pragmatic theory, two approaches which often share a nonfoundationalist orientation. From a pragmatic perspective, economic analysis, like any other analytical tool, is quite useful as long as we remain aware of its limitations. Thus, pragmatic analysis, consistent with the big tent metaphor and in contrast to ideology critique, welcomes economic analysis as one tool among many. The tool has its defects as well as its strengths. One defect is that economic analysis, while it does not foreclose rich analysis of fairness issues, does not exactly encourage it either. The prevalence of economic analysis might cause the tax scholar to feel comfortable sticking to efficiency considerations and deferring discussion of fairness issues altogether through a formalist mode of analysis where principles of fairness are stuck in as going assumptions. The question then arises, "Who will pick up the slack?"[27]

Adoption of a purely economic mode of analysis also threatens to make tax scholarship redundant and derivative.[28] It places the tax scholar in direct competition with economists. This is not a level playing field. Economists safely use economic analysis to exploit the benefits of spe-

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26. *See, e.g.*, PINDYCK & RUBINFELD, *supra* note 22, at 570–73 (describing equity/efficiency effects); AMARTYA K. SEN, COLLECTIVE CHOICE AND SOCIAL WELFARE 22 (1970) (noting that it is efficient, but not fair, to let Nero fiddle while Rome burns). The fact that the tax discourse imported economic analysis directly from public finance economics, and not from proponents within the law and economics movement per se, may help account for why tax policy analysis can resist critiques of economic analysis. Tax scholars (like public finance economists) do not typically make overarching reductive claims that, for example, tax law is only about maximizing a narrow category of efficiency or that maximizing wealth is the only criterion to evaluate a tax rule. *Cf., e.g.*, Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179, 185 (1987) ("[T]he common law seeks to promote efficiency in the sense of wealth maximization . . . ."); Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 33 (1972) (asserting that "profit-maximizing" is the engine of innovation in the common law). To the extent tax policy analysis avoids such ambitious uses of economic analysis, it may avoid the criticisms of economic analysis generally. *See, e.g.*, Cento G. Veljanovski, *Wealth Maximization, Law and Ethics—On the Limits of Economic Efficiency*, 1 INT'L REV. L. & ECON. 5, 22–23 (1981) (stating that Posner's wealth maximization principle does not acceptably address ethics or rights).

27. As stated by Posner:

> Economics does not answer the question whether the existing distribution of income and wealth is good or bad, just or unjust . . . . Nor can the economist tell us whether . . . consumer satisfaction should be the dominant value of society. Thus, the economist's competence in a discussion of the legal system is limited. He can predict the effect of legal rules on value and efficiency, in their strict technical senses, and on the existing distribution of income and wealth, but he cannot issue mandatory prescriptions for social change.

RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 15 (5th ed. 1998). Economists regularly defer on fairness issues by either using simplifying assumptions, such as equal distribution, or by a self-imposed division of labor, characterizing fairness concerns as the domain of philosophers and politicians but not economists. *See generally* DEIRDRE N. MCCLOSKEY, THE VICES OF ECONOMISTS: THE VIRTUES OF THE BOURGEOISIE (1996) (describing formalism in economics and criticizing neoclassical economics for abandoning its ethical roots).

28. *See* Livingston, *supra* note 6, at 374 ("If tax policy is economic in nature, . . . why do we need any lawyers?").

cialization. They provide economic models for examining the economic efficiency effects of a tax rule, but leave others to grapple with equity determinations. It might be suggested that examination of such issues should be left to the political process, that tax scholars have no business imposing their own views into the analysis. But this separation of the "political" from the "scholarly" is just what this article questions. There is no reason to think that *any* analysis is apolitical or objective. Accordingly, it is a mistake to strive for neutrality on such issues. On the contrary, there are good reasons for encouraging tax scholars to enter the political debates. First, it might improve the level of analyses in circulation, thus improving the broader public policy discourse. Second, thinking about politics might encourage tax scholars to examine the political process. Similarly, a pragmatic approach encourages a broad range of topics and approaches in tax scholarship.

III. EQUITY ANALYSIS

This Part critically examines the way in which the tax policy discourse traditionally treats fairness claims. As shown below, the dominant strain in the discourse is to analyze tax equity by listing core, stock principles of fairness and determining whether the tax proposal in question supports or undermines the chosen principle. In this strain, fairness principles are asserted rather than independently examined, used as the foundational starting point of inquiry rather than conclusions of reasoned analysis. This point has been made elsewhere.[29] This article, however, moves beyond identifying formalism to explaining and remedying it. To these ends, this Part connects formalist analysis of fairness in tax policy to the foundationalist tradition in philosophical ethics.[30] In this tradition,

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29. *See* Barbara H. Fried, *Fairness and the Consumption Tax*, 44 STAN. L. REV. 961, 964–65, 1015 (1992) (analyzing fairness principles that are presumed without analysis in the literature); McCaffery, *supra* note 1, at 86.

30. In this tradition, the great hope of ethical philosophy is to explain how ethical claims can be "objective" in the sense "of a kind consistent with a respectable resolution of a range of issues—epistemological, metaphysical, semantic—that in philosophical common sense are characteristically bundled together in the idea of objectivity." Stephen Darwall et al., *Toward Fin de siecle Ethics: Some Trends*, *in* MORAL DISCOURSE AND PRACTICE: SOME PHILOSOPHICAL APPROACHES 3, 37 n.29 (Stephen Darwall et al. eds., 1997) [hereinafter MORAL DISCOURSE]. This article views this tradition as foundationalist and encourages the tax policy discourse to abandon the goal of "respectable resolutions" to the problem of objectivity and instead focus on more provisional, ad hoc, and contingent resolutions to issues of fairness.

A note on terminology is appropriate here since "foundationalism" is used in the philosophical discourse in different ways. Similar to the definition used in this article, the foundationalist approach has been described as an attempt "to ground inquiry and communication in something more firm and stable than mere belief or unexamined practice. The foundationalist strategy is first to identify that ground and then so to order our activities that they become anchored to it and are thereby rendered objective and principled." STANLEY FISH, DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES 342 (1989). "Foundationalism" has also been used to denote a form of empiricism, asserting that all knowledge is derived from certain basic sensory givens whose truth is immediately evident and indubitable. *See* NIELSEN, *supra* note 9, at 29. The foundationalist tradition in philosophy has been contrasted to

fairness claims must be grounded in objective reality, or something like it, to merit assent.[31] This Part identifies these foundationalist strains in the formalist tradition in tax policy, connecting formalist treatments with the foundationalist view that fairness claims are mere expressions of personal preference not subject to rational analysis (because they lack objective grounding).[32] This Part makes clear that other nonfoundationalist philosophical views are not only possible but might be better at giving rigorous analysis of fairness claims a respectable philosophical pedigree. Accordingly, this Part offers nonfoundationalist pragmatism as an alternative approach not only to the dominant foundationalist strategy of rejecting fairness principles as meaningless but also to the constructivist strategy (much more prevalent in the more recent interdisciplinary lit-

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"naturalism," which describes knowledge as arising from reliable processes (causes) rather than being derived from basic premises. As one commentator puts it:

> Modern epistemology has been largely dominated by positions which can be characterized as "foundationalist": all knowledge is seen as ultimately grounded in certain foundational beliefs which have an epistemically privileged position—they are a priori or self-warranting, incorrigible, or something of the sort. . . . Recent work in "naturalistic epistemology" . . . suggests that there are no beliefs which are epistemically privileged in the way foundationalism seems to require.

Richard Boyd, *How to Be a Moral Realist*, *in* MORAL DISCOURSE, *supra*, at 105, 112–113. The approach suggested in this article is closer to naturalistic than foundationalist epistemology, though it seeks to avoid discussions of epistemology altogether. This, in turn, pushes this article's approach closer to "natural language philosophy" which has its own critics. *See id.* at 116 (describing "philistine antiscientism often associated with 'ordinary language' philosophy"). The foundationalism in the tax policy discourse identified in this article includes the empiricist/emotivist form that views fairness claims as cognitively empty because they lack empirical foundation. *See* ALFRED JULES AYER, LANGUAGE, TRUTH AND LOGIC 111 (1952). It also includes attempts to ground moral knowledge in universal reason. *See, e.g.*, Christine Korsgaard, *The Sources of Normativity*, *in* MORAL DISCOURSE, *supra*, at 389, 393, 399 (discussing Kant's grounding of the moral law in human autonomy and deriving a universal obligation to others from this fact).

31. *See* Darwall et al., *supra* note 30, at 7. It is of course well beyond the scope of this article to catalogue the tremendous variety of sub-schools within philosophical ethics. *See generally* Peter Railton, *Moral Realism*, *in* MORAL DISCOURSE, *supra* note 30, at 137–38 (listing 13 different forms of moral realism alone). The point is simply to identify the quest for foundations in much philosophical theory.

32. This article views such formalist treatments as one response to the foundationalist problematic: since fairness claims are not verifiable by facts in the world, they are utterly lacking in any cognitive content and are meaningless. A nonfoundationalist account of fairness claims would recognize that fairness principles are not verified by facts in the world but, and here is the difference, it would not deem fairness evaluations as lower on the totem pole of knowledge. Nonfoundationalism, in other words, rejects the fact/value distinction in ethics:

> To frame a theory of knowledge which makes it necessary to deny the validity of moral ideas, or else to refer them to some other and separate kind of universe from that of common sense and science, is both provincial and arbitrary. The pragmatist has at least tried to face, and not to dodge, the question of how it is that moral and scientific "knowledge" can both hold of one and the same world. And whatever the difficulties in his proffered solution, the conception that scientific judgments are to be assimilated to moral is closer to common sense than is the theory that validity is to be denied of moral judgments because they do not square with the preconceived theory of the nature of the world to which scientific judgments must refer.

John Dewey, *Does Reality Possess Practical Character?*, *in* PRAGMATISM: A CONTEMPORARY READER, *supra* note 7, at 79, 83. For a more detailed critique of foundationalism in philosophy, see KAI NIELSEN, ON TRANSFORMING PHILOSOPHY: A METAPHILOSOPHICAL INQUIRY (1995).

erature relying on Rawls and Dworkin) of establishing a solid basis for fairness claims by grounding them in idealized notions of reasonableness or integrity.

The remainder of this Part contrasts the use of the foundationalist/formalist strategy with the use of the nonfoundationalist pragmatic strategy in the two areas of tax policy where questions of fairness are paramount: the consumption tax and progressivity debates. It shows how the analysis of principles in these areas under the nonfoundationalist pragmatic approach, free from a concern over objective foundations, can legitimate rigorous discussion of fairness claims.

A. *The Consumption Tax Debate*

The consumption tax debate concerns whether it is desirable from an efficiency and fairness standpoint to change the tax base from an income tax base to a consumption tax base. Generally speaking, an income tax taxes aggregate increases in wealth regardless of whether such wealth is consumed or merely accumulated.[33] A consumption tax, by contrast, is generally thought to tax only wealth that is consumed for personal purposes and to exempt savings.[34] A pure consumption tax has traditionally been understood as the equivalent of a tax on wages alone, leaving the income from savings and investment collected tax free.[35] Put in these terms, it is not surprising that fairness questions have historically been paramount in the consumption tax debate.

The obvious pragmatic approach to the consumption tax debate is to make as clear as possible the distributive and productivity effects of switching to a consumption tax, line them up with our varied, sometimes competing notions of the good, and balance the information to reach some reasonable agreement or equilibrium. Indeed, the tax policy discourse has a rich pragmatic tradition in the debate. The purpose of this section is to provide a solid philosophical basis for that tradition and to

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33. Our current system of income tax is, of course, a hybrid system because it defers taxation on a substantial amount of annual wealth accumulation. *See* Henry J. Aaron et al., *Introduction* to UNEASY COMPROMISE: PROBLEMS OF A HYBRID INCOME-CONSUMPTION TAX 1, 3 (Henry J. Aaron et al. eds., 1988) (discussing the United States' hybrid system); David F. Levy, *Towards Equal Tax Treatment of Economically Equivalent Financial Instruments: Proposals for Taxing Prepaid Forward Contracts, Equity Swaps, and Certain Contingent Debt Instruments*, 3 FLA. TAX REV. 471, 474–75 (1997) (discussing the use of derivatives to postpone recognition); Edward J. McCaffery, *Tax Policy Under a Hybrid Income-Consumption Tax*, 70 TEX. L. REV. 1145, 1152–55 (1992) (examining the United States' hybrid system).

34. This understanding, however, must be qualified because a consumption tax does tax elements of saving in the same way as an income tax. *See* Joseph Bankman & Barbara H. Fried, *Winners and Losers in the Shift to a Consumption Tax*, 86 GEO. L.J. 539, 541–42 (1998).

35. *See* William D. Andrews, *A Consumption-Type or Cash Flow Personal Income Tax*, 87 HARV. L. REV. 1113, 1126 (1974); Alvin C. Warren, Jr., *Fairness and a Consumption-Type or Cash Flow Personal Income Tax*, 88 HARV. L. REV. 931, 938 (1975). This equivalence does not hold, however, since a consumption tax does tax elements of savings. *See* Bankman & Fried, *supra* note 34, at 541–42.

raise the philosophical problems with the alternative, formalist tradition in the discourse. Under the formalist tradition, the consumption tax is tested to see if it reflects a given foundational principle. This section examines the use of four such principles to highlight the problems of formalist analysis. These principles are: (1) the endowments tax principle, (2) the Hobbesian benefits principle, (3) the perfected income tax principle, and (4) the nondiscrimination principle. Historically, these principles often operated in the tax policy debate as grounding principles. Under the formalist use of these principles, the consumption tax is legitimate if it accurately reflects the chosen foundational principle. This mode of analysis is limited in that it fails to recognize that there is no one norm that legitimates our tax system but rather a multitude of competing and conflicting norms that tax policy must grapple with. Furthermore, mere matching of tax system to stock principle may hamper evaluation of the system by creating a false sense of analytical progress on fairness issues when in fact it is just recycling stock principles. The persistence of the formalist tradition can best be explained by the resilience of the foundationalist view that without objective grounding, knowledge is impossible; that without grounding principles, analysis is merely fuzzy contextualism. The point of this article is to delete the word "merely" in front of "fuzzy contextualism." This section argues that abandoning this formalist heritage for the more pragmatic orientation is both philosophically defensible and quite useful for making explicit the connection between tax policy and the good life.

1. The Endowments Tax Principle

One foundational principle used to evaluate the fairness of the consumption tax regime is the endowments tax principle. Under the endowments tax principle, tax burdens should be proportional with initial endowments (in terms of initial financial and human capital).[36] Under this notion of fairness, two taxpayers with the same potential income stream should be taxed equally regardless of what they choose to do with their endowments.[37] Thus, two taxpayers with equal ex ante earning power and financial capital should, under this principle, face the same tax burden regardless of whether they save their earnings and capital or spend it on consumption. Such taxpayers should face the same tax burden even if one taxpayer in fact earns more than the other taxpayer.[38] An income tax violates the endowments principle because it taxes people differently according to what they actually do with their endowments. Specifically, assuming people maximize their endowments, an income tax discrimi-

36. *See* DAVID F. BRADFORD & U.S. TREASURY TAX POLICY STAFF, BLUEPRINTS FOR BASIC TAX REFORM 36–38 (2d ed. rev. 1984); DON FULLERTON & DIANE LIM ROGERS, WHO BEARS THE LIFETIME TAX BURDEN? 22–23 (1993).

37. DAVID F. BRADFORD, UNTANGLING THE INCOME TAX 315 (1986), *discussed in* Fried, *supra* note 29, at 997–98 & nn.99–102.

38. *See* Fried, *supra* note 29, at 997–98.

nates against ex post savers, even when these individuals have the same ex ante endowments as their spender counterparts. A consumption tax, by removing this disparity between those who choose to spend and those who choose to save, is thus a more equitable tax under the endowments tax argument because it eliminates this ex post discrimination.[39]

Analyses under the endowments principle generally do not focus on why taxing people on their ex ante endowments should be considered fair in the first place. In this regard, the analyses are highly formalistic, assuming the appropriateness of the endowments principle and then deciphering which tax system best reflects that principle. The problem with this approach, however, is that it begs the question of whether the endowments principle is legitimate. What is required for answering, or even just posing correctly, the fairness question is an alternative analysis that does more than merely plug in a principle as a core assumption, an analysis that actually examines whether this assumption is justified. Even asking this question, however, requires that one abandon the foundationalist view that fairness principles cannot be true or false, correct or incorrect in any meaningful sense. Put another way, it is only if one assumes that one principle of fairness is just as good as another that plugging in stock notions of fairness is satisfactory. The formalist use of the endow-

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39. A simple example demonstrates how an income tax, which taxes earnings as well as the accrual on saved earnings, is said to increase the effective tax rate on those who save versus those who immediately consume, given certain assumptions. *See id.* at 963–64. *But see* Bankman & Fried, *supra* note 34. Two taxpayers, Profligate and Thrifty, each earn $100 in wage income. Profligate spends the $100 in the year earned, while Thrifty saves the $100 for 14 years. In a no-tax world, in 14 years, with a 5% compounded interest rate, Thrifty will have $200 saved. Thus, in a no-tax world, Thrifty will have twice as much to spend as Profligate. With an income tax of 40%, however, Thrifty must pay tax on the initial $100 in the year earned, as well as paying tax on the interest as it accrues in the following years. The result is that Thrifty will only have $91 for consumption, instead of $200 for consumption at the end of the 14th year. Profligate, under a 40% income tax will have $60 to spend as he pleases in the year earned. The net result of the income tax is that Thrifty has only about 50% more than Profligate as opposed to twice as much in a no-tax world. Put another way, savers pay a greater present value tax than equivalently situated spenders.

Under a consumption tax, by contrast, Thrifty is placed in an equal after-tax position relative to Profligate. Under a 40% consumption tax, Profligate will still have $60 to spend as he pleases in the year earned. Thrifty, however, pays no initial tax on the $100 earned and saved, and will pay a tax of $80 on the $200 she withdraws in year 14. Thus, Thrifty will have $120 in year 14 under a consumption tax, rather than the $91 she would enjoy under an income tax. Comparing Thrifty's and Profligate's relative positions under a consumption tax and a no-tax world, they are in identical relative positions since Thrifty will still enjoy twice as much income as Profligate under a consumption tax regime. *See id.* at 963–64. For similar examples, see Andrews, *supra* note 35, at 1121; IRVING FISHER, THE NATURE OF CAPITAL AND INCOME 249–53 (1906); Warren, *supra* note 35, at 934–36. In this way, the consumption tax is said to preserve the relative benefits of saving in a no-tax world and to leave taxpayers indifferent (from a tax perspective) between saving and spending once a consumption tax is imposed. Another way to view the endowments principle as supporting a consumption tax is to view the consumption tax "as the closest practical approach to the [endowments principle] ideal" since a cash-flow consumption tax is traditionally understood the functional equivalent of a tax on wages as earned. Lawrence Zelenak, *The Reification of Metaphor: Income Taxes, Consumption Taxes and Human Capital*, 51 TAX L. REV. 1, 3 n.17 (1995). *But see* Bankman & Fried, *supra* note 34.

ments principle in the tax policy discourse gets its legitimacy from this background foundationalism. A nonfoundationalist, pragmatic strategy that views principles of fairness as being as susceptible to truth determinations as statements in the harder sciences would never have plugged an unexamined endowments principle in a formalist model. Instead, it would have first evaluated the endowments principle to see if it made sense.

Indeed, even a preliminary analysis under a nonfoundationalist strategy indicates significant problems with the endowments principle. For instance, the endowments principle seems to advocate a lottery method of taxation. To make this clearer, consider a group of 1000 taxpayers. A computer randomly assigns to each person a number from one to 1000. These numbers represent endowments, with 1000 representing the greatest endowment and one representing the lowest. The endowments principle requires taxing this group of 1000 in proportion to their randomly assigned endowments. At a 30% rate, the person who drew 1000 would have a tax burden of 1000 x 30% or 300. The person who drew 10, however, would have a tax burden of only 3.

The interesting question that formalist uses of the endowments principle misses, and that can only be raised and not fully argued here, is whether such a lottery system of taxation makes any sense. Put another way: Why should the person who draws 1000 face a heavier tax burden merely because the computer assigned her this number? The endowments principle fails to explain why the tax burden should be heavier on those who, by luck of the genetic draw for instance, have the mere capacity to earn Michael Jordan salaries. As a principle of justice, this arbitrariness casts doubt on the endowments tax principle as a grounding norm for a fair tax system.[40] On the contrary, implementation of a system based only on the endowments principle would seem to violate fairness in many cases. This is because it would impose unduly harsh tax burdens on those who choose not to maximize the value of their endowments in the market. Accordingly, the endowments principle acts as a moral imperative that people should be forced to maximize the market value of their talents. This would be at least a controversial moral position. It would punish those who chose, for instance, to donate their labor to public service rather than sell it to the NBA. Libertarians would object that people should be free to undervalue their potential according to their own personal preferences without regulatory penalty.[41] In addition, the en-

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40. *See* Michael J. Graetz, *To Praise the Estate Tax, Not to Bury It*, 93 YALE L.J. 259, 276 (1983) (describing the arbitrariness of the benefits of birth and genetics).

41. It may be possible to implement an endowment tax in a manner that would mitigate this and other problems. *See* Alan Gunn, *The Case for an Income Tax*, 46 U. CHI. L. REV. 370, 381–82, 399–400 (1979) (raising libertarian concerns); Kaplow, *supra* note 6, at 1507–12 (acknowledging libertarian objections to ex ante taxation of endowments and developing a proxy system which would tax actual earnings while still approximating the endowment ideal); Alvin Warren, *Would a*

dowments tax principle conflicts with the notion that the tax burden should bear some relation to whether one deserves her actual income. Under an endowments tax, persons who realize wealth in excess of their ex ante endowments, through windfall gains for instance, would be rewarded through an exemption for such windfall gains.[42] Furthermore, the endowments principle entirely ignores end-state concerns about the tax system's effect on overall social welfare, thus possibly conflicting with utilitarian views of the good. The point here is not to refute the endowments principle but to show what the formalist/foundationalist approach misses and perhaps obscures and what a nonfoundationalist pragmatic analysis opens up.

2. The Hobbesian Benefits Principle

Another fairness principle that has been used in the consumption tax debates in a formalist manner is the Hobbesian benefits principle. Under this principle, one should be taxed only to the extent one removes resources from the common social pool.[43] The Hobbesian benefits principle is said to justify a consumption tax because a consumption tax taxes in proportion to what an individual takes out of the common pool.[44] An income tax is unfair under the Hobbesian benefits principle because it taxes savers more than identically situated spenders, thereby penalizing those who contribute to the common pool. Thus, a consumption tax which taxes savers and spenders equally is said to be more equitable under the Hobbesian benefits principle.

The use of the Hobbesian benefits principle in the tax policy discourse is of particular interest because it represents the second species of foundationalism criticized in this article. This second species brings master theories of distributive justice to solve fairness problems. Since the pragmatic approach advocated in this article rejects both formalism and the use of full-fledged theories of justice as foundations for fairness principles, it is useful to examine an example of the latter in William D. Andrews's 1974 article, *A Consumption-Type Or Cash Flow Personal Income Tax*.[45] The article's call for a consumption tax[46] on fairness grounds sparked a debate more than twenty years ago that still preoccu-

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Consumption Tax Be Fairer Than an Income Tax?, 89 YALE L.J. 1081, 1114 (1980) (voicing concern about the effect an earning capacity tax would have on individual liberty).

42. *See* Fried, *supra* note 29, at 1011–12.

43. THOMAS HOBBES, LEVIATHAN: PARTS I AND II at 271 (Liberal Arts Press 1958) (1651).

44. *Id.* ("For what reason is there that he which labors much and, sparing the fruits of his labor, consumes little should be more charged than he that, living idly, gets little and spends all he gets, seeing the one has no more protection from the commonwealth than the other?"). For modern treatments of this view, see CHARLES FRIED, RIGHT AND WRONG 147–50 (1978); NICHOLAS KALDOR, AN EXPENDITURE TAX 53 (4th impression 1965).

45. Andrews, *supra* note 35.

46. *See id.* at 1122.

pies the discourse.[47] Andrews makes two clusters of arguments for a consumption tax. In the first cluster are administrability, simplicity, distributive, and perfected income tax arguments.[48] In the second cluster is an argument for fairness based on the Hobbesian benefits principle.[49]

Andrews discusses the first cluster through a straightforward analysis much like the one advocated in this article. For instance, the distributive effects of a flat consumption tax are considered undesirable by Andrews, and thus, he adds progressivity and a strengthened estate and gift tax element to ensure distributive equity.[50] Andrews also questions how well the actual income tax lives up to its own ideal of taxing annual increases in wealth and suggests that the current system is too broken to fix, and that switching to a consumption tax might be better than tinkering with the broken system.[51] Still within the first cluster, Andrews evaluates the effect of a consumption tax on simplicity and administrability, describing in detail the complexities of current law in contrast to the relative simplicity of the cash-flow model of consumption taxation he supports.[52]

It is within the second cluster of arguments, explicitly addressing the fairness issues, that Andrews' methodological commitments become clearer. Andrews repeatedly endorses the consumption tax as more fair than an income/accretion tax.[53] Surprisingly, Andrews offers little to justify this central fairness claim. Andrews does cite the Hobbesian principle as an appealing intuition, quoting Hobbes for the principle that accumulation, the excess of what has been contributed to public production, should not be taxed.[54] What is interesting is Andrews' discussion (really, off-the-cuff ruminations) about the status of the fairness claim and

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47. *See, e.g.*, Warren, *supra* note 35, at 931 (examining whether, as Andrews contends, a consumption tax is fairer than an accretion-type tax). *But see* William D. Andrews, *Fairness and the Personal Income Tax: A Reply to Professor Warren*, 88 HARV. L. REV. 947 (1975) (arguing that a consumption tax is fairer than an accretion-type tax).

48. Andrews, *supra* note 35, at 1150–65.

49. *Id.* at 1164–67.

50. *See id.* at 1172. Andrews also argues that the present income tax has done little to redress actual distributive discrepancies as an empirical matter, and notes that a progressive consumption tax, supplemented with strengthened estate and gift taxes is the equivalent of a progressive income tax so supplemented since, in both cases, both accretion and accumulation are taxed. *Id.* Andrews prefers a consumption tax so modified, however, because it is less complex to administer than a supplemented income tax. *Id.* at 1116–18.

51. For instance, Andrews points out how far our system is from a true income tax since it defers tax on pension savings and unrecognized capital appreciation. *Id.* at 1116–19. The modifications required to eliminate these and other discrepancies (through a market-to-market system for instance) would create undue complexity and serious administrative problems according to Andrews. *Id.*

52. *See id.* at 1148–65. Accordingly, he welcomes the fact that a cash-flow consumption tax would render the complex reorganization provisions of the Internal Revenue Code obsolete. *See id.* at 1152.

53. Andrews often adds persuasive force to his fairness assertion by claiming efficiency gains in the same sentence. *See id.* at 1115, 1169.

54. *See id.* at 1121, 1165–67, 1172.

method. When Andrews first mentions the Hobbesian benefits principle, he characterizes it as a "point of view."[55] In his second mention he writes, "[t]o the extent accumulation exceeds deferred consumption it is indeed consumption foregone, and the Hobbesian view . . . is of considerable validity in suggesting that accumulation should be exempted, at least during the lifetime of the accumulator."[56] Thus, Andrews can be read as thinking that the Hobbesian benefits principle is both a point of view and capable of validity determinations. Accordingly, Andrews's strategy is not merely the formalist/foundationalist strategy of viewing fairness principles as personal preferences *incapable* of validity determinations. Instead, he seems at least to allow for the possibility of a provisional type of truth determination advocated by the nonfoundationalist pragmatic account in this article.

Examining in greater detail Andrews' methodological approach, however, reveals a distinction between his approach and the pragmatic approach suggested in this article. Andrews is not a formalist, but he is not a nonfoundationalist pragmatist either. He is somewhere in-between, reaching out to explicit theories of justice as a foundation for fairness claims. Andrews is something of a Rawlsian, which, from the perspective of this article, can be distinguished from nonfoundationalist pragmatism. As Andrews writes:

> Matters of fairness are not generally subject to logical demonstration from independent premises. All that reason can do is elaborate the implications of plausible hypotheses in order to facilitate an informed choice among them. What we need to do, therefore, is to examine the matter from both equal-earner and equal-consumer perspectives, recognizing that each incorporates a certain assumption about how taxes are to be distributed, and to reserve final judgment and choice between these assumptions until after the implications of both have been explored.[57]

While it is easy to see the similarities between this view and the pragmatism advocated in this article, it is more interesting to emphasize the differences in order to distinguish the ad hoc, judge-by-our-own-lights approach of this article from the self-consciously theoretical approach that is gaining currency in the discourse. One aspect of this characterization of the Rawlsian strategy is particularly worth examining—that it makes a distinction between the foundations of scientific discourses (which operate from "independent premises") and the foundations of ethical discourses. By placing fairness judgments in relation to scientific judgments, this strategy problematizes the fairness

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55. *See id.* at 1166.

56. *Id.* at 1172.

57. *See* Andrews, *supra* note 47, at 950 (citing JOHN RAWLS, A THEORY OF JUSTICE 48–50 (1971)).

discourse. It creates the need to provide the same foundation for ethical claims as exists in the hard sciences. The task is to find a system of confirmation that will give fairness claims some objectivity. Andrews looks to Rawls for such a system. It is therefore worth examining the possible distinctions between Rawls's system and nonfoundationalist pragmatism.

The main difference between the pragmatic approach advocated in this article and the Rawlsian project is that while pragmatism is motivated by a desire to get the job done, the Rawlsian constructivist project (at least one version thereof) has the goal of establishing "moral objectivity" through obtaining "a suitably constructed social point of view that all can accept."[58] Thus, explicitly bringing Rawls into the analysis through interdisciplinary work, using Rawls's system to evaluate fairness claims, inevitably brings the purely philosophical problems of objectivity and truth back into the tax policy discourse. The pragmatic approach, by contrast, gives up on such problems altogether and urges policy analysts to "just do it"[59] without worrying too much about the problems of philosophy.

The point is that we may not need philosophical theory to solve these problems and may even be better off steering clear of it. Nevertheless, there are strong similarities between, for instance, Rawls's depiction of ethical deliberation and the one in this article. Indeed, stripped of the foundationalist concerns, Rawls could be reinterpreted as a pragmatist. The similarity hinges (in part) on the account of "reflective equilibrium," where one balances all available principles and effects to reach an end state of knowledge.[60] The difference between Rawlsian reflective equilibrium and the ad hoc, provisional balancing of competing principles of the pragmatic approach may just be one of degree. For instance, the prag-

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58. *See* John Rawls, *Kantian Constructivism in Moral Theory*, *in* MORAL DISCOURSE, *supra* note 30, at 247, 248. Obviously, this aspiration for universal acceptance is more ambitious than the provisional approach advocated in this article that views it as inevitable that some reasonable objections will apply to any particular fairness regime. The pragmatic approach rejects constructivist requirements of "reasonableness" or universalizability as *a priori* constraints on acceptable justification. Such constraints can always be questioned as first principles by asking, for instance, Why should I accept your definition of reasonableness?, and, Isn't defining reasonableness *a priori* (as, for instance, requiring equal respect to one's interlocutors) just another way of defining what is fair?

59. *See, e.g.*, Lynn Baker, *"Just Do It": Pragmatism and Progressive Social Change*, 78 VA. L. REV. 697 (1992). The "just do it" phrase captures the low-brow temperament of the pragmatist approach. As William James wrote:

> This pragmatist talk about truths in the plural, about their utility and satisfactoriness, about the success with which they "work," etc., suggests to the typical intellectualist mind a sort of coarse lame second-rate makeshift article of truth. Such truths are not real truth. Such tests are merely subjective. As against this, objective truth must be something non-utilitarian, haughty, refined, remote, august, exalted. It must be an absolute correspondence of our thoughts with an equally absolute reality. It must be what we *ought* to think unconditionally. The conditioned ways in which we *do* think are so much irrelevance and matter for psychology. Down with psychology, up with logic, in all this question!

William James, *Pragmatism*, *in* PRAGMATISM: A CONTEMPORARY READER, *supra* note 7, at 53, 60–61.

60. For a more detailed account of reflective equilibrium, see NORMAN DANIELS, JUSTICE AND JUSTIFICATION: REFLECTIVE EQUILIBRIUM IN THEORY AND PRACTICE 2 (1996).

matic approach accepts fairness judgments as true or false at any point along the continuum before maximum coherence is attained. By contrast, achieving wide reflective equilibrium seems to require suspending judgment until end-state equilibrium is reached.[61] For tax policy analysts, requiring this type of analysis as a necessary precondition to commitment to principles places moral knowledge too far out of reach.[62] Instead of worrying about maximal coherence as a foundation for objectivity, the pragmatic approach urges tax scholars to just get on as best they can.

Applying this provisional pragmatic approach to the Hobbesian benefits principle then, one would ask some basic questions. First, even assuming the Hobbesian benefits principle as the ground norm, using it to justify exempting savings from taxation discounts the power and personal gain inherent with wealth accumulation,[63] even if the accumulation also benefits the common pool.[64] After all, the owners of capital retain property rights to such capital and can withdraw it at any time.[65] Second, the Hobbesian benefits principle is only one principle among many. Egalitarian tendencies, for instance, might require taxation of savings as a means of increasing benefits to the poor. Thus while Andrews is right that the Hobbesian principle is of considerable validity, it is best viewed as one principle among many others in the mix, rather than a ground norm. Furthermore, in embracing Rawls, tax scholars should read out any implication that what we are really after is an end state of perfect wide reflective equilibrium. The point here is not to settle the issue but rather to highlight the difference between foundationalist and pragmatic approaches.

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61. For instance, under a "wide reflective equilibrium" analysis one must maximize coherence not just among ethical precepts but also among all other principles in play in all areas of inquiry. *See id.*

62. From a practical (pragmatic) perspective, requiring tax scholars to learn the ins and outs of Rawls's work is likely to backfire. The fact that ethical philosophy can often be unwieldly has discouraged scholars in other areas. *See, e.g.*, Philip M. Nichols, *Trade Without Values*, 90 NW. U. L. REV. 658, 669–70 (1996) (bemoaning and avoiding the "maelstrom" of ethical theory). Instead of requiring tax scholars to learn all of Rawls's work, for instance, the approach advocated in this article sets the bar significantly lower, requiring only everyday language and analytical skills to address fairness issues. In advocating ordinary language and moving away from philosophical/theoretical language, the pragmatic approach generates some criticisms. *See, e.g.*, Boyd, *supra* note 30. The emphasis on language would draw at least implicit support from others, however. For example, Rorty writes:

> To say that the world is out there . . . is to say . . . that most things in space and time are the effects of causes which do not include human states. To say that truth is not out there is simply to say that where there are no sentences there is no truth, that sentences are elements of human languages, and that human languages are human creations.

Richard Rorty, *The Contingency of Language*, *in* PRAGMATISM: A CONTEMPORARY READER, *supra* note 7, at 107, 109.

63. *See* Jeff Strnad, *Periodicity and Accretion Taxation: Norms and Implementation*, 99 YALE L.J. 1817, 1833–46 (1990) (discussing the tangible and intangible benefits derived from the accumulation of wealth).

64. *See* Groves, *supra* note 24, at 109; Warren, *supra* note 41, at 1094–95.

65. *See* Warren, *supra* note 35, at 1094.

3. The Perfected Income Tax Principle

Examining the use of the perfected income tax principle in the consumption tax debate is a useful way to identify another manifestation of formalism in the tax policy discourse: the tendency to evaluate tax policy by matching tax system to normative base. The perfected income tax arguments have this formalist/matching quality. The matching of base to system may contribute less than we think to the resolution of fairness questions. The perfected income tax principle seeks a fair measure of aggregate wealth. It considers the income tax a poor measure of aggregate wealth, and thus endorses a consumption tax as a surrogate measure—a "perfected income tax." Under one form of the perfected income tax principle, the current income tax is viewed as unfair because it overtaxes savers by taxing the interest payments they receive on nonconsumed funds. The argument is that, when measured in terms of subjective utility, this interest does not represent a real accretion to wealth because it is merely compensation for the pain and suffering of deferred consumption.[66] Accordingly, it is said to be unfair to tax the saver because she has already suffered from her deferral of consumption and the interest from deferral is therefore not really income in an appropriately cognizable sense.[67] A consumption tax, by contrast, which exempts such interest payments from taxation, is said to be a better measure of aggregate wealth, a perfected income tax which fully accounts for the subjective utility measure of income.

The first thing to note about the perfected income tax argument for the fairness of the consumption tax is its formalist, conditional quality. It posits the income/accretion base[68] as an ideal and argues that a consumption tax better approximates this ideal. It remains facially noncommittal

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66. The point is best illustrated by a simple example. Spender, who earns $100 and immediately spends it, has enjoyed the full present value of the $100. Thus, a tax on the $100 accurately captures his wealth, taking into account the full utility that Spender has received from the $100. Saver, by contrast, who saves the $100 and collects $10 of interest, does not really gain in wealth by $10, under this theory, because the $10 is merely payment for the disutility of deferring consumption. Thus, both Saver and Spender actually receive the same aggregate wealth increase from the $100, whether they save it or spend it. Fried, *supra* note 29, at 967–68. For purposes of the current discussion, the distinction between riskless return and return from risk is not examined. The general difficulty in measuring subjective utility applies to both returns, even assuming that the risk component can be reasonably construed as compensation for the "discomfort" of bearing uncertainty. *Id.* at 990–94; *see* Joseph Bankman & Thomas Griffith, *Is the Debate Between an Income Tax and a Consumption Tax a Debate About Risk? Does it Matter?*, 47 TAX L. REV. 377, 397 (1992) (arguing that taxpayers can avoid the discriminatory impact of an income tax on the risk component of interest); *see also* Bankman & Fried, *supra* note 34.

67. *See* Fried, *supra* note 29, at 968.

68. As is well known, this base is referred to as the Haig-Simons tax base. Under the Haig-Simons base the income tax system should tax aggregate annual increases in personal income. "Personal income may be defined as the algebraic sum of (1) the market value of rights exercised in consumption and (2) the change in the value of the store of property rights between the beginning and end of the period in question." HENRY C. SIMONS, PERSONAL INCOME TAXATION 50 (1938). The formalist use of the Haig-Simons base is discussed in Livingston, *supra* note 6, at 375–80; McCaffery, *supra* note 1, at 75, 77.

on which tax base is better. Accordingly, it is not really a fairness argument at all, but rather a more formal exercise, taken up after such basic decisions have been made. This process is much like the process economists use for evaluating systems against normative bases. For an explicit argument about fairness in the tax policy discourse, however, this agnosticism is rather unsatisfactory.

The interesting question for purposes of this article is what accounts for the prevalence of this formalist/matching mode of analysis?[69] One distinct possibility is that a bad foundationalist metaphor is to blame. Under this metaphor, rational inquiry proceeds by building on independent premises. Thus, it might seem natural to proceed by stating an ideal base and measuring the system to see if the system follows from, or matches, the base. The problem is that analysis does not always, if ever, proceed in this way.[70] Rather than matching, the metaphor of balancing is better at making clear that the premises of analysis are themselves at issue. Under the influence of the matching metaphor, by contrast, there is a risk of thinking that demonstrating a mismatch between system (our income tax) and base (the stated ideal) is saying more than it is about the desirability of the tax system.[71] A pragmatic balancing approach to fairness issues would better focus.

4. The Nondiscrimination Principle

The last foundational principle addressed here is the most patently metaphysical. The nondiscrimination principle explicitly uses a no-tax world as the foundation by which to evaluate our actual tax system through the principle's parity of treatment between "similarly situated" taxpayers in a no-tax and tax-filled world.[72] Thus, the nondiscrimination principle supports a consumption tax as fairer because a consumption tax preserves the relative benefits of saving in a no-tax world and leaves

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69. For an acknowledgment of the puzzling fact that perfected income tax arguments have been accepted for so long, see Fried, *supra* note 29, at 996. As noted above, this article views formalism as a symptom of foundationalism, rather than the problem itself.

70. This account of analysis is not even universally accepted in the traditional philosophy of science. *See* Boyd, *supra* note 30, at 113.

71. Thus concluding that our tax system does not match an assumed base says nothing in itself about the desirability of our system. Policy debates which focus on matching alone run the risk of becoming semantic. *See, e.g.*, Jeff Strnad, *Taxation of Income from Capital: A Theoretical Reappraisal*, 37 STAN. L. REV. 1023 (1985) (using finance economics to show that a cash flow tax, rather than an income tax is a better match to the Haig-Simons base); Louis Kaplow & Alvin C. Warren, Jr., *An Income Tax by Any Other Name—A Reply to Professor Strnad*, 38 STAN. L. REV. 399 (1986) (arguing that Strnad simply changed the definition of the income tax base); Jeff Strnad, *The Bankruptcy of Conventional Tax Timing Wisdom Is Deeper Than Semantics: A Rejoinder to Professors Kaplow and Warren*, 39 STAN. L. REV. 389 (1987) (countering the semantics charge); Louis Kaplow & Alvin C. Warren, Jr., *Professor Strnad's Rejoinder: Simply Semantics*, 39 STAN. L. REV. 419 (1987).

72. *See* Fried, *supra* note 29, at 963–66, 1010.

taxpayers indifferent (from a tax perspective) between saving and spending once a consumption tax is imposed.[73]

As is recognized, the problem with the nondiscrimination principle as a mantra in tax law is that it skips over *why* tax law should or should not discriminate in any particular case.[74] Andrews, for instance, invokes notions of horizontal equity in his support of a consumption tax, without defining equality in any great depth.[75] What is missing from the formalistic uses of the nondiscrimination principle is an explanation of why the no tax world is the appropriate base.[76]

The analysis in this article suggests that an underlying foundationalism accounts for the prevalence of formalistic uses of the nondiscrimination principle. After all, foundationalism is just the grounding of principles of justice in a world outside of our current circumstances, interests, and customs. Like the original position, the no-tax world functions as a foundational source of correctness in tax law.[77] The nonfoundationalist, pragmatic approach, by contrast, views other-world groundings with some skepticism. Indeed, from a pragmatic perspective, the no-tax world seems particularly odd as a ground norm. This is because (for one thing) changing the tax system to the ideal in mid-stream, after social life and other aspects of regulation have built up around the "wrong" system, may be more unfair than implementing no change at all. Most importantly, it is because pragmatism views gestures to ahistorical sources of authority as presumptively metaphysical. Rather than taking the no-tax world as the normative foundation for fairness, a pragmatic approach would identify savers and spenders in the real world and ask whether they should be treated equally by the tax system. Putting the question this way highlights the fairness issue that, perhaps more than any other fairness concern, stands in the way of wide spread acceptance of the consumption tax: savers are richer than spenders and switching to a consumption tax seems at first blush to disproportionately benefit the already rich.[78]

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73. *See id.* at 961–66. There are, of course, efficiency arguments based on the no-tax world hypothetical. *See, e.g.*, KLEIN & BANKMAN, *supra* note 17, at 23.

74. *See* Louis Kaplow, *Horizontal Equity: Measures in Search of a Principle*, 42 NAT'L TAX J. 139, 140 (1989) (noting the "failure to identify the normative justification for [then] current uses of [horizontal equity]" and identifying those bases).

75. *See* Andrews, *supra* note 35, at 1165–67 (discussing the likelihood that a consumption-type tax will treat taxpayers fairly by imposing similar burdens).

76. *See* Fried, *supra* note 29, at 1006 (noting the failure of consumption tax advocates to explain and support the theory that both "savers and nonsavers have an entitlement to the relative levels of well-being they would have enjoyed in a no-tax world").

77. *See, e.g.*, JOHN RAWLS, A THEORY OF JUSTICE 136–37 (1971) (describing the use of the "original position" as a ground for justice).

78. *Cf.* Bankman & Fried, *supra* note 34 (showing how the effects of switching to a consumption tax may be overstated).

B. *The Progressivity Debate*

The tax policy debate on progressivity focuses on the fairness of wealth redistribution through a progressive tax. One system of progressivity involves increasing the percentage of tax paid to the government in proportion to increases in income.[79] Progressivity is achieved in our current system of taxation through graduated marginal rates.[80] Increasing marginal rates is not the only way to achieve progressivity. A proportionate, or a flat tax, where each dollar is taxed at the same rate, can be progressive if it is combined with an exemption, or with demogrants to lower-income taxpayers.[81] Similarly, even a pure consumption or sales tax can be progressive if combined with exemptions for consumption for essentials of certain basic needs, or with rebates or credits.[82]

The desirability of progressivity from an equity perspective has been the subject of discussion within the legal literature on tax policy for more than 40 years. The starting point in this debate is Walter J. Blum and Harry Kalven, Jr.'s, *The Uneasy Case for Progressive Taxation*,[83] published in 1953. In this work, Blum and Kalven place the burden of persuasion on the proponents of progressivity,[84] and after examining the various arguments for progressivity, conclude that the burden has not been met.[85] Given that the case for progressivity was so "uneasy," Blum and Kalven's argument supported a flat or proportionate tax system.[86] The most significant rebuttal to Blum and Kalven's view came in 1987, when Joseph Bankman and Thomas Griffith applied optimal taxation theory to demonstrate that the case for progressivity was less uneasy than previously asserted.[87]

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79. *See* Bankman & Griffith, *supra* note 25, at 1907.

80. Thus, the federal income tax rate for singles increases from 15% for income below $22,101 to 39.6% for income above $250,000. I.R.C. § 1 (West Supp. 1998).

81. Under Representative Armey's flat tax proposal, for instance, which provides for standard deductions for married, joint filers and an additional standard deduction for each dependent, a family of four earning $50,000 would pay about 6% in taxes while a family earning $200,000 would pay about 14% in taxes. *See* Freedom and Fairness Restoration Act of 1995, H.R. 2060, 104th Cong. § 101; *see also* Jacki Calmes, *Flat-Tax Plan Is Revised by Rep. Armey to Reduce Projected Loss of Revenue*, WALL ST. J., July 20, 1995, at B12.

82. Senator Lugar's plan is an example of such a progressive consumption/sales tax system. *See* Robert S. Stein, *National Issue: Is a Major Tax Overhaul Ahead? Presidential Race May Focus on Tax Reform Issue*, INVESTOR'S BUS. DAILY, Apr. 13, 1995, at A1 (addressing Senator Lugar's plan).

83. BLUM & KALVEN, *supra* note 25.

84. *Id.* at 28–29.

85. *Id.* at 56; *see also* Walter J. Blum, *Revisiting the Uneasy Case for Progressive Taxation*, 60 TAXES 16, 21 (1982) (concluding that recent changes in society have not facilitated the implementation of a progressive tax system).

86. *See* BLUM & KALVEN, *supra* note 25, at xxii. However, Blum and Kalven endorse a flat tax with an exemption, thereby including some progressivity in their proposal. *See id.*

87. *See* Bankman & Griffith, *supra* note 25, at 1906 (applying "recent developments in economics and moral theory" to the progressivity debate).

For the purposes of this article, what is important about the historical debate on progressivity is its treatment of redistributive principles.[88] A closer reading of Blum and Kalven's work shows some implicit metaethical commitments in their overall strategy. Specifically, it shows an underlying foundationalism in their work which colors their conclusions.

Blum and Kalven explicitly contrast value judgments with scientific ones.[89] When evaluating the concept of decreasing marginal utility of income or "sacrifice theory," which can justify progressivity on the grounds that the rich gain less utility from dollars over a certain level of income, for instance, Blum and Kalven remark that "[t]he ostensibly scientific form of sacrifice theory, which purports to deal with the way people actually react to money, frequently conceals a normative judgment either about the way that people ought to value money or about the social value of typical expenditures at different levels of income."[90] Blum and Kalven seem to think that the abandonment of scientific analysis for normative analysis itself undermines the argument for declining marginal utility of income. Rather than explicitly considering the legitimacy of these underlying normative judgments, Blum and Kalven associate such judgments with the purely political (specifically, "the socialist literature"),[91] and ultimately reject "the very idea of a 'moral scheme of consumption.'"[92] What Blum and Kalven fail to recognize is that all tax systems, progressive or flat, overtly redistributive or not, are moral schemes of consumption. It is a mistake to think that not taxing the rich at higher rates (and thus more) is somehow value-free or value-neutral. It appears that Blum and Kalven make this mistake because they are foundationalists. They believe that there is an objective (a default) distribution of tax burdens that redistributive rationales are challenging. By locating the arguments for progressivity closer to the political than to the scientific, Blum and Kalven set up a foundationalist dichotomy which caricatures redistributive rationales as groundless, political, even unsettling.[93] The

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88. As with the literature on fairness in the consumption tax, discussions of distributive justice rationales for progressivity have become increasingly diverse and not always susceptible to the description as foundationalist. *See, e.g.*, Marjorie E. Kornhauser, *Equality, Liberty, and a Fair Income Tax*, 23 FORDHAM URB. L.J. 607, 607–14 (1996) (applying different principles of distributive justice).

89. *See* BLUM & KALVEN, *supra* note 25, at 68–69.

90. *See id.* at 69.

91. *See id.* at 72–73.

92. *Id.* at 69; *see also* SIMONS, *supra* note 25, at 4–5 (rejecting declining marginal utility of income justifications for progressivity because of its normative character); *id.* at 18–19 (viewing progressive taxation as being based merely on "the ethical or aesthetic judgment that the prevailing distribution of wealth and income reveals a degree (and/or kind) of inequality which is distinctly evil or unlovely").

93. As Blum and Kalven wrote:

> The lingering fear must always have been that any case for progression on [redistributive] grounds proves too much. It has been seen that it is quite difficult to sponsor progression on the basis of economic equality without calling into question either the meaningfulness

pragmatic, nonfoundationalist approach rejects this dichotomy altogether, asking not whether the case for progressivity is strong enough to overcome the presumption in favor of a flat rate, but rather how the case for more redistribution compares with the case for less redistribution. Thus, the pragmatic questions are things like: Do we want to live in a society where a tiny percentage of the population owns the vast majority of the wealth and a large percentage of the population lives hand to mouth? If not, is redistribution through the tax system the best way to get us what we want?[94] While these questions may be politically charged, they are not "merely" political. All policy judgments are political in this sense. The trick is finding a reasonable compromise between competing norms. The pragmatic approach, unlike the foundationalist approach, provides a philosophical justification for this type of analysis. To further examine the difference between the pragmatic approach and the formalist/foundationalist approach in the progressivity debates, it is useful to examine two basic principles which play an important role in the debate. Accordingly, the remainder of this section briefly examines the Nozickian justice in transfer principle and the Rawlsian maximin principle from a pragmatic, nonfoundationalist perspective.

1. The Nozickian Justice in Transfer Principle

By setting up a dichotomy between redistributive taxation and taxation that respects to a greater extent the market allocation of income, Blum and Kalven implicitly endorse market distributions as presumptively just or natural. A pragmatic, nonfoundationalist approach views such moves with suspicion. This suspicion, it turns out, is justified. Specifically, the main problem with using the market as a foundation is that markets, even efficient ones, are not necessarily fair. By assuming markets as a baseline for fairness, foundationalist approaches snuff out analysis before it starts. A nonfoundationalist, pragmatic approach views market allocations just as man-made as post-market redistributions. They are fair or unfair according to our norms and traditions. Under a pragmatic form of analysis, the question is whether in a particular case a market allocation is fair. It is important to emphasize that pragmatic analysis does not provide an overarching theory of fairness or justice that is applied to particular facts. Instead, pragmatic analysis takes smaller steps, identifying problems as they come up and proposing solutions after gathering as much information as possible. Thus, rather than pro-

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of personal responsibility or the fairness with which the market distributes rewards. Progression, when offered on these grounds, is an unsettling idea.

BLUM & KALVEN, *supra* note 25, at 85; *see also* LIONEL ROBBINS, AN ESSAY ON THE NATURE AND SIGNIFICANCE OF ECONOMIC SCIENCE 132 (1932) (describing ethical determinations as amounting to claims about "thy blood or mine").

94. For an analysis supporting the argument that tax law may be a desirable means to address distributive norms, see Louis Kaplow & Steven Shavell, *Why the Legal System Is Less Efficient Than the Income Tax in Redistributing Income*, 23 J. LEGAL STUD. 667 (1994).

viding a defense, or critique of the fairness of market allocations in general, pragmatic analysis reminds us that "it depends." This distinction between pragmatic, ad hoc, provisional analysis and broader theory building is important to emphasize. This distinguishes the pragmatic form of analysis advocated in this article from interdisciplinary work that applies all encompassing theories of justice (à la Rawls and Nozick) to tax policy problems. The pragmatic approach rests on the claim that such theories are not necessary for settling practical policy issues. Take for example, Nozick's theory of "justice in transfer,"[95] that one is entitled as a matter of right to the value received in market trades (under certain conditions). Does this theory help in determining when redistribution is justified? The pragmatic approach asks us to entertain the notion that the answer is "No," that there is nothing about the *theory* per se that offers insight. Rather, the value of reading and applying Nozick lies in bringing more perspectives and information we have not anticipated into the data set so we can make a more informed decision. Thus, a pragmatic approach would not be interested in, for instance, poking holes in Nozick's theory. Rather, a pragmatic approach would use Nozick's work as a source of counterexample and competing perspective.[96]

We simply do not need to comprehensively examine the justice in transfer principle, or any other theory of justice in order to get on with policy analysis.[97] Pragmatic analysis suggests that no theory or foundational principle is necessary for resolving practical policy issues. It provides a philosophical basis for grappling with these problems anyway. The questions it asks are quite basic: Is the wealth distribution that exists one that we can live with? Are there other possibilities that would reduce suffering and make our society more just?[98] Our answers to these ques-

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95. ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 152 (1974).

96. The pragmatic approach, in other words, would probably discourage taking a "Nozickian" approach to a particular problem. Addressing the problem in theoretical language invites theoretical questions about, for instance, the coherence of Nozick's system and moves away from the practical question of how to solve the particular problem. One such theoretical question is whether under justice in transfer one deserves a market price that is high not because of the skill of the owner, but merely because of the scarcity of the resources owned. In this case, it is not clear that one deserves the full reward and that taxing and redistributing would be unfair. John Locke, for instance, can be read as denying that one is entitled to the value of property in exchange to the degree such value is derived from the scarcity of the property exchanged. *See* JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT 16–30 (Thomas P. Peardon ed., 1952). This point is discussed in Barbara Fried, *Wilt Chamberlain Revisited: Nozick's "Justice in Transfer" and the Problem of Market-Based Distribution*, 24 PHIL. & PUB. AFF. 226 (1995).

97. Thus, the pragmatic, nonfoundationalist approach looks to the practical use value of the theory and tries, as much as possible, to analyze its "*value for concrete life.*" *See* James, *supra* note 59, at 62.

98. Indeed, if there were a foundationalist principle in nonfoundationalist pragmatism it is that relieving suffering is a baseline norm. *See* RICHARD RORTY, CONTINGENCY, IRONY AND SOLIDARITY 141 (1989). In justifying such baseline norms, however, nonfoundationalist pragmatism would avoid deep justifications and instead offers the reassurance that:

> We should just thank our lucky stars that there are quite a lot of people nowadays who are pretty consistently appalled by human beings suffering unnecessarily. With

tions are no less legitimate because they lack ultimate foundations or correspond to a general theory of justice.

2. The Rawlsian Maximin Principle

The Rawlsian maximin principle has been extremely important in justifying progressivity on fairness grounds.[99] As used in the tax policy debates, the maximin principle states that the utility of the least well-off is weighted more heavily in a utilitarian calculus to determine the optimal tax rate.[100] Examining approaches to scrutinizing this principle is useful for distinguishing the pragmatic approach. The first thing to note is that arguments for redistribution to the least well-off as a good thing to do are different in kind than arguments for redistribution because it is correct under Rawls's theory. The latter approach lends the weight of Rawls's theory to support a liberal principle of redistribution. The former does not have this type of pedigree. It is useful to ask whether the weight of Rawls's theory really adds anything to the persuasiveness of the call for taking care of the least well-off. Indeed, the pragmatic approach asserts what Rawls's approach seems to deny: that the maximin principle is just one among many principles that gets its force from our tradition of equality, compassion, or liberalism. On the contrary, the point of backing up redistribution with Rawls's theory is to give it some sense of objectivity. After all, the maximin principle is "true" under Rawls's system not merely because it comports with our modern liberal notions,[101] but because it is derived from an original position in which parties would agree to the principle in a hypothetical contract behind the veil of ignorance before they know their station in society.[102]

The pragmatic approach views such attempts at objective grounding as not worth the trouble. Indeed, if you press the foundationalist claim a bit, it seems quite unstable. Is the maximin really what we would agree to behind the veil of ignorance? Doesn't requiring the voting parties in the original position to accept, for instance, the equal worth and dignity

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> luck—and especially affluence and security—there will be more and more such people. Some of them will be liberal ironists like Nabokov, Bloom and Derrida himself.... Some of them will be unimaginative, literal-minded, unromantic, decent dullards. We can use as many of both kinds of people as we can get.

Richard Rorty, *Response to Simon Critchley*, *in* DECONSTRUCTION AND PRAGMATISM 41, 42 (Chantal Mouffe ed., 1996).

99. *See* Bankman & Griffith, *supra* note 25, at 1916.

100. *See id.*

101. Rawls's use of the original position to justify the institutions of classical liberalism has been criticized as "rationalization of the political status quo." RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 182 (1977) (noting this criticism). The pragmatic approach suggested in this article takes seriously the interpretation of Rawls's theory as largely an *ex post* justification for our liberal heritage.

102. This type of foundationalism is the flip side of the foundationalism (like that of Blum and Kalven) which treats fairness principles as empty of meaning and not susceptible to truth determinations. Rather than dismissing fairness questions as meaningless, constructivism establishes alternative grounds (such as the veil of ignorance) for fairness principles.

of each individual make the original position a fixed game where the "right" results are preordained? These are questions that are quite removed from the question of whether and to what degree redistribution is appropriate. Rather than construct a system of justice around basic principles, the pragmatic approach enters the process in mid-stream evaluating each principle or suggestion from a more practical perspective.[103]

For example, the pragmatic approach would ask whether the maximin principle is a good idea by noting, for instance, that it seems rather extreme since it would lead to "perfect equalization, that is, 100-percent taxation above a certain level, with corresponding subsidies below it."[104] This raises serious incentive and efficiency problems which would sensibly prevent it from being carried out within the tax system.[105] Furthermore, taken to its extreme, it would seem to require questionable social policies such as keeping people in vegetative states alive even at the expense of reducing the rest of society to poverty.[106] Of course, one may be able to read Rawls in a way that accounts for these objections.[107] To even raise these questions supports the pragmatist point: whether a given proposal fits into Rawls's theory is not always relevant to whether the proposal is justified. Theory fit is a different question thanS whether the principle is one we should embrace. The pragmatic approach is interested primarily in the latter question. Detached from its theoretical base, putting the poor first seems to make sense. It is a dysfunctional society that has a significant portion of the population eating out of garbage cans or sleeping on the street.[108] Fortunately, such a claim resonates in our

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103. As one philosopher has described the theoretical antifoundationalist approach,

> [I]t attempts to begin from within a particular ethical perspective, working outward to explore common ground with other perspectives, requiring neither the antecedent identification of a privileged class or statements that issue from an objective point of view nor conclusive positions on canonical problems in philosophy. Despite the absence of a genuinely independent perspective, the theorist can still seek to codify the moral perspective of the particular agents in question. For example, in thinking about euthanasia, we might begin with the conviction that it is a matter of individual choice and that therefore the decision should be left to the patient. Upon further reflection on the effects of euthanasia, and our convictions that we owe things to loved ones, we might reject a rule that leaves the decision in the hands of the patient alone.

NIELSEN, *supra* note 9, at 58. While this approach is similar to Rawls's conception of equilibrium, it does not assume or require any theoretical process of construction from behind a veil of ignorance.

104. *See* KENNETH J. ARROW, *Some Ordinalist-Utilitarian Notes on Rawls's Theory of Justice*, *in* COLLECTED PAPERS OF KENNETH J. ARROW: SOCIAL CHOICE AND JUSTICE 96, 110 (1983).

105. *See id.*

106. *See id.* at 102–03.

107. Instead of defining the least well-off in such specific terms, for instance, Rawls seems to choose a more general approach, defining the least well-off as something like the average wealth and income of members of a particular social position while eschewing any more precise philosophical definitions of this category. The more malleable definition might avoid the *reductio ad absurdum* argument against Rawls.

108. Beyond reducing human suffering, redistribution might also create greater participation and cohesion in our social, political, and cultural life. For an argument that redistribution increases political participation and social commitment and is thus desirable, see ACKERMAN & ALSTOTT, *supra* note 3. For a nonfoundationalist pragmatist, an appropriate response to someone who rejects redistribution in the face of abject poverty is not to offer them a theory but to tell them a story or

culture. The important activity for tax policy analysts is to attend to this culture by adding to its narrative, not matching principle to theory.

IV. THE PRAGMATIC "METHOD"

The philosophical tradition of American pragmatism informs the nonfoundationalist approach advocated in this article. The pragmatism urged here tries to change the language of fairness from formalism and philosophical theory to the more contextualized and practical. It gives policy analysts a reason to drop the question, "What is the appropriate ground for our ethical beliefs?" and replace it with, "What should we do in this particular case?" The main reason for dropping the former is its failure to help solve the problem at hand and its potential to distract efforts at resolution of the problem.[109] Obviously, there is more than a little irony in using nonfoundationalist pragmatism (a philosophical theory) to justify walking away from philosophical theory.[110] Thus, the question arises whether philosophical pragmatism is useful at all. Indeed, the bulk of this article has addressed purely methodological issues on a fairly high level of abstraction. Accordingly, the article arguably engages in the same type of philosophical theorizing that it claims to avoid.

Obviously, this article claims the answer is "yes," or at least to a degree. Reviewing the pragmatic method and comparing it to foundationalism and the use of theories of justice shows tax scholars that they can take fairness seriously without bringing in Rawls or Dworkin. Put another way, the nonfoundationalist pragmatic project operates on two levels. On one level it counters explicit philosophical doctrines on the status of ethical claims. The strategy is a patently philosophical enterprise, conducted at a high level of abstraction in discussions of methodology. On the other level, the nonfoundationalist method consists not of talking about method or philosophy, but in redescribing the world in ways that help us see the parameters of the fairness issues at stake and what the world might look like upon their resolution. On this practical level, nonfoundationalism, as a philosophical doctrine debunking objective truth, drops away and we are left with our other ways of speaking (literary, descriptive, evangelical, romantic) to guide us through the problems we

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drive them around some really bad parts of town. If the person remains unconvinced, nonfoundationalist pragmatism offers nothing more except to ask: What happened to you anyway?

109. Putting these practical questions in theoretical/philosophical language might therefore encourage "moral holidays." *See* James, *supra* note 59, at 64 ("I have enough trouble in life already without adding the trouble of carrying [metaphysical conundums].").

110. Indeed, pragmatism's nonfoundationalist claims has generated a great deal of theoretical debate. *See, e.g.*, SUSAN HAACK, EVIDENCE AND INQUIRY: TOWARDS RECONSTRUCTION IN EPISTEMOLOGY 182–202 (1993) (criticizing Rorty's epistemological claims).

face. On this practical level, nonfoundationalist pragmatism is best described as a temperament rather than a philosophical method.[111]

The pragmatic approach's emphasis on temperament rather than theory becomes clear when one compares it to the strategy suggested recently by Professor McCaffery, who has recently examined the dominant strategies in the tax policy discourse. Like the analysis in this article, McCaffery identifies formalism as the dominant methodology of the tax policy discourse. In contrast to this article's approach, however, McCaffery advocates an "interpretive-political approach" based on John Rawls's theory of justice or Ronald Dworkin's concept of integrity.[112] The interpretive-political approach of Rawls and Dworkin is based on the belief that "[w]ords alone cannot answer [the difficult policy issues in tax law]; we need principles."[113] By contrast, the approach in this article deemphasizes foundational principles and argues that words alone are all we have and all we need. From a pragmatic perspective, the interpretive-political approach gestures at something beyond the natural language of fairness, like integrity or reason.[114] While the interpretive-political approach purports to abandon a certain variant on foundationalism (formalism), the pragmatic approach views the interpretive-political approach as a species of foundationalism. The pragmatic approach moves away from using philosophical theories of justice as grounds for our fair-

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111. William James describes pragmatism by comparing the pragmatist, a "happy-go-lucky anarchistic sort of creature" with the "doctrinaire and authoritative complexion" of the rational mind (the foundationalist James was attacking). James, *supra* note 59, at 71. Translated into the context of the tax policy discourse, the difference in temperament is between the formalist modeler and the storyteller.

The two levels of nonfoundationalist pragmatism can be viewed as two separate "language games," each appropriate for certain purposes and certain contexts. This article does not move away from foundationalism so much because of its philosophical error, but because another vocabulary at this point might enrich the tax policy discourse on fairness. It is a claim about relative usefulness, not about relative accuracy or correctness, to urge that we "in fact say little about these [philosophical] topics, and see how we get on." *See* Rorty, *supra* note 8, at 111. Thus, the difference between the suggested nonfoundationalist pragmatic "method" and the traditional foundationalist method might just be the difference between "an entrenched vocabulary which has become a nuisance and a half-formed new vocabulary which vaguely promises great things." *Id.* at 112.

112. *See* McCaffery, *supra* note 1, at 82–84.

113. *Id.* at 84.

114. By contrast, the approach in this article adopts the view that "there is nothing beyond vocabularies." STANLEY FISH, IS THERE A TEXT IN THIS CLASS? 354–55 (1980). This is more useful than the view that there is something beyond language which can help us decide which proposition, description, or imperative is better than the next. Positing something beyond words merely raises a host of philosophical questions that are not useful for solving the fairness problems at hand. To quote Richard Rorty on a similar point:

> [I]f we stick to the picture of language as a medium, something standing between the self and the nonhuman reality with which the self seeks to be in touch, we have made no progress. . . . [T]he seesaw battles between romanticism and moralism, and between idealism and realism, will continue as long as one thinks there is a hope of making sense of the question of whether a given language is "adequate to a task"—either the task of properly expressing the nature of the human species, or the task of properly representing the structure of nonhuman reality.

Rorty, *supra* note 8, at 113–14.

ness evaluations. The approach advocated in this article abandons any "attempt to see the patterns of justification within normal discourse as *more* than just such patterns . . . [as well as any] attempt to see them as hooked on to something which demands moral commitment—Reality, Truth, Objectivity, Reason."[115]

McCaffery uses both Rawls and Dworkin in his theory. The foundationalist appeal of Rawls was examined above. It is beyond the scope of this article to analyze Dworkin's theory in great detail. However, it can be said that the pragmatic approach embraces the type of checkerboard approach Dworkin's theory of integrity seeks to overcome.[116] Dworkin's theory explicitly rejects a checkerboard pattern of decision making, thus rejecting the provisional, ad hoc style of analysis advocated in this article. Instead Dworkin's theory places integrity as the master principle. For example, in order for our hybrid consumption/income tax system to be justified under Dworkin's theory, it would have to conform to the principle of integrity. By contrast, the pragmatic approach would accept the hybrid income/consumption tax system if the system was justified by reasons which have nothing to do with integrity, but with the more practical concerns of administrability, fairness and economic efficiency. This is not to say that consistency would not be desirable. It is just to say that it would not be *the* guiding principle of tax policy. Under a pragmatic approach, furthermore, full integrity may simply be too much to ask.[117]

V. CONCLUSION

This article criticizes how a tradition of formalism in the tax policy discourse affects discussions of fairness, arguing that it is rooted in foundationalism. It advocates a pragmatic nonfoundationalist strategy which lends philosophical credibility to dropping the need for objectivity altogether. Tax scholars should discuss fairness in the same language they discuss the fairness of a tip, or any other day-to-day interaction. This

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115. RICHARD RORTY, PHILOSOPHY AND THE MIRROR OF NATURE 385 (1980). Unlike the interpretive-political approach, which has "one foot in our actual, contingent, historically situated community and context, and another foot in political, social, and moral theory," the nonfoundationalist approach tries to step out of philosophical theory altogether. McCaffery, *supra* note 1, at 87.

116. *See* James D. A. Boyle, *Legal Fiction*, 38 HASTINGS L.J. 1013, 1020–22 (1987); *see also* Allan C. Hutchinson, *The Three 'Rs': Reading/Rorty/Radically*, 103 HARV. L. REV. 555, 579 (1989) (reviewing RICHARD RORTY, CONTINGENCY, IRONY AND SOLIDARITY (1989), and comparing Dworkin's foundationalism to Rorty's method of checkerboard conventions and anecdotes); Richard Rorty, *Postmodernist Bourgeois Liberalism*, *in* HERMENEUTICS AND PRAXIS 214, 215 (R. Hollinger ed., 1985) (criticizing Dworkin's theory as foundationalist). There has been a serious, often heated debate between Dworkin and Rorty concerning the derivation and status of the integrity principle. *See, e.g.*, Ronald Dworkin, *Pragmatism, Right Answers, and True Banality*, *in* PRAGMATISM IN LAW AND SOCIETY 359, 359 (Michael Brint & William Weaver eds., 1991) (explaining his belief that Rorty's "new" pragmatism does not contribute to legal theory).

117. *See* DWORKIN, *supra* note 101, at 105 (positing a lawyer of superhuman skill as a model of principled adjudication).

language is all we have and all we need to adjudicate fairness claims. Obviously, the more perspectives and information the better and this is the role interdisciplinary work might play. Incorporating all encompassing theories of justice to give foundation to our principles, however, may not be the most constructive strategy as a practical matter or the most defensible philosophically. Far better that tax policy discourse echo the natural, not specialized, language of fairness.